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Letter to an Inspector General
dated September 19, 2005

We received a letter from [a United States] Senator, dated July 19, 2005, enclosing a copy of a 2005 Report of Investigation prepared by your office concerning alleged misconduct by [a former executive branch employee]. Specifically, your office investigated allegations that [the former employee], former [Organization Director], improperly represented his employer, [Corporation A], to the [Department] regarding certain aspects of [Program X] in violation of 18 U.S.C. § 207. In the investigative report (Report), your office concluded that [the former employee] did not violate either the lifetime post-employment restriction of 18 U.S.C. § 207(a)(1) or the two-year ban of 18 U.S.C. § 207(a)(2).

[The] Senator expressed concern about the Report's determination that the relevant particular matter involving specific parties did not exist until September 28, 2001, the date on which the [Development] contracts were awarded to [Corporation A] and [Corporation B]. Specifically, he questioned whether this determination may have incorrectly excluded other, earlier efforts and developments in [Program X]. In his letter, [the] Senator states that such a "narrow interpretation of the law could open the door for senior acquisition officials to lobby government officials on the same acquisition programs that they worked on as government officials." Accordingly, [the] Senator requested that the Office of Government Ethics (OGE) review the Report[1] and issue any guidance we deem appropriate to ensure that agencies and employees understand the requirements of section 207.

As an initial matter, although OGE has authority to provide interpretive assistance concerning 18 U.S.C. § 207, OGE is not authorized to make a determination that an individual has violated 18 U.S.C. § 207 or any other criminal conflict of

[1] [The] Senator's letter enclosed a copy of the Report, but did not enclose any of the exhibits to the Report.

interest law. *See* Ethics in Government Act, 5 U.S.C. app. § 402(f)(5). Moreover, individual agencies ordinarily have the primary responsibility for providing post-employment advice to their former employees and, indeed, an agency's opinion regarding the application of 18 U.S.C. § 207 to one of its former employees is entitled to weight. *CACI, Inc.-Federal v. United States*, 719 F.2d 1567, 1576 (Fed. Cir. 1983). Nonetheless, in light of the inherent difficulties involved in post-employment questions in complex scenarios such as these, we reviewed the Report and would like to note a few considerations that may have a bearing on your analyses in future cases of this type, as well as on any further analyses you may conduct in regard to the instant case.

Our understanding of the facts concerning [Program X] and [the former employee's] involvement therein is based primarily on the facts set forth in the Report.[2] Accordingly, we assume the facts stated therein and have discussed the relevant facts only to the extent necessary to identify certain legal issues.

REPORT FINDINGS

Your investigation found that [the former employee] represented [Corporation A] to the [Department] concerning the [Development] contract as of November 7, 2002. Your office determined that the [Development] contracts had not yet become a particular matter involving specific parties before [the former employee] recused himself from matters involving [Corporation A] and [Corporation C] (on June 14, 2001), and that there was no evidence of his personal and substantial participation in [Program X] after the [Development] contracts became a particular matter involving specific parties, defined either by the August 10, 2001, contractors' response date to the RFP or by the September 28, 2001, [Development] contract award date.[3]

[2] We also spoke with [Department] ethics officials, and obtained a copy of [an ethics official's] legal analysis concerning the application of 18 U.S.C. § 207 to [the former employee].

[3] We note that the Report at times declines to state with specificity when the [Development] process became a particular matter involving parties. Although [the ethics official] concluded that the "appropriate date" was September 28, 2001, the date the [Development] contracts were awarded (Report, p. 14), she acknowledged that "a valid argument could be made" that the [Development] contract became a particular matter when [3]
(continued)

Based on these determinations, the Report concluded that there was no violation of section 207(a)(1). Report, p. 15.

Your office also found that [the former employee] did not violate 18 U.S.C. § 207(a)(2) because he no longer had "official responsibility" as [Organization Director] when the [Development] contract became a particular matter involving parties. The basis for that conclusion was the factual finding that [the former employee's] successor replaced [the former employee] on July 26, 2001, which was before the [Development] contract was awarded.

ANALYSIS

Addressing the legal issues in this situation involves a multi-part inquiry: (1) When did certain matters first become particular matters involving specific parties? Specifically, did the [Development] contracts (or prospective contracts) become a particular matter involving specific parties while [the former employee] either was participating in the matter or had official responsibility for such matter? (2) Which particular matters involving specific parties should be viewed as the same matter on which [the former employee] represented [Corporation A]? (3) Did [the former employee] participate personally and substantially in any of the relevant particular matters involving specific parties? (4) Did [the former employee] have "official responsibility" for the relevant particular matters involving specific parties during his last year of service? The answers to these questions are interrelated and are critical in determining the applicability of both sections 207(a)(1) and 207(a)(2).

A. When do matters become particular matters involving specific parties?

As you know, sections 207(a)(1) and (a)(2) of title 18 of the United States Code restrict a former employee from

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[3] (continued) the RFP was published on June 29, 2001. *Id.* The Report frequently referred to the critical date as being defined either by August 10, 2001, the day the contractors' responses to the RFP were due, or September 28, 2001, the [Development] contract award date (*see, e.g.*, Report, p. 15). Yet other times the Report concluded that the [Development] contract did not become a particular matter until September 28, 2001. *See, e.g.*, Report, p. 20.

communicating to or appearing before the Government on behalf of any other person, with the intent to influence the Government concerning a particular matter involving specific parties, either in which the former employee personally and substantially participated as a Government employee, or where such matter was under his official responsibility during the last year of Government service. Section 207(a)(1) bars such representation permanently, whereas the restriction of 207(a)(2) only applies for two years.

Determining the point when a matter first becomes a "particular matter involving specific parties" depends on the facts. In cases where the Government is pursuing a multi-year, multi-phase, multi-contract procurement program, it is not always easy to determine what parts of the process may constitute a particular matter or matters involving specific parties and exactly when they do so. Here, [Program X] appears to have been particularized into several phases: the [Analysis]; the [Development] phase; and the [Demonstration] phase. Each of these phases ultimately resulted in one or more discrete contracts. Thus, in cases such as this, one ordinarily would inquire when the phases involving the [Analysis], the [Development] and the [Demonstration] contracts became particular matters involving specific parties. (For the moment, we leave aside the issue of whether any of these different contracts should be deemed the same particular matter involving specific parties.)

1. [Analysis] Contracts

According to the Report, a "formal [Analysis] was the genesis of [Program X]." Report, p. 11. The [Department] awarded four contracts for concept development and [Analysis] for [certain products] to [Corporation B], [Corporation A], [Corporation C] and [Corporation D] in 1999. The [Analysis] contracts resulted in 22 concepts capturing potential technologies and characteristics applicable to [the product]. The [Department] completed the [Analysis] of these 22 concepts in October of 2000. By 2001, the [Department] was identifying requirements and developing an acquisition strategy for the [product], which had became known as [Program X].

The Report concluded that the [Analysis] contracts were not a particular matter. Report, p. 12. The basis for this conclusion was the factual determination that the [Analysis] contracts were limited to proposing alternative technologies and characteristics applicable to [certain products]. *Id.* Relying

on Example 1 of 5 C.F.R. § 2637.201(c)(2), the Report concluded that the [Analysis] contracts were "technical matters," and therefore they did not constitute a particular matter.

We believe this conclusion is inconsistent with section 207(a) and the interpretive regulations. The point that Example 1 of 5 C.F.R. § 2637.201(c)(2)[4] illustrates is that an employee who participates in feasibility studies or in other technical work done *before* parties are identified for a specific procurement may not be barred from engaging in representational activities after leaving Government service. This is because there generally are not specific parties identified during the early stages of technical proposals and feasibility studies. Nothing in the example, however, suggests that a contract to perform a feasibility study is not, in and of itself, a particular matter involving specific parties (even if it may be a separate particular matter from the ultimate contract to implement the program).

Even though the [Analysis] phase was an early stage in the development of [Program X], the [Analysis] contracts themselves did constitute particular matters involving specific parties. In fact, contracts constitute the quintessential particular matters involving specific parties. *See, e.g.*, 18 U.S.C. § 207(i)(3); 5 C.F.R. §§ 2637.102(a)(7) and 2637.201(c). The fact that these contracts resulted in proposed technical approaches to the [product] does not negate the fact that the [Analysis] contracts *per se* were specific contracts with identifiable parties and, as such, should be viewed as particular matters involving specific parties.

However, the fact that the [Analysis] contracts were party matters would not alter the ultimate conclusion about [the former employee] unless the [Analysis] contracts were the *same* particular matter involving specific parties as the matter on which [the former employee] began representing [Corporation A] in late 2002. As explained below, we do not see any facts in

[4] Section 207 was amended by the Ethics Reform Act of 1989, Pub. L. No. 101-194 (November 30, 1989). These amendments became effective on January 1, 1991, and apply to all employees retiring from Government on or after that date. The regulations at 5 C.F.R. part 2637 predate these amendments. However, part 2637 still provides useful guidance concerning those elements of section 207 that remain essentially unchanged from the prior version of the statute.

the Report that suggest that [the former employee] engaged in post-representational activities with respect to the [Analysis] contracts, and it would appear that the [Development] contracts appropriately could be viewed as new particular matters involving specific parties. Nevertheless, we think it is important, at least for future purposes, to emphasize OGE's view that even contracts to perform feasibility and other preliminary studies are party matters.

2. [Development] Contracts

The next inquiry would be when the [Development] contracts (and the preliminary steps leading to the [Development] contracts) became a particular matter involving specific parties. The Report determined that the relevant particular matter involving specific parties was the [Development] contracts and that this matter did not exist until September 28, 2001, the date on which the [Development] contracts were awarded to [Corporation A] and [Corporation B]. The Report also stated that a valid argument could be made that the [Development] contract became a "particular matter" when the Request for Proposals was published on June 29, 2001. Report, p. 14. We believe that this focus is somewhat too narrow, as it does not appear to consider whether expressions of interest even prior to the RFP may have been sufficient to identify parties to the procurement.

Section 207(a) can apply to participation even in the preliminary or informal stages of a particular contract. *See* 2 Op. O.L.C. 313 (1978) (an employee was deemed to have participated personally and substantially in connection with a contract even though he participated only in the inchoate stage of what would later develop into a contract). In fact, "much of the work with respect to a particular matter is accomplished before the matter reaches its final stage." *Id.* at 315.

OGE opinions also support the view that "a contract does not have to have been entered into, or even the request for proposals formulated, for a particular matter involving specific parties to exist." OGE Informal Advisory Letter 99 x 23. With matters such as contracts, ordinarily specific parties are first identified when initial proposals or indications of interest are received by the Government. *See* 5 C.F.R. § 2637.201(c)(2), Example 2. *See also* OGE Informal Advisory Letter 90 x 12 (where a number of steps toward a procurement had been taken and parties had affirmatively expressed interest, the matter was viewed as being a particular matter involving specific parties);

OGE Informal Advisory Letter 96 x 21 (a program became a particular matter involving specific parties when a party was identifiable and there was a proposal related to an ongoing agreement between the Government and the party, even though a formal agreement between the parties had yet to be received).

In our view, the Report does not fully explore the facts relevant to when the [Development] first received sufficient expressions of interest to identify prospective contractors who might be awarded either the [Development] contract (or the ultimate [Demonstration] contract). The Report indicates that [Corporation B], [Corporation A] and [Corporation C] expressed interest in participating in [Program X] at the February 22, 2001, Industry Day. In addition, potential contractors met with [Development] representatives from February 22 through June 29, 2001, to discuss requirements. In cases such as this, it is appropriate to explore whether these other contacts with potential bidders prior to the RFP or the contract award are sufficient indications of interest to conclude that the procurement became a particular matter involving specific parties.

3. *[Demonstration] Contract*

There was little discussion in the Report about when the [Demonstration] matter began. The Report notes that the primary objective of the [Development] contracts was to determine which of the two [Development] contractors should be awarded the follow-on sole source [Demonstration] contract (Report, p. 3). Once the [Development] contracts were awarded, it seems that the [Demonstration] contractor essentially would be selected as a result of a rolling, head-to-head competition between the two [Development] contractors. Accordingly, there is also the issue of whether the [Demonstration] contract was just a continuation of the [Development] contract matter, which we discuss below, under Section B. If the [Demonstration] contract were viewed as a continuation of the [Development] contracts, then the matter first involved parties when the [Development] contracts did.

Even if the [Demonstration] contract were viewed as a new matter, there may be issues as to how early it first involved parties. "[I]n unusual circumstances[,] a party may be considered to be identified to a particular matter prior to the receipt of . . . a proposal or indication of interest." OGE 96 x 21. In OGE 96 x 21, we concluded that such "unusual circumstances" were present because "[u]nlike a typical contract or grant application, the Federal program is an outgrowth of an

ongoing agreement" between the Government and the identified party. Similarly, sole source procurements may involve specific parties even before an expression of interest in the contract is received where, for example, the prospective sole source contractor has been identified by the Government. Moreover, in the present case, it might even be possible to view the ongoing participation of the two [Development] contractors as involving expressions of interest in becoming the eventual [Demonstration] award winner.

Thus, in future cases or in any further analysis you may do with respect to the current case, your office might want to inquire whether "other circumstances indicate[d] that [specific parties had] an obvious and distinct stake" in participating in the ultimate development contract (*see* OGE Informal Advisory Letter 02 x 5), or whether "unusual circumstances" were present such that a party was identified even prior to the receipt of any indication of interest (*see* OGE 96 x 21).

B. Which particular matters involving specific parties should be viewed as the same matters?

Determining when the various contracts and related efforts became particular matters involving specific parties is related to the inquiry of whether the [Development] contract on which [the former employee] ultimately represented [Corporation A] is the *same* particular matter in which he either participated personally and substantially or had official responsibility for while [Organization Director]. For purposes of section 207(a), the same particular matter must be involved both at the time that the Government employee acts in an official capacity and at the time in question after Government service, although the same particular matter may continue in another form or in part. *See* 5 C.F.R. § 2637.201(c)(4).

In the present case, it is logical to examine whether the [Analysis] contracts were the same particular matter involving specific parties as the [Development] and/or [Demonstration] contracts. Ordinarily, separate contracts are considered separate particular matters involving specific parties. *See* OGE 02 x 5. *See also* 5 C.F.R. § 2637.201(c)(4) (Example 1) (suggesting that "follow on" competitively sourced contract advancing the same objective as original contract would be new particular matter where, six years after employee terminated Government employment, the technology and personnel had changed such that a new contract would be significantly different). Moreover, a Government employee who participates in a

feasibility study or contract often may be able to make representations to the Government with respect to another contract to implement the project. *See* 5 C.F.R. § 2637.201(c)(2)(Example 1) (an employee who participated in the award of a contract to Z Company, the purpose of which was to propose alternative technical approaches, could leave the Government and represent Q Company in connection with a contract to manufacture one of the systems suggested by Z Company). Similarly, where there are fundamental differences between the scope and approach of the contracts, two procurements may not be viewed as the same particular matter. In *Caci*, 719 F.2d at 1576, the Court of Appeals for the Federal Circuit determined that the later procurement was "broader in scope, different in concept, and incorporate[d] different features" than the prior procurement. *Id.*

Based on our understanding of [Program X], it appears appropriate to view the [Analysis] contracts as different particular matters involving specific parties from either the [Development] or [Demonstration] contracts. It is our understanding that the goal of the [Analysis] contracts was to propose many alternative technical approaches from several different sources and perspectives, whereas the subsequent [Development] and [Demonstration] contracts were to design and develop the [product] and eventually execute the remainder of [Program X]. It appears that the purpose and scope of the [Development] and [Demonstration] contracts were substantially different from those of the [Analysis] contracts. Whereas the [Analysis] contracts resulted in 22 proposed alternatives, the subsequent contracts narrowed down the requirements and technical design aspects of [Program X]. The objective of the [Analysis] contracts was limited to proposing technical approaches; in contrast, the [Development] and [Demonstration] contracts were to design, test, evaluate and implement the remainder of [Program X] systems. In sum, we think the [Analysis] contracts were fundamentally different enough that an employee would have been permitted to represent someone on the substantially different [Development] and [Demonstration] contracts, especially in light of the usual presumption that successive contracts are separate matters.

The next question is whether the [Development] contracts and the [Demonstration] contract should be viewed as the same particular matter involving specific parties. We note that there is little discussion in the Report about whether [the former employee] represented [Corporation A] before the [Department] concerning the [Demonstration] contract and whether

the [Demonstration] contract should be viewed as part of the same particular matter involving specific parties as was pending when [the former employee] personally and substantially participated in or had official responsibility for [Program X]. It is not apparent that the Report considered whether the [Development] contracts were so closely integrated with the ultimate [Demonstration] contract that they should be viewed as part of the same overall procurement.

Although follow-on contracts are generally viewed as separate matters, if there is some indication that one contract directly contemplated the other contract or if there are other circumstances indicating that two contracts are really part of the same proceeding involving specific parties, then two contracts may be viewed as the same particular matter. *See* OGE Informal Advisory Letter 80 x 9, n.15; 5 C.F.R. § 2637.201(c)(4)(example 1).

According to the Report, the [Development] process used a "rolling downselect" to choose which contractor would proceed to development and production. Report, p. 3. In fact, the "primary objective" of the [Development] contracts was to determine which of the two contractors should be awarded the follow-on sole source system. *Id.* This would suggest some question as to whether the rolling downselect process was meant not only to develop the technology, but also to be an integral part of the competition to select which of the two contractors would essentially win the sole source contract. We recognize the difficulty of this legal issue under the circumstances of this program, but we raise it in the interest of a complete assessment of this case or in any similar cases in the future.

C. Was there personal and substantial participation in the relevant matters?

In general, the Report provides very little detail about [the former employee's] actual duties and efforts with regard to [Program X]. The Report notes that [the former employee] participated in a [Program X] Acquisition Strategy Panel meeting on April 10, 2001. The Report further states that there was "no evidence that he was personally and substantially involved in [Program X] after the June 29, 2001, publication [by the [Organization Director]] of the draft [product] Requirements Document." Report, p. 15. However, the Report provides few details about exactly what other substantial actions or decisions, if any, [the former employee] may have taken with

regard to any of the particular matters involving specific parties.

For example, there is little detail about [the former employee's] actions, decisions and other efforts concerning the [Development] matter. If it were determined that the matter first involved parties as of the February 22, 2001, Industry Day, then close attention should be paid to everything [the former employee] did on and after February 22. Significantly, consideration of [the former employee's] actions in the numerous meetings, deliberations, drafting of requirements and other efforts in the steps leading up to the [Development] contracts could facilitate the analysis of whether he participated personally and substantially in the [Development] contract matter. We do note the participation by [the former employee], the [Organization Director], in the April Acquisition Strategy Panel meeting, which was chaired by the then-[Demonstration] Source Selection Authority, and we would think that this at least raises a question about whether his participation may have been personal and substantial.

Similarly, from February 22 to June 29, 2001, [Organization Director] representatives met with potential [Development] contractors to discuss requirements. It is not clear whether [the former employee] personally met with any potential contractors during this time, or actively supervised subordinates concerning such meetings (or other aspects of the [Development] matter). In this connection, we note that an employee also may participate in a matter by means of direct and active supervision of others. *See* 5 C.F.R. 2637.201(d)(1).

Finally, because the Report opted not to analyze the [Demonstration] contract (Report, p. 11), there was no discussion of [the former employee's] involvement in the various stages related to the [Demonstration] contract. Of course, if the [Demonstration] contract were deemed part of the same matter involving specific parties as the [Development] contracts, then it appears that [the former employee] would have participated personally and substantially to the same extent as he did or did not in the [Development] contracts matter.

D. Official Responsibility under 18 U.S.C. § 207(a)(2)

Another question to consider is whether [the former employee] was barred by 18 U.S.C. § 207(a)(2) from representing [Corporation A] before the [Department] regarding the

[Development] contract within two years after terminating his service in the [Department].

As you know, 18 U.S.C. § 207(a)(2) bars a former executive branch employee from representing another person in connection with a particular matter involving specific parties that was pending under his "official responsibility" during his final year of Government service. "Official responsibility" is defined in 18 U.S.C. § 202(b) as the "direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." Under OGE regulations, the scope of an employee's official responsibility is generally determined by those areas assigned by statute, regulation, Executive order, job description or delegation of authority. 5 C.F.R. § 2637.202(b)(2).

[The former employee] appears to have had official responsibility for [Program X] before he went on terminal leave. Moreover, as your Report correctly observed, an employee's mere terminal leave does not affect his official responsibility. *See* OGE Informal Advisory Letter 98 x 20 (section 207(a)(2) barred former employee's proposed representation of a client in connection with a particular matter that was not pending in his agency until after he had gone on terminal leave but was pending prior to his leaving Government employment). Thus, if [the former employee] had simply gone on terminal leave, without any formal termination of responsibility for [Program X], he would have been within the reach of 207(a)(2).

Official responsibility for a matter can be terminated where there is a formal modification of an employee's responsibilities, such as by a change in the employee's position description. The critical issue then is whether [the former employee's] official responsibility for [Program X] was formally terminated. According to the Report, [the former employee] had his retirement ceremony and [his successor] assumed official responsibility as [Organization Director] on July 26, 2001. In addition, the Report refers to [the successor] as [the former employee's] "designated successor" and his "official successor." However, it is unclear whether the position of [Organization Director] was formally filled by [the successor] as of July 26, 2001, which is a critical determination. *See* OGE 98 x 20 (personnel rules prevented the Government from filling the employee's position during the employee's terminal leave). Moreover, the Report is silent as to what actually was [the

former employee's] position description during his terminal leave. In short, additional details about whether the [Organization Director] position was formally filled and the scope of [the former employee's] position description during terminal leave would help strengthen the section 207(a)(2) analysis and, in turn, the Report's conclusion.

Given the complexity and seriousness of the post-employment restrictions, we routinely recommend that Inspectors General seek any assistance they need in applying the restrictions to the facts of a particular investigation. The Report indicates that your office did contact the [Department] ethics office and obtained expert advice during the course of the investigation. We believe such cooperation and dialogue is an effective and commendable course of action. Please also feel free to contact this Office for advice as necessary; we often assist Inspectors General and others in analyzing how the criminal conflict of interest laws apply. Another alternative that you might find helpful is to contact the United States Attorney's Office or the Office of Public Integrity at the United States Department of Justice, both of which have considerable experience in post-employment cases.

We hope that this information will be helpful to you in future cases or in any re-examination that you may do with regard to [the former employee]. If you have any questions regarding this matter, please do not hesitate to contact my Office.

Sincerely,

Marilyn L. Glynn
General Counsel