



UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-208212

July 19, 1982

Building Development Counsel Inter-
national, Inc.
1629 K Street, N.W., Suite 400
Washington, D.C. 20006

Attention: Mr. Mark Price, President

Gentlemen:

You have requested our views on whether or not your company, the Building Development Counsel International, Inc. (BDCI), qualifies as a "bonafide selling agency" which is excepted from the Federal prohibition against payment of contingent fees to firms which aid contractors in obtaining Government contracts. This prohibition is found in 10 U.S.C. § 2306(b) (1976) and 41 U.S.C. § 254(a) (1976), and has been implemented in the Federal Procurement Regulations FPR, § 1-1.500 *et seq.* (1981), governing use by civilian executive agencies of the covenant against contingent fees (covenant), and the Defense Acquisition Regulations (DAR) § 1-503.3 (1976 ed.), which provides similar rules for the Department of Defense. You indicate that BDCI provides management consultant services to architectural-engineering (A-E) firms/clients for which BDCI is paid a nominal monthly retainer, plus a management fee contingent on award of a contract to the client.

The prohibition against the use of a contingent fee arrangement does not apply to "bona fide * * * selling agencies maintained by the Contractor for the purpose of securing business." The applicable regulations contain criteria for determining whether or not a firm satisfies this definition.

This determination depends on the facts and circumstances of each case. We have held that questions concerning possible violations of the prohibition are a matter for the consideration of the procuring agency administering a particular contract. See Four-Phase Systems, Incorporated, B-189585, April 19, 1978, 78-1 CPD 304; Cessna Aircraft Company, Beach Aircraft Corporation, B-180913, August 12, 1974, 74-2 CPD 91 (copies enclosed). Under these circumstances, we cannot provide a definitive response to your inquiry.

The purpose of the covenant and these regulations is the prevention of improper influence in connection with the obtaining of Government contracts, elimination of contractor-agent arrangements which encourage payment of inequitable and exorbitant fees bearing no reasonable relationship to the services actually performed and prevention of the unwarranted expenditure of public funds which may result.

The covenant, to be included in A-E contracts, states as follows:

"The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. * * *"
FPR § 1-1.503 (1981).

The covenant also reserves the right to the Government, if the covenant is breached, to annul the contract without liability, or to deduct the contingent fee from the contract price, or to otherwise recover the contingent fee. FPR § 1-1.503 (1981).

The FPR sets forth the factors to be considered in making a determination as to whether the exception applies. The factors to be applied are: (1) The agent's fee must be reasonable; (2) The agent should have adequate knowledge of the product being procured; (3) There should be a continuity of relationship between the agent and contractor; (4) The agent should be an established concern; and (5) The agent is to be regarded favorably if its functions include the solicitation of both commercial and Government business. FPR § 1-1.504-5.

Furthermore, the FPR states that these factors are not weighted against each other, nor is there one factor weighted above the others. The evaluation depends on the facts and circumstances of each case. FPR § 1-1.504-5(b). We have stated that overall compliance with these standards is determinative. B-168560, July 23, 1980.

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Our decision in B-157815, January 21, 1966 (copy enclosed), discusses a selling agency involved in a particular contract which satisfied all the criteria, on the basis of a detailed agency finding.

Since, the determination is primarily factual in terms of the stated criteria, in order to be considered a bona fide selling agency, BDCI will have to establish that it meets the criteria set forth in the regulations.

We trust this information will be helpful.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
Acting General General

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