Matter of: Compugen, Ltd.

File: B-261769

Date: September 5, 1995

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Jeffrey H. Schneider, Esq., Epstein, Becker & Green, for MasPar Computer Corporation, an interested party.
Fred Kopatich, Esq., Department of Commerce, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In light of the decision in U.S. West Comms. Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991), the General Accounting Office (GAO) will no longer exercise jurisdiction over subcontract procurements "for" the government, in the absence of a request by the federal agency involved; nor will GAO consider a sole-source subcontract award to be "by a federal agency" so as to justify taking jurisdiction over a protest of the award, where the prime contractor, in evaluating the protester's proposal and determining to make a sole-source award to another firm, exercised substantial responsibility for the procurement such that the prime contractor could not be said to be a mere conduit for the agency.

DECISION

Compugen, Ltd. protests the award of a sole-source subcontract to MasPar Computer Corporation by PRC, Inc. for a biotechnology sequence search computer system to be provided to the U.S. Patent and Trademark Office (PTO), Department of Commerce, under PRC's prime contract with PTO.

We dismiss the protest.

Since the early 1980s, PTO has sought to establish an automated patent system (APS), which would computerize all patent records and allow text retrieval. To accomplish this, PTO has established a master plan, under which an outside contractor--the systems engineering integrator--

would have the primary role of designing, testing, acquiring, and maintaining the APS. In 1984, PTO awarded a cost-plus-award-fee, task order contract to PRC to be the APS systems engineering integrator.

The prime contract provided that the contractor would acquire automated data processing (ADP) resources in accordance with the policies and procedures of the Federal Information Resources Management Regulation, 41 C.F.R. Part 201-39.[1] Under the prime contract, PTO would review and approve PRC's solicitation documents for APS system resources prior to release by PRC and, in this regard, PRC was required to prepare a source selection handbook and acquisition plan for each planned subcontract acquisition. PTO reserved the right to have no more than two government observers attend meetings of PRC's evaluation or source selection evaluation boards; the contract provided that PTO's observers may ask questions but were not permitted to present their own evaluations or opinions. PTO also reserved the right to approve subcontract selections.

In 1994, PRC awarded a sole-source subcontract to MasPar for that firm's chemical sequencing similarity software system with associated hardware (the 1994 procurement). Prior to the award of this sole-source subcontract, PTO prepared a sole-source justification for the issuance of a task order directing PRC to synopsize PTO's requirements for the computer system, inform potential sources of an intended sole-source subcontract award to MasPar, and acquire the MasPar system. PTO's sole-source justification documented PTO's conclusion that "only MasPar Computer Corporation hardware and software provides the needed compatibility and most cost effective procurement alternative" and "that the MasPar . . . system, was the only available software and hardware currently available that can satisfy PTO's advanced sequence searching requirements." On March 17, 1994, PRC synopsized the sole-source subcontract award in the Commerce Business Daily (CBD).

In May 1994, Compugen contacted PTO regarding the agency's possible requirements for a biotechnology research computer system. Compugen was informed that a MasPar computer system was being acquired by PRC for PTO under PRC's prime contract and pursuant to the March 1994 CBD announcement; Compugen was invited, however, to submit information on its system and was informed that "PTO's intent is simply to maintain an awareness of products that may be of use now or in the future." From May 1994 through March 1995, Compugen and PTO

[1]"ADP resources" are defined by the contract as ADP equipment, commercially available software, maintenance services, and related supplies.

communicated regarding the capabilities of Compugen's system.

On April 5, PRC synopsized in the CBD its intent to award another sole-source subcontract to MasPar for a biotechnology sequence search computer system (the 1995 procurement). The CBD announcement referenced Note 22, which invited interested persons to identify their interest and capability to respond to this requirement. In this regard, the CBD notice provided that:

> "PRC requires that the vendor of any sequence similarity searching software acquired must demonstrate that the products have successfully operated as part of a sequence data base searching service for public access. Further, PRC requires that any searching system acquired be fully compatible with existing SPARC hardware, and SunOS 4.x/Solaris 2.x operating system software at the USPTO. This is required to ensure that the existing hardware and software may continue to function as components of the network used to access the sequence searching software."

Compugen subsequently contacted PRC and submitted a proposal in response to the CBD announcement. After PRC conducted discussions with Compugen concerning the capabilities of its offered computer system, PRC, by letter of May 31, informed Compugen that the firm's offered sequence search hardware and software did not meet PRC's and PTO's present needs. Specifically, PRC stated that it and the government had already invested substantial resources in the MasPar system, and that introduction of Compugen's system would cause delays and require additional training. In addition, PRC concluded that Compugen's system did not provide some of the features of the MasPar system that PTO required. Compugen then filed this protest.

Commerce requests dismissal of Compugen's protest of the subcontract award because the procurement is not by a federal agency but by PRC under its prime contract with PTO. Compugen responds that PRC's subcontract award was "by or for" the government and therefore we have jurisdiction to review this subcontract procurement.

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 [f]ederal agency." 31 U.S.C. § 3551(l) (1988). In the context of subcontractor procurements, we interpreted CICA as authorizing our Office to review protests 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 is awarded on behalf of the government, that is, where the subcontract is awarded "by or for the government." See 4 C.F.R. § 21.3(m)(10) (1995); see also Ocean Enters., Ltd., 65 Comp. Gen. 585 (1986), 86-1 CPD ¶ 479, aff'd, 65 Comp. Gen. 683 (1986), 86-2 CPD ¶ 10. Pursuant to this interpretation, we traditionally reviewed subcontractor selections that were "for" the government, where the subcontract awards concerned (1) subcontracts awarded by prime contractors operating and managing certain Department of Energy, or other agency, facilities; (2) purchases of equipment for government-owned, contractor-operated plants; and (3) procurements by certain construction management prime contractors. Ocean Enters., Ltd., supra.

Our review role of the award of subcontracts was called into question by U.S. West Comms. Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991), which held that under CICA the General Services Administration Board of Contract Appeals (GSBCA) did not have jurisdiction over protests of subcontract awards; the court of appeals held, construing statutory language basically identical to that applicable to our Office, that the GSBCA does not have jurisdiction over subcontract procurements that were 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).[2]

In response to this decision, we declined to review subcontract procurements conducted by Department of Energy management and operating prime contractors in the absence of

[2]Compugen argues that PRC under this contract satisfies the tests set out in New Mexico and Johnson Controls, so as to be considered a procurement agent for the purposes of this procurement. Those decisions held that, to be considered a procurement agent, the prime contractor must be (1) acting as a purchasing agent for the government; (2) the agency relationship between the government and the prime contractor must be established by clear contractual consent; and (3) the contract must state that the government would be directly liable to vendors for the purchase price. See 455 U.S. at 742; 713 F.2d at 1551-52. Here, there is no evidence that the prime contract established an agency relationship between PRC and the agency or provided that the government was directly liable to vendors/subcontractors for the purchase price.

a request by the agency that we do so.[3] Geo-Centers, Inc., B-261716, June 29, 1995, 95-2 CPD ¶ ___. Also in response to the U.S West decision and in the absence of any authorizing language in the recently enacted Federal Acquisition Streamlining Act of 1994, Pub. Law No. 103-355, Oct. 13, 1994, we issued final revisions to our Bid Protest Regulations confirming that we review of protests of subcontract awards only upon the written request of the federal agency that awarded the prime contract. See 60 Fed. Reg. 40,742-743 (1995) (to be codified at 4 C.F.R. §§ 21.5(h), 21.13(a)).[4] The protester here has not persuaded us that our view of the applicable law is erroneous. Accordingly, in the absence of a request by the federal agency concerned, we decline to take jurisdiction of this subcontract procurement "for" the government.

Compugen also asserts that we should take jurisdiction in any event because the agency's involvement is so pervasive that PRC is in effect merely a conduit for PTO and therefore this procurement is "by" the government.[5] We have reviewed subcontract procurements where the government's involvement in the award process is so pervasive that the subcontract is in effect awarded "by" the government. We have considered a subcontract procurement to be "by" the government where the agency handles substantially all the substantive aspects of the procurement, leaving to the prime contractor only the

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[3]The Department of Energy revised its regulations, effective June 2, 1995, to eliminate language providing for our bid protest review of its management and operating contractor procurements. See 60 Fed. Reg. 28,737 (1995).

[4]These revisions will become effective October 1, 1995.

[5]Compugen also argues, citing our decision in Premiere Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8, that we will take jurisdiction over a subcontract procurement where a protester merely alleges that the government is using a prime contractor as a conduit to evade the competition requirements of CICA. Compugen misreads this decision. In Premiere Vending, we considered whether a non-appropriated fund instrumentality--an employees club of the Federal Bureau of Prisons--in conducting a procurement was acting as a conduit for the agency in order to circumvent the requirements of CICA; we found that the employees club was not acting as a conduit for the agency and did not review the merits of the protest.

procedural or ministerial aspects of the procurement, i.e., issuing the subcontract solicitation and receiving proposals. See St. Mary's Hosp. and Medical Center of San Francisco, California, 70 Comp. Gen. 579 (1991), 91-1 CPD ¶ 597; University of Michigan; Indus. Training Sys. Corp., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. On the other hand, we have found subcontractor procurements were not "by" the government, even where the agency effectively directed the subcontractor selections, where the prime contractor handled other meaningful aspects of the procurement. See ToxCo, Inc., 68 Comp. Gen. 635 (1989), 89-2 CPD ¶ 170; Kerr-McGee Chemical Corp., B-252979, May 3, 1993, 93-1 CPD ¶ 358, aff'd, B-252979.2, Aug. 25, 1993, 93-2 CPD ¶ 120.

Here, the record establishes that PRC retained substantial responsibility for the conduct of the 1995 subcontract procurement, such that it did not act as a mere conduit for the government. Although Compugen argues that PRC does not have the expertise to evaluate the sophisticated system that is to be acquired;[6] that PRC did not comply with the documentation requirements of its prime contract for conducting APS resource procurements; and that the agency directed PRC to award a sole-source contract to MasPar in 1994,[7] we find none of these factors establishes that PRC acted as only a conduit for the agency. The evidence in the record, including the affidavits provided for PRC and agency personnel, establishes that it was PRC, and not the agency, which received and evaluated Compugen's proposal in response to the April 1995 CBD announcement and which determined that award should be made to MasPar. Specifically, PRC conducted all the discussions with Compugen regarding the acceptability of its proposal in response to the 1995 CBD announcement,[8] and the only contemporaneous evaluation

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[6]We do not find that PRC lacks the expertise to evaluate the biotechnology sequence search system that is being acquired by PRC.

[7]The relationship and conduct of the agency and PRC in 1994 with respect to the acquisition of the MasPar equipment does not ipso facto establish, as Compugen asserts, that PRC is acting as a conduit for the agency in 1995, even assuming the agency directed PRC to acquire MasPar equipment in 1994. Compugen did not timely protest the 1994 acquisition of the MasPar equipment.

[8]The affidavit of Compugen's director of marketing confirms that after the April 5, 1995 CBD announcement, PTO's only communications with Compugen regarding that firm's offered system were to inform Compugen that PRC was conducting the procurement, that PRC was acting in its own capacity as a

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documentation in the record is PRC's letter to Compugen detailing PRC's reasons for rejecting Compugen's proposal. In addition, the affidavits of PRC's and the agency's personnel evidence that PRC acted in more than a ministerial way in making this subcontract award and that, consistent with the PRC contract, the agency was not actively involved in the evaluation and source selection. In sum, the record indicates that PRC's involvement in the procurement is more than that of a mere conduit for the government, and we therefore find that this procurement is not, in effect, by the government. See ToxCo, Inc., supra.

The protest is dismissed.

/s/ Ronald Berger
for Robert P. Murphy
General Counsel

[8](...continued)
private company, and that Compugen should have received notice from PRC that PRC was making award to MasPar.