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Decision

Matter of: Peter Vander Werff Construction, Inc.

File: B-415676

Date: February 6, 2018

David S. Demian, Esq., Christopher R. Sillari, Esq., and Rishi S. Bhatt, Esq., Finch, Thornton & Baird, LLP, for the protester.

Matthew Butsick, Esq., Department of Energy, for the agency.

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DIGEST

Protest challenging the decision of a prime contractor to award a subcontract is dismissed where the procurement was not by the government and the agency awarding the prime contract has not requested that subcontract protests be decided by our Office.

DECISION

Peter Vander Werff Construction, Inc. (PVWC), of El Cajon, California, protests the award of a subcontract by Lawrence Livermore National Security, LLC (LLNS) under solicitation No. B620862 for general construction and design-build construction services. PVWC challenges LLNS's decision not to award the protester a master task agreement. The Department of Energy, National Nuclear Security Agency (NNSA) requests that we dismiss the protest asserting that we lack jurisdiction over the protest.

We dismiss the protest.

BACKGROUND

LLNS is the prime contractor (under contract No. DE-AC52-07NA27344) for the management and operation (M&O) of NNSA's Lawrence Livermore National Laboratory in Livermore, California. Declaration of NNSA Contracting Officer at 1-2. By the terms of the prime contract, LLNS has the authority to enter into subcontracts for goods and services necessary to the performance of its duties. Consistent with Federal Acquisition Regulation (FAR) clause 52.244-5, LLNS is required to "select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract." FAR clause 52.244-5(a). Furthermore,

Department of Energy Acquisition Regulation (DEAR) clause 920.5244-1, (incorporated in the M&O prime contract), required LLNS to develop and implement a formal purchasing system plan. Declaration of NNSA Contracting Officer at 1. Consistent with the purchasing plan, LLNS had to obtain agency consent for award of any competitive, cost or fixed-price subcontracts with a value of \$20 million or more. Id.

On March 22, 2017, LLNS issued a solicitation for the award of multiple master task agreements (MTAs) for general construction and design-build services. Declaration of LLNS Contract Analyst at 1. Of the 32 offers received, LLNS decided to award MTAs to 16 offerors, not including PVWC. Id. After receiving notice from LLNS that it did not receive an award, this protest followed. Protest at 2-3.

DISCUSSION

PVWC challenges various aspects of its evaluation by LLNS. See id. at 4-10. The NNSA, however, requests that we dismiss the protest asserting that we lack jurisdiction to review the protest. Since PVWC's protest challenges the award of a subcontract by LLNS, and the procurement was not by the government, we conclude that the protest is not a matter that our Office will hear.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act (CICA), 31 U.S.C. sections 3551-3556. 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. 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). 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, the court in U.S. West Communications Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991), held that statutory language essentially identical to that applicable to our Office did not confer on the General Services Administration's 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 "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. Also, in response to the U.S. West decision, we issued revisions to our Bid Protest Regulations confirming that we will review protests of subcontract awards only upon the written request of the federal agency that awarded the prime contract. 4 C.F.R. §§ 21.5(h), 21.13(a); Compugen Ltd., supra at 3-5 (“we declined to review subcontract procurements conducted by Department of Energy management and operating prime contractors in the absence of a request by the agency that we do so”).

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.

The agency requests that we dismiss the protest because the procurement at issue is a subcontract awarded by LLNS and not for our consideration under our regulations at 4 C.F.R. section 21.5(h). Request for Dismissal at 1. Furthermore, the agency argues that this subcontract procurement is not a procurement “by” the government, citing to our decision in The Panther Brands, LLC, discussed above. Id. at 3-4.

PVWC responds that our Office should retain jurisdiction over the protest, asserting that the agency “admits it has complete control over the terms of the solicitation and approval of the award, and that it exercised this power by submitting input and comments to [LLNS].” Protester’s Opposition at 1. In this regard, the protester points to DEAR section 970.4401-1 to support its contention that the agency “has the undisputed responsibility for and power over this solicitation and contract award, such that this solicitation is ‘by’ the government.” Id. at 2-3. The specific language cited by the protester is as follows:

In the Department of Energy (DOE), overall responsibility for the oversight of the performance of management and operating contractors, including their purchasing activities, rests with the cognizant DOE contracting activity and, in particular, the Head of the Contracting Activity (HCA). Contracting officers are responsible for the management and operating contractors’ conformance with this subpart and the applicable terms and conditions of their contracts, and for determining whether those purchasing activities provide timely and effective support to DOE programs.

Id. at 2 citing DEAR section 970.4401-1(a) (emphasis added by protester). PVWC also points to various aspects of the procurement, such use of a “.gov” email address by

LLNS's procurement official, assorted language in the solicitation, and publication of the solicitation on the FedBizOps website.¹ Id. at 3-4.

Our review of the record shows that the procurement by LLNS was not "by" the government, as contemplated in our Office's prior decisions, and, therefore, is not for our consideration in accordance with our regulations at 4 C.F.R. section 21.5(h). In this regard, the record does not establish that the agency controlled essentially every meaningful aspect of the procurement, as would be required for our Office to assert jurisdiction over the subcontract procurement. See The Panther Brands, LLC, supra. In The Panther Brands, LLC, we discuss several aspects of that procurement that led us to conclude that the procurement was conducted "by" the government. There, for instance, the agency established its own evaluation criteria, evaluated proposals and assigned adjectival ratings. Moreover, the contractor, there, did not substantively evaluate proposals or make award recommendations to the agency, and the solicitation informed offerors that the agency would make a selection decision. Id. at 5-6.

Here, in contrast, while LLNS was required to submit the award to the agency for consent in accordance with its prime contract, the evaluation and ultimate award decision was made by LLNS.² Request for Dismissal at 4-5. Furthermore, DEAR section 970.4401-1(a), cited by the protester in support of its argument, does not establish the level of control by the agency required for our Office to take jurisdiction over a subcontract protest. In this regard, the regulation articulates overall responsibility and oversight by the agency for the management and operating contractor, but by the plain language of the cited regulation, such responsibility and oversight is to ensure compliance with agency regulation and the applicable prime contract. We conclude that

¹ We note that our prior decisions have addressed many of the arguments the protester raised in support of its contention that the procurement was conducted "by" the government. See, e.g., Baron Serv., Inc., B-402109, Dec. 24, 2009, 2009 CPD ¶ 264 at 3-4 ("Nor does the fact that [the prime contractor] posted the [request for information] and RFP on the FedBizOpps website . . . and that [prime contractor] employees at PNNL use .gov email addresses demonstrate that [Department of Energy] handled substantially all substantive aspects of the procurements . . ."); Alatech Healthcare, LLC, B-400925, B-400925.2, Mar. 9, 2009, 2009 CPD ¶ 57 at 1-3 (finding agency's review of RFP with prime contractor did not show that procurement was "by" the government, where the prime contractor was responsible for all significant aspects of the procurement).

² In this regard, NNSA specifically notes that the agency did not: (1) direct LLNS to issue the subcontract solicitation; (2) determine the scope of work under the subcontract solicitation; (3) require that LLNS include a System for Award Management registration requirement in the subcontract solicitation; (4) conduct initial evaluations for LLNS awards; or (5) direct LLNS to make award to any particular offeror under the subcontract solicitation. Declaration of NNSA Contracting Officer at 1.

the challenged subcontract procurement was not “by” the government, and, therefore, is not for our Office to consider.³ 4 C.F.R. § 21.5(h); see Baron Serv., Inc., supra.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

³ PVWC appears to imply that, by virtue of NNSA’s consent to the subcontract award, LLNS was acting as an agent or on behalf of the NNSA. Opposition to Request for Dismissal at 3-4. We disagree. In this regard, the facts do not establish that the subcontract “essentially was awarded by the government” in order to trigger our jurisdiction. See NEK Advanced Sec. Grp., Inc., B-405270.2, B-405270.3, Oct. 3, 2011, 2011 CPD ¶ 202; Baron Servs., Inc., supra, at 5 (finding no GAO jurisdiction over protest of subcontract award where prime contractor handles substantially all substantive aspects of the procurement); cf. The Panther Brands, LLC, supra, at 6 (finding GAO jurisdiction over protest of a subcontract award where the record established that the agency controlled essentially every meaningful aspect of the procurement).