

Siemens—Potential Interplay of FCPA Charges and Mandatory Debarment under the Public Procurement Directive of the European Union

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I. SIGNIFICANCE OF THE *SIEMENS* CASE

On December 15, 2008, Siemens Aktiengesellschaft (“Siemens AG”), along with three of its subsidiaries, Siemens S.A. - Argentina (“Siemens Argentina”), Siemens Bangladesh Limited (“Siemens Bangladesh”) and Siemens S.A. - Venezuela (“Siemens Venezuela”), pleaded guilty to violations of the Foreign Corrupt Practices Act (the “FCPA”).³ The Siemens case is significant in the history of prosecution under the FCPA in several respects. First, it was the “largest monetary sanction ever imposed in an FCPA case since the act was passed by Congress in 1977.”⁴ As part of the settlement, Siemens agreed to pay a criminal fine of \$450 million⁵ to the United States Department of Justice (the “DOJ”) and \$350 million in disgorgement to the United States Securities and Exchange Commission (the “SEC”).⁶ This aggregate fine of \$800 million was nearly twenty times higher than the largest previous settlement of \$44 million reached in the 2007 actions against Baker Hughes.⁷

Second, the Siemens case was the first simultaneous resolution of U.S. and foreign criminal and civil transnational bribery charges.⁸ In a settlement with the Munich Public Prosecutor’s office, Siemens agreed to pay fines and disgorgement of approximately \$569 million. The company had previously agreed, in October of 2007, to pay fines of approximately \$287 million imposed by the Munich prosecutor to resolve corruption al-

legations against its telecommunications group. The aggregate fines imposed by U.S. and German authorities against Siemens amounted to approximately \$1.6 billion.

Third, the Siemens case represents the first criminal charge under the FCPA’s accounting provisions for an “issuer’s” failure to maintain internal controls. While the parent company, Siemens AG, entered a guilty plea to two counts of criminal violations of the FCPA’s internal controls and books and records provisions,⁹ only certain of the Siemens subsidiaries pleaded guilty to anti-bribery charges under the FCPA. The criminal Information filed against Siemens AG does not refer specifically to any involvement of this entity in payments to government officials made through any facilities in the United States – the only charges of illegal payments to foreign government officials are those contained in the Informations filed against the Siemens subsidiaries in Bangladesh and Venezuela.

While it is not possible to state with certainty the rationale of the Siemens entities, the DOJ and the SEC in structuring the charges and guilty pleas in a certain manner, this article will explore one possible explanation – that of avoiding the potential effect that a conviction for FCPA bribery could have had upon the parent, Siemens AG, under the mandatory debarment provisions under the relatively recent Public Procurement Directive (2004/18/EC) (the “Directive”) of the European Union (the “EU”). By structuring the settlement in such a way as to isolate these charges against only

non-European subsidiaries – and not the parent company – it is likely that the mandatory debarment provisions under the Directive were avoided.

II. SIEMENS – FACTUAL BACKGROUND

A. General

Siemens AG engages in a wide range of businesses, including: the development and manufacture of telecommunications and information technology equipment and systems; the generation, transmission and distribution of electrical energy; and the development and manufacture of equipment and systems for the transportation, medical, industrial and traffic industries.¹⁰ Siemens currently operates in 190 regions in the world and employs over 400,000 people in the over 1,800 legal entities that make up the Siemens AG group.¹¹ Siemens AG was listed on the New York Stock Exchange (“NYSE”) on March 12, 2001, and since that date, has qualified as an “issuer” for purposes of the FCPA.

B. Charges Against the Parent Entity: Siemens AG

According to the Information filed by the DOJ, Siemens AG had a “historical failure to maintain sufficient internal anti-corruption controls”. Until Germany ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on February 15, 1999, the Information describes how Siemens AG had “operated in a largely unregulated environment with respect to international business practices.”¹² The Information states that Siemens AG failed to implement compliance and controls policies and procedures, and failed to maintain adequate controls over bank accounts and the use of cash at Siemens AG.¹³ Further, allegations of corrupt payments were not reported to the Audit Committee, were not adequately investigated and responsible employees were not disciplined.¹⁴

Additionally, as described in the Information, Siemens AG “engaged in systematic efforts to falsify its corporate books and records and [to] cir-

cumvent existing internal controls.”¹⁵ The efforts to bypass internal controls were alleged to have included, among others: (1) the use of off-book bank accounts from which corrupt payments were made; (2) entering into consultancy contracts with no basis or substance particular to the engagement (sometimes entered into after a project was won by Siemens) and under which no services were expected to be performed; (3) making payments on false invoices; (4) mischaracterizing corrupt payments on the company’s books and records; (5) using removable Post-It notes to record approvals for payments and subsequently removing the notes so as to conceal the authorization; and (6) bypassing the company’s “four-eyes” principle which required two signatures on payment authorizations.¹⁶

According to the Siemens AG Information, from March 12, 2001, the date on which its shares were listed on the NYSE, through on or about 2007, Siemens AG made approximately \$1.36 billion in payments, including \$805.5 million in payments intended in whole or in part to be made as corrupt payments to foreign officials.¹⁷ Siemens employees used numerous methods of making corrupt payments which included: direct payments; cash desks where \$66.6 million, often transported in suitcases, was withdrawn by Siemens employees; bearer checks; and slush funds in off-shore accounts, through which over \$194 million in corrupt payments were made.¹⁸

Siemens AG also violated the FCPA’s books and records provisions of the FCPA when it incorporated into its own books and records, the books and records of several of its subsidiaries that participated in the United Nations (“UN”) Oil For Food (“OFF”) Program. These subsidiaries, which include Siemens S.A.S. of France (“Siemens France”), Siemens Sanayi ve Ticaret A.S. of Turkey (“Siemens Turkey”), Osram Middle East FZE (“Osram Middle East”) and Gas Turbine Technologies S.p.A. (“GTT”), paid over \$1.7 million in kickbacks to the Iraqi government to obtain contracts under the OFF Program. These payments were falsely characterized as “commissions” paid to agents on the books and records of Siemens

France, Siemens Turkey, Osram Middle East and GTT, which expenditures were then consolidated into Siemens AG's financial reporting.

C. Charges Against the Subsidiary Entities – Siemens Argentina, Siemens Bangladesh, and Siemens Venezuela

Siemens Argentina

Headquartered in Buenos Aires, Argentina, Siemens Argentina was a controlled subsidiary of Siemens AG that contracted for and managed projects in the region for other Siemens entities.¹⁹ Siemens Argentina participated in several government projects in Argentina, including a national identity card project valued at approximately \$1 billion.²⁰ Upon receiving the bid for the project in September 1998, Siemens allegedly began to make payments to government officials in Argentina.²¹ Between March 12, 2001 and in or around January 2007, Siemens Argentina made, or caused to be made, over \$31 million in corrupt payments to Argentine officials to retain the national identity card project.²² These payments were made through consultants or other intermediaries and were improperly termed “consulting fees” or “legal fees” in Siemens Argentina's books and records, which expenditures were then consolidated into Siemens AG's financial reporting.²³

As a result of these payments and similar to its parent company, Siemens Argentina pleaded guilty to one count of conspiracy to violate the books and records provisions of the FCPA.²⁴

Siemens Bangladesh

Siemens Bangladesh, a wholly-owned subsidiary of Siemens AG, is headquartered in Dhaka, Bangladesh.²⁵ Like Siemens Argentina, Siemens Bangladesh was a regional company that contracted for and managed projects for other Siemens companies.²⁶ Similar to its parent company, Siemens Bangladesh pleaded guilty to one count of conspiracy to violate the books and records provisions of the FCPA.²⁷ However, Siemens Bangladesh was one of only two subsidiaries that also

pleaded guilty to one count of violating the anti-bribery provisions of the FCPA.²⁸

Siemens Bangladesh pleaded guilty to these two counts in connection with \$5.3 million in corrupt payments made to Bangladeshi government officials between May 2001 and August 2006.²⁹ These payments were made to secure business advantages for Siemens Bangladesh in its bidding for a project to build a nation-wide digital mobile telephone network.³⁰ Siemens Bangladesh made these payments through consultants and at least one payment to each consultant involved a U.S. bank account.³¹ The payments were classified as “commissions” and “business consulting fees”, and some payments were attributed to an unrelated project in order to conceal their improper purpose. Siemens Bangladesh improperly characterized these payments in its books and records, which expenditures were then consolidated into Siemens AG's financial reporting.

Siemens Venezuela

Siemens Venezuela was headquartered in Caracas, Venezuela and was a wholly-owned subsidiary of Siemens AG.³² Siemens Venezuela was also a regional company that contracted for and managed projects from other Siemens entities. Similar to its parent company, Siemens Venezuela pleaded guilty to one count of conspiracy to violate the books and records provisions of the FCPA.³³ However, Siemens Venezuela was one of the two subsidiaries that also pleaded guilty to one count of violating the anti-bribery provisions of the FCPA.³⁴

Siemens Venezuela was involved in two large-scale mass transit projects in Maracaibo and Valencia in Venezuela. From in or about November 2001 through approximately May 2007, Siemens Venezuela made over \$18.7 million in payments to agents with the understanding that all, or a portion, of the funds would be paid to Venezuelan officials to obtain and retain the contracts for the transit projects.³⁵ According to the Siemens Venezuela Information, some of the payments were made using bank accounts in the U.S.³⁶ Siemens

Venezuela and its consultants created sham agreements and moved the payments through multiple entities in order to conceal the nature of the payments.³⁷ Siemens Venezuela further created sham invoices and backdated authorization memoranda to record the payments in its books and records as being attributable to other operating groups and regional companies.³⁸ Siemens Venezuela improperly characterized these payments in its books and records, which expenditures were then consolidated into Siemens AG's financial reporting.

III. THE IMPACT OF THE CHARGES UNDER THE PUBLIC PROCUREMENT DIRECTIVE OF THE EUROPEAN UNION (2004/18/EC)

A. History of the Directive

Public Procurement projects are an important revenue stream for many companies. Such projects represent approximately 16% of the Gross Domestic Product for the entire EU, which is approximately €1,500 billion.³⁹ In 2004, the EU adopted two new directives on public procurement in order to simplify and modernize the rules that regulate participation in the public procurement process.⁴⁰ Four previous EU directives⁴¹ related to public procurement were consolidated into these two new directives: (1) Directive 2004/18/EC (the "Directive"), which deals with "traditional" public procurement involving public works contracts, public supply contracts and public service contracts, and (2) Directive 2004/17/EC, which governs water, energy, transport and postal services.

Adopted by the European Parliament and the Council of the European Union on March 31, 2004,⁴² the Directive was required to be transposed by all Member States of the EU as of January 31, 2006. However, as of the deadline, only eight Member States had fulfilled the requirement including: Austria, Denmark, Hungary, Lithuania, Malta, Netherlands, Slovakia and the United Kingdom.⁴³ By June 2007, the number of Member States that had transposed the Directive increased to 20 of 27, but the lack of complete transposition resulted in a European Parliament resolution to urge the remaining member states to transpose

the Directive.⁴⁴ As of today, most Member States have transposed the Directive.⁴⁵

The Directive sets out strict rules for participating in the public procurement process in the EU for contacts above a certain monetary threshold.⁴⁶ In addition, the Directive includes explicit criteria to be used by the contracting authorities in awarding their public contracts, such as price, quality, technical merit, cost-effectiveness, after-sales service and technical assistance, and the dates of delivery and completion.⁴⁷ The Directive also specifies rules regarding both the publication of various notices regarding the procurement opportunity and requires the contracting authority to abide by certain transparency requirements, such as informing unsuccessful candidates in a timely fashion.⁴⁸

B. Mandatory Debarment Under the Directive

Article 45 of the Directive provides that "any candidate or tenderer who has been the subject of conviction by final judgment of which the contracting authority is aware...shall be excluded from participation in a public contract."⁴⁹ Specifically, the Directive requires that contractors that are convicted of any of the following crimes be debarred from public procurement: (1) participation in a criminal organization, (2) corruption, (3) fraud, or (4) money laundering.⁵⁰

Unlike previous EU public procurement directives, where debarment was optional, Article 45 *mandates* the exclusion of suppliers convicted of the specified offenses. Debarment is aimed at creating an economic disincentive for the use of corruption or bribery when bidding or contracting for public procurement contracts.⁵¹ While corporate corruption convictions often require a company to pay a fine, some commentators believe that fines do not always sufficiently deter a company from continuing to use similar corrupt methods of doing business.⁵² Given the importance of public procurements to the revenue stream of many businesses, the possibility of being debarred from public procurement in each of the EU Member

States, however, is likely to serve as a significant deterrent.

When a company participates in a tender or is a candidate for a contract, Article 45 requires that the contracting authorities in EU Member States request a confirmation from the company that it has not been convicted of one of the crimes related to fraud and corruption.⁵³ Where the contracting authorities do not receive adequate assurances, they may contact the “competent authorities” to obtain additional information on any possible convictions.⁵⁴ Some have criticized this process as flawed because contracting authorities will only request assurances where they are aware of any such corruption convictions, and this can be difficult where there is no central network or database in the EU that contains such information.⁵⁵

C. The Siemens Charges and the Implications of Mandatory Debarment

As stated above, one potential factor in the negotiated disposition of the U.S. charges against Siemens and its subsidiaries may have been the potential impact of the Directive, including its mandatory debarment provisions in Article 45. Notably, while Siemens AG admitted violating the internal controls and books and records provisions of the FCPA, it avoided a conviction for bribery, which allows it to continue to be eligible for public procurement projects under the Directive.

Specifically, the charges against the parent company, Siemens AG, do not refer to its involvement with any payments to government officials through facilities in the United States. Instead, such payments are charged only in the Informations against the subsidiary entities, Siemens Venezuela and Siemens Bangladesh. Presumably, in agreeing to plead to charges under the FCPA’s accounting provisions rather than the anti-bribery provisions, Siemens AG believed that its plea would not constitute a corruption conviction for purposes of debarment under Article 45 of the Directive.

The fact that the only Siemens subsidiaries to plead guilty to the anti-bribery provisions were non-European is further indicative of the impact

the Directive may have had on the settlement structure. In fact, Linda Chatman Thomsen, the Director of the SEC’s Enforcement Division, said that the company paid an estimated \$1.4 billion in bribes to government officials not only in Asia, Africa, the Middle East and Latin America, but also in Europe.⁵⁶ However, no Siemens European subsidiaries pleaded guilty to any charges. Assuming Siemens’ Venezuela and Bangladesh subsidiaries do no business within the EU, their guilty pleas in the U.S. proceedings will not affect the ability of Siemens AG to continue to obtain procurement contracts in the EU member states.

The mandatory debarment provisions under Article 45 of the Directive are more stringent than comparable U.S. federal suspension and debarment regulations. In the U.S., companies can be debarred or suspended under provisions in the Federal Acquisition Regulation⁵⁷ (“FAR”).⁵⁸ The policy underlying the FAR debarment and suspension provisions is that the U.S. government seeks to “prevent improper dissipation of public funds”⁵⁹ in its contracting activities by dealing only with responsible contractors.⁶⁰ The debarment and suspension provisions of the FAR support this policy by “precluding agencies from entering into new contractual dealings with contractors whose prior violations of federal or state law, or failure to perform under contract, suggest they are nonresponsible.”⁶¹ The FAR allows government agency officials to debar contractors when a contractor has been convicted of or found civilly liable for any integrity offense, including fraud in connection with obtaining, attempting to obtain, or performing a public contract and bribery.⁶²

However, unlike the Directive in the EU, the FAR debarment and suspension provisions of the U.S. are designed to protect the government’s interests rather than to punish potential contractors. As such, government agencies can not enforce the debarment and suspension provisions solely to punish prior contractor misconduct.⁶³ Instead, the FAR provisions are intended to be remedial in nature. Under U.S. procedures, a company may avoid debarment in several different ways.⁶⁴ One

of the most significant ways a company can avoid debarment under the FAR is that its application is discretionary rather than mandatory. In analyzing whether a contractor should be debarred, an agency may find that the interest of the public or the government is not at stake because the contractor is "unlikely to engage in similar conduct in the future."⁶⁵ The FAR sets forth certain mitigating factors for the agency official to consider such as whether the contractor has fully investigated the "circumstances surrounding the cause for debarment," the contractor has cooperated, the contractor has agreed to pay for all liability associated with such improper activity, the contractor took appropriate disciplinary action against any responsible individuals, the contractor has undertaken any remedial measures, and the contractor has instituted or revised any review and control procures and ethics training programs.⁶⁶ The idea behind these mitigating factors is to encourage companies to undertake positive and remedial changes, rather than to simply punish the company by prohibiting them from public procurement contracts.

Instead of mandatory debarment, the U.S. debarment provisions clearly provide for agency discretion and an opportunity for a company to own up to improper activity and undertake remedial measures. This flexibility is not present under the Directive, which imposes mandatory debarment for similar instances of improper conduct. This results in the debarment provisions of the Directive being more punitive on companies, as compared to the U.S. procurement provisions that are more rehabilitative.

IV. INTERACTION BETWEEN THE FCPA AND THE MANDATORY DEBARMENT PROVISIONS OF THE DIRECTIVE – THE POTENTIAL IMPLICATIONS FOR VOLUNTARY DISCLOSURE OR GUILTY PLEAS

The potential threat of mandatory debarment will undoubtedly be a factor in a company's willingness to plead guilty to bribery charges in the U.S., which could result in its mandatory debar-

ment under the Directive. The willingness to accept such risk is likely even lower during the current financial crisis when revenue from procurement contracts may be especially critical to a particular company. Furthermore, this risk is equally applicable to European and non-European companies who want to do business in the EU.⁶⁷ While Siemens was able to restrict the bribery guilty pleas to non-European subsidiaries, this option may not be available, among other reasons, for other companies due to their corporate structure, the underlying acts supporting the bribery charge, or the preference and flexibility of the prosecutors involved. As a result, as part of the evaluation of their willingness to plead guilty to bribery charges in the U.S., such companies will have to consider that they may become subject to the very stringent mandatory debarment provisions in the EU.

Arguably, entering into a Deferred Prosecution Agreement⁶⁸ – which does not constitute a conviction – obviates the risk of mandatory debarment in the EU. While the DOJ is entering into an increasing number of Deferred Prosecution Agreements and Non-Prosecution Agreements (an increase in the U.S. of 70% in 2007 alone⁶⁹), there is still a substantial risk related to any voluntary disclosure. It should be noted that even a Deferred Prosecution Agreement does not ensure that a conviction will be avoided completely because, in the event of a company's failure to comply with the provisions of such Deferred Prosecution Agreement, the company may be required to enter its guilty plea to the original charges.

V. SUMMARY

The Siemens case illustrates how the disposition of a major FCPA case may have been structured in a manner that avoids the mandatory debarment provisions of the Directive. Due to the importance of public procurement contracts to the revenue stream of many companies, mandatory debarment may impact significantly the financial viability, or at least the profitability, of a company. In addition, the potential impact on a company's

ability to submit tenders for public procurement projects and undertake such projects will undoubtedly be a factor in a company's willingness to make a voluntary disclosure or plead guilty to bribery charges, either of which may ultimately result in a company being subject to mandatory debarment under the Directive.

ENDNOTES

1. Mr. Clark is a partner in the Business Fraud and Complex Litigation Practice at Cadwalader, Wickersham & Taft, resident in the Washington D.C. office. Prior to joining Cadwalader, Mr. Clark served as Deputy Chief of the Fraud Section of the Criminal Division of the Department of Justice, where he was responsible for all FCPA investigations and prosecutions.

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3. Press Release, Department of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008) [hereinafter DOJ Press Release].

4. *Id.*

5. This fine of \$450 million included the payments by each of Siemens Argentina, Siemens Bangladesh and Siemens Venezuela of a fine in the amount of \$500,000 to the DOJ. *Id.*

6. *Id.*; Litigation Release No. 20829, Securities and Exchange Commission, SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery With Total Disgorgement and Criminal Fines of Over

\$1.6 Billion (Dec. 15, 2008) [hereinafter SEC Litigation Release].

7. *SEC v. Baker Hughes Inc. and Roy Fearnley*, No. H-107-1408 (S.D. Texas); *SEC v. Baker Hughes Int'l*, Criminal No. H-07-130 (S.D. Texas); *SEC v. Baker Hughes Int'l*, Criminal No. H-07-129 (S.D. Texas). Please note that, on January 26, 2009, Halliburton issued a press release regarding ongoing FCPA investigations by the DOJ and SEC with respect to both Halliburton and its former subsidiary, KBR. According to the press release, the settlement with the DOJ has been fully negotiated and is awaiting final approval, and the settlement with the SEC is approved, contingent upon the settlement with the DOJ. If finalized, the aggregate amount required to be paid by Halliburton to U.S. authorities (\$559 million) would exceed the fines paid in the Baker Hughes matter and set a new record for fines and disgorgement paid by a U.S. company in a FCPA bribery investigation.

8. In December 2007, Akzo Nobel, B.V., a Dutch company, entered into a Deferred Prosecution Agreement with the DOJ, acknowledging that its subsidiaries made improper payments to the Iraqi government in connection with contracts acquired by the subsidiaries pursuant to the U.N. Oil for Food Program. While not simultaneous with the resolution with U.S. authorities, this Deferred Prosecution Agreement did contemplate a related settlement with Dutch authorities within 180 days. Press Release, Department of Justice, Akzo Nobel Acknowledges Improper Payments Made by its Subsidiaries to Iraqi Government Under the U.N. Oil for Food Program, Enters Agreement with Department of Justice (Dec. 20, 2007).

9. Memorandum on Behalf of Siemens Aktiengesellschaft, Siemens S.A. (Argentina), Siemens Bangladesh Ltd. and Siemens S.A. (Venezuela) In Support of Rule 11(c)(1)(C) Pleas and Agreed-Upon Sentences, Case 1:08-cr-00367-RJL, Dec. 12, 2008, pp. 4-5; see also DOJ Press Release, *supra* note 3.

10. Information, *U.S. v. Siemens Aktiengesellschaft*, Case 1:08-cr-00367-RJL, Dec. 12, 2008, p. 3 [hereinafter Siemens AG Information].
11. *Id.* at 3 and 11; see also Siemens “About Us” <http://w1.siemens.com/about/en/index.htm> (last visited Jan. 30, 2009) and Siemens “Siemens Worldwide” <http://w1.siemens.com/about/en/worldwide.htm> (last visited Jan. 30, 2009).
12. Siemens AG Information, *supra* note 10, at 9. Note that prior to Germany’s adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on February 15, 1999, “German law did not prohibit overseas bribery and permitted tax deductions for bribe payments to foreign officials.” *Id.*; OECD Directorate on Financial and Enterprise Affairs, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, available at http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html (last visited Jan. 30, 2009).
13. Siemens AG Information, *supra* note 10, at 37.
14. *Id.*
15. *Id.* at 22.
16. *Id.* at 13 and 22-23.
17. *Id.* at 23.
18. *Id.* at 24-27.
19. Information, *U.S. v. Siemens S.A. (Argentina)*, Dec. 12, 2008, p. 2.
20. *Id.* at 6.
21. *Id.* at 7.
22. *Id.* at 10.
23. *Id.* at 17.
24. DOJ Press Release, *supra* note 3.
25. Information, *U.S. v. Siemens Bangladesh Ltd.*, Dec. 12, 2008, p. 2 [hereinafter referred to as Siemens Bangladesh Information].
26. *Id.*
27. DOJ Press Release, *supra* note 3.
28. Siemens Bangladesh Information, *supra* note 25, at 7.
29. *Id.* at 15-16.
30. *Id.* at 2.
31. DOJ Press Release, *supra* note 3.
32. Information, *U.S. v. Siemens S.A. (Venezuela)*, Dec. 12, 2008, p. 2 [hereinafter referred to as Siemens Venezuela Information].
33. DOJ Press Release, *supra* note 3.
34. Siemens Venezuela Information, *supra* note 32, at 6.
35. *Id.* at 5-6.
36. *Id.* at 6.
37. *Id.* at 9.
38. *Id.* at 9.
39. The European Coalition for Corporate Justice, *Advocacy Paper: Sustainable Procurement in the European Union, Proposals and Recommendations to the European Commission and*

the European Parliament, Feb. 2007; Andrea Renda and Lorna Schrefler, *Briefing Note: The Public Procurement Directives: Transposition in the EU Member States*, (IP/A/IMCO/OF/2006-071), Center for European Policy Studies, May 2006.

40. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Recital 1, OJ L 134, 30.4.2004, p. 114-240 [hereinafter EU Directive 2004/18/EC].

41. The four directives replaced were: (1) Council Directive 1992/50/EC of the European Parliament and of the Council of 18 June 1992 on the coordination of procedures for the award of public services contracts, OJ L 209, 24.7.1992, last amended by Commission Directive 2001/78/EC (OJ L 285, 29.10.2001, p.1); (2) Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ L 199, 9.8.1993, p.1, last amended by Commission Directive 2001/78/EC; (3) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ L 199, 9.8.1993, last amended by Commission Directive 201/78/EC; and (4) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 199, 9.8.1993, p. 84, last amended by Commission Directive 2001/78/EC (OJ L 285, 29.10.2001, p. 1). Directives 1992/50/EC, 93/36/EEC and 93/37/EEC were replaced by EU Directive 2004/18/EC and Directive 93/38/EEC was replaced by EU Directive 2004/17/EC. Commission Regulation (EC) No. 1564/2005 of 7 September 2005.

42. EU Directive 2004/18/EC, *supra* note 40.

43. Renda and Schrefler, *supra* note 39.

44. Resolution on specific problems in the transposition and implementation of public procurement legislation and its relation to the Lisbon Agenda, EUR. PARL. DOC. PV 2006/2084(INI).

45. EUROPEAN COALITION FOR CORPORATE JUSTICE, LINKING CSR TO PUBLIC PROCUREMENT IN THE EU 3 (2007), http://www.corporatejustice.org/IMG/pdf/ECCJ_SPP_SeminarReport.pdf.

46. EU Directive 2004/18/EC, *supra* note 40, at art. 7-9.

47. EU Directive 2004/18/EC, *supra* note 40.

48.. *Id.* at art. 28.

49. *Id.* at art. 45(1). Article 45 requires that an entity be *convicted* by final judgment of one of the stated crimes in order for it to be disbarred from public procurement.

50. *Id.* at art. 45(1)(a)-(d). EU Directive 2004/18/E, art. 45 (2) lists several additional situations that may result in a discretionary debarment, such as bankruptcy, professional misconduct, nonpayment of social security or tax obligations, or serious misrepresentation. *Id.* at art. 45 (2)(a)-(g).

51. Kirstine Drew, *The Challenges Facing Debarment and the European Union Public Procurement Directive*, Fighting Corruption and Promoting Integrity in Public Procurement, OECD, 2005, p. 268.

52. *Id.*

53. EU Directive 2004/18/EC, *supra* note 40, at art. 45(1).

54. EU Directive 2004/18/EC, *supra* note 40, at art. 45(1).

55. Drew, *supra* note 51, at 271.

56. Press Release, Department of Justice, Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (Dec. 15, 2008).

57. In addition to being debarred or suspended under the FAR, companies may also face debarment or suspension as a result of specific statutory provisions. These statutory debarment provisions are beyond the scope of this article. See generally Kate M. Manuel, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, Congressional Research Service Report for Congress, Nov. 19, 2008, available at <http://fas.org/sgp/crs/misc/RL34753.pdf> (last visited Jan. 30, 2009).

58. The FAR is promulgated by the General Services Administration (GSA), the Department of Defense (DOD), and the National Aeronautics and Space Administration (NASA) under the authority of the Office of Federal Procurement Policy Act of 1974. See Office of Federal Procurement Policy Act of 1974, P.L. 93-400, 88 Stat. 796 (Codified at 41 U.S.C. §§ 401-38; DoD, GSA & NASA, Establishing the Federal Acquisition Regulation: Final Rule, 48 Fed. Reg. 42,102, 42,142 (Sept. 19, 1983). *Id.* at fn 1.

59. *U.S. v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (“It is clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition.”) (internal citations omitted).

60. 48 C.F.R. § 9.402(a) (directing agency contracting officers to “solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only”).

61. See *id.* (“Debarment and suspension are discretionary actions that...are appropriate means to effectuate [the] policy [of dealing only with responsible contractors].”).

62. 48 C.F.R. § 9.406-2(a)(1) and (3). The FAR also allows government agency officials to suspend government contractors when (a) officials suspect, upon adequate evidence, a company of committing bribery or (b) a contractor is indicted for bribery. 48 C.F.R. § 9.407-2(a) and (b). The suspension lasts only as long as the relevant agency’s investigation of the conduct for which the contractor was suspended, or any ensuing legal proceedings. Manuel, *supra* note 57, at 7.

63. 48 C.F.R. § 9.402(b) (“The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government’s protection and not for purposes of punishment.”).

64. Manuel, *supra* note 57, at 8. Other ways that a company can avoid debarment under the FAR are (a) the use of an administrative agreement in which the company admits to its conduct and agrees to certain remedial measures, (b) the government agency allowing the contractor to continue performing under current contracts or subcontracts, and (c) the agreement by the government agency to waive the debarment and enter into new contracts with a debarred or suspended contractor. Manuel, *supra* note 57, at 8-11.

65. Manuel, *supra* note 57, at 8.

66. 48 C.F.R. § 9.406-1(a). Note that debarment can also be limited to certain “divisions, organizational elements” of a company if agency official find that only such segments of the company engaged in the improper activity. 48 C.F.R. § 9.406-1(b); Manuel, *supra* note 57, at 9.

67. To date, far more companies – principally U.S. entities – have been prosecuted, or have

been the subject of Deferred Prosecution Agreements, in the United States than have been prosecuted for transnational bribery in other jurisdictions. And, while U.S. prosecutors may be more willing to agree to dispositions of criminal charges in a manner that accommodates the debarment exposure of a company, U.S. companies with significant EU procurement business would be well advised to consider EU debarment risks not only in negotiating settlements with the DOJ, but also at the time decisions are made with respect to voluntary disclosure of possible FCPA violations.

68. A Deferred Prosecution Agreement is an agreement between the government and a potential defendant whereby the defendant agrees to

comply with certain conditions for a set period of time. In exchange for this agreement, the government will agree not to charge or to dismiss any charges at the end of the period if the defendant has fulfilled his or her obligations. James K. Robinson, Philip E. Urofsky and Christopher R. Pantel, *Deferred Prosecutions and the Independent Monitor*, 2 INT'L. J. OF DISCLOSURE AND GOVERNANCE 325, 326 (2005).

69. Peter Spivack and Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008).

