

Office of Government Ethics

86 x 13 -- 09/11/86

Letter to a Former Government Employee dated September 11, 1986

This is in response to your letter of June 19, 1986 requesting an evaluation of a post-employment situation involving a potential conflict of interest.

You have stated that from 1973 until March 1986, you were employed by a Government entity as the GM-15 Director in one of three directorates into which [the agency] is organized. Although [the agency] was administered by [a specific executive branch Department] under a delegation of authority from the General Services Administration (GSA) from 1972 until September 1985, since September 1985 [the agency] has been administered by GSA. Before you left [the agency] in March 1986, you participated in a review of a Request for Proposals (RFP) that was issued on April 8, 1986 and had a closing date of May 12, 1986. Since [the consulting firm you formed upon leaving the agency] has submitted proposals in two of the Areas of Expertise listed in RFP, you are concerned about whether you will encounter post-employment conflict-of-interest problems.

We have concluded that you are not precluded by any provision of 18 U.S.C. § 207 from making representations to [the agency] in response to the RFP.

Under the post-employment statute at 18 U.S.C. § 207, there are two restrictions which potentially apply to limit your activities, since you are a former executive branch employee who was not a Senior Employee.¹ You are prohibited from representing any other person by appearance or by written or oral communication to any Department, agency or court of the United States or District of Columbia, in connection with any particular matter involving specific parties in which the United States or District of Columbia is a party or has an interest. This prohibition on making representations applies under section 207(a) for the entire lifetime of matters in which you participated personally and substantially while with the Government, and under section 207(b)(i) for a period of two years on matters which were pending under your official responsibility during your last year of Government service.

It is our opinion that section 207(b)(i) does not apply to you in this particular situation and that we thus do not need to address the official responsibility requirement under section 207(b)(i).

It is our further opinion, however, that section 207(a) does govern your situation. Therefore, under section 207(a) we must address the following issues: (1) whether you personally and substantially participated in the RFP and (2) provided that you personally and substantially participated, whether the RFP involved specific parties at the time of your participation.

We have determined that your review of the RFP did constitute personal and substantial participation in the RFP. We believe that this review was substantial, even though, as you stated in an August 5, 1986 telephone conversation with our Office, your review focused on one paragraph of the RFP in order to make whatever changes were necessary so that the document accurately reflected the role of your directorate and even though you spent a limited amount of time on the review. It is undisputed that your participation in the review was personal.

Regarding whether your participation was substantial,

[I]f [an] employee reviews a matter and passes it on, his or her participation may be regarded as "substantial" even if he or she claims merely to have engaged in inaction.²

The standard of conduct regulations further clarify what amounts to "substantial participation" in your case, since you as Director were charged with responsibility for review with respect to the RFP's portrayal of your directorate.

To participate . . . "[s]ubstantially" . . . means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.³

And, further, according to the regulations:

"Personal and substantial participation" is different from "official responsibility." One's responsibility may, however, play a role in determining the "substantiality" of an employee's participation. For example, ordinarily an employee's forbearance on a matter is not substantial participation. If, however, an employee is charged with responsibility for review of a matter and action cannot be undertaken over his or her objection, the result may be different. If the employee reviews a matter and passes it on, his or her participation may be regarded as "substantial" even if he or she claims merely to have engaged in inaction.⁴

The fact that you participated personally and substantially in the review of a paragraph of the RFP means that under 18 U.S.C. § 207(a) you participated personally and substantially with regard to the matter of the entire RFP:

We must emphasize that to fractionalize a specific contract and say that a former employee is barred as to representation on a particular clause or amendment but not as to other clauses or provisions contained therein is not consistent with the law or common sense.⁵

Central to our overall conclusion in your case is our determination that although when you reviewed the RFP in 1986 you were involved with a "particular matter,"⁶ it was a "particular matter" distinct from that of the 1983 RFP and resultant contracts. This is critical to the outcome because we understand that no specific party became identified to the 1986 RFP until responses were received on the closing date, nearly two months after your departure from [the agency].⁷ As described in your letter to our Office, in 1983 RFP's were issued which resulted in contracts being awarded to certain contractors, which contracts were for a base year with two option years, with the overall three-year period ending on June 15, 1986.

We have concluded that the 1983 RFP and contracts constitute a different particular matter than the 1986 RFP and contracts based on the following factors.⁸ The 1986 bidding package was not geared exclusively toward the 1983 group of contractors. In the 1986 contractual process, there were no presolicitation letters to establish interest on the part of previous contractors. The 1986 contract rates were not predetermined so as to favor previous contractors prior to the competitive bidding process.

While the 1986 and 1983 contracts contain identical objectives, the RFP for the new contract contains a more elaborate work statement owing to [the agency's] increased awareness of its needs for support services.⁹

In summary, at the time you personally and substantially participated in the 1986 RFP by reviewing its portrayal of [the Directorate's] capabilities, no specific party had yet become identified to the particular matter of the 1986 bidding process. Consequently, under 18 U.S.C. § 207(a) you are not barred from responding to the 1986 RFP.¹⁰

Sincerely,

David H. Martin
Director

¹ "Senior Employee", as defined under 5 C.F.R. § 737.25, refers to someone who held a Government position at the Executive Level rate of pay or was designated by the Director, OGE, from among employees for whom the basic pay rate is equal to or greater than that for GS-17 or the Senior Executive Service (SES). Since you do not meet the threshold position level, we have not addressed the post-employment restrictions found at 18 U.S.C. §§ 201(b)(ii) and (c), since these apply only to former Senior Employees.

² OGE Informal Advisory Letter 80 x 1(2), citing 5 C.F.R. § 737.5(d)(3).

³ 5 C.F.R. § 737.5(d)(1) (emphasis added).

⁴ 5 C.F.R. § 737.5(d)(3) (emphasis added).

⁵ OGE Informal Advisory Letter 80x1(2). The quoted portions of this advisory letter are relevant to your situation, even though the letter refers to a contract and you were involved with and RFP.

⁶ According to 5 C.F.R. § 737.5(c), a "particular matter" can be a "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, [or] arrest'.... Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an [isolatable]

transaction or related set of transactions between identifiable parties." See OGE Informal Advisory Letters 80 x 2 and 84 x 15 regarding the classification of an RFP as a "particular matter."

7 Regarding the timing of the identification of specific parties, see OGE Informal Advisory Letter 84 x 15 and 5 C.F.R § 7373.5(c)(2), Example2.

8 Under some circumstances, old and new contracts and RFP's all can be part of the "same particular matter." This viewpoint has been upheld in a recent Federal court case, *United States v. Medicaio Industries, Inc.*, No. 85-1885, slip op. at 5 (7th Cir. Feb. 27, 1986) (matters with a common "nucleus of operative facts" comprise the "same particular matter").

9 Information on the nature of the 1983 and 1986 contracts was obtained during August 7, 1986 and August 25, 1986 telephone conversations between OGE staff attorneys and [a contract specialist] with [the agency which] handles the soliciting and awarding contracts for the various service branches.

10 This advisory letter does not address any issues under 18 U.S.C. §§ 207(b)(i), (b)(ii), or c. Section 207(b)(i) discussed in the third paragraph of this letter. Sections 207(b)(ii) and (c) apply only to former Senior Employees and thus are not applicable to you personally, although they may affect other [agency] employees. Under section 207(b)(ii), for a two-year period a former Senior Employee is prohibited from assisting in representing anyone by personal presence before any Department, agency or court of the United States or the District of Columbia in connection with any particular matter involving specific parties in which he or she participated personally and substantially while with the Government and in which the United States or the District of Columbia is a party or has an interest. Under section 207(c), for a one-year period a former Senior Employee is prohibited from representing anyone with the intent to influence through any written or oral communication to the same Department or agency where he or she worked.