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Decision

Matter of: Vectrus Services A-S

File: B-420527; B-420527.3

Date: May 18, 2022

J. Scott Hommer, III, Esq., Rebecca E. Pearson, Esq., Christopher Griesedieck, Esq., Taylor A. Hillman, Esq., Lindsay M. Reed, Esq., and Alexander Koff, Esq., Venable LLP, for the protester.

Anuj Vohra, Esq., James G. Peyster, Esq., Rina M. Gashaw, Esq., and William B. O'Reilly, Esq., Crowell & Moring LLP, for Greenland Contractors JV A/S, the intervenor. Michael J. Farr, Esq., Erika Whelan Retta, Esq., Colonel Frank Yoon, and Katherine A. Illingworth, Esq., Department of the Air Force, for the agency.

Mary G. Curcio, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly found that the protester is ineligible to compete for award of maintenance contract at Thule Air Base in Greenland is denied where the agency reasonably concluded that the company cannot comply with the eligibility requirement, which limits award to "Danish/Greenlandic" enterprises, as defined by international agreement between the Kingdom of Denmark and the United States.

DECISION

Vectrus Services A/S, of Copenhagen, Denmark, protests the terms of request for proposals (RFP) No. FA2523-21-R-0001, issued by the Department of the Air Force for base operations and maintenance services at Thule Air Base, Greenland. Vectrus asserts that the agency has unreasonably concluded that Vectrus does not meet the solicitation's offeror eligibility criteria. The protester further asserts that the solicitation fails to provide sufficient information for offerors to prepare their proposals on an intelligent and equal basis, unreasonably fails to include past performance as an evaluation factor, and fails to provide for a reasonable price evaluation. In addition, Vectrus argues that there are several contractors that should be eliminated from the competition due to the appearance of impropriety and organizational conflicts of interest.

We deny the protest.

BACKGROUND

Thule Air Base

Thule Air Base was created as the result of the 1951 “Defense of Greenland Agreement” between the United States and the Kingdom of Denmark. Agency Report (AR), Tab 24, 1951 Defense of Greenland Agreement. The mission of Thule Air Base is to “provide early warning and attack assessment of ballistic missile launches, provide space surveillance data and to provide tracking, telemetry and commanding . . . of earth orbiting satellite vehicles.” AR, Tab 10, Steady State Performance Work Statement (PWS) at 4. Thule Air Base also provides support for arctic research operations by agencies of the United States, foreign governments, academia, and private organizations. Contracting Officer’s Statement at 2.

Prior Eligibility Requirements and Procurement

The United States and the Kingdom of Denmark have a long history of negotiating the eligibility requirements for contract opportunities at Thule Air Base. As relevant to this protest, a memorandum of understanding was entered into in 1991, and was amended in 2009. Specifically, on January 27, 2009, the Danish Ministry of Foreign Affairs (MFA) sent the United States Embassy in Denmark an acknowledgment and adoption of a diplomatic note that the Embassy had sent to the Danish MFA the previous July. The diplomatic note contained a proposal to update the understanding between the United States and the Kingdom of Denmark as to how the Department of Defense was to conduct procurements in Greenland. The language proposed by the Department of State, and accepted by the Danish MFA, stated:

In accordance with their respective laws and regulations, either Party may award contracts to commercial enterprises for goods and services, including construction projects, in Greenland, and shall procure directly from Danish/Greenlandic sources. When procurement from such sources is not feasible, US requirements may be satisfied by procurement from US or other sources. Either Party may use its own military or civilian personnel to perform services or construction projects.

AR, Tab 26 at 1-6, Memorandum of Understanding (MOU) No. 28453, March 13, 1991, as amended by AR, Tab 27, Diplomatic Note No. 053, July 16, 2008, at 1-2 and AR, Tab 28, Danish Reply to Diplomatic Note No. 053, January 27, 2009.

The Air Force planned to issue a solicitation to procure maintenance services at Thule Air Base in early 2014. On December 9, 2013, the Danish Secretary for Foreign Policy sent a letter to the United States Embassy in Denmark memorializing the agreement between the United States and Kingdom of Denmark that established the eligibility requirements that would define what qualified as a Danish or Greenlandic source under the 1991 memorandum of understanding for the upcoming Thule Air Base maintenance

contract. The agreement provided that: a company interested in participating in the procurement must produce a corporate certificate and, in this regard, the offeror “SHALL NOT BE REGISTERED AS A SUBSIDIARY OF [A] FOREIGN COMPANY.” AR, Tab 72, Danish MFA Correspondence.

On April 9, 2014, the Air Force issued the solicitation for base maintenance services at Thule Air Base using the eligibility criteria established in the 2013 diplomatic correspondence. The contract was awarded to Exelis Services, A/S (now Vectrus Services, A/S, the protester) which was registered in Denmark, as required by the solicitation, and was not registered as a subsidiary of a foreign enterprise. Notwithstanding its registration in Denmark, Exelis Services, A/S was a wholly-owned subsidiary of a United States company.

Following the award, the Kingdom of Denmark expressed concerns relating to the definition of a Danish/Greenlandic source that was eligible to compete for contracts at Thule Air Base. Memorandum of Law at 7 n.3. In 2015, the Kingdom of Denmark and the United States agreed in a joint statement to develop a mutually acceptable definition of a Danish/Greenlandic source that would be eligible for procurements at Thule Air Base, after which the Air Force would conduct a new procurement.¹ AR, Tab 76, Joint Statement on the Resolution of the Thule Base Maintenance Contract Acquisition Matter.

Revised Eligibility Requirements

On October 27, 2020, the United States Embassy in Denmark sent a diplomatic note to the Danish MFA in which it proposed eligibility criteria to define Danish and Greenlandic sources for future procurements for maintenance services at Thule Air Base under the 1991 memorandum of understanding. AR, Tab 30, Diplomatic Note 127, October 27, 2021. That same day, the MFA sent the United States Embassy in Denmark an acknowledgment and adoption of the proposed eligibility criteria. Tab 31, Danish Reply to Diplomatic Note 127, October 27, 2021. The language proposed by the United States Embassy, and accepted by the Danish MFA, is as follows:

In order to fulfill the commitments made in the Thule Air Base Joint Statement, and to ensure that the Thule Base Maintenance Contract is awarded to a “Danish/Greenlandic source” as required by the Memorandum of Understanding between the United States of America

¹ Litigation followed the award to Exelis at GAO, *Per Aarsleff A/S et al.*, B-410782 *et al.*, Feb. 18, 2015, 2015 CPD ¶ 86 (upholding the award to Exelis), the Court of Federal Claims, *PER AARSLEFF A/S v. United States, Exelis Services A/S*, Nos. 15-251C, 15-272C, and 15-330C, June 5, 2015, 121 Fed. Cl. 603 (overturning the award to Exelis), and the United States Court of Appeals for the Federal Circuit. *PER AARSLEFF A/S v. United States, Exelis Services A/S*, June 23, 2016, 829 F. 3d, 1303, reversing *PER AARSLEFF A/S v. United States, Exelis Services A/S*, Nos. 15-251C, 15-272C, and 15-330C, June 5, 2015, 121 Fed. Cl. 603.

and the Government of the Kingdom of Denmark (including the Home Rule Government of Greenland) Concerning Use of Sondrestrom Aviation Facility, Kulusuk Airfield, and Other Matters Related to United States Military Activities in Greenland, signed at Copenhagen March 13, 1991, as amended July 16, 2008, and January 27, 2009, the U.S. Department of Defense will apply the following eligibility criteria:

1. As part of its offer, an offeror must certify that at the time of offer submission and throughout the term of the contract:
 - a. it is, and shall remain, registered as a Danish or Greenlandic company in the Danish Central Business Register;
 - b. more than 50 percent of the offeror's equity, defined as the entire capital of the company, is, and shall continue to be, owned by Danish and/or Greenlandic individuals or legal entities; and
 - c. a non-Danish or non-Greenlandic individual or legal entity does not, and shall not, have a "decisive influence" (in Danish: "bestemmende indflydelse") over the offeror.
2. As part of its offer, an offeror must present a letter from a Danish or Greenlandic bank certifying banking service.

AR, Tab 30, Diplomatic Note 127, October 27, 2021.

Current Solicitation

The RFP, issued on November 17, 2021 for base operations and maintenance services, provided for the award of a contract with fixed-price, fixed-price with economic price adjustment, and cost-reimbursement line items, for a 5-year base period with options to extend the contract for an additional seven years.² AR, Tab 5, RFP at 3, 10. The RFP provided for award on a best-value tradeoff basis considering the following factors: technical, management approach, and price. Proposals were initially due on February 16; on February 24, the agency issued amendment number 2 to the solicitation. AR, Tab 6, RFP amend. 2. Offerors were permitted to submit revised proposals by March 7. Id.

As relevant to this protest, the solicitation notified potential offerors that, as authorized by Federal Acquisition Regulation (FAR) section 6.302-4, international agreement, the

² The services included airfield/airport operations, civil engineering, environmental management, food services, health services, logistics-supply/fuel, non-sensitive communication, seaport transportation, transient quarters, vehicle maintenance, and community/recreation services.

agency was conducting the procurement using other than full and open competition. RFP at 1. The solicitation further provided that competition was limited to Danish or Greenlandic sources. To demonstrate eligibility to participate in the procurement the RFP required the following:

Through the submission of a memorandum with company letterhead signed by an individual who can legally bind the company, offerors must certify that at the time of offer submission and throughout the term of the contract:

- a) it is, and shall remain, registered as a Danish or Greenlandic company in the Danish Central Business Register; and
- b) more than 50 percent of the offeror's equity, defined as the entire capital of the company, is, and shall continue to be, owned by Danish and/or Greenlandic individuals or legal entities; and
- c) a non-Danish or non-Greenlandic individual or legal entity does not, and shall not, have a "decisive influence" (in Danish: "bestemmende indflydelse") over the offeror.

As part of its offer, an offeror must present a letter from a Danish or Greenlandic bank certifying banking service.

RFP at 44, 51-52.

Vectrus filed its protest with our Office on February 11, prior to the initial deadline for receipt of proposals. Vectrus protests that the agency has improperly concluded that Vectrus does not meet the eligibility criteria to participate in the procurement.³ Vectrus also protests that the solicitation fails to include sufficient information for offerors to compete on an intelligent and equal basis, unreasonably fails to include past performance as an evaluation factor, and does not provide for a reasonable price evaluation. In addition, Vectrus asserts that several potential offerors should be excluded from the competition because they have an organizational conflict of interest that creates the appearance of impropriety. As discussed below, we find that Vectrus is not eligible to compete under the solicitation. Since Vectrus cannot compete under the solicitation, Vectrus is not an interested party to raise the remaining issues.

³ Vectrus's initial protest challenged the eligibility criteria as unduly restrictive of competition. After receiving the agency report, and learning that the agency considered Vectrus ineligible to compete for the maintenance contract, Vectrus filed a supplemental protest challenging that determination.

DISCUSSION

Generally, the Competition in Contracting Act (CICA) requires a procuring agency to specify its needs in a manner designed to achieve full and open competition and to include restrictive requirements only to the extent they are necessary to satisfy its legitimate needs. 10 U.S.C. § 2304(a)(1)(A); *Global SuperTanker Servs., LLC*, B-414987, B-414987.2, Nov. 6, 2017, 2017 CPD ¶ 345 at 5. CICA, however, does provide for exceptions to the requirement for full and open competition. As relevant here, CICA provides:

The head of an agency may use procedures other than competitive procedures only when . . . the terms of an international agreement or a treaty between the United States and a foreign government or international organization . . . have the effect of requiring the use of procedures other than competitive procedures[.]

10 U.S.C. § 2304(c)(4).

This provision is implemented in the FAR which provides that agencies need not provide for full and open competition when it is precluded by the terms of an international agreement or treaty between the United States and a foreign government or international organization. FAR 6.302-4(a)(2).

Vectrus protests that the agency has illegally and unreasonably concluded that Vectrus is not a Greenlandic or Danish source eligible to participate in this procurement. According to Vectrus, “The primary issue the GAO must resolve in this case is whether the Competition in Contracting Act of 1984 (“CICA”) permits a federal agency to use an international agreement—which that agency, the U.S. Department of State, and the U.S. Department of Justice all **agree** does not require a satisfactorily-performing incumbent’s exclusion from competition—to preclude that same incumbent from competing for award anyway.” Comments & Supp. Protest at 1.

Vectrus notes that when the Air Force issued its 2014 procurement for base maintenance services at Thule Air Base, it restricted competition to Danish/Greenlandic sources under the 1991 memorandum of understanding, and Vectrus was awarded the contract. Vectrus asserts that at that time, the agency argued that there was nothing in the underlying bilateral agreements between the United States and Denmark that required the exclusion of Danish companies that were owned by American companies. According to Vectrus, the terms of the 1991 memorandum of understanding have not changed since that procurement and Vectrus therefore remains an eligible Danish/Greenlandic firm under the memorandum of understanding, and for purposes of participating in the procurement. Vectrus contends that the agency has determined that Vectrus is not an eligible firm because, at the urging of the government of Greenland, the agency has voluntarily adopted a new definition of Greenland/Danish source which excludes Danish companies that are American, but that is not required by the 1991 memorandum of understanding.

The agency responds that the 1991 memorandum of understanding, as amended in 2009, requires that the agency limit competition to Danish or Greenlandic sources. Thus, the agency maintains that the 1991 memorandum is the international agreement that precludes the use of full and open competition. The agency further explains that diplomatic note 127 establishes the eligibility criteria a firm must meet to be considered a Danish or Greenlandic source for purposes of complying with the 1991 memorandum of understanding. The agency concludes that since Vectrus cannot meet the eligibility criteria set forth in diplomatic note 127, it is not eligible to participate in the procurement.

We are unpersuaded by Vectrus's arguments and agree with the agency. The 1991 memorandum of understanding requires the Air Force to award contracts at Thule Air Base to Danish or Greenlandic sources. The memorandum of understanding provides:

In accordance with their respective laws and regulations, either party may award contracts to commercial enterprises for goods and services, including construction projects, in Greenland, and shall procure directly from Danish/Greenlandic sources. When procurement from such sources is not feasible, US requirements may be satisfied by procurement from US or other sources. . . .

AR, Tab 26 at 1-6, MOU No. 28453, March 13, 1991, as amended by AR, Tab 27, Diplomatic Note No. 053, July 16, 2008, at 1-2 and AR, Tab 28, Danish Reply to Diplomatic Note No. 053, January 27, 2009.

The memorandum of understanding does not define the eligibility criteria a firm must meet to be considered a Danish or Greenlandic source. When Vectrus was awarded the Thule Air Base maintenance contract in 2014, as Vectrus notes, the solicitation also was restricted to Danish or Greenlandic sources in accordance with the 1991 memorandum of understanding. At that time, the United States Embassy in Denmark, and the Danish MFA, used diplomatic correspondence to reach an agreement that a firm was considered eligible as a Danish or Greenlandic source under the 1991 memorandum of understanding, if the firm was registered in Denmark, and was not registered as a subsidiary of a foreign firm. See AR, Tab 72, Danish MFA Correspondence; Tab 73, US Ambassador Response to Danish MFA Correspondence. Vectrus was eligible to compete for the air base maintenance contract under those criteria.

As to the current solicitation, we agree with Vectrus that the language in the underlying 1991 memorandum of understanding has remained the same since the 2014 solicitation was issued. Vectrus ignores, however, that the eligibility criteria defining a Danish or Greenlandic source was revised pursuant to diplomatic note 127, to exclude wholly owned subsidiaries of foreign firms. When the Air Force issued the solicitation in 2020, it therefore used the revised eligibility criteria agreed to in diplomatic note 127.

Contrary to Vectrus's assertion, the agency did not voluntarily adopt this new definition of a Danish/Greenlandic source. As stated in diplomatic note 127, the definition was

negotiated by the Governments of Denmark and the United States “[i]n order to fulfill the commitments made in the Thule Air Base Joint Statement, and to ensure that the Thule Base Maintenance Contract is awarded to a ‘Danish/Greenlandic source’ *as required by the Memorandum of Understanding between the United States of America and the Government of the Kingdom of Denmark* . . . signed at Copenhagen March 13, 1991, as amended July 16, 2008, and January 27, 2009 . . .” AR, Tab 30, Diplomatic Note 127, October 27, 2021 (emphasis added).

Vectrus has not argued or demonstrated that the Department of State is precluded from negotiating with the Governments of Denmark and Greenland to redefine the eligibility criteria for Danish or Greenlandic sources for purposes of complying with the 1991 memorandum of understanding. Rather, Vectrus has focused on the fact that the 1991 memorandum of understanding itself does not preclude Vectrus from competing and has ignored the new eligibility criteria set forth in diplomatic note 127.⁴

Based on our review of the record, we find the agency properly concluded that the 1991 memorandum of understanding was an international agreement that could be used as the basis to preclude full and open competition for this procurement pursuant to FAR 6.302-4(a)(2). We also conclude that the agency reasonably accepted, and included in its solicitation for air base maintenance services at Thule Air Base, the definition of eligibility criteria for Danish/Greenlandic sources established by diplomatic note 127. As Vectrus cannot meet this eligibility criteria, we find that the agency reasonably concluded that Vectrus is not eligible to compete for this procurement.

Vectrus has raised a number of additional challenges to the terms of the solicitation, and has argued that due to organizational conflicts of interest and the appearance of impropriety certain potential competitors should be excluded from the competition. As Vectrus is not eligible to compete in the procurement, Vectrus is not an interested party to raise these issues. 4 CF.R. § 21.0(a)(1); *DGCI Corporation*, B-418494, April 27, 2020, 2020 CPD ¶ 152 at 3.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁴ Vectrus initially protested that the agency justified restricting full and open competition based on diplomatic note 127, which, Vectrus asserted, is not an international agreement and therefore cannot serve as the basis for the restriction. In its report, the agency explained that the restriction was based on the 1991 memorandum of understanding, not diplomatic note 127. The agency further explained that diplomatic note 127 defined an eligible Greenlandic or Danish source under the 1991 memorandum of understanding.