



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of: 10-08-08

October 3, 2008

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *pch for*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Esther Heiden *EH*
Law Clerk

Subject: Draft AO 2008-11

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 8, 2008.

Attachment

October 3, 2008

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2008-11 is available for public comments under this procedure. It was requested by Lawrence Martin E. Brown.

Draft Advisory Opinion 2008-11 is scheduled to be on the Commission's agenda for its public meeting of Wednesday, October 8, 2008.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on October 7, 2008.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2008-11, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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Federal Election Commission
999 E Street, NW
Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
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3 Mr. Lawrence Martin E. Brown
4 12721 Triple Crown Road
5 North Potomac, MD 20878-3789

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7 Dear Mr. Brown:

8 We are responding to your advisory opinion request concerning the application of
9 the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission
10 regulations as to whether a personal services contractor with the United States Agency
11 for International Development ("USAID") may make a contribution for a political
12 purpose or use.

13 The Commission concludes that as a Federal contractor, you are prohibited from
14 making contributions for any political purpose or use.

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter received on
17 August 19 and your email received on August 29, 2008, as well as telephone
18 conversations with Commission attorneys.

19 Mr. Brown has entered into a personal services contract with USAID in his
20 individual capacity. Under the contract, Mr. Brown is a senior Human Resources advisor
21 for the USAID Bureau of Global Health, Office of Professional Development and
22 Management Support ("GH/PDMS"). The contract began on October 1, 2006, and was
23 for a period of two years, with an option to extend at the end of the contract period. On
24 August 21, 2008, USAID exercised this option and extended the contract an additional
25 two years, to terminate on September 30, 2010.

1 In general, Mr. Brown’s job is to provide “human resources and management
2 advice and assistance to the Bureau of Global Health.” Contract for Personal Services
3 between L. Brown and USAID, A.1 (Sept. 29, 2006). Among his duties and
4 responsibilities set out in the contract are providing advice and guidance to senior Bureau
5 of Global Health management on a number of Human Resources issues, serving as an
6 “alter ego” for the GH/PDMS Director on all Human Resource matters, supervising and
7 mentoring other GH/PDMS staff members, including the Presidential Management
8 Fellow, designing and implementing the Global Health Management Assessment effort,
9 and providing a “full range of [Human Resources] services, including recruitment, hiring
10 and manager/employee support.” Brown Contract, A.1.

11 The terms of Mr. Brown’s relationship with USAID are governed by his personal
12 services contract, as well as relevant provisions of the USAID Acquisition Regulation
13 (“AIDAR”) and the Federal Acquisition Regulation (“FAR”). The personal services
14 contract addresses supervisory controls, major duties and responsibilities, applicability of
15 the USAID Code of Conduct, workweek and compensation, applicability of the
16 regulations and rulings of the Social Security Administration and Internal Revenue
17 Service, worker’s compensation benefits, and termination procedures. Payment for Mr.
18 Brown’s services under the contract is made from funds appropriated by Congress,
19 pursuant to Section 636(a) of the Foreign Assistance Act of 1961, as amended. Brown
20 Contract, pg. 1; 22 U.S.C. 2396(a)(3).

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1 ***Question Presented***

2 *Does 2 U.S.C. 441c prohibit Mr. Brown, as a personal services contractor, from*
3 *making contributions for any political purpose or use?*

4 ***Legal Analysis and Conclusions***

5 Yes, because Mr. Brown is a Federal contractor, 2 U.S.C. 441c prohibits him
6 from making contributions for any political purpose or use.

7 The Act prohibits Federal contractors from making contributions to any party,
8 committee, or candidate for public office or to any person for any political purpose or
9 use:

10 It shall be unlawful for any person—

11 (1) Who enters into any contract with the United States or any department
12 or agency thereof either for the rendition of *personal services* . . . to
13 the United States or any department or agency thereof . . . if payment
14 for the performance of such contract . . . is to be made in whole or in
15 part from funds appropriated by the Congress, at any time between the
16 commencement of negotiations for the later of (A) the completion of
17 performance under; or (B) the termination of negotiations for, such
18 contract . . . directly or indirectly to make any contribution of money
19 or other things of value, or to promise expressly or impliedly to make
20 any such contribution to any political party, committee, or candidate
21 for public office or to any person for any political purpose or use”

22 2 U.S.C. 441c(a) (emphasis added); *see also* 11 CFR Part 115.

1 In the context of government contract law, “A personal services contract is
2 characterized by the employer-employee relationship it creates between the Government
3 and the contractor's personnel.” 48 CFR 37.104(a). Although “The Government is
4 normally required to obtain its employees by direct hire under competitive appointment
5 or other procedures required by the civil service laws,” the Government may obtain
6 personal services by contract where “Congress has specifically authorized acquisition of
7 the services by contract.” *Id.*

8 Mr. Brown, in his individual capacity, has entered into a written contract with
9 USAID, an agency of the United States. Under this contract Mr. Brown is to provide
10 personal services to USAID, and USAID is to pay him with funds appropriated by
11 Congress. Brown Contract, pg. 1, A.1; 22 U.S.C. 2396(a)(3). Notwithstanding many
12 aspects of Mr. Brown’s USAID contract which treat him as an employee (*see, e.g.,*
13 Brown Contract GP.2(c), GP.6(a), GP.6(b)), these characteristics are attributable to
14 Federal government contract law; they do not alter (and in fact reinforce) the fundamental
15 fact that Mr. Brown holds a Federal contract for personal services that is specifically
16 authorized and paid for by funds appropriated by Congress.¹ Therefore, Mr. Brown
17 meets the definition of a Federal contractor under the Act and Commission regulations. 2

¹ *See also*, Advisory Opinion 1984-53 (National Association of Realtors). In concluding that individuals who leased real property to Federal government agencies were considered to be “Federal contractors” within the meaning of the Act and Commission regulations, the Commission also noted that “many modern leases contain explicit contractual provisions regarding such subjects as repair of the premises, the furnishing of heat and electricity, and other similar matters. In many cases, leases containing such provisions can be viewed as contracts for the rendition of *personal services* or for the furnishing of material, supplies, or equipment, and *accordingly the Commission concludes that lessors who are parties to such leases would be covered by the statutory definition of ‘Federal contractor.’*” (emphasis added).

1 U.S.C. 441c(a); *see also* 11 CFR 115.1(a)(1)(i), (2). As an individual who is a Federal
2 contractor, Mr. Brown is prohibited from making contributions for any political purpose
3 or use from his business or personal funds, or any other funds under his dominion or
4 control. 2 U.S.C. 441c(a)(1); 11 CFR 115.2(a), 115.5.

5 This response constitutes an advisory opinion concerning the application of the
6 Act and Commission regulations to the specific transaction or activity set forth in your
7 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
8 of the facts or assumptions presented, and such facts or assumptions are material to a
9 conclusion presented in this advisory opinion, then the requestor may not rely on that
10 conclusion as support for its proposed activity. Any person involved in any specific
11 transaction or activity which is indistinguishable in all its material aspects from the
12 transaction or activity with respect to which this advisory opinion is rendered may rely on
13 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
14 conclusions in this advisory opinion may be affected by subsequent developments in the
15 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
16 The cited advisory opinion is available on the Commission's website at
17 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Donald F. McGahn II
Chairman