



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

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Decision

Matter of: The Boeing Company; Bombardier, Inc.

File: B-414706; B-414380.2

Date: August 25, 2017

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Craig A. Holman, Esq., Mark D. Colley, Esq., Kara L. Daniels, Esq., Michael Samuels, Esq., and Nathaniel Castellano, Esq., Arnold & Porter Kaye Scholer LLP, for L3 Technologies, Inc., the intervenor.

Colonel C. Taylor Smith, Alexis J. Bernstein, Esq., Major George M. Ebert, and Gregory A. Baxley, Esq., Department of the Air Force, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the terms of a proposed sole-source award directs the contractor to award a subcontract for purchase of a particular aircraft is denied where the solicitation does not specify the aircraft for the award of a subcontract and the record does not show that the agency, rather than the contractor, will handle the substantive aspects of the subcontract procurement. Instead, the selection of the aircraft will occur under a subcontract that is not within the jurisdiction of our Office.
2. Protest that a proposed sole-source award violates the terms of the National Defense Authorization Act for fiscal year 2017 is denied where the Act does not require the agency to conduct the procurement in the manner argued by the protesters.
3. Protest that a proposed sole-source award violates the prohibition on awarding contracts for inherently governmental functions is denied where the proposed award does not meet the definition of a prohibited contract for services.
4. Protest that a proposed sole-source award violates the prohibition on the award of new lead system integrator (LSI) contracts is denied where the proposed award does not meet the definition of a prohibited LSI contract.

5. Protest that the agency has not properly justified a proposed sole-source award on the basis of other than full and open competition is denied where the agency executed a justification and approval (J&A) and the protester does not demonstrate that the agency's rationale for the J&A was unreasonable.
6. Protest that the firm proposed for award of a sole-source contract is ineligible for award based on an organizational conflict of interest is dismissed where the protester does not demonstrate that it is an interested party to pursue this argument.

DECISION

The Boeing Company, of Arlington, Virginia, and Bombardier, Inc., of Quebec, Canada, protest the terms of the solicitation for contracts Nos. FA8620-16-G-3027 and FA8620-17-F-4757, which anticipate a sole-source award to L3 Technologies, Inc.¹, of Greenville, Texas, for the re-host of the Compass Call system onto a new aircraft. The protesters argue that the proposed sole-source award is improper because: (1) it provides for an improper sole-source subcontract award for the re-host aircraft at the direction of the government; (2) it violates the terms of the National Defense Authorization Act (NDAA) for fiscal year (FY) 2017 with respect to the decision to select the aircraft; (3) it requires L3 to perform an inherently governmental function with respect to the selection of the aircraft; (4) it violates the prohibition on the award of a new lead systems integrator (LSI) contract; (5) the agency has not justified a sole-source award to L3; and (6) L3 has an organizational conflict of interest that prohibits that firm from receiving the award.

We deny in part and dismiss in part the protests.

BACKGROUND

These protests concern the Air Force's Compass Call program, which is an airborne electronic attack system used by the agency for worldwide military operations. Contracting Officer's Statement/Memorandum of Law (COS/MOL) (B-414706) at 4-5. The primary mission equipment for this program has been hosted on a fleet of 14 EC-130H aircraft. Id. at 5. L3 has performed a contract to provide maintenance and integration services for the Compass Call fleet for the past 15 years. Id. at 10.

In 2014, the Air Force proposed to retire the existing EC-130H Compass Call fleet in response to "budget constraints and evolving worldwide threats that would reduce future effectiveness of the EC-130H COMPASS CALL airborne weapon system." Id. at 5. The NDAA for FY16 directed the Air Force to present "[a] plan for how the Air Force will recapitalize the capability requirement of the EC-130H Compass Call mission in the

¹ The record refers to the awardee as L3 and L-3, the latter apparently a reference to the awardee's former name, L-3 Communications Holdings.

future, whether through a replacement program or by integrating such capabilities onto an existing platform.” NDAA for FY16, Pub. L. No. 114-92 § 143(c)(7) (Nov. 25, 2015). The NDAA for FY16 further required the Air Force to provide a report concerning the proposed retirement of the existing Compass Call fleet, and specified that if the agency proposed to transfer the Compass Call mission equipment to an existing aircraft platform, it must conduct “an analysis that verifies that such platform has the space, weight, cooling, and power necessary to support the integration of the EC-130H Compass Call capability.” Id. § 143(c)(8).

On October 26, 2015, the Air Force issued a request for information (RFI) seeking information from aircraft manufacturers regarding their ability to provide a commercial derivative aircraft capable of meeting the requirements to host the Compass Call system. Agency Report (AR), Tab 5, RFI, at 1-2. Boeing, Bombardier, and Gulfstream Aerospace each submitted responses to the RFI. The Air Force concluded that the threats to the current system could be addressed by moving the primary mission equipment from the EC-130H aircraft to a commercial derivative aircraft. COS/MOL (B-414706) at 10. The process of moving the mission equipment to a new aircraft is called a “re-host” or “crossdeck.” Id. The agency describes the re-hosting process as follows:

[R]e-hosting the COMPASS CALL mission equipment includes: removing antenna array components from the EC-130H aircraft; installing these arrays on each side of the fuselage of a commercial derivative aircraft; re-hosting the COMPASS CALL avionics, wiring, operator consoles, power supplies and other equipment; and then testing this modified aircraft to ensure flight-worthiness and COMPASS CALL mission effectiveness.

Id. at 8.

By early 2016, the Air Force concluded that “at least one commercial derivative aircraft existed that could support COMPASS CALL mission requirements.” COS/MOL (B-414706) at 9. Although not specifically identified in the agency’s response to the protests, a letter from the Air Force to Congress advised that an aircraft manufactured by Gulfstream met the agency’s requirements. The letter stated that the Gulfstream G550 aircraft is “the only one on the market that meets size, weight, power, cooling, aperture, and performance requirements and does not require development and/or certification work that would prevent meeting schedule needs.” Protest (B-414380.2), Exh. C., Letter from Air Force to Honorable Mac Thornberry, Apr. 12, 2016, at 1; Letter from Air Force to Honorable Adam Smith, Apr. 12, 2016, at 1.

On August 19, 2016, and as discussed in detail below, the Air Force issued a classified justification and approval (J&A) which authorized a sole-source award to L3 for the Compass Call re-host based on the national security and only one responsible source exceptions to the statutory requirement for full and open competition under the

Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556. AR², Tab 20, J&A (Classified).³ As also discussed in detail below, the NDAA for FY17 authorized the Air Force to “carry out a program to transfer the primary mission equipment of the EC-130H Compass Call aircraft fleet” to an “aircraft platform” that the Secretary of the Air Force determines is “more operationally effective and survivable” than the existing aircraft and that “meets the requirements of the combatant commands.” NDAA for FY17, Pub. L. No. 114-328 § 131(a) (Dec. 23, 2016). This authorization placed a limitation on the expenditure of funds, but also stated that the limitation did not apply to the first two aircraft to be provided under a contract. Id. § 131(b).

On February 17, 2017, Bombardier filed a protest (B-414380) with our Office challenging what it characterized as an improper sole-source award by L3 to Gulfstream for the aircraft for the Compass Call re-host. Bombardier argued that L3 would make a subcontract award to Gulfstream at the direction of the Air Force, and that our Office therefore had jurisdiction to consider this matter. The Air Force requested that we dismiss the protest as premature, as the agency had not yet issued a solicitation to L3. Based on the agency’s request and representations concerning the status of the solicitation, we dismissed the protest as premature on March 10.

On May 8, the Air Force issued a solicitation to L3 seeking a proposal for the definitization of a sole-source contract for the re-host of the Compass Call mission equipment onto a commercial derivative aircraft. AR, Tab 28, RFP, at 1. The statement of work (SOW) provides for L3 to deliver one re-hosted aircraft, with an option for a second delivery. Id., Tab 25, SOW, at 9. As relevant here, the RFP requires that L3 “provide a comprehensive analysis supporting the selection of any major sub-contractor, including an analysis of the technical, price, quality, and delivery capabilities of the potential subcontractors, based on the results of significant independent market research and trade studies conducted at the subsystem and component level.” Id., Tab 28, RFP, at 2. On May 9, L3 issued an RFI seeking responses from aircraft manufacturers for an aircraft for the Compass Call re-host platform. COS/MOL (B-414706) at 14.

On May 19, Boeing filed its current protest (B-414706) challenging the proposed sole-source award to L3 as it relates to the Compass Call re-host integration work and the selection of the aircraft for the re-host. On May 26, Bombardier filed its current protest

² Citations to the agency report are to identical documents in the reports for each protest, unless otherwise noted.

³ The Air Force provided our Office and the parties the classified version of the J&A and a classified annex to its COS/MOL, as well as other classified documents. Boeing and Bombardier filed classified annexes of their respective comments. We have reviewed all of the classified filings and conclude that the protesters’ arguments can be addressed through reference to the unclassified portions of the record.

(B-414380.2) challenging the proposed sole-source award to L3 as it relates to the selection of the aircraft for the re-host.

DISCUSSION

Boeing argues that it could perform the Compass Call re-host integration work, and also contends that it could provide a Boeing 737 aircraft that could meet the agency's needs for the re-host aircraft. Bombardier does not contend that it could perform the re-host integration work, but argues that it could provide a Bombardier Global 6000 aircraft that could meet the agency's needs for the re-host aircraft. Protest (B-414380.2) at 2.

The protesters raise six primary arguments.⁴ First, Bombardier argues that the proposed award to L3 involves direction by the Air Force to select Gulfstream for the subcontract award for the re-host aircraft, without a valid basis for such a sole-source award. For arguments two, three, and four, Boeing and Bombardier challenge the award to L3 as follows: the proposed award violates the terms of the NDAA for FY17; the proposed award violates the prohibition on the award of contracts for the performance of inherently governmental functions; and the proposed award is a prohibited LSI contract. For the fifth and sixth arguments, Boeing argues that it could perform the contract as the re-host integrator, and contends that the agency's proposed sole-source award to L3 is improper because: the J&A issued for a sole-source award does not set forth a reasonable basis; and any award to L3 would be tainted by an unmitigatable organizational conflict of interest (OCI) arising from L3's relationship with Gulfstream. For the reasons discussed below, we find no basis to sustain the protests.

The jurisdiction of our Office is established by the bid protest provisions of the CICA, 31 U.S.C. §§ 3551-3556. Our Office reviews alleged violations of procurement laws and regulations to ensure that the statutory requirements for full and open competition are met. 31 U.S.C. § 3552(a); Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. CICA generally requires contracting agencies to obtain full and open competition through the use of competitive procedures, absent an exception specified in CICA or other express statutory authority. 10 U.S.C. § 2304(a)(1)(A). Where, as here, an agency uses non-competitive procedures it must execute a written J&A with sufficient facts and rationale to support the use of the cited authority. Id. § 2304(f)(1); Federal Acquisition Regulation (FAR) § 6.302-1. Our review of an agency's decision to conduct a procurement under the exceptions to full and open competition focuses on the adequacy of the rationale and conclusions set forth in the J&A. Pegasus Global Strategic Solutions, LLC, B-400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 at 7. When a J&A sets forth reasonable justifications for the agency's actions, we will not object to award on the basis of other than full and open competition. Coastal Seal Servs., LLC, B-406219, Mar. 12, 2012, 2012 CPD ¶ 111 at 4.

⁴ Boeing and Bombardier raise other collateral arguments. Although we do not address all the protesters' arguments, we have reviewed them all and conclude that none provides a basis to sustain the protest.

Directed Subcontract

Bombardier argues that the Air Force has effectively directed L3 to select Gulfstream for award of a subcontract to provide the aircraft for the Compass Call re-host. The protester contends that the Air Force's actions are improper because the agency has not complied with CICA's requirement for full and open competition in the selection of the re-host aircraft, and that the agency has not reasonably evaluated the capabilities of the Gulfstream aircraft or the aircraft that Bombardier contends could meet the Compass Call re-host requirements. The protester also contends that the RFI issued by L3 did not provide prospective subcontractors with adequate information to prepare responses. For the reasons discussed below, we conclude that the proposed contract with L3 anticipates selection of the aircraft by L3 and not the government. We therefore find no basis to sustain the protest.

Under CICA, our Office has jurisdiction to resolve bid protests concerning the solicitations and contract awards that are issued "by a Federal agency." 31 U.S.C. § 3551(1)(A). Our rules provide that we do not review procurements where a government prime contractor enters into a subcontract "for" the government. 4 C.F.R. § 21.5(h); Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103 at 3-4; Yard USA, Inc., B-232326, Sept. 1, 1988, 88-2 CPD ¶ 207. 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. 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. For example, in The Panther Brands, our Office concluded it had jurisdiction to review a subcontract award where the solicitation issued to prospective subcontractors advised that the government would make the selection decision, the agency evaluated the proposals of prospective subcontractors, and the agency selected the successful proposal without receiving an award recommendation from the prime contractor. The Panther Brands LLC, supra, at 6.

Here, Bombardier contends that the Air Force has selected the Gulfstream G550 aircraft for the Compass Call re-host effort, and that L3 will therefore perform only the procedural aspects of the subcontract procurement. In support of its argument, the protester points to the Air Force's correspondence with Congress on this matter, and statements in the media. See Protest (B-414380.2) at 12-18. The protester also contends that it was informed by L3 that the decision to award a contract to Gulfstream had been made as of January 2017. Protest (B-414380.2) at 3 ("Indeed, L3 informed Bombardier in January of this year--before the Air Force had even issued the solicitation for the sole source lead system integrator contract--that Gulfstream will supply the aircraft.").

The Air Force contends that this matter concerns a future determination by L3 that will be conducted under a subcontract and that, even if it were ripe for review at this time, it is a matter over which our Office does not have jurisdiction. The agency specifically represents that the decision to select the aircraft for the Compass Call re-host will be made by L3 under the terms of the SOW for the proposed subcontract. COS/MOL (B-414380.2) at 19-20; Agency Request for Dismissal (B-414380.2), June 8, 2017, at 7-8. In this regard, the protester does not cite to any provisions of the SOW or J&A that specifically direct L3 to select the Gulfstream G550 for the Compass Call re-host effort.

On this record, we find that the proposed sole-source award to L3 requires that firm to select the aircraft for the Compass Call re-host, subject to the requirements established by the Air Force. We find that neither the terms of the SOW, nor the classified J&A, demonstrate that the Air Force will handle the substantive aspects of the subcontract procurement, such that L3 would be left with only a procedural role in the selection of the aircraft.⁵ See The Panther Brands LLC, supra, at 4-6. Consequently, we conclude that the decision to select an aircraft is a matter that will occur under a proposed subcontract, and therefore the terms of the subcontract competition and the merits of the selection decision are matters that are not within the jurisdiction of our Office. See The Panther Brands, LLC, supra; Yard USA, Inc., supra. We next turn to the protesters' other arguments, which relate to whether the proposed contract with L3 violates procurement laws or regulations.

FY 2017 NDAA

Boeing and Bombardier argue that the proposed award to L3 violates the terms of the NDAA for FY17 with regard to the selection of an aircraft for the Compass Call re-host. In this regard, the protesters contend that the NDAA requires the Secretary of the Air Force to make a determination regarding the capabilities of the re-host aircraft before a contract is awarded for the re-host integration, and that the agency has improperly delegated that decision to L3. For the reasons discussed below, we find no basis to conclude that the Air Force has violated the requirements of the NDAA.

It is well-established that statutory analysis "begins with the plain language of the statute." Jimenez v. Quarterman, 555 U.S. 113, 118 (2009). If the statutory language is clear and unambiguous on its face, then the plain meaning of that language controls. Carcieri v. Salazar, 555 U.S. 379, 387 (2009). Where, as here, the statute is clear on its face, a review of the statutory text should not "resort to legislative history to cloud a

⁵ In response to Bombardier's requests for documents, the contracting officer expressly represents as follows: "I affirm that there are no documents concerning direction from the Air Force to L-3 to award a subcontract to Gulfstream and that there are no documents concerning direction from the Air Force to L-3 to award a subcontract to Gulfstream notwithstanding any provisions in the RFP." Decl. of Contracting Officer, June 30, 2017, at 1.

statutory text that is clear.” Technatomy Corp., B-405130, June 14, 2011, 2011 CPD ¶ 107 at 5 n.5 (citing Ratzlaf v. United States, 510 U.S. 135 (1994)).

Section 131 of the NDAA for FY 2017 provides as follows:

SEC. 131. EC-130H COMPASS CALL RECAPITALIZATION PROGRAM.

(a) Authorization.--Subject to subsection (b), the Secretary of the Air Force may carry out a program to transfer the primary mission equipment of the EC-130H Compass Call aircraft fleet to an aircraft platform that the Secretary determines--

- (1) is more operationally effective and survivable than the existing EC-130H Compass Call aircraft platform; and
- (2) meets the requirements of the combatant commands.

(b) Limitation.--

(1) Except as provided in paragraph (2), none of the funds authorized to be appropriated by this Act or otherwise made available for fiscal year 2017 or any other fiscal year for procurement may be obligated or expended on the program under subsection (a) until the date on which the Secretary of the Air Force determines that there is a high likelihood that the program will meet the requirements of the combatant commands.

(2) The limitation in paragraph (1)--

(A) shall not apply to the development and procurement of the first two aircraft under the program; and

(B) shall not limit the authority of the Secretary to enter into a contract that may include an option for the future production of aircraft under the program if--

(i) the exercise of such option is at the discretion of the Secretary; and

(ii) such option is not exercised until the Secretary determines that there is a high likelihood that the program will meet the requirements of the combatant commands.

NDAA for FY17, Pub. L. No. 114-328 § 131 (Dec. 23, 2016).

Boeing and Bombardier contend that the language of section 131 of the NDAA for FY17 requires the Air Force to make two determinations, one under paragraph (a) and one under paragraph (b). Boeing Comments, June 29, 2017, at 5; Bombardier Comments, July 6, 2017, at 21. In this regard, the protesters argue that paragraph (a) requires a threshold determination by the agency regarding the capabilities of the aircraft that must be made prior to the initiation of a procurement. The protesters acknowledge that although paragraph (b) of section 131 of the NDAA contains a restriction on the obligation or expenditure of 2017 appropriated funds, the restriction does not apply to delivery of the first two aircraft with re-hosted equipment. The protesters contend that the Air Force must determine whether a particular aircraft meets the requirements of paragraphs (a)(1) and (a)(2) before entering into a contract for the Compass Call re-host.

The Air Force argues that the NDAA does not require the determination in paragraph (a) to be made in conjunction with or as a condition precedent to a procurement. In this regard, the agency contends that paragraph (a) concerns the authorization of a program by the Air Force for the re-host, and is not a restriction on the expenditure of funds or a requirement for the terms of any procurement. The agency further contends that paragraph (b)(1) is the only restriction on the expenditure of funds, and this restriction does not apply to the first two aircraft.

We agree with the Air Force that paragraph (a) of section 131 does not require the agency to make a determination regarding the aircraft as a prerequisite to conducting a procurement, in the manner the protesters argue.⁶ Paragraph (a) provides authorization of the Compass Call program, but does not specifically tie a procurement decision to a determination by the agency. Instead, the limitation on the expenditure of funds is set forth in paragraph (b) which, as discussed above, does not apply to the first two aircraft to be purchased.

Boeing and Bombardier argue that the history of the procurement, including correspondence with Congress, certain elements of the legislative history of the NDAA for FY17, and language in rejected amendments to the NDAA, all indicate that Congress intended for the Air Force to select the aircraft, and to do so in accordance

⁶ Our Office has previously considered and rejected agencies' arguments that provisions in an NDAA are inherently outside the scope of our Office's review of protests under CICA. We have stated that our jurisdiction under CICA is based on whether the protest concerns a procurement for property or services by a federal agency, and that in exercising that jurisdiction we could properly consider the requirements of non-procurement statutes and regulations when they directly bear upon federal agency procurements. See Raytheon Co. & Kongsberg Defence & Aerospace AS, B-409615, B-409615.2, June 24, 2014 CPD ¶ at 9-10. As discussed above, however, we conclude that the provisions of paragraph (a) of section 131 of the NDAA for FY 2017 do not address specific requirements or prohibitions on procurements for the Compass Call re-host.

with the full and open competition requirements of CICA. See, e.g., Protest (B-414706) at 3-4, 6-9; Protest (B-414380.2) at 18-19. As discussed above, however, the plain language of the NDAA does not impose a specific statutory requirement for the agency to make the determination in paragraph (a) concerning the capability of the re-host integration as a precondition to a procurement. On this record, we find no basis to conclude that the Air Force's proposed award to L3 violates the terms of the NDAA for FY17. See Technatomy Corp., supra.

Inherently Governmental Function

Next, Boeing and Bombardier argue that the proposed sole-source award to L3 directs L3 to select the aircraft in a manner that violates the prohibition on a contractor's performance of inherently governmental functions. For the reasons discussed below, we find no basis to find that the proposed award here violates the applicable prohibitions, and thus no basis to sustain the protest.

The provisions of FAR subpart 7.5 address inherently governmental functions, and states that “[t]he purpose of this subpart is to prescribe policies and procedures to ensure that inherently governmental functions are not performed by contractors.” FAR § 7.500. The provisions of this subpart “apply to all contracts for services.” Id. § 7.502. The relevant provisions concerning the award of contracts are as follows:

7.503--Policy.

(a) Contracts shall not be used for the performance of inherently governmental functions.

* * * *

(c) The following is a list of examples of functions considered to be inherently governmental functions or which shall be treated as such. This list is not all inclusive:

* * * *

(12) In Federal procurement activities with respect to prime contracts--

(i) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);

(ii) Participating as a voting member on any source selection boards;

- (iii) Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
- (iv) Awarding contracts;
- (v) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);
- (vi) Terminating contracts;
- (vii) Determining whether contract costs are reasonable, allocable, and allowable; and
- (viii) Participating as a voting member on performance evaluation boards.

Id. § 7.503.

As also relevant here, FAR part 37 sets forth policies on contracts for services and defines a services contract as follows:

“Service contract” means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A service contract may be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis. Some of the areas in which service contracts are found include the following:

- (1) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.
- (2) Routine recurring maintenance of real property.
- (3) Housekeeping and base services.
- (4) Advisory and assistance services.
- (5) Operation of Government-owned equipment, real property, and systems.
- (6) Communications services.

- (7) Architect-Engineering (see subpart 36.6).
- (8) Transportation and related services (see Part 47).
- (9) Research and development (see Part 35).

Id. § 37.101 (emphasis added).

Boeing and Bombardier argue that the SOW for the proposed sole-source award contains numerous requirements for services, including engineering, testing and evaluation, and procurement and modification of the re-hosted Compass Call mission equipment and aircraft. See AR, Tab 25, SOW, at ¶ 3.0. Boeing argues that the selection of the aircraft falls squarely within the prohibition in FAR § 7.503(c)(12)(i) against “[d]etermining what supplies or services are to be acquired by the Government.”⁷

The Air Force contends that the prohibition on contractors performing inherently governmental functions in FAR subpart 7.5 applies only to “contracts for services.” FAR § 7.502. The agency notes that the RFP is designated as a “contract for supply,” and argues that the contract ultimately requires delivery of an aircraft into which the Compass Call equipment has been transferred. See AR (B-414380.2), Tab 28, RFP, at 1. For this reason, the agency argues that the prohibitions in FAR § 7.503 do not apply.

The protesters and agency, in essence, disagree as to the “primary purpose” of the Compass Call re-host requirement and solicitation. The protesters argue that the purpose of the program is services, namely the selection of an aircraft and transfer of the Compass Call equipment from the current aircraft to the new aircraft. The agency contends that the purpose of the contract is the delivery of new aircraft, into which the Compass Call equipment has been transferred.

⁷ Bombardier does not dispute the Air Force’s characterization of the RFP as anticipating a contract for supplies, rather than services, and does not contend that FAR § 7.503 applies, here. See Bombardier Comments, July 6, 2017, at 13, 25. Instead, Bombardier argues that similar provisions in 10 U.S.C. § 2383, concerning inherently governmental functions, apply. That statute, however, expressly refers to the definitions of inherently governmental functions in FAR subpart 7.5, which, as discussed above, do not apply to contracts for services. 10 U.S.C. § 2383(b)(2). Bombardier does not explain how a provision prohibiting a contract for “performance of acquisition functions closely associated with inherently governmental functions,” applies where the FAR provision cited in the statute expressly references standards which do not apply to contracts for supplies.

On this record, we find no basis to dispute the agency's characterization of the RFP as one for the "primary" purpose of delivering a re-hosted Compass Call system.⁸ In this regard, the SOW provides for procurement of an aircraft and delivery of a final re-hosted system. See AR, Tab 25, SOW, at 9-10, 15. We therefore find no basis to conclude that the proposed sole-source award to L3 violates the prohibitions in FAR subpart 7.5.

Additionally, our Office has stated that a contractor's performance of services relating to the selection of subcontractors does not necessarily represent an improper delegation of an inherently governmental function. In addressing the prohibitions set forth in FAR subpart 7.5, our Office explained that, for a contract for freight services, "the contract tasks of selecting, awarding, and managing subcontracts reflect routine subcontract administration requirements" rather than an improper contract for inherently governmental functions. 2B Brokers et al., B-298651, Nov. 27, 2006, 2006 CPD ¶ 178 at 16. Here, the proposed contract to L3 will require the contractor to select an aircraft for the purpose of delivery of a final integrated product, i.e., the re-hosted Compass Call system.

We recognize that the re-hosted aircraft is a large portion of the overall procurement, and that the aircraft is arguably the principal component of the re-host effort. Nonetheless, the protesters here have not demonstrated that the proposed contract violates any applicable procurement law or regulation. On this record, we therefore find no basis to sustain the protest.

Prohibition on New LSI Contracts

Next, Boeing and Bombardier argue that the proposed award to L3 is improper because it would violate the statutory prohibition on the award of new LSI contracts. For the reasons discussed below, we conclude that the proposed award to L3 does not meet the definition of a prohibited LSI contract.

⁸ The Air Force also states that North American Industry Classification System (NAICS) code 336411, for aircraft manufacturing, will be assigned to the contract. Decl. of Contracting Officer, July 24, 2017, at 1. Our Bid Protest Regulations provide that our Office does not review questions regarding an agency's designation of a NAICS code, as this is a matter for resolution by the Small Business Administration, which has exclusive authority over NAICS code determination appeals. Bid Protest Regulations, 4 C.F.R. § 21.5(b); BlueStar Energy Solutions, B-405690, Dec. 12, 2011, 2011 CPD ¶ 275 at 3-4; 13 C.F.R. § 121.1102; FAR § 19.303(c). Although the protest here does not concern a small business issue, our Office need not address whether we have jurisdiction to consider the assignment of a NAICS code outside of a challenge regarding small business matters. We conclude, however, that the assignment of a manufacturing NAICS code generally supports the agency's characterization of the procurement as one for supplies, rather than services.

Section 802 of the NDAA for FY08 provides the following definition of the term “lead systems integrator,” and imposes a ban on the award of new LSI contracts:

(a) PROHIBITIONS ON THE USE OF LEAD SYSTEMS INTEGRATORS.—

(1) PROHIBITION ON NEW LEAD SYSTEMS INTEGRATORS.-- Effective October 1, 2010, the Department of Defense may not award a new contract for lead systems integrator functions in the acquisition of a major system to any entity that was not performing lead systems integrator functions in the acquisition of the major system prior to the date of the enactment of this Act.

* * * *

(d) Definitions.--In this section:

(1) LEAD SYSTEMS INTEGRATOR.--The term “lead systems integrator” means--

(A) a prime contractor for the development or production of a major system, if the prime contractor is not expected at the time of award to perform a substantial portion of the work on the system and the major subsystems; or

(B) a prime contractor under a contract for the procurement of services the primary purpose of which is to perform acquisition functions closely associated with inherently governmental functions with respect to the development or production of a major system.

NDAA for FY08, Pub. L. No. 110-181 § 802 (Jan. 28, 2008). The Defense Federal Acquisition Regulation Supplement (DFARS) incorporates these provisions at DFARS § 209.570-2.

Boeing and Bombardier contend that the proposed contract with L3 violates the prohibition on the award of a new LSI contract because it requires L3 to develop or produce a major system, i.e., the re-hosted Compass Call system, and because L3 will not be performing a substantial portion of the work.⁹ With regard to the provision

⁹ Boeing and Bombardier also argue that the proposed contract with L3 meets the definition of a prohibited LSI contract because it requires L3 to perform a contract “the primary purpose of which is to perform acquisition functions closely associated with inherently governmental functions.” NDAA for FY08, Pub. L. No. 110-181 § 802(d)(1)(B). For the reasons discussed above regarding inherently governmental functions, the

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concerning “a substantial portion of the work,” the protesters characterize the effort as producing a new system, *i.e.*, a re-hosted Compass Call system comprised of the new aircraft and the Compass Call equipment. The protesters contend that the work to be performed by L3 does not involve “substantial” work on the system (the re-hosted Compass Call system) and its major subsystems (the aircraft and the Compass Call equipment), as both the system and its subsystems already exist and need merely to be integrated. See Boeing Comments, June 29, 2017, at 16; Bombardier Comments, July 6, 2017, at 12-13, 16-17.

The Air Force argues that the proposed award to L3 does not meet the definition of a prohibited LSI contract because, among other reasons, L3 will perform “substantial” work on the re-hosted Compass Call system and its major subsystems. The agency contends that the “complicated, sensitive, and time-intensive task of integrating the airframe with the existing and currently operational mission equipment” constitutes substantial work on the system and its subsystems. COS/MOL (B-414706) at 34.

Neither the NDAA for FY08, nor the DFARS, defines the term “substantial” for purposes of the LSI prohibition. The common dictionary definition of the term “substantial” means “important, essential,” “considerable in quantity,” or “being largely but not wholly that which is specified.” Merriam-Webster Dictionary, www.merriam-webster.com (last visited August 16, 2017). We conclude that the agency reasonably represents that L3 will be performing “a substantial portion of the work on the system and the major subsystems” because L3 will be responsible for the following requirements:

(1) removing the Compass Call equipment from the EC-130H aircraft; (2) configuring the new aircraft to ensure that it meets the mission requirements; (3) installing the Compass Call equipment on the new aircraft; and (4) testing the aircraft and re-hosted equipment prior to delivery of the completed aircraft. COS/MOL (B-414706) at 8; AR, Tab 25, SOW, at 8-12, 15. On this record, we conclude that the proposed contract with L3 does not meet the statutory definition of a prohibited LSI contract.¹⁰

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protesters do not demonstrate that the proposed award to L3 violates the relevant statutory or regulation provisions concerning functions closely associated with inherently governmental functions. Additionally, the protesters do not demonstrate that the “primary purpose” of the contract is the procurement of the aircraft, as opposed to the performance of the re-hosting of the Compass Call equipment onto a new aircraft.

¹⁰ Additionally, Boeing and Bombardier point to correspondence with Congress which the protesters contend reflect the Air Force’s understanding that the award to L3 would be an LSI contract. For example, the protesters cite a February 1, 2017, letter from the Air Force to Congress which refers to the agency’s intended award to L3 as an LSI. Protest (B-414706) at 7; *id.*, Exh. C, Letter from Air Force to the Honorable Jerry Moran (Feb. 1, 2017); Protest (B-414380.2) at 19-20; *id.*, Exh. B, Letter from Air Force to the Honorable John McCain (Feb. 1, 2017). The Air Force states that the use of the term LSI in the letters cited by the protester were “colloquial” references to the type of contract anticipated, and that the agency does not intend to award a prohibited LSI

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Sole-Source J&A

Next, Boeing argues that the classified J&A issued by the Air Force for the proposed award of a sole-source contract to L3 is not reasonable. Based on our review of the record, we find no basis to sustain the protest.¹¹

The Air Force issued a classified J&A for a sole-source award to L3 that relied on two exceptions to CICA's requirement for full and open competition: (1) national security, and (2) only one responsible source. COS/MOL (B-414706) at 10. Because we conclude that the agency's reliance on the national security exception was reasonable and supports the sole-source J&A, we need not discuss in detail the second exception regarding only one responsible source. We note, however, that the agency's rationale for the only one responsible source justification relies in part on the determination regarding national security.

As relevant here, the FAR provides the following regarding the national security exception to full and open competition:

6.302-6--National security.

(a) Authority.

(1) Citations: 10 U.S.C. 2304(c)(6) or 41 U.S.C. 3304(a)(6).

(2) Full and open competition need not be provided for when the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.

(b) Application. This authority may be used for any acquisition when disclosure of the Government's needs would compromise the national security (*e.g.*, would violate security requirements); it shall not be used merely because the acquisition is classified, or merely because access to classified matter will be necessary to submit a proposal or to perform the contract.

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contract. COS/MOL (B-414706) at 22 n.14; COS/MOL (B-414380.2) at 32. We see nothing in the record here which constitutes a binding admission by the Air Force that the proposed contract, notwithstanding its terms as set forth in the record provided by the agency, is a prohibited LSI contract.

¹¹ Quotations from and citations to the classified J&A are to those quotes and citations contained in the Air Force's unclassified filings with our Office.

(c) Limitations.

- (1) Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304.
- (2) See 5.202(a)(1) for synopsis requirements.
- (3) This statutory authority requires that agencies shall request offers from as many potential sources as is practicable under the circumstances.

FAR § 6.302-6.

The J&A for the proposed sole-source award to L3 states as follows:

Only L-3 has full access to the classified data needed for the COMPASS CALL re-host. L-3 maintains the classified control management of the COMPASS CALL fleet. Need-to-know provisions preclude the clearance of additional contractors for the purpose of solicitation and performance of tasks, even to those contractors that might possess access to information classified at the TS/SCI [top secret/sensitive compartmented information] level on other programs.

AR, Tab 20, J&A, at 7 (quotation from unclassified Agency Response to GAO Questions, July 12, 2017, at 7).

The following unclassified summary of the agency's rationale was provided to Congress on January 31, 2017:

We have determined that only L-3 Communications (L-3), the current COMPASS CALL contractor, can perform the lead system integration effort necessary to re-host the COMPASS CALL from the current EC-130H aircraft to a new platform. Our determination is based on national security interests preventing disclosure of highly classified information required to build, integrate, and operate the COMPASS CALL capability to any source other than L-3. It is also based on L-3's unique capability to accomplish the re-host without unacceptable delays or substantial duplication of costs. We carefully considered alternatives to the lead systems integrator approach, including the separate procurement of the aircraft. We also assessed the feasibility of utilizing alternative sources for the system integration role. We concluded that it was essential that a single entity select, based on market research, the aircraft subsystem and perform the mission equipment integration effort, and that L-3 was the only source capable of performing this critical function. Accordingly, the Air Force will rely on L-3's system integration judgment and expertise in

selecting the aircraft platform and will not direct L-3 to procure a particular aircraft subsystem.

AR, Tab 22, Email from Air Force to Boeing, at 2-23 (attaching letters from Air Force to members of Congress).

Boeing's primary challenge to the Air Force's use of the national security exception to full and open competition relies on FAR § 6.302-6(b), which states that the exception shall not be used "merely because the acquisition is classified, or merely because access to classified matter will be necessary to submit a proposal or to perform the contract." FAR § 6.302-6. In support of this argument, the protester cites our decision in Federal Labs Systems, B-224258, Feb. 4, 1987, 87-1 CPD ¶ 111, where our Office concluded that an agency did not properly rely on the national security exception to justify a limitation on the number of sources sought for a procurement.

In Federal Labs Systems, we denied the protest because the U.S. Marshals Service had reasonably justified the limited issuance of a solicitation to two bidders whom the agency concluded were immediately capable of meeting the government's requirement to provide a brand name or equivalent metal detector for federal courthouses. Id. at 1. The agency also concluded that disclosure of the intended procurement could not be made, based on national security interests. Id. at 2. The agency issued a J&A based on the unusual and compelling urgency exception and the national security interest exception, because of "a sudden rise in the number of threats to particular federal judges and a general increase in terrorist activity at the time of this procurement." Id. at 3. We denied the protest, concluding that the agency reasonably relied on a finding of unusual and compelling circumstances. Id.

Our decision also explained, however, that the agency had "unnecessarily relied on the national security exception to justify its decision to limit the competition." Id. at 4. In this regard, we concluded that the J&A lacked a reasonable basis because the information it claimed was classified had been made public, as follows:

While we do not dispute the agency's contention that the public disclosure of the design specifications for the metal detectors might provide subversive individuals or groups with valuable information, both the performance capabilities required and the salient characteristics of the equipment have been made public in the unclassified solicitation and the State Department report. Moreover, the fact that metal detectors are being used in federal courthouses is common knowledge. Thus, we agree with the protester that disclosure of this procurement to other firms would not have compromised the national security.

Id. at 4.

Here, Boeing argues that the Air Force's requirements for the Compass Call re-host program are publicly known, and that the agency therefore cannot rely on the national

security interest exception to full and open competition to justify a sole-source award to L3. The protester also contends that the agency's J&A unreasonably relies on a finding that the classified information to which L3 has access cannot be shared with other contractors, arguing that Boeing has the personnel and facilities to receive the classified information needed to perform the work. Boeing Comments, June 29, 2017, at 27. In this regard, Boeing notes that it "is one of many successful defense contractors with a valid facility security clearance that is currently [] performing highly sensitive work for the Government." Id. Further, Boeing states that its "classified work involves information classified at levels far higher than the Secret classification applied to the J&A and the documents referenced therein, and Boeing performs many contracts where, unlike the Compass Call re-host, the agency's basic need and the very existence of the contract is classified." Id.

The Air Force argues that the J&A reasonably relies on a determination that the operational details of the Compass Call system/platform are necessary for performance of the re-host effort, and that these details cannot be disclosed without jeopardizing ongoing Compass Call missions. Agency Response to GAO Questions, July 12, 2017, at 7. The agency explains that it has "determined that national security prohibits distribution of information regarding the COMPASS CALL system, including equipment, frequencies, tactics, power generation, and techniques, to anyone other than the current COMPASS CALL integrator." Id. The agency contends that although certain general information concerning the nature of the Compass Call program and its mission is unclassified and publicly available, "[r]evealing the general performance requirements for the aircraft is not the same as revealing the operational details of a highly classified weapons system serving an active combat role." Id. The agency states that the operational details regarding the Compass Call system are necessary for the performance of the re-host effort, and that they cannot be shared for the following reasons: "The Air Force will not jeopardize the current or future COMPASS CALL missions, aircrews, and aircraft, or the warfighter on the ground by revealing any information about the weapon system to another contractor, even one with appropriate security clearances." Id. at 8.

We conclude that Boeing's arguments concerning Federal Labs Systems do not support its challenge to the J&A here. In Federal Labs Systems, we concluded that the agency's requirements in terms of the performance capabilities and salient characteristics of the metal detectors had been disclosed through an unclassified solicitation. In contrast, the Air Force here has not disclosed the precise nature of the "evolving worldwide threats" to the existing aircraft platform, nor has the agency disclosed detailed information regarding the performance capabilities of the Compass Call equipment. Instead, the Air Force has made a determination that classified information regarding the Compass Call program cannot, for reasons of national security, be transferred from L3 to another contractor.

Additionally, although FAR § 6.302-6(b) states that the national security interest exception shall not be used "merely" because an acquisition is classified or requires classified information, we agree with the Air Force that the J&A sets forth a rationale

beyond the mere fact of the classification. In this regard, the J&A states that “[n]eed-to-know provisions preclude the clearance of additional contractors for the purpose of solicitation and performance of tasks, even to those contractors that might possess access to information classified at the TS/SCI level on other programs.” AR, Tab 20, J&A, at 7 (quotation from unclassified Agency Response to GAO Questions, July 12, 2017, at 7).

For the reasons discussed above, we conclude that the J&A reasonably explains why the Air Force relied on the national security exception to CICA’s requirement for full and open competition. As noted above, Boeing represents that it has the capability to perform the work and to handle the classified information necessary for that performance. Even if we were to agree with Boeing that it would be capable of performing the work if the agency provides it the classified material, the agency states that it has made a specific national security determination that precludes the transfer of classified information to an additional contractor. For our Office to sustain the protest here, we would have to conclude that the agency’s representation that national security interests preclude transfer of classified Compass Call information to another contractor is unreasonable. An agency’s decision whether to grant a firm security clearance for a particular acquisition, however, is not a matter our Office will generally review. See Westinghouse Elect. Corp., Furniture Sys. Div., B-224410.2, Oct. 3, 1986, 86-2 CPD ¶ 394 at 3. Based on our review of the record, including the classified J&A, we find no basis to sustain the protest with regard to the proposed sole-source award to L3.

Organizational Conflicts of Interest

Finally, Boeing argues that the proposed sole-source award results in an unmitigatable OCI arising from L3’s relationship to Gulfstream. For the reasons discussed below, we find that Boeing is not an interested party to pursue this argument.

The FAR requires that contracting officials avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity. FAR §§ 9.504(a), 9.505. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: (1) biased ground rules; (2) unequal access to information; and (3) impaired objectivity. As relevant here, an impaired objectivity OCI arises where a firm’s ability to render impartial advice to the government would be undermined by the firm’s competing interests. FAR § 9.505(a); Diversified Collection Servs., Inc., B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 5-6. The concern in such impaired objectivity situations is that a firm’s ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated. PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. A protester must identify “hard facts” that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. Innovative Test Asset Solutions, LLC, B-411687, B-411687.2, Oct. 2, 2015, 2016 CPD ¶ 68 at 17; see Turner Constr. Co. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011).

Boeing argues that an award to L3 would be tainted by an impaired objectivity OCI for two primary reasons. First, the protester argues that L3 is currently performing a foreign military sales contract wherein it is installing intelligence, surveillance, reconnaissance and electronic warfare (ISREW) equipment on two Gulfstream G550 aircraft for the Australian Department of Defense. Protest (B-414706) at 18. The protester argues that the work on the ISREW contract likely involves “a substantial amount of non-recurring engineering work,” and that having invested this effort into its contract, “L-3 inevitably will choose that aircraft for Compass Call.” Id.

Second, Boeing argues that L3 and Gulfstream are part of a team led by Northrop Grumman that is bidding on the Joint Surveillance Target Attack Radar System (JSTARS) recapitalization procurement. The protester contends that because L3 and Gulfstream are potential team members for the JSTARS procurement, L3’s selection of the Gulfstream aircraft for the Compass Call contract would give L3 a “leg up” on other procurements where L3 and Gulfstream might also work together.¹² Id. at 19.

Based on the record here, in particular the circumstances of the J&A issued by the Air Force, we conclude that Boeing is not an interested party to pursue its OCI allegations.¹³ A protester is an interested party to challenge the agency’s evaluation of proposals where there is a reasonable possibility that the protester’s proposal would be in line for award if its protest were sustained. Enterprise Info. Servs., Inc., B-405152 et al., Sept. 2, 2011, 2011 CPD ¶ 174 at 7 n.8. Where we find that the protester could not be in line for award, we will not address the protester’s allegation that the award is tainted by an OCI. Arc Aspicio, LLC et al., B-412612 et al., Apr. 11, 2016, 2016 CPD ¶ 117 at 12-13.

The Air Force and L3 argue that, even if Boeing’s OCI arguments have merit, the protester would be ineligible for award of the Compass Call re-host contract based on a similar or even more significant OCI because Boeing, as the re-host integrator, would be required to consider whether to purchase its own proposed aircraft. COS/MOL

¹² The Air Force does not contend that it conducted a review of the potential OCIs alleged by Boeing. Instead, the agency argues that the protester’s allegations do not identify hard facts that demonstrate the existence of a potential significant OCI because they concern potential interests for L3 that are too remote to qualify as disqualifying conflicts. See COS/MOL (B-414706) at 26-30. In effect, the agency contends that an OCI review was not required in light of the nature of the allegations raised by the protester.

¹³ Prior to filing its agency report, the Air Force requested that we dismiss Boeing’s OCI arguments on the basis that the protester was not an interested party. We denied the request based on conclusions that were made without the benefit of reviewing the J&A or the parties’ briefings on the basis for the agency’s J&A. Email from GAO to Parties, June 5, 2017.

(B-414706) at 31-31; L3 Comments, June 29, 2017, at 7-8, 26-27. Boeing argues that it could avoid any disqualifying OCI if the agency allowed the protester to enter into a subcontract to have a different, non-conflicted firm make the aircraft selection decision, as follows: “For example, if allowed to compete for an LSI contract, Boeing could limit its role to the design, engineering, integration, and support services, and subcontract with a conflict-free entity to perform the initial aircraft selection decision.” Boeing Comments, June 29, 2017, at 39.

We need not resolve whether Boeing’s proposal to be both the integrator and a prospective subcontractor creates a disqualifying OCI. We conclude, however, that under the circumstances presented by this procurement, Boeing cannot demonstrate that it is an interested party.

As discussed above, the Air Force issued a J&A which sets forth a requirement for a sole-source award to L3 based on its ability to perform both the selection of the re-host aircraft and the re-host integration work, based on its experience and access to classified information. AR, Tab 20, J&A, at 7 (quotation from Agency Response to GAO Questions, July 12, 2017, at 7); Tab 22, Email from Air Force to Boeing, at 2-23 (attaching letters from Air Force to members of Congress). The agency also states that national security interests preclude the transfer of the classified information to another contractor. Id.

Boeing’s arguments here state, in essence, that it would be able to perform the contract provided the selection of the re-host aircraft and the re-host integration work were separated. Such an approach would require transfer of classified information to two contractors, despite the agency’s finding that it cannot transfer such information to any contractor other than L3. On this record, we conclude that Boeing does not demonstrate that, even if the award to L3 was improper based on an OCI, there are any circumstances under which the protester could be awarded the contract in light of the agency’s national security interest determination. We therefore dismiss Boeing’s OCI allegations.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel