



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Inuksuk A-S

File: B-420527.2

Date: May 26, 2022

Kevin Mullen, Esq., Krista A. Nunez, Esq., and Victoria D. Angle, Esq., Morrison & Foerster LLP, for the protester.

Rina M. Gashaw, Esq., William B. O'Reilly, Esq., James G. Peyster, Esq., and Anuj Vohra, Esq., Crowell & Moring LLP, for Greenland Contractors JV A/S; and Gary J. Campbell, Esq., and Miles McCann, Esq., Womble Bond Dickinson (US) LLP, for 76 North Group A/S, the intervenors.

Erika Whelan Retta, Esq., Colonel Frank Yoon, Michael J. Farr, Esq., 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

1. Protest that firms partially owned by Greenlandic or Danish governments should be excluded from competition as a result of an organizational conflict of interest is denied where protester has not presented hard facts to demonstrate that either of these governments participated in establishing the solicitation's evaluation criteria or performance work statement.
2. Protest that agency unreasonably failed to include past performance as an evaluation factor is denied where contracting officer provided a reasonable justification to explain why past performance was not an appropriate evaluation factor for this procurement.
3. Protest that agency failed to include sufficient information for offerors to prepare proposals is denied where information included in solicitation combined with site visit and offeror's research and business judgment was sufficient for offerors to prepare proposals on an intelligent and equal basis.
4. Protest that agency unreasonably used a fixed-price type contract is denied where solicitation requirements are well-defined and mature, and agency provided sufficient information for offerors to prepare proposals.

DECISION

Inuksuk A/S, of Nuussuaq, Greenland, protests the terms of request for proposals (RFP) No. FA2523-21-R-0001, issued by the Department of the Air Force for air base maintenance services at Thule Air Base in Greenland. Inuksuk asserts that the solicitation is ambiguous, and otherwise fails to provide sufficient information for offerors to prepare their proposals on an intelligent and equal basis. Inuksuk also asserts that the agency unreasonably failed to include past performance as an evaluation factor in the solicitation. In addition, Inuksuk argues that several contractors should be eliminated from the competition due to an organizational conflict of interest (OCI).

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. AR, Tab 1, Contracting Officer’s Statement (COS) at 2.

Eligibility Requirements

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 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 (DOD) would 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, Memorandum of Understanding (MOU) No. 28453, March 13, 1991 at 1-6, 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.

On October 27, 2020, the United States Embassy in Denmark sent a diplomatic note to the Danish MFA in which the United States Embassy 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, 2020.¹ That same day, the MFA sent the United States Embassy an acknowledgment and adoption of the proposed eligibility criteria. AR, Tab 31, Danish Reply to Diplomatic Note 127, Oct. 27, 2020. 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 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.

¹ In prior procurements the agency used different definitions for an eligible Danish/Greenlandic source. The history of the changing eligibility criteria is discussed in *Vectrus Services A/S*, B-420527, B-420527.3, May 18, 2022, 2022 CPD ¶ 105 at 2-4.

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, Oct. 27, 2020 or 2021.

Current Solicitation

The RFP, issued on November 17, 2021, for base operations and maintenance services, provided for the award of an indefinite-delivery, indefinite-quantity (IDIQ) 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 solicitation noted that as authorized by Federal Acquisition Regulation (FAR) section 6.302-4, international agreement, the agency was using other than full and open competition. RFP at 1. The solicitation further specified that participation in the procurement was limited to Danish or Greenlandic firms that (1) are registered in the Danish Central Business Register; (2) more than 50 percent of the offeror's equity was owned by Danish or Greenlandic individuals or entities; and (3) a non-Danish or non-Greenlandic individual or entity did not have and would not have a decisive influence over the offeror. RFP at 44, 51-52.

Proposals were due no later than 6:00 p.m. central European time on February 16. RFP at 48. 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.* at 1.

The RFP provided that the contract would be awarded on a best-value tradeoff basis considering the following factors: technical, management approach, and price. RFP at 54. The technical factor had one subfactor, vehicle equipment and replacement, which would be evaluated as acceptable or unacceptable. The management approach factor included three subfactors: program management; Greenland resident workforce recruitment and retention; and apprenticeship program, which would each be assigned a combined technical/risk rating. Price was to be evaluated for reasonableness and balance. The solicitation included three performance work statements: basic IDIQ, phase-in, and steady state. The estimated value of the procurement is \$3.95 billion.

As relevant to this protest, the solicitation also included three attachments. Attachment 5 is a list of government furnished vehicles which the contractor will be required to repair and maintain, but that the government will replace if necessary. AR, Tab 11, RFP attach. 5; RFP; AR, Tab 6, RFP, amend. 2 at 2. Attachment 9 is a list of government furnished vehicles and equipment that the contractor is required to maintain and repair.

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.

If the contractor needs the vehicles and equipment in attachment 9 for performance, the contractor is responsible for replacing the items as part of its fixed price if they fail. AR, Tab 12, RFP attach. 9; RFP at 39, 48. Attachment 10 is a list of contract property that is owned by the contractor, and that the contractor is required to maintain and repair. If the property fails and is required for performance, the contractor is required to replace the property at its fixed-price. AR, Tab 13, RFP attach. 10; RFP at 15.

Inuksuk timely submitted its protest to our Office on February 15 at 7:00 p.m. Eastern Time, prior to the initial deadline for receipt of proposals.³

DISCUSSION

Inuksuk asserts that several contractors should be eliminated from the competition due to an organizational conflict of interest (OCI). In addition, Inuksuk argues that the solicitation is ambiguous, and otherwise fails to provide sufficient information for offerors to prepare their proposals on an intelligent and equal basis. Inuksuk also asserts that the agency unreasonably failed to include past performance as an evaluation factor in the solicitation. As discussed below, we find no merit to any of Inuksuk's allegations.

Organizational Conflict of Interest

As noted above, the 1991 memorandum of understanding requires that contracts for services at Thule Air Base be awarded to Danish or Greenlandic sources. After the Danish government expressed concern about the definition of Danish/Greenlandic source used for the prior procurement in 2014, the governments of Denmark and the United States agreed to come to the mutually acceptable definition stated above. Following the signing of this agreement finalizing the revised eligibility criteria, a press release quoted the Premier of Greenland (Kim Kielsen) as stating:

We are sincerely pleased with the agreed plan for our further bilateral cooperation with the USA. It has thus been important for Naalakkersuisut, Inatsisartut and the Greenlandic people to obtain real, tangible benefits from the American presence. We have far better terms than before as a result of a bilateral plan of cooperation, the new tender criteria and contract terms, that we have negotiated in place.

Protest, exh. 11 (quoting Government of Greenland Statement).

Inuksuk asserts that this statement demonstrates that the governments of Denmark and Greenland participated in establishing the RFP's evaluation and eligibility criteria, and that they were provided with access to non-public information. Inuksuk argues that as a result, multiple contractors that are owned

³ Since the protest was filed after the close of business on February 15, it is considered filed on February 16. 4 C.F.R. § 21.0 (g).

by the Danish or Greenlandic governments should be excluded from participating in the procurement due to a biased ground rule OCI.⁴

Generally, a biased ground rules OCI may arise where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing or providing input into the specifications or statement of work. FAR 9.505-1, 9.505-2. In these cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. *Energy Systems Group*, B-402324, Feb. 26, 2010, 2010 CPD ¶ 73 at 4.

A protester must identify “hard facts” that show the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. *Vion Corp.; EMC Corp.*, B-409985.4 *et al.*, April 3, 2015, 2015 CPD ¶ 141 at 10. Although we presume prejudice where a protest establishes facts that constitute an OCI or apparent OCI, that presumption is rebuttable. See *TDF Corp.*, B-288392, B-288392.2, Oct. 23, 2001, 2001 CPD ¶ 178 at 9. *Department of the Navy-Recon*, B-286194.7, May 29, 2002, 2002 CPD ¶ 76 at 12 (where protest establishes facts that constitute conflict or apparent conflict, we will presume prejudice unless record affirmatively demonstrates its absence). Further, even where a potential conflict of interest exists, we will not sustain a protest where the record demonstrates that there was no prejudice to the protester. *Id.*

Inuksuk has not presented hard facts that demonstrate that the governments of Denmark and Greenland participated in establishing the solicitation’s evaluation criteria, resulting in a biased ground rules OCI. Specifically, to support its allegation that the governments of Denmark and Greenland worked on the solicitation’s evaluation criteria, Inuksuk relies solely on the statement from the Premier of Greenland. This statement expressed pleasure with the agreed plan for further bilateral cooperation with the USA, and stated that “we have far better terms than before as a result of a bilateral plan of cooperation, the new tender criteria and contract terms that we have negotiated in place.” This statement followed a meeting at which the agreement for new eligibility criteria to participate in procurements at Thule Air Base was signed.

⁴ According to Inuksuk the conflict of interest arises under FAR section 3.101-1, and the standards in FAR subpart 9.5 apply to determine the conflict. Protest at 12, 13. Section 3.101 of the FAR concerns situations in which government employees, because of their job positions or relationships with particular government organizations, may have a conflict of interest. Subpart 9.5 addresses situations that can result in conflicts of interest for businesses that hold government contracts. The agency asserts that the governments of Denmark and Greenland cannot have a conflict of interest under these provisions because they are not government employees or contractors. Since we conclude that Inuksuk has not demonstrated that an unbiased ground rules OCI occurred, we do not decide if these provisions would apply to the governments of Denmark and Greenland.

As noted above, this agreement was the result of negotiations between the governments of Denmark and the United States that took place after the Danish government expressed concern with the definition of Danish/Greenlandic source that was used in the 2014 solicitation, and allowed award to a Danish firm that was a wholly owned subsidiary of an American firm. There is nothing to suggest that in this statement, the Greenlandic Premier was referring to anything other than the new eligibility criteria.

In this regard, the agency asserts that the Air Force--and not the governments of Greenland and Denmark--established the evaluation criteria and the PWS requirements for the procurement. Aside from the statement of the Premier of Greenland, Inuksuk has not presented any evidence that the governments were at all involved in the development of the solicitation's evaluation criteria or PWS requirements. Accordingly, since Inuksuk has not identified any hard facts to demonstrate that the Greenlandic or Danish governments helped establish the evaluation criteria or PWS requirements, we find that there is no biased ground rules OCI.

Moreover, while there is no dispute that the government of Denmark participated in negotiations to define the eligibility criteria for Danish and Greenlandic firms that would be used pursuant to the 1991 memorandum of understanding to procure air base services at Thule Air Base, we do not find that this provides a reason to sustain this protest. In this regard, even if negotiations to implement an international agreement could result in an impermissible OCI, which we do not conclude here, Inuksuk meets the eligibility criteria that were negotiated. Inuksuk is therefore not competitively prejudiced by any alleged OCI that resulted from negotiation of the eligibility criteria. *See generally WKF Friedman Enterprises*, B-411208, June 16, 2015, 2015 CPD ¶ 183 at 4 n.2. (protester is not interested party to challenge restrictive provision where protester can meet the restriction); *American Systems Group*, B-418469, Apr. 7, 2020, 2020 CPD ¶ 140 at 2-3 (protest that services requested under task order solicitation are outside scope of underlying multiple-award contract is dismissed where protester cannot demonstrate prejudice because it can compete for the task order).

Inadequate Information in the Solicitation

Vehicle Equipment and Replacement

Inuksuk asserts that the solicitation did not provide adequate information for offerors to prepare their proposals with respect to vehicle and equipment replacement. In this regard, the vehicle equipment and replacement subfactor under the technical factor required offerors to:

Provide your proposed approach for vehicle and equipment replacement during Steady State BMC [base maintenance contract] for general purpose vehicles, special purpose vehicles/equipment found in Steady State BMC PWS Attachment 9, (GFP Contractor Replaced) and Attachment 10, (Contract Property). . . . The proposed approach for vehicle/equipment replacement shall be a minimum of 10% of general-

purpose vehicles and 10% of special-purpose vehicles/equipment annually for the base and each option period. . . .

RFP at 48. Inuksuk protests that the solicitation does not provide sufficient information concerning the vehicles and equipment identified in RFP attachments 9 and 10 that the contractor will be responsible for replacing at its fixed price.⁵ The protester asserts that without additional information offerors are left guessing what vehicles and equipment would require replacement and will prepare their proposals based on different understandings.

Agencies must provide offerors with sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. *Vetpride Servs., Inc.*, B-419622, B-419622.2, June 7, 2021, 2021 CPD ¶ 226. However, this requirement does not oblige agencies to provide so much detail as to entirely eliminate all risk to the contractor or remove all uncertainty from every potential offeror's mind. *Shamrock Marine Towing & Salvage*, B-419940.3, B-419940.4, Dec. 27, 2021, 2022 CPD ¶ 18. In this regard, our decisions have consistently recognized that "[r]isk is inherent in most types of contracts" and firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. *JRS Management*, B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 5; *AirTrak Travel et al.*, B-292101 *et al.*, June 30, 2003, 2003 CPD ¶ 117 at 14. Moreover, an agency may offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency. *National Customer Engineering*, B-254950, Jan. 27, 1994, 94-1 CPD ¶ 44 at 5.

We find that the agency provided offerors with sufficient information to compete intelligently and on an equal basis. Attachment 9 to the solicitation is a list of equipment that is government furnished. It lists 80 pieces of serially managed items (vehicles) for

⁵ Inuksuk also protests that the agency did not provide sufficient information to identify the equipment listed in attachment 5 that the contractor would be required to replace. In its report the agency noted that it issued an amendment which clarified that the agency, and not the contractor, is responsible for replacing equipment in attachment 5. AR, Tab 6, RFP amend. 2 at 2. In its comments responding to the agency report, Inuksuk argues that amendment 2 does not provide sufficient information for the items in attachment 5 for offerors to price the repair and maintenance of the listed vehicles and equipment. The amendment was issued on February 25, and responses were due on March 7. Since Inuksuk did not raise this issue until March 28, after the amended closing date, this issue is untimely raised, and is dismissed. See *Avionic Instruments LLC*, B-418604.3, May 4, 2021, 2021 CPD ¶ 196 at 4. (solicitation improprieties that are incorporated into a solicitation after the closing date for the receipt of proposals must be protested prior to the next closing date for the receipt of proposals following the incorporation).

which the government holds title, and 33 pieces of non-serially managed equipment.⁶ AR, Tab 12, RFP attach. 9, Government Furnished Property. The contractor is required to replace any vehicle or equipment that fails at its fixed price if the contractor needs the vehicle or equipment to perform the requirements of the steady state PWS.

In attachment 9, for the serially managed items, the agency provided the item name, item description, national stock number, model number, and acquisition cost.⁷ For the non-serially managed equipment, the agency provided the item name, the item description number, the model number, and in some cases, the national stock number, acquisition cost, and delivery date.⁸ The agency states that this information was provided to the agency by the incumbent contractor and that the agency does not possess additional information. The agency also provided potential offerors a ten-day site visit during which they could inspect the vehicles and equipment. The agency asserts that this information, in combination with the site visit, offerors' business judgment, and other commercially available information, is sufficient for offerors to make a judgment about when items need to be replaced, and prepare their fixed-price proposals.

We agree. While the protester complains that the information does not include mileage or whether the vehicles are running, this information could have been assessed at the site visit. We believe that the information learned at the site visit, in combination with the information provided in attachment 9, which includes the date that vehicles were manufactured and the date the item was purchased, offerors should be able to determine the approximate time when the vehicles and equipment will need to be replaced. While Inuksuk argues about the potential effect of the weather conditions on the equipment, offerors will need to use their research and business judgment to take that into consideration in preparing their proposals. In our view, while Inuksuk would prefer that the agency do the work to provide more precise information by surveying the vehicles and equipment, the agency is not required to do so.

⁶ A serially managed item is an item designated by DOD to be uniquely tracked, controlled, or managed in maintenance, repair, and/or supply systems by means of its serial number. Defense Federal Acquisition Regulation Supplement (DFARS) 252.211-7007. A non-serially managed item is an item that is not unique. Its receipt by the government is reported by the product identification or national stock number, the combination of manufacturer code and part number, or model number and the quantity of items received.

⁷ For example, item number 2 of the serially managed items is a John Deere 410 E Backhoe Loader with an item description number of 00X00159, NSN 3805012424875, model number 410, and an acquisition cost of 286,600 Danish Kroner. The first two digits in the description number indicate the date the vehicle was manufactured.

⁸ For example, item number 1 of the non-serially managed items is a mobile heater, with an item description number of 00E40010, a national stock number of 4520014828571, and a model number of MODEL NGH. The first two digits in the description number indicate the date the equipment was procured.

Attachment 10 to the solicitation is a list of contract property, which is property that is provided by the contractor and used for performance of the contract. AR, Tab 13, RFP, attach. 10, Contract Property. The title to the property remains with the contractor until it is turned over at the end of the contract to a successor contractor. This includes vehicles, equipment, materials, and supplies. The contractor must replace contract property that fails during the course of performance at its fixed price if the item is necessary to perform the requirement.

At issue, attachment 10 listed 186 items of equipment and tools. The solicitation included the life expectancy as of May 2021 for 98 of the 186 items (noting that the life expectancy of the remaining items was unknown), and the acquisition cost for 154 of the 186 items, with the rest estimated at an acquisition cost greater than 50,000 Danish Kroner. The attachments also included the year purchased for 140 of the 186 items. This information was provided to the agency by the incumbent contractor.

The agency asserts that this information, combined with the offerors' business judgment, additional research, and the site visit information was sufficient for offerors to determine how to price their proposals. We agree. The protester complains that for 88 of the items of equipment and tools listed, the government lists the life expectancy as unknown. There is, however, an acquisition date for 154 of those items. In addition, there is a description, model or part number, and serial number. This information, combined with an inspection of the equipment, and research into life expectancy should enable offerors to estimate when an item needs to be replaced.⁹ We therefore deny this protest ground.

Performance Work Statement

Inuksuk protests that "many of the requirements listed in the PWS are stated in such a vague and ambiguous manner" that offerors are not able to understand the nature of the risk and compete on an intelligent and common basis. Protest at 9. Inuksuk, however, only points to three requirements. Inuksuk complains that PWS 3.13.38 requires offerors to maintain roads. According to Inuksuk, the permafrost under the roadway is melting which regularly creates large cracks. Inuksuk asserts that if the cracks become so large that the road needs to be replaced it is unclear whether the liability to replace falls on the contractor. Inuksuk asserts that the same lack of clarity mars PWS 3.13.34 which requires the contractor to repair and maintain the airfield, including critical infrastructure to the mission such as the runway, taxiways, and aprons. Finally, Inuksuk

⁹ We recognize that, as the protester asserts, many items have a zero life expectancy. The offeror will have to make a business judgment regarding what that might require when an offeror will have to replace vehicles and equipment. We note that the solicitation allows offerors \$3.5 million for replacing vehicles and equipment on a cost-reimbursement basis during the contract's phase-in period. AR, Tab 15, attach. 12, Phase-in Pricing Worksheet. Offerors can take that into consideration when deciding how to manage vehicle replacement in their proposals.

asserts that PWS 3.4.7 requires offerors to track hazardous waste that is generated on the base, but does not provide an estimate of how much hazardous waste will need to be tracked.

In response, with respect to PWS 3.13.38, the agency explains that the roads are unpaved and technically cannot crack if they are maintained in accordance with the PWS requirement--passable road conditions for two wheel drive vehicles on normal roads, and passable conditions for four wheel drive vehicles between June 15 and September 14.¹⁰ Steady State PWS at 67; COS at 48, 51. With respect to PWS 3.13.34, the agency explains that the Unified Facilities Criteria, operations and maintenance (O&M) manual, included in the solicitation, specified the standards and requirements for maintenance and repair of pavements and asphalt, including the airfield. The agency notes that the manual provided pictures, maps, and detailed and prescriptive guidelines for pavement and asphalt management of the airfield. PWS at 65; AR, Tab 44, Unified Facilities Criteria, O&M Manual, Asphalt, Concrete Pavement Maintenance and Repair; COS at 52.

With respect to PWS 3.4.7, the agency explains in its report that the base does not generate hazardous waste. The contractor is required to track hazardous waste that is brought on the base by DOD personnel. AR, Tab 10, Steady State PWS at 23; COS at 37. The agency further explains that workload data shared with industry indicated that no hazardous waste was brought on site between July 1, 2020, and December 31, 2021. In its comments on the agency report, Inuksuk did not respond to or refute the agency's report on these issues. Accordingly, we consider them abandoned. See *Avionic Instruments LLC*, B-418604.3, May 54, 2021, 2021 CPD ¶ 196 at 4.

Past Performance

Inuksuk protests that the solicitation does not include past performance as an evaluation factor. According to Inuksuk, given the extraordinary, harsh, and unique environment at Thule Air Base it is patently unreasonable for the agency to omit past performance as an evaluation factor.

¹⁰ After Inuksuk filed its protest the agency issued amendment number 2 to the solicitation, which added a snow and ice removal plan to the technical library. The closing date for response to amendment 2 was March 7. In its comments on the agency report, submitted on March 28, Inuksuk complained that the information in amendment 2 was inadequate as to what offerors were required to include in their proposals. This is a new basis of protest and was required to be filed before March 7, the closing date for revised proposals established in amendment 2. Since the issue was not raised until March 28 it is untimely and is dismissed. 4 C.F.R. § 21.2(a)(2) (solicitation improprieties that are incorporated into a solicitation after the closing date for the receipt of proposals must be protested prior to the next closing date for the receipt of proposals following the incorporation).

Procuring agencies are required to evaluate past performance in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold unless the contracting officer documents the reason that past performance is not an appropriate evaluation factor for the acquisition. FAR 15.304(c), 15.304(c)(3)(iii).¹¹

Here, the contracting officer documented the reasons that past performance was not an appropriate evaluation factor for this solicitation, concluding:

Past performance will not be evaluated as part of this acquisition in accordance with (IAW) FAR 15.304(c)(3)(iii). This acquisition is restricted to Danish and/or Greenlandic companies IAW an agreement between the U.S. and The Kingdom of Denmark. The number of Danish/Greenlandic companies that meet these eligibility criteria and that have actual past performance experience for a base operations and maintenance contract is limited to a single company. The requirements of the Thule Base Maintenance Contract are very mature and explicit when it comes to critical utilities. The functional area experts have indicated that evaluation of the staffing plan from offerors will be sufficient to identify if the offeror can adequately execute the requirements of the contract. The infrastructure at Thule is aging and innovation to operate and maintain, given the explicit requirements is minimal. All offerors shall identify in Factor 2, Management, how they plan on retaining the current workforce. Historically, the retention ratio from one contract to the follow-on contract has been in the high 90th percentile. The latest retention ratio was ~98% in 2017 with some individuals working at Thule for decades. The retention of the incumbent workforce minimizes risk of not conducting past performance. Additionally, FAR 9.104 requires the contracting officer to determine responsibility by looking at several specific aspects of a contractor's operation.

¹¹ Inuksuk also argues that FAR subsection 15.304(c)(3)(iii), which requires the contracting officer to document the reason that past performance is not appropriate for a specific procurement, is inconsistent with the Federal Acquisition Streamlining Act (FASA), which requires that past performance be considered in all cases where it is an indicator of the likelihood that the offeror will successfully perform a contract which it is awarded. See Pub. L. No. 103-355, § 1091(b)(1)(B). Section 15.304 of the FAR implements the requirements of FASA. In its report responding to the protest, the agency noted that FAR section 15.304 was written after FASA was passed, and does not require the narrow interpretation asserted by the protester. In its comments on the agency report Inuksuk did not dispute the agency's response; we therefore consider the issue abandoned. See *Avionic Instruments LLC*, B-418604.3, May 4, 2021, 2021 CPD ¶ 196 at 4.

AR Tab 21, Source Selection Plan at 5. The contracting officer also noted that past performance was not used as an evaluation factor in the previous acquisition, and the incumbent is successfully performing. *Id.*

The determination of a contracting agency's needs and the best method of accommodating them are matters primarily within the agency's discretion. *Crewzers Fire Crew Trans., Inc.*, B-402530, B-402530.2, May 17, 2010, 2010 CPD ¶ 117 at 3. A protester's disagreement with an agency's judgment concerning the agency's needs and how to accommodate those needs does not show that the agency's judgment is unreasonable. *Cryo Techs.*, B-406003, Jan. 18, 2012, 2012 CPD ¶ 29 at 2.

Inuksuk disputes that the contracting officer reasonably concluded that past performance should not be used as an evaluation factor for this procurement. Inuksuk disagrees that there is only one Danish/Greenlandic firm that meets the eligibility criteria and has past performance on a base operations and maintenance contract. Inuksuk asserts that the contracting officer's market research actually indicated there were three additional companies with relevant past performance. Protest at 13, 14 (citing AR, Tab 53, Market Research Report, at 10, 13-14).

One of those companies, however is Vectrus Services A/S, the incumbent contractor. Vectrus is a wholly owned subsidiary of an American company and therefore is not eligible to compete for this procurement. See *Vectrus Services A/S*, B-420527, B-420527.3, *supra*. The other two contractors identified by Inuksuk have construction experience on Thule Air Base or under arctic conditions. Protest at 14. The solicitation, however, is for base maintenance services, and the contractor's responsibilities will include significant work other than construction.¹² See AR, Tab 10, Steady State PWS. Inuksuk's assertions do not show that the contracting officer unreasonably concluded that only one contractor had base operations and maintenance services past performance.

Inuksuk also disagrees that the solicitation requirements are mature and explicit. The solicitation included 651 requirements in the steady state PWS. Inuksuk challenged three of the requirements as not well defined, and as discussed above, abandoned each of those arguments. Inuksuk also protested that the solicitation did not include sufficient information on vehicles and equipment that the contractor was required to replace. As discussed above, GAO has concluded that the information in the solicitation was sufficient. Further, as the agency discussed in its report, the overall requirements have been in place with some modifications since 2005. Memorandum of

¹² Inuksuk also asserts that it is an eligible contractor that has relevant past performance through its minority owner Vectrus Services Greenland A/S and the parent company of the minority owner, the incumbent, Vectrus Services Corporation. The market research report was completed in 2021, and Inuksuk was not formed until February of 2022, after the solicitation was issued. There was therefore no basis for the agency to consider whether Inuksuk had relevant past performance when it conducted the market survey.

Law at 64. Inuksuk has given GAO no basis to find that the contracting officer unreasonably considered the requirements mature and well-defined.

Inuksuk also asserts that the decision to exclude past performance as an evaluation factor can not be justified simply by evaluating responsibility. Inuksuk complains that the agency has not indicted what elements of responsibility it will consider. While the contracting officer did not explicitly state the elements of responsibility that will be considered, FAR section 9.104, which the contracting officer references, lists those elements.¹³ Inuksuk also asserts that since the contracting officer is only required to assess the responsibility of the apparent awardee there will be no opportunity for the agency to compare offerors' past performance records. It is implicit in the decision not to include past performance as an evaluation factor, which is permitted by FAR section 15.304(c)(3)(iii), that the agency will not comparatively evaluate offerors' past performance. The contracting officer, however, will have the opportunity to assess whether the selected contractor can adequately perform.

Finally, the contracting officer also noted that offerors are required to identify how they plan on retaining the current workforce and that historically the retention ratio from one contract to the follow-on contract has been in the high 90th percentile. Inuksuk does not dispute the contracting officer's conclusion the high level of retention in this workforce reduces performance risk. Nor does Inuksuk address the contracting officer's statement that past performance was not evaluated in the prior solicitation, and the incumbent contractor is successfully performing.

Given all these factors, we find that the contracting officer reasonably justified the decision not to use past performance as an evaluation factor in this solicitation and deny this protest ground.

Price Structure and Evaluation

Finally, Inuksuk protests that the agency's decision to procure services on a predominately fixed-price basis without providing reasonable estimates regarding historical performance is unreasonable. According to Inuksuk, the agency should have

¹³ Section 9.104-1 of the FAR requires:

To be determined responsible, a prospective contractor must—
(a) Have adequate financial resources to perform the contract, or the ability to obtain them; (b) Be able to comply with the required or proposed delivery or performance schedule; (c) Have a satisfactory performance record; (d) Have a satisfactory record of integrity and business ethics; (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them; (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

provided adequate historical information on relevant projections to ensure that offerors are pricing the same requirements. In the alternative, Inuksuk asserts that the agency should provide for a price realism analysis because the RFP requirements may not be fully understood by competing offerors.

While the protester here attempts to implicate the entire PWS as vague and not providing sufficient information, the protest is limited to challenging attachments 9 and 10. As discussed above, we find that the agency provided sufficient information for offerors to determine how to price their proposals for attachments 9 and 10.¹⁴ Since, as discussed above, we have concluded that the agency provided sufficient information for offerors to prepare their proposals, we deny this basis of protest.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

¹⁴ The protester also argued that three PWS requirements were inadequately defined. As discussed above, Inuksuk abandoned those arguments. We note that in any case, the protester was complaining about 3 of 651 requirements.