


**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST**

)	
Plaintiff,)	
)	Case No. _____
v.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

DECLARATION OF AMB. JONAS BERING LIISBERG

1. I serve as Under-Secretary for Legal Affairs, Ambassador, Ministry of Foreign Affairs of Denmark, and have held that position since August 2013. In my role as Under-Secretary for Legal Affairs, I advise the Minister for Foreign Affairs of Denmark on legal matters.

2. The Under-Secretary for Legal Affairs acts as the Head of the Legal Service of the Ministry of Foreign Affairs. The Legal Service consists of the Department for International Law, the Department for Human Rights and the European Union Law Department.

3. The statements contained in this Declaration are made to the best of my knowledge and belief, and are based upon my personal knowledge and information made available to me in the course of performing my official duties. The Declaration does not purport to be an exhaustive account of all relevant facts.

4. I am authorized to provide the Court of Federal Claims this Declaration on behalf of the Government of the Kingdom of Denmark ("GKDK") in collaboration with the Greenlandic Self-Rule Government. The GKDK is providing this Declaration because of its interest in the proper interpretation and implementation of the agreements between GKDK

Grønlandsudvalget 2014-15 (1. samling)
GRU Alm.del endeligt svar på spørgsmål 63
Offentligt

and the United States Government relating to Thule Air Force, as described below. This Declaration was drafted by the GKDK and not by any of the private companies involved.

5. I am familiar with Solicitation No. FA2523-12-R-0006 (the "Solicitation") issued by the United States Air Force for the Thule Air Base Maintenance Contract ("Thule Contract").

6. Solicitation Section L.3 limited the competition to "Danish/Greenlandic enterprises":

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 Centrale 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.

7. The purpose of this Declaration is to provide the Court information about the phrase "NOT BE REGISTERED AS A SUBSIDIARY OF FOREIGN COMPANY" as an eligibility criterion for award of the Thule Contract as agreed to by the GKDK and the United States in a December 2013 exchange of letters between the Ministry of Foreign Affairs of Denmark and the United States Embassy in Demark.

Background of Bilateral Legal Framework Between the United States and GKDK Regarding Thule Air Base in Greenland

8. The U.S. military presence in Greenland followed an agreement of April 9, 1941 (the "Greenland Treaty"), which granted to the United States the right to locate and construct airplane landing fields and facilities for the defense of Greenland and for the defense of the North American continent.

9. After the establishment of the North Atlantic Treaty Organization ("NATO") in 1949, the Greenland Treaty was elaborated in the Agreement of 27 April 1951 pursuant to the North Atlantic Treaty between the Government of the United States of America and the Government of the Kingdom of Denmark concerning the defense of Greenland and the rest of the North Atlantic Treaty area (the "Defense Agreement"). The Defense Agreement has since served as the basic framework for U.S. military presence and activities in Greenland.

10. The close cooperation between the United States, Denmark and Greenland regarding the U.S. military presence in Greenland and the Thule Air Base has been an important part of the Transatlantic security architecture for more than half a century.

11. The Defense Agreement has been amended - and arrangements relating to the Defense Agreement have been up-dated - on several occasions since, e.g. by way of exchange of letters and notes at the diplomatic level but also in the context of annual or regular meetings of various committees established by the parties, most notably the Permanent Committee established by agreement in 1991.

12. The key documents in this legal framework include the following: Agreed Minutes on Contracts and Labor Used in Works on Defense Areas in Greenland (9-11 July, 1956); Agreement on establishment of a Consultative Committee (2 December, 1960); Aide-Memoire with regard to Danish participation in U.S. defense projects in Greenland (6 June, 1962); Memorandum of Understanding ("MoU") on various matters related to U.S. military activities in Greenland (13 March, 1991); Agreement to amend and supplement the 1951 Agreement (6 August, 2004); and Exchange of Notes amending Article IV of the 1991 MoU (16 July 2008 and 27 January 2009).

13. The 1962 Aide Memoire established a goal of "ensuring as great a Danish participation in [U.S. defense projects in Greenland] as possible" and "[i]ncreasing the

utilization of Danish contractors in the operations of [the parties'] vital support bases at Thule and Sonderstrom."

14. A focus of amendments, adjustments and consultations in recent years has been a mutual wish by the parties to ensure that Greenland and the Greenlandic people enjoy the greatest possible benefits of the U.S. military presence. This mutual wish is expressed, for example, in a joint fact sheet of 6 August 2004 concerning the above-mentioned Agreement of the same date. This intention is also at the core of the Danish/Greenlandic nationality requirements which have been gradually introduced and strengthened since the 1950s.

The 2013 Exchange Regarding Eligibility Criteria Between the Ministry of Foreign Affairs of Denmark and the U.S. Embassy in Denmark

15. In December 2013, prior to the issuance of the final Solicitation, the United States Government and the GKDK exchanged letters at the diplomatic level to update the bilateral legal framework between the countries regarding the procurement procedure for the Thule Contract competition.

16. The exchange of letters of December 2013 forms an integral and binding part of the bilateral legal framework under international law between the United States Government and the GKDK in relation to the defense of Greenland and the North American continent.

17. One issue discussed involved which country should bear responsibility for verification of the offerors' Danish/Greenlandic nationality. Prior to the instant Solicitation, the Danish Ministry of Foreign Affairs determined whether an offeror was sufficiently Danish or Greenlandic-owned for purposes of qualifying for certain projects in Greenland.

18. The GKDK, a member of the European Union ("EU"), had some concerns that if it participated in the procurement process it would trigger certain competition obligations under EU procurement law. The EU obligations of Denmark do not extend to the

Greenlandic self-rule government authorities because Greenland is not covered by Danish Membership in the EU. Thus, during negotiations, the GKDK proposed that the responsibility for verification of Danish/Greenlandic nationality should be transferred to Greenlandic self-rule government authorities.

19. This proposal was not acceptable to the United States. As an alternative, the parties agreed to transfer the responsibility for verification of nationality to U.S. authorities after the United States confirmed its commitment to source from only Danish/Greenlandic sources.

20. During these discussions, the GKDK also proposed to narrow the nationality criteria to only cover Greenlandic companies. This was also not acceptable to the United States. The parties, therefore, agreed to maintain the existing nationality requirement, limiting the competition to Danish and Greenlandic companies.

21. In the letter of 9 December 2013 from the State Secretary for Foreign Affairs of Denmark, accepted by the US ambassador to Denmark in a letter of 13 December 2013, the GKDK explained as follows:

... the Danish authorities consider that the purpose of restricting participation in the procurement to the Danish/Greenlandic companies is to ensure Greenland and Greenlandic society greatest possible benefits from the agreement.

It was in this spirit that it was suggested to narrow the criteria to only Greenlandic companies. However, the strong wish of the United States not to further limit the number of companies eligible to participate in the procurement is acknowledged.

(See December 9, 2013 Letter, attached as Exhibit ____.)

22. As to the more specific requirements of proof for Danish/Greenlandic nationality, the United States Government proposed, and the GKDK agreed, that companies interested in participating in the Thule Contract procurement must, among other things,

submit a corporation certificate from relevant authorities verifying that the company is registered as a business in the Kingdom of Denmark.

23. In addition to this formal requirement, the letter of 9 December 2013 stated:

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(See id.)

24. The GKDK understood that the United States proposed the language in this letter to show the United States' commitment to Greenland and the Greenlandic people benefitting from the U.S. presence at Thule.

25. Based on this exchange, the GKDK understood that the United States would include this language into the Solicitation to notify all interested offerors that the Thule Contract could not be lawfully awarded to a registered Danish company owned and controlled by a foreign company.

26. The exchange of letters of December 2013 refers to the broader purpose of the agreement as two-fold: (1) Making the "assessment of what constitutes a company eligible to participate in the procurement more manageable," while at the same time (2) "maintaining the spirit of the agreements [past and present] underlying the recent procurement procedure."

Danish Law And Practice Relating To Corporate Registration

27. In Denmark, a company cannot be listed in the public register, the Danish Business Register, as a "subsidiary" or "a subsidiary of a foreign company."

28. No such public registration category exists under Danish company law or in the Danish Business Registry. Nor is any other information on foreign ownership of a registered company recorded in the Danish Business Registry.

29. Under Danish company law the ownership and the distribution of shares in a Danish company does not in itself exclusively define whether another company may exercise a controlling interest in the Danish company.

30. Under Danish company law (article 5 point 3 and article 6 and 7 in Consolidation Act no. 322 of 11 April 2011 on Public and Private Limited Companies), which is subject to full European harmonization, the definition of a "subsidiary" relates to the ownership and/or the actual control exercised by the parent. Accordingly, a "subsidiary" in Denmark is a company that is partly or completely owned by another company that has "decisive influence" (in Danish: "bestemmende indflydelse") over the subsidiary.

31. "Decisive influence" means the power to control a subsidiary's financial and operational decisions. Decisive influence over a subsidiary is exerted if the parent company owns, directly or indirectly through a subsidiary, more than half of the voting rights in an enterprise, unless in special cases such ownership can be clearly demonstrated not to constitute a decisive influence.

32. Where a parent holds half or less than half of the voting rights in an enterprise, decisive influence is exerted if the parent has (i) the power to exercise more than half of the voting rights according to an agreement with other investors, (ii) the power to control the financial and operational decisions of an enterprise under the Articles of Association or an agreement, (iii) the power to appoint or remove a majority of the members of the supreme management body, and this body exerts a decisive influence on the enterprise; or (iv) the power to exercise the de facto majority of votes at general meetings or at the meetings of an equivalent body, thus exerting the de facto decisive influence on the enterprise.

33. The existence and effect of potential voting rights, including rights to subscribe for and purchase shares that are currently exercisable or convertible, must be taken into

account in the assessment of whether a company exerts a decisive influence. Any voting rights attaching to the shares owned by the subsidiary itself or its subsidiaries must be disregarded in the calculation of voting rights in the subsidiary.

34. A separate public "company ownership registry" was recently introduced in Denmark with effect from 15 December 2014. However, there was no relevant public data base on ownership of companies at the time of the Thule Contract competition or at the time of the conclusion of the exchange of letters of December 2013.

35. According to the Danish company law, limited liability companies are required to maintain records (a register of shareholders) on all individuals and companies that own shares in the company. The records must be made available to public authorities in Denmark. In order to receive such information the public authorities would need to contact the company or other keeper of the register of shareholders. Reference is made to article 50-52 in Consolidation Act no. 322 of 11 April 2011 on Public and Private Limited Companies.

36. Thus, public authorities in Denmark could not, at the relevant time, by themselves (without contacting the company or other keeper of the register of shareholders) provide information on whether a registered company is a subsidiary or other information about the ownership of the company.

37. Anyone, including a foreign government, is entitled by law to receive a print of a record on individuals and companies that own 5 percent or more of the voting rights or capital from a Danish limited liability company after payment to the company of a small fee to cover the print production and shipping. The requirement applies to all limited companies, including public limited companies having issued share certificates or whose shares have been issued through a securities centre. Reference is made to article 8 in executive order no. 172 of

22 February 2010 with reference to article 55 and 56 in Consolidation Act no. 322 of 11 April 2011 on Public and Private Limited Companies.

38. As noted above, knowledge of a company's ownership and voting rights in a Danish company is not in itself sufficient to establish with certainty whether the first mentioned company exerts a decisive influence in the Danish company and, thus, that the Danish company is a subsidiary to the other company. Establishing with certainty whether a registered Danish company is a subsidiary (of another Danish company or of a foreign company) requires that all relevant information (the Articles of Association of the company, the agreements (if any) entered into between the shareholders regarding their shareholding in the company and the register of all shareholders of the company or a print of the abovementioned records) is provided. The United States could have looked into this by contacting the company in question.

**The Eligibility Requirements Agreed Upon By the United States
and the GKDK Focused On Foreign Ownership, Not Registration.**

39. Article 31(1) of the Vienna Convention on the Law of Treaties stipulates the general rule of interpretation of treaties under international law. According to this provision, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

40. The requirement of interpretation in good faith raises the presumption that the treaty terms were intended to mean something, rather than nothing. And good faith requires the parties to a treaty to act fairly and reasonably, and to refrain from taking unfair advantage. *See, e.g.,* Commentary on the 1969 Vienna Convention on the Law of Treaties, Mark E. Villiger, 2009, p. 425.

41. An interpretation according to which "registered as a subsidiary of foreign company" is held to exclude only Danish companies that in the public Danish Business

Registry are labelled "subsidiary of foreign company" would render the provision in the 2013 letters meaningless because, as noted above, the Registry does not allow categorization companies in that manner.

42. Article 32 of the Vienna Convention identifies the supplementary means of interpretation. This provision establishes that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

43. While the term "subsidiary", and by implication "subsidiary of foreign company", may have different legal definitions in different national jurisdictions, the ordinary meaning of the term in an international agreement, which does not refer to any specific legal system or establish any special meaning itself, clearly must include a company that is wholly or primarily owned and/or controlled by a company registered in a foreign jurisdiction.

44. The terms "registered as" may give rise to questions. Different possible meanings could be contemplated. However, in the context of a company law jurisdiction (the Kingdom of Denmark) which does not operate with a public registration category of "subsidiary", and even less, "subsidiary of foreign company", the possibilities seem limited.

45. One ordinary meaning of the terms in such a context could be that they relate to a company, which based on the mandatory registration of ownership in the records held by the company itself must be characterized as a subsidiary. It should be noted that there is no reference to "public" registration in the negative criteria on subsidiary of foreign company in the exchange of letters. "Registered as" could also be construed as including registered

information and records available in a foreign jurisdiction, e.g. the US, pertaining to the parent company.

46. Given the fact that the terms were drafted and introduced by the US side, perhaps on the basis of a US Air Force paradigm and inaccurate assumptions about Danish company law, it seems plausible that the most loyal interpretation of "registered as" is to disregard them as having no independent significance in the context.

47. It is a well-established supplementary principle of treaty interpretation that if more than one meaning is admissible, a provision should be interpreted *contra proferentem*, i.e. that meaning which is least to the advantage of the party which prepared and proposed the provision, or for whose benefit it was inserted in the treaty, should be preferred. See, e.g., Oppenheim's International Law, 9th edition, 1992, p. 1279. In this case the possibly ambiguous terms "registered as" were introduced by the US side, likely with the intention of making the new US responsibility for certification of Danish/Greenlandic nationality as simple and manageable as possible.

48. The object and purpose of the Defense Agreement, including the 2013 letters, and other eligibility criteria in the Solicitation are clear on their face. It was to ensure Greenland and Greenlandic society greatest possible benefits from the agreement, and the intention was to maintain "the spirit of the agreements underlying the recent procurement procedure". The language in the 2013 letters plainly excludes all registered Danish companies that are owned and/or controlled by foreign company. The language serves the purpose of ensuring, in a way which is objective, manageable and consistent with the practice and intentions of the parties, that eligible companies for the Thule Contract not only have a formal link by registration to Denmark or Greenland, but a real and genuine link, avoiding shell companies owned and controlled by foreign companies.


49. Fulfilment of such a nationality requirement contained in the exchange of letters would in the interpretation of the GKDK entail that the contracting authority requires the tenderers to submit documentation regarding their ownership as part of the certification process.

50. This interpretation is confirmed in the December 2013 exchange of letters. The letters served to ensure Greenland and the Greenlandic people would enjoy the greatest possible benefits from the Defense Agreement, thereby maintaining "the spirit of the agreements underlying the recent procurement procedure."

I submit this Declaration consistent with Danish law governing the truthfulness of declarations to be used in government or other public matters.

Executed on this 19th day of March, 2015.

By:


Jonas Bering Liisberg
Under-Secretary for Legal Affairs, Ambassador,
Ministry of Foreign Affairs of Denmark