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DECISION



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

FILE: B-186347
B-185495

DATE: October 14, 1976

MATTER OF:

H. L. Yoh Company;
Hammer Security Service of California, Inc.

DIGEST:

1. Pursuant to 5 U.S.C. § 3108 individual employed by Pinkerton Detective Agency or similar organization may not be employed by Government. Therefore, guard services contract awarded to such individual, should be canceled since record shows that at time of award he was president/qualified manager of investigative corporation licensed to perform investigations in State of California.
2. Prior decision in Hammer Security Service of California, Inc., (B-185495, March 30, 1976) that proposal was technically unacceptable and properly excluded from competitive range is affirmed where request for reconsideration does not show that decision involved any mistake of relevant fact or law warranting its reversal or modification since reasons cited as basis for reconsideration were either previously considered or were matters related to contract performance.

The H. L. Yoh Company, Division of Day & Zimmermann, Inc. (Yoh), protests (B-186347) the award of a contract to Inter-Con Security Systems (Inter-Con) 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). This RFP was the subject of our decision in Hammer Security Service of California, Inc. (Hammer), B-185495, March 30, 1976, 76-1 CPD 207, denying Hammer's protest against alleged deficiencies in the solicitation and the exclusion of its proposal from the competitive range. Hammer requests (B-185495) reconsideration of that decision.

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

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services. Yoh, the incumbent contractor, was a large business and, therefore, ineligible to submit a proposal. Copies of the solicitation were sent to 42 sources. Seven proposals were received in response to the solicitation on September 19, 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 was one of the five offerors notified that its proposal was not within the competitive range. Pending resolution of Hammer's protest, SAMSO extended performance under Yoh's contract and withheld award under the RFP. The protest by Yoh was filed on March 31, 1976, the day after an award was made to Inter-Con.

The Air Force has suggested that a threshold question is presented concerning whether Yoh is an interested party under our protest procedures since Yoh, as a large business, was ineligible for award under this small business set-aside procurement. We agree that such a question would ordinarily have to be considered, but in view of the fact that Hammer has raised the same issue concerning Inter-Con's eligibility for award in its request for reconsideration, which for all practicable purposes is a new protest by that firm, we have developed and will consider that issue in connection with Hammer's protest.

The basis for the protests is the contention that the contract awarded to Inter-Con was illegal because it violated the so-called Anti-Pinkerton Act (5 U.S.C. § 3108) (1970). It is argued that Inter-Con was ineligible for the award since its owner/qualified manager (Mr. Enrique Hernandez, Sr.) was also the president/qualified manager of Inter-Con Investigators, Inc., which is licensed under California law to provide investigative services.

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:

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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:

"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."

3. "Contract F04693-75-C-0012, Section J, Special Provisions, paragraph b.13:

"PINKERTON ACT - Sep 6, 1966, (80 Stat. 416; 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, dba 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. 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, having 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

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Enrique Hernandez, Sr., President/Qualified Manager
Bertha Hernandez, Vice President
Enrique Hernandez, Jr., Secretary

The Air Force administrative report on the protest states that appropriate provisions of State law applicable to the contract are contained in the California Business and Professions Code (Code), Sections 7500ff, the Private Investigator and Adjuster Act. Definitions for a private investigator and a private patrol operator are given respectively in Sections 7521(a) and (b). In this regard, Section 7521(c) states:

"(c) A person licensed as a private patrol operator only may not make any investigation or investigations except those that are incidental to the theft, loss, embezzlement, misappropriation, or concealment of any property, or any other thing enumerated in this section, which he has been hired or engaged to protect, guard, or watch."

The Air Force also notes that Section 665 of the Rules and Regulations issued by the BCIS provides that no licensee is to engage in any operations outside the scope of the license as defined in that section. To engage in both private investigator and private patrol operator activities, a contractor would be required to have a class A-C license. The Air Force notes that Inter-Con only possessed a patrol operator's license and for it to engage in investigative services would constitute a violation of the code. In this regard, Section 7520 of the Code, Necessity of License, provides that:

"No person shall engage in a business regulated by this chapter; act or assume to act as; or represent himself to be a licensee unless he is licensed under this chapter; and no person shall falsely represent that he is employed by a licensee."

The record shows that Inter-Con Investigators, Inc., was a California corporation formed in January 1974. The Articles of Incorporation stated that its primary business was: "security surveillance, security enforcement, security consulting, polygraph

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examinations and general investigation." The contracting officer concluded that the private investigator's license in question was issued to the corporation, and, therefore, did not affect the award. This finding was based in part on the written response (dated April 13, 1976) from the Assistant Chief, BCIS, advising that:

"a. An individual Private Investigator license has not been issued to Enrique Hernandez, Sr., doing business as Inter-Con Security Systems.

"b. Enrique Hernandez, Sr. is not personally licensed as a Private Investigator by the State of California.

"c. The continuity of the Private Investigator license, A-5756, issued to Inter-Con Investigators, Inc., is dependent upon their having a qualified manager, i.e., an individual who has met the qualifications for and is eligible for individual licensing. Enrique Hernandez, Sr. occupies this position with Inter-Con Investigators, Inc. at this time. Should Mr. Hernandez leave this position, Inter-Con Investigators, Inc. would have 120 days to obtain a new Qualified Manager to prevent suspension or cancellation of the license."

In the contracting officer's Statement of Facts and Findings (dated April 19, 1976), it was concluded that the relationship between Inter-Con Investigators, Inc., and Inter-Con was and always had been that of two separate and distinct businesses. In this regard, it was stated that:

"Mr. Hernandez presented information in the form of financial statements, copies of licenses and articles of incorporation, business receipts and other documents, which satisfied the contracting officer that Inter-Con Security Systems and Inter-Con Investigators, Inc., do not share operating and administrative personnel, books of account, tax and insurance transactions, assets or facilities."

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The contracting officer also noted that:

"Mr. Hernandez states that Inter-Con Investigators, Inc., provides only polygraph examination services; this service does not require a Private Investigator's license in California. Mr. Hernandez states that he obtained a license only to lend credibility to the firm to the satisfaction of his customers. A check of several local telephone directories revealed that Inter-Con Investigators, Inc., is not listed under the heading of 'Investigators' or 'Detective Agencies,' but is listed only under the heading of 'Lie Detection.' It should also be pointed out that Inter-Con Investigators does not maintain a staff of investigators. According to Mr. Hernandez, the firm operates only when polygraph examinations are administered; Mr. Hernandez administers the examinations. The firm, in an unaudited financial statement presented to the Contracting Officer, reports no income for the six month period ending 31 March 1976. It should be pointed out, however, that the articles of incorporation for Inter-Con Investigators, Inc. do empower the corporation to engage in investigative work at any time."

It is also argued by the protesters that there is no distinction between Enrique Hernandez, Sr., dba Inter-Con Security Systems, and his status as the employee/president/part-owner of Inter-Con Investigators, Inc., the licensed private investigative corporation (detective agency). It is maintained that under the Code, supra, he is legally authorized to conduct investigations by virtue of his licensing. Such licensing, it is contended, clearly prohibited Inter-Con's eligibility for award under the RFP and resulted in the contract award being in violation of the Anti-Pinkerton Act. With respect to the prohibition, it is pointed out that the Pinkerton Act specifically applies to "An individual employed by the Pinkerton Detective Agency, or similar organization" (Emphasis supplied).

It is also alleged that Mr. Hernandez's proposal was nonresponsive for its failure to complete the licensing certification (Part I,

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section B) of the RFP, supra. It is maintained that in order to avoid the problem of certifying that Enrique Hernandez, Sr., the offeror was or was not licensed, he simply ignored the requested certification and 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."

However, it is believed that the net effect of this statement was to circumvent the fact that Mr. Hernandez, as an employee of a licensed private investigative agency, was prohibited from accepting an award.

Legal arguments advocating contract rescission are based upon several decisions of this Office involving the Pinkerton Act, including 38 Comp. Gen. 881, 882 (1959), wherein we stated:

"The accounting officers of the Government have held uniformly that the cited statute is a plain prohibition against the employment in Government service of employees of detective agencies and is applicable to contracts or agreements with a detective agency as a firm as well as to contracts with, or appointment of, individual employees of such agency. * * *

* * * * *

"It has been held also that the prohibition of the statute is against the employment of a detective agency or its employees, regardless of the character of the services to be performed and that the fact that the services of the said agencies are not to be of a detective or investigative nature is not material. See 26 Comp. Gen. 303, 306."

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 the

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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.

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.

The record here shows that Inter-Con Investigators, Inc., was incorporated by and had as its three directors, Enrique Hernandez, Sr., Bertha Hernandez, and Enrique Hernandez, Jr., who occupied the

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respective positions of president/qualified manager, vice president, and secretary when the private investigator's license was issued. For purposes of compliance with 5 U.S.C. § 3108, an offeror had to be without authority to conduct detective or investigative services at the time of award. See B-156424, July 22, 1965. In this connection, we note that Mr. Hernandez, Sr., 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. This 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. Thus, in the record before us that degree of separateness found in the Wackenhut case, supra, does not exist.

Further, if a firm is chartered as a detective agency and licensed as a detective agency, the fact that it does not actually engage in detective work, as asserted here, will not permit it to escape the prohibition of section 3108. In B-146293, July 14, 1961, we held that a contract for guard services could not properly be awarded to a firm which, although it did not in fact engage in detective work, was empowered under its corporate charter to operate and conduct a private detective agency and was licensed to engage in the private detective business. In that decision, we stated the test as follows:

"It is our view that the low bidder's actual 'performance' under the license granted it pursuant to the Pennsylvania Private Detective Act of 1953 is not the criterion by which its status as a detective agency must be tested. It is rather, we think, the nature of the functions which it may perform under such license which determines its status as a detective agency. While it is probably true * * * that World Industrial Security, Inc., has heretofore been engaged exclusively in the business of providing industrial security services, including uniformed guard and carrier services, it appears also to be true that that concern may at any

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time exercise the power granted by its license to furnish investigative services, and has in fact held itself out as a detective agency."

See also 41 Comp. Gen. 819, 822 (1962), wherein we stated:

"* * * [T]he basic issue which must be resolved is whether Midwest is empowered by its articles of incorporation to engage in investigative or detective work in the ordinary sense of those terms as opposed to their meaning as inclusive of watch, guard or patrol services under the Minnesota statutes. For if the company is authorized to conduct any investigative or detective business, we can see no basis for distinguishing this case from [B-146293]. * * *"

We further pointed out, at page 823:

"* * * [C]ertification by a company authorized to conduct any investigative or detective business that it will not engage in such activity during the term of a Government contract would not serve to remove the company from the exclusion laid down in B-146293. Such a certification would not, in fact, limit the company's corporate powers but would merely give rise to a breach of contract if the certification were violated. And the fact that the corporation had never previously actually performed investigative or detective services, is as stated in the cited decision, immaterial."

Since Inter-Con Investigators, Inc., is empowered under its corporate charter to engage in the private detective business, and since it is licensed under California law to engage in such business, we must conclude that it is a detective agency for purposes of 5 U.S.C. § 3108 and that Enrique Hernandez, Sr. as the president/qualified manager of the corporation is an individual employed by it, thereby 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.

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The effect of awarding a contract in contravention of statute was discussed in 52 Comp. Gen. 215, 218 (1972), as follows:

"* * * We are in agreement with the position of the Court of Claims that 'the binding stamp of nullity' should be imposed only when the illegality of an award is 'plain,' * * * or 'palpable,' * * *. In determining whether an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor * * * or if the contractor was on direct notice that the procedures being followed were violative of such requirements * * * then the award may be canceled without liability to the Government except to the extent recovery may be had on the basis of quantum meruit. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the Government. * * *" (Citations omitted.)

Applying this test to the instant situation, it seems clear that the award was made contrary to statutory requirements, "because of some action or statement by the contractor," i.e., Mr. Hernandez's failure to: (1) execute the RFP's Pinkerton certificate; and, (2) to reveal his relationship with Inter-Con Investigators, Inc., in the separate letter of transmission.

Accordingly, we conclude that the contract with Inter-Con Security System should be canceled. Since the need for security services at SANSO will undoubtedly continue, we will not object to delaying cancellation for a reasonable period of time so as to obtain the services through resolicitation or through other means.

In view of our decision regarding the Anti-Pinkerton violation, it is unnecessary for us to respond in detail to the remaining allegations upon which Hammer has based its request for reconsideration of our March 30, 1976, decision (B-185495), except to note we did consider the additional information submitted in Hammer's written response dated March 23, 1976, which was received in our Office on the morning of March 26, 1976. The additional information contained

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therein was incorporated into our decision of March 30, 1976. With respect to the matters allegedly occurring after contract award, it is the position of our Office that the merits of a request for reconsideration must be determined upon the information existing at the time of the decision and not upon subsequent allegations or circumstances related to contract performance.

While we will reconsider our decision if a material mistake of fact or law is alleged and proven, there is no showing in the present request for reconsideration that our prior decision (that Hammer's proposal was technically unacceptable and properly excluded from the competitive range) involved any mistake of relevant fact or law which would warrant its reversal or modification.

Accordingly, the decision of March 30, 1976, is affirmed.

Since this decision contains a recommendation for corrective action, a copy is being forwarded to each of the committees referenced in section 236 of the Legislative Reorganization Act of 1970.

Deputy


Comptroller General
of the United States