GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: RGB Display Corporation

File: B-284699

Date: May 17, 2000

Kelli Lazalier for the protester.
Geoffrey D. Chun, Esq., Department of the Navy, for the agency.
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DIGEST

General Accounting Office will not consider protest of an award of a subcontract as "by" the government where the item being procured is a component of the end item to be delivered under a supply contract and is being incorporated into the end item pursuant to a legitimate change order that is necessary to ensure that a compliant end item will be delivered.

DECISION

RGB Display Corporation protests the award of a subcontract to Diamond Visionics Company by Lockheed Martin Information Systems (LMIS), pursuant to a change order issued by the Department of the Navy under prime contract No. N61339-93-C-0004, for close combat tactical trainers (CCCT) for use by the Department of the Army.

We dismiss the protest.

The Navy awarded the prime contract to LMIS on November 20, 1992. Agency Report (AR) at 2, and attach. 1. The CCCT simulates a 360-degree view of the battlefield that a tank commander would have by peering out the top hatch of the vehicle. In the technology being replaced by the subcontract at issue, this "Commander's Popped Hatch" employed a circle of 10 26-inch monitors, with every other monitor placed at a higher level and turned downward instead of toward the center of the circle. The images of the five downward-facing monitors each reflected off of a mirrored surface (the beamsplitter) at approximately a 45-degree angle toward the center of the circle. This had the effect of creating a (virtually) seamless

360-degree image for the commander. Supplemental Agency Letter (SAL), Apr. 11, 2000, at 1. The 26-inch monitors, which were Cathode Ray Tube (CRT)-based, were manufactured by the protester, an LMIS vendor, using Mitsubishi Corporation's commercial off-the-shelf CRTs. During the course of performance, Mitsubishi discontinued production of the 26-inch CRTs. AR at 1.

With no currently available technical alternative identified by LMIS for the 26-inch monitors, the agency turned to the Department of Defense's (DOD) Small Business Innovation Research (SBIR) program on May 1, 1996. The Marine Corps awarded a competitively solicited phase 1 contract to Diamond Visionics on November 4, 1996 for a study to determine the scientific and technical merit and feasibility of alternatives to the 26-inch monitor. AR at 2-3, and attach. 5. A phase 2 award, for an initial prototype design, followed on August 13, 1997. AR at 3, and attachs. 6 and 7.

Diamond Visionics proposed digital display units (DDUs). The DDU does not use the traditional CRT technology. Rather, it uses a new chip technology made by Texas Instruments that is widely used in projectors. Diamond Visionics' initial prototype DDU design was a form/fit/function replacement for the 26-inch monitor, but required the use of a beamsplitter. Diamond Visionics subsequently determined that 10 DDUs could be placed in a circle (edge to edge) and provide the same virtually seamless 360-degree image without a beamsplitter. SAL at 2. Diamond Visionics was then awarded a phase 3 SBIR contract to produce a prototype DDU design without the beamsplitter, with options for production units. AR at 3, and attach. 9.

By the end of phase 2 of the SBIR contract, LMIS had almost depleted its inventory of 26-inch monitors. After an extensive trade study, the agency found that two different technologies existed to replace the 26-inch monitors: the DDU, and a modified 27-inch monitor proposed by the protester. When LMIS depleted its inventory of 26-inch monitors (prior to award of the phase 3 contract), the DDU was still in development, so LMIS purchased the protester's modified 27-inch monitors. AR at 3, and attachs. 10-16. After Diamond Visionics completed phase 3, an integrated product team (IPT) that included the agency, LMIS, and the end-users evaluated the DDU and the modified 27-inch monitor and conducted a life-cycle cost comparison. The IPT considered technical, safety, and human factors, as well as integrated logistics support, production readiness, configuration management, qualification testing, cost and risk factors. AR at 1, 3. Both technologies were found to have some problems, but the DDU was found to offer significantly higher performance and growth potential. The DDU also was found to offer excellent supportability through elimination of the expensive beamsplitter and elimination of the troublesome color alignment required due to shadow mask magnetization that characterizes the 26-inch monitor. AR at 3. In addition, the IPT determined that, although the DDU had a higher acquisition cost, it had a significantly lower life cycle cost because of lower annual maintenance and replacement spare acquisition costs. AR attach. 16. The agency selected the DDU technology and had LMIS negotiate with Diamond Visionics to establish pricing and terms and conditions. AR at 4. On March 23, 2000, the agency incorporated a change order into LMIS's contract

directing the prime contractor to use the DDU as the monitor component for the CCCT. AR at 4, and attachs. 20-21. This protest followed.

RGB challenges the agency's "directive" requiring LMIS to purchase unproven displays rather than the protester's modified 27-inch monitors. The protester claims that the visual quality and performance of its monitor is far superior to that of the unproven display, while its cost is much lower than the DDU's. Protest at 1-2. In its comments on the agency report, RGB claims it has developed additional advanced technological features for its monitor. Comments at 2-3. The protester requests that our Office direct that a fair competition be conducted by an unbiased agency based on cost, performance, and long-term availability.

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) (1994). 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 Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103 at 3-4. However, consistent with the holding in U.S. West Communications Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991), it now is our view that our jurisdiction generally does not extend to awards made by others but "for" the government; we therefore no longer review protests of such subcontract awards where, as here, the agency involved has not requested in writing that we do so. See 4 C.F.R. §§ 21.5(h), 21.13(a) (2000); see also Compugen, Ltd., supra, at 4-5.

We continue to take jurisdiction where the subcontract is "by" the government. See Peter Bauwens Bauunternehmung GmbH & Co. KG, B-277734 et al., Oct. 8, 1997, 97-2 CPD ¶ 98 at 2-3. Generally, we have reviewed subcontract procurements where the government's involvement in the award process was so pervasive that the subcontract in effect was awarded "by" the government. 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 or ministerial aspects of the procurement, i.e., issuing the subcontract solicitation and receiving proposals. See St. Mary's Hosp. and Med. Ctr. of San Francisco, California, B-243061, June 24, 1991, 91-1 CPD ¶ 597 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, even where the agency effectively directed the subcontractor selections, where the prime contractor handled other meaningful aspects of the

procurement. See Kerr-McGee Chemical Corp.--Recon., B-252979.2, Aug. 25, 1993, 93-2 CPD ¶ 120 at 4; ToxCo, Inc., B-235562, Aug. 23, 1989, 89-2 CPD ¶ 170 at 4-5.

There was no procurement "by" the government here. Our "by" jurisdiction to consider protests of subcontract awards does not encompass legitimate change orders--such as the one in issue here--issued by an agency pursuant to its contract administration responsibility to ensure that the agency will obtain a product compliant with the specifications. In this regard, it is significant that the subcontract supply of monitors is integral to--rather than discrete from--LMIS's obligation under its own supply contract to deliver compliant CCCTs; LMIS cannot perform its contract without the monitors. Further, the agency has no independent need for the monitors apart from the CCCTs; rather, the monitors were merely components to be incorporated into the end items to be delivered to the agency. Issuing a change order to specify a component under these circumstances, in our view, is part of legitimate contract administration, and does not constitute a procurement "by" the agency. See Kerr-McGee Chemical Corp.--Recon., supra, at 6, comparing Edison Chouest Offshore, Inc.; Polar Marine Partners, B-230121.2, B-230121.3, May 19, 1988, 88-1 CPD ¶ 477 (prime contractor was not a mere conduit where the subcontract work needed to be integrated by the prime contractor with its other functions to perform the prime contract) with University of Mich.; Industrial Training Sys. Corp., supra, (subcontracted services were discrete from any of the prime contractor's responsibilities under its prime contract). Such contract administration matters fall outside of our bid protest jurisdiction. 4 C.F.R. § 21.5(a) (2000).

Moreover, even if the protester were correct that the agency's actions were in the nature of a procurement, this was not a situation where the agency essentially "took over" the procurement such that the prime contractor was a mere conduit, with no substantive responsibilities. Rather, LMIS was a substantial participant in the technical evaluation of the competing proposals and also negotiated price and terms and conditions.

The protest is dismissed.

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