



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Howard Johnson Lodge

File: B-244302

Date: September 17, 1991

Ginny McCullers for the protester.
Hugh R. Overholt, Esq., Maupin, Taylor, Ellis & Adams, P.C.,
for McDonald's Inn Inc., an interested party.
Herbert F. Kelley, Jr., Esq., Department of the Army, for the
agency.
Behn Miller, Mary Curcio, Esq., and Christine S. McIody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Protest that agreement between selling agent and contractor constitutes improper contingent fee agreement is denied where under the terms of the agreement and in actual practice, the selling agent does not solicit or obtain contracts directly from the procuring agency.

DECISION

Howard Johnson Lodge, located in Charlotte, North Carolina, protests the award of a contract under invitation for bids (IFB) No. DABT47-91-B-0031 to McDonald's Inn Inc. The IFB was issued by the Department of the Army to provide meals and lodging for enlistees during their training at the Military Entrance Processing Station located in Charlotte.^{1/} In its protest, Howard Johnson, the second low bidder, argues that the McDonald's Inn bid should be rejected due to a prohibited contingent fee arrangement that exists between McDonald's Inn and its agent, General Sales Agency.^{2/}

We deny the protest.

^{1/} The IFB was issued on March 6, 1991, and bid opening was held on April 5; eight bids were received.

^{2/} General Sales Agency is an assumed name, legally registered to Priscidon Enterprises, Inc., a North Carolina corporation.

In response to the IFB, McDonald's Inn submitted a bid in which it certified that it had entered into a contingent fee arrangement with General Sales. Upon request by the Army, McDonald's Inn also submitted standard form 119, "Statement of Contingent or Other Fees," and a copy of the agency agreement between McDonald's Inn and General Sales.

Under the agreement, General Sales, as "Agent," is to provide the following services:

- "(a) Provide a locator and screening service intended to find and present suitable opportunities for new business to Client.
- (b) Assistance in the preparation and submission of competitive bids and support documents as required.
- (c) On-going advisory service relating to the implementation and the performance of contracts awarded to Client, as a result of Agency's services.
- (d) Acting as liaison service between Client and customer on contracts awarded to Client as a result of Agency's services.
- (e) Assisting Client in obtaining prompt payment of monies due from customer on contracts awarded as a result of Agency's services.
- (f) Filing administrative protests on Federal Government Contracts awarded to Client, as a result of Agency's services.
- (g) Filing appeals on administrative protests mentioned at (f) above, if necessary."

In return, McDonald's Inn, as "Client," has agreed to pay General Sales "ten percent (10%) of the gross amount" of any contract "received by Client" as a result of General Sales's assistance.

With regard to contingent fee arrangements, 10 U.S.C. § 2306(b) (1988) provides:

"Each contract awarded under this chapter after using procedures other than sealed-bid procedures shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business." (Emphasis added.)

The statutory prohibition is implemented in Federal Acquisition Regulation (FAR) § 52.203-5, "Covenant Against Contingent Fees,"^{3/} See also FAR § 3.401 (definition of "bona fide agency").

Here, Howard Johnson protests that the McDonald's Inn-General Sales agreement constitutes a prohibited contingent fee agreement because General Sales does not qualify as a bona fide agency. To support this assertion, Howard Johnson maintains that the amount of the fee to be paid to General Sales--10 percent of all gross revenues--is exorbitant, in contravention of FAR § 3.408-2(c)(1), and that General Sales does not represent McDonald's Inn for both government and commercial contracts as contemplated by FAR § 3.408-2(c)(5).

We need not decide whether General Sales qualifies as a bona fide agency since we find that the McDonald's Inn-General Sales agreement does not constitute a contingent fee agreement within the meaning of the applicable statute and regulation.

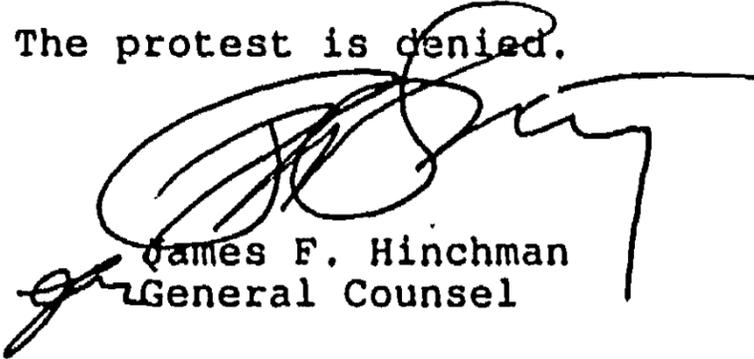
The purpose of the contingent fee prohibition is to prevent the attempted or actual exercise of improper influence by third parties over the federal procurement system. Quinn v. Gulf & Western Corp., 644 F.2d 89 (2d Cir. 1981). Thus, we have found that the prohibition on contingent fees only applies to situations where the selling agent directly solicits or obtains a contract from the procuring agency. Holmes & Narver Servs., Inc., B-242240, Apr. 15, 1991, 91-1 CPD ¶ 373; see also Browne v. R&R Eng'g Co., 264 F.2d 219 (3d Cir. 1959). The fact that an agent's fee is contingent upon the contractor receiving the contract award is insufficient to bring a fee agreement under the contingent fee prohibition; rather, the regulation contemplates a specific demonstration that an agent is retained for the express purpose of contacting government officials. Holmes & Narver Servs., Inc., supra.

^{3/} By their terms, 10 U.S.C. § 2306(b) and 41 U.S.C. § 254(a) (1988)--the statutory basis for the contingent fee prohibition--only apply to negotiated contracts. Nevertheless, the Department of Defense (DOD) and the General Services Administration (GSA)--who are charged under the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 421(c) (1988), with promulgating the FAR--have decided as a matter of policy to extend the statutory prohibition for negotiated contracts to sealed bid contracts. FAR § 3.403. Accordingly, the contingent fee prohibition applies to all federal procurements.

Here, it is clear that General Sales and McDonald's Inn entered into a contingent fee arrangement; however, the arrangement is not one that falls within the statutory and regulatory prohibition on such arrangements. Although General Sales is bound to assist McDonald's Inn in securing business from the government, there is no indication that General Sales, either under the terms of the written agreement or in actual practice, solicits or obtains contracts directly from the procuring federal agency. Rather, General Sales locates advertised procurements via the Commerce Business Daily or other publications and then alerts McDonald's Inn to these potential opportunities; if McDonald's Inn expresses an interest in the procurement, General Sales then assists McDonald's Inn in preparing a bid. At no point does General Sales contact the procuring agency to elicit contracts; General Sales's role does not involve any dealing with those officials responsible for any aspect of letting public contracts until after a contract is awarded.

Under these circumstances, where there is no evidence in the record that General Sales offered or performed services that involved any contact or dealing with the government before award on this procurement, we find that the McDonald's Inn-General Sales agreement does not constitute a prohibited contingent fee arrangement within the meaning of the applicable statute and regulation. Id. Accordingly, the agreement provided no basis for rejection of the McDonald's Inn bid.

The protest is denied.


James F. Hinchman
General Counsel