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Decision

Matter of: NEK Advanced Securities Group, Inc.

File: B-405270.2; B-405270.3

Date: October 3, 2011

Emanuel Anton, Esq., Anton Law Group, for the protester.
Debra J. Talley, Esq., Department of the Army, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Government Accountability Office will not consider protest of subcontractor selection as “by” the government where prime contractor developed the evaluation criteria, participated in the evaluation of initial proposals, developed the terms of a request for final offers, evaluated the final proposals, performed the responsibility determinations, and selected the awardee.

DECISION

NEK Advanced Securities Group, Inc., of Colorado Springs, Colorado, protests the decision by Raytheon Technical Services Company, LLC, a government prime contractor, to select Oak Grove Technologies, Inc., of Raleigh, North Carolina, rather than itself, to provide training support to the Army.

We dismiss the protest.¹

In 2007, the U.S. Army Program Executive Office for Simulation, Training and Instrumentation (PEO STRI) awarded Raytheon a 10-year indefinite-delivery/indefinite-quantity contract to provide training services and support for U.S. military agencies and multinational coalition forces. In April 2011, PEO STRI issued a

¹ The agency sought dismissal of the protest arguing that it was untimely and that our Office lacked jurisdiction over the protest. Because, as explained below, we agree with the agency that we lack jurisdiction, we need not address the agency’s argument that the protest was untimely filed.

request to Raytheon for a proposal to perform instruction and training services for U.S. Army Special Operations Forces (the end user). The agency's request included a statement of work describing in detail the agency's requirements. Upon receipt of the request, Raytheon developed evaluation criteria and prepared a subcontractor solicitation for the work that it did not intend to self-perform. Raytheon issued the solicitation to a pre-established group of subcontractors and received three proposals in response. The protester and Oak Grove were among the responding firms.

Raytheon employees and representatives of the end user evaluated the proposals. The end user evaluators assigned Oak Grove's proposal the highest technical score and NEK's proposal the second highest score, whereas the Raytheon evaluators rated NEK's proposal most favorably and Oak Grove's third. Raytheon personnel separately performed an evaluation of the offerors' pricing without any involvement from government personnel. After reviewing the evaluation results, a Raytheon source selection board determined that NEK and Oak Grove had offered comparable technical solutions and prices, and that to differentiate between the proposals, it would give both offerors the opportunity to address weaknesses in their proposals and to submit final offers. Raytheon personnel determined the terms of the request for final offers and evaluated the responses from the two firms; Raytheon personnel then selected Oak Grove for award. Raytheon personnel also independently evaluated the two offerors' responsibility.

NEK objects to the selection of Oak Grove's proposal, arguing that it should have been rejected as technically unacceptable because it failed to include required information. As explained below, we will not consider the merits of NEK's protest because the procurement here was not conducted by 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) (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. 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). 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 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 the awardee. Alatech Healthcare LLC, B-400925, B-400925.2, Mar. 9, 2009, 2009 CPD ¶ 57 at 3-4.

Here, it is clear from the record that the agency’s involvement in and control over the acquisition process were not so pervasive as to render the procurement essentially by the government. Raytheon personnel developed the evaluation criteria, participated in the evaluation of initial proposals, developed the terms of the request for final offers, evaluated the final proposals, performed the responsibility determinations, and selected Oak Grove for award. While we recognize that agency personnel played a major role in the evaluation of initial proposals and that the Raytheon source selection board gave considerable weight to their findings in its final evaluation, government involvement in the evaluation/selection process is not enough to make the procurement “by” the government, STR, L.L.C., B-297421, Dec. 22, 2005, 2006 CPD ¶ 11 at 5. Rather, 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 meaningful input into substantive decisions, *id.*, which the record does not establish to have been the case here.²

² Our review of the record here included consideration of the statement furnished by NEK’s co-CEO, as well as Raytheon’s subcontractor source selection document and statements by the agency contracting officer and Raytheon’s Director of Sourcing, Procurement, and Subcontracting.

Because we find that the procurement here was not “by” the government, we conclude that we do not have jurisdiction over NEK’s protest. Accordingly, the protest is dismissed.³

Lynn H. Gibson
General Counsel

³ We also dismiss as academic NEK’s request for reconsideration of our decision NEK Advanced Securities Group, Inc., B-405270, Aug. 1, 2011, in which we dismissed as untimely a separate NEK protest of the selection of Oak Grove. Because we lack jurisdiction over the selection decision by Raytheon, we would not consider the protest even if we determined it to be timely.