

Office of Government Ethics

86 x 15 -- 11/25/86

Letter to a Private Attorney dated November 25, 1986

We have received your letters of October 28, 1986, and your follow-up letter of November 4, 1986, requesting an opinion as to the applicability of the post employment provisions of the Ethics in Government Act to the activities of a former Government employee who may be hired by your client to provide technical and consulting advice.

You relate that your client is in the process of bidding on a General Services Administration (GSA) contract for the procurement of transportation auditing services. The proposed contract is a negotiable fixed price services contract. Under this contract, the successful offeror will audit payments made by various Federal agencies to [companies for a specific kind of service provided the agencies]. The proposed contract also includes certain auxiliary services involving research, preparation and dispatch of notices of overcharge and notices of indebtedness, preparation of project responses, development and maintenance of specified records, and sorting, storing and forwarding of [specific] accounts.

You advise that various Federal agencies have previously contracted separately with the [companies] for [these] services. Pursuant to applicable law, the bills for such services are paid by each agency and automatically forwarded to GSA for auditing. Under the GSA Request for Proposals (RFP's), GSA will be contracting with at least three private sector entities to audit these bills to assure that the Government paid the lowest charges under applicable tariffs.

Your client has approached a former [Government employee] regarding a job. [The former employee] would provide [your client] with technical and consulting advice and, if [your client] is awarded the contract, [the former employee] would represent the company before the GSA concerning the auditing services contract.

While in the Government, including the one year period prior to the termination of his employment, [the now former employee] served in a GS-15 position and was responsible for [programs for

the worldwide acquisition of these services] for a Department. Specifically, he was in charge of obtaining the services of [the providing companies], funding and paying of all [departmental] bills [for these services], and filing loss and damage claims for the [Department]. You state that, as a matter of law, [the now former employee] had no discretion with regard to the referral of bills to GSA for audit, nor did he have any authority to challenge the accuracy of the bills submitted to and paid by his agency. However, he would, from time to time, respond to technical inquiries from GSA as to the type of goods shipped, loading procedures used, and methods of shipment employed. In this capacity, he would occasionally meet and confer with GSA officials and would also speak with them via telephone.

You now seek a determination by our Office as to whether [the former employee] "participated personally and substantially," within the meaning of 18 U.S.C. § 207(a), in the matter which is to be the subject of his representation before GSA. Further, you ask whether the matter may be deemed to have been under his "official responsibility" within the meaning of 18 U.S.C. § 207(b)(i), even if he did not personally and substantially participate in the matter.¹

To trigger the proscriptions contained in 18 U.S.C. §§ 207(a) or (b)(i), the matter involved must have been a particular matter involving a specific party or parties while the employee was with the Government. (Emphasis added). According to Example 2 under 5 C.F.R. § 737.5(c)(2), the contract to provide audit services became a particular matter when the RFP was being formulated. However, it would ordinarily not become one involving a specific party until at least one contractor's initial proposal or some indication of interest from a contractor was first received. To obtain necessary additional information on this issue, a member of my staff spoke with personnel at GSA and the [former employee's former Department]. According to GSA, the RFP went out in June 1986 and closed on August 7, 1986. That closing date was the deadline for responses from parties interested in performing under the contract. Since all responses had to be received by August 7, the contract was a "particular matter involving specific parties" as of that date, if not earlier, because specific parties were identified to the proposal.

Since we have determined that the GSA contract was the type of matter covered by section 207, the next issue is whether [the former employee] participated "personally and substantially" on

the same contract while a Government employee. According to your letter, [the former employee] was not in any way involved with the GSA Request for Proposals described above. He never had any discussions with GSA officials concerning this RFP, either during the planning or pre-solicitation stage of GSA's procurement process or after GSA had issued the RFP. This is confirmed by the GSA employee in charge of the matter, who indicated that no one at the [Department who had employed him] was involved in this matter. In the past, GSA has had similar contracts for audits services, but GSA indicated that [the former employee] has not been involved in the contracting process for any of the earlier contracts either. Furthermore, the mere submission of bills [for the agency's acquisition of these services] to GSA, under the new contract or any earlier one, would not normally be considered personal and substantial participation in the particular matter (the fixed price contract). According to 5 C.F.R. § 737.5(d), personal and substantial participation requires more than involvement on an administrative or peripheral issue. As a result, the lifetime restriction on engaging in representational activities on particular matters in which the employee participated personally and substantially would not apply to [the former employee] with regard to the particular GSA contract in question.

The remaining inquiry under section 207(b)(i) is whether the GSA contract was under [the former employee's] official responsibility during his last year in his position [at his Department]. Official responsibility is defined in 18 U.S.C. § 202 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." As discussed earlier in this letter, the GSA contract was a particular matter involving specific parties by August 7, 1986, [and] it was pending during [the former employee's] last year with the [Department]. However, GSA indicated that this matter would not have required input from other agencies, since it was a GSA solicitation to which private companies were responding. Furthermore, the [Department] confirmed that this was not a matter that would have been under the official responsibility of any employee in that organization [in which the former employee had served]. [The employee's] performance of non-discretionary actions with regard to the bills for [used] services and his responses to GSA's technical inquiries would not rise to the level of official responsibility for the contract. His supervision of a person who carried out those functions for his

office would also fail to meet that standard. In neither case would [the former employee] have administrative or operating authority to direct Government action under the contract. Accordingly, the two-year restriction of section 207(b)(i) does not apply in this case.

Based upon the preceding facts and analysis, [the former employee] is not restricted under 18 U.S.C. § 207 from representing [your client] before the GSA on this particular contract for transportation audits services.

Sincerely,

Donald E. Campbell
Deputy Director

1 Your submission suggests, and we agree, that the former Government employee is not a Senior Employee within the meaning of 5 C.F.R. § 737.25. Pursuant to 18 U.S.C. § 207(d) only employees paid at the Executive Level, or those paid at a rate equal to or greater than GS-17 or the General Schedule prescribed by section 5332 of title 5, United States Code, and designated by the Director, OGE, are subject to the one year "cooling off" period prescribed by 18 U.S.C. §§ 207(b)(ii) or (c).