GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

Office of Government Ethics

VIA EMAIL

April 17, 2014

Mr. Todd A. Douglas
TDouglas@weichert.com

Dear Mr. Douglas:

This responds to your April 9, 2014, email, by which you request advice concerning whether you can respond to a Department of General Services ("DGS") Request for Proposals ("RFP") given that you worked at DGS until February 14, 2014. Based upon the information you provide in your email and in your follow-up conversation with a member of my staff, I conclude that, as long as you ensure that you meet the requirements set forth below, responding to the DGS RFP and performing services for DGS if you are awarded the contract would be permissible.

You state that when you worked at DGS, you were a Realty Officer, and that your job responsibilities included those services listed in the RFP, including strategic planning, tenant representation, and legal support and coordination of solicitations for space. You are in the process of identifying a commercial real estate firm and a legal firm to partner with and believe that your knowledge of District government makes you qualified to perform the work specified in the RFP. You also state that you anticipate working not only on new issues that arise from matters you worked on as a DGS employee, but probably the *very same* issues and matters as well. In other words, the government would be outsourcing to you some of the same work you did as a government employee.

Post–Employment Restrictions

Although the District has in place post-employment rules, they are not meant to prevent District employees from working in the private sector after their government service ends or to be so restrictive as to make following the post-employment rules impossible. There are, however, certain requirements you must follow.[1]

[1] The discussion of post-employment restrictions that follows is based on 6B DCMR Chapter 18, which was revised and became effective on April 11, 2014.

A former District employee is prohibited, for one year, from having any transactions with the employee's agency that are **intended to influence the agency** in connection with any particular government matter pending before the agency or in which it has a direct and substantial interest. Specifically, 6B DCMR § 1811.10 provides:

> A former employee (other than a special government employee who serves for fewer than one-hundred and thirty (130) days in a calendar year) shall be prohibited for one (1) year from having any transactions with the former agency intended to influence the agency in connection with any particular government matter pending before the agency or in which it has a direct and substantial interest, whether or not such matter involves a specific party.[2]

Therefore, you, as a former District employee, are prohibited for one year from the date of your separation from service, February 14, 2014, from having any transactions with DGS that are intended to influence DGS on any particular government matter pending before DGS or in which DGS has a direct and substantial interest. This prohibition applies regardless of whether the particular government matter involves a specific party and regardless of whether you participated in or had responsibility for that particular matter when you were a DGS employee. In addition, this prohibition applies to matters that first arose after you left District service, as long as they concern a particular government matter that was pending before DGS when you worked there or in which DGS has a direct and substantial interest. Although the term "direct and substantial interest" is undefined in 6B DCMR Chapter 18, it is clear that easily identified matters such as contracts, leases, and particular projects such as an agency's relocation project or an agency's strategic plan are included in the term.

Similarly, 6B DCMR § 1811.3 provides:

> A former government employee shall be permanently prohibited from knowingly acting as an attorney, agent, or representative in any formal or informal appearance before an agency as to a particular matter involving a specific party[3] if the employee participated personally and substantially in that matter as a government employee.[4]

This section seeks permanently to ban representational work for any matter involving a specific party that you worked on while in the government's employ.

---

[2] 6B DCMR § 1811.11 states that the "restriction in Subsection 1811.10 of this section is intended to prohibit the possible use of personal influence based on past government affiliations to facilitate the transaction of business. Therefore, the restriction shall apply without regard to whether the former employee had participated in, or had responsibility for, the particular matter, and shall include matters which first arise after the employee leaves government service."

[3] Particular government matter involving a specific party is defined is 6B DCMR Chapter 18 as, "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the District government is a party or has a direct and substantial interest, and which has application to one (1) or more specifically identified persons or entities."

[4] Similarly, 6B DCMR § 1811.4 provides that "[a] former government employee shall be permanently prohibited from making any oral or written communication to an agency with the intent to influence that agency on behalf of another as to a particular government matter involving a specific party if the employee participated personally and substantially in that matter as a government employee."

Notwithstanding what may seem like a blanket prohibition for dealing with your previous agency on a temporary or permanent basis, I interpret 6B DCMR §§ 1811.10, 1811.11, 1811.3, and 1811.4 to refer instead to matters in which the former employee is representing a person or entity whose interests are or may become adverse to those of the District. For example, if you were proposing to represent a client/potential lessee, in a particular matter, such as a lease, in which the District, as the lessor, has a direct and substantial interest, you would be prohibited from having any transactions with DGS that are intended to influence DGS, for one year from the date of your separation from District service. Similarly, you would be prohibited permanently from formal or informal appearances before DGS, as well as oral or written communications to DGS.

You, however, informed the member of my staff with whom you spoke, that the District, in putting out the RFP, seeks to contract with a person or entity that will *represent the District and assist it* with various real estate services. Specifically, the Scope of Work in the Request for Proposals, Solicitation Number: DCAM-14-NC-0121, provides:

> The Department anticipates that the selected Real Estate Consultant will assist the Department with the management of the District's real estate portfolio by providing the specific real estate consulting services as more specifically described herein. (p.4.)

As such, the District would be your client and you would be both representing the District and acting on its behalf. It is not enough to say that your interests and the District's align. Instead, you actually must represent the District's interests, and only the District's interests, for you to avoid violating 6B DCMR §§ 1811.10, 1811.11, 1811.3, and 1811.4. To ensure that your work under the contract will involve representing the District's interests and only the District's interests, there must be a specific written agreement in place that states that your services are representational.[5] In that situation, you would not be prohibited from having transactions with DGS, having formal or informal appearances before DGS, or having oral or written communications with DGS.

It is important to note, however, that to comply with 6B DCMR §§ 1811.10, 1811.11, 1811.3, and 1811.4, you would have to make sure that you do not represent the private entity that holds the contract with the District, or any other person or entity, in any negotiations with DGS.[6] For example, you would be prohibited from handling matters such as contract negotiations and fee renegotiations. Similarly, you would be prohibited from calling a DGS employee to request an extension, or sending an email complaining about a payment delay and requesting prompter payment. In those situations, you would not be representing the District government. Instead you would be representing the interests of another person or entity before your former employer, DGS, which is prohibited.[7]

---

[5] It is important to note, however, that simply because a former government employee is performing services on behalf of the government pursuant to a contract with the government, this does not mean that the former government employee "shares an identity of interests" with the government (U.S. Office of Government Ethics, "Letter to a Former Government Attorney," 82 x 16, November 5, 1982). *See also* U.S. Office of Government Ethics, "Letter to a Designated Agency Ethics Official," 08 x 7, March 28, 2008, which explains that just because the former employee's activity furthers the government's interests does not mean that the former employee is acting on behalf of the government. There must be "a specific agreement to provide representational services to the [government]" *Id* at 2.

[6] *See* U.S. Office of Government Ethics, "Letter to a Former Government Attorney," 82 x 16, November 5, 1982.

[7] *See* U.S. Office of Government Ethics, "Letter to a Former Government Attorney," 82 x 16, November 5, 1982, which states: "[y]ou may not, pursuant to our interpretation, represent your firm on such matters as contract negotiations, fee negotiations, and requests for additional personnel (and thus money for the firm), or on matters

As a best practice, I recommend that if you obtain the contract with DGS, you work with DGS to do the following:

1) Include in the contract documents a confidentiality clause[8] indicating that the contracting entity and its employees shall keep all information obtained through the performance of the contract confidential, shall not use such information in connection with any other matters, and shall not disclose any such information to any other person or entity, in accordance with District and federal laws governing the confidentiality of records; and

2) Include in the contract documents a written statement by a DGS official that DGS is aware that you previously worked there and whether you worked on a particular matter involving a specific party as a DGS employee that you will work on pursuant to your contract with DGS. The written statement also should include a determination, through DGS's own analysis, that the District is your client and your performance of services will involve you representing the District's interests and only the District's interests and that you will not represent any interests that are or may become adverse to the District's.[9]

Accordingly, you are not prohibited from obtaining a contract with DGS to provide services where you will represent DGS's interests, as long as you do not improperly reveal any confidential information you learned as a District employee and do not represent the private entity that holds the contract with DGS, or any other person or entity, in any negotiations with DGS where your interests or the private entity's interests are or may become adverse to the District's interests.

This advice is provided to you pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1162.19), which empowers me to provide such guidance. As a result, no enforcement action for violation of the District's Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

You also are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that your identity will not be disclosed unless you consent to such disclosure in writing. We encourage individuals to so consent in the interest of greater government transparency. Please, then, let me know your wishes about disclosure.

---

involving any questions of the competence of the services provided by the firm. If you did so, you would be acting as an agent of the firm in matters where there is controversy arising out of the business relationship between [the agency] and the firm. On the other hand, once your firm is hired, you may in the normal course of providing the litigation services required under the contract, contact [the agency], and discuss further strategy. In these instances, there is no element of intent to influence or controversy concerning the business relationship on your part. It is simply the flow of information necessary to carry out the contract." (p. 4.)

[8] I note that confidentiality clauses are not uncommon and that such a clause already may be included in the RFP.

[9] BEGA already has confirmed with the Office of Contracting and Procurement ("OCP") that this is acceptable and that, if provided to OCP, the written statement will be maintained in the contract files.

If you have any questions or wish to discuss this matter further, I can be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

1165-001