



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Captain Lloyd K. Rice, USN (Retired) - Selling to
the Department of Defense
File: B-227320
Date: February 9, 1989

DIGEST

A retired Regular Navy officer who was employed by a Department of Defense contractor did not violate 37 U.S.C. § 801(b) and implementing regulations, which prohibit a retired Regular officer from negotiating changes in specifications of a contract with the Department of Defense, when that officer worked with non-contracting Defense personnel as a technical expert for the purpose of coordinating the correction of the malfunctioning of an item that had previously been procured and delivered. This is so even though the technical solution proposed by the officer ultimately led to a modification of the contract.

DECISION

The question in this case is whether retired Navy Captain Lloyd K. Rice's activities as a civilian employee of a government contractor constituted "selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense" within the meaning of 37 U.S.C. § 801(b), so as to preclude payment of his retired pay.^{1/} In the particular circumstances presented, we conclude that Captain Rice's activities did not amount to "selling" supplies to the government under the terms of that statute.

^{1/} Mr. R. H. Conn, Comptroller of the Navy, submitted this question for a decision, which was assigned No. SS-N-1474 by the Department of Defense Military Pay and Allowance Committee.

0-44590/137924

BACKGROUND

Captain Lloyd K. Rice retired from the United States Navy as a Regular officer on October 1, 1984. On August 12, 1985, he submitted to the Navy a DD Form 1357, Statement of Employment, which indicated that he was employed by a Department of Defense contractor in the position of a senior staff engineer/scientist and program manager for the contractor's OM-55 supply contract with the Navy. That contract supplied spread spectrum modems with antijam capabilities used for satellite communications. The Statement of Employment is a necessary component in the Navy's system of enforcing the prohibition in 37 U.S.C. § 801(b) against a retired Regular officer "selling" supplies or war materials to the Department of Defense. The Navy conducted an investigation to determine whether Captain Rice had been "selling" to the Navy on behalf of his employer, the defense contractor. The investigation was triggered by the brief description of Captain Rice's duties on the Statement of Employment.

The investigation produced findings that Captain Rice and his employer were familiar with the restrictions of 37 U.S.C. § 801(b), and that he had deliberately been excluded from activities relating to pricing and other aspects of contract negotiations to assure compliance with that statute. One aspect of Captain Rice's duties concerning the OM-55 modems, however, caused Navy officials to suspect that he may have contravened 37 U.S.C. § 801(b). This involved his role in resolving a problem that the power supply units in the modems were experiencing in the field. Although the OM-55 modems had been sold to the Navy in 1982, several years before Captain Rice began working for the contractor, it was only at the time of his employment in 1985 and later that contract administration problems surfaced. He participated in conversations with naval personnel, attended several program reviews of the OM-55 modems called by the Navy, and corresponded with naval personnel as part of the contractor's effort to find a solution to the power unit failure. The Navy correctly characterizes Captain Rice as the contractor's technical expert who coordinated a mutually satisfactory solution that eventually resulted in an ECP (engineering change proposal) submitted by the contractor to the Navy, which is incorporated as a change to the existing contract. The Navy also believes, however, that this coordination activity may have amounted to "selling" to the government.

ANALYSIS AND CONCLUSION

A retired Regular officer may not be paid military retired pay for 3 years after retirement ". . . 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" 37 U.S.C. § 801(b).

Implementing regulations contained in Enclosure 2 to Department of Defense Directive 5500.7, January 15, 1977, define "selling" for the purposes of that section as including:

". . . negotiating or discussing changes in specifications, price, cost allowances, or other terms of a contract. . . ."

The directive also states that neither the statute nor the directive "preclude a retired Regular officer from accepting employment with private industry solely because his employer is a contractor with the Government."

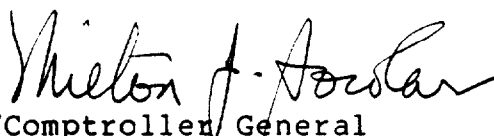
We have held that the employment of retired Regular officers in nonsales, executive, or administrative positions which require agency contacts by the retired officers in their capacities as noncontracting technical specialists, which involve no sales activities, are outside the purview of the statute and the implementing regulations. See 52 Comp. Gen. 3, 6 (1972); 42 Comp. Gen. 87 and 236 (1962). Conversely, where a retired officer actually participates in some phase of the procurement process, we have held that those activities bring him within the purview of the definition of "selling" as defined in the DOD directive. 42 Comp. Gen. 236, supra. The Navy is aware of our decision which states:

". . . we do not believe that retired officers whose duties concern only the technical background operations of assembling, analyzing, preparing and reporting necessary information, material, correspondence and documents for use by others are to be regarded as engaged in selling within the contemplation of the statutes. Nor do we believe that an officer who occasionally accompanies other members of his firm as technical adviser to meetings with Department of Defense personnel to discuss performance or progress or similar matters under awarded contracts may reasonably be viewed as being engaged in selling, etc., for purposes of the statutory provisions." 42 Comp. Gen. 87, supra, at 93.

However, the Navy suggests that Captain Rice may have been engaging in the procurement process, or violating the regulatory prohibition of "discussing changes in specifications of a contract," by coordinating a mutually satisfactory solution to the power supply unit of the OM-55 modem.

In our view, working on technical solutions to a contract problem is several steps removed from discussing changes in specifications of a contract. It is not until the retired officer discusses a proposed ECP or other concrete proposed specification change in some kind of procurement framework that we believe he is negotiating changes in the specifications of a contract.

In the present case, we view as significant the testimony by several Navy personnel that Captain Rice was aware of restrictions on his employment activities, and that he terminated conversations when it appeared that it was turning into a contracting or negotiating phase. We find it also significant that the Navy program manager and his deputy who had frequent contact with Captain Rice concerning the OM-55 modem agreed that all of the contacts concerning the supply contract were solicited by the Navy, were confined to the exploration of technical issues, and were outside of the procurement or contracting process.^{2/} The contractor here was a large corporation which had a contracting staff that did in fact negotiate and discuss the ECP that finally resulted from Captain Rice's technical solution, and it appears that the contractor endeavored to insulate Captain Rice from this contracting activity. We believe in this case the record supports a conclusion that Captain Rice was not selling to the government or discussing changes in the specifications of a contract within the purview of 37 U.S.C. § 801(b). Therefore, his retired pay should not be disturbed.


Acting Comptroller General
of the United States

^{2/} Compare 42 Comp. Gen. 87, supra, at page 91, concerning contacts which are initiated by the government rather than the retiree, and which do not appear to involve contract negotiations or disputes.