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# Decision

**Matter of:** Thales LAS France SAS

**File:** B-422805

**Date:** August 30, 2024

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## DIGEST

Protest challenging the decision of a prime contractor to refuse to sign an end user certificate with the protester in connection with a subcontract procurement is dismissed where the procurement was not by the government and the agency awarding the prime task order has not requested that subcontract protests be decided by our Office.

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## DECISION

Thales LAS France SAS, of Limours, France, protests the conduct of a subcontract procurement by BAE Systems Technology Solutions & Services, Inc. (BAE), of Falls Church, Virginia, under solicitation No. MS-23-057, issued by BAE for radar arrays. The protester contends that BAE, acting as the United States Space Force's representative, has erred in refusing to sign an end user certificate to permit Thales to transmit its complete subcontract proposal.

We dismiss the protest for lack of jurisdiction.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act (CICA), 31 U.S.C. sections 3551-3557. Under 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).

Under this requirement, our jurisdiction generally does not extend to awards made by others “for” the government, and in the absence of a request by the federal agency concerned, we do not take jurisdiction over subcontract procurements conducted by prime contractors on behalf of the government. *Compugen Ltd.*, B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103 at 3-4. We will take jurisdiction, however, where we find that a subcontract essentially was awarded “by” the government. *The Panther Brands, LLC*, B-409073, Jan. 17, 2014, 2014 CPD ¶ 54 at 4-6. That is, 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. In contrast, we have found subcontractor procurements are 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. *Raytheon Co.*, B-415722 *et al.*, Dec. 28, 2017, 2018 CPD ¶ 56 at 5.

The agency requests that we dismiss the protest in this case because, while the agency issued a task order request for proposals (RFP) to BAE, BAE is solely responsible for conducting the subcontract procurement that the protester is challenging. Agency Req. for Dismissal at 6-10. Specifically, BAE issued the subcontract RFP, received proposals from prospective subcontractors, evaluated them, and made a source selection decision. *Id.* Following that process, BAE submitted its proposal in response to the agency’s task order RFP, but the agency has not yet issued a task order to BAE. *Id.* Of note the agency represents that it has had no role in BAE’s selection of subcontractors, other than to provide a list of six possible sources at the outset of the selection process. *Id.* at 2.

In response, Thales principally argues that two emails sent by BAE representatives confirm that the agency, not BAE, was in fact responsible for the ultimate selection. Resp. to Req. for Dismissal at 2-4. Specifically emails from two different BAE employees to Thales indicated, among other things, that the agency has not “made award” or “made it[s] choice of supplier,” and that these statements make it clear that the agency is, in reality, conducting the procurement. *Id.* citing Protest, exhs. B and C. In response to this argument, the agency and BAE have provided declarations from the two BAE employees in question who separately represent that the “award” and “choice” referred to were the agency’s decision to issue a task order to BAE based on its proposal provided in response to the task order RFP issued by the agency to BAE, not in reference to the subcontract RFP that BAE was conducting. See Req. for Dismissal, exh. 12, Declaration of Program Manager; BAE Resp. to Req. for Dismissal, exh. 1, Declaration of Subcontracts Administrator.

The protester argues that, notwithstanding these declarations, there remain disputes about material facts that should preclude dismissal. The protester advances two

principal arguments. First, Thales argues that the representations made by BAE's employees that they were referring to the task order RFP award are not credible because BAE is the only potential competitor under the agency's task order RFP, so it would be irrational to talk about the agency's "choice of supplier" in that context. Resp. to Req. for Dismissal at 2-4. Second, the protester argues that the agency has not provided any declarations from agency officials or contemporaneous source selection materials that demonstrate what actually took place in this subcontract procurement, instead relying on procurement documents that only describe how the evaluation was intended to take place and misleading declarations from BAE staff. *Id.*

We are unpersuaded by these arguments. Preliminarily, we note that Thales is simply incorrect that the agency provided no statements from agency officials. For example, Thales filed an agency-level protest of these issues prior to filing the instant protest. The agency dismissed Thales's protest, and the dismissal was signed by the contracting officer. See Req. for Dismissal, exh. 11, Dismissal of Agency Level Protest. Among other things, the dismissal explained that the agency was not involved in the conduct of the subcontract procurement and that "BAE Systems solely evaluated vendor proposals and made an award decision." *Id.* at 1. Therefore, the record contains a signed statement from the contracting officer representing that she was not involved in the evaluation or award of the subcontract RFP. Further, we note that government officials are presumed to act in good faith and allegations to the contrary must be supported by convincing proof; we will not assume bad faith on the basis of inference or supposition. See *Veterans Healthcare Supply Sols., Inc.*, B-411904, Nov. 12, 2015, 2015 CPD ¶ 354 at 8.

More significantly, even reading the statements from BAE staff concerning the agency making a choice of supplier in the light most favorable to the protester, we still see no basis to take jurisdiction in this case. As discussed above, we will only take jurisdiction where the record establishes that the agency controlled essentially every meaningful aspect of the procurement. *Peter Vander Werff Constr., Inc.*, B-415676, Feb. 6, 2018, 2018 CPD ¶ 67 at 4. For example, in our decision in *Peter Vander Werff Constr., Inc.*, we concluded we lacked jurisdiction notwithstanding that the prime contractor was required to submit its subcontract award to the agency for consent in accordance with its prime contract. *Id.* That is, we concluded that the agency's right to approve or decline the prime contractor's subcontract award decision is not enough to establish jurisdiction, where, as here, the agency did not direct the prime to award to any particular subcontractor. *Id.*

Even reading the email statements in light of the declarations from BAE staff and the contracting officer's representations, the statements from BAE employees can reasonably be read, at best, as a statement that the government has not yet decided whether to ratify or decline BAE's proposed selection of a subcontractor by issuing a task order to BAE. That is, the emails, in the context of the rest of the record, suggest that the government has not yet decided whether it will accept BAE's proposal and choice of supplier, or reject BAE's proposal and send BAE back to revise its proposal or choose another supplier. These facts concerning the level of agency involvement are

not meaningfully different from the facts in *Peter Vander Werff Constr., Inc.*, in which we concluded we lacked jurisdiction. *Id.*

For those reasons, we conclude we lack jurisdiction here because the challenged procurement is not a procurement conducted by a federal agency. 31 U.S.C. § 3551(1)(A).

The protest is dismissed.

Edda Emmanuelli Perez  
General Counsel