

Office of Government Ethics

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Letter to an Attorney for a Private Corporation dated June 13, 1980

This [advice] is rendered in response to your letter request of November 7, 1979, as further refined by the opinion of the General Counsel, [of a] Department, letter of February 14, 1980, and your letter of March 17, 1980.

In this opinion, we have occasion to decide whether or not a former Government employee who is now an employee of [a corporation] is barred from representing [the corporation] in conjunction with any of the four phases of [a] Government program relating to the delivery of [certain] aircraft to [a foreign air force]. More specifically, we are called on to decide whether the [third phase of this Government] program, "Phase III," was a "particular matter involving a specific party or parties" at the time the former Government employee worked on it [in his former Department]¹ and whether or not his participation in the matter rose to the level of "personal and substantial" participation within the meaning of 18 U.S.C. § 207. We conclude that at the time your employee worked on the [third phase of the] program, it was a particular matter involving specific parties and that his work constituted "personal and substantial" participation so as to trigger the restrictions of 18 U.S.C. § 207 (Pub. L. No. 87-849).² We further conclude, however, for the reasons set forth below, that such findings do not necessarily preclude all contacts or communications by the former Government employee on behalf of [the corporation] as those contacts or communications relate to the [third phase of the] program or contracts flowing therefrom. We further conclude that the former employee would not be barred from acting as [the corporation's] agent in regard to the other three phases of [this particular program].

Facts

[The former Government employee involved] is currently an employee of [a corporation]. Prior to his retirement, effective May 1, 1979, he served as a Staff Assistant to the Chief of the Acquisition Division [of a subordinate command within a Department]. In early 1978, [the employee] was designated the [Department's] foreign military sales monitor, a term synonymous with program manager, for one phase of [a] four phase [Government]

program. In that capacity he was responsible for developing and recommending an appropriate technical support plan for [certain] aircraft subsequent to their delivery to the [foreign air force]. The program for technical support of the aircraft in [the foreign country] has been designated as [Phase III of this] program.

The [complete] program is a comprehensive program whereby the United States, through the agencies of [the former employee's] Department and subject to certain requisite approvals of [another] Department and the United States Congress, plans to equip [a particular foreign air force] with 60 aircraft and necessary support by way of aircraft spare parts, ground support equipment, training and other services so as to enable the [foreign air force] to effectively utilize the aircraft. The program is divided into four phases. [Phase I] covers the actual sale and furnishing of 60 aircraft together with related support hardware and data. [Phase II] covers the construction at several sites in [the foreign country] of aircraft hangars and associated air base improvements. [Phase III] involves the in-country maintenance of the aircraft in [the foreign country] for a period of approximately three years and the training of [that country's] personnel in aircraft maintenance and repair so that at the end of the three year period the aircraft can be maintained and repaired in large part by [the country's own] personnel. [Phase IV] consists of pilot training of [the foreign country's own] pilots within the United States and the training of ground personnel in certain aspects of aircraft maintenance.

[Phase I] is covered by a government-to-government agreement entered into by the United States and [the foreign country] in July 1978. [Phase I] will be implemented in its essential elements by a contract entered into between the United States and [the corporation] for the manufacture of 60 aircraft. A contract calling for the commencement of efforts leading to the manufacture of the 60 aircraft was entered into between the United States acting through the [a subordinate command of the Department] and [the corporation] on February 26, 1979, prior to [the subject employee's] leaving Government service. [The employee] was not involved in establishing the contract requirements but did, however, have knowledge of the activity. His participation in matters involving [Phase I] of the program was limited to overall cognizance of major program requirements and coordination of the [total program's] Provisioning Policy as dictated by standard policies and procedures [of the former employee's Department]. [The corporation] and [the employee] assert that he did not have

"official responsibility" as defined in 18 U.S.C. § 202(b) for the program. The [Department's] General Counsel does not take issue with that assertion and this Office finds nothing to contradict it.

During July 1978, a United States team including approximately 18 [Department] personnel, 2 [of the corporation's] personnel and others visited [the foreign country] to brief the [country's air force] on plans for the program, including all four segments of the program. [The employee] was a member of the [Department's] team which also included a number of representatives from [two ancillary commands of the Department]. [The employee] also participated during February 1979, in a program review conducted at [the foreign country]. During both visits, [the employee's] personal participation was limited to [Phase III] matters.

During the period July-September 1978, a team consisting of personnel from the Production Management branch [within the] Acquisition Division and others at [the subordinate command] was formed to prepare a program description for the [Phase II] program. [The corporation] asserts that [the employee] was not a member of that team. He did, however, review various drafts of the program description and offered comments thereon. The program description was completed during January 1979, prior to [the employee's] retirement, for submission to and approval by the [ancillary command] and the [foreign government]. This same team prepared a Statement of Work for use in the contemplated Request for Proposal issued by [the subordinate command]. [The employee] also reviewed and commented on various portions and drafts of the Statement of Work. The Statement of Work was incomplete as of the date of [the employee's] retirement.

It should be noted that either in June or July 1979, [the Department] determined that the Request for Proposal for [Phase III] should be limited to a proposal from [the corporation], the designer and manufacturer of the aircraft [in question]. [The corporation] was, in effect, thereby designated the "sole source" for Phase III of the program.

[The corporation] desires to utilize [the former employee] to provide coordination between a division of [the corporation] and the [the subordinate command] on matters involving [this] program. Specifically, [the corporation] has described his typical duties to this Office as follows:

1. Apprise appropriate [corporation] personnel of current events involving [the] program, performance, customer organizational changes and/or reorganizations, customer requirements, and ensure that communications between [the corporation] and the customer are directed to the proper authority.
2. Communicate with the customer's [the subordinate command's] personnel to coordinate and effect implementation of subject program.
3. Provide intercommunication between [the corporation] and the customer's organization to assure that program activities are properly coordinated, both procedurally and technically.
4. Participate in appropriate customer activities involving briefings, reviews, and meetings.
5. Be responsible for logistic support of [the corporation] personnel while attending conferences, meetings or briefings at customer facilities.

In August 1979, [the employee] attempted to obtain contractor credentials so that he could represent [the corporation] before [the subordinate command's] personnel in relation to [the program]. He was denied such credentials premised upon the duties he had performed for the [Department] at [the subordinate command] in connection with the program. An opinion issued by the [counsel for the subordinate command] concluded that his personal and substantial involvement in the programs forever barred him from acting as an agent or attorney for anyone other than the United States (18 U.S.C. § 207(a)).

It was the issuance of the aforesaid opinion which prompted the request for this opinion.

Issues

Whether or not [the former employee] is precluded from representing [the corporation] in regard to [the program's] matters generally or [Phase III] matters specifically turns on the resolution of several threshold issues.

As previously noted, [the former employee] retired on

April 30, 1979, which was prior to the effective date of the amendments to 18 U.S.C. § 207 enacted by the passage of the Ethics in Government Act of 1978 (Pub. L. No. 95-521).³ Accordingly, the prohibitions which apply to him are those found in 18 U.S.C. § 207 as it read at the time of his retirement.⁴

Based upon our analysis of the program as described at pages 2 and 3 above, it is the opinion of this Office that [Phase I, II and IV] are separate "particular matters" and that [the former employee's] peripheral involvement in those phases of the program other than [Phase III] did not rise to a level that would trigger the prohibitions of 18 U.S.C. §§ 207(a) or (b). Accordingly, he would not be prohibited from acting as [corporation's] agent or representative as to matters evolving from and limited to Phases I, II or IV.

There are, however, two issues the resolution of which will determine whether [the employee] may at any time and in any way act to represent [the corporation] as to [Phase III] or any matters evolving therefrom. Those issues are as follows:

1. Was the [Phase III] program a "particular matter involving a specific party or parties" in which [the employee] "participated personally and substantially" while a Government employee, and, if so,
2. Would [the former employee's] duties, as described by [the corporation], violate section 207?

Discussion

1. Was the [Phase III] program a "particular matter involving a specific party or parties" in which [the former employee] "participated personally and substantially" while a Government employee?

The applicable statute provides, in relevant part, as follows:

- (a) Whoever, having been an officer or employee of the executive branch of the United States Government. . . , after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or

other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise while so employed. . . [S]hall be fined not more than \$10,000, or imprisoned not more than two years, or both.⁵

[The corporation] argues that its contemplated proposal and the anticipated contract for furnishing services to the [foreign air force] under the [Phase III of the] program were not, at the time [the former employee] left Government service, "particular matters involving a specific party or parties."

In support of its argument [the corporation] cites the Memorandum of the Attorney General regarding Conflict of Interest Provisions of Pub. L. No. 87-849, 28 F.R. 985, (Feb. 1, 1963) as follows:

Subsections (a) and (b) describe the activities they forbid as being in connection with 'particular matter(s) involving a specific party or parties' in which the former officer or employee had participated. The quoted language does not include general policy or standards, or other similar matters. Thus past participation in or official responsibility for a matter of this kind . . . does not disqualify a former employee from representing another person in a proceeding which is governed by the rule or other result of such matter.

[The corporation] further refers to language in the introduction to the Interim Regulations on Post Employment Conflict of Interest, 5 C.F.R. Part 737, 44 F.R. 19974, (Apr. 3, 1979), issued by the Office of Personnel Management, as follows:

Under both subsections (a) and (b) a former employee is limited only with respect to a 'particular matter involving a specific party or parties' in which the United States is a 'party or has a direct and substantial interest' -- and in which the employee had the prior involvement specified by the statute. This is an important qualification, and means, for example, that an employee can participate in formulating a general program or regulation, but not be restricted later as to specific cases involving the application of that program or regulation. (pp. 19974-19975).

We, of course, do not question the validity of these quotations. The term "particular matter" as used in 18 U.S.C. § 207 is restricted to a particular contract, a particular case, a particular proceeding, a particular claim and the like.⁶ As noted in the legislative history, the word "particular" emphasizes that the restriction applies to a specific case or matter and not to a general area of activity.⁷

Insofar as the meaning of the limiting phrase "involving a specific party or parties" is concerned, we concur in Manning's comment as follows:

Where this language is used, it is clear that the statute is concerned with discrete and isolatable transactions between identifiable parties A close standard of specificity is required in two different respects under subsection (a); for a matter to be swept under the subsection, it must involve a specific party or parties both at the time the government employee acted upon it in his official capacity and at the subsequent time when he undertakes to act as an agent or attorney following termination of his government service.⁸

It is the opinion of this Office that [the corporation] was involved in the program and, more specifically, [Phase III], as a "specific party" from the time that the decision was made by the U. S. Government to approve the sale of the aircraft to [the foreign country]. As early as July 1978, representatives of [the

corporation] attended meetings in [the foreign country] together with [Department] personnel, including [the employee], to discuss the entire program with [representatives of the foreign government]. During the same time that [the employee] was deeply involved in [Phase III] (from early 1978 until his retirement in April 1979), it became clear that [the corporation] was identified as the likely contractor for [Phase III] because of its familiarity with its own aircraft. As noted previously, this identification was formalized in July 1979, when [the corporation] was named "sole source" for Phase III.

This Office concurs in the opinion of the General Counsel of the [former employee's Department] 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, in this case, the [Department] by private parties as contractual requirements evolve. We further concur in the conclusion of the [Department's] General Counsel that [the corporation] was clearly identified with the entire program, including Phase III, long before [the employee] left Government service. We have no doubt that [Phase III] was a "particular matter" before his departure.

Having determined that [Phase III] was a particular matter involving specific parties at the time [the employee] worked thereon, we must now determine whether his participation therein was personal and substantial. As Foreign Military Sales Monitor for [Phase III] he had a direct and important role in formulating the plan for technical support of the aircraft to be purchased by [the foreign country]. He also made trips to [the foreign country], participated in briefings on [Phase III] and commented on and had an input into the review and formulation of a 150 page Statement of Work for [Phase III of the program].

While it may be argued that his activity consisted of participation in stages of what would later become a formal contract, we are, nevertheless, of the opinion that section 207 covers such participation. Much of the work with respect to a particular matter is accomplished before the matter reaches its final stage. For example, an employee may personally participate in an investigation to determine whether the Government should file a formal action. Further, he might recommend, based upon his investigation, that the formal action be undertaken. If such an employee could at that point, before the actual filing of the

action, leave the Government and contend that he was not barred by section 207 because his work did not extend to participation in an actual "judicial or other proceeding," the purpose of section 207 would be undermined. The same holds true with respect to the preliminary steps leading to a contract. Thus, if its purposes are to be served, section 207 must be read as including personal and substantial participation in the formative stages of particular matters.

Indeed, the express terms of section 207 deal with preliminary aspects of particular matters. The language covers participation through decision, approval, disapproval, recommendation, the rendering of advice, investigation, etc. Such activity is frequently associated with the preliminary aspects of a particular matter.

For the foregoing reasons we are of the opinion that [the former employee's] activities in regard to [Phase III] while [working for the Department] constituted personal and substantial participation in a particular matter involving specific parties and are, therefore, covered by section 207.

2. Would [the former employee's] proposed duties, as described by [the corporation] violate section 207?

The Office of Legal Counsel, Department of Justice, in an unpublished opinion issued in December 1978, had occasion to address the question concerning what types of representation are proscribed by section 207.⁹ That opinion, which also dealt with the application of the pre-amended section 207 (Pub. L. No. 87-849), took the position that not all communications between a former Government employee and his or her agency necessarily constitute acting as an "agent" within the proscriptions of section 207. It expressed the more limited view, in which this Office concurs, that "in the context of a contract, a former employee acts as the 'agent' of a nonfederal person or entity where he urges or requests the Government to take or refrain from taking action or otherwise acts on behalf of that person or entity in dealing with the Government pertaining to the provisions or performance of the contract as to which the contractor and the Government may have differing or potentially differing views."

The foregoing interpretation "requiring an ingredient of at least inchoate adversariness," is, as the opinion points out, reflected in the list of particular matters to which the ban in

section 207 specifically applies: "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties," in which the United States is a party or has a direct and substantial interest.

The opinion further points out that "[a] contract between the Government and a private person or entity . . . may extend over a long period of time and involve numerous contacts between governmental and contractor personnel that jointly facilitate performance of the contract and have no adversarial aspect." (emphasis added.) This Office and the Department of Justice, do not believe that the use of the term "contract" in section 207 was intended to apply to all such communications or contacts. The foregoing interpretation is essentially embodied in the regulations concerning Post Employment Conflict of Interest recently issued by this Office interpreting section 207(a), as amended by Title V of the Ethics in Government Act of 1978.¹⁰

Our review of the legislative history of section 207, like the review by the Department of Justice, revealed nothing to suggest that the prohibitions of section 207(a) were intended to cover contacts or communications with the Government that do not involve potentially adversarial or controversial matters with respect to a contract or other particular matter.

On the other hand, quoting again from the Department of Justice opinion:

This does not, of course, mean that the restriction in § 207 is limited to formal appearances or proceedings. The provision . . . does reach informal meetings, correspondence, or conversations with agency officials in which the former employee urges the position of a contractor with respect to an aspect of the contract in which the position of the contractor and that of the employee's former agency are potentially divergent. Moreover, the prohibition against acting as the contractor's 'agent' should not be confined to major disputes, renegotiations, or the like. Requests for extensions of interim deadlines or work orders, non-routine

requests for instructions or information from the agency, suggestions about new directions or even relatively minor portions of the contract, and explanation or justification of the manner in which the contractor has proceeded or intends to proceed would all appear to be barred; they involve at least potentially divergent views of the Government and the contractor on subsidiary issues or an implicit representation by the agent that the contractor is in compliance with contract requirements.

This Office does not have a full appreciation or understanding of exactly what it is intended that [the former employee] do on behalf of [the corporation] as set forth in [the corporation's] generalized description of his typical duties envisioned, supra, p. 4-5. However, insofar as his activities in relation to [Phase III] do not involve his urging the position of [the corporation] relative to any aspect of the proposal or contract, as described in the preceding paragraph, it is the opinion of this Office that he may undertake such duties without violating the prohibitions of section 207.

This opinion does not address the question of whether or not [the former employee's] proposed employment violates the provisions of either 18 U.S.C. § 281 or 37 U.S.C. § 801(c) as such violations will depend on his particular conduct, not his employment status. If it subsequently appears that his particular conduct violates the provisions of those statutes, it would be appropriate to refer the matter to the proper authorities for investigation and disposition.

Sincerely,

J. Jackson Walter
Director

1 Early 1978 through April 30, 1979, at which time he retired from the [Department].

2 18 U.S.C. § 207 (Pub. L. No. 87-849) was amended in 1978 by the Ethics in Government Act (Pub. L. No. 95-521) but the

effective date of the section 207 amendments was July 1, 1979, two months after the former Government employee's retirement.

3 Section 502 of Pub. L. No. 95-521 provides: "The amendments made by section 501 shall not apply to those individuals who left government service prior to the effective date such amendments...."

Section 503 provides: "The amendments made by section 501 shall become effective on July 1, 1979."

4 18 U.S.C. § 207 (Pub. L. No. 87-849).

5 18 U.S.C. § 207(a) (Pub. L. No. 87-849).

6 B. Manning, Federal Conflict of Interest Law 55 (1964)

7 H.R. Rep. No. 748, 87th Cong., 1st Sess. 20 (1961).

8 B. Manning, *supra* at 204. See also 5 C.F.R. § 737.5(c)(4).

9 Letter from Leon Ulman, Deputy Assistant Attorney General, to James L. Kelly, Acting General Counsel, Nuclear Regulatory Commission (December 28, 1978).

10 See 5 C.F.R. § 737.5(b)(5).