



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

October 14, 2008

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2008-11

Mr. Lawrence Martin E. Brown  
12721 Triple Crown Road  
North Potomac, MD 20878-3789

Dear Mr. Brown:

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

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

***Background***

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

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

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

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

### ***Question Presented***

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

### ***Legal Analysis and Conclusions***

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

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

It shall be unlawful for any person—

- (1) Who enters into any contract with the United States or any department or agency thereof either for the rendition of *personal services* . . . to the United States or any department or agency thereof . . . if payment for the performance of such contract . . . is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for the later of (A) the completion of performance under; or (B) the termination of negotiations for, such contract . . . directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make

any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use . . . .

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

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

Mr. Brown, in his individual capacity, has entered into a written contract with USAID, an agency of the United States. Under this contract Mr. Brown is to provide personal services to USAID, and USAID is to pay him with funds appropriated by Congress. Brown Contract, pg. 1, A.1; 22 U.S.C. 2396(a)(3). Notwithstanding many aspects of Mr. Brown’s USAID contract which treat him as an employee (*see, e.g., Brown Contract* GP.2(c), GP.6(a), GP.6(b)), these characteristics are attributable to Federal government contract law; they do not alter (and in fact reinforce) the fundamental fact that Mr. Brown holds a Federal contract for personal services that is specifically authorized and paid for by funds appropriated by Congress.<sup>1</sup> Therefore, Mr. Brown meets the definition of a Federal contractor under the Act and Commission regulations. 2 U.S.C. 441c(a); *see also* 11 CFR 115.1(a)(1)(i), (2). As an individual who is a Federal contractor, Mr. Brown is prohibited from making contributions for any political purpose or use from his business or personal funds, or any other funds under his dominion or control. 2 U.S.C. 441c(a)(1); 11 CFR 115.2(a), 115.5.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on

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<sup>1</sup> *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).

this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinion is available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)  
Donald F. McGahn II  
Chairman