

## Office of Government Ethics

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### Letter to an Agency Ethics Official dated March 2, 1988

This responds to your February 2, 1988 letter to [this Office's Chief Counsel]. You have referred to the January 28, 1988 meeting in [the Chief Counsel's] office attended by [an Office of Government Ethics (OGE) staff attorney]; [a private attorney representing a former Senior Employee of your agency]; [a private attorney representing the Corporation]; [two agency attorneys]; and, of course, [the Chief Counsel] and yourself. You have requested that we confirm your understanding of the legal conclusion reached among those in attendance at the meeting with respect to whether the proposed representational activities on behalf of [the Corporation] by the former [agency] Senior Employee are permissible under 18 U.S.C. § 207(a). While we reiterate that we agree with the conclusion that at the present time it appears that [the former employee] can engage in the contemplated representational activities without violating section 207(a), we wish to clarify the reasoning behind our endorsement of this outcome.

The pertinent facts of [the former employee's] situation are set forth in your letter and the attached memorandum by [one of the agency attorneys]. Prior to leaving [the agency] in 1985, [the former employee] was [in a particular position in the procurement area]. In that official capacity, [the former employee] participated personally and substantially in the award of two contracts to [the corporation] for a [specific program to be used by Federal employees]. Originally awarded in 1983, the contracts provided for an initial one-year term and four option years. Now that all of the option years have been exercised, [the agency] anticipates issuing a new solicitation during 1988.

Under section 207(a), as a former [agency] employee, [the individual] is prohibited from representing any other person by appearance or by written or oral communication to any Department, agency, or court of the United States or District of Columbia, in connection with any particular matter involving specific parties in which the United States or District of Columbia is a party or has an interest, for the entire lifetime of matters in which he participated personally and substantially while with the Government. The only element of section 207(a) open to question

in [the former employee's] situation is whether the 1988 solicitation is to be considered part of the "same particular matter" as the 1983 contracts. Only if the 1988 solicitation and the 1983 contracts are determined to be different particular matters can [the individual] make representations to [the agency] on behalf of [the corporation] without violating section 207(a).

According to the interpretive post-employment regulation issued by this Office at 5 C.F.R. § 737.5(c)(4), the factors that must be considered in determining whether two particular matters are the same are

the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

It is upon the application of these factors that our analysis primarily relies.

Based on the written material you have submitted as well as on our discussion in the meeting, it is our understanding that while the 1988 work statement may be similar to that of the 1983 contracts, it will not necessarily be identical, owing to such factors as recent developments [in the fields] and [the agency's] increased awareness of its needs for [such] services. It is our further understanding that while previous contractor, [the Corporation], is anticipated to be one of the 1988 bidders, other potential bidders will be included at the presolicitation and solicitation stages of the new award. The five-year period since the award of the original contract and the three-year period since [the individual] left [the agency] weigh in favor of determining the 1988 solicitation a particular matter distinct from that of the 1983 contracts.

Because of our understanding that the 1983 and 1988 work statements are fundamentally distinct in scope and approach and that the bidding groups will be different and because of the time elapsed not only since the original award, but also since [the former employee's] departure from [the agency], we conclude that: (1) the 1988 solicitation will constitute a distinct particular matter from the 1983 contracts; and (2) [the individual] can engage in representational activities before [the agency] on behalf of [the Corporation] with respect to the 1988 solicitation

without violating section 207(a). We caution that should any of the facts that underlie our understandings change appreciably as the 1988 solicitation progresses, our conclusion as to the permissibility of the representations might be affected accordingly.

Sincerely,

Frank Q. Nebeker  
Director

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**1** As stated in your letter, since more than two years have passed since [the former employee] left [the agency], only subsection (a) of section 207 bears consideration.