

No. 23-02

Date: October 25, 2023

Foreign Corrupt Practices Act Review

Opinion Procedure Release

The Department of Justice (the “Department”) has reviewed the Foreign Corrupt Practices Act (“FCPA”) Opinion request of a U.S.-based company (the “Requestor”), a provider of training events and logistical support. The Department received the Requestor’s request (“Request”) on or about September 20, 2023, and the Requestor submitted supplemental information on or about September 25, 2023. The Requestor is a “domestic concern” under 15 U.S.C. § 78dd-2(h)(1). It is therefore eligible to request an Opinion of the U.S. Attorney General, pursuant to 28 C.F.R. § 80.4, regarding whether certain specified, prospective—not hypothetical—conduct conforms with the Department’s present enforcement policy regarding the anti-bribery provisions of the FCPA.

Background

According to the Request, Requestor was awarded a task order issued pursuant to its contract with an agency of the United States government (the “Agency”). This task order requires the Requestor to establish training events utilized by multiple U.S. government entities in which the Requestor provides, *inter alia*, logistical support for foreign government personnel. This logistical support, in turn, includes providing stipend payments to foreign officials who attend these training events. The stipends are intended to pay for meals that are not required to be served during the event, along with driving mileage costs for certain event participants.

In connection with the above-described task order, Requestor proposes to pay certain stipend amounts to a United States Government Officer (“U.S. Officer”), which the U.S. Officer will subsequently deliver to foreign officials. The Requestor has represented, among other things, that:

- The Agency has advised Requestor that the stipends are authorized by a particular United States law: the Foreign Assistance Act of 1961. Specifically, as represented by Requestor, Sections 129 and 636 authorize the stipend payments here.
- All stipend payment amounts have been approved, or have been determined and set, by the U.S. Government. The amounts to be paid are either (i) calculated in relation to the Department of State’s Meals and Incidental Expenses (“M&IE”) rates, or (ii) otherwise dictated by the U.S. Embassy in a particular country, based on that country’s internal per diem rate.

- Requestor’s proposed (and U.S. Government-accepted) stipend payments are between \$8 and \$40 per day, depending on the location of the training event.
- Requestor maintains accounting records to document the payments, its costs, and any associated cash transactions, and Requestor provides all documentation and invoices currency payment amounts to the Agency.
- Requestor received its task order, which calls for the at-issue payments, via a competitive selection process operated by the U.S. Government. Further, Requestor was not made aware of the names or other information of any foreign officials when it determined the approach and pricing for its task order proposal.
- Requestor will not pay any funds to foreign officials directly but will instead provide currency only to the relevant U.S. Officer, who will then remit the amounts to the foreign officials directly.

Analysis

The FCPA prohibits, *inter alia*, any domestic concern from corruptly giving or offering anything of value to any “foreign official” to assist “in obtaining or retaining business for or with, or directing any business to, any person.” 15 U.S.C. § 78dd-2(a)(1). “Corruptly” means an intent or desire to wrongfully influence the recipient. The “business purpose” test of the FCPA is met where the purpose of the payment or offer is to assist in obtaining and retaining business.¹

Based on all the facts and circumstances as represented by the Requestor, the Department does not presently intend to take any enforcement action under the anti-bribery provisions of the FCPA. Among other things, based on the information provided by the Requestor, the proposed expenditures reflect no corrupt intent of Requestor—which is demonstrated, in part, by the Agency’s belief that the Foreign Assistance Act authorizes the at-issue payments to foreign officials. Moreover, the payments themselves do not appear to be for the purpose of assisting Requestor in obtaining and retaining business.² To the contrary, based on the specific facts

¹ See H.R. Rep. No. 100-576, at 1951-52 (in amending the FCPA in 1988, Congress noted on the business purpose of the FCPA that “the reference to corrupt payments for ‘retaining business’ in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment.”).

² The Department has issued prior FCPA Opinion Procedure Releases about payments for which the purpose is not to assist in obtaining or retaining business. See, e.g., [FCPA Opinion Release 22-01](#) (proposed payment sought release of requesting party’s maritime vessel, captain, and crew, who had inadvertently entered a country’s waters and were subsequently detained, resulting in significant risk to life and well-being); [FCPA Opinion Release 04-04](#) (company

presented here, any payments to foreign officials are both called-for and ultimately delivered by agencies and/or personnel of the United States Government.

This FCPA Opinion Procedure Release has no binding application to any party other than Requestor and can be relied on by Requestor only to the extent that the disclosure of facts and circumstances in its Request and supplements is accurate and complete.

proposed to fund “Study Tour” of foreign officials, where the requesting company, among other things, (i) did not select the particular foreign officials who would participate, (ii) was not aware of any pending or anticipated business in the foreign country or with the foreign government, and (iii) intended to pay travel costs directly to third-party providers or to reimburse costs only upon presentation of a receipt); [FCPA Opinion Release 04-03](#) (law firm proposed to sponsor trip for officials of a ministry of the People’s Republic of China to meet with U.S. public-sector officials, where the law firm, *inter alia*, (i) had no business before the entities that might send officials on the visit, (ii) did not select the particular officials who would be invited, and (iii) did not pay any funds directly to the government officials, but rather paid them to third-party providers).