

Office of Government Ethics

92 x 15 -- 03/27/92

Letter to a Former Government Employee dated March 27, 1992

This is in response to your letter of March 11, 1992, with which you have forwarded an ethics opinion issued by [an ethics official of your former agency]. You disagree with [the ethics official's] conclusion that you were a procurement official for purposes of [a specific] contract and request advice from this Office as to whether your status was in fact that of a procurement official. You also ask to be advised as to the post employment restrictions that would apply to you as a procurement official.

The Office of Government Ethics has no authority to review or second-guess ethics advice given by agency ethics officials regarding applicability of the procurement integrity provisions of 41 U.S.C. § 423. Authority to render such opinions is specifically given to designated agency ethics officials or their delegates by 41 U.S.C. § 423(k).

As to your view that you were not a procurement official because your input into the statement consumed a very small part of your regular duties and was not otherwise "substantial," you may wish to consider the pertinent definitions in Part 3.104 of the Federal Acquisition Regulation. Paragraph 3.104-4(h) defines a procurement official to mean any civilian or military official or employee, including a member of the uniformed services, who has participated personally and substantially in any one of several enumerated activities, including the drafting of specifications, for a particular procurement. Paragraph 3.104-4(g) defines personal and substantial participation as follows:

(g) Participated personally and substantially means active and significant involvement of the individual in activities directly related to the procurement. To participate "personally" means directly and includes the participation of a subordinate when actually directed by the supervisor in the matter. To participate "substantially" means that the employee's involvement must be of significance to the matter. For example, the review of procurement documents solely to determine compliance with applicable regulatory, administrative or

budgetary requirements or procedures does not constitute substantial participation in a procurement. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial.

`An individual who was a procurement official with respect to a particular procurement is subject to two post-employment restrictions. For two years, he may not participate personally and substantially on behalf of the contractor in the performance of the contract awarded as a result of that procurement. And for two years, he may not participate in any manner on behalf of that contractor or any competing contractor in any negotiations leading to the award, modification, or extension of a contract for that procurement.

Because a former procurement official who violates one of these two restrictions may be subject to civil penalties of up to \$100,000, I would strongly urge that you rely upon [the ethics official's] advice.

Sincerely,

Stephen D. Potts
Director