Office of Government Ethics
84 x 15 -- 11/19/84

Letter to Private Attorneys dated November 19, 1984

This is in response to your request of September 4, 1984 for an interpretation of certain aspects of 18 U.S.C. § 207 to the post-employment activities of your client, and his wish to represent his new employer, in its solicitation of business before [your client's] former employer, [a Federal agency].

In your letter of September 4, you posed two issues which you requested this Office address. In both instances, you requested that we assume [your client] had "official responsibility" for and "participated personally and substantially" in the project at issue until he left the [agency]. Given that, the first issue was presented as follows:

> For purposes of determining whether 18 U.S.C. § 207 imposes a bar to representation of an entity, is the term "specific party" limited only to those entities who were parties or potential parties at the time a former federal employee had personal and substantial participation or official responsibility for a matter on behalf of the employing federal agency?

The answer to that question is no. The entity the former official would like to represent need not have been an actual or potential party to a matter at the time he or she personally and substantially participated in the matter. There need only have been a party or parties identified with the matter at the time of the former employee's participation for this element of the statute to be present.

The language of section 207(a) is clear on this issue. It prohibits a former executive branch employee from "represent[ing] any other person . . . or, with the intent to influence, mak[ing] any oral or written communications on behalf of any other person" to various entities of the Government in connection with any "particular matter involving a specific party or parties" and in which he "participated personally and substantially." (Emphasis added.)

If the statute had intended to prohibit only a former

employee's representations of a party which was involved at the time of his or her official participation in the matter, a simple change in the language could have made that clear. Instead, the statute prohibits the representational activities on behalf of anyone, not just of a party to the matter at the time of official participation, and it defines the matters as those involving a specific party or parties not those involving the party or parties now wishing the representational services of the former employee.

The prohibition of section 207(a) is often referred to as the one which prohibits "switching sides" in a matter. For the restrictions to apply one need not switch from representing the Government service to representing a specific party identified with a matter before he or she left the Government; one need only switch to any party other than the Government as long as the matter remains the same.[1]

This interpretation of the statute is also consistent with the intent of Congress when it reviewed the post-employment provisions and passed amendments in 1978 making them more stringent than prior statutes had been. Congress was concerned with what they perceived to be persons who used their personal influence, as well as inside information, on behalf of private clients. Thus, the amendments to section 207 were enacted in part "to prevent the exercise of undue influence over former colleagues still in office in matters pending before the agency and or department, to prevent former Government employees from utilizing information gained during Government Service for their own benefit and the benefit of their private clients and to promote the even handed exercise of administrative discretion."[2] New sections 207(b)(ii) and (c), not at issue here, were primarily aimed at prohibiting the use of undue influence. Sections 207(a) and (b)(i) were aimed at prohibiting the use of inside information. That inside information was not to be used on behalf of any person other than the Government, not just the person who was an identified party at the time. The harm to the Government is not simply that a former employee might have been able to assist his or her new employer in a matter before leaving Government. The harm also includes the use or the apparent use of inside information gained about competitors of the new employer who were parties to a matter prior to the new employer's expressed interest. Protection from this harm is necessary to the preservation of the integrity of the Government's contracting process.

The second issue you requested we address was posed by you as follows:

> Is a Draft RFP that is published in Commerce Business Daily a "matter" for purposes of 18 U.S.C. 207 when the draft RFP only solicits information from the private sector about the feasibility of a project and does not solicit actual bids on a contract?

The answer to this question posed in this manner is yes. The draft RFP is a "particular matter" as that term is used in 18 U.S.C. § 207. This is consistent with the early legislative history of this term as it is used in the criminal conflict of interest statutes. The phrase "particular matter" covers "the whole range of matters in which the government has an interest."**3** It was intended to "make clear the enumeration is comprehensive of all matters that come before a federal department or agency."**4** The additional terminology "involving a specific party or parties" modifies particular matter and narrows it to more discrete and isolatable transactions between specific parties. Our regulations at 5 C.F.R. § 737.11(d), while under the section concerning section 207(c), addresses the term "particular matter" as opposed to the much narrower term "particular matter involving a specific party or parties." In those regulations, we noted that a "matter" included "the proposed adoption of a regulation or interpretive ruling, or an agency's determination to undertake a particular project or to open such a project for competitive bidding." A draft RFP is certainly a "matter" as it is an announcement of an agency's determination to undertake a particular project. It cannot be considered a policy issue or simply conceptual work done before a program has been particularized into one or more specific projects. It is that step in the procurement cycle that determines public interest in a specific project the Government intends to pursue. The solicitation of bids is not always the determining factor in triggering when in the process a procurement becomes a "matter." That step is very often far into the "matter" of that procurement.

A draft RFP becomes "a particular matter involving a specific party or parties" when potential contractors are identified to the project. See Example 2 of the interpretive regulations at 5 C.F.R. § 737.5(c). While the example is set forth to show a possible interrelationship between subsection (f) and subsections (a), (b) and (c) of section 207, the example is very

clear about the application of the law to draft RFP's.

In the case at issue, the [agency] placed the announcement in the Commerce Business Daily that it intended to issue a draft solicitation document on its plan to acquire an automated examination system and asked all interested vendors to respond. Once parties began responding to that announcement, the particular matter of the acquisition of an automated examination system became one which involved specific parties.

While you did not pose a follow-up question should our response to this second issue be yes, the matter involving specific parties in which the employee participated as a Government employee must be the same matter in which he or she now wishes to represent a private party for the restrictions of section 207 to apply. Our regulations at 5 C.F.R. § 737.5(c)(4) state:

> The requirement of a "particular matter involving a specific party" applies both at the time that the Government employee acts in an official capacity and at the time in question after Government service. The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider 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.

A draft RFP is issued both to solicit interest from potential vendors as well as to solicit information and input on the proposed procurement. Simply because a draft RFP and the final proposed procurement may differ somewhat in their terms, does not automatically make them two separate matters. In the instant case we believe that the analysis done by the [agency] in its June 14, 1984 letter to your client which you attached for our information is correct, and that the draft RFP announced in August of 1983 is the same matter as the three proposed procurements and the resulting contracts. The differences in the draft RFP and the proposed procurements involving the restructuring of the procurement from an A-109 to a non A-109 process, the acceleration of the period of performance for certain stages, and the inclusion of more personnel are not so significant as to create a whole new matter. The requirements for

development of the system, the equipment and the training set forth in the draft RFP did not change in any significant manner in the proposed procurement. In our view they are all part and parcel of the same matter. Therefore, assuming, as you asked us to do, that your client either personally and substantially participated in or had official responsibility for this draft RFP, the provisions of 18 U.S.C. 207(a) or (b) will apply to representations he might wish to make on behalf of [the company] to the [agency] on this project.

Sincerely,

David H. Martin
Director

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1 You noted in your letter that OGE letter 80 x 2 dated February 26, 1980 would lead one to believe that a party must have been identified with a matter at the time the former employee worked onthe matter for the prohibitions of section 207 to apply. It is unfortunate that the letter was not written more precisely. The recipients and the agency involved did understand that if there were any party identified to the matter at the time of the former employees' participation, the restrictions would apply, even though, we must admit, the letter could have been more clear.

Additionally, however, while it makes no difference in our response to this question, you stated in your September 4, 1984 letter that [the company now employing your client] was not a party or an anticipated party to the matter at the time of [your client's official Government] participation. [Your client's former agency] provided this Office with a copy of a September 12, 1983 letter submitted by [the company], in response to the announcement in the commerce Business Daily, in which it indicated its interest in the proposal and asked to have the draft solicitation document sent to a specific individual within] that company. It certainly could be argued that from that point on, [the company] was an anticipated party to the matter.

2 S. Rep. No. 95-170, 95th Cong., 1st Sess. 31, 34 (1977).

3 S. Rep. 2213, 87th Cong., 2d Sess. 12 (1962).

4 H.R. Rep. 748, 87th Cong., 1st Sess. 20 (1961).