



**United States Government Accountability Office
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Decision

Matter of: STR, L.L.C.

File: B-297421

Date: December 22, 2005

Thomas A. Coulter, Esq., LeClair Ryan P.C., for the protester.

Warren D. Leishman, Esq., and Peter E. Young, Esq., Agency for International Development, for the agency.

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DIGEST

Government Accountability Office will not consider protest of an award of a subcontract as "by" the government where the prime contractor drafted the portion of the solicitation pertaining to evaluation of vendor responses; participated substantially in the evaluation of responses and selection of a product for award; and will be responsible for administration of the subcontract.

DECISION

STR, L.L.C. protests the proposed award of a subcontract by SRA International, Inc., a government prime contractor, to Infoterra, Inc. The subcontract is for a grants management software program to be used by the Agency for International Development (AID) and the Department of State.

We dismiss the protest.

SRA holds a contract with the General Services Administration (GSA) Federal Systems Integration and Management Center pursuant to which it is performing a task order for information management services for AID. In its capacity as a government prime contractor, SRA issued a request for information (RFI) on August 12, 2005, seeking detailed information on commercially available acquisition and assistance systems capable of satisfying the requirements of AID and the Department of State for a Joint Acquisition and Assistance Management System (JAAMS). The RFI explained that AID and State required proven commercial off-the-shelf products based on mature, fully developed systems already in production in other federal agencies, and that vendors could offer already integrated products or individual products capable of being integrated by SRA to meet the agencies'

requirements. The RFI further explained that the selected product vendor(s) might serve as subcontractors to SRA under its prime contract.

SRA's issuance of the RFI at issue here was preceded by AID's issuance, and subsequent withdrawal, of an RFI seeking related information regarding commercially available acquisition and assistance systems. The AID RFI differed from the SRA RFI in several respects, one of which was that it notified vendors that the agencies were soliciting vendor responses for market research purposes only and that the RFI would not result in a contract award. In keeping with the foregoing, the AID RFI did not contain evaluation criteria, whereas the SRA solicitation did.

STR submitted responses to both RFIs. On October 3, SRA notified STR that its product had not been selected; in a subsequent telephone conversation, SRA informed STR that the selected vendor was Infoterra.

The protester takes issue with the selection of Infoterra, arguing that the firm does not have a full system in production in any federal agency, as required by the RFI.

We will not consider the merits of STR's arguments because, as explained below, the procurement at issue was not conducted by or for a federal agency and thus is not subject to our jurisdiction.

Under the Competition in Contracting Act of 1984 (CICA), our Office has jurisdiction to resolve bid protests concerning solicitations and contract awards that are issued "by a Federal agency." 31 U.S.C. § 3551(1)(A) (2000). Pursuant to our authority under CICA, we initially took jurisdiction over subcontract awards by prime contractors to the federal government where, as result of the government's involvement in the award process, or the contractual relationship between the prime contractor and the government, the subcontract in effect was awarded on behalf of—*i.e.*, "by or for"—the government, and federal procurement laws and regulations otherwise would apply. See, e.g., St. Mary's Hosp. and Med. Ctr. of San Francisco, Calif., B-243061, June 24, 1991, 91-1 CPD ¶ 597. However, in U.S. West Communications Servs., Inc. v. United States, 940 F. 2d 622 (Fed. Cir. 1991), the court of appeals construed statutory language basically identical to that applicable to our Office as not conferring on the GSA Board of Contract Appeals jurisdiction over subcontract procurements conducted "for" a federal agency in the absence of a showing that the prime contractor was a procurement agent, as defined by the Supreme Court in United States v. New Mexico, 455 U.S. 720 (1982) and the court of appeals in United States v. Johnson Controls, Inc., 713 F. 2d 1541 (Fed. Cir. 1983). We subsequently concluded that our jurisdiction generally does not extend to awards made by others but "for" the government, and that, accordingly, in the absence of a request by the federal agency concerned, we would not take jurisdiction

over such procurements.¹ Compugen Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103 at 3-4.

We continue to take jurisdiction where the subcontract is “by” the government. RGB Display Corp., B-284699, May 17, 2000, 2000 CPD ¶ 80 at 3. We have considered a subcontract procurement to be “by” the government where the agency handled substantially all the substantive aspects of the procurement and, in effect, “took over” the procurement, leaving to the prime contractor only the procedural aspects of the procurement, i.e., issuing the subcontract solicitation and receiving proposals. See St. Mary’s Hosp. and Med. Ctr. of San Francisco, Calif., *supra*, at 5-6; University of Mich.; Industrial Training Sys. Corp., B-225756, B-225756.2, June 30, 1987, 87-1 CPD ¶ 643 at 5-6. In such cases, the prime contractor’s role in the procurement was essentially ministerial, such that it was merely acting as a conduit for the government. On the other hand, we have found subcontractor procurements were not “by” the government where the prime contractor handled other meaningful aspects of the procurement, such as preparing the subcontract solicitation and evaluation criteria, evaluating the offers, negotiating with the offerors, and selecting an awardee. See Kerr-McGee Chem. Corp-Recon., B-252979.2, Aug. 25, 1993, 93-2 CPD ¶ 120 at 4-6; ToxCo, Inc., B-235562, Aug. 23, 1989, 89-2 CPD ¶ 170 at 4-5.

STR contends that SRA is acting merely as a conduit for the government here and that, accordingly, we should take jurisdiction over its protest.²

We do not agree with the protester that the government’s involvement in and control over the acquisition process here was so pervasive as to render the procurement essentially by the government. First, contrary to STR’s contention, the RFI issued by SRA is not “nearly identical” to the solicitation issued by AID; as noted above, the

¹ AID has not requested that we review protests of the award of subcontracts by its prime contractors.

² In its initial protest, STR also argued that SRA meets the definition of procurement agent set forth in United States v. New Mexico and United States v. Johnson Controls, Inc., and that the procurement is therefore “for” the government. (These decisions hold that a prime contractor should be considered a procurement agent for the government where: (1) it is acting as a purchasing agent for the government; (2) the agency relationship between the government and the prime contractor is established by clear contractual consent; and (3) the contract states that the government will be directly liable to the vendors for the purchase price. See 455 U.S. at 742; 713 F.2d at 1551-52.) Here, the prime contract did not appoint SRA as the government’s agent. In addition, there is no evidence that the government will be directly liable to Infoterra for the purchase price; indeed, according to both SRA’s project manager and the manager of the JAAMS program for AID, privity of contract will be between SRA and Infoterra and not between the government and Infoterra.

two differ significantly in that the AID RFI did not include evaluation criteria, whereas the SRA solicitation did. Both the AID program manager and the SRA project manager report that SRA had primary responsibility for drafting the evaluation criteria.³

Second, it is clear from the record that SRA personnel played a major role in the evaluation of proposals and selection of an awardee. In this connection, the evaluation team consisted of both government representatives and SRA employees, with the two subgroups providing differing types of substantive input into the evaluation/selection process. As explained by the AID program manager in the following excerpt:

The government team members represented various user stakeholders of the COTS system to include grants officers, program officers, financial analyst, policy analyst, and IT analyst. These representatives focused primarily on the requirements and the ability of the software to meet them from a users' perspective, e.g., ease of use, intuitiveness, logical flow. Concurrently, SRA conducted in-depth technical and cost assessments and performed customer reference interviews. SRA analysis, from the integration perspective, included requirements, technical feasibility, implementation factors to configure the system, and the complexity of the integration points of the software from a risk and schedule impacts.

³ The AID program manager stated as follows:

The SRA team managed the second RFI process to include the drafting of the document . . . The contents of the RFI document, to include the instructions and evaluation criteria was drafted using SRA's standard commercial practices for recommending COTS solutions. The government reviewed and concurred to the final draft of the RFI prior to issuance.

Declaration of AID Program Manager, Dec. 6, 2005, at 4. Similarly, the SRA project manager stated that "SRA developed the initial evaluation criteria and finalized the criteria taking into consideration input from the Government." Declaration of SRA Project Manager, Dec. 6, 2005, at 2.

Declaration of AID Program Manager, Dec. 6, 2005, at 4-5.⁴ It is also clear from the record that the SRA team members were full participants in the deliberations that led to recommendation of the Infoterra product. While we recognize that it is apparent from the foregoing that government personnel, as well as SRA personnel, played major roles in the evaluation, government involvement in the evaluation/selection process is not enough to make the procurement “by” the government, Perkins-Elmer Corp.; Metco Div., B-237076, Dec. 24, 1989, 89-2 CPD ¶ 604 at 4; we consider a procurement to be “by” the government only where the agency controls the procurement process to such an extent that the contractor has no real input into substantive decisions, which was clearly not the case here.

Third, it is apparent from the record that administration of the contract is to be handled by SRA and that privity of contract will be between the SRA and Infoterra and not between the government and Infoterra. Declaration of AID Program Manager, Dec. 6, 2005, at 5; Declaration of SRA Project Manager, Dec. 6, 2005, at 3.

Because we find that the procurement here was not “by” the government, we conclude that we do not have jurisdiction over STR’s protest. Accordingly, the protest is dismissed.

Anthony H. Gamboa
General Counsel

⁴ Similarly, the SRA project manager stated as follows:

SRA had full responsibility, as part of its performance based contract, for assessing the technical merits of the competing programs and the ease of integrating each program into the overall JAMS system and USAID architecture.

Declaration of SRA Project Manager, Dec. 6, 2005, at 2-3.