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

FILE: B-186257 DATE: JAN 3 1977

MATTER OF: Progressive Security Agency, Inc., Reconsideration

DIGEST: Decision of September 23, 1976, holding that contract for guard services at Navy installation violated 5 U.S.C. § 3108, is affirmed, notwithstanding subsequent information which revealed that contract was originally awarded to sole proprietor who held private detective license and who formed corporation several months after award. In view of time element involved, however, cancellation is no longer feasible. Corporation may be considered for future award if president divests himself of detective license, since corporate charter has been amended to eliminate authority to perform investigative services and corporation has applied for guard service license.

By letter of November 19, 1976, the Assistant Secretary of the Navy (Installations & Logistics) asked us to reconsider our decision of September 23, 1976, Matter of Progressive Security Agency, Inc., B-186257, 55 Comp. Gen. ____. That decision held that Contract N00140-76-C-6304, effective December 11, 1975, awarded pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1970) was in contravention of the so-called Anti-Pinkerton Act, 5 U.S.C. § 3108, 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."

In our initial consideration, we found that Progressive Security Agency, Inc. (PSA), a Massachusetts corporation, was a "detective agency" for purposes of the Act because it was expressly empowered under its corporate charter to perform investigative as well as protective services, and was licensed as a detective agency under a Massachusetts statute which provides separate licenses for detective and protective agencies. We also noted that PSA had explicitly presented itself to the public as a detective agency by virtue of telephone directory advertisements. We concluded that the award to PSA was thus improper regardless of the character of the services to be performed under the contract. Our interpretation of § 3108 is discussed in some detail in our September 23 decision and need not be repeated here. We further concluded that the contract should be cancelled. Finally, we made recommendations designed to preclude similar problems in the future.

The Navy's November 10 letter submits additional factual material not available during our original consideration and (a) requests that we reconsider our previous conclusion; (b) raises the possibility of another award to PSA upon expiration of the present contract since the matters raised in our first decision "can all be corrected by some formal action"; and (c) seeks modification or elimination of our recommended guidelines for future procurements. These matters will be treated in the order listed.

With respect to our original conclusion, Navy submits the following:

(1) PSA amended its corporate charter on August 1, 1976, to eliminate the authorization to provide investigative services.

(2) The detective license obtained under Mass. G.L. ch. 147, sec. 22-30 was issued to William W. Green (President of PSA) as an individual (sole proprietor) doing business as "Progressive Security Agency," and not to the corporation. Navy states that PSA--the corporation--currently holds no license but is in the process of applying for a guard service license.

(3) "Previous GAO decisions have allowed correction of corporate charters and licenses after contract award to avoid a violation of the Anti-Pinkerton Act."

(4) Previous General Accounting Office (GAO) decisions "have held that broad purposes in a corporate charter will not suffice to establish a violation of the Anti-Pinkerton Act."

(5) Neither the corporation nor the sole proprietorship have detective licenses in Rhode Island where the contract is being performed and whose laws, Navy states, "make no provision for special licenses for guard service or protective companies."

PSA's charter, prior to August 1, 1976, set forth the corporation's purpose as follows:

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

The August 1 amendment substitutes the word "consulting" for the word "investigatory" in the above purpose statement. While the nature of the "consulting" services anticipated by the amendment is not specified, the amendment does remove the authorization to perform investigative services.

Prior decisions of our Office have allowed corrections of corporate charters and licenses after bid opening or the date for receipt of proposals to avoid violations of the Anti-Pinkerton Act. Thus, in B-172387, June 21, 1971, we said that we would not object to the award of a contract to a company which had amended its charter after bid opening to eliminate its investigatory authority. We stated in that decision:

> "It is true * * * that the integrity of the formal advertising system ordinarily precludes the acceptance of offers subsequent to bid opening. The amendment by IPSA of its Articles of Incorporation after bid opening might be considered an analogous situation. However, the extent to which the statutory restriction in 5 U.S.C. 3108 should be applied today to the furnishing of guard services to the Government is at least not free from doubt. See 44 Comp. Gen. 564, 568-69 (1965). In the circumstances, therefore, we would not be required to object to an award to IPSA."

Award in that case had been postponed pending our decision. See also B-156424, July 22, 1965 (change of state license after bid opening but prior to award); B-161770, November 22, 1967 (charter amendment after issuance of solicitation but 3 days prior to date set for receipt of proposals). In all of these cases the eligibility problem was cured prior to award. But cf. B-[illegible], November 13, 1967, which involved a post-award licensing correction (company had initially applied for the correct license but withdrew its application based on apparent misinformation). Reviewing the above cases, we believe the correct view is that corrections to charters and licenses may be made prior to award to avoid Anti-Pinkerton Act violations. However, such corrections after award, while perhaps relevant in terms of future procurements, do not, in the absence of compelling circumstances, retroactively expunge ineligibility existing at the time of the award.

Concerning the effect of "broad purposes" in a corporate charter, it has been our position that charter authority must be specific to establish a violation of the Anti-Pinkerton Act. 41 Comp. Gen. 819, 822 (1962). This stems from the recognition that most corporations, whatever their nature, include in their charters an "omnibus" clause ("engage in any lawful act or activity for which corporations may be organized in this state" or similar language). It is sufficient to note in this connection that PSA's charter prior to August 1, 1976, was quite specific.

Next, it is true, as Navy states, that the license involved was issued to William V. Green as an individual "under the title of Progressive Security Agency." The corporation itself thus held no license. Navy, citing 44 Comp. Gen. 564 (1965), suggests that the PSA contract should not be objectionable since the corporation, and sole proprietorship are different legal entities. In 44 Comp. Gen. 564, we refused to "pierce the corporate veil" in a situation where a subsidiary corporation had been formed apparently for the primary if not sole purpose of circumventing the Anti-Pinkerton prohibition. We did, however, note a minimum degree of separation (44 Comp. Gen. at 568), and have raised objections in cases where even that minimum did not appear to exist. B-167723, September 12, 1969.

In the present case, no evidence of separateness in any respect other than name has been presented. To the extent that the corporation may have done or solicited business in Massachusetts, this must have occurred under color of the license issued to the sole proprietorship, since there would appear to be no other legal basis for the corporation's operation or solicitation in Massachusetts.

In any event, the degree of separation between the corporation and the sole proprietorship is, for purposes of the present case, immaterial. Navy's clarification of the sole proprietorship versus the corporation has caused us to realize one fact which had been obscured in our original consideration. The contract was originally awarded, not to the corporation, but to the sole proprietorship, because the corporation did not yet exist. The Articles of Organization for the corporation were signed by Mr. Green as Incorporator on March 29, 1976, and filed with the Secretary of the Commonwealth of Massachusetts on April 1. Indeed, the designation "Inc." appears nowhere in the documentation of the negotiations and award of the contract. The contract was thus awarded to "Progressive Security Agency," the sole proprietorship of Mr. Green, who held a private detective license. (Our inquiry revealed that license P-613 was a renewal and that a similar license was held at the time of award.)

Finally, Rhode Island law does not require the licensing of protective agencies and requires only a limited licensing of private detectives ("for the detection, prevention, and punishment of crime"). General Laws of Rhode Island, title 5, sec. 5-5-1. The acquisition of a certificate of authority entitles a foreign corporation to do business in Rhode Island and affords it the same rights and duties as a domestic corporation. Id., title 7, sec. 7-1.1-99, 7-1.1-100. Our decisions emphasizing legal authority rather than actual performance are based on the recognition that a performance test would place an impossible administrative burden on the procuring agency, since the agency could not reasonably be expected to monitor all the business the contractor might undertake during the course of performance. In this context, an interpretation of the Anti-Pinkerton Act under which a firm could be a detective agency in one state but not in another would produce an impossible result. The status of PSA in Massachusetts is thus sufficient for purposes of the statutory prohibition.

In view of the foregoing, we remain of the opinion that the award was in contravention of 5 U.S.C. § 3108 and therefore affirm our September 13 decision. However, the contract having since expired, corrective action with respect to Contract N00140-76-C-6304 for the performance year beginning December 11, 1975, is no longer feasible and the recommendation to cancel is moot.

With respect to any future award to the corporation, we note again that the corporation is no longer authorized by its charter to perform investigative services, and that it has applied for a guard service license. In conjunction with this, unless Mr. Green is able to show some degree of separateness between his two capacities, he should be advised to divest himself of his private detective license. If, as he has stated, he has no intention of undertaking any detective or investigative work, this should not be objectionable. On these terms, a future award to the corporation would not violate the Anti-Pinkerton Act.

Navy urges that our recommended guidelines are "inadvisable" for two reasons:

(1) The bidder's self-certification is accepted in numerous other areas such as--

> "ICC licenses and local licenses held by household goods contractors; AEC licenses to firms permitting them to handle nuclear material and dispose of nuclear wastes; licenses held by operators of flying schools; representations as to being a manufacturer or regular dealer under Walsh-Healy, etc. * * *."

(2) The required documents "would become elements of responsiveness rather than factors of responsibility as they have been considered in the past."

Ray's first reason appears to be based on the premise that if self-certification is adequate in the other areas cited, it should be adequate for Anti-Pinkerton Act purposes. Our guidelines, however, were based on the fact, as amply evidenced by the complications of this case, that self-certification in this area has not proved to be satisfactory.

With respect to the issue of responsiveness versus responsibility, the mere fact that a writing is required to be submitted with a bid does not automatically make it a matter of responsiveness. 49 Comp. Gen. 457, 461 (1969); B-[illegible], May 7, 1973. The status of a bidder or offeror with respect to the Anti-Pinkerton Act has traditionally been viewed as a matter of responsibility, and this view is reinforced by our decisions permitting corrections of charters and licenses after bid opening. Our guidelines contain nothing to change this view.

It is our opinion that the Anti-Pinkerton Act no longer serves a useful purpose, and we plan to submit to the 93d Congress a recommendation for its repeal. As long as the Act remains in effect, however, we believe it is in the interests of all concerned—this Office, procuring agencies, and bidders—to minimize as far as possible the protest activity we are encountering under it and the attendant expense to both the Government and the private sector. Our guidelines, when viewed in conjunction with our decisions permitting corrections after bid opening, were designed to accomplish this objective at minimal cost, and we still believe they are useful.

R.F.KELLER

Deputy Comptroller General
of the United States