

11-30-44



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Emerson Electric Co.

File: B-232234.2

Date: March 16, 1989

DIGEST

Statutes barring retired military officer from representing other parties before military department within 2 years of retirement and permanently barring officer from representing parties before government concerning matters in which officer was personally and substantially involved are, either by explicit statutory language or agency regulation, not applicable to retired enlisted military personnel.

DECISION

Emerson Electric Co. protests the Air Force's award of a contract to Exide Electronics, Inc., under request for proposals (RFP) No. F04606-87-R-0313 for uninterruptable power systems (UPS). Emerson contends that Mr. Edmund Jones, a retired Air Force Chief Master Sergeant and currently Exide's Manager of Federal Systems, violated 18 U.S.C. § 207(a) (1982) and 18 U.S.C.A. § 281 (West Supp. 1988), governing retirees' representational activities, by signing Exide's proposal and award documents.

We deny the protest.

On May 5, 1987, the agency issued the RFP to meet the agency's requirements for UPS, which protect electronic equipment from power anomalies both by controlling the flow of current from commercial utilities and by providing power in the event that service is interrupted. The competition was essentially based on price alone, with award to be made to the lowest technically acceptable offeror.

On June 26, the agency held a preproposal conference for potential offerors; Mr. Jones, who had retired from the Air Force as a Chief Master Sergeant on November 30, 1985, and who was then serving as Exide's Manager of Federal Systems,

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attended the conference as a representative of Exide.^{1/} On February 18, 1988, the agency received two technically acceptable initial proposals, from the awardee, and from the protester. On April 4, the agency issued amendment No. 0008 requesting that best and final offers (BAFOs) be submitted by April 8; both offerors responded in a timely manner. Mr. Jones, who had signed Exide's initial proposal and who had served as Exide's point of contact for negotiations, also signed Exide's BAFO.

On May 6, 1988, since Exide's evaluated price was substantially lower than the protester's evaluated price the agency awarded a contract to Exide. Having learned of Mr. Jones' retirement date and discovering that his activities on behalf of Exide had occurred within a 2-year period since Mr. Jones' retirement, Emerson filed this protest on November 29 against the Air Force's refusal either to reject Exide's offer or to terminate the contract.^{2/}

Emerson alleges that Mr. Jones' representational activities, such as signing the Exide offer, violate 18 U.S.C.A. § 281, which provides in pertinent part that:

"(a)(1) A retired officer of the Armed Forces who . . . within two years after release from active duty . . . receives . . . any compensation for representation of any person in the sale of anything to the United States through the military department in which the officer is retired . . . shall be fined under this title or imprisoned not more than two years, or both."^{3/}

^{1/} Mr. Jones is a retired enlisted man and was never a commissioned officer during his military service.

^{2/} This is Emerson's second protest. We previously denied Emerson's protest alleging that Exide's offer was "non-responsive" under the solicitation. Emerson Electric Co., B-232234, Dec. 2, 1988, 88-2 CPD ¶ 552.

^{3/} Previously, this language essentially was included as an 18 U.S.C. § 281 note (1982) and the prohibition against representation by a retired military officer was applicable at all relevant times in this case.

Emerson also contends that Mr. Jones' actions violate 18 U.S.C. § 207(a) which prohibits former government employees from representing parties before the government on matters in which such employees participated personally and substantially in the course of their employment.

With regard to 18 U.S.C.A. § 281, we have previously held that apart from Mr. Jones' other activities on behalf of Exide, signing a bid can constitute "representation" under 18 U.S.C.A. § 281, and, where agency regulations so provide, the agency may reject a bid submitted by a retired officer. See Sterling Supply Corp., B-224298, Jan. 6, 1987, 87-1 CPD ¶ 10; Sterling Supply Corp.--Request for Reconsideration, B-224298.2, Apr. 6, 1987, 87-1 CPD ¶ 381.

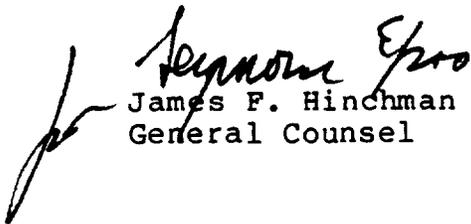
Here, the major military departments have issued extensive regulations implementing 18 U.S.C.A. § 281 and other conflict of interest statutes. Of particular significance, the Air Force regulations, applicable here, implement 18 U.S.C.A. § 281 by proscribing certain representational activities by retired regular (commissioned) officers. See Air Force Regulation 30-30, para 21 (1983). These regulations do not proscribe representational conduct by retired enlisted personnel. We also note that Army and Navy regulations similarly fail to apply this prohibition to retired enlisted personnel. See 32 C.F.R. §§ 583.1(d)(ii), 721.15(c)(1) (ii)(A) (1987).

In Sterling Supply Corp., B-224298, *supra*, and in other decisions of our Office, we have accepted the basic principle of generally granting deference to the agency's interpretation of statutes which it is charged with administering. Charles A. Martin & Assocs., 65 Comp. Gen. 828 (1986), 86-2 CPD ¶ 268. Here, the regulations, which we accept as controlling, restrict coverage of 18 U.S.C.A. § 281 to commissioned officers only. Further, this interpretation of the term "officer" in 18 U.S.C.A. § 281 (as referring to commissioned officers) is consistent with the generally applicable definition of "officer" which defines that term as a "commissioned or warrant officer." 10 U.S.C. § 101(14) (1982). Thus, we cannot conclude that the agency's regulations, limiting coverage to commissioned

officers, is arbitrary or unreasonable. See generally Wallace O'Conner, Inc., B-227834, Aug. 19, 1987, 87-2 CPD ¶ 181.4/ Accordingly, we find that the agency reasonably concluded that Mr. Jones did not violate 18 U.S.C. § 281.

Emerson also alleges that Mr. Jones violated 18 U.S.C. § 207(a), the permanent statutory bar against representational activities regarding matters in which individuals participated "personally and substantially" as government employees. However, 18 U.S.C. § 202(a) expressly exempts enlisted personnel from this prohibition. Since, as indicated above, Mr. Jones is an enlisted person, we find that the representational provisions of 18 U.S.C. § 207(a) are inapplicable to this situation. We note also that, consistent with this statute, Air Force Regulation 30-30, para. 20, specifically provides that 18 U.S.C. § 207(a) does not govern enlisted personnel. While Emerson argues that Congress did not intend to exempt noncommissioned officers from compliance with 18 U.S.C. §§ 201-208, we believe that the clear and unambiguous language of the statute indicates otherwise.

We deny the protest.


James F. Hinchman
General Counsel

4/ We also note that Congress is apparently aware that the statute treats the representational activities of retired officers on a different basis than the representational activities of retired enlisted personnel. See H.R. Rep. No. 446, 100th Cong., 1st Sess. 665, reprinted in 1987 U.S. CODE CONG. & AD. News 1355, 1777.