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**DECISION**



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

**FILE: E-186001**

**DATE: December 22, 1975**

**MATTER OF: Dikewood Services Company**

**DIGEST:**

1. When evaluation provision of RFP gives no indication of relative importance of criteria, offerors may properly assume that all are of equal importance. Evaluation which eliminated protester from competitive range on basis of emphasis on one section vis-a-vis another was not in accordance with evaluation scheme in RFP and improper. Recommend rescoring proposal on basis of all criteria being equal to determine if the proposal should have been included in competitive range.
2. Protest that changes to membership of technical evaluation board occurred after evaluation process had started and replacement personnel were less qualified than personnel removed is denied since investigation revealed that all membership changes occurred before start of evaluation and educational and professional backgrounds of replacement personnel were comparable to those removed.
3. While comparison of statement of work in RFP and protester's previously submitted unsolicited proposal which initiated instant RFP indicates that some portions of statement of work were taken verbatim from unsolicited

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proposal, no impropriety is shown as need for procurement was documented in review by Air Force predating unsolicited proposal.

4. Participation in preproposal conference of retired Air Force General to ascertain if his retired status affected his acceptability as project manager is not a violation of 18 U.S.C. § 281 (1970), and implementing regulations, in absence of further contacts for selling purposes since contact between retired officers and former branch of military is permissible in non-sales environment and mere association of retired officer's name with particular company is not sufficient to establish violation.

Nellis Air Force Base issued request for proposals (RFP) F26600-75-09025 on December 1, 1975, for system engineering and technical assistance (SETA) in the improvement, expansion and management of the Nellis test ranges. Dikewood Services Company (Dikewood) protests rejection of its proposal as technically unacceptable.

The RFP solicited responses to either the SETA portion, systems support (SS), or both. Proposals were required to be submitted in four volumes with page limitations: 1) contractual, 10 pages; 2) technical, 80 pages; 3) management, 40 pages; and 4) cost, unlimited. Proposers were cautioned at paragraph 36(2)(a) of the RFP that the technical proposal was the most important consideration in the award of the contract. The pertinent provisions cautioned that the technical proposal should be complete and specific:

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"b. The proposal should contain an outline of the proposed lines of investigation, method of approach to the statement of work (SOW), the phases or steps into which the project may logically be divided, estimated time required to complete each phase or step and any information considered pertinent to the SOW.

\* \* \* \* \*

"c. The proposal should briefly outline a response to the sample Task Directives xxx-001 and xxx-002 which, along with the applicable DOD are included as attachment 1. The proposal of additional alternative tasks which would enhance achieving an improved capability is encouraged.

"d. Twelve (12) copies of this [technical] volume shall be submitted \* \* \* consisting of no more than 80 pages \* \* \*."

The SOW was divided into four sections--1. Introduction, 2. Scope of Work in support of the Tactical Fighter Weapons Center (TFWC) Range Group, 3. General Background (Services and Definitions), 4. Tasks (SETA). Under section 2, the contractor was required to provide general SETA and technical review. Specific SETA tasks were stated in section 4.

Dikewood's proposal was determined by the technical evaluation board (Board) to be outside of the competitive range as technically unacceptable. The reasons offered by the contracting officer in his letter of notification to Dikewood were:

"a. Much of the Statement of Work was merely reiterated as it was stated in the RFP, without explanations as to how the work would be accomplished.

"b. The technical approach lacked depth in substantially all areas. For instance, the discussions of Systems Studies and Preparation of Specifications were not innovative and an understanding of the requirements was not demonstrated.

"c. The degree of authority vested in the on-site manager was not clear."

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Dikewood responded to the Air Force's letter by attempting to refute the reasons advanced. Dikewood indicated that its proposal was organized to correspond to the SOW and deliberately retained the SOW headings to facilitate evaluation. To this extent Dikewood admits iteration of the SOW.

As for an explanation as to how the work would be done, Dikewood maintained that with the exception of the sample tasks (xxx-001 and xxx-002), no specific range improvement tasks were identified in the RFP as work to be accomplished. In the absence of specific problems, Dikewood emphasized its understanding of the technical areas of range improvement and presented a general methodology of systems engineering in response to section 2 of the SOW. Further, section 2 of Dikewood's proposal also contained a summary of particular methods of requirements definition, which it believes crucial to the definition and justification of range improvements. Specific methods of improvements were also discussed.

Dikewood stressed that it made a conscious election to devote the bulk of its proposal to:

"\* \* \* detailed, in-depth discussions of the principal technical areas within which TFWC range improvements will be required. This emphasis was inferred from the evaluation criteria, which stressed the ability to develop and allocate requirements, and understanding of the problem (of range improvement we supposed). Consequently, a lower page count was allocated to the mechanics of specification writing, ECP processing, meeting attendance, etc. Therefore, within the imposed page limitation, discussion of these routine matters was necessarily curtailed. \* \* \* Section 4.1.2.1.3 refers to MIL-STD-490, which is the 'how to' document for the mechanics of specification writing. We assumed that evaluators would not expect 'reiteration' of those instructions in a page-limited proposal. We also assumed that the desire for innovativeness and creativity applies not to matters of routine paperwork such as specification writing, but to methods to determine what is most urgently needed and how to obtain improvements with constraints of costs, time and existing environment--in short, in deciding what to specify, rather than how to write a specification \* \* \*."

Dikewood also attempted to rebut the Air Force's assessment that the authority of the on-site manager was not clear. Dikewood

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points to section 2.3.1.2 which states, "[I]n performance of the total SETA effort, and in responding to changes in direction of the Range Group program as it affects the SETA effort, Mr. Shaskey, as the Project Manager, will take full responsibility."

In its report to our Office in response to Dikewood's protest, the Air Force maintains that the:

"\* \* \* primary and overriding reason for disqualification was due to the fact that the Dikewood proposal did not clearly demonstrate how it would accomplish the work. The overall lack of depth in the technical areas, such as the discussions of Systems Studies and preparation of specifications, did not demonstrate an understanding of the requirements or present any innovative approaches. Other failings were the lack of clarity on the degree of authority vested in the on-site manager to be assigned to the program by Dikewood."

Dikewood has raised additional issues in support of its contention that its proposal was technically acceptable. Dikewood maintains that an unsolicited proposal it submitted 8 months earlier to the Air Force for SETA services to TFWC formed the basis for a large portion of the SOW, parts of which were incorporated verbatim in the SOW. Dikewood stresses that its experience in other ranges and as incumbent at Nellis demonstrates overwhelmingly its capability to perform the work. Since qualifications based upon U.S. Government experience was listed as the second most important evaluation criterion, Dikewood infers that the Board could not have adhered to the evaluation criteria stated in the RFP in concluding that Dikewood's proposal was outside the competitive range.

Concerning the composition of the Board, Dikewood alleges that an unusual number of personnel changes were made to the Board which replaced allegedly qualified personnel with less qualified personnel. Finally, Dikewood questions the propriety of the participation of a retired Brigadier General at the preproposal conference as a representative of one of the firms determined to be in the competitive range. Dikewood notes that the Brigadier General asked questions and discussed the suitability of a retired officer serving as the SETA program manager.

In order to respond to certain of Dikewood's allegations, we found it necessary for GAO representatives to conduct an on-site

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investigation at Nellis. This review was conducted by personnel from our Los Angeles Regional Office and has generated the factual basis upon which our conclusions hereafter are based. The review encompassed interviewing the SETA project officer, contracting officer and several members of the Board. We also reviewed various proposals submitted by Dikewood and others; Dikewood's unsolicited proposal and several of Dikewood's systems engineering contract work statements; the source selection plan utilized by the Board; proposal evaluation criteria; Board minutes and personal notes of Board members; Nellis Range Management Plan; and the personnel files of several members of the Board. The results of this review have not heretofore been released.

#### Applicable Legal Principles

At this point, it is necessary to outline the legal principles within which the information developed as a result of our investigation must be considered. The first consideration concerns the determination of the competitive range. In Servrite International, Ltd., B-187197, October 8, 1976, 76-2 CPD 325, and cases cited, our Office restated the circumstances permitting the exclusion of a proposal, as submitted, from the competitive range, as a result of informational deficiencies. Essentially, exclusion is permissible if the deficiencies are so material as to preclude any possibility of upgrading the proposal to an acceptable level, except through major revisions or additions, which would be tantamount to the submission of a new proposal. In reviewing the reasonableness of the agency's determination, our Office has considered: 1) how definitely the RFP called for detailed information, the omission of which was relied upon in excluding a proposal from the competitive range; 2) the nature of the informational deficiency, e.g., whether it tended to show that the offeror did not understand what was required or merely made the proposal inferior, but not unacceptable; 3) the scope and range of the deficiency and the effort required to correct it; and 4) whether the "deficient," but reasonably correctable, proposal represented a significant cost savings.

In light of the above, it must also be borne in mind that the RFP must be drafted so as to permit offerors to compete equally. This duty may be discharged in part by informing offerors of the evaluation criteria by which the proposals will be judged, the relative importance of those criteria, and applying those criteria in the stated relative importance. Unless stated otherwise, offerors may properly assume that all criteria are of equal importance. 52 Comp. Gen. 686 (1973). Each subcriterion need not be

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disclosed so long as offerors are advised of the basic criteria, and any subcriteria used by the agency in the actual evaluation are merely definitive of the basic criteria. However, where a relatively sketchy evaluation plan is stated in the RFP, and the agency possesses an extremely detailed evaluation scheme with numerous, unannounced, definitive subcriteria, the withholding of those known subcriteria does not promote the basic procurement objective of providing offerors with sufficient information to prepare an intelligent response to the Government's requirements. Moreover, when the exclusion of a proposal from the competitive range has the effect of keeping only one proposal in the competitive range, that determination will be closely scrutinized due to its oppressive effect on the competitive aspects of procurement.

It must be clearly recognized that in questions concerning technical considerations, it is not the function of our Office to substitute its opinion for the procuring activity. Since the procuring activity is most often in the best position to evaluate the merits of a proposal, and that activity must bear the day-to-day problems as they arise as a result of their determination, our Office will accept the agency determination unless demonstrated to be unreasonable or founded on fraud or bad faith.

Lastly, in the evaluation process, we have stated that the test of whether the Government unfairly construes its work statement too narrowly should be judged not solely on the basis of the work statement, but must be viewed in light of the evaluation factors set out in the RFP and those which the Government utilized in ranking proposals. Iroquois Research Institute, B-184318, February 23, 1976, 76-1 CPD 123. Moreover, the evaluation must be predicated upon the proposal as submitted and may not encompass peripheral knowledge assumed by an offeror to be possessed by the Government due to its familiarity with the offeror as a result of its status as incumbent. Comten-Comress, B-183379, June 30, 1975, 75-1 CPD 400.

#### Evaluation Process

As part of our review, the relative areas of emphasis of Dikewood's proposal vis-a-vis the highest rated proposals show that Dikewood chose to stress its response to section 2 of the work statement, while the proposals rated higher devoted their attention mainly to section 4 of the SOW. This result is generated by the preference of the Air Force for section 4 responses and is reflected in the expanded evaluation criteria. The evaluation plan essentially applied a four-pronged test against each

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factor listed in section 4: understanding of the problems; providing a sound approach; demonstrating compliance with the requirements; indicating company or personnel are qualified to do the job. Essentially, this approach was also used in evaluating responses to task directives xxx-001 and xxx-002. The expanded evaluation criteria did not consider section 2 tasks per se. They were not subjected to the same scrutiny as the section 4 tasks. However, as will be discussed more fully below, as the section 2 requirements overlapped or impacted upon section 4, they were considered by the technical evaluation board.

To illustrate the impact of this evaluation plan upon the acceptability of the proposals, section 2, entitled "Scope of Work," was approximately 2 pages long in the RFP. It had three major headings with a total of 29 subheadings. On the other hand, section 4 was 7-1/2 pages long, with 16 major headings with 63 subheadings. This aspect of the evaluation takes on an added significance when considered in conjunction with the 80-page limitation imposed upon the technical proposal. Obviously, an incorrect assessment of the Air Force's desires causes an offeror to expend effort and pages in response to one area to the detriment of another, with little or no credit for the misplaced effort. Without the page limitation, the misdirected emphasis could be offset by fully responding to each section of the SOW.

This analysis is borne out in this instance by the fact that Dikewood spent 59 of its total of 79 pages in responding to section 2, while only 8 pages were spent in response to section 4. Also, Dikewood devoted only 7 pages to sample task directives xxx-001 and xxx-002, while the top-ranked proposals spent 24 and 21 pages, respectively. Another aspect of this confusion is that had Dikewood put its main effort into its section 4 response, it is highly probable that the Board's criticism of Dikewood's response being merely a "playback" would have been eliminated.

It seems to us, with the benefit of hindsight, that the essence of the dispute between Dikewood and Nellis revolves about the clarity of the RFP. As stated earlier, the purpose for the rule requiring a listing of the evaluation criteria and their relative order of importance is to satisfy the requirement that offerors be given sufficient information to submit an intelligent proposal. Furthermore, by outlining the relative importance attached to each criterion by the Government, proposals may be

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structured to give the Government the best advantage for its dollars. Thus, the inquiry here becomes whether the RFP conveyed to offerors the Government's overwhelming concern with responses to section 4 vis-a-vis the rest of the SOW. A corollary of this issue is whether the technical evaluation team followed the evaluation criteria in the RFP in considering the second and third most important factors--qualifications based on U.S. Government experience and qualifications based on offeror data.

We believe that the RFP was deficient in this regard. The specific language which gives rise to the controversy is in the evaluation criterion, "Technical Approach," which states:

"\* \* \* The contractor's technical approach will be evaluated based on its soundness and adequacy to accomplish all tasks outlined in the Statement of Work \* \* \*." (Underscoring added.)

The table of contents of the SOW shows four headings: 1) Introduction; 2) Scope of Work; 3) General Background; 4) Tasks. In the body of the SOW, section 2.0 is labeled "Scope of Work" and section 2.1 is entitled "Specific Tasks."

Since there was no clear indication from the RFP that the Air Force would place greater emphasis on section 4 responses, Dikewood could properly assume that section 2 and section 4 were of equal importance. In this light, it is understandable that Dikewood might have assumed that the Air Force was aware of its capabilities to perform the more technical aspects of section 4 and allocated the bulk of its page-limited technical proposal to the area Dikewood felt would complement the knowledge already within the Air Force's possession. That is not to say that Dikewood's assessment was proper since the Air Force

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may not properly consider my knowledge of Dikewood's capabilities other than those stated in Dikewood's proposal.

Thus, the Air Force failed to stress its strong concern with section 4, and Dikewood was eliminated from the competitive range on the basis of an evaluation different than that stated in the RFP. We recommend that the Air Force re-evaluate Dikewood's proposal on the basis of sections 4 and 2 being weighted equally. If, after conducting such a re-evaluation the Air Force concludes that Dikewood should have been in the competitive range, negotiations should be reopened. On the other hand, if the reevaluation reaches the same conclusion as the initial evaluation, we would offer no objection to continuing with the procurement.

Composition of and Qualifications of  
Technical Evaluation Board Members

Dikewood has challenged, as unusual, the number of changes made to the composition of the technical evaluation Board personnel. Dikewood also believes that changes occurred in the personnel after the evaluation process had commenced. Also, Dikewood maintains that well-qualified individuals were removed from the Board in favor of less qualified individuals.

To respond to these charges our investigators reviewed the personnel files of the individuals involved and interviewed all of the evaluators except one, who was on vacation. We also reviewed related documentation to establish when the changes occurred in relation to the commencement of the evaluation, as well as to establish the reasons for the replacements.

We are concerned here with the composition of the technical evaluation Board, not the management or cost proposal evaluators.

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The Board met first on January 19, 1976. The original source selection plan contemplated 5 members on the technical review board. Of that original complement, 3 were removed and were replaced by only two others for a total of four. Our investigation established that the two additions were made before the technical evaluation commenced. Our files reflect statements concerning the release of unauthorized procurement information signed on January 8 and 19, 1976. Our investigation has uncovered no evidence which disputes this fact.

Concerning the qualifications of the removed technical board members measured against their replacements, our review of the educational and professional backgrounds indicates that all of the persons involved were well qualified. The training and experience of the three members removed from the Board are as follows:

1. Bachelor of Science degree in electrical engineering. Masters of Business Administration. Several systems engineering courses. Nine years practical range experience, including six and one-half years at the Nevada Test Site and two and one-half years at Nellis AFB.
2. Bachelor of Science degree in electrical engineering. Ten years experience in electronic warfare. Served on two source evaluation boards in last three years.
3. Eight years experience in threat simulation at Nellis and Eglin Air Force Base. Served on one source evaluation board.

The qualifications of the individuals appointed to the Board are:

1. Bachelor of Science degree in mechanical engineering. Extensive graduate studies. Several technical courses.

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Ten years of range experience including eight years at the Atlantic Fleet Weapons Range and two years at Nellis. Nine years as electrical engineer with U.S. Army Map Service.

2. Bachelor of Science degree in engineering. Technical adviser to the Range Management officer, Advanced Development Test Center, Eglin, Air Force Base. Co-chairman of ADTC evaluation committee on range operation and maintenance contracts. Previous experience in proposal evaluation.

The qualifications of the two members originally appointed to the Board are:

1. Bachelor of Science degree in mechanical engineering. Extensive graduate work. Several technical courses. Eight years experience with White Sands Missile Range. Nine years at Nellis responsible for design development, engineering and management of instrumentation range. Served on one major and several smaller source evaluation boards.
2. Extensive courses in computers. Fifteen years experience in various phases of computers including two and one-half years in electronic warfare at Nellis.

In comparing the credentials of the various individuals, we do not perceive any substantial difference in the qualifications of those appointed to the Board vis-a-vis those removed from the Board vis-a-vis those that remained on the Board.

#### Unsolicited Proposal

Dikewood also questions its elimination from the competitive range since it believes that the SETA contract was initiated by an unsolicited proposal for range improvement dated April 21, 1975, submitted by Dikewood to Nellis. Dikewood states that long sections of the unsolicited proposal were quoted verbatim in the RFP and formed the foundation of the SOW.

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We reviewed the unsolicited proposal, the SOW, the Nellis Range Management Plan drafted in March 1975, a Space and Missile Systems Organization (SAMSO), contract with the Aerospace Corporation F04701-75-C-0076, SAMSO Regulation 800-8, June 1, 1974, entitled "Policies and Procedures Relating to the Aerospace Corporation Technical Support," and other Dikewood/Air Force contracts.

A comparison of the unsolicited proposal and the SOW shows that two items appeared in both. Nine of the 16 functional/technical areas in section 2 of the SOW, Scope of Work, correspond exactly with the "Scope" section of the unsolicited proposal. Also, the introduction to the SOW was identical in both documents.

On the other hand, an overwhelming majority of the specific tasks in section 4 of the SOW are from SAMSO Regulations 800-8. As discussed earlier, it is section 4 that outlines the details of the work to be performed, not section 2. We note that SAMSO Regulation 800-8 accompanied the Aerospace Corporation/Air Force contract -0076.

Thus, we are unable to agree with Dikewood that the verbatim use of portions of Dikewood's unsolicited proposal compels the conclusion that the unsolicited proposal initiated the SETA procurement. The need for range improvement was foreseen by Nellis in the March 1975 Preliminary Range Improvement Plan. Moreover, even assuming that Dikewood's unsolicited proposal planted the seed for a range improvement project, it does not automatically follow that Dikewood would be best qualified to perform that function. To iterate, the merits of each proposal must be judged on the basis of the proposal as submitted.

#### Involvement of Retired Air Force General in the Procurement

Dikewood has stated that a retired Air Force General participated in this procurement. The retired General attended the pre-proposal conference and discussed the suitability of a retired regular officer as the SETA manager. Dikewood also stated that the retired General indicated that appointments had been made with senior military personnel associated with the procurement. Dikewood questions the propriety of such involvement.

The controlling legislation concerning this matter is 18 USC § 281 (1970), wherein it is provided:

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"Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

"Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

"This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress."

This statute is implemented by Department of Defense Directive 5500.7, August 8, 1967, which is in turn implemented by Air Force Regulation (AFR) 30-30, March 12, 1976. As pertinent, AFR 30-30 provides:

"A retired regular officer is prohibited, at all times, from receiving or agreeing to receive any compensation for representing any person in :

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sale of anything to the Government through the department in whose service he holds a retired status (See 18 U.S.C. 281).

\* \* \* \* \*

"For the purpose of this statute; selling means:

\* \* \* \* \*

"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,

\* \* \* \* \*

"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."

Inasmuch as title 18 of the United States Code concerns criminal matters, its interpretation is within the exclusive province of the Department of Justice. In the event that we reach the initial opinion that a prima facie case of a violation exists, we then forward our information to the Department of Justice, for its consideration.

However, the position of our Office as to what activities constitute selling has evolved through our interpretation of the civil selling law, 37 U.S.C. § 801(c) (1970), which is applicable by its terms only to selling of "supplies or war materials." Thus, selling activities to provide services is not within the purview of the civil selling law and consequently not subject to its prohibitions. B-158148, February 9, 1966. However, this statute is also implemented by DOD Directive 5500.7, and applies the same definition of selling. Thus, our decisions rendered on this point are analogous and may be used for our present purposes.

In this instance, we are concerned with activities promoting the sale of services, rather than supplies or war materials. Thus the civil selling statute is inapplicable.

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We are not convinced that the activities here in question represent violations of 18 U.S.C. § 281 (1970), and implementing regulations. It is our position that while every precontract contact is not per se a violation, such contacts should be viewed as violations unless clearly shown to be for other purposes. 42 Comp. Gen. 236 (1962). It is in this light that our decision B-181056, supra, must be distinguished. In that case, the retired officer made numerous visits to the procurement officials at the base for the express purpose of selling a product of his employer, in addition to attending the pre-proposal conference.

The record indicates that the retired General asked only one question at the preproposal conference, and that concerned his suitability as project manager in his retired status. The Air Force response referred him to another authority for the answer. We do not believe that this alone can be regarded as a sales contact within the meaning of AFR 30-30. The only possible sales connotation must be inferred from the association of the retired General with the particular firm. However, to view the event as a sales liaison would virtually preclude a retired officer who works for a firm that does business with his former branch of service from any contact with his former military associates. We have recognized that contacts for nonsales purposes are, indeed, permissible. See 42 Comp. Gen. 87 (1962); 41 Comp. Gen. 799 (1962).

Our investigation reveals that the retired General visited the Vice Commander, Tactical Fighter Weapons Center, Nellis, on a personal matter and there was apparently only a brief reference in their conversation to the procurement.

We perceive no violations of applicable statute or regulations in the course of conduct described.

Deputy

*R. F. Kelly*  
Comptroller General  
of the United States