

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT

MUR 7887

DATE COMPLAINT FILED: Mar. 17, 2021

DATE OF NOTIFICATION: Mar. 22, 2021

DATE OF LAST RESPONSE: May 6, 2021

DATE ACTIVATED: July 21, 2021

EXPIRATION OF SOL: Nov. 6, 2025

ELECTION CYCLE: 2020

COMPLAINANT:

Campaign Legal Center

RESPONDENTS:

Hamilton Company

Americans for Prosperity Action and Robert Jentgens in his official capacity as treasurer¹**RELEVANT STATUTES****AND REGULATIONS:**

52 U.S.C. § 30119(a)

11 C.F.R. § 115.1

11 C.F.R. § 115.2

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that Hamilton Company (“Hamilton”) violated the federal contractor prohibition of the Federal Election Campaign Act of 1971, as amended (the “Act”), by making a \$300,000 contribution to Americans for Prosperity Action and Robert Jentgens in his official capacity as treasurer (“AFP”), an independent expenditure-only political committee (“IEOPC”), while Hamilton was a federal government contractor. The Complaint also raises

¹ Alex Varban was the treasurer at the time of the activity at issue in this matter as well as the time at which the Complaint and Response were received by the Commission. *See* Americans for Prosperity Action, Statement of Organization (May 7, 2019), available at <https://docquery.fec.gov/pdf/625/201905079149636625/201905079149636625.pdf>. On July 1, 2021, the Committee filed an amended Statement of Organization designating and Robert Jentgens as its treasurer. *See* Statement of Organization (July 1, 2021), <https://docquery.fec.gov/pdf/798/202107019450941798/202107019450941798.pdf>.

1 questions as to whether AFP violated the Act by knowingly soliciting a contribution from a
2 federal contractor.

3 Hamilton argues that it was not a federal contractor within the meaning of the Act, and
4 therefore did not violate the prohibition, because its sales to the federal government were not
5 awarded through the request for proposal process but, instead, were made pursuant to purchase
6 orders. It contends that purchase order agreements are “materially different” from government
7 contracts that are awarded through the request for proposal process. AFP asserts that it had no
8 reason to believe that Hamilton was a federal contractor at the time it contributed, and therefore,
9 did not violate the Act by knowingly soliciting a prohibited contractor contribution.

10 As explained below, Hamilton’s transactions by purchase order fall within the definition
11 of a contract under the prohibition, which includes any contract between any person and a federal
12 government agency for the furnishing of personal property or personal services. Therefore,
13 Hamilton was prohibited from making contributions while its contracts were being performed.
14 Accordingly, we recommend that the Commission find reason to believe that Hamilton violated
15 52 U.S.C. § 30119(a)(1). In addition, we recommend that the Commission enter into pre-
16 probable cause conciliation (“PPCC”) with Hamilton and approve the attached proposed
17 conciliation agreement

18 There is no information in the record to suggest that the AFP knowingly solicited
19 contributions from a federal contractor. However, it is possible that Hamilton’s response to the
20 reason-to-believe findings or discussions during conciliation could provide more information
21 regarding the potential solicitation of the contribution. We therefore recommend, consistent with
22 past matters in which there was no available information regarding the solicitation, that the

Commission take no action as to AFP at this time, pending development of additional information through the post-reason to believe and PPCC process with Hamilton.

II. FACTUAL BACKGROUND

Hamilton is a lab equipment manufacturing company based in Reno, Nevada.² The Complaint alleges, based on information publicly available at USASpending.gov, that Hamilton was a party to numerous federal contracts, including a contract with the Department of Health and Human Services for \$1.2 million that began on September 10, 2020, and a contract with the Department of Defense for \$871,233 that began on March 22, 2017.³ On November 6, 2020, during the period of performance for both of the above referenced contracts,⁴ Hamilton made a \$300,000 contribution to AFP.⁵

Hamilton acknowledges the facts regarding both its contribution to AFP and its sales to the federal government, but disputes the legal conclusion that it was a federal contractor within

² Compl. at 2 (Mar. 17, 2021); *About Us*, Hamilton Company, <https://www.hamiltoncompany.com/about-us> (last visited Sept. 1, 2021).

³ Compl. at 2 (citing USASpending.gov, Contract Summary, Award ID 75N95020P00548, https://www.usaspending.gov/award/CONT_AWD_75N95020P00548_7529_-NONE_-NONE- (last visited Mar. 16, 2021) (showing a \$1,237,587.54 contract from the U.S. Department of Health and Human Services to Hamilton Company with a period of performance of September 10, 2020 through April 10, 2021); USASpending.gov, Contract Summary, Award ID N6264517C4008, https://www.usaspending.gov/award/CONT_AWD_N6264517C4008_9700_-NONE_-NONE- (last visited Mar. 16, 2021) (showing a \$871,233 contract from the U.S. Department of Defense to Hamilton Company with a period of performance of March 22, 2017 through March 21, 2021).

⁴ A current review of USASpending.gov is consistent with Complainant's allegations that the referenced contracts were being performed on the date that the contribution was made to AFP, and also indicates that because of the exercising of an option in the contract with the Department of Defense, the total value of the contract with the Department of Defense is now nearly \$1.3 million. See USASpending.gov, Contract Summary, Award ID N6264517C4008, https://www.usaspending.gov/award/CONT_AWD_N6264517C4008_9700_-NONE_-NONE- (last visited Nov. 2, 2021) (showing a \$1.3 million contract between the Department of Defense and Hamilton with a period of performance of March 22, 2017 through March 21, 2021); USASpending.gov, Contract Summary, Award ID 75N95020P00548, https://www.usaspending.gov/award/CONT_AWD_75N95020P00548_7529_-NONE_-NONE- (last visited Nov. 2, 2021) (showing a \$1.2 million contract between the Department of Health and Human Services and Hamilton with a period of performance of September 10, 2020 through April 10, 2021).

⁵ Americans for Prosperity Action, 2020 Post-General Election Report, FEC Form 3X at 22 (amended Jan. 31, 2021), <https://docquery.fec.gov/pdf/707/202101319424073707/202101319424073707.pdf>.

the meaning of the Act because its sales of goods or services to the federal government were not awarded through the request for proposal process but, instead, were made pursuant to purchase orders.⁶ AFP disputes the factual basis for any violation by stating that it had “no reason to believe that Hamilton Company was a federal contractor at the time the contribution was made and, therefore, Americans for Prosperity did not knowingly solicit a contribution from a federal contractor.”⁷ Upon receiving the Complaint, Hamilton states that it requested a refund of its contributions, and on April 29, 2021, AFP refunded Hamilton’s contribution.⁸

III. LEGAL ANALYSIS

A. The Commission Should Find Reason to Believe that Hamilton Violated 52 U.S.C. § 30119(a)(1) by Making a Prohibited Federal Contractor Contributions

A “contribution” is defined as “any gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office.”⁹ Under the Act, a federal contractor may not make contributions to political committees.¹⁰ Specifically, the Act prohibits “any person . . . [w]ho enters into any contract with the United States . . . for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof” from making a contribution “if payment for the performance of such contract . . . is to be made in whole or in part from funds appropriated by the Congress.”¹¹

⁶ Hamilton Resp. at 2 (May 6, 2021).

⁷ Americans for Prosperity Resp. at 2- 3 (May 6, 2021).

⁸ Hamilton Resp. at 2; Americans for Prosperity Resp. at 3; *see* Americans for Prosperity, 2021 May Monthly Report at 15 (May 20, 2021), <https://docquery.fec.gov/pdf/792/202105209447319792/202105209447319792.pdf>.

⁹ 52 U.S.C. § 30101(8)(A)(i).

¹⁰ *Id.* § 30119(a); 11 C.F.R. § 115.2.

¹¹ 52 U.S.C. § 30119(a)(1); *see also* 11 C.F.R. part 115.

These prohibitions begin to run at the beginning of negotiations or when proposal requests are sent out, whichever occurs first, and end upon the completion of performance of the contract or the termination of negotiations, whichever occurs last.¹²

The federal contractor contribution prohibition applies to any federal contractor who makes contributions to any political party, political committee, federal candidate, or “any person for any political purpose or use.”¹³ Commission regulations define “contract” to include:

(1) A sole source, negotiated, or advertised procurement conducted by the United States or any of its agencies;

(2) A written (except as otherwise authorized) contract, between any person and the United States or any of its departments or agencies, for the furnishing of personal property, real property, or personal services; and

(3) Any modification of a contract.¹⁴

Hamilton does not dispute the existence of its transactions with the Department of Health and Human Services or the Department of Defense, nor that these contracts were being performed when it made the \$300,000 contribution to AFP, but it asserts that it nonetheless “should not be considered a government contractor.”¹⁵ Instead, Hamilton argues for a limited understanding of government contracts consisting only of “long-term government contracts through the [request for proposal] process” and asserts that “Hamilton has never bid on or been awarded a government contract through the [request for proposal] process, but rather provided

¹² 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.1(b).

¹³ 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.2.

¹⁴ 11 C.F.R. § 115.1(c).

¹⁵ Hamilton Resp. at 1. *See supra* note 2.

goods to certain government agencies pursuant to purchase orders, ” which, it asserts, are
 “materially different.”¹⁶

Hamilton’s argument that the prohibition is limited to federal government contracts
 resulting from a formal solicitation by the federal government or through the request for proposal
 process is contrary to both the plain language of 11 C.F.R. § 115.1(c)(2) and Commission
 precedent. The regulation defines “contract” to include a “contract between any person and the
 United States or any of its departments or agencies, for the furnishing personal property . . . or
 personal services.”¹⁷ The Commission has explained that “section 115.2(c)(2) expands the
 meaning of contract . . . beyond only procurement contracts.”¹⁸ Further, the Commission has
 stated that “there is no distinction between a negotiated contract and a competitively bid contract.
 This conclusion follows from the language of [the prohibition] which refers to ‘any contract.’”¹⁹

There is no dispute that a purchase via a purchase order is such a written contract. Courts
 have recognized that: “a purchase order is generally an offer which may then be accepted or
 rejected by a seller.”²⁰ If the terms of such an offer are accepted, the purchase order becomes the
 contract.²¹ This understanding is also consistent with the Explanation and Justification that the
 Commission put forth in support of the regulations, explaining that “[t]he prohibition covers all

¹⁶ Hamilton Resp. at 1-2.

¹⁷ 11 C.F.R. § 115.1(c)(2).

¹⁸ Advisory Op 1993-12 (Mississippi Band of Choctaw Indians) at 3.

¹⁹ Advisory Opinion 1975-110 (further noting that “[s]ince the word contract is used in a general rather than a limited sense, there is no basis in the statutory language for the differentiation If a more limited meaning had been intended, it is logical to assume that Congress would have incorporated it into the statute”) (discussing prior version of the prohibition, then located at 18 U.S.C. § 611, which used the same “any contract” language).

²⁰ *Roanoke Cement Co. v. Falk Corp.*, 413 F.3d 431, 433 (4th Cir. 2005) (internal quotations omitted); *cf. Summit Glob. Contractors, Inc. v. Enbridge Energy, Ltd. P’ship*, 594 S.W.3d 693, 701 (Tex. App. 2019) (considering a purchase offer as the acceptance of an offer in the form of a sufficiently detailed bid inviting the purchase order).

²¹ *See* U.C.C. § 2-206, Offer and Acceptance in Formation of a Contract.

contracts entered into with the Federal government, including contracts as defined in 41 C.F.R. § 1-1.208,” which explicitly included purchase orders in the definition of contract for purpose of federal acquisition regulations.²²

The contractual nature of the purchase order transactions in the present matter is further underlined by Hamilton’s own website that includes the three-page standard term sheet which it deems to be part of any agreement made via a purchase order unless otherwise authorized by Hamilton in writing.²³ These terms of the agreement outline the rights and obligations of the parties, payment terms, dates of performance, a force majeure clause, and a choice of law clause.²⁴ Thus, purchase order agreements, as Hamilton regularly enters into them, are not only created in the fashion of a contract, via a written offer and acceptance, their very terms are easily recognizable as those of an at least modestly sophisticated contract.²⁵

Further, these written contracts were made to acquire personal property or personal services, as described by the regulation.²⁶ According to the descriptions of these transactions on USASpending.gov, the first of the two relevant contracts was made with the Department of

²² Explanation and Justification for Part 115, H.R. Doc. No. 95-44 at 120 (1977); *see* 41 C.F.R. §§ 1-1.208 (1973) (“‘Contract’ means establishment of a binding legal relation basically obligating the seller to furnish personal property or nonpersonal services (including construction) and the buyer to pay therefor. It includes all types of commitments which obligate the Government to an expenditure of funds and which, except as otherwise authorized, are in writing. In addition to a two-signature document, it includes all transactions resulting from acceptance of offers by . . . orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance. . . .”) (emphasis added); *see also* Federal Acquisition Regulations, 48 C.F.R. § 2.10 (2021) (also including “orders, such as purchase orders” with in the definition of contract).

²³ Hamilton General Terms and Conditions of Sale for Service, available at <https://craft-hamilton.s3.amazonaws.com/About-Us/Terms-and-Conditions/GTS/Hamilton-Company-General-Terms-and-Conditions-of-Sale-for-Service-F-744.pdf?mtime=20181220090847> (last visited Aug. 19, 2021).

²⁴ *Id.*

²⁵ While we do not possess information indicating whether the government agreed to Hamilton’s standard terms or agreed in writing to some modified terms, the presence of a written and potentially negotiated term sheet, is nonetheless evidence of the contractual nature of the transaction.

²⁶ *See* 11 C.F.R. § 115.1(c)(2).

1 Defense for “robotics maintenance services in support of the DOD Drug demand reduction
2 program,” which would appear to be “personal services”²⁷ and the second was made with the
3 Department of Health and Human Services for the purchase of an “automated cell culture
4 processing system,” which would appear to be personal property.²⁸ Thus, the transactions are
5 both in the form — a written contract — and for the purposes — personal property, real
6 property, or personal services — covered by section 115.2(c)(2).

7 Therefore, it appears that Hamilton was a federal contractor within the meaning of
8 Commission regulations at the time of its contribution to AFP and that the contribution was
9 therefore prohibited by section 30119.

10 Hamilton contends that, notwithstanding its contractor status, because it requested and
11 received a refund of its contribution when it learned of the Complaint, that “should resolve any
12 of the Complainant’s concerns.”²⁹ While, as discussed below, this remedial measure may reduce
13 the civil penalty that the Commission seeks to resolve the matter, it does not excuse the
14 violation.³⁰ Accordingly, we should recommend that the Commission find reason to believe that
15 Hamilton violated 52 U.S.C. § 30119(a)(1) and enter into pre-probable cause conciliation.

²⁷ *See supra* note 3.

²⁸ *Id.*

²⁹ Hamilton Resp. at 2.

³⁰ *See* Factual and Legal Analysis at 4, MUR 7451 (Ring Power Corporation).

B. The Commission Should Take No Action at this Time as to the Allegation that AFP Violated 52 U.S.C. § 30119(a)(2) by Knowingly Soliciting a Prohibited Federal Contractor Contribution

The Act also prohibits any person from knowingly soliciting any federal contractor contribution.³¹ In the present matter, the Complaint does not specifically allege that AFP knowingly solicited the Hamilton contribution, or provide any information that would indicate that it knew that Hamilton was a federal contractor. AFP denies that it knowingly solicited contributions from a federal contractor and states that, after receiving a request from Hamilton, it refunded the contribution.³²

In several similar matters, the Commission has taken no action against the committee that may have solicited the federal contractor contribution in order to assess any potential information that may be acquired from the contributor's post-reason to believe response or discussions during pre-probable cause conciliation.³³ Consistent with this line of matters, we recommend that the Commission take no action at this time as to AFP.

³¹ 52 U.S.C. § 30119(a)(2); *see also* 11 C.F.R. § 115.2(c).

³² AFP Resp. at 2-3.

³³ *See* Certification MUR 7568 (Alpha Marine Services Holdings, LLC) (July 2, 2020) (taking no action at this time with respect to recipient committee); Certification MUR 7451 (Ring Power Corporation) (May 9, 2019) (same); Certification MUR 7450 (Ashbrite, Inc.) (July 23, 2019) (same); and Certification, MUR 7099 (Suffolk Construction Co.) (May 23, 2017) (same); *see also* First Gen. Counsel's Rpt. at 5, MUR 7568 (Alpha Marine Service Holdings, LLC) (recommending that the Commission take no action at this time with respect to recipient committee); First Gen. Counsel's Rpt. at 6-7, MUR 7451 (Ring Power Corporation) (same); First Gen. Counsel's Rpt. at 8-9, MUR 7450 (Ashbrite, Inc.) (same); and First Gen. Counsel's Rpt. at 7, MUR 7099 (Suffolk Construction) (same).

1

2

3

4

5

6

7 **V. RECOMMENDATIONS**

8 1. Find reason to believe that Hamilton Company violated 52 U.S.C. § 30119(a)(1)
9 by making a prohibited federal contractor contribution;

10 2. Take no action at this time with respect to Americans for Prosperity Action and
11 Robert Jentgens in his official capacity as treasurer;

12 3. Approve the attached Factual and Legal Analysis;

13 4. Authorize pre-probable cause conciliation with Hamilton Company;

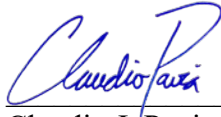
14 5. Approve the attached Conciliation Agreement; and


6. Approve the appropriate letters.


Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Associate General Counsel
for Enforcement

11/08/2021
Date



Claudio J. Pavia
Acting Deputy Associate General
Counsel for Enforcement

Mark Shonkwiler
Assistant General Counsel

Nicholas O. Mueller
Attorney

Dem office edits 1/6/22

**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

Respondent: Hamilton Company

MUR 7887

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission alleging that Hamilton Company (“Hamilton”) violated the federal contractor prohibition of the Federal Election Campaign Act of 1971, as amended (the “Act”), by making a \$300,000 contribution to Americans for Prosperity Action and Robert Jentgens in his official capacity as treasurer (“AFP”), an independent expenditure-only political committee (“IEOPC”), while Hamilton was a federal government contractor.

Hamilton argues that it was not a federal contractor within the meaning of the Act, and therefore did not violate the prohibition, because its sales to the federal government were not awarded through the request for proposal process but, instead, were made pursuant to purchase orders. It contends that purchase order agreements are “materially different” from government contracts that are awarded through the request for proposal process.

As explained below, Hamilton’s transactions by purchase order fall within the definition of a contract under the prohibition, which includes any contract between any person and a federal government agency for the furnishing of personal property or personal services. Therefore, Hamilton was prohibited from making contributions while its contracts were being performed. Accordingly, the Commission finds reason to believe that Hamilton violated 52 U.S.C. § 30119(a)(1).

II. FACTUAL BACKGROUND

Hamilton is a lab equipment manufacturing company based in Reno, Nevada.¹ The Complaint alleges, based on information publicly available at USASpending.gov, that Hamilton was a party to numerous federal contracts, including a contract with the Department of Health and Human Services for \$1.2 million that began on September 10, 2020, and a contract with the Department of Defense for \$871,233 that began on March 22, 2017.² On November 6, 2020, during the period of performance for both of the above referenced contracts,³ Hamilton made a \$300,000 contribution to AFP.⁴

Hamilton acknowledges the facts regarding both its contribution to AFP and its sales to the federal government, but disputes the legal conclusion that it was a federal contractor within the meaning of the Act because its sales of goods or services to the federal government were not awarded through the request for proposal process but, instead, were made pursuant to purchase

¹ Compl. at 2 (Mar. 17, 2021); *About Us*, Hamilton Company, <https://www.hamiltoncompany.com/about-us> (last visited Sept. 1, 2021).

² Compl. at 2 (citing USASpending.gov, Contract Summary, Award ID 75N95020P00548, https://www.usaspending.gov/award/CONT_AWD_75N95020P00548_7529_-NONE_-NONE- (last visited Mar. 16, 2021) (showing a \$1,237,587.54 contract from the U.S. Department of Health and Human Services to Hamilton Company with a period of performance of September 10, 2020 through April 10, 2021); USASpending.gov, Contract Summary, Award ID N6264517C4008, https://www.usaspending.gov/award/CONT_AWD_N6264517C4008_9700_-NONE_-NONE- (last visited Mar. 16, 2021) (showing a \$871,233 contract from the U.S. Department of Defense to Hamilton Company with a period of performance of March 22, 2017 through March 21, 2021).

³ A current review of USASpending.gov is consistent with Complainant's allegations that the referenced contracts were being performed on the date that the contribution was made to AFP, and also indicates that because of the exercising of an option in the contract with the Department of Defense, the total value of the contract with the Department of Defense is now nearly \$1.3 million. See USASpending.gov, Contract Summary, Award ID N6264517C4008, https://www.usaspending.gov/award/CONT_AWD_N6264517C4008_9700_-NONE_-NONE- (last visited Nov. 2, 2021) (showing a \$1.3 million contract between the Department of Defense and Hamilton with a period of performance of March 22, 2017 through March 21, 2021); USASpending.gov, Contract Summary, Award ID 75N95020P00548, https://www.usaspending.gov/award/CONT_AWD_75N95020P00548_7529_-NONE_-NONE- (last visited Nov. 2, 2021) (showing a \$1.2 million contract between the Department of Health and Human Services and Hamilton with a period of performance of September 10, 2020 through April 10, 2021).

⁴ Americans for Prosperity Action, 2020 Post-General Election Report, FEC Form 3X at 22 (amended Jan. 31, 2021), <https://docquery.fec.gov/pdf/707/202101319424073707/202101319424073707.pdf>.

orders.⁵ Upon receiving the Complaint, Hamilton states that it requested a refund of its contributions, and on April 29, 2021, AFP refunded Hamilton's contribution.⁶

III. LEGAL ANALYSIS

A "contribution" is defined as "any gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office."⁷ Under the Act, a federal contractor may not make contributions to political committees.⁸ Specifically, the Act prohibits "any person . . . [w]ho enters into any contract with the United States . . . for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof" from making a contribution "if payment for the performance of such contract . . . is to be made in whole or in part from funds appropriated by the Congress."⁹ These prohibitions begin to run at the beginning of negotiations or when proposal requests are sent out, whichever occurs first, and end upon the completion of performance of the contract or the termination of negotiations, whichever occurs last.¹⁰

The federal contractor contribution prohibition applies to any federal contractor who makes contributions to any political party, political committee, federal candidate, or "any person for any political purpose or use."¹¹ Commission regulations define "contract" to include:

(1) A sole source, negotiated, or advertised procurement conducted by the United States or any of its agencies;

⁵ Hamilton Resp. at 2 (May 6, 2021).

⁶ Hamilton Resp. at 2; *see* Americans for Prosperity, 2021 May Monthly Report at 15 (May 20, 2021), <https://docquery.fec.gov/pdf/792/202105209447319792/202105209447319792.pdf>.

⁷ 52 U.S.C. § 30101(8)(A)(i).

⁸ *Id.* § 30119(a); 11 C.F.R. § 115.2.

⁹ 52 U.S.C. § 30119(a)(1); *see also* 11 C.F.R. part 115.

¹⁰ 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.1(b).

¹¹ 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.2.

(2) A written (except as otherwise authorized) contract, between any person and the United States or any of its departments or agencies, for the furnishing of personal property, real property, or personal services; and

(3) Any modification of a contract.¹²

Hamilton does not dispute the existence of its transactions with the Department of Health and Human Services or the Department of Defense, nor that these contracts were being performed when it made the \$300,000 contribution to AFP, but it asserts that it nonetheless “should not be considered a government contractor.”¹³ Instead, Hamilton argues for a limited understanding of government contracts consisting only of “long-term government contracts through the [request for proposal] process” and asserts that “Hamilton has never bid on or been awarded a government contract through the [request for proposal] process, but rather provided goods to certain government agencies pursuant to purchase orders, ” which, it asserts, are “materially different.”¹⁴

Hamilton’s argument that the prohibition is limited to federal government contracts resulting from a formal solicitation by the federal government or through the request for proposal process is contrary to both the plain language of 11 C.F.R. § 115.1(c)(2) and Commission precedent. The regulation defines “contract” to include a “contract between any person and the United States or any of its departments or agencies, for the furnishing personal property . . . or personal services.”¹⁵ The Commission has explained that “section 115.2(c)(2) expands the

¹² 11 C.F.R. § 115.1(c).

¹³ Hamilton Resp. at 1. *See supra* note 2.

¹⁴ Hamilton Resp. at 1-2.

¹⁵ 11 C.F.R. § 115.1(c)(2).

1 meaning of contract . . . beyond only procurement contracts.”¹⁶ Further, the Commission has
 2 stated that “there is no distinction between a negotiated contract and a competitively bid contract.
 3 This conclusion follows from the language of [the prohibition] which refers to ‘any contract.’”¹⁷

4 There is no dispute that a purchase via a purchase order is such a written contract. Courts
 5 have recognized that: “a purchase order is generally an offer which may then be accepted or
 6 rejected by a seller.”¹⁸ If the terms of such an offer are accepted, the purchase order becomes the
 7 contract.¹⁹ This understanding is also consistent with the Explanation and Justification that the
 8 Commission put forth in support of the regulations, explaining that “[t]he prohibition covers all
 9 contracts entered into with the Federal government, including contracts as defined in 41 C.F.R.
 10 § 1-1.208,” which explicitly included purchase orders in the definition of contract for purpose of
 11 federal acquisition regulations.²⁰

12 The contractual nature of the purchase order transactions in the present matter is further
 13 underlined by Hamilton’s own website that includes the three-page standard term sheet which it

¹⁶ Advisory Op 1993-12 (Mississippi Band of Choctaw Indians) at 3.

¹⁷ Advisory Opinion 1975-110 (further noting that “[s]ince the word contract is used in a general rather than a limited sense, there is no basis in the statutory language for the differentiation If a more limited meaning had been intended, it is logical to assume that Congress would have incorporated it into the statute”) (discussing prior version of the prohibition, then located at 18 U.S.C. § 611, which used the same “any contract” language).

¹⁸ *Roanoke Cement Co. v. Falk Corp.*, 413 F.3d 431, 433 (4th Cir. 2005) (internal quotations omitted); *cf. Summit Glob. Contractors, Inc. v. Enbridge Energy, Ltd. P’ship*, 594 S.W.3d 693, 701 (Tex. App. 2019) (considering a purchase offer as the acceptance of an offer in the form of a sufficiently detailed bid inviting the purchase order).

¹⁹ See U.C.C. § 2-206, Offer and Acceptance in Formation of a Contract.

²⁰ Explanation and Justification for Part 115, H.R. Doc. No. 95-44 at 120 (1977); see 41 C.F.R. §§ 1-1.208 (1973) (“Contract’ means establishment of a binding legal relation basically obligating the seller to furnish personal property or nonpersonal services (including construction) and the buyer to pay therefor. It includes all types of commitments which obligate the Government to an expenditure of funds and which, except as otherwise authorized, are in writing. In addition to a two-signature document, it includes all transactions resulting from acceptance of offers by . . . orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance. . . .”) (emphasis added); see also Federal Acquisition Regulations, 48 C.F.R. § 2.10 (2021) (also including “orders, such as purchase orders” with in the definition of contract).

1 deems to be part of any agreement made via a purchase order unless otherwise authorized by
2 Hamilton in writing.²¹ These terms of the agreement outline the rights and obligations of the
3 parties, payment terms, dates of performance, a force majeure clause, and a choice of law
4 clause.²² Thus, purchase order agreements, as Hamilton regularly enters into them, are not only
5 created in the fashion of a contract, via a written offer and acceptance, their very terms are easily
6 recognizable as those of a contract.²³

7 Further, these written contracts were made to acquire personal property or personal
8 services, as described by the regulation.²⁴ According to the descriptions of these transactions on
9 USASpending.gov, the first of the two relevant contracts was made with the Department of
10 Defense for “robotics maintenance services in support of the DOD Drug demand reduction
11 program,” which would appear to be “personal services²⁵ and the second was made with the
12 Department of Health and Human Services for the purchase of an “automated cell culture
13 processing system,” which would appear to be personal property.²⁶ Thus, the transactions are
14 both in the form — a written contract — and for the purposes — personal property, real
15 property, or personal services — covered by section 115.2(c)(2).

²¹ Hamilton General Terms and Conditions of Sale for Service, available at <https://craft-hamilton.s3.amazonaws.com/About-Us/Terms-and-Conditions/GTS/Hamilton-Company-General-Terms-and-Conditions-of-Sale-for-Service-F-744.pdf?mtime=20181220090847> (last visited Aug. 19, 2021).

²² *Id.*

²³ While the Commission does not possess information indicating whether the government agreed to Hamilton’s standard terms or agreed in writing to some modified terms, the presence of a written and potentially negotiated term sheet, is nonetheless evidence of the contractual nature of the transaction.

²⁴ *See* 11 C.F.R. § 115.1(c)(2).

²⁵ *See supra* note 3.

²⁶ *Id.*

1 Therefore, it appears that Hamilton was a federal contractor within the meaning of
2 Commission regulations at the time of its contribution to AFP and that the contribution was
3 therefore prohibited by section 30119.

4 Hamilton contends that, notwithstanding its contractor status, because it requested and
5 received a refund of its contribution when it learned of the Complaint, that “should resolve any
6 of the Complainant’s concerns.”²⁷ However, this remedial measure does not excuse the
7 violation.²⁸ Accordingly, the Commission finds reason to believe that Hamilton violated
8 52 U.S.C. § 30119(a)(1).

²⁷ Hamilton Resp. at 2.

²⁸ *See* Factual and Legal Analysis at 4, MUR 7451 (Ring Power Corporation).