



## Decision

**Matter of:** Baron Services, Inc.

**File:** B-402109

**Date:** December 24, 2009

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Joel Brown, Esq., and Jeremy Becker-Welts, Esq., Bradley Arant Boult Cummings LLP, for the protester.

H. Jack Shearer, Esq., Department of Energy, for the agency.

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### DIGEST

Government Accountability Office will not consider protest of an award of subcontract as “by” the government, where record shows that prime contractor conducted the acquisition, including drafting solicitation and evaluation criteria, receipt and evaluation of proposals, and selection of subcontractor.

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### DECISION

Baron Services, Inc., of Huntsville, Alabama, protests the decision of Battelle Memorial Institute (Battelle), Pacific Northwest Division, of Richland, Washington, a prime contractor with the Department of Energy (DOE), not to award it a subcontract under request for proposals (RFP) No. 101350 for radars.

We dismiss the protest.

On April 8, 2009, Battelle issued a request for information (RFI) on the FedBizOpps website, seeking sources for a contemplated procurement of two C-Band Scanning Atmospheric Radiation Measurement (ARM) Precipitation radars to support atmospheric and climate research for the ARM Climate Research Facility, which is a DOE national user facility that is managed and operated by nine DOE national laboratories, including the Pacific Northwest National Laboratory (PNNL).<sup>1</sup> See

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<sup>1</sup> The RFI informed vendors that the RFI was issued as part of market research to address PNNL’s needs and that “Battelle does not intend to award a contract on the basis of this RFI, or to otherwise pay for information in response to this RFI.” RFI, April 8, 2009, at 2.

www.arm.gov. PNNL, a Federally Funded Research and Development Center, is managed and operated by Battelle under a prime contract with DOE pursuant to Federal Acquisition Regulation (FAR) subpart 17.6. See DOE's PNNL Contract with Battelle, Statement of Work, at C-1, available at <http://doeprimecontract.pnl.gov>. Among other things, Battelle's contract provides for approval by DOE of subcontract awards made by Battelle and provides Battelle with authority to purchase equipment for the agency.<sup>2</sup> See id., § I, clause I-115, Department of Energy Acquisition Regulation (DEAR) 970.5244-1, "Contractor Purchasing System" and clause I-116, DEAR 970.5245-1, "Property."

The RFP, issued by Battelle on the FedBizOpps website on June 24, provided for the award of a fixed-price subcontract for two radars.<sup>3</sup> Offerors were informed that the solicitation requirements would be funded by the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).<sup>4</sup> RFP at 2. The solicitation also informed offerors that proposals were to be submitted to Battelle and identified a Battelle employee as the "sole point of contact for any communications or questions regarding this acquisition." Id.

Battelle received a number of proposals, including Baron's, in response to the RFP. Following evaluation of proposals by an evaluation panel established by Battelle (none of which were DOE employees), the source selection authority, a Battelle employee, selected the proposal of Advanced Radar Corporation for award. DOE's

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<sup>2</sup> Battelle's contract provides that title to property purchased by Battelle for DOE, the cost of which is reimbursed by DOE as a direct cost under Battelle's contract, would pass directly to DOE from the vendor. See Battelle Contract, § I, clause I-116, DEAR 970.5245-1, Property.

<sup>3</sup> In accordance with its contract with DOE, Battelle obtained the approval of DOE's contracting officer for the issuance of the RFP, which had an estimated award amount of \$3.5 million. See DOE's Response to Opposition to Dismissal Request, Nov. 5, 2009, Tab 6, DOE Approval of RFP. Subsequently, DOE increased Battelle's threshold for DOE's review of subcontract actions from \$1 million to \$5 million. See id., Tab 7, Battelle Purchasing System Consent Threshold, July 8, 2009. Thereafter, Battelle obtained no further approvals from DOE for the acquisition of the radars under the RFP. Declaration of DOE Contracting Officer.

<sup>4</sup> The purposes of the Recovery Act include: (1) to preserve and create jobs and promote economic recovery; (2) to assist those most impacted by the recession; (3) to provide investments needed to increase economic efficiency by spurring technological advances in science and health; (4) to invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits; and (5) to stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases. Pub. L. No. 111-5, § 3, 123 Stat. 115, 116.

Response to Opposition to Dismissal Request at 3. Following a debriefing provided by Battelle, Baron protested to our Office.

DOE requests that we dismiss Baron's protest because it concerns a subcontract awarded by Battelle as a DOE prime contractor and not a procurement conducted by the government. Dismissal Request.

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) (2006). 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. & Med. Ctr. of San Francisco, Cal., B-243061, June 24, 1991, 91-1 CPD ¶ 597. However, in its decision U.S. West Commc'ns 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). 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. Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103 at 3-4.

We continue to take jurisdiction, however, where we find that a subcontract essentially was awarded "by" the government. See RGB Display Corp., B-284699, May 17, 2000, 2000 CPD ¶ 80 at 3. 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. Alatech Healthcare, LLC, B-400925, B-400925.2, Mar. 9, 2009, 2009 CPD ¶ 57 at 3. We have found a subcontract procurement to be "by" the government only 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. & Med. Ctr. of San Francisco, Cal., *supra*, at 5-6; University of Mich.; Indus. 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, Alatech

Healthcare, LLC, supra, at 3. On the other hand, we have found subcontractor procurements were not “by” the government where the prime contractor handled meaningful aspects of the procurement, such as preparing the subcontract solicitation and evaluation criteria, evaluating the offers, negotiating with the offerors, and selecting 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, Baron contends that, although radars were procured under Battelle’s prime contract with DOE, the agency had a pervasive role in the procurement such that the procurement was essentially conducted by DOE. That is, Baron argues that the agency, by virtue of its review and approval of the RFP (including its “associated evaluation criteria”), retained ultimate control over the evaluation of proposals and selection of the subcontractor. Opposition to Dismissal Request at 2-3. The protester also contends that the fact that the solicitation was posted on the FedBizOpps website, the government-wide port of entry where agency contracting officers are required to synopsise certain contract actions and solicitations under the FAR, demonstrates that the procurement was conducted by DOE. In addition, the protester believes that DOE must have been substantially involved in this procurement because the subcontract will be funded under the American Recovery and Reinvestment Act and argues that Act requires DOE to implement certain competition requirements. See id. at 5, citing Pub. L. No. 111-5, § 1554, 123 Stat. 302.<sup>5</sup> Baron also argues that the expenditure of government funds and the determination of which supplies or services are to be procured and at what cost are inherently governmental functions that must be performed by the agency. See id. at 6. In this regard, the protester notes that title to the radars passes directly to the government, that the Battelle agents involved in the procurement use “.gov” email extensions, and that the solicitation bears DOE’s official seal. Id., n.3 at 3.

In response, DOE states that it did not have a substantial role in the procurement and that no federal employees were involved in receipt of proposals and the selection process. Dismissal Request at 2. In this regard, DOE has provided a declaration from its contracting officer and affidavits from two Battelle employees who state that (1) DOE did not receive, review, or evaluate any proposals submitted in response to the RFP, (2) DOE did not participate in the selection of the awardee, and (3) Battelle had the sole responsibility for determining the evaluation criteria and the extent of information that was to be included in the RFP. See DOE’s Response to Opposition to Dismissal Request, Tab 8, Declaration of DOE Contracting Officer; Tab 9, Affidavit of Battelle Evaluation Panel Chairperson; and Tab 10, Affidavit of Battelle Contracts Specialist. DOE states that its only

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<sup>5</sup> Section 1554 of the Act provides that contracts funded under the Act be awarded as fixed-price contracts using competitive procedures to the maximum extent possible.

participation in the solicitation involved reviewing the RFP and approving its issuance.

The record shows that Battelle, and not DOE, handled all the meaningful aspects of this procurement, including preparing the subcontract solicitation and evaluation criteria, evaluating the offers, and selecting the awardee. DOE's approval of the issuance of the RFP does not demonstrate that DOE took over the procurement. See, e.g., Alatech Healthcare, LLC, supra, at 1-3 (agency review, comment, and discussion of RFP with prime contractor did not show that procurement was "by" the government, where the contractor was responsible for significant aspects of the procurement); see also STR, L.L.C., B-297421, Dec. 22, 2005, 2006 CPD ¶ 11 at 3 (government involvement in evaluation/selection process not enough to make procurement by government). Nor does the fact that Battelle posted the RFI and RFP on the FedBizOpps website and used DOE's agency seal on the FedBizOpps postings, and that Battelle employees at PNNL use .gov email addresses demonstrate that DOE handled substantially all substantive aspects of the procurements, given that it was Battelle, and not DOE, that prepared the RFP, received and evaluated proposals, and selected Advanced Radar's proposal for award. See Compugen, Ltd., supra, at 2 (prime contractor's use of Commerce Business Daily for subcontract solicitation). We also do not find significant here that DOE would obtain title to the radars in accordance with the terms of Battelle's prime contract. See Merrick Eng'g, Inc.-Recon., B-247334.2, May 14, 1992, 92-1 CPD ¶ 444 at 2-3 (government acquisition of title to property purchased under a subcontract does not establish that procurement was conducted by or for the government).

We also do not agree with Baron that the subcontract procurement of the radars by Battelle under its prime contract was an inherently governmental function, which meant that DOE had to conduct the procurement. See Opposition to Dismissal Request at 6. The FAR specifically recognizes that prime contractors may award subcontracts to obtain supplies and services for the performance of the prime contract. See, e.g., FAR Part 44, Subcontracting Policies and Procedures. There also is no merit to Baron's arguments that this subcontract procurement was necessarily by the government because of the requirements of the American Recovery and Reinvestment Act and the use of funds under this Act. As noted by Baron, section 1554 of the Act provides that "[t]o the maximum extent possible, contracts funded under this Act shall be awarded as fixed-price contracts through the use of competitive procedures." Included in Battelle's prime contract is a specific clause, "Special Provisions Relating to Work Funded under American Recovery and Reinvestment Act of 2009," which is required to be flowed-down to first-tier subcontractors and which includes a number of requirements, including the segregation of obligations and expenditures related to funding under the Act, and otherwise complying with all requirements of the Act. See Battelle Contract, § H.38, at H-51 -- H-53. Here, Battelle awarded a fixed-price subcontract competitively. In sum, the record shows that Battelle's involvement in the procurement is more than that of a mere conduit for the government, and we therefore find that this procurement was not conducted by the government.

The protest is dismissed.

Lynn H. Gibson  
Acting General Counsel