U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Raytheon Company

File: B-415722; B-415722.2; B-415722.3

Date: December 28, 2017

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Colonel C. Taylor Smith, Sarah L. Stanton, Esq., Lieutenant Colonel Kevin P. Stiens, and Alexis J. Bernstein, Esq., Department of the Air Force, for the agency.
Paula J. Haurilesko, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO will not consider the protest of a potential radar subsystem subcontractor challenging offerors' exclusion from the competitive range where the offerors, and not the agency, selected and negotiated with the subcontractors for inclusion in the offerors' proposal and are responsible for delivering the entire system to the government.

DECISION

Raytheon Company, of McKinney, Texas, protests the exclusion of certain proposals from the competitive range under request for proposals (RFP) No. FA8730-16-R-0021, issued by the Department of the Air Force for the Joint Surveillance Target Attack Radar System (JSTARS) recapitalization effort. Raytheon challenges the Air Force's competitive range determination and the evaluation of Raytheon's radar.

We dismiss the protest.

BACKGROUND

The JSTARS program is a command and control weapon system that provides forward deployed battle management, robust communications, standoff surface surveillance, target detection, and tracking and combat identification of objects within specified combat engagement areas. Air Force Request for Dismissal, Attach. 1, RFP amend. 2,

at 2943.[1] The major features of the JSTARS mission system are the aircraft; radar subsystems; communications; and battle management command and control. Id. The agency's recapitalization (recap) program is intended to incorporate currently available technology to replace legacy JSTARS battle management command and control and intelligence, surveillance, and reconnaissance capabilities on a smaller, more efficient airframe. Id. In March 2016, as part of the JSTARS recap radar risk reduction effort, the Air Force awarded sole-source contracts to Raytheon and Northrop Grumman for the contractors to mature the radar subsystem design to support potential JSTARS recap engineering and manufacturing development (EMD) prime contractors. Protest at 4; Exh. A, Raytheon Radar Risk Reduction Contract, Statement of Work, at 1, 7.

On December 28, 2016, the agency issued RFP No. FA8730-16-R-0021 seeking proposals for EMD and production of the recapitalization of the JSTARS weapon system. Air Force Request for Dismissal at 2. The RFP states that award will be made to the offeror who provides the best value to the government, where a tradeoff will be made between the technical factor and cost. RFP amend. 2, at 4355. The technical factor is considered more important than price. Id. Offerors are also required to receive an acceptable rating under the small business participation factor to be eligible for award. Id.

The technical factor is comprised of three equally weighted subfactors: weapon system, program execution, and design architecture and life cycle enablers. Id. at 4356. As relevant here, under the design architecture and life cycle enablers subfactor, the RFP states that the government will evaluate the offeror's proposed design approach and solutions to meet JSTARS recap program requirements and objectives applicable to the following elements:

- software development approach,
- radar open systems architecture compliance and subsystem design and performance, and
- data rights.

Id. at 4357. The RFP states that a single technical/risk rating will be assigned to each subfactor. Id. at 4356. With respect to the radar subsystem, the RFP states that "[t]he Government highly encourages Offerors to submit two full proposals, each using a separate radar solution." Id. at 4289. The RFP further states that the government reserves the right to use information from the two ongoing radar risk reduction contracts to inform the evaluation notices of the proposed solution. Id. at 4290.

The Air Force received two proposals each from the Boeing Company, Lockheed Martin Corporation, and Northrop Grumman Systems Corporation. Air Force Request for Dismissal, Attach. 2, Competitive Range Decision Document, at 2. Each offeror

[1] Where the Air Force renumbered documents in the record, we cite to the agency's page numbers.

submitted a proposal offering a Raytheon Space and Airborne Systems radar, and another proposal offering a Northrop Grumman Mission Systems radar. Id. After reviewing the six proposals, the Air Force assigned the proposals the following ratings:

[DELETED]

Id. at 5. The source selection authority (SSA) reviewed the evaluation results and established a competitive range of the most highly rated proposals, comprised of the Boeing, Lockheed, and Northrop proposals that offered the Northrop radar. Id. The SSA noted that, although the three proposals offering the Northrop radar contained [DELETED] correctable through discussions and did not require a major technical redesign to the offerors' solutions. Id. at 8.

The SSA concluded that, in each of the proposals offering the Raytheon radar, the radar presented an unacceptable risk of unsuccessful performance. Id. In this regard, the SSA cited several reasons for excluding the proposals containing the Raytheon radar from the competitive range, including the radar's dependence on the [DELETED]; inclusion of [DELETED]; lack of [DELETED]; reliance of a [DELETED] that do not meet solicitation requirements; failure to address multiple requirements in the [DELETED]; ambiguous material to support the [DELETED]; and inconsistent, inaccurate, or overly optimistic claims regarding [DELETED] based on the government's knowledge of the ongoing radar risk reduction efforts and the [DELETED], as well as the Air Force's knowledge about radar design. Id. at 6-7.

Upon learning of the Air Force's competitive range determination, Raytheon protested to our Office, objecting to the agency's evaluation of its proposed radar solution and conclusions upon which the Air Force based its competitive range determination.

DISCUSSION

Raytheon contends that the Air Force's competitive range determination constitutes a subcontractor selection "by the government" and therefore GAO has jurisdiction over its protest. Raytheon Objection to Dismissal Request at 1, 11. Raytheon contends that the Air Force handled the substantive aspects of the procurement with respect to the proposed radar subsystems. Id. at 11. In this regard, Raytheon states that the Air Force: (1) established the requirements and specifications for the JSTARS radar subsystem in the systems requirement document, which governs Raytheon's and Northrop's radar risk reduction contracts as well as the JSTARS EMD solicitation; (2) evaluated and rated the proposed radars, assigned strengths, weaknesses, and deficiencies to the radars, and drafted evaluation notices that were specific to each subcontractor; and (3) relied on the evaluation of the radars as the determining factor in establishing the competitive range. Id. at 11, 14-15. On this basis, Raytheon argues that there is no material, meaningful distinction between the Air Force's evaluation of a prime contractor's technical proposal that included the radar solution and the evaluation of a subcontractor's proposal for the radar solution. Id. at 15.

Raytheon further argues that the fact that Raytheon's proposal was part of a larger proposal submitted by a potential prime contractor does not prevent GAO from taking jurisdiction. Id. at 14. Raytheon asserts that our decision in The Panther Brands, LLC, B-409073, Jan. 17, 2014, 2014 CPD ¶ 54, is applicable to the circumstances here, because our Office took jurisdiction over a protest of the award of a second-tier subcontract where the agency used its own evaluation criteria to evaluate summaries of subcontractor proposals, assign adjectival ratings, and identify strengths and weaknesses, and thus handled substantially all of the substantive aspects of the procurement. Id. at 13. Raytheon argues that, here, the Air Force encouraged and expected offerors to propose both Raytheon and Northrop radar solutions so that the agency could evaluate and choose between them; the agency then evaluated Raytheon's and Northrop's subcontract proposals, as presented by the prime offerors, and selected which subcontract solution will be used in the JSTARS EMD contract. Id. at 14, 16.

The Air Force contends that Raytheon is not an interested party to protest the exclusion of Boeing's, Lockheed's, and Northrop's proposals from the competitive range, and asks that we dismiss the protest. Air Force Request for Dismissal at 1. The agency states that Raytheon did not submit a proposal and as a subcontractor does not have a direct economic interest to be able to protest the exclusion of the prime contractors' proposals from the competition and therefore, GAO does not have jurisdiction over this protest. Id. at 3 (citing 4 C.F.R. § 21.5(h) (GAO will not consider a protest of the award or proposed award of a subcontract except where the agency has requested in writing that such protests be reviewed by GAO)).

The Air Force asserts that our decisions in which we have concluded that a subcontractor has standing to protest involve a subcontract award decision that was controlled directly and completely by the government, not the evaluation of an offeror's proposal under a solicitation for a prime contract. Id. at 4. The agency further asserts that it had no involvement in the terms of the subcontractor arrangements in the JSTARS recap procurement, and although it encouraged offerors to leverage the radar risk reduction contractors and consider submitting a proposal for each of the two possible radar solutions, it left the selection of the subcontractors and the terms and details of the evaluation of the subcontractor proposals and subcontractor arrangements and configuration to the potential prime contractors. Id. In this regard, the Air Force states that the offerors proposed different prices, contract types, and scope with respect to the Raytheon radar to support the offerors' proposed JSTARS solutions. Id. The Air Force also states that nothing in the RFP constrained the offerors' selection of subcontractors, and nothing precluded offerors from conducting their own evaluation of the Northrop and Raytheon radars and selecting only one for inclusion in a proposal. Id.

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(1)(A). In the context of subcontractor procurements, we initially 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 Ocean Enters., Ltd., B-221851, May 22, 1986, 86-1 CPD ¶ 479, aff'd, Ocean Enters., Ltd.--Recon., B-221851.2, June 26, 1986, 86-2 CPD ¶ 10. Pursuant to this interpretation, we had 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. Id.

In 1995, in light of the decision by the Federal Circuit in U.S. West Comms. Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991),[2] we determined that we would no longer exercise jurisdiction over subcontract protests "for" the government, in the absence of a request by the federal agency involved in the procurement. See 4 C.F.R. § 21.5(h); Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103 at 4-5. However, we continue to take jurisdiction where we find that a subcontract essentially was awarded "by" the government. See The Panther Brands, LLC, supra, at 4-6.

In this regard, we have considered a subcontract procurement to be "by" the government where the agency handled substantially all of the substantive aspects of the procurement and, 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. Id.; St. Mary's Hosp. & Med. Ctr. of San Francisco, Cal., B-243061, June 24, 1991, 91-1 CPD ¶ 597 at 5-6. 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 Baron Servs., Inc., B-402109, Dec. 24, 2009, 2009 CPD ¶ 264 at 3; Kerr-McGee Chem. Corp.--Recon., B-252979.2, Aug. 25, 1993, 93-2 CPD ¶ 120 at 4-6.

Based on the record before us, we find that there was no procurement "by" the government here with respect to the radar subsystems.[3] Although we recognize that

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[2] The decision construed statutory language in CICA basically identical to that applicable to our Office to mean that the General Services Administration Board of Contract Appeals did 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).

[3] Raytheon presented a many-layered argument that the Air Force's competitive range determination constitutes a subcontractor selection "by the government." Although we (continued...)

the Air Force's competitive range determination essentially results in selection of the radar subsystem subcontractor, we conclude, based on our prior decisions, that the offerors are not acting as conduits for the government in the procurement of these radar systems because the radars are part of a larger system in which the prime contractor has the responsibility for integrating the radar into the larger system under the prime contract.

For example, in RGB Display Corp., B-284699, May 17, 2000, 2000 CPD ¶ 80, a protest of the award of a subcontract for digital display units (monitors) to be used in close combat tactical trainers, our Office concluded that we did not have jurisdiction over a subcontract issued pursuant to a change order. Id. at 4. There, when cathode-ray tubes were no longer available for use in 26-inch monitors, the agency awarded a competitively solicited phase I contract under the Small Business Innovative Research program for a firm to study alternatives to the monitors. Id. at 2. At the end of the phase I contract, that firm proposed using digital display units in place of the 26-inch monitors. Id. An integrated product team consisting of the agency, prime contractor, and end users evaluated the digital display units and RGB's proposed substitute monitors. Id. The agency selected the digital display units and had the prime contractor negotiate to establish pricing and terms and conditions. Id. In concluding that GAO did not have jurisdiction, the decision noted that "it is significant that the subcontract supply of monitors is integral to--rather than discrete from--[the prime contractor's] obligation under its own supply contract to deliver compliant [close combat tactical trainers]; [the prime contractor] cannot perform its contract without the monitors." Id. at 4.

Similarly, in Rohde-Schwarz-Polarad, Inc.--Recon., B-219108.2, July 8, 1985, 85-2 CPD ¶ 33, our Office concluded that we did not have jurisdiction over the award of a subcontract for very high frequency (VHF) direction-finders for use at municipal airports by the prime contractor providing the Federal Aviation Administration (FAA) with VHF direction-finder systems. In the decision, we concluded that the prime contractor was not acting as a conduit between the FAA and the subcontractor, even though the equipment supplied under the subcontract was a major component of the required system. Id. at 2. In this regard, we stated, "[r]egardless of whether [the prime contractor] itself produces the various components or simply integrates them into the required system, [the prime contractor] is responsible under its contract with FAA for developing the end-product systems." Id.

Here, the competitive range determination involves the selection of a prime contractor for the JSTARS EMD recapitalization effort. Although the radars are integral to the prime contractor's obligations under the JSTARS EMD contract and the agency considered the radars proposed by the offerors in the agency's evaluation, the radars are a subsystem to the entire effort. Therefore, based on our decisions in RGB Display

(...continued)
have discussed a few of those arguments here, we have considered all of Raytheon's arguments, and find no basis to take jurisdiction over the protest.

Corp. and Rohde-Schwarz-Polarad, Inc., we conclude that there was no procurement "by" the government of the radar subsystems.

Likewise, in The Boeing Co.; Bombardier, Inc., B-414706, B-414380.2, Aug. 25, 2017, 2017 CPD ¶ 274, our Office concluded that it did not have jurisdiction over a sole-source subcontract award for an aircraft where the proposed sole-source award of a contract with the prime contractor anticipated selection of the aircraft by the prime contractor, not the government. See, id. at 6-7. The proposed sole-source award to the prime contractor required the firm to select the aircraft subject to the requirements established by the Air Force. We concluded that neither the terms of the statement of work, nor the sole-source justification and approval document for the prime contract award, demonstrated that the Air Force would handle the substantive aspects of the subcontract procurement, such that the prime contractor would be left with only a procedural role in the selection of the aircraft. Id. at 7. In the instant protest, although the record shows that the agency evaluated the technical aspect of the proposed radar subsystems, as in The Boeing Co.; Bombardier, Inc., the offerors were free to propose either one radar subsystem, or both, and to structure the terms of the subcontract.

Although Raytheon analogizes to our decision in The Panther Brands, LLC, we conclude that the circumstances are inapposite. The protest in The Panther Brands involved the award of a subcontract by a first-tier subcontractor for sponsorship of a racing team by the Army National Guard. The Army National Guard developed a statement of work, which the subcontractor used to develop a solicitation to obtain an IndyCar driver and team to sponsor. The subcontractor provided a summary of the contents of the proposals, which was incorporated into the prime contractor's task order proposal. The Army National Guard evaluated the summaries and chose the IndyCar team based on the summaries. We took jurisdiction because, although summaries of the IndyCar proposals were included in the prime contractor's task order proposal, the agency evaluated the IndyCar proposals as distinct from the prime contractor's task order proposal and selected the racing team to sponsor. In the instant case, offerors selected and negotiated the terms with their subcontractors, and the Air Force evaluated the radar subsystems as part of a larger proposal in a competitive

acquisition.[4] Accordingly, this is not a situation where the selection of the radar subsystem contractor included in the offerors' proposals was "by" the government.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

[4] Even if we were to assume that Raytheon was in essence a joint venture partner or team member in a teaming arrangement, we would not find Raytheon to be an interested party. Compare, InSpace 21 LLC, B-410852, B-410852.3, Dec. 8, 2014, 2014 CPD ¶ 363 at 4 (member of joint venture is not an interested party to protest where it is unclear that it has the authority to represent the joint venture) with Burns & Roe Servs. Corp., B-291530, Jan. 23, 2003, 2004 CPD ¶ 85 at 2 n.1 (team member is interested party when authorized to act for joint venture). Here, Raytheon does not assert that it is representing any of the offerors in its protest.