

Office of Government Ethics

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Letter to an Employee dated August 8, 1986

This is in response to [a letter from your agency's] Designated Agency Ethics Official, [in which he] requested, on your behalf, an advisory opinion on the issue whether a business entity with which you are connected may contract with the Federal Government. Since this request does not meet the two-pronged test set forth in 5 C.F.R. §§ 738.302 and 738.303 for the issuance of a formal advisory opinion, we will respond by issuing an informal advisory letter.

According to [your DAEO's] letter, you are the President and Chief Executive Officer of a company that provides a variety of audio-visual services. In your Government capacity, you are [a] Public Affairs Officer [for one office in your agency]. The letter explains that you sought advice from the Office of Counsel at [your office] concerning the propriety of your private business dealings with agencies of the Federal Government. By memorandum dated July 13, 1982, the Office of Counsel advised you that it is permissible for your company to receive Government contracts as long as you disclose your Government employee status to the contracting officer prior to contracting and confine your business dealings to agencies other than the agency in which you are currently employed. The memorandum failed to mention the impact of 18 U.S.C. §§ 203 and 205, which the Deputy Standards of Conduct Counselor at [your office] later indicated could have an impact on your dealings with the Federal Government on behalf of [your company]. Consequently, you would like advice from this Office on the matter.

The basis for the standards of conduct for Federal executive branch employees is Executive Order 11222. Section 202 of the Order states that such employees shall not engage in any outside employment that might result in a conflict, or an apparent conflict, between their private interests and their official duties and responsibilities with the Government. The Executive Order has been implemented by [your agency]. Those provisions essentially mirror [your agency's Directive] on standards of conduct, which applies to all [agency] components and personnel. Under [the specific agency Directive], [agency] personnel are prohibited from engaging in outside employment or other outside

activity, with or without compensation, which (1) interferes with, or is not compatible with, the performance of their Government duties; (2) may reasonably be expected to bring discredit to the Government or the [agency] component concerned; or (3) is otherwise inconsistent with the requirements of the Directive, including the requirement that an employee must avoid actions and situations that can reasonably be expected to create the appearance of a conflict of interest.

The Directive (Directive, VIIA) also prohibits [agency] personnel from engaging in any personal, business, or professional activity, or receiving any direct or indirect financial interest, which would create a conflict of interest between their private interests and their Government positions. In addition, the Directive (Directive, VIIB) prohibits [agency] personnel from using for private gain information not generally available to the public, which they obtain by reason of their [agency] positions.

Based upon those provisions, it would appear that a Government employee could contract with the Government, as long as he or she avoided the types of situations described above. The employee could not use nonpublic information and could not enter into a contract with his or her own agency over which the employee would have responsibility or which could otherwise create a conflict of interest.

However, in addition to the agency's regulations and Directives on outside employment, there are three criminal conflict of interest statutes that impose restrictions that are related to your private business activities with the Government: 18 U.S.C. §§ 203, 205, and 208. Section 203 prohibits a Federal Government employee from receiving compensation based on anyone's representations before a Government agency in relation to any particular matter, such as a contract or claim, in which the United States is a party or has a substantial interest. Section 205 prohibits a Government employee from personally representing anyone, with or without compensation, before a Federal Department, agency, or employee. Therefore, you may not make any representations, either for compensation or without compensation, to a Federal agency or employee, on behalf of [your private company].

Section 203 would have an impact on the manner in which you could be paid for your services to [the company]. It prohibits

you from receiving compensation based on anyone's representations to the Federal Government, including representations made by your wife or another employee of [the company]. You or other employees of [the company] would be making representations to Government Departments or agencies in the course of obtaining or performing a Government contract. As a result, any compensation you might receive from such contracts would be based, directly or indirectly, upon those representations, and you would be prohibited under section 203 from accepting such compensation. This does not mean that [the company] cannot compensate you in any way for your services. However, it means that you, as either an officer or employee of [the company], cannot receive compensation that is tied to the profitability of [the company's] activities with the Federal Government. You may be a salaried employee of [the company], be compensated on an hourly basis in such a way that your compensation is not contingent on the Federal source of funding, or be compensated based upon the profitability of [the company's] contracts with entities other than the Federal Government, as long as you do not personally make any representations to the Government.

Under the criminal statutes, a representation may be either oral or written, but it must be a communication which is made with the intent to influence. For example, if you were to prepare a report or proposal which [the company] intended to submit to the Government, the document could not be submitted under your name if the document was designed to influence the person or entity receiving it. That would constitute a written representation by you on [the company's] behalf. Likewise, you may not speak to a Government employee about a contract on behalf of [the company], beyond the mere exchange of factual information. You may, however, identify yourself as being associated with [the company] in order to gain admittance to the facility where a contract with [the company] is being performed, and you may seek any public documents necessary to complete your work.

As interpreted by the Department of Justice, these statutes allow an exemption for an employee to represent himself or herself before the Government. However, this right to self-representation does not extend to the representation of a distinct legal entity such as a corporation. Since your business is set up as a corporation, you are not entitled to the self-representation exemption from the criminal statutes for your representations on behalf of [the company].

The third criminal statute that could apply is 18 U.S.C. § 208, which prohibits a Government employee from taking official actions on particular matters affecting the employee's personal financial interests or those of his or her spouse, minor child, or partner. It also prohibits the employee from taking official actions in a particular matter affecting an organization in which he or she is serving as an officer. As President and CEO of [the company], you would be prohibited from acting on particular matters affecting [the company] should they come before you in your capacity as Public Affairs Officer at [your office].

Beyond the prohibitions contained in the criminal conflict of interest statutes and the standards of conduct regulations, the Defense Acquisition Regulation, DAR § 1-302.6, and the Federal Acquisition Regulation, FAR § 3-601, prohibit contracts between the Federal Government and Government employees or organizations substantially owned by Government employees, except where the needs of the Government cannot otherwise be supplied. As a result, even if there were no conflicts of interest present, your activities could be constrained by the prohibition against the Government contracting with its own employees.

Even if [the company] is able to get beyond the hurdles contained in the DAR and the FAR and obtain a Government contract, your activities on behalf of [the company] before the Government will be limited. Although you may provide in-house assistance on a matter going before the Government, you may not make any representations to the Government or its employees on behalf of [the company]. Other [company] employees who are not employees of the Federal Government would have to make those representations. In addition, your compensation from [the company] must not be tied to the profitability of any Federal contract. You may, however, be a salaried employee of [the company], receive compensation on an hourly basis that is not contingent on a Federal source of funding, or receive compensation from contracts with nongovernment entities.

We hope you find this information helpful.

Sincerely,

David H. Martin
Director