

Contractor Doctor: Can an agency sue me because I went to the client direct?

Dear Contractor Doctor,

I was talking to an agency about a possible contract and when they finally mentioned the client, I told them I knew someone there who could give me a good reference, and said for them to put me forward.

When they sent me an email asking me to confirm that they could represent me to the client, I replied 'no'. I then contacted my friend at the client who put me forward for the role. I was interviewed and won the contract.

The agency has found out and claims that my conversations with them were recorded; they want a cut and are threatening to sue me. What should I do?

Thanks

Andrew

Contractor Doctor says:

"The contractor was talking to the agency in order to find a contract," explains [Roger Sinclair](#) of contractor specialist law firm Egos. "That means that at the outset the contractor should have been asked by the agency whether they wished to opt out of [Conduct of Employment Regulations](#)."

If the contractor does not opt out, then the agency is required to disclose its terms of business to the contractor, and these would generally stipulate that the contractor should not approach the agency's clients direct.

In this case, says Sinclair, if the contractor had not opted-out, then they would be in breach of the agency's terms of business and the agency would be within its rights to take action against the contractor.

However, according to Sinclair, agencies frequently do not ask contractors the opt-out question at this early stage, which potentially leaves the agency in a vulnerable position and would mean the contractor has not been formally notified of the agency's terms of business.

Confidential information

"In the case of contractors who choose to opt out of the Conduct of Employment Regulations," continues Sinclair, "there is no legal requirement on the agency to disclose its terms of business at the outset; given that, as a matter of contract law, undisclosed terms will generally be of no effect, it might be that the position here would not be covered by the agency's terms of business, and so there may be no contractual restriction to contacting the client."

But that does not necessarily give the contractor free rein, as Sinclair explains: "The agency may well be entitled to say that their disclosure of the client's details was made to the contractor under conditions of confidentiality.

"If so, by contacting the client about the contract opportunity after speaking to the agency, the contractor may be considered to have abused that confidence, and so there may be a liability on the contractor to the agency in this respect."

If the contractor won the contract by going direct based on confidential information provided by the agency, whether opted out or not, the agency may well have grounds to sue.

Recorded business conversations

"A recorded conversation need not be negative, as the recording may help reduce uncertainty around a dispute," says Sinclair. "However, there are some important issues to consider."

Did the contractor actually hear the recording or were they merely informed that it had been made? If it was actually recorded, what in fact was said? Can the agency actually find the recording? And was the recording made legitimately, with the contractor's knowledge?

According to Sinclair, a business can only legitimately record telephone conversations for a [limited number of reasons](#):

- o To provide evidence that a business transaction has occurred

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Roger Sinclair, Egos

- o For compliance purposes
- o For reasons of quality and service
- o For the purposes of crime detection
- o To ensure that a telephone system is working properly.

But Sinclair warns that the legislation is complex: "Much of the law in this field is driven by Europe and is correspondingly complicated. Generally speaking, if you plan on being honest in your dealings with a business counterpart, then what do you have to fear from being recorded? But it is generally preferable to know the call is being recorded from the outset – at the least, it encourages a greater degree of caution in what one says."

"What we seem to have in this situation is a contractor who has used confidential information behind the agency's back for personal gain," concludes Sinclair, "and has been caught doing it."

Good luck with your contracting!

Contractor Doctor

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