

08 x 7

Letter to a Designated Agency Ethics Official
dated March 28, 2008

This responds to your letter requesting guidance concerning the application of 18 U.S.C. § 207(a) and (c) to a former employee of [your agency]. Letter of [Designated Agency Ethics Officials] to Robert I. Cusick, Director, Office of Government Ethics (OGE), February 29, 2008. Prior to requesting written guidance from my Office, a member of your staff discussed the same issues with an OGE desk officer by telephone and electronic mail. The advice provided below confirms that provided earlier by the OGE desk officer.

According to the information provided by your office, [a former employee] was Director of [a] Department of [your agency]. As Director of that office, [the former employee] was a "senior employee," under 18 U.S.C. § 207(c), and his one-year cooling-off period runs from the date of his separation, July 9, 2007. Also as Director, [the former employee] participated personally and substantially in the award of an indefinite delivery, indefinite quantity (IDIQ) contract to six financial advisory firms for various financial analysis services. [The former employee] now works for a subcontractor of one of the awardees, and you inquire whether he would be prohibited from "speaking, corresponding, or meeting with [agency] employees" with respect to a particular task order that has been awarded under the IDIQ contract.

As you recognize, [the former employee's] proposed activity raises questions under both section 207(c) and section 207(a)(1). Section 207(c) prohibits him from representing another person before [the agency] in connection with any matter for one year after his separation. Section 207(a)(1) prohibits him from ever representing another person before the Government in connection with the same particular matter involving specific parties in which he participated personally and substantially for the Government. Certain issues discussed below are common to both restrictions, i.e., whether [the former employee's] communications and appearances would be on behalf of the United States and whether they would be made with the intent to influence the Government. A third issue, whether the current financial advisory services task order is the same particular

matter involving specific parties as a particular matter in which he participated for [the agency], pertains only to section 207(a)(1).

1. On Behalf of the United States

The post-employment restrictions relevant here do not apply to communications or appearances made "on behalf of . . . the United States." 18 U.S.C. § 207(a)(1); 18 U.S.C. § 207(c)(1). You indicate that [the former employee's] proposed communications and appearances would be made in the performance of [an agency] contract. Specifically, working as an employee of a subcontractor, [the former employee] would be providing "advice to the [the agency] on how [the agency] can best protect its interests" in connection with a specific bankruptcy proceeding. Therefore, you inquire whether the "fact that [the former employee's] work will be in support of [the agency] makes a difference" in the application of the post-employment restrictions. Essentially, the question is whether his communications and appearances in the course of performing the Government contract are actually made on behalf of the United States.

It is clear that a former employee does not act on behalf of the United States merely because the activity furthers the interests of the United States. See, e.g., OGE Informal Advisory Memorandum 04 x 11, at 5. In fact, OGE specifically has rejected the idea that a former employee is communicating or appearing on behalf of the United States merely because the individual is providing support services to an agency under a Government contract. See OGE Informal Advisory Letter 99 x 19; 68 *Federal Register* 7844, 7861-62 (February 18, 2003)(preamble to proposed post-employment rule). OGE has recognized that communications and appearances made during the performance of a Government contract are on behalf of the United States only if there is a specific agreement to provide representational services to the United States. The most obvious, although not the only, example would be a contract with an agency to provide it with legal representation. E.g., OGE Informal Advisory Letter 82 x 16; see generally 68 *Federal Register* at 7862. Nothing in the information provided by your office indicates that [the former employee] would be providing representational services to [the agency] under the financial advisory services contract. Therefore, it does not appear that [the former employee] can benefit from the statutory exclusion for communications or appearances made on behalf of the United States.

2. Intent to Influence

Both of the post-employment restrictions at issue here apply only to communications or appearances made with the "intent to influence" the Government. Generally speaking, communications or appearances are made with the intent to influence the Government if made for the purpose of seeking some discretionary Government action or influencing Government action in connection with a matter which involves an appreciable element of dispute. In this connection, we note that a member of your staff informed the OGE desk officer that [the former employee] would not be making any contacts with [the agency] concerning any billing disputes. That [the former employee] may refrain from such "business" contacts, however, does not mean that his contractual services will not involve the potential for any intent to influence the Government.

It is well-established in our opinions that communications and appearances made by a former employee in the course of performing a Government contract can involve an intent to influence the Government. See OGE Informal Advisory Letters 07 x 12; 06 x 7; 05 x 3; 03 x 6; 99 x 19; 95 x 10. As we have explained previously:

Employees sometimes assume, incorrectly, that section 207 applies only to communications about the award or modification or other major business aspects of a contract. However, section 207 also can apply to communications that a former employee makes while performing work under the contract, even if the contract specifically requires contractor personnel to communicate with the Government. Of course, certain routine or ministerial communications would not be covered, for example, making routine factual statements that are not potentially controversial. However, many communications made while the former employee is performing the contract may involve the intent to influence the Government, because the contractor and the Government have potentially differing views or interests on the matter being discussed.

OGE 06 x 7, Attachment at 11. The Office of Legal Counsel likewise has recognized that the restrictions of section 207 "should not be confined to major disputes, renegotiation, or the like" and that the potential for controversy between a contractor and the Government may arise in a variety of

contexts. 2 O.L.C. 313, 317 (1978). OLC has cited numerous such examples:

Requests for extensions of interim deadlines or work orders, nonroutine requests for instructions or information from the agency, suggestions about new directions on even relatively minor portions of the contract, and explanation or justification of the manner in which the contractor has proceeded or intends to proceed would all be barred; they involve at least potentially divergent views of the Government and the contractor on subsidiary issues or an implicit representation by the agent that the contractor is in compliance with contract requirements.

Id.

Your office has not provided details about the kinds of communications or appearances [the former employee] is expected to make in providing advisory services under the contract. We cannot opine, in the abstract, whether any such contacts would be limited to routine or ministerial matters or otherwise would not involve any potential for a divergence of interests between the Government and the contractor (or subcontractor). However, we would point out that OGE has indicated in the past that the performance of advisory services can involve the potential for intent to influence:

Depending on the circumstances, the provision of advice . . . could raise the potential for differing interests as between the Government and the support contractor, such as disputes about the adequacy of any options presented or different interests with respect to the difficulty or feasibility of developing certain options for the Government.

OGE 03 x 6; see also OGE 99 x 19 (communications made during performance of litigation support contract may involve intent to influence).¹ Therefore, we are not in a position to say that

¹ An example included in OGE 06 x 7 is illustrative:

Example: A Government economist participated personally and substantially in a contract that required the contractor to perform certain econometric studies. The contractor would like to hire him to work on performing further research under the same

none of [the former employee's] work under the contract could implicate section 207(a)(1) and (c).

3. *Same Particular Matter*

Finally, with respect to the permanent restriction of section 207(a)(1), you inquire whether the communications or appearances that [the former employee] would be making concern the same particular matter in which he participated personally and substantially as Director. See 5 C.F.R. § 2637.201(c)(4)(same particular matter must be involved). [The former employee] would be providing financial advisory services to [the agency] in connection with a task order under an IDIQ contract for financial advisory services. As Director, [the former employee] chaired the technical evaluation panel that reviewed the proposals submitted by financial advisory firms in response to the request for proposals for the IDIQ contract.

OGE typically views a contract, including an IDIQ contract, as a single particular matter involving specific parties. In compelling circumstances, OGE has entertained the argument that the individual task or delivery orders under certain large IDIQ contracts might be considered separate particular matters from each other. However, even if the IDIQ contract at issue here could be treated this way, [the former employee] would not benefit because he participated in the award of the overall IDIQ contract, not just an individual task order. In OGE's view, any former employee who participated personally and substantially in the award of the overall IDIQ contract has participated in any task or delivery orders under the contract, because each task or delivery order is subject to the terms and conditions of the

contract. The job would require the individual to meet frequently with agency personnel to answer any questions concerning the research that has been performed and to obtain instructions for further research. It is expected that these discussions sometimes may involve questions about the adequacy of research already performed or alternative approaches to performing future research. Such discussions, even though required under the contract, potentially could involve disputes between the contractor and the agency. The employee should be advised that section 207 could prevent him from meeting with agency employees as intended.

OGE 06 x 7, Attachment at 11-12.

overall contract. See, e.g., 48 C.F.R. § 52.216-18. Therefore, we would conclude that section 207(a)(1) bars [the former employee] from making any communications or appearances, with the intent to influence the Government, in connection with the task order.

If you have any questions concerning this matter, please contact my Office.

Sincerely,

Robert I. Cusick
Director