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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Brian X. Scott

File: B-298370; B-298490

Date: August 18, 2006

Brian X. Scott for the protester.
Maj. Peter G. Hartman, Department of the Army, for the agency.
Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Solicitations for cargo transportation and security services and for base security services in Iraq will not result in an award that violates the Anti-Pinkerton Act or Department of Defense policies regarding contractor personnel because the services required under the resultant contract are guard and protective services, and not "quasi-military armed forces" activities.

DECISION

Brian X. Scott protests the terms of request for proposals (RFP) Nos. W91GY0-06-R-0015 (RFP-0015) and W91GER-06-R-0013 (RFP-0013), issued by the Department of the Army, Joint Contracting Command-Iraq/Afghanistan, for cargo transportation and security services in and around Iraq and for base security services in Iraq.[1] The protester contends that each solicitation's statement of work (SOW) requires performance of security services that constitute the provision of "quasi-military armed forces for hire," which would result in the award of a contract that violates the Anti-Pinkerton Act, 5 U.S.C. § 3108 (2000), and Department of Defense (DoD) instructions and regulations.

We deny the protests.

[1] The protester filed two separate protests, which we address here in a single decision based on the commonality of issues; protest B-298370 challenges the terms of RFP-0015, and protest B-298420 challenges the terms of RFP-0013.

BACKGROUND

RFP-0015 was issued on May 14, 2006, and anticipates multiple awards of indefinite-delivery/indefinite-quantity (ID/IQ) contracts with fixed-price task orders for cargo transportation services in Iraq, Kuwait, and Jordan. The base ordering period is 1 year, with one 6-month option period. Offerors are required to propose vehicles, personnel, and other equipment necessary for contract performance. The SOW requires contractors to provide security escorts for the cargo convoys, including a "minimum of three (3) vehicle escorts with radios and weapons for every 10 transportation trucks and 5 ton trucks (includes 2 1/2 ton trucks) [and] [f]or all sensitive cargo the contractor will include a minimum of two (2) Ex-Pat security escort vehicles." RFP-0015, SOW, at 2.

RFP-0013 was issued on June 19, 2006, and anticipates multiple awards of ID/IQ contracts with fixed-price task orders for internal security operations services at the Victory Base Complex (VBC) in Iraq. The base ordering period is from the date of contract award until July 2008, with one 6-month option period. Offerors are required to propose "all labor, weapons, equipment, and other essential requirements to supplement and augment security operations" at VCB. RFP-0013, SOW, ¶ 1. The RFP describes the security requirements as follows:

> The objective is to maintain a high level of security at select entry control points and perimeter security operations. The tasks will be accomplished by providing internal operations at entry control points, manning perimeter towers, securing selected facilities, providing armed escorts for local national laborers, and maintaining a liaison cell at Area Defense Operations Centers (ADOC) and the Base Defense Operations Center (BDOC).

Id.

Contractors must also "provide management/administrative oversight of designated (in this SOW) security functions and personnel," and "shall repel and control any unlawful or destructive activity directed towards the VCB." Id. ¶¶ 1.1.1, 1.1.2.

The agency states that contracts that require provision of armed personnel, such as those anticipated by the two solicitations, are subject to DoD Instruction (DoDI) No. 3020.41, "Contractor Personnel Authorized to Accompany the U.S. Armed Forces." The DoDI "establishes and implements policy and guidance, assigns responsibilities, and serves as a comprehensive source of DoD policy and procedures concerning DoD contractor personnel authorized to accompany the U.S. Armed Forces." DoDI No. 3020.41, at 1. The DoDI categorizes contractor personnel who are authorized to accompany U.S. Armed Forces as "contingency contractor personnel." Id. These personnel are considered civilians under the Geneva Convention. Id. ¶¶ 6.1.1, E.2.1.3.

DISCUSSION

The protester contends that the security requirements of both solicitations violate the Anti-Pinkerton Act and DoDI No. 3020.41 to the extent that each will require contingency contractor personnel to engage in combat operations.[2] The protester argues that if the services that he believes are prohibited under the Act and the DoDI were removed from the solicitations, he could provide the remaining services. That is, if the security requirements for RFP-0015 were removed, the protester contends that he could provide the cargo transportation services, and if RFP-0013 were amended to remove what he characterizes as combat requirements, he could provide the remaining guard services.

(1) ANTI-PINKERTON ACT

The protester first contends that the security requirements of each of the RFPs would result in contracts that violate the Anti-Pinkerton Act. The Anti-Pinkerton Act 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." 5 U.S.C. § 3108. The Anti-Pinkerton Act was enacted by Congress in 1892 in response to reports that businesses had employed various groups and individuals, including the Pinkerton Detective Agency, to disrupt or harass labor organizers during disputes in the 1880s and early 1890s. See Letter to John C. Stennis, United States Senate, B-139965, Mar. 6, 1980. The Act, however, was not interpreted by a court until more than 80 years later, in United States ex rel. Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977), cert. denied, 434 U.S. 1035 (1978).[3] In Equifax, the court rejected a challenge to the award by the

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[2] The protester also argues that the requirement to provide truck drivers under RFP-0015 violates the Anti-Pinkerton Act and DoD policies, and that RFP-0013 improperly bundles security services with non-security services. These arguments, which constitute alleged solicitation improprieties, are untimely, because each was raised for the first time in the protester's comments on the agency reports, after the time set for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2006). In any event, we have considered each argument and conclude that neither has merit.

[3] The court in Equifax provided this further background:

> The Anti-Pinkerton Act is an expression of legislative frustration. In the 1890's, the nascent labor movement was increasingly involved in sometimes violent confrontations with factory owners over wages and working conditions. When the owners' resort to legal remedies proved fruitless or when the local police force was ineffectual in handling strikes, owners frequently engaged the Pinkerton Agency to supply large bodies of armed men to discourage strikers from interfering with

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government of a contract to a credit reporting company that provided information regarding prospective government employees on grounds that the firm utilized private detectives, in violation of the Act. The court interpreted the history and purpose of the Act as follows:

> The purpose of the Act and the legislative history reveal that an organization was "similar" to the Pinkerton Detective Agency only if it offered for hire mercenary, quasi-military forces as strikebreakers and armed guards. It had the secondary effect of deterring any other organization from providing such services lest it be branded a "similar organization." The legislative history supports this view and no other.

Equifax, 557 F.2d at 462.

Following the Fifth Circuit's decision in Equifax, our Office advised that we would "follow [the] court's interpretation" of the Anti-Pinkerton Act. Letter To The Heads Of Federal Departments And Agencies, B-139965, June 7, 1978, 57 Comp. Gen. 524. Our Office agreed with the court's reasoning, but observed that the court, in ruling that the Act only barred contracts with offerors who provide a "quasi-military armed force," did not define that operative term.[4] Id. We similarly declined to provide a specific definition for that term, and stated as follows:

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> the orderly operation of business. One particularly violent and bloody confrontation occurred in Homestead, Pennsylvania, when the Amalgamated Association of Iron and Steel Workers struck a Carnegie Steel Mill. Managers of the mill employed an armed force of 300 Pinkertons to protect the mill. As the Pinkertons approached the mill, floating on barges down the Monongahela River, a firefight ensued between them and strikers on the banks. Numerous injuries and some deaths resulted from this struggle. The Homestead incident prompted congressional investigations on ways to prevent employers' reliance on Pinkertons to solve labor disputes. See S. Rep. No. 1280, 52d Cong., 2d Sess. (1893); H. Rep. No. 2447, 52d Cong., 2d Sess. (1893).

Equifax, 557 F.2d at 461.

[4] Our Office has noted that "it has become apparent in recent years that the act has outlived the circumstances which produced it, and whether the act continues to serve a useful purpose has been frequently questioned." Letter To The Heads Of Federal Departments And Agencies, supra. Similarly, we have stated that "[i]t is our belief that a review of the act's legislative history . . . leaves no doubt but that whatever may have been the overriding policy considerations leading to enactment of this legislation almost 90 years ago, they do not have much, if any, bearing on the

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> We have carefully considered the court's decision and find ourselves in essential agreement with it. We note that the court did not define "quasi-military armed force," nor do we see the need to attempt it here. Nevertheless, it seems clear that a company which provides guard or protective services does not thereby become a "quasi-military armed force," even if the individual guards are armed, and even though the company may also be engaged in the business of providing general investigative or "detective" services. In the future, we will follow the decision of the Fifth Circuit in Equifax in interpreting and applying the Anti-Pinkerton Act; that is, the statutory prohibition will be applied only if an organization can be said to offer quasi-military armed forces for hire. Prior decisions of this office inconsistent with the Equifax interpretation will no longer be followed.

Id.[5]

The parties here agree that the key definition for purposes of the protest is whether the solicitations require provision of "quasi-military armed forces." Although neither the court in Equifax nor our Office has provided a definition of "quasi-military armed forces," these precedents clearly identified services that are not prohibited by the Act, namely "guard or protective services . . . even if the individual guards are armed." Id.

The protester contends that the solicitations' security requirements constitute "offensive or defensive combat," a term he argues encompasses a broader range of activities than that permitted for performance by non-military contingency contractor personnel. The protester argues that "[t]he purpose of guard or protective services is to provide active surveillance, documentation, reporting and physical presence in order to deter harm to persons or property and safeguard military assets," whereas "quasi-military armed force refers to private security

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current practices of the government in contracting for guard services." Letter to John C. Stennis, supra.

[5] Our Office's discussion in Letter To The Heads Of Federal Departments And Agencies is referenced in Federal Acquisition Regulation (FAR) § 37.109, which applies the provisions of the Anti-Pinkerton Act: "Contracts with 'Pinkerton Detective Agencies or similar organizations' are prohibited by 5 U.S.C. § 3108. This prohibition applies only to contracts with organizations that offer quasi-military armed forces for hire, or with their employees, regardless of the contract's character. An organization providing guard or protective services does not thereby become a 'quasi-military armed force,' even though the guards are armed or the organization provides general investigative or detective services. (See 57 Comp. Gen. 524)."

contractors that are hired by the US government to engage in or be prepared to engage in offensive or defensive combat." Protest of RFP-0013 at 3.

The agency responds that the protester's definitions of offensive or defensive combat and guard or protective services are not based on statutory or regulatory definitions, and thus are not relevant for establishing whether the activities contemplated by the solicitation are activities that cannot be performed by a government contractor under the Act. We agree with the agency.

The provisions of the SOWs describe guard or protective services that are often performed in the private sector, such as bank guards or armed escorts for valuable cargo, as opposed to combat operations reserved solely for performance by the armed forces. For example, RFP-0013 states that although the contractor must provide security escorts for cargo convoys, the contractor must notify the agency and summon support in the event of an attack. Specifically, the SOW for RFP-0013 states as follows:

> In case of attack, the contractor is authorized to defend themselves with force according to the rules established by the Use of Force and Escalation of Force policies in effect at that time. . . . Additionally, the convoy will carry a 'panic' button on every mission and if attacked this button must be pushed to notify the [Logistics Management Control Center] to send military support to assist, if available.

RFP-0013 at C-1(c).

RFP-0015 also states that "[u]nder no conditions are contract security forces involved in offensive operations," and that they must "request Coalition forces support for any threats to VCB facilities and personnel." Id. ¶ RFP-0015, SOW, ¶¶ 1, 1.1.3.

In sum, the protester provides no basis for concluding that the solicitations' requirements include activities that Congress sought to bar government contractors from performing under the Anti-Pinkerton Act. See Equifax, 557 F.2d at 462. The plain meaning and legislative history of the Act, as interpreted by the courts and our Office, point to a strict reading of the statutory language to prohibit contracts with the Pinkerton Detective Agency and other entities offering quasi-military forces as strikebreakers. We therefore do not believe that the Act prohibits contracts with security guards, even if the guards are armed. Accordingly, we find no basis to conclude that either solicitation at issue here would result in a contract that would violate the Anti-Pinkerton Act.

(2) DoDI No. 3020.41

The protester next argues that DoDI No. 3020.41, which the agency states is the DoD policy that governs the types of services sought under this solicitation, prohibits the

performance by contingency contractor personnel of the security services identified in the SOWs.[6] The protester contends that although the DoDI authorizes contingency contractor personnel to "be armed for individual self-defense," it also states that such contractor personnel "may not participate in mutual defense." DoDI No. 3020.41 ¶ 6.3.4.1. The protester argues that this language prohibits contractor personnel from engaging in activities that will require the use of firearms or the provision of defense for any purpose other than personal self-defense.[7]

In the context of other provisions of the DoDI, it is clear that the language cited by the protester is not intended to prohibit the services sought under the solicitations. For example, the DoDI provides explicit instruction for authorizing the "Use of Contingency Contractor Personnel for Security Services," stating as follows:

> If consistent with applicable U.S., [host nation], and international law, and relevant SOFAs [status of forces agreements] or other international agreements and this Instruction, a defense contractor may be authorized to provide security services for other than uniquely military functions. Contracts for security services shall contain provisions informing the contractor of any known or potentially hazardous situations. Whether a particular use of contract security personnel to protect military assets is permissible is dependent on the facts and requires legal analysis. Variables such as the nature of the operation, the type of conflict, any applicable status agreement related to the presence of U.S. forces, and the nature of the activity being protected require case-by-case determinations. The use of force by contingency contractor personnel is often strictly limited by laws and

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[6] Because our Office's jurisdiction is limited to consideration of whether a procurement statute or regulation has been violated, 31 U.S.C. §§ 3551-3552 (2000), violation of an internal agency instruction or directive would generally not constitute a valid basis of protest. See RMS Indus., B-246082 et al., Jan. 22, 1992, 92-1 CPD ¶ 104 at 2. As explained below, however, DoD has issued an interim amendment to conform the Defense Federal Acquisition Regulation Supplement to the provisions of DoDI challenged here by the protester; thus, our review of the DoDI is appropriate to the extent that a violation of the DoDI could potentially result in a violation of similar provisions in the amended regulations.

[7] The protester also contends that contingency contractor personnel are prohibited from performing "uniquely governmental" work, such as combat operations. See Protest of RFP-0013 at 3. The protester's argument, however, assumes that the services sought under the two solicitations are combat operations, and thus run afoul of the prohibition on such operations under the DoDI. As discussed herein, there is no basis to conclude that the services sought under the protested solicitations constitute prohibited combat operations.

> not protected by SOFA provisions. Contingency contractor personnel providing security services and who exceed the limits imposed by applicable law may be subject to prosecution.

Id. ¶ 6.3.5.

In addition, the provisions regarding arming contingency contractor personnel detail an authorization procedure that clearly anticipates performance of security or guard services similar to those sought under the solicitations. For example, the DoDI states as follows:

> Requests for permission to arm contingency contractor personnel to provide security services shall be reviewed on a case-by-case basis by the appropriate Staff Judge Advocate to the geographic Combatant Commander to ensure there is a legal basis for approval. The request will then be approved or denied by the geographic Combatant Commander or a specifically identified designee, no lower than the general or flag officer level.
>
> Contracts shall be used cautiously in contingency operations where major combat operations are ongoing or imminent. In these situations, contract security services will not be authorized to guard U.S. or coalition military supply routes, military facilities, military personnel, or military property except as specifically authorized by the geographic Combatant Commander (non-delegable).

Id. ¶¶ 6.3.5.1, 6.3.5.2.

The foregoing provisions clearly anticipate, as relevant to the solicitations, situations in which contractor personnel may be authorized to provide security services to guard "coalition military supply routes, military facilities, military personnel, or military property."[8]

Additionally, an interim amendment to Defense Federal Acquisition Regulation Supplement (DFARS) parts 212, 225, and 252, published in the Federal Register on June 16, 2006, states that although contingency contractor personnel may be authorized to use force as part of security responsibilities, they are prohibited from participating in direct combat activities. The amendment, which is intended to conform the DFARS to DoDI No. 3020.41, states as follows:

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[8] The agency notes that, at the time the agency submitted its report for the protest of RFP-0013, the authorization for use of force had not been issued for that solicitation. We nonetheless review the protester's challenges here because offerors are required to submit proposals based on the assumption that authorization may occur.

> Private security contractor personnel are also authorized to use deadly force when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract. It is the responsibility of the combatant commander to ensure that the private security contract mission statements do not authorize the performance of any inherently Governmental military functions, such as preemptive attacks, or any other types of attacks. Otherwise, civilians who accompany the U.S. Armed Forces lose their law of war protections from direct attack if and for such time as they take a direct part in hostilities.

71 Fed. Reg. 34,826, 34,826-27 (June 16, 2006).

This interim amendment to the DFARS provides additional clarification that the services sought under the solicitations are limited to guard and protective services in that contractor personnel are not permitted to engage in "preemptive attacks, or any other types of attacks." In sum, we believe that nothing in DoDI No. 3020.41 or the DFARS prohibits contingency contractor personnel from performing the services sought under the solicitations; rather, the services sought under the solicitations appear to comport with the DoD policies and regulations which state that security contractors are not allowed to conduct direct combat activities or offensive operations.[9]

The protests are denied.

Gary L. Kepplinger
General Counsel

[9] The protester makes several additional allegations, including arguments that the security services sought results in a violation of a "taboo" against hiring mercenaries under U.S. military tradition, and that the services also infringe on Iraqi sovereignty. To the extent that they are within our Office's bid protest jurisdiction (that is, they constitute claims that a federal agency has violated federal procurement statutes or regulations), we have reviewed the protester's additional arguments and find no basis for sustaining the protests.