Office of the Government Ethics

99 x 16

Letter to an Alternate Designated Agency Ethics Official dated September 10, 1999

By letter of June 14, 1999, you requested written advice on behalf of a former employee of [your agency], regarding application of the permanent post-employment restriction at 18 U.S.C. § 207(a)(1) on certain representational activities. As you noted, your office previously discussed this matter during several telephone conversations with the Deputy General Counsel here at the Office of Government Ethics (OGE) and with one of our senior staff attorneys who specializes in interpreting the post-employment statute. Although that oral advice suggested that the former employee would be barred from the representational activity that he was considering, you have been asked by him to pursue the matter further with us by seeking reconsideration. For the reasons indicated below, our advice remains unchanged.

As your letter noted, 18 U.S.C. § 207(a)(1) permanently bars former employees from representing others before the Government on a particular matter involving specific parties if they participated personally and substantially in the same matter involving parties prior to leaving Government service. We understand that [the former employee] served [in a certain position] until his retirement in November 1997. His responsibilities included procurement programs for [certain] Governmentwide services and support [both local and wide area]. The issue is whether he participated personally and substantially in [Program A] for local service contracts that are being established in metropolitan areas.[1]

While [the former employee] acknowledges personal and substantial participation in the related [Program B] acquisition program for [wide-area] services and in development of the overall strategy that established the acquisition parameters and

[1] [The former employee] is aware of the separate two-year representational bar for matters under his official responsibility, at 18 U.S.C. § 207(a)(2). His only question concerns application of the permanent bar in section 207(a)(1).

competitive goals for both [Program A and Program B], he contends that [Program A] was a separate particular matter, in which he did not participate personally and substantially. Therefore, he believes he could legally represent [a company] before [your agency] and other Federal agencies on [Program A] matters, such as discussions on recently awarded [Program A] contracts in specific cities, future [Program A] contracts, and contract management and administration, as well as the marketing of services to Federal agencies under those contracts, either directly or through the winning contractor.

By way of background factual information, we understand that planning for [Program A] began shortly after passage of [an] Act. In December 1996, [Program A] was incorporated into the overall acquisition planning strategy for the program [managed by his former position], including both [Program A and Program B]. That strategy was refined and supplemented in 1997, after comments from numerous companies to [your agency] and Congress.[2] Once the overall acquisition strategy was finalized in a statement of principles, the two acquisition programs [A and B] were procured independently of each other. While the overall acquisition strategy did not specify the location or other details for a particular procurement, it did establish the acquisition parameters and competitive goals. The [statement of principles] of the overall acquisition strategy was incorporated as part of [Program A's] Request for Qualification Statement (RQS), whereby offerors were prequalified under generic nationwide Government requirements prior to their responding to the city-specific Requests for Proposals (RFP).

We also understand that, although [the former employee] participated personally and substantially in the overall acquisition strategy and in [Program B], he contends that he did not so participate in [Program A]. Your letter suggests that, other than the overall acquisition strategy, his participation in [Program A] prior to retirement consisted of attendance at certain high-level briefings of an informational nature only,

---

[2] You have acknowledged that these industry comments on the overall acquisition strategy were considered expressions of interest in the strategy and [Program A], thereby creating one or more "matters involving specific parties," as that phrase is used in 18 U.S.C. § 207, even though no companies were actually committed until the receipt of proposals. Therefore, the existence of specific parties is not at issue herein.

concerning the RQS and the initial three pilot cities. He did not participate in the drafting of the generic RQS, the city-specific RFPs, the source selection materials, the evaluation activities, or the award decisions for [Program A]. In contrast, he was personally and substantially involved in the structure and evolution of the RFPs for [Program B] procurement, and in the approval of awards.

Whenever a high-level official attends briefings, his involvement bears close scrutiny, to determine whether it was truly limited to the receipt of information. His participation in the discussion, or even his mere presence, could amount to a tacit acquiescence in any issues raised at the briefing. Even assuming, however, that [the former employee's] participation in the RQS and subsequent matters relating to [Program A] was perfunctory, as you suggest, his personal and substantial participation in formulation of the [statement of principles] governing [Program A] procurements still brings 18 U.S.C. § 207(a)(1) to bear, as discussed below.

We do not consider the [statement of principles] to constitute a separate matter involving parties from [Program A's] contracts. Even though each city-specific contract may be a separate particular matter, the [statement of principles] of the overall acquisition strategy directly informed each such contract. As noted above, those principles were incorporated into the RQS for [Program A]. Substantively, they established distinctive contracting policies for [Program A] on matters such as pricing, price bundling, use of non-contractor facilities, adding optional services, limiting the Government's obligation to minimum revenue guarantees, the duration of contracts, the award process, and agency participation in specific competitions.

You have cited an example in 5 C.F.R. part 2637, the OGE regulation which is used as guidance in interpreting the post-employment statute, to support the view that the overall acquisition strategy was a separate matter from the actual [Program A] contracts. Example 2 at 5 C.F.R. § 2637.201(c)(2) illustrates that work on the technical design of a new satellite communications system was separate from the subsequent contracting process to construct that system. The issue in that example was when the satellite contract became a particular matter and ultimately a matter involving specific parties. Since the technical design did not relate to the contracting process, it was considered to be separate; furthermore, it did

not apparently involve specific parties at that stage. Therefore, the former employee could represent a company in its contract proposals, even though he had worked on the technical design for the system.

We believe that example contrasts sharply with the situation about which you have inquired. The overall acquisition strategy for obtaining both local and [wide-area] Federal services appears to have been an integral part of the contracting process for [Program A] of local services, establishing the [statement of principles] on parameters, goals and policies which were incorporated into the RQS and which governed the subsequent RFPs and contracts. We do not agree with the argument that the unique procurement philosophy of the overall acquisition strategy can be likened to the technical design for a satellite communications system in the cited example. Technical design, typically involving scientific or engineering concepts, would not influence the subsequent contracting process in the same direct manner as would a procurement strategy, in our opinion.[3]

In deciding whether two particular matters involving specific parties are the same, the regulation at 5 C.F.R. § 2637.201(c)(4) focuses on "the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest." Applying that guidance to the facts presented, we conclude that if [the former employee] were to represent someone before [your agency] or another Federal agency regarding [a Program A] ***contract***, he would be involved in the same particular matter involving specific parties as the ***overall acquisition strategy*** for [Program A] in which he participated personally and substantially as a Government employee. Therefore, the permanent bar at 18 U.S.C. § 207(a)(1) controls.[4]

---

[3] Nor do we agree with your observation that the example might stand for the proposition that expressions of interest must relate to a particular RFP, rather than an entire program, in order to establish parties to a matter.

[4] To the extent that [the former employee's] proposed activities would not involve representations to a Federal agency, such as his mention of a possible service marketing (continued...)

Sincerely,

Stephen D. Potts
Director

[4](...continued)
arrangement with a winning contractor that does not implicate the contracting process, he might not be barred. That question, however, is beyond the scope of the issues and facts presented to us for resolution.