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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Addison Construction, Inc.

File: B-293805

Date: April 20, 2004

Christopher Solop, Esq., and Lynn Hawkins Patton, Esq., Armstrong Allen, for the protester.
Alexander T. Bakos, Esq., National Aeronautics and Space Administration, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office will not consider protest of an award of a subcontract as "by" the government where prime contractor drafted the sections of the solicitation pertaining to the evaluation of bids, evaluated the bids, and selected the awardee.

DECISION

Addison Construction, Inc. protests the award of a subcontract by Mississippi Space Services (MSS), a National Aeronautics and Space Administration (NASA) prime contractor, to Holliday Construction Corporation.

We dismiss the protest.

MSS holds a contract with NASA for the provision of facility operating services at Stennis Space Center, Mississippi. Among the services to be furnished by MSS pursuant to the contract are acquisition services, including the subcontracting out of construction contracts. The contract provides for the initiation of a subcontract construction acquisition by the contractor upon receipt of a request from NASA describing the requirement, known as a Stennis Work Request (SWR).

On January 12, 2004, the NASA contracting officer issued an SWR to MSS for site development for a future First Response Facility, and on January 16, MSS issued a "request for bid" (RFB) for the work. The RFB specified the period of performance as 120 calendar days from the date of award and provided for award to the "responsible, responsive, and technically-acceptable bidder whose bid, conforming to the solicitation, will be most advantageous to MSS, considering only price and the

price-related factors specified elsewhere in the solicitation." RFB, § M.2.[1] Bidders were to furnish prices for various line items of work (e.g., mobilization and demobilization, surveying and layout, and hauling and compacting fill), as well as a total price. In addition, bidders who were unable to meet the MSS schedule were invited to propose an alternate schedule. RFB, § B, p. 4.

MSS opened 11 bids on February 19. Addison's bid of $588,000 was lowest, and Holliday's bid of $637,600 was seventh lowest. Addison confirmed in its bid that it would complete the job within the required performance period of 120 days, while Holliday, in the section of the bid where bidders unable to meet the MSS schedule were to propose alternate schedules, offered a performance period of [deleted] days. Holliday was the only bidder to propose an alternative schedule.

By e-mail message dated February 24, the MSS engineer/program manager for the project recommended to the MSS contract management office that the "Site Preparation Contract Award go to the company that can complete the job the fastest." The engineer explained the rationale for his recommendation as follows:

> The First Response Facility Building Contract would be significantly impacted by delays in the Site Preparation Project resulting from the rainy season coming in June. If we can beat the rain under this contract then possible weather delays in the preceding [sic] building contract will be reduced. In addition, the economic benefits of completing the contract in [deleted] days offset the additional contract cost for faster performance and at the very least ends up a wash. I spoke with [deleted], the NASA Project Technical Monitor, and he indicated that he would prefer to have the job completed as soon as possible for the same reasons.

Agency Request for Dismissal, Exhibit 11. A second e-mail message, dated February 25, from the NASA technical monitor to the MSS engineer, documented the technical monitor's basis for agreeing that the site development contract should be awarded to other than the low bidder, i.e., that time saved on the site development work would beneficially affect the follow-on building construction schedule; that a longer period of performance would increase the probability of delays by extending the completion date further into the hurricane season; and that, due to inflation, earlier completion of the follow-on work would reduce overall project cost. The technical monitor noted that while he recommended award to other than the low bidder, "it remain[ed] fully MSS's responsibility to make the appropriate award, all factors being considered."

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[1] The only price-related factor specified elsewhere in the solicitation was a price evaluation preference for small disadvantaged businesses.

MSS did not proceed with award to Holliday, however; instead, without consulting or informing the NASA technical monitor or any other NASA employee, MSS sought a "best and final offer" (BAFO) from each of the seven lowest-priced bidders. In its BAFO request, issued on March 1, MSS notified bidders as follows:

> The original baseline bid requested a 120-day Period of Performance. We feel that it might not have been clear that you could offer an alternative or shorter period of time to complete the work, and would like to allow you the opportunity to re-visit your bid.

Accordingly, MSS asked bidders how long "in their best judgment" it would take them to complete the project, and what, if any impact it would have on their bids.[2]

Six bidders responded to the BAFO request, as follows:

Bidder	**Addison**	**Bidder 1**	**Bidder 2**	**Bidder 3**	**Bidder 4**	**Holliday**
Base Award Calendar Days	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]	[deleted][3]
Mobilization Complete After Notice-to-Proceed	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
Complete Work After Mobilization Complete	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
Monetary Impact	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]
Original Bid	$588,000	$606,500	$612,350	$615,300	$630,555	$637,600
BAFO	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]	[deleted]

[2] The BAFO request asked bidders for the number of days that it would take them to complete the "base award"; the number of days that it would take them to complete mobilization after notice to proceed; and the number of days that it would take them to complete all base award work after mobilization had been completed.

[3] While in its table summarizing the above information, Agency Report, Tab 25, MSS indicates that Holliday proposed [deleted] calendar days to complete the base award and [deleted] to complete the work after mobilization has been completed, Holliday's bid shows that it actually reversed its entries for the two items, proposing [deleted] days for the base award and [deleted] days to complete the work. We assume that the table prepared by MSS is based on MSS's assumption that Holliday intended to complete the work in [deleted] days.

On March 5, MSS notified Addison that Holliday had been selected for award and that MSS was awaiting NASA's approval. Protest at 5. By letter dated March 9, MSS requested the consent of the NASA contracting officer to award a subcontract to Holliday. Addison protested to our Office the same day.[4]

Addison asserts that it was entitled to award as the lowest-priced technically acceptable bidder at the time of the initial bid opening. In the alternative, the protester alleges that it was misled by the agency with regard to the content of its BAFO and that the agency should solicit a second round of BAFOs. We will not consider the merits of Addison's arguments because, as explained below, the procurement at issue 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) (2000). 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 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 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 but "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.[5]

We continue to take jurisdiction where the subcontract is "by" the government. RGB Display Corp., B-284699, May 17, 2000, 2000 CPD ¶ 80 at 3. We have considered a

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[4] It is our understanding that no award has been made pending our decision on the protest.

[5] NASA has not requested that we review protest of subcontract awards by any of its prime contractors. Agency Request for Dismissal at 2, n.1.

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 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 an awardee. See Kerr-McGee Chemical 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.

MSS's involvement in and control over the procurement here was such that the procurement cannot be said to have been conducted by the government. In this connection, while it is true that NASA defined the scope of the work to be performed, it was MSS that drafted the sections of the RFB pertaining to the evaluation of bids, evaluated the bids, and selected the awardee. Further, while the MSS program manager consulted with the NASA technical monitor during the evaluation process regarding awarding to the bidder with the shortest proposed period of performance, there is no indication that the technical monitor's input was anything more than a recommendation--indeed, in his e-mail message to the MSS program manager, the technical monitor emphasized that notwithstanding his recommendation, responsibility for award remained with MSS. Moreover, it is evident that the technical monitor's recommendation was not controlling in that it was not in fact implemented--i.e., MSS did not proceed with award to the bidder offering the shortest period of performance, as recommended by the technical monitor; instead, without notice to or consultation with any NASA employee, it solicited BAFOs.

Because we find that the procurement here was not "by" the government, we conclude that we do not have jurisdiction over Addison's protest. Accordingly, the protest is dismissed.

Anthony H. Gamboa
General Counsel