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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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OFFICE OF GENERAL COUNSEL
GAO 00040

JAN 5 1979

Address
Reqs

Colonel Marvis F. Lynes, USA (Retired)
2704 Lakewood Drive
Augusta, Georgia 30904

Dear Colonel Lynes:

ARMY
Retiree
AGC 00020

This refers to your recent letter which was delivered to this Office on December 8, 1978, in which you request advice concerning ~~your possible employment by one of several firms which are contractors~~ ^{ARMY CIVILIAN} doing business with the Army. You state in your letter that prior to your retirement from the Army on September 30, 1978, your assignment was as the Director of Industrial Operations (DIO) at Fort Gordon, Georgia, and had general staff responsibility for developing the Commercial-Industrial Type Activities (CITA) package for the Army pilot contracting-out effort at Fort Gordon. You enclose with your letter a letter of a job offer from one of the firms interested in the Fort Gordon project and which sets forth the duties you would perform should you accept the offer of employment.

Subsection 801(c) of title 37, United States Code, provides as follows:

"(c) 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 Army, the Regular Navy, the Regular Air Force, the Regular Marine Corps, the Regular Coast Guard, the Environmental Science Services Administration, or the Public Health Service, 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."

AGC 00005

Department of Defense Directive 5500.7, January 15, 1977, enclosure 2, defines "selling" for the purposes of 37 U.S.C. 801(c) as follows:

- "(1) Signing a bid, proposal, or contract;
- "(2) Negotiating a contract;

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- "(3) Contacting an officer or employee of any of the foregoing departments or agencies for the purpose of:
 - "(a) Obtaining or negotiating contracts,
 - "(b) Negotiating or discussing changes in specifications, price, cost allowances, or other terms of a contract, or
 - "(c) Settling disputes concerning performance of a contract; or
- "(4) 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."

It is also stated in the directive that the pertinent statutes or the directive are not intended to preclude a retired Regular officer from accepting employment with private industry solely because the employer is a contractor with the Government.

Concerning activities of retired Regular officers in connection with the prohibition contained in 37 U.S.C. 801(c) this Office has held that the employment of such officers in nonsales, executive or administrative positions, and contacts by a retired officer, in his capacity as a noncontracting technical specialist which involve no sales activities are outside the purview of the statute. See 41 Comp. Gen. 784 (1962); 41 id. 799 (1962); 42 id. 87 (1962); 42 id. 236 (1962); 52 id. 3 (1972); 56 id. 188 (1976) (copy enclosed).

However, we must point out that even though a retired officer's described duties with a Defense contractor do not appear to bring him within the purview of the statute, if he actually participates in some phase of the procurement process, such activities bring him within the definition of selling contained in the Department of Defense directive. 43 id. 408 (1963). See also, 42 Comp. Gen. 87, supra; 42 id. 236, supra. Furthermore, in view of the obvious purposes for which the statute is intended, contacts made by retired Regular officers employed by Defense contractors with

departmental personnel if they relate to the procurement process or are intended to influence the procurement process may come within the purview of the statute. In that connection we have concluded that retired Regular officers employed by Defense contractors, who attend social functions sponsored and paid for by their employers, together with departmental personnel in a position to influence procurements, may be subject to the provisions of 37 U.S.C. 801(c), since the purpose of such activities would be to generate "good will" for his employer, which is a form of selling, see 56 Comp. Gen. 898 (1977) copy enclosed.

From our review of the letter describing the duties you would perform we cannot say conclusively whether you would come within the scope of the statute. However, as can be seen from our foregoing comments, if your activities are of a strictly technical nature or involve internal management of your employer's program it would seem that you would not be within the purview of the statute. On the other hand, if your activities result in contacts with Government personnel involved in the procurement process and such contacts could be construed as coming within the definitions of selling listed in the DOD directive or decisions of this Office, you would be subject to the provisions of 37 U.S.C. 801(c) and would be subject to the loss of retired pay prescribed by the statute.

The above analysis is applicable to each of the situations which you mention in your letter. Contact with Departments and agencies not mentioned in 37 U.S.C. 801(c) are not limited. However, contacts with the Departments and agencies mentioned which might influence a procurement in which your employer is participating must be strictly avoided no matter what position you occupy. Further the prohibition in 37 U.S.C. 801(c) does not relate to the position you held prior to retirement but is applicable to all contacts with the Departments and agencies mentioned.

Our comments concern the implementation of 37 U.S.C. 801(c) only and not to the enforcement of criminal provisions of title 18, United States Code, which are matters within the jurisdiction of the Department of Justice.

B-193662

We trust that the information provided will be of assistance to you.

Sincerely yours,

Edwin J. Monsma

Edwin J. Monsma
Assistant General Counsel

Enclosures - 2