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International Procurement

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In 1998, there were several important developments that impacted the manner in which companies and governments may conduct themselves in procuring goods and services across national borders. First, the United States Senate ratified an international convention aimed at combating bribery of foreign public officials in international business transactions. The convention required member countries to criminalize such behavior and to cooperate with other member countries in prosecuting violators of transnational bribery laws. Congress and the president in turn amended the Foreign Corrupt Practices Act to conform to the requirements of the convention. In the defense sector, the United States Department of Defense eased its contingent fee limitations on foreign military sales to permit United States companies to pay otherwise prohibited contingent fees with the advanced approval of the country in question. In the international arena, the United States issued new restrictions and sanctions on contracting with countries in response to perceived violations of international law. In the area of domestic procurement laws of foreign nations, Germany amended its procurement laws to conform to European Economic Community (EEC) requirements regarding judicial review of alleged discriminatory practices. Companies that believe they have encountered discriminatory practices in Germany now will be able to seek monetary damages through a structured, judicial review process. In Massachusetts, a federal judge struck down a Massachusetts law forbidding the purchase of goods or services from companies doing business in Myanmar (formerly Burma) as an unconstitutional intrusion on the exclusive power of the federal government over foreign affairs. This decision makes similar state or local laws aimed at changing the domestic policies of foreign countries ripe for constitutional challenge. Finally, the United States government has proposed a change to its rules providing for preferential treatment of U.S.-made products.

I. International Defense Sales

A. FCPA AMENDED AS REQUIRED BY OECD CONVENTION

On November 10, 1998, Congress and the President enacted the International Anti-Bribery and Fair Competition Act of 1998 (Act).[1] The Act amended the Foreign Corrupt Practices

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1. *See* International Anti-Bribery and Fair Competition Act, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

Act of 1988, for the stated purposes of improving the competitiveness of American business and promoting foreign commerce. The Act implements the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention), ratified by the United States Senate on July 31, 1998.[2] The Convention outlaws the bribery of public officials to obtain business. Furthermore, the Convention requires that countries that are parties to the Convention criminalize the bribery of foreign public officials and punish such bribery on a basis comparable to domestic bribery. Finally, the Convention mandates that parties cooperate in the investigation and enforcement of transnational anti-bribery laws.

The Convention, signed on December 17, 1997, by twenty-eight members of the Organization for Economic Cooperation and Development (OECD), and five other countries, largely mirrors the U.S. Foreign Corrupt Practices Act (FCPA).[3] Minor differences between the Convention and the FCPA, however, required implementing legislation to amend the FCPA to conform to the requirements of the Convention. Other countries also must adopt legislation implementing the Convention.

The amendments expand the FCPA to include bribes to foreign public officials that are made to secure any improper advantage. The amendments also expand the FCPA to cover not only United States businesses and issuers of securities, but also any foreign natural or legal person that engages in a prohibited act within the territory of the United States.

In addition, the amendments expand the definition of public official in the FCPA to include officials of public international organizations. They make foreign employees and agents of issuers and domestic concerns subject to criminal penalties in the same way that United States citizens are. The amendments provide for jurisdiction even when United States businesses and nationals engage in the offering of bribes wholly outside the United States. The amendments also contain strict monitoring and reporting requirements to ensure that other OECD members fully implement the anti-bribery convention under their laws. They require that the administration report to Congress concerning its efforts to strengthen the Convention by extending the prohibitions contained in the Convention. These extensions cover bribes to political parties, party officials, and candidates for political office.

B. Change in FMS Rules

The Defense Acquisition Regulations (DAR) Council, on March 9, 1998, amended the Defense Acquisition Regulation Supplement (DFARS)[4] to ease restrictions on the cost allowability of contingent fees paid in connection with Foreign Military Sales (FMS).[5] The new rule *removes* the long-standing $50,000 ceiling on the cost allowability of contingent fees that are paid to help secure sales in the FMS Program. Under the new rule, contractors are permitted to treat those commissions that exceed $50,000, and are paid to help secure FMS contracts, as allowable costs as long as such amounts are approved in writing by the foreign customer prior to contract award. Certain customers—Australia, Egypt, Greece, Israel, Japan, Jordan, the Republic of Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, and the Venezuelan Air Force—must approve *any* amount of commissions to be treated as allowable costs, including amounts less than $50,000.

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2. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1.

3. *See* 15 U.S.C.A. §§ 78m, 78dd-1, 78dd-2, & 78ff (West Supp. 1998).

4. *See* Defense Acquisition Regulation Supplement, 48 C.F.R. § 225.7303-4 (1998).

5. *See* Defense Federal Acquisition Regulation Supplement; Misc. Amendments, 63 Fed. Reg. 11,522 (1998).

C. New United States Regulatory Restrictions on International Procurement

The United States issued a number of new restrictions and sanctions on contracting with various countries in response to perceived violations of international law. For example, on May 13, 1998, President Clinton directed government agencies to impose sanctions, as authorized by § 102(b)(2) of the Arms Export Control Act, on India for detonating a nuclear device on May 11, 1998.[6] Similarly, on May 30, 1998, the president directed government agencies to impose sanctions on Pakistan.[7] The State Department subsequently revoked all licenses and approvals for the export of defense articles and defense services to either country.[8] By interim rule effective November 19, 1998, the Commerce Department's Bureau of Export Administration (BXA) issued sanctions against India and Pakistan, and added Indian and Pakistani military entities to the Export Administration Regulations (EAR) Entity List.[9]

On May 19, 1998, President Clinton renewed a ban on new investment in Myanmar by implementing Executive Order 13047, dated May 20, 1997. The Department of the Treasury's Office of Foreign Assets Controls (OFAC) implemented this ban in a new Part 537 to CFR, Chapter V.[10] OFAC also issued sanctions by direction of the president against Sudan effective July 1, 1998. These sanctions implemented an embargo on the export of all products and technologies, except for informational materials, food, medicine, and other items to relieve human suffering.[11]

II. Germany Enacts New Procurement Code

In response to growing pressure from the United States and other countries, Germany amended its Procurement Code effective January 1, 1999.[12] For over twenty years, the United States has pushed for such a change, charging that the German market for turbines, generators, and other equipment was effectively closed to United States companies.

The main impact of the amendment is to establish a formal judicial review process in regular German courts of law for suits charging discriminatory practices in violation of international or domestic law governing prohibitions on procurement discrimination. These laws include the European Economic Community Council Directive of February 1992.[13] The Directive coordinated the national laws of member nations relating to the application of EEC procurement rules to the water, energy, transport, and telecommunications sectors, and the directive requiring judicial review procedures.[14] Formerly, Germany had maintained that its procurement laws satisfied these directives by permitting review in specialized courts

6. *See* Presidential Determination No. 98-22, 63 Fed. Reg. 27,665 (1998).

7. *See* Presidential Determination No. 98-25, 63 Fed. Reg. 31,881 (1998).

8. *See* Bureau of Political Military Affairs, Revocation of Munitions Exports Licenses & Other Approvals, 63 Fed. Reg. 33,122 (1998) (Pakistan); 63 Fed. Reg. 27,781 (1998) (India).

9. *See* India and Pakistan Sanctions and Other Materials, 63 Fed. Reg. 64,322 (1998).

10. *See* Burmese Sanctions Regulations, 63 Fed. Reg. 27,846 (1998).

11. *See generally* Sudanese Sanctions Regulations, 31 C.F.R. § 538 (1998); Sudanese Sanctions Regulations, 63 Fed. Reg. 35,809 (1998).

12. *See* Gesetz zur Änderung der Rechtsgrundlagen für die Vergabe öffentilicher Aufträge-Vergaberectsänderungsgesetz VgÄG, v.29.May.1998 (BGB1. I S. 2510).

13. Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of community rules on the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors, 1992 O.J. (L 076) 14.

14. Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, 1989 O.J. (L 395) 33.

dealing with budgetary matters. The amendment creates special procurement courts called *Vergebekammern*, which review decisions by procurement offices on the state level, called *Vergabeprüfstellen*. Decisions by the *Vergebekammern* can be appealed to the *Oberlandesgerichte*, or state supreme courts, where the amendments require the establishment of specialized benches or panels with jurisdiction for public procurement only. The amendments provide for relief in the form of money damages for contractors or agencies that are found to have violated the EEC's anti-discrimination directives.

III. Massachusetts Burma Law Unconstitutional

In *National Foreign Trade Council v. Baker*, a federal district court in Massachusetts ruled that Massachusetts' Burma law was unconstitutional.[15] The Massachusetts' Burma law prohibits the Commonwealth of Massachusetts and its agents from purchasing goods or services from anyone doing business with the Union of Myanmar (formerly known as the Nation of Burma). The statute authorizes the Operational Services Division (OSD), an agency in the state's Executive Office of Administration and Finance, to establish a restricted purchase list of companies doing business with Burma as defined by the statute. Once OSD makes a preliminary finding that a company does business with Myanmar, the company can submit a sworn affidavit to refute the finding. OSD then makes a final decision whether to place a company on the restricted purchase list. Once a company is placed on the list, it cannot be used, other than in certain limited circumstances.

Applying the foreign affairs doctrine, the court ruled that the Burma law is an unconstitutional infringement on the federal government's power to regulate foreign affairs. The basis of the court's ruling is that the United States Constitution grants the federal government exclusive authority to conduct foreign affairs.[16] The court cited various provisions in the Constitution as evidence of the Framers' intent to vest plenary power over foreign affairs in the federal government, including: (a) the grant to Congress of sole authority to provide for the common defense, and to regulate commerce with foreign nations;[17] (b) the grant to the president to make treaties and appoint ambassadors;[18] and (c) the prohibition on states from making treaties, entering into agreements with other countries, or imposing duties on imports and exports.[19] The court also based its decision on Supreme Court jurisprudence ruling that the federal government retains exclusive authority over external affairs.[20]

The court also relied on the principle that state laws are invalid if they have more than some incidental or indirect effect on foreign countries, or if they have a great potential for disruption or embarrassment of the United States foreign policy.[21] In this regard, the court ruled that because the Burma law was enacted solely to sanction Myanmar for human rights violations and to change Myanmar's domestic policies, the law has more than an incidental effect on

15. National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998).

16. *Id.* at 290.

17. *See* U.S. CONST. art. I, § 8, cls. 1 & 3.

18. *See* U.S. CONST. art. II, § 2, cl. 2.

19. *See* U.S. CONST. art. I, § 10, cls. 1-3.

20. *National Foreign Trade Council*, 26 F. Supp. 2d at 290 (citing, e.g., United States v. Pink, 315 U.S. 203, 233 (1942).

21. *See id.* (quoting Zschernig v. Miller, 389 U.S. 429 (1968) (ruling unconstitutional a probate law that conditioned right of nonresident alien to inherit property from an Oregon resident on reciprocal treatment from beneficiary's country of origin)).

foreign countries and a great potential for disruption or embarrassment.[22] The court distinguished federal decisions upholding state "buy American" statutes or selective divestment statutes on the rationale that such statutes were enacted for the purpose and effect of creating jobs and promoting economic development at home.[23] Applying *Zschernig*, the court held that because the Burma law was designed with the purpose of changing Burma's domestic policy, it had more than an incidental substantive impact on foreign relations.[24] Thus, the court concluded that the Burma law is "an unconstitutional infringement on the foreign affairs power of the federal government."[25] The state of Massachusetts has appealed the decision.

The decision in *National Foreign Trade Council v. Baker* could have a wide impact on the laws of many states if the laws were enacted with the purpose of changing the domestic policy of foreign nations. Approximately twenty-three cities, including New York, San Francisco, and Portland, have laws prohibiting municipal governments from dealing with companies doing business with Myanmar.

IV. Proposed FAR Change: Status of U.S.-Made End Products

On September 28, 1998, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council promulgated a proposed rule to amend certain foreign acquisition clauses in the Federal Acquisition Regulation (FAR).[26] At that time, the FAR Secretariat initiated a public comment period, which ended on November 27, 1998. The rule clarifies several policies and procedures, including the treatment of U.S.-made end products for acquisitions subject to the Trade Agreements Act (TAA).[27]

The TAA prohibits the purchase of foreign end products, except for products from countries that are eligible under the TAA, the North American Free Trade Agreement (NAFTA),[28] the Caribbean Basin Economic Recovery Act (CBERA),[29] or another agreement. These eligible products compete on an equal basis with domestic end products, without application of Buy American Act (BAA) or Balance of Payments Program (BPP) evaluation factors.[30] However, the current FAR does not list the United States as a designated country under the TAA, and therefore, the FAR does not accord the same treatment to U.S.-made end products (those products substantially transformed in the United States) as it accords designated country end products and domestic end products. Thus, the current FAR prohibits a contractor from supplying these other U.S.-made end products when the TAA applies.[31]

However, based on a decision in *International Business Machines Corporation*,[32] most government agencies, to different degrees, have deviated from the FAR 52.225-9. The General Services

22. *See id.* at 291 (following *Zschernig*, 389 U.S. at 434-35).
23. *See id.* at 292.
24. *See id.*
25. *Id.*
26. *See* Federal Acquisition Regulation; Foreign Acquisition, 63 Fed. Reg. 51,642 (1998).
27. *See* 19 U.S.C. §§ 2501-2582 (1994).
28. *See* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).
29. *See* Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, tit. II, 97 Stat. 384 (1983).
30. *See* Buy American Act, 41 U.S.C. §§ 10a-10d (1994) (originally enacted as Act of March 3, 1933, ch. 212, tit. III, 47 Stat. 1520); Balance of Payments Program, 48 C.F.R. §§ 25.300-.305 (1994) (regular procurement); 48 C.F.R. §§ 225.300-.370 (1994) (defense procurement).
31. Federal Acquisition Regulation (FAR) 52.225-9, 48 C.F.R. § 52.225-9 (1999).
32. General Services Administration Board of Contract Appeals (GSBCA) No. 10532-P, 90-2 BCA ¶ 22,824 (May 18, 1990).

Administration (GSA) and most non-defense agencies accord equal treatment to U.S.-made end products, TAA-designated country end products, and domestic end products. On the other hand, Department of Defense (DOD) provides for a 50 percent evaluation preference for domestic end products and TAA-designated end products over U.S.-made end products, unless a specific waiver applies. One such waiver involves all information technology goods. On May 16, 1997, DOD implemented this information technology waiver of its evaluation preference in DFARS Case 97-DO22.[33] Furthermore, the National Aeronautics and Space Administration (NASA) does not deviate from FAR 52.225-9, and thus, NASA currently prohibits procurement of U.S.-made end products under the TAA.[34]

Thus, the Councils' proposed change to the FAR part 25 and the associated clauses in part 52 would update the FAR to conform with the *IBM* decision and with the current approaches of the individual agencies.[35]

33. *See* Defense Acquisition Regulation Supplement; Misc. Amendments, 63 Fed. Reg. 11,522 (1998); *see also* Defense Federal Acquisition Regulation (DFAR) 225.105, 48 C.F.R. § 225.105 (1999) (evaluation procedures); DFAR 225.402, 48 C.F.R. § 225.402 (1999) (policy); DFAR 225.603(a)(i)(D), 48 C.F.R. § 225.603(a)(i)(D) (1999) (pre-award procedures).

34. *See* National Aeronautics and Space Administration (NASA) FAR Sup. 1825.4, 48 C.F.R. § 1825.4 (1999).

35. *See* Federal Acquisition Regulation; Foreign Acquisition, 63 Fed. Reg. 51,642 (1998).