Lobbying Do’s and Don’t’s for Government Contractors: Our Unique Regulatory Environment

Presented By:
Caleb P. Burns
Suzette Derrevere
George E. Petel
Jade C. Totman

April 18, 2018

These slides are accompanied by an oral presentation and should not be relied upon as legal advice.
Copyright © 2018 Wiley Rein LLP
Speakers

Caleb P. Burns  
Partner  
Wiley Rein LLP  
202.719.7451  
cburns@wileyrein.com

Suzette Derrevere  
Chief Counsel  
The Boeing Company  
703-465-3281  
suzette.w.derrevere@boeing.com

George E. Petel  
Associate  
Wiley Rein LLP  
202.719.3759  
gpetel@wileyrein.com

Jade C. Totman  
Senior Counsel  
The Boeing Company  
(703) 465-3039  
jade.c.totman@boeing.com
Overview

- Lobbying Disclosure Act
- Byrd Amendment
- FAR: Accounting for Lobbying Costs
- FY-18 National Defense Authorization Act
LOBB DYING DISCLOSURE ACT (LDA)
Lobbying Disclosure Act

- Who is subject to regulation, registration, and reporting under the LDA?
- Any company that employs a “lobbyist.”
- This will turn on, among other things, the choice that a contractor makes regarding the accounting method it uses to measure lobbying activities.
Lobbying Disclosure Act

- The choice that a contractor makes regarding its accounting method will also affect:
  - The number of employees that must be disclosed as a “lobbyist” on LDA reports and subject to additional burdens; and
  - The total amount that the company must disclose on LDA reports as lobbying expenses.

- LDA registrants have until the first report of each year (due April 20) to elect an accounting method for the year.
Lobbying Disclosure Act

- The two accounting methods available are:
  - The LDA method; and
  - The Internal Revenue Code (IRC) method.

- The principal difference between them is that the IRC method includes very little executive branch lobbying.
Lobbying Disclosure Act

- Under the LDA accounting method, lobbying of the following “covered executive branch officials” is regulated:
  - The President and Vice President;
  - Any officer or employee in the Executive Office of the President;
  - Any officer or employee serving in a position in Level I-V of the Executive Schedule;
  - Any member of the uniformed services whose pay grade is at or above O-7; and
  - “Schedule C” employees.
Lobbying Disclosure Act

- But under the IRC accounting method, only lobbying of the following “covered executive branch officials” is regulated.
  - President and Vice-President.
  - Officers or Employees of the White House Office.
  - 2 most senior officers in the agencies of the Executive Office of the President.
  - Cabinet level officials and their immediate deputies.
  - Individuals serving in a position in Level I of the Executive Schedule and their immediate deputies.
Thus, the narrow definition of “covered executive branch officials” pursuant to the IRC accounting method may permit a contractor that has extensive dealings with the executive branch or the military to stay below the relevant thresholds and avoid regulation under the LDA.

But there is a trade-off...
Lobbying Disclosure Act

- If a contractor, nonetheless, crosses the relevant thresholds to be regulated under the LDA, then the contractor will be required to file quarterly reports that disclose, among other things, the total amount spent on lobbying which will, again, be affected by the accounting method chosen.
  - Though the IRC method includes very little executive branch lobbying, it must capture all expenses for federal, state, and local direct and grassroots lobbying on legislation.
  - The LDA method includes far more executive branch lobbying, but does not include expenses for any state or local direct or grassroots lobbying.
Lobbying Disclosure Act

Though not a legal concern, the disclosure of total lobbying expenses can raise operational and public relations issues:

- Does the company have adequate systems in place to capture non-federal and grassroots lobbying expenses?
- Will the resulting lobbying expense figure be larger or smaller and will that engender scrutiny and inquiry from the public and/or competitors?
Byrd Amendment
Byrd Amendment

- The Byrd Amendment prohibits federal government contractors from using appropriated funds to pay for lobbying for a government award.
- The Byrd Amendment requires federal government contractors to file disclosure reports if they use non-appropriated funds to pay for government contract lobbying.
Byrd Amendment: Prohibitions

- No appropriated funds may be used by the recipient of a federal government contract 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

- ...with respect to the awarding, making, entering into, extension, continuation, renewal, amendment, or modification of any:
  - Federal contract;
  - Grant;
  - Loan; or
  - Cooperative agreement.

- “Influencing or attempting to influence” is defined as making a communication to or appearance before a covered official with the intent to influence.
Byrd Amendment: Exemptions

- Payments of reasonable compensation to an entity’s regularly employed employees to perform the following duties are not subject to the prohibitions of the Byrd Amendment:
  - Conducting agency and legislative liaison activities not directly related to an award;
  - Providing any information specifically requested by an agency or Congress;
  - If not related to a specific solicitation:
    - Discussing with an agency the qualities and characteristics of the contractor’s products or services, conditions or terms of sale, and service capabilities; and
    - Conducting technical discussions and other activities regarding the application or adaptation of the contractor’s products or services for an agency’s use.
  - If prior to a formal solicitation:
    - Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a contract, grant, or cooperative agreement; and
    - Conducting technical discussions regarding the preparation of an unsolicited proposal prior to the proposal’s official submission.
Byrd Amendment: Exemptions

The following activities are also exempt from the prohibitions of the Byrd Amendment regardless of whether they are performed by an entity’s employees or outside consultants:

- Reasonable payments to a consultant or payments of reasonable compensation to employees for “professional or technical services rendered directly in the preparation, submission, or negotiation” of the award, or for meeting requirements imposed by law as a condition of receiving the award; and
- Communications in the nature of routine and ongoing post-administration of grants and contracts.
Byrd Amendment Violations – Sandia National Laboratories

- In 2015, Sandia Corporation, a wholly-owned subsidiary of Lockheed Martin Corporation, reached a nearly $4.8 million settlement to resolve Byrd Amendment and False Claims Act allegations.
- Sandia held the Management and Operating (M&O) Contract with the Department of Energy’s (DOE’s) National Nuclear Security Administration to operate the Sandia National Laboratories (SNL).
- DOE M&O contracts are characterized by their special purpose and the close relationship they create between DOE and the contractor, and include special requirements related to work direction, cost controls, and site management, in addition to FAR requirements in the contract.
Byrd Amendment Violations – Sandia National Laboratories

- A DOE Inspector General Special Inquiry alleged that Sandia violated the Byrd Amendment and the False Claims Act by using federal funds for activities related to lobbying to obtain a renewal of the contract.

- The IG determined that Sandia employees funded under the M&O contract were actively engaged in the implementation of a plan to influence members of Congress and Federal officials to discourage any re-competition of the M&O contract.
Byrd Amendment Violations – Sandia National Laboratories

- As part of the lobbying effort, Sandia hired consultants, including a former Congresswoman, to craft its lobbying strategy.
- The IG report also noted that Sandia employees may have inappropriately provided written materials to members of the New Mexico Congressional Delegation despite warnings from officials that the reports did not fall under any lobbying exception.
- DOE re-competitive the O&M contract in 2017.
Byrd Amendment: Reporting Requirements

- An entity that requests or receives a federal government contract, grant, loan, cooperative agreement, or a commitment to insure or guarantee a loan from an agency is subject to special certification and reporting requirements for its lobbying activity
  - Form LLL Disclosure
Anti-Lobbying Contract Clauses and Certification

- FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions
- FAR 52.203-12, Limitation on Payments to Influence Certain Federal Transactions
Federal Acquisition Regulation
Cost Principles
Lobbying & Political Activity Costs (FAR 31.205-22)

- If contractor incurs costs that are not allowable, allocable, reasonable (prudent) or in accord with contract provisions, contractor may not include these costs (direct or indirect) in any proposal or billing with the USG, where the proposal or billing are based on costs, not price.

- Federal Acquisition Regulation (FAR) Part 31 contains the guiding principles for these cost allowability standards.
Lobbying & Political Activity Costs (FAR 31.205-22)

- Costs associated with federal, state or local lobbying activities through cash or kind, endorsements, publicity or similar activities are generally unallowable:
  - Attempts to influence elections
  - Attempts to influence legislation or referendums
  - Legislative liaison activities, when in support of an effort to engage in unallowable activities
  - Attempts to improperly influence congressional or federal employees to give consideration to or act regarding a regulatory or contract matter
  - Contributions to political parties, Political Action Committees (PAC) or similar organizations

- When a contractor seeks reimbursement for indirect costs, total lobbying costs must be separately identified on the cost proposal.
Lobbying & Political Activity Costs (FAR 31.205-22)

The below costs, however, are allowable:

• Presenting technical and factual information on a topic related to contract performance in response to a documented request from a legislative body or staff member (but cost of meals/lodging are unallowable)

• Activities authorized by statute to be undertaken with funds from the contract

• Otherwise unallowable state and local government legislative lobbying to directly reduce contract costs or avoid material impairment of contract performance
Lobbying & Political Activity Costs (FAR 31.205-22)

- Failure to properly (1) identify, (2) segregate and (3) exclude unallowable costs can cause severe penalties to contractors

- Penalties can include the amount of the expressly unallowable cost, plus interest on the paid portion, if any, of the disallowance
  - Other administrative, civil and criminal penalties provided by law

- Employees must assist their companies in being alert to identify and exclude unallowable costs
FAR 31.205-22 – Appeal of Raytheon


- Holding: Raytheon was successful in the majority of its appeal and the Board held that some costs were not expressly unallowable

  - But, salary costs of employees who engage in lobbying activity were held expressly unallowable, and subject to penalty and interest when included by contractor in cost submissions
FAR 31.205-22 – Appeal of Raytheon

- Contractor argued that per FAR 31.201-6(e)(2), salaries for staff participating in unallowable costs -- such as lobbying -- are treated as directly associated costs to that unallowable activity, and are not “expressly unallowable”

- ASBCA disagreed with Raytheon’s claims that that salary costs of staff who only sometimes engage in lobbying and political activity are not expressly unallowed:
  - “[M]aterial salary expenses of employees who engage in activities that generate unallowable lobbying costs are named and stated to be unallowable under the combination of FAR 31.201 -6(a) and FAR 31.201 -6(e)(2) [Accounting for Unallowable Costs]”
Audit – Defense Contract Audit Agency (DCAA)

- Incurred Cost Audits determine the accuracy of contractor's representation of its annual allowable cost.
- DCAA expresses an opinion as to whether such costs are allowable, reasonable, and allocable to the contract, based on government accounting and acquisition provisions, including the FAR Part 31 Cost Principles.
- Incurred cost audits allow the contracting officer to recover the questioned costs before the contract is officially closed out, which prevents excess payments by the Government.
Audit - Defense Contract Management Agency (DCMA)

- Contractor Purchasing System Review (CPSR)
- DCMA CPSR Guidebook – 30 Major Purchasing Areas Reviewed
- Appendix 7 – Anti-Lobbying
  - All of the contractor’s subcontract/purchase order files above $100,000 before October 1, 2010, or $150,000 on or after Oct 2010 that are subject to Government review are to be examined for compliance
  - Audit to ensure prime contractor is obtaining FAR 52.203-11 anti-lobbying certifications and flowing down FAR 52.203-12 when required
FY18 NDAA

- Section 1045 of the NDAA imposes new post-government employment lobbying prohibitions effective December 12, 2017:
  - **Two-year prohibition** on military officers grade O-9 or higher and their “civilian grade equivalents”
    - Tier 3 (and above) SES (career and non-career),
    - Defense Intelligence Senior Executive Service (DISES), and
    - Presidential Appointees confirmed by the Senate.
  - **One-year prohibition** on military officers grade O-7 and O-8 and their “civilian grade equivalents”
    - Tier 1 and 2 SES (career and noncareer),
    - Defense Intelligence Senior Level (DISL),
    - Senior Level (SL), and
    - Scientific and Professional (ST).
FY18 NDAA

- The lobbying prohibition applies to:
  - Any DOD lobbying activities including those directed to any DOD officials and other “covered” officials in any Department if the lobbying concerns DOD matters.
  - Direct lobbying contacts and behind-the-scenes research, advice and strategy with others.

- The scope of the prohibition goes beyond other similar post-government employment restrictions that typically apply only to direct contacts with the former employee’s agency.
Questions and Contact Information

Caleb P. Burns  
Partner  
Wiley Rein LLP  
202.719.7451  
cburns@wileyrein.com

Suzette Derrevere  
Chief Counsel  
The Boeing Company  
703-465-3281  
suzette.w.derrevere@boeing.com

George E. Petel  
Associate  
Wiley Rein LLP  
202.719.3759  
gpetel@wileyrein.com

Jade C. Totman  
Senior Counsel  
The Boeing Company  
(703) 465-3039  
jade.c.totman@boeing.com