

McAuliffe



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Convention Marketing Services

File: B-245660.3; B-246175

Date: February 4, 1992

Monica Anderson for the protester.
Mike Harris, Lodging Consultants, Inc., for Layton Hospitality, Inc., d/b/a Howard Johnson and JoAnn Johnson, Federal Contract Specialists, Inc., for Best Western Gloucester Inn, interested parties.
Herbert F. Kelley, Jr., Esq., Gerald P. Kohns, Esq., and John P. Carrell, Esq., Department of the Army, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that agreements between selling agents and contractors constitute improper contingent fee agreements are denied where contracting activity reasonably determined bona fide commercial or selling agents were maintained by contractors for the purpose of securing business and agents did not exert or propose to exert improper influence to solicit or obtain government contracts.

DECISION

Convention Marketing Services (CMS) protests the proposed award of a contract under invitation for bids (IFB) No. DAKF15-92-B-0004 to Layton Hospitality, Inc., d/b/a Howard Johnson and the proposed award of a contract under IFB No. DABT35-91-B-0027 to Best Western Gloucester Inn. The IFBs were issued by the Department of the Army to provide meals and lodging for enlistees during their training at the Military Entrance Processing Stations in Milwaukee, Wisconsin, and Philadelphia, Pennsylvania. CMS, the apparent second low bidder under both solicitations, contends that the low bids submitted by Layton (under IFB No. DAKF15-92-B-0004) and Best Western (under IFB No. DABT35-91-B-0027) should be rejected due to prohibited

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contingent fee arrangements that exist between Layton and its agent, Lodging Consultants, Inc., and between Best Western and its agent, Federal Contract Specialists, Inc.

We deny the protests.

In their bids, Layton and Best Western each certified that it had entered into a contingent fee arrangement with a sales agent. Upon request by the Army, both contractors also submitted standard form (SF) 119, "Statement of Contingent or Other Fees," and a copy of their agency agreements. In their SF 119s, Layton and Best Western certified that Lodging Consultants and Federal Contract Specialists, respectively, would assist the contractors in the acquisition and preparation of federal government lodging contracts. The terms of the agency agreements between the parties are identical;¹ Lodging Consultants' and Federal Contract Specialists' duties (as "agent") include the following:

- "1) Obtaining copies of the bid sets [for the contractor].
- 2) Previous bid results furnished, if available.
- 3) Indoctrination of [the contractor's] key personnel as to the specifications of the contracts.
- 4) Recommendations by [the agent's] staff for competitive bid rates.
- 5) Screening of [the contractor's] bids for technical and clerical compliance.
- 6) Obtaining the results of the bid openings.

¹CMS also argues that the similarity in language used in Lodging Consultants' and Federal Contract Specialists' agency agreements, as well as the similarities in their protest comments, suggests that these two firms are "working in concert" in violation of antitrust laws. We agree that there are similarities between the language of the agency agreements and the agents' protest comments which suggest that information has been shared between these agents. However, we do not agree that it necessarily follows that the agents' sharing of this type of information is prohibited or had any effect on the bidding here. In fact, CMS does not establish otherwise. Generally, allegations of violations of antitrust laws are outside the scope of the bid protest process and should be referred to the Department of Justice, not our forum, since the interpretation and the enforcement of such laws are functions of the Attorney General and the federal courts. See generally Federal Acquisition Regulation (FAR) § 3.301; Society Brand, Inc. et al., 55 Comp. Gen. 475 (1975), 75-2 CPD ¶ 327. ✓

- 7) Filing of administrative protests and appeals, as needed, to protect [the contractor's] interests on any given bid action.
- 8) Assistance in collecting any late payments from the Government under the 'Prompt Payment Act' as amended."

Both agency agreements state that if the client receives a contract award:

"as a result of a solicitation in which [a]gent's services were requested and were in fact used, [c]lient agrees to pay [a]gent a commission of ten percent (10%) of the amount received from the Government for rooms furnished under the contract."

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."

The statutory prohibition is implemented in FAR § 52.203-5, "Covenant Against Contingent Fees."² FAR § 3.401 (FAC 90-7) defines the term "bona fide agency" to mean

"an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit

²By 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 and the General Services Administration--who are charged under the Office of Federal Procurement Policy 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.

or obtain any Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence."

The term "improper influence" is defined as:

"any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter." FAR § 3.401. ✓

CMS protests that the Layton-Lodging Consultants and the Best Western-Federal Contract Specialists agreements constitute prohibited contingent fee agreements because in both instances, the agents communicated with government personnel before contract award and thus have exerted or possibly may exert improper influence in obtaining government contracts for their clients. Specifically, the protester challenges the propriety of Lodging Consultants' role as liaison between contractor and contracting agency, as evidenced by the communications Lodging Consultants has had with government contracting personnel on Layton's behalf (including obtaining a copy of the solicitation and representing Layton in this protest.) Regarding the Best Western-Federal Contract Specialists agreement, CMS challenges the agent's duties listed in the agency agreement (stated above) and specifically contests the propriety of the agent's role in having filed a successful size status protest with the Small Business Administration on behalf of Best Western under the IFB, and in filing comments for its client on the current protest. CMS essentially argues that through repeated contacts with government contracting personnel, these agents may develop friendly relationships with that personnel which "will give an advantage to their efforts on behalf of their clients."

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. Howard Johnson Lodge, B-244302, Sept. 17, 1991, 91-2 CPD ¶ 255; Quinn v. Gulf & Western Corp., 644 F.2d 89 (2d Cir. 1981). ✓ For example, the prohibition on contingent fees applies to situations where the selling agent directly solicits or obtains a contract from the procuring agency. Browne v. R&R Eng'g Co., 264 F.2d 219 (3d Cir. 1959); Holmes & Narver Servs., Inc., B-242240, Apr. 15, 1991, 91-1 CPD ¶ 373. ✓ Where a bona fide commercial or selling agency is maintained by a contractor for the purpose of securing business, the agency contract and the agent's actions must be reviewed to "protect government agencies against corrupting influences" and to insure that there is no "threat of persons selling government influence or access to government officials."

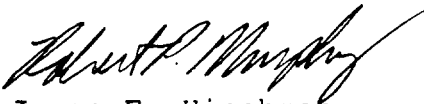
Puma Indus. Consulting v. Daal Assocs., Inc., 808 F.2d 982 (2d Cir. 1987). The fact that an agent's fee is contingent upon the contractor receiving the contract award is insufficient to bring a fee agreement under the contingent fee prohibition; rather, the regulation contemplates a specific demonstration that an agent is retained for the express purpose of contacting government officials, Holmes & Narver Servs., Inc., supra; see also Browne v. R&R Eng'g Co., supra, where such contact poses a threat of the exertion of improper influence to obtain government contracts.

Our review of the record shows that although the agents, Lodging Consultants and Federal Contract Specialists, agree to assist their clients, Layton and Best Western, in securing business from the government, there is no indication that either agent, through the terms of its written agreement or in actual practice, has exerted or has proposed to exert any improper influence upon government contracting personnel in its efforts to obtain government contracts for its client. We find this case distinguishable from the facts in Browne v. R&R Eng'g Co., supra--which decision the protester cites in support of its position--where a contingent fee arrangement was found improper because the agent, which was not a bona fide commercial or selling agent, agreed to utilize his prior dealings and friendly relationships with government contracting personnel to solicit or obtain contracts for his client. Here, there is no showing that the agency agreements involve other than legitimate ongoing business relationships with established concerns, knowledgeable of their clients' services, regarding the pursuit of business in return for a fee--which the protester does not allege is excessive.

In Puma Indus. Consulting v. Daal Assocs., Inc., supra, the court found that a bona fide commercial or selling agent's efforts in having its client contractor added to the government's list of bidders, the agent's review of the contractor's bid, and the filing of documents for the client to obtain a Certificate of Competency from the Small Business Administration, without which the government would not have awarded the contracts to the client/contractor, did not constitute a threat of improper influence. Similarly, we do not find that the duties listed in the present agency agreements or Lodging Consultants' and Federal Contract Specialists' communications with government contracting personnel pose the necessary threat of improper influence to constitute a prohibited contingent fee agreement. We therefore find no reason to question the reasonableness of the Army's determination that here the referenced agents are bona fide commercial or selling agents properly maintained by contractors for the purpose of securing business.

Neither Layton nor Best Western was given any guarantee by its agent of receiving a contract, there is no evidence that shows that the agents held themselves out as able to influence the contracting process in any way, and the contacts made here were limited and mostly administrative in nature--obtaining copies of the IFBs without identifying the clients, and filing interested party protest submissions for the clients regarding size status or an alleged contingency fee prohibition. Although the protester suggests that any contacts by a bona fide commercial or selling agent to government contracting personnel may eventually develop into "social relationships" that may confer an advantage upon the agent's client, the protester has not substantiated that claim here and, without more, we cannot find that the facts of these cases--regarding the challenged agency agreements--pose the threat of improper influence that the warranty against contingent fee agreements protects against.

Accordingly, the protests are denied.


for James F. Hinchman
General Counsel