



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Alatech Healthcare, LLC

File: B-400925; B-400925.2

Date: March 9, 2009

Robert S. Nichols, Esq., Amy Laderberg O'Sullivan, Esq., and James G. Peyster, Esq., Crowell & Moring LLP, for the protester.

Diane A. Perone, Esq., United States Agency for International Development, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Government Accountability Office will not consider protest of an award of subcontract as “by” the government, where record shows that prime contractor had extensive involvement in conducting acquisition, including drafting of solicitation, receipt and evaluation of proposals and selection of successful concerns.

DECISION

Alatech Healthcare, LLC, of Dothan, Alabama, protests the decision of John Snow, Inc. (JSI), of Boston, Massachusetts, a prime contractor with the United States Agency for International Development (AID), not to award it a subcontract under request for proposals (RFP) No. RH-03-08, issued by JSI for a quantity of male condoms.

We dismiss the protest.

The agency has an ongoing requirement for male condoms in connection with various reproductive health and HIV/AIDS prevention programs administered by AID on a worldwide basis. Agency Report (AR), exh. 7, ¶ 2. The agency advises that, in 2005 and 2006, in connection with responding to various high priority requirements, it determined that it could better meet its needs by awarding prime indefinite-delivery/indefinite-quantity contracts, under which it could acquire condoms, as well as other goods. *Id.*, ¶¶ 5-7. Toward that end, AID awarded what is referred to as the DELIVER contract to JSI in 2006, under which JSI would, among other things, assist AID in meeting its requirements for male condoms through the award of one or more subcontracts. *Id.*; AR, exh. 3.

AID is required to procure condoms consistent with certain statutory appropriations language. In this regard, the Consolidated Appropriations Act for 2008, Pub. L. No. 110-161, Sect. 6, Div. I, Title III, 121 Stat. 1844 (Dec. 26, 2007) provides:

[T]o the maximum extent feasible, taking into consideration cost, timely availability, and best health practices, funds appropriated in this Act or prior appropriations Acts that are made available for condom procurement shall be made available only for the procurement of condoms manufactured in the United States.

The record shows that the agency issued a task order to JSI under its DELIVER contract to, among other things, conduct a procurement for male condoms. AR, exh. 4; exh. 7, ¶ 21. Consistent with the terms of the task order, JSI prepared the RFP that is the subject of the current protest. AR, exh. 5. AID reviewed the RFP and provided comments to JSI concerning various provisions, informed JSI of AID's interpretation of the above-quoted statutory language, and discussed revisions to the RFP that it viewed as necessary to reflect AID's interpretation of that language. AR, exh. 7, ¶¶ 21-22. After the RFP was issued, AID assisted JSI in responding to vendor questions relating to the RFP and, specifically, provided the response to a question relating to implementation of the statutory language. *Id.* ¶ 24. Beyond these activities, AID's involvement with the acquisition was limited. JSI prepared and issued the RFP, received and evaluated proposals, presented AID with the results of its evaluation, and advised the agency of its selection decisions; AID reviewed JSI's proposed subcontractor selections, requested clarifying information, and approved the selections. AR, exh. 7, ¶¶ 25-29.

The record shows that an AID employee with no management role in connection with JSI's prime contract observed JSI's proposal evaluation panel's deliberations as a non-voting member. According to the agency, her role was to observe JSI's conduct of the evaluation to ensure that the agency's requirements received due attention, and that its interpretation of the statutory language noted above was implemented. *Id.* ¶ 25.

AID requests that we dismiss the protest as beyond our jurisdiction because the acquisition was conducted by a prime contractor for the award of subcontracts, rather than by a federal agency. The protester asserts that AID essentially directed JSI in its implementation of the statutory requirement, and that this aspect of the acquisition therefore essentially was conducted "by" AID through JSI. Alatech concludes that we have jurisdiction to consider the protest to the extent that it challenges the agency's implementation of the statutory language.

We agree with the agency that the procurement at issue 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 a 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 its decision 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 General Services Administration's 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).¹ We subsequently concluded that our jurisdiction generally does not extend to awards made by others "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.² Compugen Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103 at 3-4.

We continue to take jurisdiction where we find that a subcontract essentially was awarded "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 substantive aspects--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

¹ While Alatech refers to JSI as AID's "purchasing agent" in several places in its pleadings, it made no express argument or showing that this was the case in its protest letter. Further, in its comments responding to the agency's report, Alatech again did not present information, evidence or argument that such a relationship exists. See STR, L.L.C., B-297421, Dec. 22, 2005, 2006 CPD ¶ 11 at 3 n.2.

² AID has not requested that we review protests of the award of subcontracts by its prime contractors.

the 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.

Here, as discussed, JSI was responsible for virtually all significant aspects of the procurement. JSI prepared the solicitation, including the evaluation criteria (taking into consideration input from AID); evaluated and scored the proposals; engaged in discussions with the prospective subcontractors; performed responsibility determinations of the prospective awardees; and made award recommendation findings that were approved by AID. AR, exh. 8, at 3-4. AID's assistance in implementing the statutory appropriations language and approving the award recommendations made by JSI was not sufficient to render this an acquisition conducted "by" AID; a procurement is only "by" the government where the agency controls the procurement process to such an extent that the contractor has no real input into substantive decisions. STR, L.L.C., supra at 5. That clearly was not the case here.

Moreover, we decline to adopt the view advanced by the protester--that the agency effectively conducted that aspect of the procurement relating to implementation of the statutory language--and therefore could be said to have effectively awarded the subcontract, at least in that respect. In considering whether a procurement was conducted "by" the government, we assess the totality of the circumstances, including the question of which party was responsible for the preparation of the solicitation, the receipt and evaluation of proposals, the conduct of discussions, the selection of a prospective awardee and the conduct of responsibility determinations. As reflected in our prior decisions in this area, we do not break the procurement into segments and consider the "by" question on a segment-by-segment basis. The protester has presented no information or argument that leads us to question the correctness of our approach in this regard. We conclude that our Office lacks jurisdiction to consider the propriety of the awards here.

The protest is dismissed.

Gary L. Kepplinger
General Counsel