

Office of Government Ethics
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Letter to a Designated Agency Ethics Official
dated March 10, 1987

This is in response to your letter of February 4, 1987, in which you request a formal advisory opinion on the application of the post-employment restrictions of 18 U.S.C. § 207(a). Because the subject matter of this request fails to satisfy the criteria of 5 C.F.R. § 738.303 for the issuance of a formal advisory opinion, we will respond by way of this informal advisory letter.

According to your letter, an employee [of your Department] served on detail from [an agency within the Department] as a full-voting member of a Source Evaluation Board (SEB) from January 1986 to July 17, 1986. [Your Department] uses Source Evaluation Boards to develop contract requirements, evaluate bids received, and make recommendations concerning the award of major systems acquisition contracts. From January to June 30, 1986, the employee assisted in developing the RFP (request for proposals), cost estimates, and evaluation criteria for a particular procurement and, on June 30, [the Department] began receiving bids. From June 30 to July 7, the employee was on vacation. Upon his return, he and two other members of the SEB worked on a preliminary assessment of the financial resources of the bidders. The employee reviewed annual reports of the bidding companies and computed "current ratios," which eventually became part of a comprehensive analysis of the financial resources of the bidders. During this period, the employee had access to the bids, although he indicated that he did not use the information submitted by the bidders in preparing the current ratios. After the employee's resignation, other members of the SEB completed the analysis, which was put into final form in September 1986 and considered by the SEB in determining which to select. Although the contract has not yet been awarded, there are only two bids currently under consideration.

On July 17, 1986, the employee resigned from the SEB to return to his position with [an agency within the Department], where he has not taken any action relating to the procurement. The employee is now considering leaving the Government for a job that would require him to represent a non-governmental entity to [the Department] concerning the contract after it has been awarded.

The employee would work for a subcontractor who is likely to be selected by the successful bidder to perform work under the contract.

Based upon the facts you have presented, we conclude that the restrictions of 18 U.S.C. § 207(a) apply to prohibit the employee from engaging in representational activities before the Government on this contract. Under the post-employment statute at 18 U.S.C. § 207, there are two restrictions which could apply to the employee's activities, since as a GS-15 Program Analyst he would not be subject to the additional restrictions on Senior Employees. Section 207(a) prohibits a former executive branch employee from representing anyone other than the United States on a particular matter involving a specific party in which he or she had personally and substantially participated while a Government employee. The second restriction, section 207(b)(i), prohibits the former employee, for a period of two years following termination of Government service, from representing anyone other than the United States on a particular matter involving a specific party in which the United States has an interest and which was actually pending under the employee's official responsibility within a period of one year prior to the termination of such responsibility.

The central issue raised in your letter is whether the employee participated personally and substantially on the contract while a Government employee. You ask the following questions, which we will address in our discussion of the concept of substantial participation under section 207(a):

- 1) Under 18 U.S.C. § 207(a), does active participation in an SEB before bids are received preclude future representation of the winning contractor to the Government on matters relating to the contract?; and
- 2) Does participation in an SEB after bids are received preclude future representation of the winning contractor to the Government, even where the member's activities after bids are received are of short duration and of limited consequence to the evaluation process?

To trigger the proscription of section 207(a), the employee must have participated personally and substantially in a

particular matter involving specific parties. As a result, the answer to your first question is that, unless further action is taken by the employee after the matter becomes one involving a specific party, section 207(a) will not preclude the employee's future representations on the matter.

In your letter, you do not dispute that the contract was a particular matter involving specific parties during the time the employee was serving on the SEB. Example 2 of 5 C.F.R. § 737.5(c)(2) describes a situation similar to this case, indicating that the contract became a particular matter when the RFP was being formulated. It would ordinarily not become a particular matter involving a specific party or parties until initial proposals or indications of interest therein by contractors were first received. However, in certain types of procurement it might be possible to identify specific parties prior to the receipt of bids. Accordingly, the contract became a particular matter involving specific parties on June 30, when the bids were received, if not sooner.

In this case, the employee continued to participate in the matter after specific parties had been identified in the matter. According to your letter, the employee argues that his participation in the matter after the bids came in should not be considered to have been "substantial." However, such a determination must be made in the context of the policy behind the post-employment restrictions of section 207. As discussed at 5 C.F.R. § 737.1(c), that policy is to "bar certain acts by former Government employees which may reasonably give the appearance of making unfair use of prior Government employment and affiliations." The regulations at 5 C.F.R. § 737.1(c)(1) explain:

When a former Government employee who has been involved with a particular matter decides to act as the representative for another person on that matter, such "switching of sides" undermines confidence in the fairness of proceedings and creates the impression that personal influence, gained by Government affiliation, is decisive.

Because of the concern with the appearance of making unfair use of prior Government employment, in determining whether the employee's participation was substantial, it is important to consider the totality of the employee's activities relating to

the contract, both before the bids were received and after.

As defined by section 207(a), personal and substantial participation may be exercised "through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise." Under the regulations at 5 C.F.R. § 737.5(d), for the participation to be substantial, there must be "more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue." In addition, one's responsibility for the matter may play a role in determining the substantiality of the employee's participation. (See 5 C.F.R. § 737.5(d)(3)).

Looking at the totality of the employee's participation in the matter, we determine that it was substantial. From January to June 30, 1986, the employee assisted in the development of the RFP for the contract, including a statement of work, cost estimates, and evaluation criteria for the procurement. That participation went beyond involvement on an administrative or peripheral issue. As a member of the SEB, the employee would have made decisions, given advice, or made recommendations in performing those tasks. Therefore, the employee personally and substantially participated in the RFP for the contract.

For section 207(a) to apply, the participation during the period after specific parties are identified to the contract does not have to be, in and of itself, substantial. However, even after the bids were received, the employee's participation, while limited in duration, was substantial. It went beyond perfunctory involvement or involvement on an administrative or peripheral issue. The preparation of an analysis of the financial resources of the bidders was an essential component of the SEB's evaluation process. The comprehensive analysis prepared from the information the SEB members compiled was considered by the SEB in determining who should get the contract. In addition, as a full-voting member of the SEB, the employee, along with the other Board members, was responsible for developing contract requirements, evaluating bids received, and making recommendations concerning the awarding of the contract.

Because the employee was personally and substantially involved in a particular matter involving specific parties, the contract, during his Government service, he is prohibited from representing the contractor, subcontractor, or any other entity other than the United States before the [Department] or

any other Federal agency in matters involving the contract. Since section 207(a) restricts the employee's activity for the lifetime of the contract, it is not necessary to determine whether the matter was under his official responsibility for purposes of the two-year restriction of 18 U.S.C. § 207(b)(i).

Although section 207(a) applies, it covers only representational activities, which are attempts to influence the Government on behalf of someone other than the Government in an appearance or by other communication. However, according to 5 C.F.R. § 737.5(b)(5), communications that do not include an "intent to influence" are not prohibited. An example of a permissible activity that is cited in the regulation is a communication by a former employee not in connection with an adversarial proceeding, imparting purely factual information. Furthermore, section 737.5(b)(6) of 5 C.F.R. explains that section 207(a) does not prohibit a former employee from providing in-house assistance in connection with the representation of another person. As a result, the employee may go to work for the contractor or subcontractor, but he will have to limit his activities on behalf of that employer in order to avoid engaging in impermissible representations.

Sincerely,

David H. Martin
Director