

DECISION



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

61540 97983

FILE: B-180257

DATE: September 23, 1976

MATTER OF: Progressive Security Agency, Inc.

- DIGEST:
1. Company whose corporate charter specifically authorizes investigative as well as protective functions, and which is licensed as detective agency under Massachusetts statute prescribing separate licenses for detective and protective agencies, is a detective agency for purposes of 5 U.S.C. § 3108 (1970) and may not be employed by Federal agency, even though employment is solely to perform guard services.
 2. Contract for guard services was awarded based on contractor's representations that it was not a detective agency for purposes of 5 U.S.C. § 3108 (1970). Upon subsequent determination that contractor is a detective agency and thus subject to statutory prohibition, contract should be canceled.
 3. Since certification by contractor that it is not a detective agency has proved inadequate to prevent violations of statutory prohibition against employment of detective agencies by Federal Government, procuring agency, in procurement for guard services, should require as part of bid or initial proposal, adequate documentation concerning bidder's or offeror's corporate authority and licensing status.

This decision to the Department of the Navy and the Small Business Administration (SBA) is the result of a congressional inquiry concerning the propriety of a contract with Progressive Security Agency, Inc. (PSA), in the circumstances described below. At issue is whether the contract violates 5 U.S.C. § 3108 (1970), the so-called Anti-Pinkerton Act, which provides:

"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."

For the reasons discussed below, we believe the contract contravenes the statutory prohibition.

In late 1975, a number of civil service guards were separated from their positions at the Naval Education and Training Center, Newport, Rhode Island, as part of a reduction in force. The guards had been employed to provide security services at the Naval Underwater Systems Center, Newport. In October 1975, Navy determined that substitute civil service guards were not available and that, since security needs at the Underwater Systems Center continued, the guard services would be contracted out.

By letter dated October 24, 1975, the SBA Region 1 Office, Boston, Mass., requested that the proposed procurement for guard services at the Underwater Systems Center be set aside for contracting with SBA pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1970). Under the so-called 8(a) program, SBA is authorized to enter into procurement contracts with Federal agencies and, in turn, to subcontract the work to small businesses. The program currently emphasizes providing subcontracts to businesses owned by socially or economically disadvantaged persons. 13 C.F.R. § 124.8-1(b) (1976).

On or about December 1, 1975, SBA began negotiations with PSA, a Massachusetts corporation with principal place of business at 54 Devonshire St., Boston. The PSA proposal was found acceptable, and on December 11, Navy approved the proposed award to SBA with the express understanding that the contract was to be performed by PSA. Contract NO0140-76-C-6304 was subsequently awarded to SBA, effective December 11, 1975, and contained the statement: "This is the prime contract for guard services being performed by sub-contractor Progressive Security Agency under 8(a)." The contract price was \$314,453.04.

The separated civil service guards have filed an administrative appeal with the Civil Service Commission (CSC), challenging the legitimacy of the reduction in force. We are advised by CSC officials that the appeal is still pending and that our decision on the question of the Anti-Pinkerton Act may be treated as separate and distinct from the appeal. We emphasize that we deal here solely with the question of the legality of the contract under the Anti-Pinkerton Act and express no opinion on the merits of the appeal pending before CSC.

In interpreting 5 U.S.C. § 3108 and its predecessor legislation over the years, we have established the following principles:

(1) The Act applies to contracts with "detective agencies" as firms or corporations as well as to contracts with or appointments of individual employees of such agencies. 8 Comp. Gen. 89 (1928).

(2) The Act prohibits the employment of a detective agency or its employees, regardless of the character of the services to be performed; the fact that such services are not to be of a "detective or investigative" nature is immaterial. Thus, detectives or detective agencies may not be employed in any capacity. 26 Comp. Gen. 303 (1946).

(3) Although we have never defined "detective agency" for purposes of the Anti-Pinkerton Act, we have drawn a distinction between detective agencies and protective agencies, and have expressed the view that the Act does not forbid contracts with the latter. Thus, the Government may employ a protective agency, but may not employ a detective agency to do protective work. 26 Comp. Gen. 303; 38 id. 881 (1959). See also 41 Comp. Gen. 819 (1962); 44 id. 564 (1965). The essential question is thus the status of PSA as either a "detective" or a "protective" agency.

Navy, in its administrative report to us, indicates that the following clause is normally included in its solicitations and resulting contracts for guard services:

"ADDITIONAL REPRESENTATION/CERTIFICATION BY BIDDER CONCERNING
DETECTIVE LICENSING AND/OR DETECTIVE AGENCY AFFILIATION

"The offeror represents and certifies as part of his offer that he is not a firm or an individual possessing a detective license.

"Bidder is responsible for compliance with State or Local Laws regarding any necessary license for performance hereunder. Bidder represents that he does not have such license or licenses.

"The Act of September 6, 1966 (80 Stat. 416; 5 U.S.C. 3108) provides: '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.'

"No award may be made under this invitation to any firm or individual engaged, in whole or in part, in work customarily performed by a detective agency as such, and any bid submitted by such firm or individual will be rejected."

However, the clause was inadvertently omitted from this contract.

The Navy procuring activity's report also states the following:

"The Contracting Officer contacted Mr. R. Marvelli, SBA Boston, negotiator for this subcontract. Mr. Marvelli advised that the question of whether Progressive Security participated directly or indirectly in either a detective agency or performed detective services was raised during negotiations. The reply was that the Progressive Security Agency provided guard services only, has not to date and has no future intentions of participating in any detective or investigative work which would be in violation of [5] U.S.C. 3108. Mr. Marvelli also provided an affidavit signed by an officer of the company on this point. The affidavit refers to another 8(a) subcontract placed by SBA Boston with the same subcontractor. * * *"

The "affidavit" (actually titled a "certificate"), is dated October 16, 1975, signed by William W. Green, President of PSA, and reads as follows:

"I hereby certify that Progressive Security Agency is not a detective agency within the meaning of the Act of March 3, 1893, 27 Stat. 591, 5 U.S.C. [3108]."

The Navy report continues:

"Mr. Green of [PSA] was contacted on 18 May 1976 to determine whether there was any recent change in company policy with reference to performing detective or investigative work. Mr. Green re-affirmed that the purpose of the company was to provide guard services only. Enclosure (10) is a telegram from [PSA] confirming that the company is not and does not intend to engage in any activities which would be in violation of [5] U.S.C. 3108. He also advised that he would execute an amendment to the contract incorporating the clause quoted in paragraph 3 above at no cost. By separate action the Contracting Officer is issuing an appropriate amendment and a copy will be forwarded to the addressee after execution by the company."

The "clause quoted in paragraph 3 above" is the above-cited provision which Navy states was inadvertently omitted from the contract. The telegram cited as "Enclosure (10)" reads as follows:

"This is to confirm my telephone conversation today with you with reference to my company directly or indirectly participating in detective work. You are advised my company is formed for the sole purpose of providing guard service to Government activities and is not in violation

of 5USC3108. Sincerely, William W. Green, President,
Progressive Security Agency Inc."

It appears from the foregoing that the conclusion by both Navy and SBA that PSA is not a "detective agency" was based solely on statements by the President of PSA, accepted by both agencies without further inquiry.

PSA advertises in the 1976 Boston area telephone directory "yellow pages" as a "Detective Agency." An examination of the 1976 Boston telephone directories reveals that PSA is listed in the "white pages" at page 734 and in the "yellow pages" twice -- under the headings "Detective Agencies" (page 385) and "Guard & Patrol Service" (page 602). In addition, PSA has an advertisement at page 601 of the "yellow pages" containing the following statement: "* * * For more than fifteen years, the PSA Staff has worked effectively in all areas of Security and Investigation. * * *"

We have consistently held that a telephone listing alone is not sufficient evidence that a given firm is a detective agency for purposes of 5 U.S.C. § 3108. B-177137, February 12, 1973; B-176307, March 21, 1973; B-181684, March 17, 1975. We have, however, suggested that the fact of such a listing should prompt further inquiry by the procuring agency, B-176307 and B-181684, supra, but have also noted that a subsequent Anti-Pinkerton Act certification by the contractor may negate any contrary inference which might be drawn from yellow-page listings. B-176307, supra. The record in this case does not disclose whether Navy or SBA had actual knowledge of PSA's directory listings. Cf. B-181684, supra.

The criteria applied in determining whether a given firm is a "detective" or a "protective" agency for purposes of section 3108 have been set forth in our decisions. Essentially, we consider both the functions the firm in fact performs and the nature of the functions it may perform under its corporate charter and under licensing arrangements in the States in which it does business. Apart from the statement in PSA's yellow-page advertisement, the record indicates that PSA performs protective rather than investigative functions. However, 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 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 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."

To determine the nature of the work PSA is authorized to do, we obtained a copy of its Articles of Organization, on file with the Office of the Secretary of the Commonwealth of Massachusetts. The purpose for which PSA was organized, quoting from Item 2 of the Articles, is as follows:

"To provide professional security services to businesses and individuals and organizations and also to provide investigatory services to business, individuals, and organizations."

It thus appears that PSA is empowered under its corporate charter to perform detective or investigative, as well as protective, work,

We have also reviewed Massachusetts statutes prescribing the licensing of detective and guard agencies, contained in General Laws, chapter 147. The statute separately defines "private detective business" and "watch, guard or patrol agency." Mass. G.L., ch. 147, sec. 22. Section 23 prohibits the conduct or solicitation of either business unless licensed in accordance with section 25. Pertinent portions of sections 24 and 25 are quoted below:

Sec. 24: "An application for a license to engage in the private detective business or a license to engage in the business of watch, guard or patrol agency shall be filed with the commissioner on forms furnished by him, and statements of fact therein shall be under oath of the applicant. * * *"

Sec. 25: "The commissioner may grant to an applicant complying with the provisions of section twenty-four a license to engage in the private detective business or a license to engage in the business of watch, guard or patrol agency * * *."

The Massachusetts Department of Public Safety, the agency responsible for administering chapter 147, advises us that a license to engage in the private detective business is deemed the broader of the two, and includes the authority to engage in the business of watch, guard or patrol agency. A license to engage in the business of watch, guard or patrol agency does not, however, include authority to engage in the private detective business. Our inquiry with the Licensing Section of the Massachusetts Department of Public Safety disclosed that PSA holds a current license to engage in the private detective business.

In sum, PSA is empowered under its corporate charter to engage in the private detective business as well as the "protective" business.

It is also specifically licensed to engage in the private detective business under Massachusetts law. It is significant in this connection, as noted above, that the Massachusetts statutory scheme provides separate licenses for detective and protective agencies. Finally, although there is evidence that PSA may not in fact be engaging in detective work, it has presented itself to the public as a detective agency by virtue of its telephone directory advertisements. Considering these factors, we must conclude that PSA is a detective agency for purposes of 5 U.S.C. § 3108. 41 Comp. Gen. 819, supra; B-146293, supra. Accordingly, the statutory prohibition is applicable regardless of the character of the services to be performed under the contract.

One final issue may bear brief mention. In 26 Comp. Gen. 303 (1946), we held that the Anti-Pinkerton prohibition does not extend to subcontracts, stating at 305:

"* * * Where a subcontract is entered into with an independent contractor of the United States, the Government is in nowise a party to the agreement nor is there created any privity of contract between the subcontractor and the United States. * * *"

The contract with PSA is technically a subcontract vis-a-vis Navy. Nevertheless, it is a prime contract vis-a-vis SBA, another Government agency, and thus remains subject to the prohibition.

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., PSA's representations that it was not a detective agency for purposes of 5 U.S.C. § 3108. We conclude therefore that the contract should be canceled. B-167723, September 12, 1969. Since the need for security services at the Underwater Systems Center will presumably continue, resolicitation should adequately precede the cancellation so as to assure continuity of service.

It is apparent from our review of this and similar cases that reliance on the prospective contractor's certification that it is not a detective agency, within 5 U.S.C. § 3108, is not effective to assure compliance with that section. To prevent improper awards in the future, we are proposing the following guidelines and recommend that agency procedures be revised accordingly:

(1) In any procurement for guard or protective services, the procuring agency must be deemed to be on notice of the possibility that the procurement may violate 5 U.S.C. § 3108.

(2) In order to make an accurate determination for purposes of the statute, the procuring agency must have the necessary information available prior to award. Thus, in any procurement for guard or protective services, the procuring agency should require from each bidder or offeror, as part of the bid or initial proposal, documentation as follows:

(a) A copy of its corporate charter, or, if unincorporated, such other comparable documentation as may exist.

(b) A statement by an authorized official of the bidder or offeror setting forth its licensing status under pertinent State and local laws requiring that agencies or individuals performing detective work be licensed. The statement should include appropriate statutory citations.

(c) A statement by an authorized official of the bidder or offeror that it is not performing detective work.

These procedures are not intended to eliminate the need for, or desirability of, an appropriate contract provision. The provision used by Navy does not appear adequate to provide the desired protection, and we recommend that it be revised in accordance with the guidelines set forth above.

Since this decision contains recommendations for corrective action, copies are being sent to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C.

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§ 1176 (1970). Navy and SBA are subject to the reporting requirements of that section. The General Accounting Office should be advised of the actions taken.

Deputy

R. F. Kilian
Comptroller General
of the United States