

LIMITATION ON THE PAYMENT OF FUNDS TO INFLUENCE FEDERAL TRANSACTIONS

Background: The “Byrd Amendment” (P.L. No. 101-121, codified at 31 U.S.C. § 1352) generally prohibits recipients of federal contracts, grants, loans, and cooperative agreements from using appropriated funds to lobby government agencies and Congress in connection with any of these transactions. The statute also requires that anyone who requests or receives a federal contract, grant, loan or cooperative agreement (1) certify that they have not used appropriated funds to influence an award and (2) disclose all lobbying activities undertaken to influence an award that were paid for with other than appropriated funds. 31 U.S.C § 1352(b).

Summary: For federal contracts, the FAR contains a number of implementing provisions at Subpart 3.8 and mandatory FAR clauses at 52.203-11 and 52.203-12 that apply to contracts in excess of \$100,000.

- Because the FAR clauses require only that the contractor comply with the requirements of the statute, no additional certification is required. Simply signing an offer is sufficient to establish the contractor's representation that it has not made any prohibited lobbying payments. See *Tennier Industries, Inc.*, B-239025, 90-2 CPD ¶ 25 (July 11, 1990).
- The contractor's disclosure must identify if any funds other than appropriated funds (such as fee or profit from prior federal contracts) have been used for lobbying activities in connection with the contract.

The statute and FAR provide that the Byrd Amendment restrictions do not apply in several circumstances. These exceptions permit contractors to engage in reasonable legislative and agency liaison activities by a contractor's own employees that is unrelated to a specific solicitation, and to pay for professional and technical services necessary to prepare, submit, or negotiate an offer or proposal.

- Agency and legislative liaison activity by a contractor's employees is permissible so long as these activities are not directly related to a pending solicitation. Thus, communications concerning the qualities of a contractor's products or services, and providing information necessary for an agency to make a decision about initiating a solicitation are permitted. Providing information that is specifically requested by an agency or Congress is permitted at any time. FAR 3.802(c)(1).
- Reasonable compensation paid to a contractor's own employees for professional and technical services rendered directly in the preparation, submission or negotiation of a bid or proposal is also permissible. Reasonable compensation for professional and technical services paid to consultants and other nonemployees is permissible so long as the services are rendered directly in the preparation of a bid or proposal *and* involves advice or analysis directly applying to any professional or technical discipline (e.g., payments to lawyers and accountants for legal or accounting services related to a bid or proposal). FAR 3.802(c)(2).

Violations of the statute are punishable by civil penalties of not less than \$10,000 and not more than \$100,000 for each prohibited expenditure and for each failure to disclose a lobbying activity. Violations are also punishable under the Program Fraud and Civil Remedies Act, 31 USC §§ 3803, *et seq.*

Practitioner Tips: The Byrd Amendment prohibitions against the use of appropriated funds for lobbying and disclosure requirements can be problematic in several respects. In particular, the exceptions above can be difficult to interpret and apply in day-to-day communications with federal agencies and in the course of marketing and business development activities. For example, an otherwise permissible exchange of technical data with an agency to assist the agency better identify its requirements may become a prohibited lobbying activity if these communications continue after the agency issues a solicitation. To assure compliance with the statute and the FAR, contractors should:

- Review marketing and business development policies to ensure consistency with the statute and the FAR.
- Ensure that business development and other employees that have contact with federal officials are familiar with these prohibitions and that they know where to go for advice when questions arise.
- Evaluate cost accounting and financial management practices to ensure that adequate internal controls are in place to avoid the use of appropriated funds to pay for lobbying activities.
- Ensure that agreements with consultants and other professionals contain appropriate terms and conditions that clearly identify the nature of the services to be provided. Such agreements should specifically indicate whether these services involve the application of professional and technical services that fall within the exception described above or whether the services involve lobbying activities that must be paid for with other than appropriated funds and disclosed to the agency.

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