



Government Contracts Advisory

September 23, 2010

Real Property Buyers Beware: Court of Federal Claims Dismisses Complaint Against the U.S. Government Involving Attempted Property Transfer

On September 15, 2010, the U.S. House of Representatives unanimously passed the Overseas Contractor Reform Act (H.R. 5366), a bill introduced by Rep. Peter Welch (D-Vt). The bill has been touted as a means to “debar crooked contractors” by requiring agencies to propose for debarment those companies and individuals found in violation of the 1977 Foreign Corrupt Practices Act (“FCPA”). The bill does not simply affect “crooked” contractors however. This legislation has the potential to affect *any* contractor that engages in overseas business activities subject to the FCPA. A mandatory proposed debarment would be required for companies with a limited international presence but which run afoul of the FCPA due to the activities of foreign distributors or sales agents, and would be triggered by any business activities abroad - whether they be government contract-related or commercial. The bill’s overbreadth and lack of clarity are among a number of significant problems with the legislation.

Specific areas of concern include:

- The bill is broadly defined and requires any entity “found to be in violation” of the FCPA to be proposed for debarment and the legislation does not define “found to be in violation”;
- Being proposed for debarment immediately renders a contractor ineligible for federal programs, and the change in language from “shall be debarred” in the original draft bill to “shall be proposed for debarment” does not remedy this problem;
- FCPA violations often are totally unrelated to government contracts, and also often stem from the unauthorized acts of a single agent or representative;
- The bill does not identify which government agency is to take any resultant debarment action;
- The express policy statement contained in the bill that those who have violated the FCPA should not receive federal awards will render it difficult for debarment officials to find a “violation” presently responsible, regardless of the corrective and remedial actions taken; and
- The bill does not create any distinction for contractors who self-disclose.

At this time, there is not a companion bill pending in the Senate, which is scheduled to adjourn on October 8, 2010. Even if the bill is not enacted in this session of Congress, there is a substantial likelihood that it will be reintroduced. Contractors should consider taking immediate action to alert the Senate of the bill’s serious deficiencies.

CONTACTS

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