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MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2003-016, Free Trade Agreements-Chile and Singapore, and Treade Agreements Thresholds

Attached is a comment received on the subject FAR case published at 69 FR 1051; January 7, 2004. The comment closing date was March 8, 2004.

Response Number	Date Received	Comment Date	Commenter
2003-016-1	03/31/04	03/23/04	DOJ

Atachments

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

March 23, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Attn: Ms. Laurie Duarte
Washington, D.C. 20405

Re: FAC 2001-19, FAR case 2003-016
Federal Acquisition Regulation; Free Trade Agreements–Chile and Singapore, and Trade Agreements Thresholds

This letter provides comments of the Department of Justice respecting the interim rule amending the Federal Acquisition Regulation (FAR) to implement new Free Trade Agreements (FTAs) with Chile and Singapore. In particular, we refer to Sections 106 of Public Laws 108-77 and 108-78, the authorizing legislation for the two agreements. We do not believe that the interim rule completely complies with these statutes and propose a revision.

Background

Both the Chile and Singapore FTAs contain provisions permitting any claim for breach of an "investment agreement" to be adjudicated through binding arbitration. Chile FTA Article 10.15(1)(a)(i)(C); Singapore FTA Article 15.15(1)(a)(i)(C). Both FTAs define an investment agreement as a "written agreement . . . between a national authority of a Party and a covered investment or an investor of the other Party (i) that grants rights with respect to natural resources or other assets that a national authority controls, and (ii) that the covered investment or the investor relies on in establishing or acquiring the covered investment." Chile FTA Article 10.27; Singapore FTA Article 15.1.

The Chile FTA also includes a governing law provision establishing the applicable law to be used in ruling upon any arbitration claim. It requires the tribunal in the first instance to decide any issues in dispute in accordance "with the rules of law specified in the pertinent investment agreement." Chile FTA Article 10.21(2). To ensure that agencies entering into investment agreements can control what law is applied in an arbitration, Congress enacted Section 106 in the authorization acts for both FTAs. Pub. L. Nos. 108-77, § 106; 108-78, § 106. It broadly requires that "[a]ll contracts executed by any agency of the United States on or after the date of entry into force of the Agreement shall contain a clause specifying the law that will apply to resolve any breach of contract claim."

Initially, we note that Section 106 of each authorizing act applies to all contracts entered into by any agency of the United States. Thus, it applies not only to contracts subject to the FAR, but to all other types of contracts entered into by agencies. Accordingly, broader action is necessary to ensure its complete implementation beyond merely amending the FAR. However, given that the scope of the proposal at issue here is limited to the FAR, we address the remainder of our comments to it.

The Interim Rule

As we understand the proposal, the interim rule attempts to achieve compliance with Section 106 by including the following choice of law provision in each of the trade agreements clauses (FAR 52.225-3, 52.225-5, and 52.225-11): "United States law will apply to resolve any claim of breach of contract." We do not believe this adequately protects the interests of the United States in potential arbitrations of investment agreements, nor does it comply with the literal terms of Section 106.

The cited FAR clauses actually address Trade Agreement Act and Buy American Act issues presented by, among other things, the FTAs. FAR 25.402 explains the threshold dollar amounts at which a contract is determined to be subject to an FTA for these purposes. Accordingly, FAR 25.1101-1102 provide for the insertion of one of the three clauses depending upon whether the contract is for the acquisition of supplies or for construction services, and when the contract meets or exceeds specified threshold amounts. Although potentially adequate for the purpose of addressing Trade Agreement Act and Buy American Act issues, these instructions do not protect the United States' governing law interests for all breach claims that might be brought to arbitration under the FTAs. Again, the FTAs permit arbitration of breach claims arising from any "investment agreement," and the definition of "investment agreement" has no dollar threshold in it. As we understand the application of the interim rule, any contract that does not fall within the threshold amounts necessary for inclusion of one of the three trade agreements clauses would not contain the necessary governing law language, though the contract might very well fall within the definition of an investment agreement and therefore be subject to arbitration. This is especially troublesome for construction contracts, where the threshold amount necessary for inclusion of FAR 52.225-11 is well over $6 million.

Additionally, there seems to be at least one entire category of contracts completely omitted from this scheme: non-construction services contracts. It does not appear that any of the three clauses must be included in such contracts, though it is certainly possible that if such a contract also grants rights respecting an asset controlled by the government it would qualify as an investment agreement.

We believe that the purpose of Congress' sweeping express requirement in Section 106 is to avoid difficult debates as to what types of contracts might meet the definition of an investment agreement and therefore need the protection of a governing law clause. Instead, the Congressional mandate greatly simplifies this problem by requiring the inclusion of such a clause

in every contract entered into by all government agencies. We propose that the FAR be amended to require that the following clause be inserted in every contract to which the FAR is subject: "United States law will apply to resolve any claim of breach of contract." We believe that this is an easy and complete solution that ensures compliance with the statutory mandate.

We thank you for the opportunity to provide our comments.

Sincerely,

DAVID M. COHEN
Director
Commercial Litigation Branch