

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



Office of Government Ethics

December 11, 2012

XXXX XXXXXX
XXXX XXXX XX XX
XXXXXXXXXX, XX XXXXX

Dear xxx xxxxxx:

This responds to your letter (email) dated November 28, 2012, asking whether you permissibly may work on a contract awarded to a firm by the District of Columbia government, in light of your prior employment by the District. A provision of the contract requires coordination between the firm and the District agency where you formerly worked. Based on the factual predicates provided in your letter and in my conversations with you, I do not believe that your work on the contract conflicts with the ethical obligations that bind former employees.

The contract was awarded by the D.C. Department of xxx xxxxxxxxxxxx xxxxxx to xxx xxxxxxxxxxxx xxxxx of xxxxxxxxxxxx xxxxxxxx, to develop a new xxxxxxxxxxxxxxxx xxxxxxx xxxxx for xxxxx. On xxxxxxxx xx, 2011 you completed xxx xxxxxx xxxxxx as a xxxxxxxxxxxxxxxx on the xxxxx xxxxxxxx xxxxxxxxxxxx xxxxxxx. You state that you presumptively were a “senior employee” by virtue of your compensation level, xxxxxx. As a xxx xxxxxxxxxxxx, you had considerable interaction with xxxxx. You now work as an individual consultant on xxxxxxx xxxxxxx and xxxxxxx xxxxxxx. In your consultant capacity, you are part of a team of xxxxxxxxxxxxxxxx to xxx. You state that you were retained by xxx for this project because of your familiarity with District xxxxxxx xxxxxxx xxxxxxx, and that your name appears in xxx xxxxxxxxxxxx.

XXXXXXXX XXXXXXXXXXXX of the contract states: “xxx xxxxxxxxxxxx xxxxxx xxxxxx, xx xxxxxxxxxxxxxxxx xxxxx xxxxx xxx xxx xxx xxx, xxxxxxxxxxxx xx xxxxxxxxxxxx xxxxxxxxxxxx xx xxxxxxx xxxxxxxxxxxx xxxxxxxxxxxxxxxxxx xxx xxx xxxxxxxxxxxx xxxxxxxxxxxx xxxxxx xxxxxxxxxxxx xx xxxxxxxxxxxx xxxxxxxxxxxx xxxxxxxxxxxx.”

Post-Employment Restrictions

Certain restrictions apply to the post-employment activities of former District employees. All employees are subject to a lifetime ban on appearing in a representational capacity before an agency regarding “a particular government matter involving a specific party if the employee participated personally and substantially in that matter as a government

employee.”¹ A lifetime ban also prohibits former employees from communicating with an agency “with the intent to influence that agency on behalf of another person as to a particular government matter involving a specific party if the employee participated personally and substantially in that matter as a government employee.”²

In addition to these narrowly crafted prohibitions, senior employees also are subject to a one-year ban prohibiting “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.”³ While the one-year ban generally is broader than the lifetime ban, it is narrower in one respect: it prohibits transactions only with the employee’s “former agency,” whereas the lifetime ban applies to “an agency.”

Discussion

The lifetime ban facially does not apply in this instance because, as a xxxxxxxxxxxx, you will not be appearing before, or communicating with, xxxx in a representational capacity on behalf of another. You are an xxxxxxxxx of a xxxxxxxx xxxxxxxxx, xxx. xxx and its xxxxxxxxxxxxxxx stand in a xxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx with xxxx. As against xxxxx xxxxxxx, xxx and its xxxxxxxxxxx represent xxxx. In the absence of representational activity, further analysis of the lifetime ban is unnecessary.⁴

Your work as a xxxxxxxxxxxx is prohibited, if at all, under the one-year ban against “any transactions” with your former agency, xxx, with the intent to influence it in connection with a particular matter pending before it or in which it has a direct and substantial interest. The contract was issued by xxxx, not xxx. xxxxx stated role with respect to the contract is limited to the above-quoted section requiring xxx to coordinate with xxx and xxxx in preparing a xxxxxxxx xxxxxxxx xxxxxxxx. I nevertheless conclude that xxx has a direct and substantial interest in the overall contract. xxx is preparing a xxxxxxxxxxxxxxx xxxxxxx xxxxx; xxx xxxxxxxxxxx xxxxxxx xxxxxxxxxxx in the District. In these circumstances, I believe your work as a xxxxxxxxxxxxxxx will involve some degree of transactions with your former agency in connection with a matter in which it has a direct and substantial interest.

Those transactions are not prohibited, however, because the matter is not a “particular” matter and also because the transactions with xxx contemplated by the contract do not appear to offer the motive or opportunity for you to influence the xxx. The District’s post-employment rules define the term “particular matter involving a specific party.”⁵ A “specific party” is defined as “one or more specifically identified persons or entities.”⁶

¹ 6A DCMR § 1814.4.

² *Id.* at § 1814.5.

³ *Id.* at § 1814.12. The one-year ban “is aimed at the possible use of personal influence based on past governmental affiliations to facilitate the transaction of business. *Id.* at § 1814.13. For that reason, the ban applies “without regard to whether the former senior employee had participated in, or had responsibility for, the particular matter, and ... include[s] matters which first arise after the senior employee leaves government service.” *Id.*

⁴ For the same reason – absence of representational activity – we do not address the post-employment rules’ two-year bans against post-employment appearances and communications regarding particular matters for which an employee had official responsibility. *Id.* at §§ 1814.16-17.

⁵ *Id.* at § 1814.1.

⁶ *Id.*

“Particular matters” involving such persons include judicial proceedings, contracts, licenses and the like.⁷ The definition provides limited assistance in construing the one-year post-employment ban, which expressly covers a particular matter whether or not it involves a specific party. Federal ethics authority, which we view as persuasive albeit not binding authority, is more helpful on this point. “Particular matter,” which is used pervasively in federal ethics regulations, is defined in one rule as including “matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, *or* a discrete and identifiable class of persons.”⁸ The term clearly is not limited to identifiable persons. Indeed, it “may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons.”⁹ It does not, however, cover “consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons.”¹⁰

Under this authority, the xxxxxxxxxxxxxxx xxxxxxx xxxx to be developed under the xxx contract is clearly too broad to be deemed a “particular matter.” The contract envisions a xxxx that will include xxxxxxxx and xxxxxxxxxxxxxxxxxx likely to xxxxxxx x xxxx xxxxx xx xxxxxxxxxxxxxxx, xxxxxxxxxxxxxx and xxxxxxxxxxxxxxx. While the xxxx almost certainly will lead to future particular matters, the xxxx itself is not such a matter.

Finally, it requires an unduly attenuated chain of reasoning to describe the transactions involved in coordinating a portion of the xxxxx with your former agency as activity intended to influence the agency. xxxx issued the contract and has ultimate responsibility for its completion and further use. Given the respective positions that you and the xxx occupy with respect to the contract, it appears more likely that the xxx might have an interest in influencing xxx and you, not the other way around.

For all of these reasons, I do not believe that your government ethics obligations as a former xxxxxxxxxxxxxx xx xxx xxx would prohibit the proposed post-employment activity described herein.

Please be advised that 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 § 1-1161.01 *et seq.*, 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.

Finally, you 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 identifying information will not be disclosed unless and until you consent to such disclosure in writing, should you wish to do so.

⁷ *Id.*

⁸ 5 CFR § 2640.103(a)(1) (emphasis added). Part 2640 contains interpretation, exemptions and waiver guidance concerning 18 U.S.C. 208 (acts affecting personal financial interest).

⁹ *Id.*

¹⁰ *Id.* For example, a regulation applicable only to meat packing plants is a particular matter; a change to health and safety regulations applicable to all employers in the United States is not. *Id.*, examples 3, 4.

Please let me know if you have any questions or wish to discuss this matter further. I may be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Thank you for bringing this matter to my attention.

Sincerely,

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