Lawful advocacy: Contractor compliance with federal campaign contribution requirements

July 15, 2015

Last week, the US Court of Appeals for the District of Columbia upheld the ban in US law on contributions to federal political candidates and parties by individuals performing contracts with the federal government. Although this decision preserves the status quo, it provides an opportunity to discuss the current contribution limitations, consider possible future developments and identify alternatives that might enable federal contractors to engage in the political process.

In upholding the long-standing ban on contributions by government contractors, the court in *Wagner v. Federal Election Commission*, rebuffed first amendment free speech and associational challenges by a group of individuals who held individual professional services contracts with the United States government.[1] In ruling as it did, the appellate court found that the current ban on contractor contributions was sufficiently tailored to satisfy the government's interests in preventing corruption or the appearance of corruption, and in protecting against interference with a “merit-based” system of government contracting.

The challenge brought by the contractors was intentionally quite narrow in that it challenged the prohibition only as it applies to individuals with government contracts (not companies) and addressed only the prohibition against direct contributions to candidates and parties. The case intentionally did not address contributions to other political advocacy groups, including political action committees that make contributions to candidates (PACs) or to the so-called “independent expenditure only committees” (Super-PACs).

Participation in public advocacy and the political process is especially important for federal contractors who are not only subject to significant regulation, but whose customer base and business opportunities substantially are determined through the political process. However, since 1940, any individual or company performing a contract with the United States has been precluded from making campaign contributions “directly or indirectly…to any political party, committee, or candidate for public office or to any person for any political purpose.” See 52 U.S.C. § 30119(a)(1). The court’s decision in *Wagner* maintains this prohibition and clearly limits direct contractor contributions to political candidates.

Given the limited issues in the *Wagner* case, one may expect future challenges to broad limitations on contractor contributions. The Court’s decisions in *Buckley v. Valeo* and *Citizens United v. Federal Election Commission* confirm that limitations on contributions to political candidates are subject to the least scrutiny. Limitations on other avenues of political speech, including independent expenditures, are subject to greater scrutiny. Further challenges, therefore, may seek to overturn limitations on contractor contributions to PACs that, in turn, make contributions to specific candidates. Given the attenuation between the contractor’s contribution to the PAC and the PAC’s subsequent decision to contribute to a candidate, it may be argued that the appearance of corruption that is at the heart of the *Wagner* decision is already diminished. Such a challenge would broaden opportunities for advocacy because a US subsidiary of a foreign (non-US) company already is permitted to establish a PAC and make contributions to that PAC from its US generated income. Thus, foreign registered companies with interests in government contracts would have

an opportunity—through their US subsidiaries—to participate in the US political process. Future cases may als challenge limits on contributions to Super-PACs that do not contribute to candidates at all but, instead, make independent expenditures.

As things stand, a contractor's employees may make direct contributions to federal candidates and PACs, and may engage in other forms of political speech, and may, if they choose, participate in the political process on their employers behalf, if not with their employer's money. Additional limitations, however, may apply to contributions by contractors and their employees to state and local candidates based upon state and local pay-to-play and campaign finance requirements.

Dentons' Political Law team is well situated to provide domestic and foreign entities, as well as their employees, with comprehensive advice and counsel on these and other compliance matters. As a service to its clients operating around the world which contract with the United States, Dentons will also be hosting a webinar later this year that will help our clients identify the myriad regulatory challenges they face when engaging in advocacy, procurements or contribution activity with governments worldwide.

1. See also DC Circuit Court of Appeals Provides Major Support For the Constitutionality of Pay-to-Play Laws…And Probably Makes an Executive Order Mandating Contractor Disclosure of Political Spending Likely.

Your Key Contacts

Joseph G. Martinez
Office Managing Partner, Denver
D +1 303 634 4371
joe.martinez@dentons.com

Benjamin P. Keane
Partner, Washington, DC
D +1 202 496 7672
ben.keane@dentons.com