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GAO Faults State Dept. Reversal On Consulate Build Award

By **Rae Ann Varona**

Law360 (March 28, 2024, 8:52 PM EDT) -- The U.S. Government Accountability Office backed an Illinois construction company's challenge to losing a deal to build a U.S. consulate compound in Turkey, rejecting the U.S. Department of State's contention that the company wasn't the same entity that met security prequalifications.

The State Department had overturned an earlier contract award to Pernix Federal LLC on the ground that it was ineligible for the deal because Pernix was not the offeror it determined met certain prequalifications required for firms looking to compete for design and construction deals for diplomatic facilities overseas. It said the prequalified entity was a de facto joint venture and that it thus couldn't let the company, as a "stand-alone entity," go forward with submitting a proposal for the procurement's final phase.

But GAO general counsel Edda Emmanuelli Perez said the department made the wrong call as Pernix could reasonably be considered both a de facto joint venture and the offeror eligible for the third phase.

"We find that where a company chooses to utilize a de facto joint venture to qualify as a United States person in [Omnibus Diplomatic Security and Antiterrorism Act of 1986, also called the Security Act] procurements, it can prequalify as a de facto joint venture and submit any subsequent responses from a stand-alone entity, i.e., the offering entity, and still be considered the same entity that was prequalified," Perez said in a March 22 decision released Thursday.

She said that Pernix was "always" the offering entity.

The deal, according to Perez's decision, called for a contractor to design and build a new consulate compound in Adana, Turkey, and required offerors to go through three phases in the procurement. The first phase required offerors to show that they qualified under the Security Act, which was enacted in response to terrorist attacks on U.S. citizens and embassies in the 1980s.

Offerors prequalified under the first phase -- were invited to submit phase two qualifications of lead design and construction firms. Four of the highest technically qualified teams then got invited to participate in the third and final phase where offerors would submit technical and price proposals for the deal.

Pernix had submitted a phase three proposal and won the contract in September. However, a disappointed offeror, B.L. Harbert International LLC, protested the award to the GAO, arguing that Pernix couldn't have met the prequalification because it couldn't meet the definition of a U.S. person as required by the Security Act.

In December, the State Department notified Pernix that it should have been excluded from the competition because the company, as a stand-alone entity, was not the offeror prequalified under the first phase and evaluated under the second phase.

In excluding Pernix from the deal, the State Department had also found the company ineligible because the de facto joint venture -- which comprises Pernix and its partners Pernix Group Inc. and BE&K Building GRoups LLC -- was not registered in the System for Award Management, or SAM.gov, the federal government's system for contract opportunities, at the time it submitted its phase three proposal.

Pernix, in its protest, argued that it was impossible for a de facto joint venture to register in the system and that the State Department knew that before the due date for phase three proposals.

Perez again backed Pernix and said that the department failed to explain how a de facto joint venture could meet the requirements. She said the department also failed to explain why it was even necessary for a de

facto joint venture to be registered in the system to meet its needs.

"As a result, the agency has removed Pernix from the competition because of Pernix's failure to comply with a requirement that the agency does not refute is impossible to meet," Perez said.

The State Department's ineligibility determination was thus unreasonable, she said.

Counsel for Pernix did not immediately respond to a request for comment late Thursday, nor did the State Department.

Pernix is represented by J. Randolph MacPherson of Halloran & Sage LLP.

The State Department is represented in-house by Kathleen D. Martin.

The case is Matter of: Pernix Federal LLC, file number B-422122.2, before the U.S. Government Accountability Office.

--Editing by Andrew Cohen.

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