INVERTED CORPORATE GIANT MAY BE ELIGIBLE FOR U.S. GOVERNMENT CONTRACTS

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Section 835 of the Homeland Security Act of 2002, bars D.H.S. from contracting with a foreign incorporated entity that meets the definition of an inverted company. Nonetheless, it has become known that the manufacturing giant, Ingersoll-Rand Plc ("Ingersoll-Rand"), submitted a legal memorandum to the Department of Homeland Security ("D.H.S." or "Department"), which argued that the provision should not be followed.[1]

Ingersoll-Rand's memorandum apparently was submitted in March of 2013. Last year, Homeland Security Principal Deputy General Counsel, Joseph Maher, responded in a written letter stating that the Department did not disagree with the company's arguments. Presumably, this means that the company is eligible to receive U.S. government contracts. In fact, Ingersoll-Rand won a contract a few months ago with the Army Corps of Engineers, despite complaints from Democratic legislators. Presumably, other companies are entitled to comparable treatment.

Ingersoll-Rand was formed in 1905 in the United States by the merger of two rival drill manufactures. In 2002, the company moved its place of incorporation to Bermuda. In the wake of increased scrutiny of tax havens by the United States, it moved its place of incorporation again in 2009 to Ireland. The moves were said to have saved the company many millions of dollars in U.S. taxes.

INGERSOLL-RAND'S LEGAL ARGUMENTS

It is understood that the main arguments of Ingersoll-Rand were:

1. The bar against contracting with inverted companies violates the World Trade Organization's Government Procurement Agreement, an agreement signed by the United States and Ireland, which requires contracting states to not discriminate against each other's companies in government contracting;

2. Domestic companies that inverted to one foreign country and then moved to another country should not be considered to meet the definition of inverted company because they are not U.S. companies that inverted to a foreign country, but rather, foreign companies that moved to a foreign country;

3. Under § 835 of the Homeland Security Act of 2002, companies that have businesses in their new corporate homes should be allowed to bid on contracts under the exception for companies with "substantial business" in their place of incorporation.

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[1] Bloomberg News stated that it had received a copy of the memorandum from Ingersoll-Rand, on the condition that it would not publish the document.

The first argument above seems to be the strongest for Ingersoll-Rand, and could be the argument that opens the door for other inverted companies to receive U.S. government contracts.

The second argument above, if acceptable to D.H.S., would create a simple roadmap to skirt around the §835 bar. As long as it moved more than once, an inverted company could be eligible receive a U.S. government contract.

The third argument above reflects the fact that the definition of "inverted domestic corporation" under §835 is based on §7874 of the Internal Revenue Code (the "Code"). Under Code §7874, "substantial business activities" means that at least 25% of the expanded affiliate group's employees, employee compensation, assets, and income must be in or derived from the foreign country.[2] Though Ingersoll-Rand reportedly argued in the memorandum that it employs approximately 700 people in Ireland and has a factory in the country that manufactures one of its main products, its business activities in that country reportedly consist of only 2% of its worldwide business.

Another possible explanation for what – at least at first blush – appears to be Ingersoll-Rand's victory over §835, could be explained by the law's waiver provision. Initially, §835 provided that the prohibition against contracting with inverted companies was waived if D.H.S. determined that the waiver was required in the interest of homeland security, or to prevent the loss of jobs in the United States, or to prevent the U.S. government from incurring any additional costs that it would otherwise not incur. Later, the latter two reasons were removed from the law. Still, a waiver based upon a contract being "in the interest of homeland security" could be somewhat broadly applied. Thus, it remains to be seen whether D.H.S. approval to receive U.S. government contracts is based on the arguments set worth in its memorandum, or whether its recent award is the result of applying the law's waiver provision.

[2] Treas. Regs. §1.7874-T.