

No. 94-01

Date: May 13, 1994

Foreign Corrupt Practices Act Review

Opinion Procedure Release

The Department has received an FCPA opinion request from an American company, its wholly owned subsidiary (the subsidiary) and a foreign citizen. The American company seeks, through its subsidiary, to enter into a contract with a foreign national. The American company's subsidiary is engaged in the manufacturing of products for use in clinical and hospital laboratories. Its manufacturing operations are located on real property which it acquired from a company that is a state-owned enterprise (the enterprise) now being transformed into a joint stock company.

The subsidiary wishes to enter into a contract with an individual who is the general director of the enterprise. The individual is a longtime resident of the area and has experience dealing with the local authorities and public utility service providers. The American company's foreign attorney has advised that under the nation's law, the individual would not be regarded as either a government employee or a public official, the foreign attorney's opinion is not dispositive, and we have considered the foreign individual to be a "foreign official" under the statute.

The subsidiary desires consulting assistance from the individual in two respects. First, the subsidiary intends to obtain direct electric power service for its plant by constructing a substation, which will connect to the local grid. This will require the subsidiary to enter into a service agreement with the local power authority and obtain authorization from the authority to connect to its power grid. Second, the subsidiary currently accesses its premises over rights of way acquired from the enterprise when the subsidiary purchased the land and improvements on which its facilities are located. In order to gain direct access to the substation it will construct and improve access to its facilities generally, the subsidiary will need to perform some minor road construction and installation of fencing. Undertaking these improvements will require certain abutter consents and incidental governmental approvals.

The subsidiary represents that the individual can assist it in preparing submissions proper in form and content to obtain the necessary authorization to connect to the grid and to contract to purchase electric power. The subsidiary also represents that the individual can also aid it in obtaining the consents and submitting its application in proper form and substance for constructing the road and installing the fencing. Without the consulting assistance of someone who is familiar with the location and operation of the existing electrical equipment and with the necessary authorization procedures, the subsidiary represents that the proposed projects would be substantially more difficult to complete. For the individual's consulting assistance, the subsidiary will pay him \$20,000 over twelve months.

The individual has also made the following representations:

1. That he is entering into the consulting agreement in his personal and private capacity and not as an officer, employee, or agent of the enterprise, or any other entity or individual. He also represents that the execution of the consulting agreement and the performance of his obligations thereunder do not violate any rules of, or applicable to, the enterprise, and that his consultancy will not interfere with his duties as an officer and employee of the enterprise, and that he has obtained approval of his proposed consulting activities from the enterprise.

2. That during the period of his consulting agreement, in the event that any corporate actions or approvals of the enterprise are necessary for the subsidiary to seek or obtain the consents, approvals, or authorizations which are the subject of the consulting agreement, he will abstain from voting or taking any action with regard to such matters, and instead he will refer all such matters to the governing body of the enterprise.

3. That during the period of his consulting agreement he will not use his position as a director of the enterprise to influence on behalf of the subsidiary any act or decision of the government or any department, agency, or instrumentality thereof.

4. That no payments which he will receive under the consulting agreement from the subsidiary will be used directly or indirectly to offer, pay, promise, give, or authorize payment of money or anything of value to any governmental or public official for the purpose of influencing any act or decision of such public official in his official capacity.

5. That the payments which he will receive under the consulting agreement from the subsidiary and the services rendered in performance of the consulting agreement are lawful under the written laws and regulations of the nation. He represents that the payments which he will receive under the consulting agreement from the subsidiary will be paid to him in the nation, and that all applicable reporting or disclosure laws of the nation will be satisfied with respect to such payments.

6. That he will be compensated only for his consulting services and only as set forth in the consulting agreement. He represents that his compensation is not dependent on the success of the subsidiary in securing direct electric power service or the incidental access approvals and his agreement does not include or involve any additional success fee. He represents that he has no right to any future relationship with the subsidiary beyond that set forth in the consulting agreement.

7. That in performing his duties under the consulting agreement he will not appear on behalf of the subsidiary before any agency of the local government, and that any communication to him concerning the approvals the subsidiary will be seeking from representatives of any local governmental agency shall be referred for response to the subsidiary.

8. That he will be performing services under the consulting agreement as an independent contractor for the subsidiary without authority to legally bind the subsidiary and that he will not be an employee or agent of the subsidiary.

9. That he will be performing services under the consulting agreement personally and he will not contract with other individuals or other businesses to provide the services as agreed to.

10. That if he violates these representations or breaches the consulting agreement in any manner, the agreement will automatically be rendered void *ab initio* and he will surrender any claim for payment under the consulting agreement, even for services previously performed.

Based upon all the facts and circumstances, as represented by the requestors, the Department does not presently intend to take any enforcement action with respect to the prospective contractual relationship described in the request.

The FCPA Opinion Letter and this Release have no binding application to any party which did not join in the request, and can be relied upon by the requesting parties only to the extent that the disclosure of facts and circumstances in the request is accurate and complete and continues to accurately and completely reflect such facts and circumstances.