

## **Office of Government Ethics**

**91 x 25 -- 07/22/91**

### **Letter to a Designated Agency Ethics Official dated July 22, 1991**

This is in response to your letter of June 20, 1991, in which you have requested assistance in resolving an issue concerning the definition at 41 U.S.C. § 423(p)(3) of the term "procurement official." While you have tentatively concluded that a business entity, such as a corporation, can be a procurement official, you have forwarded a legal brief prepared by [a law] firm which concludes, to the contrary, that only an individual can be a procurement official. You note that the matter is not entirely free from doubt.

The Office of Government Ethics does not have authority to interpret the cited statutory provision or the regulations implementing that provision. Therefore, I can only advise you that our understanding of the meaning of the term "procurement official" is consistent with your own and not with that urged in [the law firm's] brief. Although the argument is otherwise developed, the brief relies heavily on regulatory language, such as that found in FAR paragraph 3.104-6(a), that substitutes the term "individual" for "civilian or military official or employee of any agency" in discussing specific restrictions or requirements applicable to procurement officials. It dismisses regulatory language, such as that found in FAR paragraphs 3.104 6(b) and (c), which uses the phrase "an individual or other entity who is a procurement official" to describe the same class. Paragraph 3.104-6(c) was drafted by this Office after the underlying statute was amended to give us responsibility for issuing regulations implementing the recusal provisions of 41 U.S.C. § 423(c). The phrase "or other entity" was inserted for the purpose of making it clear that any eligible procurement official, including a contractor that is a business entity, has a right to seek recusal in order to engage in discussions of a business opportunity with a competing contractor.

As to [the law firm's] argument that the "plain meaning" rule dictates a conclusion that only individuals can be procurement officials, we can only offer our own view that the plain meaning of the terms "contractor" and "subcontractor" would include business entities. The very purpose of 41 U.S.C. §

423(p)(3)(B) is to give the phrase "employee of an agency" a construction at odds with its plain and accepted meaning and to cover by that definition persons, including independent contractors, with whom the Government has no employer-employee relationship. It is no more at odds with that purpose to include within its coverage a contractor who is a business entity than it is to include an individual who is an independent contractor. Because the [law firm] brief indicates a need to clarify this issue when the interim FAR regulations are finalized, I have taken the liberty of forwarding a copy of your letter and its enclosures to the Administrator, Office of Federal Procurement Policy.

Sincerely,

Stephen D. Potts  
Director