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J. Peace
Proc I

DECISION

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

B-186347
FILE: B-185495

DATE: March 7, 1977

MATTER OF: Inter-Con Security Systems, Inc.

DIGEST:

1. Prior decision holding that contract award violated provisions of 5 U.S.C. § 3108 (Anti-Pinkerton Act) is affirmed upon reconsideration since "new information" does not show decision involved any mistake of fact or law warranting its reversal or modification.

2. Request for reconsideration on ground that decision involved error of law is denied since contention that statute relied upon (5 U.S.C. § 3108) in decision is unconstitutional is matter for consideration by courts.

Inter-Con Security Systems, Inc. (Inter-Con), has requested reconsideration of our decision H. L. Yoh Company; Hammer Security Service of California, Inc., B-186347, B-185495, October 14, 1976, 76-2 CPD 333, wherein our Office recommended that a contract awarded to Inter-Con be canceled. The contract was awarded under request for proposals (RFP) F04693-75-R-0012, issued by the Department of the Air Force for security police services to be performed at the Los Angeles Air Force Station, Headquarters, Space and Missile Systems Organization (SAMSO).

The RFP, a total small business set-aside, requested offerors to provide uniform security and law enforcement services, registration and identification services, and investigative and administrative services. Copies of the solicitation were sent to 42 sources. Seven proposals were received in response to the solicitation on September 15, 1975, the date set for submission of proposals. As a result of a protest lodged on October 9, 1975, one of the seven offerors was determined to be other than a small business. After evaluation of proposals, Hammer Security Service of California Inc. (Hammer), was one of the five offerors notified that its proposal was not within the competitive range. Pending resolution of a protest on this issue by Hammer, award was withheld and SAMSO extended performance under the contract held by the incumbent contractor, the H. L. Yoh Company, Division of Day &

Zimmerman, Inc. (Yoh). In our decision, Hammer Security Service of California, B-185495, March 30, 1976, 76-1 CPD 207, we denied Hammer's protest against the alleged deficiencies in the solicitation and the exclusion of its proposal from the competitive range. A new protest was filed by Yoh on March 31, 1976, the day after an award under the RFP was made to Inter-Con. Hammer requested reconsideration of its decision and also protested the award to Inter-Con. The protest was sustained by our decision of October 14, 1976, supra.

The basis for the protests was the contention that the contract awarded to Inter-Con was illegal because it violated the provisions of a statute popularly known as the Anti-Pinkerton Act (5 U.S.C. § 3108 (1970)). Section 3108 of title 5, United States Code, entitled "Employment of detective agencies; restrictions," states:

> "An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia."

This section was incorporated in the RFP (and the resulting contract) through the following provisions of the solicitation:

> 1. "Part 1, Section B: In addition to the certifications in paragraph a., above, the offeror shall also certify as to the following:
>
> > "LICENSING: The offeror certifies that he is ( ) is not ( ) licensed in California to perform work which would fall within the prohibition of the Pinkerton Act."
>
> 2. "Part 1, Section C-1, Instructions, Conditions and Notices to Offerors, paragraph b.8:
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> > "PINKERTON ACT: 5 USC 3108, Sept 6, 1966. Award of a contract resulting from this RFP shall be subject to the prohibition of the Pinkerton Act."
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> 3. "Contract F04693-75-C-0012, Section J, Special Provisions, paragraph b.13:
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> > "PINKERTON ACT - Sep 6, 1966, (80 Stat. 415; 5 USC 3108) - The above Pinkerton Act prohibition applies to the Contractor and each of his employees."

At the time of award Inter-Con was a sole proprietorship business organization under California law, i.e., Enrique Hernandez, d.b.a. Inter-Con Security Systems. Award was made to that firm notwithstanding the fact that the required licensing certification, supra, had not been completed by Inter-Con.

In lieu of the requested certification, Mr Hernandez submitted a letter of transmittal which, in pertinent part, stated:

> "I further certify that Inter-Con Security Systems, Inc., does not perform investigative work which would fall within the prohibition of the Pinkerton Act."

Nevertheless, the record showed that private patrol operator license C 6374 had been issued to Inter-Con Security Systems; Enrique Hernandez, Sr., Qualified Manager/Owner, by the California Department of Consumer Affairs, Bureau of Collection & Investigative Services (BCIS) on August 14, 1974. However, at the time of award, private investigator license A-5756 was valid and had been issued on March 11, 1974, to:

> Inter-Con Investigators, Inc.
> 1640 Fullerton Avenue, Monterey Park, CA
> Now located at:
> 2320 S. Garfield Avenue, Monterey Park, CA
>
> Enrique Hernandez, Sr., President/Qualified Manager
> Bertha Hernandez, Vice President
> Enrique Hernandez, Jr., Secretary

Since Inter-Con Investigators, Inc., was empowered under its corporate charter to engage in the private detective business and was licensed under California law to engage in such business, we found that it was a detective agency for purposes of 5 U.S.C. § 3108 and that Enrique Hernandez, Sr., as the president/qualified manager of the corporation was an individual employed by it, thus prohibiting him from being employed by or contracting with the Government, regardless of the character of the services to be performed under the instant contract. Therefore, we concluded that the contract with Enrique Hernandez, d.b.a. Inter-Con Security Systems, should be canceled.

Inter-Con maintains that our decision was based upon substantial errors of fact and law. Affidavits from Enrique Hernandez and D. C.

Wesley have been submitted purportedly setting forth new factual matters, not previously considered, which require modification or reversal of the decision. Also, Inter-Con's counsel contends that application of the Anti-Pinkerton Act is unconstitutional because (1) later congressional enactments have resulted in the repeal, by implication, of the act; (2) the act is unconstitutionally vague and ambiguous; and (3) the act violates the equal protection provisions of the United States Constitution and the amendments thereto, since there is currently no reasonable basis for the exclusion of an employee of a detective agency from contracting with the Government.

The affidavits of Mr. Hernandez and Mr. Wesley include information regarding the applicability of the Anti-Pinkerton Act allegedly received during a September 29, 1975, preaward survey conducted at the Inter-Con offices by an Air Force Source Selection Committee. Mr. Hernandez states that the corporate structure of Inter-Con Investigators and his relationship to that corporation were explained to the Air Force representatives. In addition, Mr. Hernandez notes the Air Force was also advised that he performed polygraph work only and that no investigative work was performed by him or by anyone connected with Inter-Con Investigators. The affidavits contend that the response of an Air Force representative to this information was: "We see no problem at all with the Pinkerton Act. We have checked it out and everything is okay."

The Air Force position purportedly expressed at the September 29, 1975, preaward meeting represents the view subscribed to by the Air Force throughout our consideration of this matter. In the October 14, 1976, decision we commented:

> "The Air Force position is that there was no error insofar as the Pinkerton statute is concerned and that if there was any error, it was in the way the Pinkerton certification requirement was physically placed in the RFP which possibly caused confusion. The certification provision was written by the contracting officer. Therefore he considered Mr. Hernandez's failure to fill in appropriate block as a minor irregularity since the same information was provided by the statement, supra, in Mr. Hernandez's letter of transmittal. The contracting officer also states that he accepted this statement because

> it was said to be known that Mr. Hernandez possessed two Government contracts with other agencies, and there was no reason to suspect difficulties under the statutory prohibition. Moreover, it is asserted that Mr. Hernandez rightfully certified that he is not licensed to perform work which would fall within the statutory prohibition since he was doing business as an individual and, as an individual, was not licensed as a private investigator. Finally, the Air Force indicates that Mr. Hernandez has taken steps after award to correct the minor irregularity by requesting (on May 3, 1976) that California cancel the investigator's license."

It is therefore clear that the Air Force position purportedly expressed at the preaward meeting and referred to in the affidavits was considered in our prior decision. Although the affidavits prove that Inter-Con was aware of and discussed a possible violation of the statute prior to award, they present no justification for Mr. Hernandez's failure to execute the RFP's Pinkerton certificate or to make a written revelation of his relationship with Inter-Con Investigators in the letter submitted with his offer. Thus, the affidavits do not present new information but merely additional documentation in support of the Air Force position which was considered in our decision of October 14, 1976.

Regarding the applicability of the Anti-Pinkerton Act to the circumstances of this case, our decision noted that:

> "In recommending that the protests on this issue be denied, the Air Force relies in part on the rationale of our decision in the so-called Wackenhut Services, Incorporated case, 44 Comp. Gen. 564 (1965). Under the facts of that case, we upheld an award to a protective agency (guard services) which was a wholly owned State-approved subsidiary of a detective agency corporation. Since the protective agency maintained its books, accounts and financial transactions separate from the parent corporation, we regarded it as a separate entity even though the parent and subsidiary shared administrative

> personnel. We noted that the protective agency had been incorporated, and that the State's approval of its corporate form established a prima facie case of separate identity. We concluded that there was no showing that the Pinkerton statute and its underlying policy considerations afforded sufficient reason to require our Office to pierce the corporate veil and look behind the pro forma elements of separate corporate identity which distinguished a guard service company from its parent detective company. In reaching our decision in the Wackenhut case, supra, our Office recognized however that the literal provisions of the Pinkerton statute were still required to be applied for as long as it remained in force."

Inter-Con Investigators was incorporated by (and had as one of its three directors) Mr. Enrique Hernandez who occupied the position of president/qualified manager when the private investigator's license was issued. For purposes of compliance with 5 U.S.C. § 3108, we have held that an offeror has to be without authority to conduct detective or investigative services at the time of award. See Progressive Security Agency, Inc., Reconsideration, B-180257, January 6, 1977; B-156424, July 22, 1965. In that connection, we noted that Mr. Hernandez was the only member of the corporation authorized by the State license to perform investigations and could do so at any time on behalf of the corporation. That relationship existed when his proposal was submitted under the RFP and continued after award was made to him as the noncorporate entity, Enrique Hernandez, Sr., d.b.a. Inter-Con Security Systems. Therefore, we concluded that the degree of separateness found in the Wackenhut case, supra, did not exist.

Inter-Con argues that we should reconsider our decision on this matter because application of the provisions of 5 U.S.C. § 3108 in this instance constituted a material mistake of law. It asks that this Office conclude that the statute is either unconstitutional as applied to Inter-Con and/or that its provisions should not be applied, enforced, or given any effect since later congressional enactments have resulted in the repeal, sub silentio, and by implication, of the act. However, the question of whether a statute is constitutional is a matter for determination by the courts and not by this Office.

As stated in Wackenhut (44 id. 564, 568) supra, we are required to apply the literal provisions of the Anti-Pinkerton statute for so long as it remains in force. Any inconsistencies in the law and current accepted business practices is a matter to be remedied by legislation. It has long been the view of our Office that application of the Anti-Pinkerton Act no longer serves a useful purpose, and we plan to submit to the 95th Congress a recommendation for its repeal. Nevertheless, we do not find that the enforcement of a current statute constitutes a mistake of law.

Inter-Con has also raised two additional reasons why we should reconsider our decision: first, the substantial loss which Inter-Con would sustain if the contract is terminated, and second, the high cost the Government would incur by reprocuring the service. Inter-Con states that its proposed cost of performance was predicated on a contract award for a 28-month performance period. Thus, it asserts that a 13-month award (resulting from the termination) would create a hardship for the company. In addition, Inter-Con implies that the Government would be required to spend an additional $980,000 for new security clearance investigations if reprocurement resulted in an award to a different contractor.

Our review of the RFP shows that the basic contract including the phase-in period totaled 8 months. Option 1 was for 3 additional months, followed by 12 months under option 2. Finally, an additional 6 months was provided for under option 3. Offerors were clearly advised that the Government retained the right to exercise any or all of the options, and that the evaluation of the options would not obligate the Government to exercise the option or options. Therefore, Inter-Con's assumption in connection with figuring its cost of performance that the Government would exercise the options was at its risk and has no bearing on the issues which were the subject of our decision.

Regarding the increased cost of reprocurement, Inter-Con was allegedly advised that it costs the Department of Defense approximately $10,000 to investigate each employee prior to granting a "secret" or "top secret" clearance. Since Inter-Con had 98 employees with such clearances, it assumed that an award to a new contractor would require the Government to perform additional investigations for 98 new employees at an estimated total cost of $980,000. We question the accuracy of the figure cited by Inter-Con as the cost for each investigation.

In addition, we note that the RFP encouraged the maximum use of incumbent personnel and that many of the experienced personnel had been previously investigated. Moreover, the possible cost of resolicitation would not change the factual or legal bases upon which the decision of October 14, 1976, was rendered.

Since there has been no showing that our decision of October 14, 1976, was based on a mistake of relevant fact or applicable law which would warrant reversal or modification, it is affirmed.

Acting Comptroller General
of the United States