ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --   )
)
Mr. Michael Ronchetti and RFIDcomplete, LLC   )   ASBCA No. 56201
)
Under Contract No. SPO103-06-C-0013   )

APPEARANCE FOR THE APPELLANT: Christopher D. Cyphers, Esq.
                                         Frontier Law Group, LLC
                                         Palmer, AK

APPEARANCES FOR THE GOVERNMENT: Michael L. McGlinchey, Esq.
                                         Chief Trial Attorney
                                       Suzanne M. Steffen, Esq.
                                         Trial Attorney
                                         Defense Supply Center (DLA)
                                         Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE STEMPLER
ON THE GOVERNMENT'S MOTION TO DISMISS

The government moves to dismiss the appeal for lack of jurisdiction on the basis that the appellants, RFIDcomplete, LLC (RFIDc) and Mr. Micheal Ronchetti, are subcontractors with whom the government has no privity of contract. We grant the government's motion and dismiss the appeal for lack of jurisdiction.

FINDINGS OF FACTS FOR PURPOSES OF THE MOTION

1. On 27 September 2006, Naniq Systems, LLC (Naniq) and RFIDc entered into a Memorandum of Understanding (MOU). The MOU provided that the parties would work together to obtain Federal contracts. Paragraph 4(a) of the MOU stated that for each project the relationship between Naniq and RFIDc would be either a joint venture, prime subcontractor or teaming agreement. The MOU is signed on RFIDc's behalf by Mr. Michael Ronchetti. (R4, tab 26, ex. 3 at 3b)

2. The Defense Logistics Agency (DLA) Enterprise Services, Defense Supply Center Philadelphia awarded Contract No. SPO103-06-C-0013 (the prime contract) to Naniq on 30 September 2006. The contract was for enhancement of the efficiency of Department of Defense global supply chain processes through implementation of Radio

Frequency Identification (RFID) technology. The contract incorporated by reference Naniq's cost proposals. (R4, tab 2)

3. Naniq's cost proposal II also stated in relevant part:

> The operating arrangement between Naniq and the Team companies will be a prime/sub contract. Naniq will be the Prime Contractor with each Team company acting as a subcontractor to Naniq. . . .
>
> . . . .
>
> The "Role and Obligations of Each Party" stipulate that Naniq will offer a subcontract for specified services to each Team member as follows:
>
> RFIDcomplete – " . . . Automatic Data Capture Services and Engineering. i.e. barcoding, RFID, Real Time tracking systems- and other descriptions for this particular market."

(R4, tab 2 at 3 of 12, ¶ 1.1) RFIDc's invoices were submitted directly to Naniq for payment (R4, tab 26, attachment).

4. The prime contract incorporated FAR 52.233-1 DISPUTES (JUL 2002) (R4, tab 26 at 27 of 46). It did not include any language authorizing a direct appeal by a subcontractor. Nor did it refer to FAR 9.6 CONTRACTOR TEAM ARRANGEMENTS, which states in part:

> 9.601 Definition.
>
> "Contractor team arrangement," as used in this subpart, means an arrangement in which –
>
> (1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
>
> (2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.

5. By letter dated 2 May 2007, outside counsel submitted a $129,152.10 claim[1] under the prime contract on behalf of Mr. Michael Ronchetti and RFIDc to the contracting officer and requested a final decision. In its claim, appellants state in pertinent part:

> In September of 2006, four RFID Implementing Contractors . . . entered into a teaming arrangement and submitted a joint proposal (the "*Joint Offer*") in response to a request for proposal . . . . On September 30, 2006, DLA accepted the team's final revised Joint Offer and awarded the DLA Contract to the team under a Contractor Team Arrangement as authorized by <u>FAR 9.6</u> and as further set out in the DLA Contract. Thereafter, the RFID Implementing contractors proceeded as agreed under the Contractor Team Arrangement for a brief period of time until Naniq Systems LLC ("Naniq") unilaterally, and without notice to the balance of the RFID Implementing Contractors, attempted to make modifications and/or amendments to the DLA Contract without RFIDc's approval as required by applicable FARs, the DLA Contract and . . . RFIDc's Memorandum of Understanding with Naniq (the "*Teaming Agreement*"). [emphasis in original]

(R4, tab 26)

6. By final decision dated 27 June 2007[2] the contracting officer determined that the government had no privity of contract with appellants. The claim, therefore, was not considered. The contracting officer suggested that any disagreement that RFIDc has with Naniq should be pursued directly with Naniq and provided appellants with the mandatory language concerning their right of appeal. (R4, tab 27)

7. By letter dated 21 September 2007, appellant's appealed from the contracting officer's decision.

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[1] The claim was certified by appellants' outside counsel. We express no opinion on this certification.

[2] The letter was mistakenly dated 27 June, 2008.

<u>DECISION</u>

The government moves to dismiss this appeal on the basis that the Board lacks jurisdiction over the appeal because appellants are subcontractors with whom the government has no privity of contract. Our jurisdiction stems from the Contract Disputes Act of 1978 (CDA), as amended, 41 U.S.C. §§ 601-613, which "gives the right to appeal to a Board of Contract Appeals to contractors only and not to subcontractors." *Technic Services, Inc.*, ASBCA No. 38411, 89-3 BCA ¶ 22,193 at 111,651. A subcontractor "may prosecute its claims only through, and with the consent and cooperation of, the prime . . . ." *Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810, 814 (Fed. Cir. 1984). A subcontractor whose claims are not sponsored by the prime lacks privity with the government. *United States v. Johnson Controls, Inc.,* 713 F.2d 1541, 1550-51, 1556 (Fed. Cir. 1983).

Appellants argue that the offer encompassed in Naniq's cost proposal, which was accepted by the government, was actually a joint offer. As such, the government entered into the contract under a "Contractor Team Arrangement as authorized by <u>FAR 9.6</u> [emphasis in original]" and as further set out in the contract. The contract does not, as appellants contend, award the contract to a team. The only party to the contract with the government was Naniq. Naniq's cost proposal as incorporated into the contract clearly stated that Naniq and the team companies were operating under a "prime/sub" relationship. The contract makes no reference to FAR 9.6, or that the contract was being awarded under FAR 9.6. Further evidence of the prime-subcontractor relationship between Naniq and appellants is that RFIDc submitted its invoices directly to Naniq, not the government.

Appellants further allege that the teaming agreement contemplated a joint working relationship between Naniq and RFIDc with the "potential for developing into a prime/sub relationship." Appellants urge the Board to determine that the failure of Naniq to honor its duties under the contract should not affect the government's obligation to pay RFIDc for its work under the contract. We have not made any finding of fact concerning RFIDc's allegation that Naniq failed to honor its obligations under the contract because, even if proven, they would be irrelevant to our decision on the motion.

The prime contract did not provide for a direct subcontractor appeal and there is no evidence that appellants were part of a joint offer or teaming arrangement that gave it prime contractor status.

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The appeal is dismissed for lack of jurisdiction.

Dated: 7 March 2008

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MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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I <u>concur</u>   I <u>concur</u>

EUNICE W. THOMAS   MONROE E. FREEMAN, JR.
Administrative Judge   Administrative Judge
Vice Chairman   Armed Services Board
Armed Services Board   of Contract Appeals
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56201, Appeal of Mr. Michael Ronchetti and RFIDcomplete, LLC, rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals

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