

Office of Government Ethics
85 x 12 -- 08/29/85

Letter to a Member of Congress dated August 29, 1985

This is in response to your letter of August 2, 1985, in which you requested information on behalf of a constituent regarding the impact of the Federal conflict of interest statutes and regulations on an outside business activity your constituent would like to pursue. According to your letter, your constituent is employed by [an agency within a Department]. In addition, he owns his own business and is interested in having his business bid on a contract to operate [his own agency's program at a specific facility]. He would like to know whether bidding on the contract would create a conflict of interest and whether the situation would be different if he were employed by any agency of the Federal Government other than [his present agency]. Based upon our examination of the information you provided us, we find that your constituent's bidding on [this] contract poses conflict of interest problems under the criminal statutes and the agency's standards of conduct regulations. The restrictions are substantially the same whether he is employed by [his present agency] or another agency of the Federal Government.

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 the Office of Personnel Management's (OPM's) regulations at 5 C.F.R. Part 735. The provision on outside employment, section 735.203, prohibits an employee from engaging in any outside employment that is "not compatible with the full and proper discharge of the duties and responsibilities of his Government employment." The regulation defines incompatible activities to include the following:

- (1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest; or

- (2) Outside employment which tends to impair his mental or physical capacity to perform his Government duties and responsibilities in an acceptable manner.

Each agency has issued its own regulations on outside employment, based upon OPM's model regulations. Some agencies require their employees to receive written approval from the agency before engaging in outside employment. Agencies also differ in the types of outside employment they will authorize. As a result, your constituent should contact the Designated Agency Ethics Official (DAEO) at the [parent] Department for a determination as to whether this proposed outside employment is permissible under the agency's regulations.

In addition to the agency's regulations on outside employment, there are two criminal conflict of interest statutes that bear on your constituent's private business activities with the Government. In your constituent's situation, the relevant statutes are 18 U.S.C. §§ 203 and 205. Section 203 prohibits a Government employee from receiving any 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 an interest. Section 205 prohibits a Government employee from personally representing anyone, with or without compensation, before a Federal Department, agency, or employee. Therefore, your constituent may not make any representations on behalf of his company to a Federal agency or employee in the course of getting or performing the contract.

Section 203 would have an impact on the manner in which your constituent would be paid for his services to his company. It prohibits your constituent from receiving compensation based on anyone's representation to the Federal Government. That statute would prohibit him from receiving compensation from his business that is contingent on getting or performing the Government contract. Since he or other employees of his company would be making representations to [his agency] in the course of getting or performing the contract, your constituent's compensation from that contract would be based upon their representations to the Government, which is prohibited under section 203. On the other hand, he may be a salaried employee or receive compensation on an hourly basis for his services to his company that is not contingent on the Federal source of funding, as long as he does not personally make any representations to the Government.

For the purposes of the criminal statutes, a representation can be either oral or written. For example, if your constituent were to write a report or other paper which the business intended to submit, the document could not be submitted under his name. That would constitute a written representation by him on his company's behalf. Likewise, your constituent may not speak to an employee at [his agency] about the contract on behalf of his company beyond the mere exchange of factual information. He may, however, identify himself as being associated with the company for such things as being able to gain admittance to the facility where the contract is being performed, and he may seek any public documents necessary to complete his work.

As interpreted by the Department of Justice, these statutes allow an exemption for an employee's representation of himself before the Government. However, this right of self-representation does not extend to the representation of a distinct legal entity such as a corporation. As a result, if your constituent's business is set up as a corporation or in some other legal form, he would not be entitled to the self-representation exemption from the criminal statutes. If, on the other hand, your constituent is a sole proprietor, his activities before the Government related to the contract might be permissible, although it is not clear that such activities would be within the self representation exemption. Even if the self-representation exemption is found to apply, your constituent remains subject to the limitations on outside employment contained in the regulations.

Beyond the prohibitions contained in the criminal conflict of interest statutes and the standards of conduct regulations, the Federal Acquisition Regulations (FAR) contain a prohibition that might serve as a barrier to your constituent's contracting with the Government. Section 3-601 of the FAR prohibits 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 the agency fails to uncover any conflicts of interest and decides to approve the outside activity, your constituent's activities with the Government would be constrained by the prohibition against the Government contracting with its own employees.

I hope your constituent finds this information helpful. If he has additional questions, he should contact this Office at 202-632-0569.

Sincerely,

David H. Martin
Director