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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

50525

FILE: B-181056

DATE: February 10, 1975

MATTER OF: Major Stephen J. Pishock, USMC (Retired) -
Contracting with Government

DIGEST:

A retired Regular Marine Corps officer who, within three years of his name being placed on a retired list, makes precontract contacts with contracting officials of the Marine Corps in his capacity as a representative of a firm selling to the Marine Corps may be presumed to be engaged in selling within the meaning of 37 U.S.C. § 801(c) (1970) and DOD Directive 5500.7, and therefore, in the absence of convincing rebuttal evidence, the officer's retired pay for the period of prohibited activities is to be recovered.

This decision is in response to Headquarters United States Marine Corps letter dated April 9, 1974 (file reference MPS-24-1j1), with enclosure, requesting a determination whether certain business activities engaged in by Major Stephen J. Pishock, USMC (Retired), 192-20-09-10, constitute a violation of 37 U.S.C. § 801(c) (1970), so as to require forfeiture by him of retired pay for the period in question.

It is stated that Major Pishock is serving as the Washington representative of Radio Engineering Products, a Montreal firm that does business on a regular basis with the Marine Corps. The enclosure to the April 9, 1974 letter is a report on this matter by the Naval Investigative Service (NIS).

A sworn but unsigned statement by Major Pishock in the report shows that he retired from the Marine Corps on July 30, 1970, and began his employment with Radio Engineering Products (REP) as a "Program Coordinator" on August 1, 1970. Major Pishock's duties in this position are described by him as follows:

"I joined REP after my retirement in 1970. The job title of Program Coordinator was created to coordinate the phasing in of equipment manufactured by the company, provide technical liaison or advisory service in support of this effort, insure rapid resolution of reported equipment deficiencies, act as expeditor when required (mail man - equipment finder, etc), provide transportation and guide service in the U.S. area. Assist in presentations and demonstrations * * *."

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Section 801(c) of title 37, United States Code (1970), provides in pertinent part that:

"Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of * * * the Regular Marine Corps * * * who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service."

Paragraph I.C.2 of Department of Defense (DOD) Directive Number 5500.7, dated August 8, 1967, defines "selling" for the purposes of 10 U.S.C. § 801(c) as:

- "a. Signing a bid, proposal, or contract;
- "b. Negotiating a contract;
- "c. Contacting an officer or employee of any of the foregoing departments or agencies for the purpose of:
 - "(1) Obtaining or negotiating contracts,
 - "(2) Negotiating or discussing changes in specifications, price, cost allowances, or other terms of a contract, or
 - "(3) Settling disputes concerning performance of a contract, or
- "d. Any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person."

Paragraph I.C.2 of DOD Directive 5500.7 also states that it is not the intent of the directive to preclude a retired Regular officer from accepting employment with private industry solely because his employer is a contractor with the Government.

This Office has held generally that the employment of retired Regular officers in nonsales, executive or administrative positions, including contacts by a retired officer in his capacity as a non-contracting technical specialist which involves no sales activities, is outside the purview of the statute and the DOD directive. See 41 Comp. Gen. 784 (1962); 41 Comp. Gen. 799 (1962); 42 Comp. Gen. 87 (1962); 42 Comp. Gen. 236 (1962); and 52 Comp. Gen. 3 (1972). However, this Office has taken the position that where a retired officer actually participates in some phase of the procurement process, such activities bring him within the purview of the definition of "selling" in the DOD directive. See for example, 42 Comp. Gen. 32 (1962); 42 Comp. Gen. 236, supra; and 43 Comp. Gen. 408 (1963).

The report by NIS in the matter of Major Pishock contains sworn statements by Mr. Millard F. Pippin, Jr., and Mr. George H. Sandrock, Contract Negotiators at the Procurement Division, Headquarters, U.S. Marine Corps, concerning their contacts with Major Pishock. Mr. Pippin indicates that his first contact with Major Pishock was in the latter part of 1971 when Major Pishock "inquired if the Marine Corps had a requirement for the VHF diplexer." The next contact Mr. Pippin states that he had with Major Pishock was in the first part of 1972 when Major Pishock reportedly stated to Mr. Pippin that "because of his firm's interest in the diplexer, he would like to be placed on the bidder's list if and when the Marine Corps initiated procurement action." Major Pishock responds in his statement that he "cannot confirm Mr. Pippin's allegation" in this respect, and points out that another department of his company would handle the matter of placement of REP on bidder's lists.

After a solicitation for technical proposals for the diplexers had been issued, and prior to the closing date (June 1972), Major Pishock, according to Mr. Pippin, contacted him at least once and apprised him of REP's experience with the product sought to be procured. This allegation is un rebutted by Major Pishock.

Mr. Pippin reports that during the period of evaluation of technical proposals in the solicitation of the diplexer, Major Pishock made at least two inquiries, by phone and personal visit, concerning the status of his company's proposal. He also states that Major Pishock attended a preproposal conference on a proposed procurement of a line unit telephone, and later made several calls concerning the status of REP's proposal for that item. Major Pishock has responded that he does "not recall addressing Mr. Pippin in that context if at all." He suggests that Mr. Pippin may have misunderstood a general

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inquiry such as "How things were going or how was business," or may have attributed to him remarks made by other members of his company. However, the NIS report contains a copy of a letter dated September 21, 1972, from Mr. S. T. Fisher of REP, addressed to Headquarters, U.S. Marine Corps, "Subject: Proposed procurement of Line Unit, Telephone * * *." The letter purports to be "in furtherance of Mr. Steve Pishock's visit to your office on 12 September 1972 during which a proposed procurement of the TA-807/GCC Line Unit, Telephone was briefly discussed." The letter goes on to state that at the September 12 meeting it was disclosed that consideration was being given to an open procurement of the item in question, and argues that any procurement should be sole source for REP through its parent company.

Concerning the evidentiary conflict thus presented, it is noted that, although Major Pishock in general denies that his contacts with Mr. Pippin were for the purpose of selling his company's products, he does not deny that the contacts reported by Mr. Pippin took place. In 42 Comp. Gen. 236, 240, it was held in this regard, that:

"While we agree that not every precontract contact is to be viewed as a sale activity for purposes of the statutes, it is our view * * * that such contacts generally, either direct or indirect, with officials of Defense agencies by retired officers representing companies who sell supplies or war materials to those agencies should be viewed as coming within the scope of the statutes and the provisions of the Department of Defense Directive unless clearly and adequately shown to be for some other purpose."

In the instant case, no account is offered by the retired officer of the purpose of his precontract contacts with Mr. Pippin, a contract negotiator, nor are we aware of any explanation why Major Pishock, in his capacity as a technical adviser, would initiate precontract contacts with Mr. Pippin unless for some reason directly or indirectly involving sales. Moreover, the September 21 letter from Mr. Fisher strongly supports the testimony of Mr. Pippin that Major Pishock was then engaged in selling with respect to the line unit telephone. Accordingly, we conclude that the contacts described above must be viewed as participation in the proscribed activities.

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The fact that the precontract conferences were attended by other members of Major Pishock's company does not affect this result, in the absence of a clear and adequate showing that Major Pishock's presence at such conferences was not, directly or indirectly, a sales activity. 42 Comp. Gen. 236. Major Pishock asserts that he was interested in attending the conferences "because of support that I was to render in this area in the event of an award." Even assuming that Major Pishock did not intend, by his presence at the conferences, to engage in sales, the implementing DOD directive includes within the meaning of "selling" "any other liaison activity with a view toward the ultimate consummation of a sale * * *." Major Pishock's attendance at a preproposal conference with Marine Corps contract negotiators could reasonably be construed as being "with a view toward the ultimate consummation of a sale."

With respect to the precontract contacts with Major Pishock reported by Mr. Sandrock, Major Pishock explains that he was acting at the request of Mr. Sandrock to help resolve the matter of some missing and obliterated drawings which were part of a bid set. However, Major Pishock is referring to events in 1973, while Mr. Sandrock alleges that late in the summer of 1972, he met with Major Pishock who then "expressed his company's interest in the procurement of the TH-85 /telephone terminals/." Mr. Sandrock also refers to Major Pishock's attendance at a preproposal conference on January 18, 1973, and to personal visits and phone calls to him by Major Pishock relative to the procurement of the TH-85 between November 11, 1972, and February 16, 1973. We note that the extract from the Contractor Visitation Log for Procurement Division, reproduced in the NIS report, does not verify Mr. Sandrock's allegations, since it shows no visits by Major Pishock to Mr. Sandrock during the period in question. This discrepancy in the evidence, coupled with Major Pishock's explanation of his contacts with Mr. Sandrock, including his allegation that they were at Mr. Sandrock's request, would make it difficult, without further investigation, to conclude that in these instances Major Pishock was engaged in selling within the meaning of the statute. As will be discussed below, it is not necessary to pursue this question further, however, since the contacts with Mr. Sandrock all took place during the period of Major Pishock's contacts with Mr. Pippin. The contacts with Mr. Pippin resulted in forfeiture for the duration of those contacts and the resulting contracts.

The report also contains sworn statements by Major Paul V. McNutt, USMC (Retired), who was the Projects Officer at Communication-Electronics Systems Branch, Technical Division, Headquarters, U.S.

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Marine Corps (CSY-3) and by Captain William R. Carr, USMC, a Project Engineer in CSY-3, Supply Department. The visitor's log for CSY-3 disclosed that Major Pishock visited that office as a representative of REP on numerous occasions beginning August 13, 1970. Major McNutt listed various purposes of Major Pishock's visits to him from August 13, 1970, to July 5, 1972, among which purposes, were:

"c. Visits made in the interest of promoting or bringing to the Marine Corps' attention some new item that was being developed by Radio Engineering Products.

* * * * *

"f. Visits made where he attempted to convince me that the Marine Corps should go sole source to Radio Engineering Products for any additional procurements of Multichannel Radio Equipment."

However, other purposes listed by Major McNutt were to discuss technical problems at Major McNutt's request or to ask if any problems were being encountered, and to coordinate the activities of other REP technical personnel.

Major Pishock's visits to CSY-3, between August 13, 1970, and July 5, 1972, for the purpose of promoting or bringing to the Marine Corps' attention new products of his employer, or to convince Major McNutt that the Marine Corps should go sole source to Radio Engineering Products for any additional procurements of multichannel radio equipment, in our view constitute participation in sales activities within the purview of 37 U.S.C. § 801(c).

Concerning Major Pishock's visits to Captain Carr at CSY-3 subsequent to July 1972, Captain Carr stated that he encountered Major Pishock when the latter, during August 1972, introduced himself as a program coordinator for REP, and offered to assist with "any problems with REP equipment in the field * * *." Captain Carr stated that he met with Major Pishock some 9 to 10 times. He further stated that most of those meetings were at Captain Carr's request and were for the purpose of availing himself of technical assistance from Major Pishock. Such meetings, limited to discussion of technical matters with Captain Carr, do not subject Major Pishock to the statutory proscription.

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However, Captain Carr also stated that two of the meetings involved Major Pishock bringing in personnel of REP or its parent company, in one case to explain the role of the parent company in contracting for the Marine Corps, and in the other to explain apparent deficiencies in the REP proposal for the diplexer. This Office has held that a retired officer who accompanies other members of his firm to meetings with Department of Defense personnel for the purpose of discussing any supply procurement proposals is engaging in sales activities within the purview of statutes such as 37 U.S.C. § 801(c). E.g., 42 Comp. Gen. 87, 93. Therefore, it appears that Major Pishock was engaging in the proscribed activity during those two meetings.

There remains for consideration the question of the specific effect of 37 U.S.C. § 801(c), with respect to the retired pay of Major Pishock. The statute by its terms prohibits payments during a three-year period from his retirement to an officer engaged in selling. In construing an earlier statute which prohibited payment of retired pay to a Regular officer engaged in selling "while he is so engaged" (act of August 10, 1956, ch. 1041, § 6112, 70A Stat. 381), it was held that:

"* * * While not all of Admiral Davidson's time was devoted to his Navy sales activities during such period, the statute makes no distinction between cases involving frequent contacts with the Navy and cases involving infrequent contacts with the Navy and the prohibition of the statute has been viewed as remaining in effect during the period of the contracts which result from the proscribed sales activities. See 39 Comp. Gen. 366 and 41 Comp. Gen. 642." 42 Comp. Gen. 32 at 35.

The same rules are applicable under 37 U.S.C. § 801(c) which is broader in this respect than section 6112 of the act of August 10, 1956, in that it is not limited to periods while the retired officer is engaged in selling. This result seems consistent with the statutory purpose, to discourage initiation of contacts which might lead to favoritism in connection with Government purchases of supplies and war materials. B-152160, December 11, 1964, and 38 Comp. Gen. 470 (1959). A rule which limited forfeiture of pay only to the immediate period of a specific selling activity could allow a retired officer to achieve considerable gain to himself or his company at the risk of only a relatively small forfeiture.

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On the present record it is not clear when the earliest prohibited sales activity by Major Pishock occurred. The earliest evidence of any prohibited selling activities is that at least some of Major Pishock's contacts with Major McNutt between August 13, 1970, and July 5, 1972, were within the statutory prohibition. However, the general allegations made by Major McNutt concerning Major Pishock's activities are insufficient to justify the conclusion that Major Pishock was engaged in selling for the entire period of these contacts. The NIS appears to have conducted an extensive investigation of this matter and further investigation at this late date seems unlikely to resolve the uncertainties in the record concerning these contacts.

It seems clear, however, that Major Pishock's contacts with Mr. Pippin, beginning in the latter part of 1971, were prohibited sales activities which result in the forfeiture of his retired pay through the period of the two contracts involved, one for the VHF diplexer and the other for the line unit telephone, both awarded on May 18, 1973. While the exact date in the latter part of 1971 that the contacts with Mr. Pippin began is not clear, it would appear that such period would at least include the month of December 1971. Also, it is probable that the period of performance of those contracts continued through July 30, 1973, the end of the three-year statutory period applicable to Major Pishock under 37 U.S.C. § 801(c). It is also noted that Major Pishock's prohibited contacts with Captain Carr occurred sometime during the period of August 1972 through June 1973.

Accordingly, it is concluded that Major Pishock was in violation of 37 U.S.C. § 801(c) during the period December 1, 1971, through July 30, 1973, and was not entitled to retired pay for that period. Collection action should be begun to recover such retired pay.

R.F. KELLER

Acting Comptroller General
of the United States