

Office of Government Ethics

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Letter to Designated Agency Ethics Official dated February 26, 1980

This is in response to your letter of January 3, 1980, wherein you requested the advice of this Office concerning the applicability of sections 207(a) and 207(b)(i) to certain former employees of [an office within your Department] who are contemplating representing a private sector entity back before the Government.

Review of your letter with enclosure reveals the following:

Three former employees of [your Department] left in October 1979, and formed a corporation. The former employees are considering providing assistance to a potential offeror in responding to a request for proposals (RFP) for a new grant application processing contract, a matter in which two of the former employees participated while employed by the [Department]. One assisted in the preparation of a draft RFP (he also reviewed a later draft after leaving the Government at the request of the Government), the other neither reviewed the draft nor had any substantial involvement in its development, but he was, however, the supervisor of the former employee who assisted in the drafting of the RFP. The third individual was not personally involved and had no direct responsibility for the RFP but was generally familiar with its development. The RFP had not been issued at the time they left Government.

At the outset, this Office concurs in your advice, providing that the former employees could assist and advise the offeror in preparing the proposal and in performing the contract if awarded, because such activity would not constitute "representation" prohibited by 18 U.S.C. § 207. The remaining issue requiring resolution is whether or not the two former employees who were involved in the development of the RFP, either personally and substantially or through official responsibility, are banned by sections 207(a) and (b)(i), respectively, from participating in negotiations with Government officials regarding the contract growing out of the RFP, and attempting to influence the Government action relative thereto. This issue does not affect the third, nonparticipating, former employee.

Generally, 18 U.S.C. § 207(a) prohibits a former officer or employee of the executive branch from acting as agent or attorney

for anyone other than the United States in connection with any particular matter involving a specific party or parties in which the United States is a party or has a direct or substantial interest and in which he or she participated personally and substantially when employed by the Government. The phrase "particular matter involving a specific party or parties" refers to a discrete and isolatable transaction between identifiable parties. 18 U.S.C. § 207(b)(i) prohibits a former officer or employee, for two years after leaving his or her position, from acting as agent or attorney for anyone other than the United States in any "particular matter involving a specific party or parties" that was actually pending under such official's "official responsibility" within a period of one year prior to the termination of such responsibility (emphasis added).

The phrase "particular matter" as used in 18 U.S.C § 207 is restricted in scope to mean a particular contract, a particular case, a particular proceeding, or a particular claim. B. Manning, Federal Conflict of Interest Law 55 (1964). The RFP in this case clearly meets the "particular matter" standard.

The phrase "particular matter" as further restricted by the modifying phrase "involving a specific party or parties." Commenting on the importance of the limiting phrase "involving a specific party or parties," Manning provided as follows:

Where the language is used, it is clear that the statute is concerned with discrete and isolatable transactions between identifiable parties. . . . A close standard of specificity is required in two different respects under subsection (a); for a matter to be swept under the subsection, it must involve a specific party both at the time the government employee acted upon it in his official capacity and at the subsequent time when he undertakes to act as agent or attorney following termination of his government service. Id. at 204.

While Manning's comment referred to the language in the pre-amended statute, that language was unchanged in the amended statute.

That standard was adopted by this Office in 5 C.F.R. § 737.5(c)(4) of the regulations concerning Post Employment Conflict of Interest (45 Fed. Reg. 7410, February 1, 1980). The example to which you referred in your letter, i.e., Example 2 at 5 C.F.R. § 737.5(c)(2) was based, in part, upon the same standard. And, while your concern that such an interpretation potentially involves inherent dangers of a former employee influencing the actions of his or her former agency in favor of the new employer is valid, the former employee would not be barred from representing another on the same particular matter, unless both prongs of the standard are met.

Accordingly, unless the potential offeror was identified as a party or one matter in question at the time the two former employees worked on the matter, the bar found in 18 U.S.C. §§ 207(a) and (b)(i) would not attach.

I trust these comments will prove of some value to you.

Sincerely,

J. Jackson Walter
Director