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Comptroller General
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Decision

Matter of: Per Aarsleff A/S; Copenhagen Arctic A/S; Greenland Contractors I/S

File: B-410782; B-410782.2; B-410782.3

Date: February 18, 2015

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Kevin P. Connelly, Esq., Kelly E. Buroker, Esq., Kirsten W. Konar, Esq., Caroline A. Keller, Esq., and Kyle E. Gilbertson, Esq., Vedder Price, P.C., for Exelis Services A/S, the intervenor.

Maj. Carlos M. De Dios, and Christine Piper, Esq., Department of the Air Force, for the agency.

Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests that the agency unreasonably found that the awardee complied with the solicitation's eligibility requirement, which limited award to "Danish/Greenlandic enterprises," is denied where the agency's evaluation of the awardee's proposal was consistent with the terms of the solicitation. Additionally, any challenges to the solicitation are untimely because they were not filed prior to the due date for receipt of proposals.
2. Protest that the agency engaged in misleading discussions with a protester that led it to increase its price is denied where the protester's contention is not supported by the record, and where the protester, in any event, cannot show that it could have been prejudiced even if the discussions were misleading.
3. Challenge to the evaluation of the awardee's experience is denied where the solicitation did not prohibit offerors from relying on the experience of their teaming partners and subcontractors to satisfy the solicitation requirements.

4. Protest that the agency failed to evaluate the realism of the awardee's proposed price is denied where the solicitation did not expressly require a price realism evaluation, and where, in any event, the protester raising this challenge cannot demonstrate that it could have been prejudiced by the agency's failure to conduct such an evaluation.

DECISION

Per Aarsleff A/S, of Aabyhoej, Denmark, Copenhagen Arctic A/S, of Copenhagen, Denmark, and Greenland Contractors I/S, of Copenhagen, Denmark, protest the award of a contract to Exelis Services A/S, of Hellerup, Denmark, by the Department of the Air Force, under request for proposals (RFP) No. FA2523-12-R-0006, to provide operations, maintenance, and support services at Thule Air Base in Thule, Greenland.¹ The protesters argue that the award to Exelis Services was unreasonable because, they contend, the awardee is not a Danish or Greenlandic company, as required by the RFP, and was instead a wholly-owned subsidiary of a foreign (United States) company. Per Aarsleff also argues that the agency unreasonably found that Exelis Services met the RFP's experience requirements, and that the agency conducted misleading discussions with the protester. Greenland Contractors also argues that the agency failed to reasonably evaluate Exelis Services' proposed price.

We deny the protests.

BACKGROUND

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 35², 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." Performance Work Statement (PWS) at 1. Thule Air Base also provides support for arctic research operations by agencies of the United States, foreign governments, academia, and private organizations. Per Aarsleff Contracting Officer (CO) Statement at 1-2.

¹ Greenland is a self-governing entity within the Kingdom of Denmark. See Government of Greenland website, available at: <http://naalakkersuisut.gl/en/About-government-of-greenland/About-Greenland/Politics-in-Greenland>.

² The agency report for each protest used a uniform system for identifying documents; citations to tabs in the agency report refer to the same document provided to all protesters, unless otherwise noted.

The United States and the Kingdom of Denmark have a long history of negotiating the eligibility requirements for contract opportunities at Thule Air Base. See Greenland Contractors AR at 3. A 1962 Aide Memoire was drafted by the Department of State in June 1962 to clarify certain provisions of the 1951 agreement that created Thule Air Base. AR, Tab 31, 1962 Aide Memoire, at 1. This document established the authority of a procuring activity in Copenhagen, Denmark, for operations and supplies at Thule Air Base. Id. at 4. The purpose of the procurement activity was to allow Danish concerns to participate more fully, and on an equal basis, with United States business concerns in the procurement of goods and services to support Thule. Id. at 4-6, 12-13; see Greenland Contractors AR at 3.

On January 27, 2009, the Danish Ministry of Foreign Affairs (MFA) sent the United States Embassy in Denmark an acknowledgment and adoption of a note that the Embassy had sent to the Danish MFA the previous July. AR, Tab 25, 2009 Diplomatic Note. 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. Greenland Contractors AR at 4. 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 25, 2009 Diplomatic Note, at 1.

On April 11, 2013, officials from the Air Force and the Department of State entered into discussions with Danish MFA officials to discuss the criteria that would be used to verify the status of a Danish or Greenlandic company in preparation for the Thule Air Base solicitation. Greenland Contractors CO Statement at 5; see AR, Tab 5, Danish Company Criteria Correspondence; Tab 6, Danish MFA Correspondence. The parties concluded that Denmark could not be the country certifying that offerors were eligible Danish or Greenlandic sources, because doing so would trigger obligations under European Union procurement law. AR, Tab 5, Danish Company Criteria Correspondence, at 13-14. Additionally, allowing Greenland to determine the eligibility of each source was considered to create a conflict of interest because the incumbent contractor, Greenland Contractors, is partially owned by the government of Greenland. Id. at 18.

To resolve this matter, the Department of State suggested a “simple, transparent checklist” that the Air Force could use to verify eligibility. Id. at 13. On November 4, a Department of State official emailed a description of the general requirements for conducting business in Denmark to the CO responsible for the Thule Air Base procurement. Id. at 15. On December 9, 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 concerning the eligibility requirements for the Thule Air Base contract. This letter acknowledged that the Danish MFA would “no longer issue clearances for companies eligible to participate in the procurement,” and instead gave the United States the responsibility to “assess whether a company qualifies as Danish or Greenlandic based on predefined criteria.” AR, Tab 6, Danish MFA Correspondence, at 1. The letter stated 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.” Id. at 1-2 (emphasis in original). The letter also required potential offerors to produce a signed letter from an officer of a bank within Denmark verifying that the company conducts business with that institution. Id.

The Request for Proposals

The RFP was issued on April 9, 2014,³ and provided for the award of a fixed-price contract with economic price adjustment and cost reimbursement line items, for a 1-year base period and six 1-year options. RFP at 101, 111.⁴ The solicitation sought to acquire non-personal base operations and maintenance services at Thule Air Base, which requires providing support in the following areas: supply/fuel, airfield/airport, transportation/seaport, civil engineering, environmental management, health services, food services, temporary lodging, recreation services, community services, and non-sensitive communication services. PWS at 1. Award was to be made to the responsible firm that submitted the lowest-priced, technically acceptable proposal that met all of the eligibility requirements set forth in the solicitation. RFP at 111.

With regard to technical acceptability, the RFP advised that the agency would evaluate proposals under seven non-price, technical subfactors: (1) program management; (2) infrastructure operation and maintenance plan; (3) logistics plan; (4) vehicle/equipment replacement plan; (5) resource utilization plan; (6) downward pricing; and (7) experience. Id. at 111-112. The solicitation stated that an

³ A draft RFP was issued on December 5, 2013, which also included the provisions discussed herein concerning the eligibility of firms to compete.

⁴ Citations to the RFP are to the conformed copy provided by the Air Force.

unacceptable rating under any one of these subfactors would result in the proposal being rated technically unacceptable. Id. at 112. The agency was to evaluate price using one or more of the price analysis techniques outlined in Federal Acquisition Regulation (FAR) § 15.404-1(b) to determine whether the proposed prices were reasonable, complete and balanced. Id. at 115. The solicitation included the following notice:

Offerors are advised to clearly show justification for unique practices that significantly lower pricing. An assessment that the proposal is not reasonable or affordable will result in the offer being unacceptable for award.

RFP at 115.

With regard to the eligibility of firms to participate in the procurement, the RFP stated the following:

L-3. OFFEROR ELIGIBILITY

Participation in this acquisition is limited to Danish/Greenlandic enterprises. Enterprises must possess a corporation certificate (Selskabscertifikat m. oblat) verifying the company is registered as a business in the Kingdom of Denmark (Det Central Virksomhedsregister (CVR); Det Grønlandske Erhvervsregister (GER); Skráseting Føroya (Skrás. Nr.)). NOTE: THE REGISTERED OFFICE OF THE ENTERPRISE SHALL BE IN THE KINGDOM OF DENMARK AND SHALL NOT BE REGISTERED AS A SUBSIDIARY OF FOREIGN COMPANY. Enterprises must produce a signed letter from an officer of a bank within the Kingdom of Denmark verifying the company conducts business with that institution. NOTE: ELECTRONIC FUNDS TRANSFER OF INVOICE PAYMENTS WILL ONLY BE MADE TO A BANK IN THE KINGDOM OF DENMARK.

RFP at 102-03.

Similarly, the RFP's instructions required offerors' proposals to address the following:

L-6. INFORMATION TO OFFERORS (ITO) AND INSTRUCTIONS FOR PROPOSAL PREPARATION INSTRUCTIONS (IPP)

* * * * *

b. **Contract Documents.** As part of the proposal submission, include the following:

* * * * *

2) Corporation certificate (Selskabscertifikat m. oblat) verifying that your company is registered as a business in the Kingdom of Denmark. (Det Central Virksomhedsregister (CVR); Det Grønlandske Erhversregister (GER); Skráseting Føroya (Skrás. Nr.))

NOTE: THE REGISTERED OFFICE OF THE ENTERPRISE SHALL BE IN THE KINGDOM OF DENMARK AND SHALL NOT BE REGISTERED AS A SUBSIDIARY OF FOREIGN COMPANY.

3) Signed letter from an officer of a bank within the Kingdom of Denmark verifying that your company conducts business with that institution.

NOTE: ELECTRONIC FUNDS TRANSFER OF INVOICE PAYMENTS WILL ONLY BE MADE TO A BANK IN THE KINGDOM OF DENMARK.

Id. at 109.

The solicitation required that offerors provide a staffing plan in accordance with the agreements between the United States and the Kingdom of Denmark. RFP at 107. The RFP stated that personnel working at Thule Air Base must be Danish, Greenlandic, or American citizens, and must adhere to Danish/Greenlandic labor law. Id. As certification of this requirement, offerors were required to provide a “statement of assurance that Danish/Greenlandic labor law will be followed and applied to personnel who are proposed to work at Thule [Air Base].” Id.

The solicitation also included the following relevant provisions in the PWS concerning:

H-6. STATUTORY RESTRICTIONS ON FOREIGN ACQUISITIONS

The requirements at PWS 3.1.16 to maximize and document contract related purchases and subcontracts for Danish and Greenlandic sources required by the 1962 International Agreement (Aide Memoire) between the US and Denmark take precedence in the performance of this contract.

RFP at 77.

3.1.16 Maximize and document contract-related purchases and subcontracts from Danish and Greenlandic sources.

Required by the 1962 Agreement (Aide Memoire) between the Government of the US and the Government of the Kingdom of Denmark. Document and justify any exceptions.

PWS at 10.

Of relevance to this protest, and as discussed in detail below, the Air Force received questions from offerors in response to the draft RFP regarding the requirement to be a “Danish/Greenlandic enterprise[],” and provided responses on December 10, 2014, and January 22, 2014. RFP at 116-17, Questions & Answers (Q&As).

Evaluation of Proposals and Award

The Air Force received four proposals in response to the RFP by the initial closing date of May 9, 2014: Per Aarsleff, Copenhagen Arctic, Greenland Contractors, and Exelis Services. All offerors were included in the competitive range, and the agency issued evaluation notices (ENs) to each offeror and conducted oral discussions. The agency evaluated the EN responses and held a second round of discussions.⁵ Each offeror received a letter that its proposal remained in the competitive range and that it was currently rated as technically acceptable. The agency then requested final proposal revisions (FPRs).

The Air Force concluded that all offerors’ proposals were technically acceptable, and that all offerors were eligible to receive award as Danish or Greenlandic enterprises. AR, Source Selection Decision, at 2-3. Exelis Services proposed the lowest evaluated price of \$363,925,645, Per Aarsleff proposed the second-lowest evaluated price of \$[DELETED], Copenhagen Arctic proposed the third-lowest evaluated price of \$[DELETED], and Greenland Contractors proposed the fourth-lowest evaluated price of \$[DELETED]. Id. at 4. After evaluating the FPRs, the Air Force selected Exelis Services for award based on its lowest-priced, technically acceptable proposal. Id. at 5. The agency advised the other three offerors of its award decision, and these protests to our Office followed.

DISCUSSION

Per Aarsleff, Copenhagen Arctic and Greenland Contractors each argue that the award to Exelis Services was unreasonable and did not meet the RFP requirements because the awardee is not a Danish or Greenlandic company, but is rather a subsidiary of a foreign (United States) company. Per Aarsleff Protest at 9;

⁵ During this time the Air Force contacted the Danish Foreign Ministry to obtain assistance in determining if these offerors “can be considered Danish Firms and not a subsidiary of a foreign firm.” AR, Tab 6, Ministry of Foreign Affairs Correspondence at 4. The Danish Foreign Ministry replied that it was “not able to assist in the assessment of the companies in question.” Id.

Copenhagen Arctic Protest at 4; Greenland Contractors Protest at 10. Additionally, Per Aarsleff argues that Exelis Services cannot demonstrate the minimum experience required by the RFP, and contends that the agency conducted misleading discussions that caused the protester to increase its proposed price. Per Aarsleff Protest at 16, 19. Greenland Contractors also argues that the agency failed to reasonably evaluate Exelis Services' proposed price. Greenland Contractors Protest at 18. For the reasons discussed below, we find no basis to sustain the protests.⁶

Danish/Greenlandic Enterprise Requirement

The protesters each argue that Exelis Services was not eligible for award because it was not a "Danish/Greenlandic enterprise[]," as required by the RFP. As discussed above, the RFP stated that "THE REGISTERED OFFICE OF THE ENTERPRISE SHALL BE IN THE KINGDOM OF DENMARK AND SHALL NOT BE REGISTERED AS A SUBSIDIARY OF FOREIGN COMPANY." RFP at 102.⁷ The protesters argue that the agency's interpretation of the solicitation improperly focused on the issue of registration, rather than the ownership of the offeror. The protesters contend that Exelis Services was incorporated in Denmark only shortly before proposal submission and is a wholly-owned subsidiary of Exelis Systems Corporation, a United States based company. For these reasons, the protesters argue that Exelis Services should have been excluded from the competition. We have reviewed the record and conclude that the Air Force evaluated Exelis Services' proposal in a manner that was consistent with the terms of the solicitation. We also conclude that the protesters' arguments essentially challenge alleged defects in the solicitation that were apparent prior to the time for submission of proposals, and are therefore untimely.

The evaluation of an offeror's proposal is a matter within the agency's discretion. National Gov't Servs., Inc., B-401063.2 et al., Jan. 30, 2012, 2012 CPD ¶ 59 at 5. A protester's disagreement with the agency's judgment does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4. In reviewing a protest against an agency's evaluation of

⁶ The protesters raise other collateral arguments. While our decision does not specifically address every argument, we have considered all of the protesters' assertions and find that none provides a basis for sustaining the protests.

⁷ The parties appear to take differing views as to whether the prohibition on registration "AS A SUBSIDIARY OF FOREIGN COMPANY" applies to the enterprise, or the registered office of the enterprise. For the reasons discussed below, we need not resolve this matter, as under either interpretation, the Air Force's evaluation of Exelis Services' proposal was reasonable.

proposals, our Office will not reevaluate the proposals, but will instead examine the record to determine whether the agency's judgments are reasonable and consistent with the solicitation's evaluation factors and applicable statutes and regulations. Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶ 141 at 4; Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. Where, as here, a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Alluviam LLC, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2.

As discussed above, the RFP section stated that “[p]articipation in this acquisition is limited to Danish/Greenlandic enterprises.” RFP at 102. This section of the RFP set forth three criteria for eligibility as a Danish/Greenlandic enterprise: (1) “Enterprises must possess a corporation certificate (Selskabscertifikat m. oblat) verifying the company is registered as a business in the Kingdom of Denmark (Det Central Virksomhedsregister (CVR),” (2) “THE REGISTERED OFFICE OF THE ENTERPRISE SHALL BE IN THE KINGDOM OF DENMARK AND SHALL NOT BE REGISTERED AS A SUBSIDIARY OF FOREIGN COMPANY,” and (3) “Enterprises must produce a signed letter from an officer of a bank within the Kingdom of Denmark verifying the company conducts business with that institution.” Id. at 102-03; see also RFP at 109.

As also discussed above, the Air Force evaluated each offeror and concluded that each met the Danish/Greenlandic enterprise requirement. AR, Source Selection Decision, at 2-3. Specifically, the agency states that “[t]he Danish Business Register (CVR) was checked to verify that all Offerors were registered as a business in the Kingdom of Denmark,” and further states that “[t]here was no information indicating that any Offeror, including Exelis Services A/S, had offices registered as subsidiaries of a foreign company.” Greenland Contractors CO Statement at 10; see also id. at 12-13; Copenhagen Arctic CO Statement at 10, 12-13; Per Aarsleff CO Statement at 10, 13-14.

The protesters do not challenge the eligibility of Exelis Services to participate in the competition based on the requirement to have a corporate certificate or the requirement to produce a letter from a bank. The protesters, however, argue that the Air Force's evaluation of offerors' eligibility as Danish/Greenlandic enterprises was unreasonably limited to the RFP's prohibition against a firm being “registered as a subsidiary of foreign company.” RFP at 102. In this regard, the protesters argue that the treaty obligations between the United States and the Kingdom of Denmark required the awardee to be a Danish or Greenlandic firm, and that the Air Force was therefore required to look beyond the issue of “registration” and to investigate the actual ownership of each offeror. The protesters argue that an

investigation into Exelis Services' corporate parentage would have disclosed non-Danish or Greenlandic ownership.

While the parties agree that the United States and the Kingdom of Denmark have a long history of treaty obligations concerning the Thule Air Base, our Office's focus here is on the terms of the solicitation.⁸ Here, we find that the RFP clearly stated that participation in the competition and award of the contract would be limited to "Danish/Greenlandic enterprises." RFP at 102. The RFP also, however, identified the three above-referenced criteria the Air Force would evaluate to determine whether a firm was an eligible enterprise.⁹ Id. at 102-03. The RFP did not state that the specific terms of any treaties or other obligations between the United States and the Kingdom of Denmark would be utilized for purposes of determining the eligibility of a firm to compete.¹⁰

If the protesters believed that terms specific to treaties or other obligations should have been referenced in or incorporated into the RFP, they were required to challenge this matter prior to the time for receipt of proposals. Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of providing parties a fair opportunity

⁸ As discussed herein, our decision as to whether Exelis met the eligibility requirements under the RFP is limited to the terms of the RFP. In this regard, we conclude that the RFP set forth the ground rules under which the Air Force would assess whether a firm met the eligibility requirements that exist under the treaty obligations between the United States and the Kingdom of Denmark. Our decision therefore does not address whether award to Exelis Services met those treaty obligations, separate and apart from the terms of the RFP.

⁹ As discussed above, the agreements between the countries appear to designate the United States as the party responsible for establishing eligibility criteria for the RFP. See AR, Tab 6, Denmark MFA Correspondence, at 1. We need not address this issue in detail, however, as our decision here turns on the provisions of the RFP.

¹⁰ The protesters argue that RFP section H.6 incorporated the terms of the 1962 Aide Memoire, and therefore required a broader interpretation of eligibility. See RFP at 77; see also PWS at 10. As discussed below, however, the solicitation incorporated the Aide Memoire only as to labor and purchasing requirements during contract performance, and did not specifically incorporate the terms of the Aide Memoire, or any other agreements between the United States and the Kingdom of Denmark regarding the eligibility requirements. See id. Instead, RFP sections L-3 and L-6 set forth the eligibility criteria established by the Air Force, and thus informed offerors as to how the agency would evaluate whether an offeror was a Danish/Greenlandic enterprise. See RFP at 102-103, 109.

to present their cases, and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Peacock, Myers & Adams, B-279327, Mar. 24, 1998, 98-1 CPD ¶ 94 at 3-4; Professional Rehab. Consultants, Inc., B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 at 2. Under these rules, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must be filed before that time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2014). Where alleged improprieties do not exist in the initial solicitation, but subsequently occur (e.g., via an amendment to the solicitation or based on agency clarifications of the terms of the solicitation), they generally must be protested not later than the next closing time for receipt of proposals. Id.; see Armorworks Enters., LLC, B-400394, B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 5.

The protesters argue that the Air Force could not have reasonably relied on the “registered as a foreign subsidiary” provision of the RFP because, they contend, there was no way for a firm to register in the CVR as a subsidiary of a foreign company. The protesters provide numerous legal opinions and declarations from Danish legal authorities in support of this view of Danish law and the CVR. See, e.g., Per Aarsleff Comments (Dec. 22, 2014), Exh. A, Decl. of Christian Th. Kjølbbye (Danish Attorney). The Air Force does not specifically dispute the protesters’ contentions in this regard. Thus, the protesters contend, the RFP, despite its plain language, cannot be interpreted as stating that an offeror will be considered eligible as long as it is “NOT BE REGISTERED AS A SUBSIDIARY OF FOREIGN COMPANY.” RFP at 102. The protesters therefore argue that the assessment as to whether an offeror is a “Danish/Greenlandic enterprise” within the meaning of the RFP should turn on whether the prime contractor had Danish or Greenlandic ownership or control. Per Aarsleff Protest at 10.

We conclude that the RFP was clear on its face as to the issue of registration in the CVR. Specifically, we agree with the Air Force and Exelis Services that the RFP’s eligibility analysis addressed whether the offeror was registered as a subsidiary of a foreign company. Apart from the RFP’s language concerning registration, there are no other criteria in the RFP that explain how the agency would evaluate whether a firm was a Danish or Greenlandic enterprise. Although the parties seek to add the issue of ownership or control to the RFP, nothing in the solicitation provides for consideration of these criteria.

Even if there was some doubt as to the meaning of this RFP provision at the time the draft solicitation was issued in December 2013, the Air Force provided two Q&As that removed all doubt as to how the agency interpreted the provision. As discussed above, the Air Force was asked the following question from an offeror: “What do you mean by ‘not be registered’?” RFP at 116. The agency responded on Dec. 10, 2013:

In the searchable part of the CVR [Danish Business Register] there is an information point called 'type of company/virksomhedsform' that has 'subsidiary of foreign company' as a possibility, so there is a way to see if the company is fully registered as Danish or acting as a foreign subsidiary in Denmark.

RFP at 116. This response clearly advised offerors that the Air Force believed that there was within the CVR a place for a firm to indicate that a firm was a subsidiary of a foreign firm. Id.

Similarly, the Air Force was asked the following question from an offeror: "Please provide further clarification as to what a 'Danish Enterprise' is as will be interpreted by the US Air Force?" The agency responded on January 22, 2014:

To be eligible for award, an offeror must present: 1. Corporation certificate (Selskabscertifikat m. oblat) verifying that your company is registered as a business in the Kingdom of Denmark. (Det Central Virksomhedsregister (CVR); Det Grønlandske Erhvervsregister (GER); Skráseting Føroya (Skrás. Nr.)) NOTE: THE REGISTERED OFFICE OF THE ENTERPRISE SHALL BE IN THE KINGDOM OF DENMARK AND SHALL NOT BE REGISTERED AS A SUBSIDIARY OF FOREIGN COMPANY. 2. Signed letter from an officer of a bank within the Kingdom of Denmark verifying that your company conducts business with that institution. NOTE: ELECTRONIC FUNDS TRANSFER OF INVOICE PAYMENTS WILL ONLY BE MADE TO A BANK IN THE KINGDOM OF DENMARK.

Id. at 117. This response essentially repeats the language from section L of the RFP. Id. at 102-03.

We think that these Q&As clearly advised offerors that the agency intended to evaluate whether an offeror was registered in the CVR as a subsidiary of a foreign company.¹¹ To the extent the protesters argue that the answers above provide

¹¹ Even if the solicitation was ambiguous as to the registration requirement, we conclude that such an ambiguity would not provide a basis to sustain the protest. An ambiguity exists if a solicitation term is susceptible to more than one reasonable interpretation that is consistent with the solicitation, when read as a whole. Poly-Pacific Techs., Inc., B-293925.3, May 16, 2005, 2005 CPD ¶ 100 at 3. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Where a patent ambiguity in a solicitation is not challenged prior to the submission of bids, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. 4 C.F.R. § 21.2(a)(1); Simont S.p.A., B-400481, Oct. 1, 2008, 2008 CPD ¶ 179 at 4. Here, (continued...)

incorrect information, because the CVR does not allow for such a registration, we conclude that the protesters' arguments are challenges to the terms of the solicitation and are therefore untimely. In this regard, the Q&As were issued prior to the May 9, 2014, due date for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1).

In sum, we conclude that the Air Force reasonably evaluated Exelis Services' proposal, and reasonably found that Exelis Services was eligible for award under the terms of the solicitation. We therefore find no basis to sustain the protest.

Exelis Services' Experience

Next, Per Aarsleff argues that Exelis does not meet the RFP's experience requirements because of the way in which the awardee was structured and how it proposed to perform the PWS requirements. Per Aarsleff Protest at 16. We find no merit to this argument.

The experience technical evaluation subfactor instructed offerors to "submit a single summary of the offeror's (and teammates) relevant experience" performed within the previous 5 years, that reflected the following:

The summary should show recent experience in a remote environment performing operations of power production and distribution, heating ventilation and air conditioning (HVAC), or water treatment and distribution. Operations shall demonstrate performance in a remote environment and challenges faced and overcome in that environment. Experience may be demonstrated either as a prime contractor or team effort; and either through a single prior contract or by a combination of prior contracts. Recent experience information shall consist of activities performed within the previous 5 years from the issue date of this solicitation.

1) Provide documentation of previous work that demonstrates a comprehensive understanding of tasks required to perform civil engineering operations of power production and distribution, heating ventilation and air conditioning (HVAC) or water treatment and distribution in a remote environment.

(...continued)

given the specificity of the Q&As, we conclude that even if the solicitation contained an ambiguity regarding eligibility, such an ambiguity would have been patent, rather than latent.

2) Provide previous activities performed in a remote environment. A remote environment is defined as an environment with personnel and cargo logistical challenges, limited external resources, or an environment, which requires self-sustainability capabilities.

RFP at 108. The RFP also instructed offerors to “[p]rovide complete information as to the arrangement and relationship and copies of any teaming or joint venture agreements.” Id. at 110.

The Air Force evaluated the “single summary of the offeror’s (and teammates) relevant experience” required by the RFP during its evaluation. AR, Tab 38, Exelis Evaluation, at 241-242. The agency concluded that Exelis Services provided an acceptable summary of experience that met the solicitation requirements. Id.

The protester notes that Exelis Services’ proposal stated that the offeror teamed with its direct parent company, Exelis Systems Corporation, as a subcontractor, to perform the work under the contract. AR, Tab 37, Exelis Proposal, Vol. I, Subfactor 1, at 1; id., Exelis Proposal, Vol. 2, Factor 2, at 1. In fact, the protester contends that 100 percent of the work will be performed by Exelis Systems. See Per Aarsleff Comments (Dec. 22, 2014) at 37-38. For the experience subfactor, the awardee’s proposal cited experience relating to Exelis Systems, and did not cite any experience for Exelis Services. AR, Tab 37, Exelis Proposal, Vol. I, Subfactor 7, at 2-3, 7. The protester argues that although the RFP allowed team members to contribute to the prime offeror’s satisfaction of the minimum experience requirement, the RFP did not allow the prime offeror to rely entirely on its subcontractors to demonstrate experience because “implicit in the minimum experience criteria was a requirement that the prime contractor have at least some experience . . . related to the work that it will perform.” Per Aarsleff Comments (Dec. 22, 2014) at 38.

We find no basis to question the reasonableness of the agency’s evaluation of the Exelis Services’ experience. An agency may consider the experience or past performance of an offeror’s parent or affiliated company, provided the RFP does not prohibit such consideration. See, e.g., Perini/Jones, Joint Venture, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4; Hot Shot Express, Inc., B-290482, Aug. 2, 2002, 2002 CPD ¶ 139 at 3. Here, even if Exelis Services intends to subcontract all of the work under this contract, Per Aarsleff fails to identify anything in the RFP that would require the agency to reject Exelis Services’ proposal as unacceptable under the experience subfactor based on the awardee’s approach. See Computer Sci. Corp., B-409386.2; B-409386.3, Jan. 8, 2015, 2015 CPD ¶ 34 at 5 (holding that an offeror’s proposed approach of subcontracting 96.2 percent of the work did not require the agency to assess risks to the proposal where the solicitation did not bar this approach). As discussed above, the experience subfactor stated that “[e]xperience may be demonstrated either as a prime contractor or team effort,” but did not set forth a minimum level of experience for the prime contractor. RFP

at 108. In this regard, the solicitation did not specify that the prime contractor had to demonstrate experience as a prime contractor, or experience working as part of a team effort.¹² Because the RFP did not prohibit an offeror from relying solely on the experience of its proposed teaming members, we find no basis to sustain the protest.

Misleading Discussions

Next, Per Aarsleff argues that the Air Force engaged in misleading discussions with the protester. In this regard, Per Aarsleff argues that the agency misunderstood its proposed labor approach, which caused the agency to direct the protester to unnecessarily increase its price during discussions. The protester also argues that the agency failed to advise Per Aarsleff where it might reduce staff, and therefore improve its chances for award. Per Aarsleff Protest at 18-20. We find no merit to these arguments.

When an agency engages in discussions with an offeror the discussions must be meaningful, that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision. Hanford Env'tl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 8. Although discussions must address deficiencies and significant weaknesses identified in proposals, the precise content of discussions is largely a matter of the contracting officer's judgment. FAR § 15.306(d)(3); American States Utilities Servs., Inc., B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 5. An agency may not mislead an offeror through the framing of a discussion question into responding in a manner that does not address the agency's actual concerns, or otherwise misinform the offeror concerning a problem with its proposal. Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6. There is no requirement, however, that an agency inform an offeror during discussions that its price may be too high, where the offeror's price is not considered excessive or unreasonable. Uniband, Inc., B-289305, Feb. 8, 2002, 2002 CPD ¶ 51 at 11.

The Air Force initially found that Per Aarsleff's proposal was unacceptable under the program management subfactor, and issued 44 ENs to the firm regarding its staffing

¹² Even if the solicitation was ambiguous as to the experience requirement, we conclude that such an ambiguity was patent, rather than latent, and therefore must have been challenged prior to the time for receipt of proposals. See 4 C.F.R. § 21.2(a)(1); Poly-Pacific Techs., Inc., supra. Thus, any challenge to the interpretation of the experience requirement is now untimely. Id.

plan.¹³ AR, Tab 8, Initial Evaluation Briefing, at 24; Per Aarsleff CO Statement at 18-19. In these ENs, the agency referenced the specific labor category where the protester's staffing or qualifications appeared to be insufficient to fulfill a particular PWS requirement. AR, Tab 9, Per Aarsleff Staffing Plan ENs (Round 1). Each EN gave the protester the option to either "provide your company's methodology to fulfill this requirement with proposed staffing and qualifications or update your staffing plan." Id.

First, to the extent Per Aarsleff argues that the Air Force conducted misleading discussions because it failed to advise the protester that its proposed price was too high for any particular area, we disagree. As discussed above, agencies are not required to advise an offeror that its prices are higher than other offerors, as long as the prices are not unreasonably high or otherwise unacceptable. See Uniband, Inc., supra. Here, none of the protester's proposed prices were found to be unreasonably high or unacceptable.

Next, to the extent Per Aarsleff argues that the Air Force conducted misleading discussions because it failed to recognize that the protester's proposed staffing plan was acceptable as initially proposed, and did not require additional increases in staffing, we also disagree. The Air Force states that, with respect to certain ENs that indicated a low level of proposed staff, Per Aarsleff elected to explain its methodology for meeting the PWS requirement with its initial proposed staffing; for these ENs, the agency accepted the response and closed those ENs. See Per Aarsleff CO Statement at 19; AR, Tab 9, Per Aarsleff Staffing Plan ENs (Round 1), at 11. In other instances Per Aarsleff elected to increase its proposed labor hours or staffing in response to the EN; for these ENs, the agency also accepted the response and closed those ENs. See Per Aarsleff CO Statement at 19; AR, Tab 9, Per Aarsleff Staffing Plan ENs (Round 1), at 13-14. The CO stated that at no time during discussions did the agency indicate to Per Aarsleff, or any offeror, that its' only option was to increase its labor hours in order to obtain acceptable ratings. Id. at 18. Thus, for all ENs, the protester had the opportunity to demonstrate that its initially-proposed staffing was adequate, rather than increasing its staffing. On this record, we find no basis to conclude that the agency misled the protester during discussions.

In any event we note that Per Aarsleff has not demonstrated any possibility of prejudice resulting from the agency's discussions regarding the protester's proposed methodology for meeting the PWS requirements. In this regard, our Office will not sustain a protest unless the protester demonstrates a reasonable

¹³ Overall, the CO issued 85 ENs to Per Aarsleff; 44 were in regard to the staffing plan as part of Subfactor 1-Program Management. Per Aarsleff CO Statement at 19.

possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192 at 9-10; McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3.

Here, we note that Exelis Services' final evaluated price of \$363,925,645 was less than Per Aarsleff's initial evaluated price of \$[DELETED]. AR, Source Selection Decision, at 4. Thus, even if the agency's discussions were misleading, correcting this alleged mistake--by lowering the protester's price to its initial level--would not make the protest's price lower than Exelis Services' revised price. Because the solicitation provided for award to the offeror who submitted the lowest-priced, technically acceptable proposal, we find that Per Aarsleff cannot demonstrate that it could have been prejudiced by misleading discussions. See Serco Inc., B-405280, Oct. 12, 2011, 2011 CPD ¶ 237 at 11-12.

Price Evaluation

Finally, Greenland Contractors argues that the Air Force failed to evaluate whether Exelis Services' proposed price was too low, and also argues that the awardee's low price demonstrates that the awardee will not comply with Danish and Greenlandic labor law, as required by the RFP. Greenland Contractors Protest at 18; Greenland Contractors Comments (Dec. 22, 2014) at 11. For the reasons discussed below, we find no merit to these arguments, and also conclude, in any event, that the protester fails to demonstrate that it could have been prejudiced by the alleged errors in the agency's evaluation.

As discussed above, the RFP stated that the Air Force would evaluate prices using one or more of the price analysis techniques outlined in FAR § 15.404-1(b) to determine whether the proposed prices were reasonable, complete and balanced. RFP at 115. The solicitation also included the following notice to offerors concerning price:

Offerors are advised to clearly show justification for unique practices that significantly lower pricing. An assessment that the proposal is not reasonable or affordable will result in the offer being unacceptable for award.

Id.

As a general matter, when awarding a fixed-price contract, an agency is only required to determine whether the offered prices are fair and reasonable. FAR § 15.402(a). An agency's concern in making a price reasonableness determination focuses on whether the offered prices are too high, rather than too low. Vital Link, Inc., B-405123, Aug. 26, 2011, 2011 CPD ¶ 233 at 6. Where there is no evaluation

factor providing for consideration of price realism, a determination that an offeror's price is too low generally concerns the offeror's responsibility. PAE Gov't Servs., Inc., B-407818, Mar. 5, 2013, 2013 CPD ¶ 91 at 6. While an agency may conduct a price realism analysis in awarding a fixed-price contract for the limited purposes of assessing whether an offeror's low price reflects a lack of technical understanding of risk, see FAR § 15.404-1(d)(3), offerors must be advised that the agency will conduct such an analysis. Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6. In other words, offerors must be reasonably informed that a price realism analysis will occur, and, in circumstances where price realism is not explicitly called for in the RFP, offerors must be reasonably informed that negative consequences may result. NJVC, LLC, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 4; see also DynCorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 9. Absent a solicitation provision providing for a price realism evaluation, agencies are neither required nor permitted to conduct a realism evaluation in awarding a fixed-price contract. Emergint Techs., Inc., supra.

Here, Greenland Contractors acknowledges that the solicitation did not expressly require a price realism analysis. See Greenland Contractors Comments (Dec. 22, 2014) at 15. The protester also argues, however, that the "Air Force was not free to ignore" the solicitation provision that "[o]fferors are advised to clearly show justification for unique practices that significantly lower pricing." Id., citing RFP at 115. Greenland Contractors states that, as the incumbent contractor, it understood the solicitation requirements and costs, and contends that the awardee's proposed price was too low to adequately perform the contract. Greenland Contractors Comments (Dec. 22, 2014) at 14-15.

We conclude that the solicitation did not require the Air Force to conduct a price realism evaluation. In this regard, the RFP did not specifically state that the agency would evaluate the offerors' proposed prices to determine whether they were so low that they reflected a lack of technical understanding, nor did the RFP state that the agency could reject a proposal for offering unrealistically low prices. See NJVC, LLC, supra; DynCorp Int'l LLC, supra.

To the extent the price evaluation criterion required offerors to "show justification for unique practices that significantly lower pricing," RFP at 115, we do not think that this statement obligated the agency to evaluate the risk of poor performance stemming from a low price, in light of the absence of a price realism factor in the solicitation. In this regard, the requirement to show a justification for significantly low prices was set out in the first sentence of the solicitation provision. Id. The second sentence of the provision clearly referred to whether the proposed price was "reasonable or affordable," i.e., too high. Id.

As our Office has held, price reasonableness and price realism are distinct concepts. Logistics 2020, Inc., B-408543; B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258 at 7. The purpose of a price reasonableness review is to determine whether

the prices offered are too high, as opposed to too low. See FAR § 15.404-1(b); Sterling Servs., Inc., B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3. Conversely, a price realism review is to determine whether prices are too low, such that there may be a risk of poor performance. FAR §15.404-1(d); C.L. Price & Assocs., Inc., B-403476.2, Jan. 7, 2011, 2011 CPD ¶ 16 at 3. Here, we do not think that the RFP provision, when reading the two sentences in conjunction, advised offerors that the agency would evaluate the realism, rather than the reasonableness, of the offerors' proposed prices.¹⁴

The Air Force evaluated Exelis Services' proposed price and found it reasonable.¹⁵ AR, Source Selection Decision, at 3. On this record we find no basis to conclude that the agency's evaluation of Exelis Services' proposed price was unreasonable.

In any event, we also conclude that Greenland Contracting's arguments concerning the evaluation of Exelis Services' proposed price do not demonstrate any possibility of prejudice to the protester. As discussed above, Exelis Services proposed the

¹⁴ Additionally, the price evaluation criteria concerning "significantly lower pricing" must be read in conjunction with the RFP's technical evaluation subfactor for "Downward Pricing." RFP at 114. This technical evaluation subfactor required offerors to explain their approaches to "achieve continuous downward pricing" through technical approach efficiencies, and required offerors to show for option years 2 through 6 "a reduction from the previous option year amount in total annual amount proposed." Id. This subfactor appears to indicate that the agency was concerned with ensuring that offerors propose reasonable prices, that is, prices that were not too high. Greenland Contractors does not contend that Exelis Services' proposal should have been found unacceptable under the downward pricing technical evaluation subfactor.

¹⁵ In the agency's initial report responding to the protest, the CO stated that Exelis Services "clearly show[ed] justification for unique practices that significantly lower prices" by the fact that it presented a staffing plan "which was unique from" that of Greenland Contractors. Greenland Contractors CO Statement at 15. In contrast, the agency's response to interrogatories from our Office concerning this matter included a declaration from the administrative CO, who stated that he found the offerors' prices reasonable "based on adequate price competition," and that "none of the proposals contained 'significantly lower pricing.'" Agency Response to GAO Interrogatories, Tab 3, Declaration of Administrative CO (Jan. 26, 2015), at 1-2. The agency's statements concerning whether Exelis Services proposed "significantly lower prices" appear to be in conflict. Nonetheless, we do not find that the apparent inconsistency in the record provides a basis to sustain the protest in light of the absence of a solicitation requirement for price realism, and--as discussed below--the absence of any possibility of prejudice for the protester.

lowest total evaluated price of \$363,925,645, Per Aarsleff proposed the second-lowest evaluated price of \$[DELETED], Copenhagen Arctic proposed the third-lowest evaluated price of \$[DELETED], and Greenland Contractors the proposed fourth-lowest evaluated price of \$[DELETED]. AR, Source Selection Decision at 4.

Greenland Contractors cites several examples in support of its argument that the Air Force should have found Exelis Services' proposed price too low. For example Greenland Contractors argues that Exelis Services price for CLIN 1 of \$[DELETED] was [DELETED] lower than Greenland Contractors' price for CLIN 1 of \$[DELETED]. AR, Tab 37, Exelis Services Proposals, at 661; Greenland Contractors Comments (Dec. 22, 2014) at 13. The protester also notes that Exelis Services' price of \$[DELETED] for the non-labor element of CLIN 1 was [DELETED] lower than Greenland Contractors' evaluated price of \$[DELETED] for the same line item. AR Tab 37, Exelis Services Proposal at 661; Greenland Contractors Comments (Dec. 22, 2014) at 14. However, while the protester cites several areas where it contends Exelis Services' prices were too low, it does not cite any similar specific problems with the other two intervening offerors' prices. Instead, the protester merely argues that the agency record "shows similar problems with respect to the significant lower pricing proposed by the other offerors." Greenland Contractors Comments (Dec. 22, 2014) at 14 n.7.

We conclude that Greenland Contractors' specific arguments concerning the Air Force's evaluation of Exelis Services' proposed prices do not provide a basis to conclude that the agency's evaluation of the other two, lower-priced offerors' proposals was unreasonable. Since Greenland Contractors has not specifically challenged the evaluation of intervening offerors' proposed prices, we find that Greenland Contractors cannot demonstrate that it would have been prejudiced by the agency's evaluation of Exelis Services' proposed price. In this regard, even if the solicitation required the agency to evaluate pricing in the manner the protester contends, and the protester's arguments concerning the awardee had merit, the intervening offerors, and not Greenland Contractors, would be in line for award. See, e.g., McDonald Constr. Servs., Inc., B-285980, B-285980.2, Oct. 25, 2000, 2000 CPD ¶ 183 at 11; U.S. Constructors, Inc., B-282776, July 21, 1999, 99-2 CPD ¶ 14 at 5. On this record, we find no basis to sustain the protest.

The protests are denied.

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