

# Drawing the Line

## Three Case Studies in Procurement Ethics

FRANK KENDALL

All business relationships, perhaps all human relationships, if they are to succeed must be built on some level of trust. Throughout my careers in government and the defense industry, the subjects of ethics and trust, as they relate to defense procurement, have surfaced repeatedly, but never with more relevance than today. Competitive pressures on industry, and budget pressures on the Defense Department, are stronger now than ever. In this climate, the temptation to cut corners can be intense. The three incidents described in this article all occurred recently, and in just this climate.

When I left government service to join industry in 1994 after a career in the military and in the civil service, I was unsure about the ethical environment I would enter. My friends include many military officers and government civilians who made the transition to industry successfully. They assured me that despite the pressure that the profit motive places on people in industry, the ethical climate in industry was not an issue. Generally, they were right. This article is about ethics violations committed by government employees. In fact, they were all committed by military officers.

### No Gain May Not Mean No Pain

The three incidents all have another important point in common. In each case, the individual involved probably believed that he or she acted in the best interests of the government and their military service. There is no direct evidence that suggests any personal gain was involved in

any of these incidents. This common thread makes these three experiences especially worthy of our consideration.

Although the incidents are factual, pseudonyms will be used and details altered sufficient to avoid any embarrassment. One individual was relieved and retired early as a result of an infraction. In another case, the investigation was mishandled, and the individual has retired without any sanction. In the last case, no wrongdoing was reported, and it isn't even clear that there was, in fact, an actionable ethics violation. Readers are invited to form their own opinions, not so much about these incidents or the people involved, but about how they should or would act in similar circumstances, and where, in general, the line between ethical and unethical conduct should be drawn.

### The Letter Better Unseen

The first incident is very straightforward and involves an officer passing a document marked "Competition Sensitive" by one contractor, to another competing contractor.

During the winter of 1996, I was with another executive from my firm aboard a company jet leaving National Airport. The company's proposal manager for a key competitive program, who had been to the Pentagon, boarded the aircraft with a manila envelope given to him by one of our Washington employees. That employee had received it from the field grade officer who was the Service's program manager. The program was in competition, although only a draft Request for

Proposal (RFP) had been issued so far. Our employee had been told that the document was "something you need to see."

At that time, we were engaged in a fierce debate with the Department of Defense (DoD) over the terms of the RFP. The argument was about the legal and policy implications of some factors that the government included in the draft RFP and intended to use in the proposal evaluation. If the government proceeded as planned, we believed we would be at a significant competitive disadvantage in a program of enormous importance to the company. We believed the government's plan was a matter of poor policy and possibly inconsistent with procurement law.

Apparently, the government program manager agreed with us. The document marked "Competition Sensitive" that he provided us was a legal analysis, prepared by our competitor, supporting retaining the proposed language in the draft RFP. The program manager's intent [and I'm speculating here] was to give us an opportunity to respond to our competitor's position.

Although we fumbled around more than we should have, we as industry employees acted appropriately. At the time of the incident, none of us on the plane was certain of our legal obligation. A government employee had given us the document. Despite the markings on the envelope, we reasoned that perhaps the program manager simply made the determination that the material in the en-

---

Kendall, currently a private consultant, was Director of Tactical Warfare Programs in the Office of the Under Secretary of Defense (Acquisition & Technology), from 1989 to 1994. From 1994 to 1996, he held executive positions in the defense industry. Kendall is a graduate of the U.S. Military Academy and holds advanced degrees in engineering and business administration.

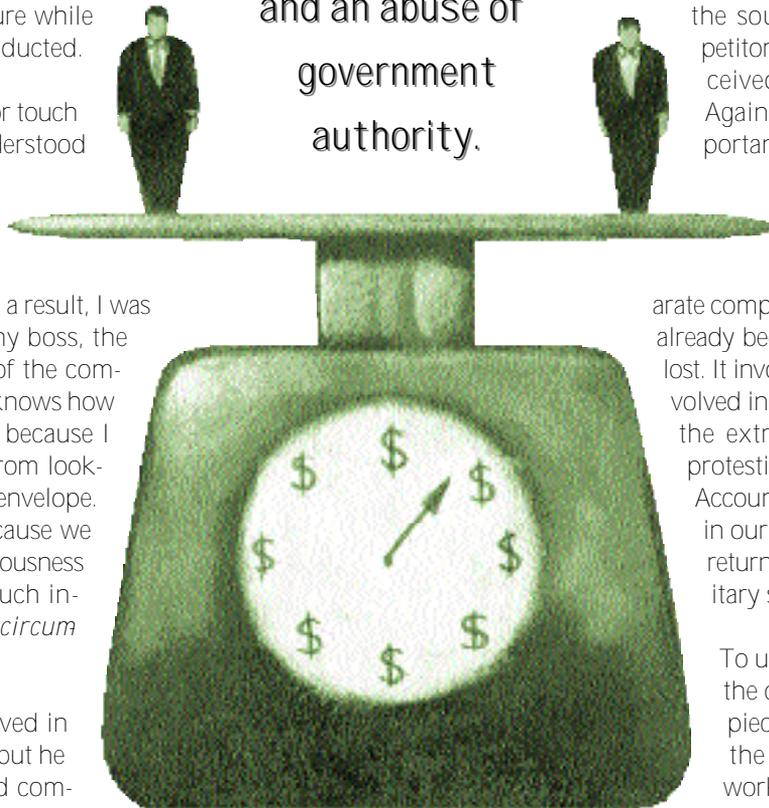
velope really wasn't "protected" because of its content. Since we hadn't solicited the document or provided anything in return, what was our obligation? The answer [and I'm embarrassed to admit my own ignorance in this regard] is that under procurement law, it's a felony to pass or receive such a document. The law is simple and clear. The circumstances are not relevant. *It is a felony.*

The next day, our proposal manager passed the document to our legal and contracting people, and they promptly returned it to the government. An investigation ensued, and the officer involved was relieved of his position as program manager and retired from military service. As for the industry executives, our proposal manager, and the other executive on the plane with me, we were removed from the program as a precautionary measure while the investigation was conducted.

I had declined to look at or touch the document until I understood how the rules applied to this very unusual situation. The other two people had skimmed it to determine its contents. As a result, I was merely chewed out by my boss, the Chief Executive Officer of the company [and a person who knows how to do that sort of thing], because I did not stop the others from looking at the contents of the envelope. We were all culpable because we did not appreciate the seriousness of receiving or passing such information, *under any circumstances.*

I believe the officer involved in this incident meant well, but he used poor judgment, and committed what could have been classified a felony. I doubt that he understood the severity of what he had done, or he wouldn't have taken the risk. In my view, his big mistake was to put his own views about what was fair and reasonable above the rules of the acquisition process. If he believed the markings were inappropriate, and that we had a right to respond to the document, then

**The very idea of coercing a contractor into giving up the right to fair resolution of a protest based on its merits, in return for a more favorable set of source selection rules on a separate competitive procurement was, in our minds, totally unethical and an abuse of government authority.**



he could have asked his legal and contracting support staffs to review it. Instead, he chose to act on his own.

### Politics and Practicalities

The second incident is less straightforward. It happened in the same timeframe, and it involves a flag officer

attempting to coerce a contractor into withdrawing a protest of an award to a competitor. Let us call him General Jones.

General Jones visited our company, where he received a day of briefings on various programs. After formal presentations, a smaller meeting was held, at which only seven or eight people were present. Three of us were from the company, and four or five were from the government. General Jones was the ranking military service representative. He was accompanied by another flag officer, General Smith, whose story will come later. This meeting was a semi-private session to discuss two sensitive issues.

Remember the draft RFP from the first incident? That was one of the issues on the table. We were fighting hard to get the government to change the rules of the source selection so our competitor wouldn't have what we perceived as an unfair advantage. Again, this was an extremely important program to the company, with a multi-billion-dollar value.

The second issue was a separate competitive procurement that had already been competed, which we had lost. It involved the same competitor involved in the RFP issue. We had taken the extraordinary step [for us], of protesting the loss; the Government Accounting Office (GAO) had found in our favor on the protest and had returned the protest case to the military service for resolution.

To us, resolution meant giving us the contract – or at least a major piece of it. The government had the option to re-compete, but work had been ongoing for several months already. This was a small program in terms of revenue, but it had "sentimental" value to my company because we had been the sole source on this program for a decade before we lost the competition. The government, for its part, wanted us to withdraw the protest because it didn't want the program disrupted for practical and political reasons.

What did General Jones do? One can describe his actions in various ways. According to a memorandum he later provided to the investigator, he offered us a deal. It would be less kind, but perhaps more accurate, to say he tried to bribe or blackmail us. His deal was that if we withdrew our protest on the small program, then he was "confident" the language we objected to in the draft RFP for the multi-billion-dollar program would be removed. His actual words were, "Which of these two issues is more important to you? Don't you understand that there is a linkage between these two decisions? Which of them is more important to you?"

As company representatives, we did nothing wrong at the meeting. We all simply ignored the offer and continued to present our case on both issues, based on the merits. After General Jones left, in some apparent frustration, we met privately to discuss the meeting. It would be a serious understatement to say we were offended by the offer from General Jones. We had a right to have both of these issues decided on their merits.

The very idea of coercing a contractor into giving up the right to fair resolution of a protest based on its merits, in return for a more favorable set of source selection rules on a separate competitive procurement was, in our minds, totally unethical and an abuse of government authority. I wondered at the time how our competitor would react if he knew the government was offering us this deal. [Since it was the same competitor in both cases, I expect their priorities would have been different from ours!]

When we were alone, I asked one of the other company executives if the general's conduct had been illegal as well as unethical; he told me it was. As a result, I took the extraordinary step of reporting the incident anonymously to the DoD ethics hot line. This was not a particularly loyal act as an employee. In fact, one of my concerns was the potential for retaliation against my company by the military service. I didn't think this was likely, and I hope I wasn't naive in

that regard. There had been a number of people present, including a representative of another military service, so I anticipated some ambiguity about the source of the report.

I accepted the risks because I felt it was my duty as a citizen and a former acquisition official to make the report. Frankly, I was also angry that a prominent flag officer, from the acquisition system that I had worked for years to strengthen, could have abused his authority this way.

An investigation was conducted some months later. I was aware it was ongoing, but I was never contacted by the investigating officer. About a year later, I requested the investigation report under the Freedom of Information Act. I was curious about the result and why I hadn't been contacted. As I mentioned, the investigation was [in my view] mishandled. The report confirmed this.

Besides General Jones, the investigator talked to only three of the people present. He also wrongly assumed, or was led to misunderstand or, in fact, simply misunderstood, the nature of the complaint. He was looking for evidence that General Jones had promised us the actual contract for the large program as opposed to improving our competitive position by altering the source selection rules in our favor. The report indicates that General Jones denied making us the offer of an actual contract, but admitted making us the offer I described. The reported language General Jones used is instructive. He is reported to have said that "the intent was to obtain the best business deal for the government and that [his civilian supervisor] was aware of the objectives of the visit to [my company] and concurred with the course of action."

### **In Whose Best Interests?**

Is it ever in the best interests of the government to coerce a contractor into withdrawing a protest by threatening to hurt the company's chances on another competition if the protest is not withdrawn? An act of this type destroys trust in the acquisition process and thereby en-

courages unethical conduct by industry. Industry is naturally suspicious of the government's closely held source selection process anyway, and this sort of occurrence tends to confirm our worst fears. Executives in my company were sincerely afraid of retaliation by the Service because the incident was reported.

### **"Legal" Depends On Who You Ask**

Is the situation with General Jones technically illegal? I discussed this question with government contracting officials, former and current officials in the DoD Inspector General's Office, and former members of the DoD General Counsel's staff. No one knew the answer. All agreed that this type of conduct is highly unethical, but surprisingly it took several attempts before someone researched the question of its legality and obtained an authoritative answer. My colleague in the company seems to have been mistaken. *It was not illegal conduct.*

General Jones retired and went to work for our competitor as a senior executive. The investigator's report found my complaint, which the investigator understood to be that we had been offered an actual contract in return for withdrawing our protest, to have been "unsubstantiated."

### **A Grayer Shade of Unethical**

This brings us to the third incident and General Smith. This is the most "gray" of the three cases. It involves the possible misleading of the investigator in the case of General Jones.

General Smith was interviewed under oath during the investigation into General Jones' conduct. He apparently did not explain what really happened in the meeting to a seemingly confused investigator, and may have actually contributed to the confusion.

He is reported to have said that General Jones did not offer the contractor a contract, or part of a contract, in return for withdrawing the protest. This is true. He reported that he did not hear any linkage such as "If you do this for me, then I will give you business here." Again, this