

## **Office of Government Ethics**

**91 x 33 -- 08/29/91**

### **Letter to an Agency Assistant General Counsel dated August 29, 1991**

This is in reply to your request that the Office of Government Ethics (OGE) review post-employment advice that [your agency] proposes to forward to a former [agency] employee. While serving in [two] positions, [the former employee] was involved in aspects of [a] system procurement conducted by the General Services Administration (GSA). [The former employee] requested advice from your office earlier this year to determine whether he is barred by 18 U.S.C. § 207(a) from contacting current executive branch officials concerning contracts for the system.

Using [the former employee's] request and [your agency] draft advice letter as a basis, OGE sought information from GSA concerning key factual issues.

While the Ethics Reform Act of 1989 significantly revised various provisions of 18 U.S.C. § 207, the key elements of the permanent restriction at issue in [the former employee's] case were essentially unchanged. The permanent restriction prohibits former employees from communicating to or appearing before a current employee of a department, agency, or Federal court, with the intent to influence, concerning any particular matter involving a specific party or parties in which he participated personally and substantially and in which the United States is a party or has a direct and substantial interest. The restriction does not bar self-representation, but only communications and appearances made on behalf of another person.

In his letter of March 13, 1991, [the former employee] argues that he is not barred by the permanent restriction from contacting current executive branch officials concerning [the system] contracts because his representations would not be in connection with a particular matter in which he was personally and substantially involved as a Federal employee. According to [the former employee's] analysis, the [system] procurement is divisible into at least two particular matters, with a new one commencing in connection with the issuance of [an] Amendment to the RFP (providing for dual vendors and mandatory agency participation). Thus, [the former employee] argues that if he did

not personally and substantially participate in the procurement as fundamentally changed with the advent of [the] Amendment, then he is not barred from representing persons before employees of the United States in connection with [the system] contracts.

While we note that GSA's Designated Agency Ethics Official is of the view that "the entire [system] is one particular matter," we agree that the analysis adopted in the draft advice letter obviates the need to determine whether the original RFP [first] issued and the amended version issued [later] are part of the same particular matter. The draft advice letter first reasons that "if [the] Amendment is a separate `particular matter,' it can trace its origin at least as far back as September-October 1987" when "GSA decided, and then announced, its intention to `redirect' the procurement to provide for dual vendors." The advice letter then identifies language in [the former employee's] request that indicates that [he] was personally and substantially involved in important decisions relating to [the] Amendment:

As your letter indicates, your involvement in the [system] procurement did not "virtually cease [ ]" until after GSA had decided to `redirect' the procurement. ("Once [an official] decided to withdraw the original RFP, I virtually ceased all involvement with the [system] program . . . . I terminated my participation as soon as [the agency] reviewed this GSA announcement to revise the RFP and start over.") Moreover, after that `redirection' decision, you continued to communicate with congressional staff concerning the [system] procurement, in particular with regard to the issue of voluntary vs. mandatory agency participation. These communications apparently ceased no earlier than [a date subsequent to the origin of the Amendment], when the conference report for the fiscal year continuing resolution directed GSA to require mandatory agency participation.

Once it is determined that [the former employee] personally and substantially participated in [the] Amendment, it is unnecessary to determine whether [the] Amendment marked the beginning of a new particular matter. Whether or not divisible, [the former employee] participated personally and substantially in the [system] procurement that resulted in the contracts concerning which he would now make post-employment communications or

appearances.

The draft [agency] advice letter also focuses on the point at which the [system] procurement involved "specific parties." The permanent restriction will not bar [the former employee's] post-employment communications or appearances unless the [system] procurement involved a specific party or parties at the time of his personal and substantial participation in the procurement. After reviewing relevant case law, OGE informal advisory memoranda, and regulatory guidance in 5 C.F.R. Part 2637, the draft advice letter concludes that the [system] procurement did not involve a specific party or parties "until vendors submitted bids in [the spring of 1988] in response to [the] Amendment," a time subsequent to [the former employee's] last involvement with the procurement. Based upon documentation forwarded to OGE by GSA and as outlined below, however, we disagree with this conclusion.

In our letter [to GSA], we requested that GSA "supply relevant facts that will assist [the agency] and this Office in determining whether specific parties were identified to the procurement prior to the receipt of proposals in [the spring of 1988]." In requesting this assistance, we quoted from two OGE informal advisory letters not summarized in the [agency] draft advice letter. We noted that OGE Informal Advisory Letter 80 x 4 indicates that "in certain types of procurement it might be possible to identify specific parties prior to the receipt of bids." We also quoted from Informal Advisory Letter 80 x 4 wherein we stated that "the question of when a particular matter involves a specific party is not to be determined mechanically by dates of contract documents, but more realistically by the degree of interest expressed and contacts made with . . . parties as contractual requirements evolve."

In responding to our [letter to GSA], [the] Designated Agency Ethics Official enclosed documents supporting her opinion that specific parties were identified to the [system] procurement "as early as [the spring of 1986]." A first set of documents consists of letters from various companies, forwarded to GSA in 1986 and early 1987, expressing an interest in the [system] procurement. The 1986 letter from [Corporation A], for example, says that the company thinks that GSA "is right on target with the [system] procurement in its present form, and look[s] forward to participating in a spirited competition." A second set of documents includes a copy of a GSA Board of Contract Appeals

decision in a protest filed by [Corporation B] [in 1987], alleging that two clauses in the [system] solicitation were violative of statute and regulation. The second set of documents also includes a copy of a Notice of Intervention filed by [Corporation A], wherein it identified itself as a prospective offeror to the [system] procurement. A third set of documents consists of several newspaper articles that identify potential [system] offerors as early as [the beginning of 1987].

We do not believe it necessary to pinpoint the exact date when a specific party or parties first became identified to the [system] procurement in order to provide guidance to [the former employee]. We are satisfied that a specific party became identified to the [system] procurement at least as early as [1987] when [Corporation B] filed its protest and [Corporation A] intervened. Since this is in advance of the time when [the former employee] last participated personally and substantially in the [system] procurement, this means that the "specific party" element of the permanent restriction is satisfied.

In summary, we are of the opinion that [the former employee] personally and substantially participated in the [system] procurement with respect to which proposals were received in [a time in 1988] and which ultimately resulted in the contracts concerning which he proposes now to represent others before the executive branch. We also are of the opinion that a specific party was identified to the [system] procurement prior to [the former employee's] last personal and substantial participation in that procurement. Consequently, we believe that [the former employee] should be advised that he is barred by the permanent restriction of 18 U.S.C. § 207 from contacting executive branch officials on behalf of other persons concerning [system] contracts.

Sincerely,

Stephen D. Potts  
Director