The Byrd Amendment and the Government Contractor: Death of a Salesman?

by Paul J. Seidman and Robert D. Banfield

The Byrd Amendment, 31 U.S.C. § 1352, contains the following significant provisions:

- It prohibits the recipient of any federal contract, subcontract, or covered federal funding from using "appropriated funds" to pay any person for influencing or attempting to influence personnel of any federal agency, a member of Congress, or congressional personnel in connection with the making, award, or modification of a federal contract, grant, cooperative agreement, or loan guarantee;
- It requires applicants for or recipients of federal contracts, subcontracts, or other covered funding to (1) certify that no prohibited payments of "appropriated funds" have been made, and (2) report any payments using "other than appropriated funds" that would be prohibited if made with appropriated funds; and,
- It provides a civil penalty of up to $100,000 for each prohibited payment or failure to report.

Events Leading to Enactment

The Anti-Influencing Act, which is commonly known as the Byrd Amendment, was introduced by Senate Appropriations Committee Chairman Robert C. Byrd of West Virginia on July 26, 1989. In his introductory remarks Senator Byrd stated the primary focus of the legislation is twofold. First, the act is a response to the revelations of huge consulting fees paid for influence peddling at the Department of Housing and Urban Development. Second, the act is a response to reports lobbyists are creating projects and having them earmarked in appropriation bills for their clients.[1]

On July 31, 1989, *The Washington Post* carried a front-page report titled "Byrd Drops Home-State Effort In Anger Over Lobbyists' Role." This article conveyed a more personal motivation for Byrd's strong support for passage of the act.

According to *The Washington Post*, Byrd was approached by a delegation from West Virginia University (WVU) for assistance in funding a $16 to $18 million "materials research project." A staff member informed Byrd that lobbyists were present in the delegation. Byrd excused the lobbyists. He then expressed his anger to his constituents for feeling that it was necessary to hire lobbyists to approach him. The meeting closed with Byrd's expressing his continued support for the university project.

Byrd subsequently withdrew his sup-

Paul J. Seidman is a principal in the law firm of Seidman & Associates, P.C., Washington, D.C., and McLean, Virginia. He is a member of NCMA's Washington, D.C., Chapter.
Robert D. Banfield was a law clerk at Seidman & Associates, P.C., 1990–1991, while attending The National Law Center of The George Washington University.
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port. His change of position was prompted by a June 18, 1989, *Washington Post* article that detailed extensive activities of the lobbyist firm Cassidy and Associates before the House and Senate Appropriations Committees. These activities included creating the idea of using the Stockpile Transaction Fund as a mechanism to get appropriations for university clients—including WVU. A Cassidy and Associates executive had accompanied university personnel to the meeting where Byrd had dismissed the lobbyists.

The senator is renowned on Capitol Hill for his skill at channeling funds to his home state. The dramatic effect of his withdrawing all support for the university research project is thought to have facilitated the swift passage of the bill through Congress.

The Statute

Transactions Covered

The act applies to federal funding transactions. It is expressly applicable to the award of any federal contract, grant, or cooperative agreement, the making of any federal loan, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement. [2]

The Prohibition

In general, the statute prohibits the "recipient" of a federal contract, grant, or cooperative agreement from expending "funds appropriated by any act" to "pay any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with a [covered transaction]." [3]

Applicability

The statute defines the "recipient" of a federal contract, grant, or cooperative agreement to include the contractors, subcontractors, and subgrantees of the "recipient."[4] Subcontractors and subgrantees are therefore covered by the act's prohibition.

Exceptions

The act provides statutory exceptions for lobbying efforts not related to a federal funding transaction and certain professional and technical services.

An exception is provided for "reasonable compensation made to an officer or employee...for agency and legislative liaison activities not directly related to a [covered transaction]." [5]

A further exception is provided for "reasonable payment to a person in connection with, or...reasonable compensation to an officer or employee...if the payment is made for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that federal contract, grant, loan, or cooperative agreement." [6]

Problem Areas

What is meant by "appropriated funds"? The act prohibits contractors from spending appropriated funds for lobbying. What Byrd obviously had in mind was payments made pursuant to federal contract, grant, or cooperative agreement or the proceeds of a federal loan. The term "appropriated funds" used in the statute simply does not reflect this intention.

One might think that recipients of contracts or other covered funding transactions could never spend "appropriated funds." After all, they cannot write checks against the United States Treasury. Once the treasury check has been deposited by the payee, the funds lose their "appropriated" character. But such a reading makes the Byrd Amendment a nullity, so other interpretations have been adapted, as will be discussed.

Are all payments for "influence" prohibited or just those for corrupt influence such as

bribery or gratuities? There is no legitimate reason to prohibit payments to influence the award of a contract or other covered funding transaction *on the merits.* There is no need for a new law prohibiting corrupt influence. Adequate coverage is provided in these other laws:

- 18 U.S.C § 201 makes bribery a criminal offense;
- 18 U.S.C § 207 makes the payment of gratuities a criminal offense;
- 10 U.S.C §§ 2397a, 2397b, 2397c and 41 U.S.C § 423(f) provide adequate protection against conflicts of interest; and,
- Costs of lobbying Congress are unallowable. (Federal Acquisition Regulation [FAR] § 31.205–22).

Certification and Disclosure Requirements

The act requires each contractor, subcontractor, subgrantee, and applicant to *certify* that appropriated funds have not been and will not be used for influencing activities in regards to the award, modification, continuation, or renewal of the federal transaction in question. *Disclosure* of expenditures of "nonappropriated funds" for influencing activities for which the use of appropriated funds is prohibited is also required.

Each contractor, subcontractor, subgrantee, and applicant is responsible for the accuracy of its individual certifications and disclosures. The certification and disclosure requirements apply to subcontractors and subgrantees at every tier.

Certification of present and future compliance with the act must be submitted with any offer for award of a federal contract, subcontract, grant, or cooperative agreement in excess of $100,000 and for loans, loan guarantees, and loan insurance applications in excess of $150,000.[7] Successful offerors or applicants must recertify upon contract award or modification and upon receipt or extension of funding.

In addition to requiring certification that no appropriated funds have been or will be improperly used, the act requires contractors, subcontractors, funds applicants, and recipients to disclose expenditures of nonappropriated funds for influencing or attempting to influence agency or congressional personnel. Therefore, any expenditures made with nonappropriated funds that would be prohibited if made with appropriated funds must be disclosed.

Disclosure statements must be updated quarterly if anything materially changes the accuracy of the prior disclosure [8] "Material changes" include those in amounts expended or expected to be expended, in the purposes for influencing or in the persons paid or expected to be paid. [9]

Implementation of the Act

The December 20, 1989, "Interim Final Guidance"

The act, which became effective on December 23, 1989, directed the Office of Management and Budget (OMB) to issue governmentwide guidance to ensure consistent implementation by all federal agencies. The OMB published "Interim Final Guidance" for implementation of the Byrd Amendment in the *Federal Register* for December 20, 1989. [10] The use of the terms "interim" and "final" to describe the rule is oxymoronic. It simply makes no sense, but neither does the statute.

Under the Interim Final Guidance, appropriated funds do not include "profits from any covered federal action."[11] This is the only guidance given. Since the major thrust of the act is to prohibit federal funding applicants from using "appropriated funds" for lobbying Congress or an agency, one might expect a more precise definition. But any effort at a more precise definition would probably highlight the problem that contractors really do not spend appropriated funds at all.

The Interim Final Guidance does not limit the application of the act to corrupt influence such as bribery. The statutory phrase "influencing or attempting to influence" is defined as "making, with an intent to influence, any communication to, or appearance before an officer or employee of any agency, a member of

Congress, or an employee of a member of Congress in connection with any covered federal action." [12]

The effect of the Interim Final Guidance is to limit the Byrd Amendment's application through exemptions to the act that:

- Permit a contractor or other federal funding recipient to make reasonable payments to its officers or employees for agency and legislative liaison activities not directly related to a covered federal action; [13]
- Permit contractors to provide any information specifically requested by an agency or Congress at any time; [14]
- Permit contractors, where "not related to a specific solicitation," to (1) discuss with an agency the characteristics of its products or services or terms of sale and (2) have technical discussions regarding the application of its products or services to an agency's use; [15]
- Permit contractors before the issuance of a solicitation to (1) provide information to an agency that it needs to make an informed decision about initiating the procurement, (2) participate in technical discussions concerning the preparation of an unsolicited proposal before its submission, and (3) conduct capability presentations—if made by small businesses—for purposes of obtaining a certificate of competency; [16]
- Limit liability for the erroneous certification of a subcontractor to the subcontractor who made it; [17] and,
- Limit the penalty for first offenses to $10,000 in the absence of "aggravating circumstances." [18]

The "Interim Final Rules"

The OMB subsequently published two "Interim Final Rules" which incorporate the "Interim Final Guidance" without elaboration. More specifically:

- An "Interim Final Rule" for contracts covered by the FAR was published in the *Federal Register* for January 30, 1990;[19] and
- An Interim Final Rule for contracts not covered by the FAR and for federal grants, loans, cooperative agreements, loan guarantee commitments, and loan insurance commitments was published in the *Federal Register* for February 26, 1990. [20]

For the convenience of the reader the citations for the Interim Final Guidance reference the FAR section where the referenced portion of the Interim Final Guidance was subsequently adopted.

Unpublished and Published Clarifications

On March 23, 1990, the Office of Federal Procurement Policy (OFPP) issued "clarifications" to the December 1989 OMB Interim Final Guidance in an unpublished memorandum to the headquarters and field staff of the federal agencies.[21] These clarifications were later adopted as part of clarifications published in the *Federal Register* on June 15, 1990, as follows: [22]

The certification and disclosure requirements apply only to the contract, grant, cooperative agreement, loan, or other federal funding transaction for which the certification or disclosure is made. Thus in bidding on one contract, a contractor is not required to certify or report lobbying expenditures made with respect to other contracts.

The effective date of December 23, 1989, does not apply to modifications of contracts awarded before that date. An exception to this rule is provided for modifications that are beyond the scope of the original contract and are in essence a new procurement. These are the sorts of modifications that require the issuance of a justification and approval for noncompetitive award.

This exception applies only to contract modifications, not to the modification of other funding agreements such as a grant, cooperative agreement, or loan.

As previously noted, the Interim Guidance defined appropriated funds as not including profits on covered funding transactions. The June 1990 clarification restates this limitation on what constitutes appropriated funds. In addition, it provides that to the extent a person can demonstrate that the person has sufficient monies, other than federal appropriated funds, the federal government shall assume that these other monies were spent for any influencing activities unallowable with federal appropriated funds.

Final Rule Pending

Publication of a "final" rule was at one time anticipated as early as fall 1990. OMB personnel now advise that although further clarifications are expected, publication of final rules is not anticipated anytime soon.

Guidelines for Corporate Implementation

The Byrd Amendment is a statutory and regulatory nightmare. Although many areas of the act can be clarified only through agency application or judicial action, the following guidelines provide a basic framework for compliance with the act:

(1) To determine if a set of facts raises concern, a company must first determine whether there was a communication, whether the communication was with an agency or with Congress, whether the communication was made with the intent to influence, and whether the intent of the communication was to influence the award of a contract, grant, cooperative agreement, loan, or other federal funding transaction. A transaction is not subject to the act unless *all* of these factors are present.

(2) If the factors set forth in paragraph (1) are all present, the next question is whether the factual circumstances fall within a statutory or regulatory exemption. As previously discussed, there are statutory exemptions for attempts to influence not related to a particular contract and for professional or technical services rendered in preparation, submission or negotiation of any bid, proposal, or application for that federal contract, grant, loan, or cooperative agreement or for meeting legal requirements.

In addition, the regulatory guidance permits contractors to provide any information specifically requested by an agency or Congress, provide certain information before the solicitation is issued, have technical discussions concerning the preparation of an unsolicited proposal before its submission, and make a capability presentation for purposes of obtaining a small business certificate of competency.

(3) If all of the factors in paragraph (1) are present and no exemption is applicable, the use of appropriated funds to influence the funding decision is prohibited. Appropriated funds do not include profits earned under federal contracts. Furthermore, to the extent a company can demonstrate that it has sufficient monies, other than federal appropriated funds, the federal government will assume that these other monies were spent for any influencing activities unallowable with federal appropriated funds.

(4) Certification of present and future compliance with the act must be submitted with any offer for award of a federal contract, subcontract, grant, subgrant, or cooperative agreement in excess of $100,000 and for loans, loan guarantees, and loan insurance applications in excess of $150,000. This is now built into the standard solicitation forms used by procuring agencies.

(5) If all of the factors in paragraph (1) are present and no exemption is applicable a contractor, subcontractor, funds applicant, or funds recipient is required to disclose any expenditure of nonappropriated funds for influencing or attempting to influence agency or congressional personnel with respect to a federal contract, subcontract, grant, subgrant, or cooperative agreement in excess of $100,000 and for loans, loan guarantees, and loan insurance applications in excess of $150,000.

A Final Comment

The most prudent course, and the one that probably lurked in the back of Senator Byrd's mind when he concocted the statute, is not to buy influence at all. There are some potential "horribles"—what happens, for example, to a contractor that buys and reports some influence in a year when an extraordinary write-off creates a net loss? The problem is that some quite ordinary activities can at least look like the exertion of influence.

Endnotes

1. 135 *Cong. Rec.* S8779–80 (daily ed. July 26, 1989) (statement of Sen. Byrd).
2. 31 U.S.C. § 1352(a)(2).
3. 31 U.S.C. § 1352(a)(1).
4. 31 U.S.C. § 1352(h)(1).
5. 31 U.S.C. § 1352(e)(1)(A).
6. 31 U.S.C. § 1352(e)(1)(B).
7. 31 U.S.C. § 1352(b)(2) and (e)(2).
8. 31 U.S.C. § 1352(b)(4).
9. 31 U.S.C. § 1352(b)(2)(B).
10. 54 *Fed. Reg.* 52306.
11. OMB Guidance § ___.100
12. OMB Guidance § ___.105(h), incorporated in the Federal Acquisition Regulations (FAR) at § 3.801.
13. § ___.200(a); FAR § 3.802(c)(1)(i).
14. § ___.200(b); FAR § 3.802(c)(1)(ii).
15. § ___.200(c); FAR § 3.802(c)(1)(iii).
16. § ___.200(d); FAR § 3.802(c)(1)(iv).
17. § ___.110(f); FAR § 52.203–12(e)(2).
18. § ___.400(d) [no FAR equivalent].
19. 55 *Fed. Reg.* 3190–01; Federal Acquisition Circular 84–55, January 30, 1990.
20. 55 *Fed. Reg.* 6736.
21. This internal government memorandum was subsequently published in *Federal Contracts Report*, Bureau of National Affairs, April 2, 1990, pp. 449–450.
22. 55 *Fed. Reg.* 24540.