

Ms. Williams



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Custom Signs Today

File: B-237956

Date: April 10, 1990

William O. Weatherly, for the protester.
Christine S. Williams, Esq., Office of the General Counsel,
General Services Administration, for the agency.
Paula A. Williams, Esq., and John F. Mitchell, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protest that agency improperly rejected offer based on a contingent fee arrangement is denied since the agency reasonably found that the contingent fee arrangement of 20 percent of gross sales was exorbitant when compared to the customary fees paid for similar services.

DECISION

Custom Signs Today protests the rejection of its offer submitted in response to request for proposals (RFP) No. 7FXG-Z3-89-9912-B, issued by the General Services Administration (GSA) to obtain multiyear, multiple award Federal Supply Schedule contracts for advertising displays, signs, and related products. Custom Signs' offer was rejected because GSA determined that the commission to be paid to its selling agent under the contingent fee arrangement submitted by Custom Signs was exorbitant and therefore the arrangement was with other than a bona fide agency.

We deny the protest.

In response to the RFP, Custom Signs submitted a proposal in which it certified that it had entered into a contingent fee arrangement; none of the other 96 offerors did so. The contracting officer requested Custom Signs to furnish a standard form (SF) 119, "Statement of Contingent or Other Fees," so that she could determine if the contingent fee arrangement was with either a "bona fide agency" or a "bona fide employee" in which case the contingent fee arrangement

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would be unobjectionable. Federal Acquisition Regulation (FAR) § 3.408-1(a)(2).

Custom Signs submitted a completed SF 119 and a copy of a commercial selling agency agreement between itself and Bellport International Trading Co., Inc. Under the contingent fee agreement, Bellport was to perform a number of tasks such as to: "aggressively solicit" government contracts; review bid solicitations; prepare bids and negotiate contracts; act as liaison between Custom Signs and government agencies, and suppliers; and assist in contract administration tasks, such as "coordinating" government inspections, "reviewing" with suppliers specification and shipping requirements, and "calculating" shipping costs. In return, Custom Signs agreed to pay Bellport "20% of total sales on any resultant contract."

GSA evaluated the SF 119 and the related commercial selling agreement between Custom Signs and Bellport to determine the reasonableness of this contingent fee. The contracting agency conducted a survey of contingent fee arrangements under GSA-awarded, multiple award schedule (MASC) contracts and found that the highest fee ever allowed was 12 percent and that the customary contingent fees allowed for similar services under the MASC program averaged 5 to 7 percent. Based on these findings, the contracting officer concluded that the 20 percent fee was disproportionate to the value of the services to be performed by Bellport or to cite customary fees for similar services, and determined that Bellport therefore was not a "bona fide agency" as set forth in FAR § 3.401. The contracting officer notified Custom Signs by letter dated November 7, 1989, that its proposal was rejected for this reason. This protest followed.

GSA first maintains that the protest should be dismissed as untimely since it was filed more than 10 working days after Custom Signs knew its basis for protest. 4 C.F.R. § 21.2 (a)(2) (1989). According to the agency, the protester received notice of rejection of its offer on November 10, but did not file its protest until December 4. Custom Signs contends, however, that GSA sent the November 7 letter to the site listed in its offer as the place of production and not to the firm's address listed on the face of its offer, and that it did not actually receive the letter until November 27. Thus, the protester argues that its protest which was filed with this Office on December 4 was timely. We agree.

In its protest, Custom Signs challenges GSA's determination that the 20 percent contingent fee is exorbitant because, in its view, there is no regulatory authority which permits an

agency to reject an offer on this basis. As support for this position, the protester points out that the applicable FAR provisions do not definitively state what is a reasonable contingency fee nor do they set a ceiling for this fee. Custom Signs insists that its decision to retain Bellport as its commercial selling agent is a business decision not subject to review by GSA. Moreover, the protester asserts that the contingency fee is a negotiable item and GSA should not have rejected its proposal prior to conducting negotiations.

We find no merit in Custom Signs' position. 41 U.S.C. § 254(a) (1982) generally prohibits contingent fee arrangements for soliciting or obtaining government contracts because such arrangements may lead to attempted or actual exercise of improper influence. However, certain exceptions to this prohibition are allowed--contingent fee arrangements between contractors and bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. 41 U.S.C. § 254(a). Contrary to the protester's assertions, section 3.408-2 of the FAR does provide guidelines that agencies should consider in evaluating the SF 119 and related information to determine whether a contingent fee arrangement meets the statutory exception permitting contingent fee arrangements with bona fide employees or agencies. See 41 U.S.C. § 254(a) and FAR § 3.402(b). Section 3.408-2(c) of the FAR describes circumstances that ordinarily exist in acceptable arrangements where the agency relationship is bona fide. The first among these is "[t]he fee should not be inequitable or exorbitant when compared to the services performed or to customary fees for similar services related to commercial business." FAR § 3.408-2(c)(1).

GSA found, among other things, that a fee of 20 percent of gross sales was disproportionate to the level of effort/services to be provided by Bellport and disproportionate to the customary fees similar services.

In its comments on the agency report, Custom Signs reiterates its view that the 20 percent contingent fee is reasonable since the services provided by Bellport "exceed" a normal agent's tasks. In connection with the protest, the protester furnished--for the first time--an undated document from Bellport entitled "Breakdown of Services" which lists "numerous areas of responsibility" some of which do not appear in the written agreement between the two firms (which by its own terms represents the entire agreement of the parties). Custom Signs takes the position that had GSA "elect[ed]" to request additional information this document

would have been provided for its consideration. While the protester disputes GSA's findings, it has offered no probative evidence to rebut the agency's conclusion that a 20 percent fee was not commensurate with the level of effort necessary to obtain a government contract to furnish signs and display systems or with the customary fees for similar services. Under these circumstances, GSA had a valid basis to reject Custom Signs' proposal.

The protest is denied.


for James F. Hinchman
General Counsel