

Comptroller General  
of the United States

Washington, D.C. 20548

Miller  
146.211

## Decision

**Matter of:** Howard Johnson Lodge--Reconsideration

**File:** B-244302.2

**Date:** March 24, 1992

Ginny McCullers for the protester, Behn Miller, Esq., Mary Curcio, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Decision which found contingent fee agreement between selling agency and contractor did not violate contingent fee prohibition set forth at 10 U.S.C. § 2306(b) (1988) is affirmed on reconsideration, where correction of factual error in the decision did not change the ultimate conclusion that the selling agency agreement was proper.

### DECISION

Howard Johnson Lodge requests reconsideration of our decision, Howard Johnson Lodge, B-244302, Sept. 17, 1991, 91-2 CPD ¶ 255, in which we denied its protest challenging award of a contract to McDonald's Inn, Inc., under invitation for bids No. DABT47-91-B-0031, 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, North Carolina.

In its protest, Howard Johnson contended that McDonald's Inn maintained an improper contingent fee agreement with its selling agent, General Sales Agency, in contravention of 10 U.S.C. § 2306(b) (1988), which prohibits contingent fee arrangements except where the agreement exists between a contractor and its bona fide employee or selling agency. We denied this protest based on our finding that General Sales's role as a selling agency was limited to locating potential solicitations and assisting McDonald's Inn with bid preparation. Since we concluded that General Sales did not directly deal with government procurement officials, we found that the McDonald's Inn-General Sales contingent fee arrangement was not subject to the contingent fee prohibition. In requesting reconsideration, Howard Johnson maintains that our prior decision warrants reversal since it was based upon a mistake of fact.

In response to the protester's request, we closely reviewed the record in this case and agree with the protester that the analysis in our prior decision rested on an erroneous factual finding. However, we affirm our prior decision denying the protest for the reasons discussed below.

With regard to contingent fee arrangements, 10 U.S.C. § 2306(b) 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 Federal Acquisition Regulation (FAR) Subpart 3.4, "Contingent Fees," and § 52.203-5, "Covenant Against Contingent Fees."

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). The prohibition only applies to situations where the selling agency agrees "to solicit or obtain" a contract from a procuring agency, and there is an exception for activities by "a bona fide employee or established commercial or selling agency." See Holmes & Narver Servs., Inc., B-242240, Apr. 15, 1991, 91-1 CPD ¶ 373; Convention Mktg. Servs., B-245660.3; B-246175, Feb. 4, 1992, 92-1 CPD ¶ \_\_\_\_.

Our prior decision rested on a conclusion that the agreement between McDonald's Inn and General Sales Agency did not contemplate direct contacts between procurement officials and General Sales Agency before contract award. Without such contact, the agency could not be said "to solicit or

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<sup>1</sup>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. 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), with promulgating the FAR--extended the prohibition to sealed bid contracts. FAR § 3.403. Accordingly, the contingent fee prohibition applies to all federal procurements.

obtain" a contract. Because we believed that there would be no direct contact between the agency and the government, we had no reason to address the Army's contention that General Sales Agency falls within the statutory exception for bona fide selling agencies. We now conclude that the agreement with McDonald's Inn contemplates sufficient direct dealing between General Sales contracting officials that the firm was employed to solicit or obtain contracts.

The McDonald's Inn-General Sales Agency agreement consists of a general "Retainer Agreement," dated March 17, 1991, and a supplemental "Addendum No. 0031," also dated March 17. Under the terms of the retainer agreement, General Sales has offered to perform 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."

Although General Sales informed this Office that it locates advertised procurements via publications such as the Commerce Business Daily and then alerts McDonald's Inn to these potential opportunities, Howard Johnson maintains that once located, General Sales contacts the contracting agency directly and arranges for the agency to send a solicitation package to McDonald's Inn. As evidence of this direct contact, Howard Johnson points to a clause of addendum No. 0031 to the McDonald's Inn-General Sales agreement which provides:

"General Sales Agency is currently aware of the following business opportunity. We are giving a general description so that a decision can be made whether you wish [General Sales] to send the complete bid set to you and act as your Sales Agency . . . ." (Emphasis added.)

On reconsideration, we find that the language set forth in addendum No. 0031--as well as the language of subparagraphs (a) and (b) of the retainer agreement--is so general that it potentially authorizes sufficient contact between the selling agency and government officials to constitute "soliciting or obtaining" within the meaning of the contingent fee prohibition, 10 U.S.C. § 2306(b). Accordingly, we agree with the Army and the protester that the McDonald's Inn-General Sales Agency agreement is a contingent fee agreement within the scope of 10 U.S.C. § 2306(b) and its implementing regulations. The question presented, therefore, is whether the agreement falls within the "bona fide agency" exception, FAR § 3.402(b).

A contingent fee agreement is only enforceable if it exists between a contractor and its bona fide employee or agency. FAR § 3.402(b); Puma Indus. Consulting, Inc. v. Daal Assocs., Inc., 808 F.2d 982 (2d Cir. 1987). In this regard, FAR § 3.401 defines a "bona fide agency" as:

"[A]n established commercial or selling agency, maintained by the contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence."

To assist in determining whether a firm constitutes a bona fide agency, FAR § 3.408-2(c) sets forth five guidelines which describe circumstances ordinarily existing in acceptable arrangements in which the agency is bona fide. These guidelines provide that:

"(1) The fee should not be inequitable or exorbitant when compared to the services performed or to customary fees for similar services related to commercial business.

"(2) The agency should have adequate knowledge of the contractor's products and business, as well as other qualifications necessary to sell the products or services on their merits.

"(3) The contractor and the agency should have a continuing relationship or, in newly established relationships, should contemplate future continuity.

"(4) The agency should be an established concern that has existed for a considerable period, or be a newly established going concern likely to continue in the future. The business of the agency should be conducted in the agency name and characterized by the customary indicia of the conduct of regular business.

"(5) While an agency that confines its selling activities to Government contracts is not disqualified, the fact that an agency represents the contractor in Government and commercial sales should receive favorable consideration." FAR § 3.408-2(c).

Under the McDonald's Inn-General Sales Agency agreement, McDonald's Inn has agreed to pay General Sales "[10] percent . . . of the gross amount of any contract received by McDonald's Inn as a result of General Sales's assistance." According to Howard Johnson, the customary fee charged by other selling agencies is limited to 10 percent of the room revenue portion of the contract; since General Sales's fee is not similarly restricted, Howard Johnson argues that the agency's fee is inequitable and exorbitant and therefore demonstrates that General Sales is not a bona fide agency. We disagree.

The record does not support Howard Johnson's argument that General Sales's fee is excessive and not commensurate with the services provided. After reviewing the McDonald's Inn-General Sales Agency agreement, the contracting officer conducted a survey of seven representative travel industry agencies which clearly established that General Sales's fee falls within the range of fees customarily paid to other selling agencies.<sup>2</sup> Given General Sales's standing with regard to other selling agencies' commission rates, there is no basis for questioning the Army's conclusion that General Sales's fee is proportionate to its selling services. See Custom Signs Today, B-237956, Apr. 10, 1990, 90-1 CPD ¶ 379.

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<sup>2</sup>While four agents indicated that their contingent fee is limited to 10 percent of the room revenue portion of each contract, two agents advised the contracting officer that their standard contingent fee amounts to 10 percent of the gross amount of each contract. One agent maintained that its contingent fee could amount to as much as 17 percent of the total contract price.

The five guidelines set forth in FAR § 3.408-2(c) to assist in a bona fide agency determination, as explained in the regulation, are "not individually or collectively inviolable rules." Each contingent fee arrangement is to be evaluated "in its totality, including attendant facts and circumstances," to determine whether an agent has been retained to improperly solicit or obtain a government contract for its client. FAR § 3.408-2(c); Puma Indus. Consulting, Inc. v. Daal Assocs., Inc., 808 F.2d 982. Accordingly, where--as here--a selling agency is maintained by a contractor for the purpose of securing business, the agency contract and the agent's actions are reviewed to ensure that there is no threat of persons selling government influence or access to government officials. Convention Mktg. Servs., supra. If there is no hint of improper influence,<sup>3</sup> then the agency is bona fide and the agreement falls within the exception. Puma Indus. Consulting, Inc. v. Daal Assocs., Inc., 808 F.2d 982.

Our review of the record shows that although General Sales has agreed to assist McDonald's Inn in securing business from the government, there is no indication in terms of its written agency agreement or the record before us that the agent has exerted or proposed to exert influence upon government contracting personnel in its efforts on behalf of McDonald's Inn.<sup>4</sup> In our view, an established selling agency that obtains necessary solicitation documents and provides other administrative services--arranging for a

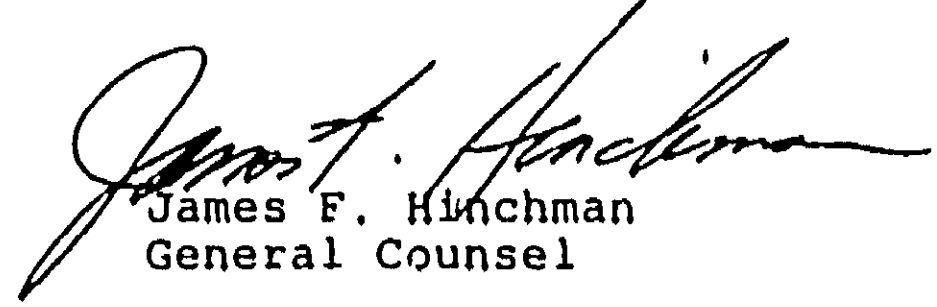
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<sup>3</sup>According to FAR § 3.401, "improper influence . . . means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter."

<sup>4</sup>Under three prior procurements--conducted by different Army installations in 1987, 1990, and 1991--the Army determined that contingent fee arrangements involving General Sales and three different contractor clients did not qualify as bona fide agency agreements. In its protest, Howard Johnson relies upon these procurements as evidence of General Sales's status. We do not find the Army determinations on the prior procurements controlling here. The Army's prior determination apparently resulted from the prime contractor failing to adequately document its agency relationship with General Sales rather than on any pattern of behavior by General Sales that might be relevant to the relationship at issue in this case.

client to be placed on an agency's list of prospective bidders, reviewing a procurement's requirements, and assisting a client with the preparation and submission of its bid--is consistent with General Sales being a bona fide selling agency under 10 U.S.C. § 2306(b) and FAR § 3.402(b).<sup>5</sup> See Puma Indus. Consulting, Inc. v. Daal Assocs., Inc., 808 F.2d 982. There is no hint of improper influence on this record, and we find that the McDonald's Inn-General Sales Agency contingent fee arrangement is a bona fide agency agreement permitted by 10 U.S.C. § 2306(b).

The prior decision is affirmed.

  
James F. Hinchman  
General Counsel

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<sup>5</sup>We note that the administrative services provided by General Sales are identical to those listed in the agency agreement between Howard Johnson and its own selling agency, Federal Contract Specialists.