Office of Government Ethics
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Letter to a Designated Agency Ethics Official dated November 25, 1987

This is in response to your October 21, 1987, letter, requesting an advisory opinion on the applicability of 18 U.S.C. § 207 to [a former agency employee] and his proposed employment as [Company A's] manager at [its communications services facility].

Because more than two years have elapsed since [the individual's] resignation from [your agency], 18 U.S.C. § 207(a) is the only post-employment provision that we need to address. Section 207(a) prohibits a former officer or employee of the Government from knowingly acting as agent or attorney for anyone, except the United States:

> (2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States . . . is a party or has a direct and substantial interest, and
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> (3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed . . . . (Emphasis added.)

[The former employee's] current employer, [Company A], proposes to assign [him] to the position of Site Manager of [Company A's communications services facility]. In that capacity, [the former employee] would be involved in representations to [your agency] on matters pertaining to section II of a restructured contract between [Company B] and [your agency]. While employed by [your agency], [the former employee] personally and substantially participated in the original contract as a member of the Source Evaluation Board (SEB) that reviewed the requirements. From August 1975 to November 1980, [the former employee], as Assistant Director of [a particular

operational area], continued his work with the SEB until [the agency] awarded the contract in December 1976 to [Company B]. Since the [original] contract was a particular matter involving a specific party, [Company B], 18 U.S.C. § 207(a) would prohibit [the former employee] from representing [Company A] back to the Government on the [original] contract.

Since [the former employee's] participation on the [original] contract triggers the prohibition of section 207(a), we need to determine whether the [original] contract is the same particular matter as the one involved in his proposed employment. To make this determination, we must answer the following questions:

(1) whether the [original] contract is a different particular matter than the restructured contract;

(2) if so, whether section I of the restructured contract is a different particular matter than section II of the restructured contract; and

(3) if so, whether [the former employee's] participation on the technical evaluation pertaining to section II constituted personal and substantial participation in the matter.

As [Company A] explains in its submission, the [original] contract was between [your agency] and [Company B], a wholly-owned subsidiary of [Company C]. The contract, for the provision of [specific communications services] involved the design and construction of a [tracking and relay system]. The system was to consist of a series of [machines] and a [plant], owned and operated by [Company B]. [Your agency] and [Company C] were to share use of the system. Although the contract detailed the services [Company B] was to provide, it lacked a statement of work concerning how the contractor was to design, develop, operate, and maintain the system to provide the specified services, leaving these matters to the contractor's discretion. The contract was for a firm fixed-price of [a specified sum], with performance scheduled to end in [a specified year].

According to [Company A], in the early 1980's, the parties realized that the shared system could no longer satisfy the Government's projected requirements. [Your agency] was also seeking a greater degree of authority over the development, operation and maintenance of the system. To achieve these

objectives, [your agency] requested, and [Company B] submitted, a proposal for a major restructuring of the contract. [Company A] explains that, at [your agency's] insistence, the restructured contract was treated as a new procurement.

The restructuring was completed in December 1982. [Company A] explains that "[a]lthough issued for administrative convenience as an amendment to [specified contract identification number], the restructured contract was more than a mere modification of the existing contract."**1** While the [original] contract had simply provided for the leasing of [specified communications services] to [your agency], the restructured contract divided the program into two distinct areas of activity, referred to as section I and section II. The preamble contained in the restructured contract states: "[t]his contract consists of two independent Sections."**2**

[Company A] describes section I as "a greatly revised and updated version of the [original] contract terms and conditions, on a fixed-price basis."**3** Under section I, the system was converted from shared to Government-dedicated use. [Your agency] also obtained a greater hands-on role in overseeing contractor functions; however, [Company B] remained responsible for system development, integration, testing, system checkout, and a brief maintenance and operations (M&O) period prior to full system readiness. Section II dealt with the new requirement to maintain and operate the [communications system] over the long term. The implementation of section II did not begin until October 1984, and the pricing and other key terms were not in place until late 1985.

The post-employment regulations at 5 C.F.R. § 737.5(c)(4) list the factors one must consider in determining whether two particular matters are the same. According to that provision:

> [t]he 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.

In this case, an analysis of these factors leads to the conclusion that the [original] contract is a different matter from the restructured contract. The [original] contract involved construction and deployment of a [specific communications

system], as does the restructured contract, but the approach has changed, as has the contractor. The [original] contract simply provided for the leasing of communications services to [your agency]. By comparison, the restructured contract converts the arrangement from shared to Government-dedicated use. In addition, it provides for the maintenance and operation of the [communications system] over the long term, a requirement not contained in the [original] contract.

As for the parties involved, although [your agency] has remained the same, [Company B] has changed significantly since the initial contract was awarded. It was originally a wholly-owned unit of [Company C]. In 1980, the contracting entity formally changed, pursuant to a novation agreement, to a partnership owned by three independent public companies. The present contractor is a wholly-owned unit of [Company A].

In a recent case, United States v. Medico Industries, Inc., 784 F.2d 840 (7th Cir. 1986), the court confronted the question of whether a contract and its subsequent modification were the same particular matter. It concluded that where an ordinance contract and a subsequent modification involved the same parties, facts, and subject matter, differing only as to the terms governing price, quantity, and delivery date, the contract and modification were the "same particular matter" under 18 U.S.C. § 207(a).

In contrast to Medico, there is a 1980 Office of Government Ethics Informal Advisory Letter, 80 x 1, addressing the post-employment restrictions applicable to a former Government employee who had created amendatory language for, or rendered legal advice on, the sufficiency of contracts at his agency. This Office concluded that, with regard to the specific contracts that the former employee had reviewed, section 207(a) would prohibit him from representing private contractors to the Government on those contracts. With regard to contracts he had not reviewed and which were entered into after his departure from the agency, he could represent the private contractor, even though the contract might contain certain generic clauses that he had drafted previously for other similar contracts. These contracts were for a definite term and were reviewed annually, and the foundation of these contracts was the services rendered (employee benefits) and the cost of providing such services. In that opinion, we stated that "[t]o the extent that the contracts change each year relative to rates and employee benefits, we

interpret the effect of such changes as constituting or creating a new particular matter or contract."

In this case, the distinctions between the [original] contract and the restructured contract go well beyond the mere change in the terms governing price, quantity and delivery date, which the court in the Medico case did not consider sufficient to qualify the modification as a new particular matter. As in the case discussed in the advisory letter, the services to be rendered are substantially different. Under the [original] contract, [Company B] was to provide communications services in support of [your agency's program] through a shared-use system. The restructured contract converted the system from shared to Government-dedicated use and added a long-term M & O requirement. Consequently, we believe the [original contract] and the subsequent restructured contract are different particular matters for purposes of 18 U.S.C. § 207(a).

After the restructuring of the contract, [the former employee] served from September 1983 to September 1984 as Deputy Director of [a specific program concerned with the system]. As such, he was responsible for the development, integration, test and preparation of [the program], of which the [specific communications system] was a key segment. According to [Company A], [the former employee's] personal and substantial involvement with the [communications system] during that period was strictly on section I of the contract.

Since we have already determined that [the individual] participated personally and substantially on section I of the restructured contract, we must next determine whether section I is a different particular matter involving a specific party from section II. We have been advised that [the former employee's] proposed position with [Company A] is limited to section II matters. According to your cover letter, [your agency] considers section II to be a different particular matter from the 1986 contract.

With regard to section I and section II, there are several factors to consider in determining whether they are different particular matters. These are outlined in a chart that [Company A] included in its submission. Both section I and section II received new congressional and agency authorization. The value of section I is [a specified sum] and is funded on a fixed-price basis. Section II has a value of more than $200 million, which

is handled on a cost-reimbursable basis. The terms and conditions for section I are a revision of those contained in the [original] contract, whereas section II has a new and separate set of terms and conditions. Section II requires a different system of reports and a different performance evaluation plan from section I. As for the type of work covered, section I is principally construction with limited short-term maintenance and operations, as specified in the contract. On the other hand, section II is for long-term maintenance and operations only. Finally, the two sections are administered by two distinct [subdivisions of a bureau within the agency]. As a result, we conclude that these two components of the restructured contract are separate particular matters for purposes of 18 U.S.C. § 207(a).

Although it appears that the entire restructured contract is a different particular matter from the [original] contract, it is not clear that section I, when viewed as a particular matter in and of itself, is a different particular matter from the [original] contract. In this analysis, however, this issue is not determinative as long as section II is different from both section I and the earlier contract, as we have concluded it is.

The final question to address is whether [the former employee] participated personally and substantially as a Government employee on section II. The materials submitted and our supplemental discussions with officials at [your agency] failed to answer all of our questions about the scope of [the individual's] responsibilities as Deputy Director of [a specific program concerned with the system], but we have the following information upon which to base our decision. According to [Company A's] submission, the project [to develop the system] was under [the individual's] official responsibility as Deputy Director of [the program]. We are told that, in that capacity, he was one of several [agency] officials who concurred in the technical evaluation of [Company B's] M & O proposal, which is tied in to section II. It is our understanding that the technical evaluation was an internal document prepared by the technical group, containing its evaluation of the contractor's proposal. The technical evaluation itself was not part of [Company B's] proposal, and [the former employee] was not on the committee that prepared the evaluation.

In the supplemental material [Company A] submitted on [a specific date], they further address [the individual's] role in

this matter. They describe his role in the review of the technical evaluation as "perfunctory," since the [activities pertaining to the system] in which he was principally involved related to the current readiness and operational status of the system, not the M & O Plan to be implemented in the future. [Company A] characterizes [the former employee's] concurrence as informational to his supervisor who was "empowered to concur in the evaluation irrespective of whether [the individual] concurred or specifically noncurred [sic]."**4** After [the former employee's] supervisor signed off on it, the technical evaluation went to the Director of the [bureau within the agency]. From there it went to the Associate Administrator for [a specific area of responsibility], who reports directly to the [head of the agency] at headquarters. The evaluation would have to reach that point before the agency even made its decision to begin negotiating on the proposal itself.

The interpretive regulations on 18 U.S.C. § 207 provide guidance on what constitutes personal and substantial participation for purposes of the statute. In this case, it is clear that [the former employee] personally concurred on the technical evaluation because we have a copy of the signature page which he signed. The issue is whether his participation was substantial. According to 5 C.F.R. § 737.5(d), "substantially" is defined as follows:

> "Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort.

Because we are not as familiar with [your agency's] procedures and [the former employee's] duties while at [the agency] as you are, we are placing great weight on the statement in your [specific date] letter indicating your view that [his] involvement with the technical evaluation was not "personal and substantial." [Company A's] submission indicates that [the former employee's] supervisor had the power to concur in the evaluation regardless of [the former employee's] concurrence or nonconcurrence and that [his] review was mainly for informational

purposes. We also understand that [the former employee] had no additional involvement on section II matters while at [your agency]. Therefore, we conclude that [his] role, as described in this case, would not be considered substantial.

As a result, [the former employee] may represent [Company A] to [your agency] and other entities of the Federal Government on section II of the restructured contract. With regard to the [original] contract and section I of the restructured contract, [he] is subject to the lifetime bar on representational activity before the Government on behalf of someone other than the United States. This means that [he] may not act as someone's agent or attorney before the Government, or make any written or oral communication to the Government on that person's behalf in an attempt to influence the Government, on those matters. The statute does not, however, prohibit a former employee from providing in-house assistance in connection with matters in which the employee had personally and substantially participated while in Government.

Sincerely,

Donald E. Campbell
Acting Director

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1 Letter from [Company A's legal advisor] to Donald E. Campbell, Acting Director, OGE.

2 Id.

3 Id.

4 Letter from [Company A's legal advisor] to [an OGE staff attorney].