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UNDERSTANDING THE DODD AMENDMENT

SUMMARY

A recent anti-outsourcing amendment passed by the U.S. Senate represents a significant infringement on the ability of Governors to manage resources in their own states, while also likely spurring retaliation against U.S. companies seeking contracts with foreign governments. Ironically, the amendment was added to a trade and tax bill (S. 1637) needed to avoid retaliation from the European Union after an unfavorable World Trade Organization ruling. The amendment sponsored by Senator Christopher Dodd (D-CT) would ban, with some exceptions, the use of any federal funds for work to be performed offshore, including prohibiting states from using federal grants for any offshore work, which will increase state contracting costs. The amendment also requires that the federal government withhold money from state governments unless they individually certify that each federal grant, which collectively total more than $200 billion a year, is not used to perform work outside the United States. There is little doubt that if other nations passed such a law prohibiting U.S.-based employees from working on contracts involving a foreign government, members of Congress would register opposition and demand an opening of such markets. The logic of the amendment is that U.S. companies also should be barred from employing U.S. labor to perform contracts for foreign governments. As a leading provider of services, U.S. companies and their employees would benefit the most from more open government procurement policies worldwide and, as such, the Dodd amendment is a significant setback for such companies and employees.

WHAT DOES THE DODD AMENDMENT DO?

Senator Christopher Dodd (D-CT) added an amendment to a Senate trade bill that prohibits federal funds from being used for federal contract work offshore, including making permanent a temporary ban on contracting out work offshore if the work is currently performed by federal government employees, known as the Thomas-Voinovich amendment. The Dodd amendment also requires that the federal government withhold money from state governments unless they individually certify that each federal grant they receive will not be used to perform work outside the United States.

The amendment states that "funds appropriated for financial assistance for a State may not be disbursed to or for such State during a fiscal year unless the chief executive of that State has transmitted to the Administrator for Federal Procurement Policy, not later than April 1 of the preceding fiscal year, a written certification that none of such funds will be expended for the performance outside the United States of contracts entered into by such State." It empowers the Office of Management and Budget to enforce state compliance.

While the federal and state (federal grant) bans exempt the signatories of the WTO Agreement on Government Procurement, the provision of the Dodd amendment that makes the Thomas-Voinovich

amendment permanent does not exempt the signatories of that agreement. The amendment, which passed on March 4, 2004, in a 70-26 vote, was added to S. 1673, a bill needed to change U.S. tax provisions to avoid European Union retaliation due to an unfavorable WTO ruling. (See the appendix for the full text of the Dodd amendment.)

An amendment by Senator McConnell (R-KY) added the following to the Dodd amendment: "This title and the amendments made by this title shall take effect 30 days after the Secretary of Commerce certifies that the amendments made by this title will not result in the loss of more jobs than it will protect and will not cause harm to the U.S. economy. The initial certification shall be made by the Secretary of Commerce no later than 90 (ninety) days after the enactment of this Act. Such certification must be renewed on or before January 1 of each year in order for the amendments made by this title to be in effect for that year. (b) Consistency with International Agreements. The provisions of this title shall not apply to the extent that they may be inconsistent with obligations under international agreements. Within 90 days of this legislation, OMB, in consultation with the office of the USTR, shall develop guidelines for the implementation of this provision."

An amendment by Senator McCain (R-AZ) exempted certain national security-related procurement from the provisions of the Dodd amendment out of concern it would devastate U.S. ability to receive certain services in this area and for American companies to earn contracts from foreign governments for military equipment and related sales.

DODD AMENDMENT'S IMPACT ON STATES

The federal government annually provides more than $220 billion in grants to state and local governments, in the form of many different individual grants and programs.[1] Generally speaking, this money is returned to the taxpayers of a state after first being paid in federal taxes. The Dodd amendment would significantly complicate the grant process for Governors and state agencies by prohibiting a state from receiving a grant unless it first certifies that no dollars from the grant will go to perform work outside of the United States.

The provision of the amendment specifying that federal money could be used to pay for services performed in countries that have signed the WTO Agreement on Government Procurement will likely further complicate the task of the states. The extent to which federal money is used in concert with state funding will make it more difficult for states to comply with this federal mandate.

Not only is this provision an additional burden and a violation of the principles of federalism, it will likely raise contracting costs for states. In 2003, utilizing money from a federal economic

development grant, the state of Indiana received proposals from three internationally recognized companies to install a new, sophisticated unemployment insurance claims system, aiming to speed claims and reduce bureaucracy. In the end, the Governor succumbed to political pressure and canceled the contract with the company that won the bidding because it was an Indian firm (Tata Consultancy Services).

The Tata proposal was "$8.1 million less than the next-most-competitive bid," *The Indianapolis Star* reported. Out of 65 contract employees, Tata would have employed a number of Hoosiers through an Indiana-based subcontractor but would also have used Indians currently employed by the firm, working both in the United States and India. To put these figures in perspective, if one assumed the governor's action leads to hiring an extra 50 people from Indiana at the cost of at least $8.1 million for taxpayers (the difference between Tata's bid and its nearest competitor), that would translate into Indiana taxpayers spending an extra $162,000 per worker on top of what the other Tata workers would have made.[2] In other words, the Dodd amendment will cost states money not only in complying with this new mandate but in prohibiting the use of overseas labor even if such labor would deliver the best value for state taxpayers.

RETALIATION AGAINST U.S. FIRMS

The week before the U.S. Senate voted to bar Indian firms from performing U.S. government contract work in India, California-based Hewlett Packard was awarded a 10-year, $150 million contract to manage the information technology systems of the state-run Bank of India.[3] If Senator Dodd had been born in India and entered parliament there is a good chance Hewlett-Packard would never have won this contract.

The logic of the Dodd amendment is that all governments should prohibit contract work that is not performed within their own borders. Since it is well known that America does not have a monopoly on nationalism, the Dodd amendment can only inspire more countries to adopt such a policy, to the detriment of U.S. companies. Misguided policy makers in other countries would likely single out U.S. companies for such a restriction, while awarding contracts to European, Canadian, or Asian corporations.

Senator Dodd stated on the Senate floor that his bill exempts procurement covered by the WTO Agreement on Government Procurement. There are two problems with this statement. First, as noted earlier, the bill does not appear to allow even companies from countries that are signatories to the WTO Agreement on Government Procurement to perform foreign-based contracts for work if the services are currently performed by U.S. government employees (making the Thomas-

Voinovich amendment permanent), which may invite retaliation, shutting off, for example, U.S. bidding on the privatizing of certain state functions overseas. Second, the government procurement agreement only has 26 signatories: Austria, Belgium, Canada, Denmark, the European Union (as an entity), Finland, France, Germany, Greece, Hong Kong, Ireland, Israel, Italy, Japan, the Republic of Korea, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, the United Kingdom, and the United States.[4] That means the United States is denying federal government contracting work to a large portion of the world and potentially affecting the ability of U.S. companies to perform work in much of the world as a consequence.

There is no evidence the Dodd amendment will create jobs. It is far more likely to cost jobs by raising costs for state and federal taxpayers (through limiting contract competition) and by harming U.S. companies ability to secure contracts abroad.

CONCLUSION

It is ironic that in a bill to avoid trade retaliation, the U.S. Senate has included an amendment almost guaranteed to result in retaliation against U.S. firms seeking government contracts overseas. The Dodd amendment is more than a feel-good provision in which office holders can claim they "protected jobs." It usurps the principles of federalism by mandating how certain state contracts can be performed and closes an important U.S. market to foreign firms at a time when the United States by both words and actions should be trying to open world markets.

APPENDIX

TEXT OF DODD AMENDMENT (*CONGRESSIONAL RECORD* - MARCH 4, 2004)

Mr. DODD. I send a modification to the Dodd amendment to the desk and ask it be so modified.

The PRESIDING OFFICER. The amendment is modified.

The amendment (No. 2660), as modified, is as follows:

At the end of the bill, add the following:

TITLE V—PROTECTION OF UNITED STATES WORKERS FROM COMPETITION OF FOREIGN WORKFORCES

SEC. 501. LIMITATIONS ON OFF-SHORE PERFORMANCE OF CONTRACTS.

LIMITATIONS.—

(1) IN GENERAL.—The Office of Federal Procurement Policy Act (41 U.S.C. 403 et seq.) is amended by adding at the end the following new section:

``SEC. 42. LIMITATIONS ON OFF-SHORE PERFORMANCE OF CONTRACTS.

``(a) CONVERSIONS TO CONTRACTOR PERFORMANCE OF FEDERAL ACTIVITIES.—An activity or function of an executive agency that is converted to contractor performance under Office of Management and Budget Circular A-76 may not be performed by the contractor or any subcontractor at a location outside the United States except to the extent that such activity or function was previously performed by Federal Government employees outside the United States.

``(b) OTHER FEDERAL CONTRACTS.—(1) A contract that is entered into by the head of an executive agency may not be performed outside the United States except to meet a requirement of the executive agency for the contract to be performed specifically at a location outside the United States.

``(2) The prohibition in paragraph (1) does not apply in the case of a contract of an executive agency if—

``(A) the President determines in writing that it is necessary in the national security interests of the United States for the contract to be performed outside the United States; or

``(B) the head of such executive agency makes a determination and reports such determination on a timely basis to the Director of the Office of Management and Budget that—

``(i) the property or services needed by the executive agency are available only by means of performance of the contract outside the United States; and

``(ii) no property or services available by means of performance of the contract inside the United States would satisfy the executive agency's need.

``(3) Paragraph (1) does not apply to the performance of a contract outside the United States under the exception provided in subsection (a).

``(c) STATE CONTRACTS.—(1) Except as provided in paragraph (2), funds appropriated for financial assistance for a State may not be disbursed to or for such State during a fiscal year unless the chief

executive of that State has transmitted to the Administrator for Federal Procurement Policy, not later than April 1 of the preceding fiscal year, a written certification that none of such funds will be expended for the performance outside the United States of contracts entered into by such State.

``(2) The prohibition on disbursement of funds to or for a State under paragraph (1) does not apply with respect to the performance of a State contract outside the United States if—

``(A) the chief executive of such State—

``(i) determines that the property or services needed by the State are available only by means of performance of the contract outside the United States and no property or services available by means of performance of the contract inside the United States would satisfy the State's need; and

``(ii) transmits a notification of such determination to the head of the executive agency of the United States that administers the authority under which such funds are disbursed to or for the State; and

``(B) the head of the executive agency receiving the notification of such determination—

``(i) confirms that the facts warrant the determination;

``(ii) approves the determination; and

``(iii) transmits a notification of the approval of the determination to the Director of the Office of Management and Budget.

``(3) In this subsection, the term `State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

``(d) subsections (b) and (c) shall not apply to procurement covered by the WTO Government Procurement Agreement.

``(e) RESPONSIBILITIES OF OMB.—The Director of the Office of Management and Budget shall—

``(1) maintain—

``(A) the waivers granted under subsection (b)(2), together with the determinations and certifications on which such waivers were based; and

``(B) the notifications received under subsection (c)(2)(B)(iii); and

``(2) submit to Congress promptly after the end of each quarter of each fiscal year a report that sets forth—

``(A) the waivers that were granted under subsection (b)(2) during such quarter; and

``(B) the notifications that were received under subsection (c)(2)(B)(iii) during such quarter.

``(f) ANNUAL GAO REVIEW.—The Comptroller General shall—

``(1) review, each fiscal year, the waivers granted during such fiscal year under subsection (b)(2) and the disbursements of funds authorized pursuant to the exceptions in subsections (c)(2) and (e) and

``(2) promptly after the end of such fiscal year, transmit to Congress a report containing a list of the contracts covered by such waivers and exception together with a brief description of the performance of each such contract to the maximum extent feasible outside the United States.''.

(2) CLERICAL AMENDMENT.—The table of sections in section 1(b) of such Act is amended by adding at the end the following new item:

``Sec. 42. Limitations on off-shore performance of contracts.''.

(b) INAPPLICABILITY TO STATES DURING FIRST TWO FISCAL YEARS.—Section 42(c) of the Office of Federal Procurement Policy Act (as added by subsection (a)) shall not apply to disbursements of funds to a State during the fiscal year in which this Act is enacted and the next fiscal year.

SEC. 502. REPEAL OF SUPERSEDED LAW.

Section 647 of the Transportation, Treasury, and Independent Agencies Appropriations Act, 2004 (division F of Public Law 108-199) is amended by striking subsection (e).

SEC. 503. EFFECTIVE DATE AND APPLICABILITY.

This title and the amendments made by this title shall take effect 30 days after the date of the enactment of this Act and, subject to subsection (b) of section 501, shall apply with respect to new contracts entered into on or after such date.

AMENDMENT NO. 2680, AS MODIFIED, TO AMENDMENT NO. 2660

The PRESIDING OFFICER. Under the previous order, the McConnell second-degree amendment is modified with the changes at the desk, and it is agreed to.

The amendment (No. 2680), as modified, was agreed to, as follows:

On page 7, strike lines 10 through 14 and insert the following:

(a) This title and the amendments made by this title shall take effect 30 days after the Secretary of Commerce certifies that the amendments made by this title will not result in the loss of more jobs than it will protect and will not cause harm to the U.S. economy. The initial certification shall be made by the Secretary of Commerce no later than 90 (ninety) days after the enactment of this Act. Such certification must be renewed on or before January 1 of each year in order for the amendments made by this title to be in effect for that year.

(b) Consistency with International Agreements. The provisions of this title shall not apply to the extent that they may be inconsistent with obligations under international agreements. Within 90 days of this legislation, OMB, in consultation with the office of the USTR, shall develop guidelines for the implementation of this provision.

The PRESIDING OFFICER. The Senator from Wyoming.

AMENDMENT NO. 2685 TO AMENDMENT NO. 2660, AS MODIFIED AND AMENDED

Mr. THOMAS. I send an amendment to the desk on behalf of Senator McCain.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Wyoming [Mr. THOMAS], for Mr. McCain, for himself and Mr. Warner, proposes an amendment numbered 2685 to amendment No. 2660, as modified and amended.

The amendment is as follows:

(Purpose: To protect United States workers from competition of foreign workforces for performance of Federal and State contracts)

On page 5, insert after line 16 the following:

(e) NATIONAL SECURITY EXEMPTION.—Subsection (b) shall not apply to any procurement for national security purposes entered into by:

(1) the Department of Defense or any agency or entity thereof;

(2) the Department of the Army, the Department of the Navy, the Department of the Air Force, or any agency or entity of any of the military departments;

(3) the Department of Homeland Security;

(4) the Department of Energy or any agency or entity thereof, with respect to the national security programs of that Department; or

(5) any element of the intelligence community.

The PRESIDING OFFICER. Under the order, the amendment is agreed to.

The amendment (No. 2685) was agreed to.

AMENDMENT NO. 2660 .....

Mr. DODD. I ask for the yeas and nays on the Dodd amendment.

.....

The PRESIDING OFFICER. All time has expired. The question is on agreeing to amendment No. 2660, as modified, as amended.

The yeas and nays have been ordered.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from Louisiana (Mr. BREAUX), the Senator from North Carolina (Mr. EDWARDS), the Senator from South Dakota (Mr. JOHNSON), and the Senator from Massachusetts (Mr. KERRY) are necessarily absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote ``yea.''

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 70, nays 26.

END NOTES

1. Iris. J. Lav, "Decline in Federal Grants Will Put Additional Squeeze on State and Local Budgets," Center on Budget and Policy Priorities, February 3, 2004.

2. Stuart Anderson and Cesar Conda, "The Cost of Canceling a State Contract," *Indianapolis Star*, November 30, 2003.

3. "Bank of India to outsource IT to Hewlett-Packard," Reuters, February, 25, 2004.

4. Simon Evenett, "Multilateral Disciplines and Government Procurement," Bernard M. Hoekman and Aaditya Matto, (Eds.), Development, Trade and the WTO, World Trade Organization, 2002, pp. 417-427.

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