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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Architect of the Capitol—Payment of Fringe Benefits to Temporary Employees

File: B-303961

Date: December 6, 2004

DIGEST

Participation by the Architect of the Capitol (AOC) in a multiemployer defined benefit plan would constitute a violation of the Antideficiency Act because of the possibility of indeterminate withdrawal liability under the Employee Retirement Income Security Act. Language instructing AOC to take all steps which may be required to pay fringe benefits to its temporary employees "notwithstanding any other provision of law" does not suffice to waive the Antideficiency Act. Nothing in the statute or its legislative history suggests that Congress intended a waiver of the Antideficiency Act, and AOC can give effect to both this language and the Antideficiency Act.

DECISION

The Architect of the Capitol (AOC) has requested our decision regarding whether participation in a multiemployer defined benefit plan could lead to a violation of the Antideficiency Act because of the possibility of withdrawal liability under the Employee Retirement Income Security Act (ERISA). Letter from Alan M. Hantman, Architect of the Capitol, to David M. Walker, Comptroller General, July 15, 2004. As we explain below, the Antideficiency Act prohibits AOC from participation in such a plan because the potential for withdrawal liability could subject the government to an indeterminate and costly liability that extends into future years, for which appropriated funds may not be available. Although Congress directed AOC to take all steps required to pay fringe benefits to its temporary employees "notwithstanding any other provision of law," this language does not waive the Antideficiency Act.

BACKGROUND

The Architect of the Capitol has followed the practice of hiring, on a temporary basis, tradesman employees who are members of unions.[1] In 2001, concerns arose over AOC's long-term use of these temporary employees and the fact that these employees did not enjoy the same eligibility for health, retirement, and insurance benefits as other federal employees. H.R. Rep. No. 107-169, at 16 (2001). Congress, therefore, included a provision in AOC's fiscal year 2002 appropriation that directed AOC to ensure that its temporary employees were eligible for fringe benefits, including life insurance, health insurance, and retirement.[2] Legislative Branch Appropriations Act, Fiscal Year 2002, Pub. L. No. 107-68, § 133(a), 115 Stat. 560, 581-2 (Nov. 12, 2001).

In response to this mandate, AOC converted 101 temporary employees, at their request, to federal wage grade positions, which enjoy the same eligibility for benefits as other federal employees.[3] Currently, 57 percent of AOC's tradesman employees receive federal benefits. However, there are approximately 85 employees who have elected to remain in temporary appointments and thus are ineligible for federal benefits. For these employees, AOC sought to implement section 133(a) by making payments directly to their unions' benefit trust funds, but was concerned that a 1977 decision by the Comptroller General would prohibit such transfers.[4] However, in a

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[1] These employees include plumbers, electricians, masons, ironworkers, and carpenters.

[2] Section 133(a)(1) states

> "Except as provided in paragraph (2), none of the funds provided by this Act or any other Act may be used by the Architect of the Capitol . . . to employ any individual as a temporary employee within a category of temporary employment which does not provide employees with the same eligibility for life insurance, health insurance, retirement, and other benefits which is provided to temporary employees who are hired for a period exceeding 1 year in length."

Subsection (a)(2) lists several exceptions to this requirement, including summer employees, individuals hired for less than 120 days during any 5-year period, and temporary employees who opt to remain under their current pay system. Subsection (a)(3) states "nothing in this subsection may be construed to require the Architect of the Capitol to provide duplicative benefits."

[3] Wage grade employees are federal employees whose pay is set pursuant to 5 U.S.C. §§ 5341-5349.

[4] The opinion held that disbursing officers could only draw public money as authorized for payments made pursuant to law and to persons to whom payment is made. Therefore, the Architect could only make payments directly to its employees,

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December 2001 decision, we concluded that section 133(a) provided AOC with the appropriate authority to transfer fringe benefit payments directly to union employee benefit trust funds. B-289496, Dec. 21, 2001.

In 2003, Congress amended section 133(a) by adding a new paragraph (4) that explicitly directs AOC to make such contributions for benefits to "any third party designated to receive such contributions on behalf of the employees under a collective bargaining agreement, participation agreement, or other arrangement entered into by the Architect." Legislative Branch Appropriations Act, 2004, Pub. L. No. 108-83, § 1101(a)(2), 117 Stat. 1007, 1027 (Sept. 30, 2003) (amending § 133(a) of Pub. L. No. 107-68). Congress also directed AOC to "take all steps which may be required" to implement section 133(a), "notwithstanding any other provision of law." Pub. L. No. 108-83, § 1101(d).

According to AOC, in order to give effect to the law, it began lengthy and extensive negotiations with the five unions that represent its 85 temporary employees in order to agree upon the means to pay the fringe benefits. Each union has separate benefit plans for its members, different participation rules, and varying methods of accepting employer contributions. The unions advised AOC that they would only accept AOC's contributions if AOC entered into a participation agreement and became a member of their multiemployer defined benefit plans.[5] Memorandum from Charles K. Tyler, General Counsel, AOC, to Alan M. Hantman, Architect of the Capitol, July 12, 2004 (Tyler Memo), at 2.

These multiemployer defined benefit plans are governed by the Employee Retirement Income Security Act (ERISA). 29 U.S.C. §§ 1001-1461. Employee pension or welfare plans established or maintained by the federal government, a state, or locality are exempt from ERISA. 29 U.S.C. §§ 1002(32), 1003(b)(1). Here, private trade unions, in conjunction with private employers, rather than AOC, established and maintain the plans in which AOC has been asked to participate, and the provisions of Title IV of ERISA are likely to apply to AOC's participation in such plans. AOC received a legal opinion from outside counsel that confirmed this conclusion. Letter from Kenneth R.

(...continued)
and not to union trust funds. B-189553, Oct. 13, 1977. This restriction on disbursing officers is currently codified at 31 U.S.C. § 3322.

[5] A defined benefit plan promises a definite benefit that is generally based on an employee's years of service and either a flat dollar amount or the employee's salary. A defined contribution plan bases benefits on the contributions to and investment returns on a participant's individual account. In a defined benefit plan, the employer bears the investment risk; in a defined contribution plan, the employee bears the risk. GAO, *Private Pensions: Multiemployer Plans Face Short- and Long-Term Challenges*, GAO-04-423, at 4 (March 26, 2004). According to AOC, the unions require that AOC make a lump sum contribution for each of its temporary employees, which the unions would then distribute to employee health care, life insurance, and pension plans.

Hoffman, Partner, Venable LLP, to Margaret Cox, Associate General Counsel, AOC, April 20, 2004.

AOC feared that participation as a sponsoring employer in a multiemployer defined benefit plan could lead to what is termed "withdrawal liability" under Title IV of ERISA. Withdrawal liability is the amount that an employer who withdraws from a multiemployer plan under Title IV of ERISA is required to pay to continue funding their proportionate share of the plan's unfunded vested benefits. 29 U.S.C. §§ 1381, 1391. In other words, an employer's liability to a plan continues even after its withdrawal from the plan. In order to protect employees' benefits in multiemployer defined benefit plans, ERISA requires participating employers, even after they withdraw from a plan, to continue funding the benefits owed to their employees that have not yet been paid. Upon withdrawal, this liability could arise in two ways: AOC would face an immediate withdrawal liability if it withdrew from a plan with unfunded vested benefits. Yet, even with a fully funded plan, AOC would face the potential of costly future liability if the plan became underfunded in subsequent years. *See* GAO-04-423, at 23. Therefore, the government's liability as a participating employer in a multiemployer plan is difficult to predict at the time that AOC enters into a participation agreement because it is dependent on the financial health of other employers in the plan and the return on investments made by the plan's trustees. *See id.*

In order to avoid the possibility of such a liability, AOC attempted to negotiate with its unions to hold the federal government harmless from withdrawal liability or, alternatively, to allow AOC to simply transfer funds to the plans, without signing a participation agreement. Tyler Memo, at 3. However, only one union was amenable to such an arrangement,[6] and AOC became concerned that signing a participation agreement to join a multiemployer defined benefit plan could lead to future liabilities over which AOC had no control and for which funds might not be appropriated. *Id.* Therefore, AOC sought our decision as to whether participating in a multiemployer defined benefit plan would violate the Antideficiency Act and whether the "notwithstanding any other provision of law" language of section 1101 of the Legislative Branch Appropriations Act of 2004 waives the Antideficiency Act.

DISCUSSION

The Antideficiency Act prohibits federal officials from involving the government "in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). In 1909, in one of the first interpretations of the Antideficiency Act, the Comptroller of the Treasury, the predecessor to the Comptroller General, stated that: "[N]o officer of the Government has a right to make a contract on its behalf involving the payment of an indefinite and uncertain sum that may exceed the appropriation, and which is not capable of

[6] This union represents approximately 25 of the Architect's temporary employees.

definite ascertainment by the terms of the contract, but is wholly dependent upon the happening of some contingency the consequence of which can not be defined by the contract." 15 Comp. Dec. 405, 407 (1909).

Over the years, the Comptroller General has restated and applied this principle in numerous decisions. For example, in 1976, we pointed out that the Antideficiency Act would prohibit an agency from signing a contract in which termination costs were indeterminate or dependent on events or actions outside of the agency's control. 56 Comp. Gen. 142, 156-7 (1976). More recently, we again observed that an agency may not, without statutory authority, accept a legal duty that could mature into a legal liability by virtue of actions beyond the control of the agency. B-300480, April 9, 2003. Indeed, this principle drives a long line of our decisions holding that open-ended indemnification agreements run afoul of the Antideficiency Act. *See, e.g.,* 62 Comp. Gen. 361 (1983). *See also Hercules, Inc. v. United States,* 516 U.S. 417, 427 (1996) (open-ended indemnification agreements barred by the Antideficiency Act).

Similarly, AOC could not, without violating the Antideficiency Act, sign a participation agreement that could subject the government to the possibility of withdrawal liability. Annually, AOC can budget for its contributions to a plan, because participation in a plan and the payments due are negotiated on a yearly basis, depending on the health of the plan. However, because ERISA governs these plans, if AOC decided to withdraw from a participation agreement at a future date, AOC would still be liable for its share of benefits not covered by plan assets upon withdrawal. 29 U.S.C. §§ 1381, 1391. This liability could extend into future years, and the amount of AOC's liability would depend on factors outside of its control, such as the financial health of other employers participating in the plan and the return on investments made by the plan's trustees. GAO-04-423, at 23. Since AOC has no assurance that appropriations will be available to cover this liability, the Antideficiency Act would prohibit entering into a participation agreement that could subject the government to an indefinite withdrawal liability. 31 U.S.C. § 1341(a)(1)(B).

The Legislative Branch Appropriations Act of 2004 directs AOC to take all steps required to implement section 133(a), "notwithstanding any other provision of law." Pub. L. No. 108-83, § 1101(d). While we have never had occasion to address whether such language includes the Antideficiency Act, we have noted the importance of legislative history in determining whether an agency is authorized to sign contracts and make obligations in advance of appropriations. 67 Comp. Gen. 190 (1988). In such cases, we look for "language indicating a clear intent to make an exception" to the Antideficiency Act.[7] *Id.* For example, conference report language in the Farms

[7] We have similarly looked for "clear legislative expressions of congressional intent" in interpreting exceptions to the time restrictions placed on appropriated funds "[g]iven the significance of time restrictions in preserving congressional power of the purse." B-288142, Sept. 6, 2001.

for the Future Act of 1990 stating that funding for a mandatory pilot program constituted direct spending authority indicated that Congress intended a waiver of the Antideficiency Act.[8] B-244093, July 19, 1991.

In this case, the language and legislative history of section 133(a) do not suggest that Congress intended a waiver of the Antideficiency Act. There is no mention in the House Appropriations Committee report of any Antideficiency Act implications of AOC's payment of fringe benefits.[9] *See* H.R. Rep. No. 108-186, at 15 (2003). Given the fact that government-sponsored employee benefit plans are generally exempt from ERISA,[10] it is unlikely that it would have occurred to Congress that AOC would be required to enter into a participation agreement with open-ended liability. It is more likely that Congress analogized to the federal life, health, and retirement plans, which are available to the vast majority of federal employees and are obligated on a pay-period-by-pay-period basis. *See* 5 U.S.C. § 5504 *and* 24 Comp. Gen. 676, 678 (1945).

Although the scant legislative history does not suggest which provisions of law Congress intended to waive, we would read the "notwithstanding" language to ensure that the restrictions on disbursing officers did not prevent AOC from making direct payments to employee benefit trust funds.[11] At the time the "notwithstanding" language was enacted by Congress, the restrictions on disbursing officers was the major obstacle that AOC had identified in implementing section 133(a).[12] *See* H.R. Rep. No. 108-186, at 15 (2003). This view of the interplay of the two statutes honors a

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[8] Direct spending authority is mandatory spending that is not controlled through appropriations. *A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1, at 41, Jan. 1993. Congressional intent to waive the Antideficiency Act was also evident in the structure of the Farms for the Future Act. The Act distinguished between federal loan guarantees for the state of Vermont and other states by limiting the eligibility of other states to "the option of the Secretary of Agriculture and subject to appropriations." B-244093, July 19, 1991.

[9] The House Appropriations Committee originated the amendments to section 133(a).

[10] Plans established or maintained by the federal government, a state, or locality are exempt from ERISA. 29 U.S.C. §§ 1002(32), 1003(b)(1). However, since AOC neither established nor will maintain any of the plans in which it is being asked to participate, the provisions of ERISA are likely to apply.

[11] For example, 31 U.S.C. § 3322(a)(2) limits a disbursing officer's ability to transfer public money only as authorized for payments made pursuant to law and to persons to whom payment is made.

[12] In addition, prior to the passage of the amendments to section 133(a), AOC sought the opinion of the Internal Revenue Service (IRS) as to whether it had the legal authority to make fringe benefit payments on a pre-tax basis. Letter from Alan M. Hantman, Architect of the Capitol, to Charles O. Rossotti, Commissioner, IRS, Feb. 7, 2002.

longstanding principle of statutory construction that if possible, statutes should be construed harmoniously, so as to give effect to both. *See, e.g., Posadas v. National City Bank,* 296 U.S. 497, 503 (1936); *Negonsott v. Samuels,* 933 F.2d 818, 819 (10th Cir. 1991).

The federal courts have followed this principle in interpreting other "notwithstanding" provisions.[13] In such cases, the "notwithstanding" clause "is not necessarily preemptive" of all laws. *E.P. Paup Co. v. Director, Office of Workers Compensation Programs,* 999 F.2d 1341, 1348 (9th Cir. 1993). The courts have only preempted laws that are in "irreconcilable conflict" with the latter statute.[14] *In re Glacier Bay,* 944 F.2d 577, 583 (9th Cir. 1991). The Supreme Court has similarly stated, "[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override *conflicting* provisions of any other section." *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (emphasis added). In that decision, the Supreme Court had to reconcile two provisions in a housing subsidy contract: one that guaranteed a landlord automatic annual payment adjustments and another that stated that "notwithstanding any other provisions of this Contract," annual adjustments shall not result in material differences between subsidized and market rates. *Id.* at 13-14. The Court held that the two provisions clearly conflicted if annual adjustments exceeded market rates, and in such a case, the "notwithstanding" provision trumped the annual adjustment provisions. *Id.* at 18-19.

Similarly, the Court of Appeals for the Federal Circuit considered the effect of an appropriations provision that stated "notwithstanding any other provision of law," the statute of limitations on tribal trust fund claims shall not commence to run until the tribe is furnished with an accounting. *Shoshone Indian Tribe of the Wind River Reservation v. United States,* 364 F.3d 1339, 1344 (Fed. Cir. 2004). The Court of Appeals held that a clear conflict existed between the appropriations provision and the statute of limitations, and that the "notwithstanding" phrase "connotes a legislative intent to displace any other provision of law that is contrary" to the appropriations provision. *Id.* at 1346.

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[13] No court has ever addressed whether the phrase "notwithstanding any other provision of law," alone, would be sufficient to waive the Antideficiency Act.

[14] Similarly, in a 2002 bid protest decision, we considered whether a provision directing the Department of Energy to award certain contracts "notwithstanding any other provision of law" waived the Competition in Contracting Act (CICA). B-290125.2, B-290125.3, Dec. 18, 2002. In that case, we stated that that while such language does not give an agency "unfettered discretion," it does exempt it from laws that ordinarily would prevent the agency from taking the action that Congress has directed it to undertake. *Id.* Since CICA did not present a direct obstacle to the awarding of the contracts, we concluded that its provisions still applied. *Id.*

In the present case, the provisions of section 133(a) and the Antideficiency Act are not in irreconcilable conflict. Section 133(a) requires AOC to "take all steps which may be required to carry out" its provisions. In fact, AOC has done just that. AOC converted the majority of its temporary employees to federal wage grade positions, and then began negotiations with its five unions and requested the ability either to make contributions without signing a participation agreement or to simply transfer funds equal to the fringe benefit portion of their employees' pay. Tyler Memo, at 3. Such an arrangement would constitute a defined contribution plan, which does not subject an employer to withdrawal liability. 29 U.S.C. § 1321(b)(1).

AOC could also, without violating the Antideficiency Act, negotiate and sign a participation agreement that exempts or indemnifies AOC for any withdrawal liability or provides for AOC's participation only to the extent of available appropriations. In fact, the committee report emphasizes that section 133(a) "gives the Architect flexibility to provide eligibility for benefits from a variety of appropriate sources." H.R. Rep. No. 108-186, at 15 (2003). If the unions that represent its temporary employees are not amenable to such arrangements, AOC could refrain from hiring temporary employees and meet its construction needs through its federal wage grade employees, whose salaries and benefits are paid and obligated on a pay period basis.

In our past decisions, we have been unwilling to read general language, such as the "notwithstanding" clause in the Legislative Branch Appropriations Act of 2004, as a waiver of the Antideficiency Act. *See, e.g.,* 67 Comp. Gen. 190 (1988).[15] The Antideficiency Act is one of the fundamental statutes by which Congress exercises its constitutional control of the public purse. B-262069, Aug. 1, 1995. The Act represents Congress's strongest means to enforce the constitutional command that "[n]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, cl. 7. Therefore, we will not interpret general language, such as the "notwithstanding" clause, to imply a waiver of the Antideficiency Act without some legislative history to indicate that Congress intended to give the agency authority to obligate in advance or in excess of an appropriation. *Cf.* B-288142, Sept. 6, 2001 (absent "clear legislative expressions of congressional intent," we were unwilling to infer exceptions to time restrictions placed on appropriations "given the significance of time restrictions in preserving congressional power of the purse"). *See also* 31 U.S.C. § 1301(d) ("A law may be construed . . . to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states . . . that such a contract may be made.").

Indeed, there are numerous occasions of the "notwithstanding" clause in statute, and reading these as waivers of the Antideficiency Act could have profound implications

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[15] *See also* 5 Op. Off. Legal Counsel 1, 4 (Jan. 16, 1981) (authority to incur obligations in advance of appropriations "may not ordinarily be inferred . . . from the kind of broad, categorical authority, standing alone, that often appears, for example, in the organic statutes of government agencies.")

for federal fiscal control.[16] For example, the Consolidated Appropriations Act of 2004 authorized the Secretary of Agriculture to "[n]otwithstanding any other provision of law . . . make funding and other assistance available . . . to repair and prevent damage to non-Federal land in watersheds that have been impaired by fires initiated by the Federal Government." Pub. L. No. 108-199, Div. A, tit. VII, § 781, 118 Stat. 3, 44 (Jan. 23, 2004). We do not believe that Congress intended the Secretary to provide such assistance in excess of available appropriations. Similarly, section 2291(a)(4) of Title 22 of the United States Code states, "Notwithstanding any other provision of law, the President is authorized to furnish assistance to any country or international organization, on such terms and conditions as he may determine, for the control of narcotic and psychotropic drugs and other controlled substances, or for other anticrime purposes." Provisions such as these do not authorize the provision of assistance in advance of or in excess of appropriations. Effect can be given to these statutes, by making funding and assistance available, without violating the Antideficiency Act.

Therefore, given the lack of any legislative history indicating that Congress intended to waive the Antideficiency Act and the fact that AOC can give effect to both section 133(a) and the Antideficiency Act, we cannot say that the Legislative Branch Appropriations Act of 2004 provides the clarity necessary to find a waiver of the Antideficiency Act. Section 133(a) prohibits AOC from hiring temporary employees that are ineligible for fringe benefits. It does not require AOC to violate the Antideficiency Act.

While AOC cannot, without violating the Antideficiency Act, contribute to a multiemployer defined benefit plan that subjects the government to the potential for indeterminate withdrawal liability, it can attempt to negotiate an agreement with the unions that represent its temporary employees to participate in such a plan while holding the federal government harmless for any withdrawal liability. If the unions are unwilling to agree to such an arrangement, AOC should fully inform Congress of the situation.

[16] Since 1988, Congress has enacted over 700 public laws with provisions containing the phrase "notwithstanding any other provision of law." LEXIS search, Public Laws database, October 15, 2004.

CONCLUSION

The Antideficiency Act precludes AOC from signing a participation agreement to contribute to a multiemployer defined benefit plan that subjects the government to the potential for withdrawal liability, an indeterminate liability dependent on events and actions outside of AOC's control. Although Congress directed AOC to take all steps which may be required to implement section 133(a) "notwithstanding any other provision of law," this language does not waive the Antideficiency Act. Nothing in the statute or legislative history evinces a clear intent by Congress to waive the Antideficiency Act.

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General Counsel