Bednarz

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

147013

Decision

Matter of: General Sales Agency

File: B-247133.2

Date: June 29, 1992

Herbert C. Ross for the protester.
Phillip E. Johnson for Federal Contract Specialists, Inc., an interested party.
Herbert Kelley, Esq., and Gerald P. Kohns, Esq., Department of the Army, for the agency.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly accepted a bid that misrepresented the existence of a contingent fee arrangement, where the contingent fee relationship between the bidder and its agent was not of the type prohibited and the bidder did not intentionally violate the requirement to reveal the relationship's existence.

DECISION

General Sales Agency protests the proposed award of a contract to Howard Johnson Lodge under invitation for bids (IFB) No. DAKF31-91-B-0136, issued by the Department of the Army, for the provision of meals and lodging for the Military Entrance and Processing Station, Springfield, Massachusetts. General Sales is an agent for the apparent next low bidder, Comfort Inn. General Sales argues that the Army must reject Howard Johnson's bid because the firm misrepresented the existence of a contingent fee arrangement with its agent, Federal Contract Specialists (FCS).

We deny the protest.

The IFB included the text of Federal Acquisition Regulation (FAR) § 52.203-4, "Contingent Fee Representation and Agreement," which requires a prospective contractor to certify whether it has employed or retained any entity to solicit or obtain the contract and, if so, whether it has agreed to pay such entity a fee contingent upon the award of the contract. The Contingent Fee Representation incorporates by reference FAR § 3.405(a), which provides that a prospective contractor may not refuse to disclose a contingent fee arrangement on

the basis of any claimed professional or special relationship, nor may it refuse to disclose a contingent fee paid only for information.

The Army received six bids on bid opening, December 20, 1991. The elimination of the low bidder as nonresponsible positioned Howard Johnson, the second low bidder, for award. In the representation accompanying its bid, Howard Johnson certified that it had no contingent fee arrangement with any person or company.

On January 13, 1992, General Sales protested to the agency that Howard Johnson had deliberately falsified its contingent fee representation since Howard Johnson had such an arrangement. In response to the protest, the contracting officer withheld the proposed award to Howard Johnson and requested that the firm submit a Standard Form 119, "Statement of Contingent or Other Fees."

In response to the Army's request, Howard Johnson identified an agency relationship with FCS, but stated that it did not believe that certification was necessary under the General Accounting Office (GAO) decision in Howard Johnson Lodge, B-244302, Sept. 17, 1991, 91-2 CPD ¶ 255. Based upon its interpretation of this GAO decision, Howard Johnson asserted that FCS was not employed or retained to solicit or obtain this contract within the meaning of the contingent fee prohibition, and that certification was therefore unnecessary. In support of its position, Howard Johnson provided the agency with a copy of the contingent fee agreement between itself and FCS. The agreement provides, among other things, that FCS will serve as Howard Johnson's "locator service" for government contract opportunities and will provide guidance as to how and where to solicit particular contracts. In exchange, Howard Johnson must pay FCS 7-1/2 percent of the gross amount of any government contract received with FCS' assistance. The agreement specifies that FCS will not solicit or obtain government contracts through the exercise of improper influence. Howard Johnson noted that FCS did not obtain a copy of the solicitation from the contracting agency.

After reviewing Howard Johnson's contingent fee statement and agreement, the contracting officer concluded that the relationship between Howard Johnson and FCS constituted a permissible contingent fee arrangement between a contractor and its bona fide agent and, in particular, did not contemplate the exertion of improper influence in competing for government contracts. Although the contingent fee representation accompanying the bid required disclosure of this relationship, the contracting officer did not find evidence to support the protester's allegation that Howard Johnson's

erroneous certification was the product of a willful misrepresentation. Consequently, the contracting officer declined to reject Howard Johnson's bid and, on February 19, 1992, denied General Sales's protest.

General Sales argues that the inclusion of the false contingent fee representation in Howard Johnson's bid requires the bid's rejection, regardless of whether the contingent fee relationship between Howard Johnson and FCS is authorized. As support for this proposition, the protester cites FAR §§ 3.409(a), (b), which provides, in pertinent part, that where there is specific evidence, or other reasonable basis, to suspect a misrepresentation of a contingent fee arrangement, the chief of the contracting office must review the facts and, if appropriate, reject the bid or proposal. General Sales argues that the agency lacks discretion under this provision to accept a bid which contains a false contingent fee representation, even if the contingent fee arrangement is, in fact, permissible.

We agree with General Sales that Howard Johnson was required to disclose in its bid its contingent fee relationship with FCS and that this failure could, in appropriate circumstances, require the rejection of Howard Johnson's bid. Howard Johnson Lodge--Recon., B-244302.2, Mar. 24, 1992, 92-1 CPD ¶ 305. However, contrary to the protester's assertion, FAR §§ 3.409(a), (b) does not require the automatic rejection of a bid that contains an erroneous contingent fee certification, but allows the contracting agency an opportunity to review the facts and reject the bid if appropriate. In this regard, completion of the representation is not necessary for the bid to be responsive. See Corbin Superior Composites, Inc., B-236777.2, Jan. 2, 1990, 90-1 CPD ¶ 2; B-170996, Dec. 7, 1970. See also FAR § 3.405, which affords a prospective contractor who fails to complete the representation another opportunity to comply.

In this case, although Howard Johnson improperly failed to disclose in its bid its agreement with FCS, we find that the contracting officer properly considered Howard Johnson's bid. The record indicates that Howard Johnson did not identify its relationship with FCS because it interpreted our September 1991 decision in Howard Johnson Lodge, supra, to exclude the relationship from the definition of a contingent fee arrangement. After bid submission in this case, we reconsidered the Howard Johnson Lodge decision, correcting the erroneous discussion of the law in our initial opinion. We explained that bidders must disclose in their bids any contingent fee agreement that potentially authorizes direct contact between government officials and the selling agency before contract award, e.g., a contingent fee agreement for a "locator service," as we have here. See Howard Johnson Lodge--Recon., supra. Since Howard Johnson,

when it submitted its bid, reasonably relied upon our decision in Howard Johnson Lodge, supra, we find that the contracting officer could appropriately excuse Howard Johnson's erroneous bid certification, provided that the arrangement was not otherwise prohibited. See B-270996, supra.

We agree with the agency's judgment that the relationship between Howard Johnson and FCS does not violate the contingent fee proscription. The purpose of the contingent fee prohibition is to prevent the use of improper influence by third parties over the federal procurement system. Howard Johnson Lodge--Recon., supra. The prohibition only applies to situations where the selling agency agrees to "solicit or obtain" a contract from the procuring agency. There is an exception to the prohibition for bona fide employees or established commercial or selling agencies, maintained by the contractor, who neither exert nor propose to exert improper influence to obtain government contracts. See FAR § 3.401. FAR § 3.408-2(c) sets forth five guidelines to assist in determining whether a firm constitutes a bona fide agency, including whether the fee is equitable and commensurate with the service to be performed, and whether the contractor and the selling agency maintain or contemplate a continuing relationship.

The contingent fee arrangement between Howard Johnson and FCS substantially resembles the bona fide agency arrangement that General Sales had with a lodging facility, which was the subject of our decision in Howard Johnson Lodge--Recon., supra. That decision found General Sales's contingent fee arrangement proper and we think the logic in that case is persuasive here. The 7-1/2 percent contingent fee that the agreement accords to FCS is not excessive or incommensurate with the services to be rendered. See Howard Johnson Lodge--Recon., supra, where we found that a 10 percent contingent fee negotiated by General Sales and another lodging facility for substantially similar services was not excessive. Howard Johnson has also stated that, although its relationship with FCS is newly established, both parties anticipate a long, on-going business relationship. Finally, there is no evidence that FCS exerted, or proposes to exert, improper influence to obtain federal contracts on behalf of Howard Johnson. Thus, the agency reasonably found the Howard Johnson-FCS contingent fee arrangement was permissible.

Based on the foregoing, we find the Army properly accepted Howard Johnson's bid, and the protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel