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# Decision

**Matter of:** Pernix Federal, LLC

**File:** B-422122.2

**Date:** March 22, 2024

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J. Randolph MacPherson, Esq., Halloran & Sage LLP, for the protester.  
Kathleen D. Martin, Esq., Department of State, for the agency.  
Charmaine A. Stevenson, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest challenging agency's post-award determination that the protester was ineligible under The Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended (Security Act), and System for Award Management (SAM) registration requirements to submit a proposal for an overseas construction project is sustained where the record shows that the protester's submissions and proposal satisfied the requirements of the prequalification notices and solicitation.

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## DECISION

Pernix Federal, LLC (Pernix), of Lombard, Illinois, protests the Department of State's decision to overturn its earlier award of a contract to Pernix under request for proposals (RFP) No. 19AQMM-20-R0047 for a new consulate compound in Adana, Turkey. According to the protester, the agency's determination that Pernix was not eligible to compete for the Adana requirements--a determination the agency made after taking corrective action in response to a protest by another firm challenging an initial award to Pernix--is unreasonable and inconsistent with Pernix's submissions and proposal. The protester further contends that the agency's post-corrective action consideration of Pernix's eligibility is contrary to the terms of the RFP and inconsistent with the agency's past practices.

We sustain the protest.

## BACKGROUND

This protest presents issues concerning the requirements of The Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended (Security Act), as implemented in

regulations promulgated by the Department of State, as well as how those requirements intersect with Federal Acquisition Regulation (FAR) requirements related to registration in the System for Award Management (SAM). The Security Act was enacted in response to terrorist and state-sponsored attacks on United States citizens and embassies in the early and mid-1980s “to provide enhanced diplomatic security and combat international terrorism.” H.R. Rep. No. 99-783, at 53 (1986) (Conf. Rep.). Among other things, the Security Act established several statutory qualification requirements for firms seeking to compete for contracts to design and construct diplomatic facilities located overseas.

Of relevance here, the Security Act requires that, where adequate competition exists, only United States persons and qualified joint venture persons may bid on a diplomatic construction or design project. 22 U.S.C. § 4852(a)(1). The Act defines the term “United States person” as an entity which, among other things, “has performed within the United States or at a United States diplomatic or consular establishment abroad administrative and technical, professional, or construction services similar in complexity, type of construction, and value to the project being bid” and “has the existing technical and financial resources in the United States to perform the contract.” *Id.* § 4852(c)(2)(D) and (G). Further, a “qualified United States joint venture person” is defined as “a joint venture in which a United States person or persons owns at least 51 percent of the assets of the joint venture.” *Id.* § 4852(c)(3).

In its regulations implementing the Security Act, the agency additionally permits a *de facto* joint venture to qualify as a United States person, stating as follows:

A prospective bidder/offeror may be an individual organization or firm, a formal joint venture in which the co-venturers have reduced their arrangement to writing, or a *de facto* joint venture where no formal agreement has been reached, but the offering entity relies upon the experience of a related U.S. firm that guarantees performance. To be considered a “qualified United States joint venture person,” the joint venture must have at least one firm or organization that itself meets all the requirements of a U.S. person. . . . By signing this bid/proposal, the U.S. person co-venturer agrees to be individually responsible for performance of the contract, notwithstanding the terms of any joint venture agreement.

48 C.F.R. § 652.236-72; see *Caddell Constr. Co.*, B-298949.2, June 15, 2007, 2007 CPD ¶ 119 at 6 (finding the agency’s promulgation of regulations to permit an offeror to rely on a *de facto* joint venture to be considered a qualified United States joint venture person consistent with the Security Act).

On November 27, 2019, the agency posted on beta.sam.gov a synopsis to advise offerors of its intent to conduct a 3-phase procurement to award a contract for the

design and construction of a new consulate compound in Adana, Turkey. Contracting Officer's Statement (COS) at 3.<sup>1</sup> In phase 1, offerors were required to submit a "Statement of Qualifications for Purpose of Section 402 of The Omnibus Diplomatic Security and Antiterrorism Act of 1986" pamphlet. Agency Report (AR), Tab 1, Adana Phase 1 Prequalification Submission Requirements Notice at 4. Offerors were required to identify contracts or subcontracts successfully completed in the United States or at a United States diplomatic or consular mission "involving work of the same general type and complexity as the solicited project and having a contract or subcontract value of at least \$116,250,000." *Id.*

In phase 2, offerors found to be prequalified during phase 1 would be invited to submit phase 2 qualifications of the lead design firm and construction firm, and the agency would then select up to four of the highest technically qualified teams to participate in phase 3. *Id.* at 2-3. In phase 3, the phase 2 prequalified offerors would be invited to submit technical and price proposals for award of a fixed price contract and be required to participate in a project site visit in Turkey following the issuance of the phase 3 RFP. *Id.* at 3.

In 2020 and 2021, the agency notified Pernix that Pernix was prequalified in phases 1 and 2, respectively, and would be invited to submit a proposal in response to the phase 3 RFP. Pernix submitted a phase 3 proposal, and on September 30, 2023, the agency awarded a contract to Pernix Federal, LLC. COS at 22; see *also* Protest, exh. 13, Contract No. 19AQMM-23-C0157. Subsequently, B.L. Harbert International, LLC, a disappointed offeror, filed a protest with our Office alleging that Pernix could not have prequalified in phases 1 or 2 because it could not meet the definition of a United States person as required by the Security Act.

On October 27, the agency notified our Office that it would take corrective action, and we dismissed the protest as academic. *B.L. Harbert Int'l, LLC*, B-422122, Nov. 9, 2023 (unpublished decision). The agency stated that its corrective action would include "confirmation of the eligibility of the awardee, Pernix Federal, LLC to compete under Phase [3] of the Solicitation and its eligibility for award," and would confirm that "the awardee, Pernix Federal, LLC, was the Offeror that was expressly prequalified under Phase [1] and Phase [2] and that the Phase [3] proposal submitted by Pernix Federal, LLC was submitted by the same Offeror prequalified in Phases [1] and [2]." *Id.* at 1-2. The agency also stated it would confirm that prequalified offerors were properly registered in SAM. *Id.* at 2.

On December 8, 2023, the agency notified Pernix that Pernix Federal, LLC as a stand-alone entity was not the offeror prequalified under phase 1 and evaluated under phase 2, was not eligible to submit a phase 3 proposal, and should have been excluded from the competition pursuant to the terms of the RFP. AR, Tab 13, Pernix Federal Eligibility Determination Notice at 1. The agency additionally advised that "because the

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<sup>1</sup> In this decision, all page citations are to Adobe PDF page numbers.

Pernix de facto [joint venture] was not registered in SAM at the time of the Phase 3 proposal submission, it is ineligible for award.” *Id.* After a debriefing, this protest followed.

## DISCUSSION

The protester challenges the agency’s post-award determination that Pernix was not eligible to participate in phase 3. Pernix argues the agency’s determination is not reasonable and is inconsistent with the phase 1 and 2 submission requirements, the RFP, and the statements Pernix made in its phase 1 and 2 submissions and phase 3 proposal. Protest at 12-13. Specifically, the protester contends that Pernix Federal, LLC, as a stand-alone entity, was the offeror prequalified to compete in phase 3, and that it has been and is registered in SAM. *Id.* at 12; Comments at 10-12.

In reviewing an agency’s prequalification decision under the Security Act, we examine the supporting record to determine whether the decision was rational, consistent with the stated evaluation criteria, consistent with the applicable laws and regulations, and adequately documented. *CCE Specialties, LLC*, B-413998, Jan 18, 2017, 2017 CPD ¶ 28 at 5; *Caddell Constr. Co., Inc.*, B-411005, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132 at 8.

Here, on September 23, 2019, the Department of State issued a notice of this procurement and stated that only United States persons would be eligible to compete; the agency would evaluate the prequalification submission of the architectural design firms and construction contractors to demonstrate performance of similar construction work for Security Act purposes. Protest, exh. 1, Adana Pre-Solicitation Notice at 21. The phase 1 prequalification notice subsequently published by the agency stated as follows:

**IMPORTANT NOTE:** Organizations that wish to use the experience or financial resources of any other legally dependent organization or individual, including parent companies, subsidiaries, or other related firms, must do so by way of a joint venture. A prospective offeror may be an individual organization or firm, a formal joint venture (where the arrangement among the co-venturers has been reduced to writing), or “de facto” joint venture (where no formal agreement has been reached, but the offering entity relies upon the experience of a related U.S. person firm that guarantees performance). To be considered a “qualified United States joint venture person,” every joint venture must have at least one firm or organization that itself meets all the requirements of a U.S. person listed in Section 402. The U.S. person co-venturer shall submit a pamphlet and will be required to sign a guarantee making the U.S. person individually responsible for performance of any contract awarded, notwithstanding the terms of any joint venture agreement.

AR, Tab 1, Adana Phase 1 Prequalification Notice at 4-5.

On January 28, 2020, Pernix submitted its phase 1 submission. The protester's phase 1 submission contained a cover letter on Pernix Federal, LLC letterhead which stated:

We are including a FY20 [fiscal year 2020] Certification pamphlet for Pernix Federal, LLC. and its de facto joint venture partners Pernix Group, Inc. and BE&K Building Group, LLC, with respect to the Phase I Request for Proposal noted above. . . . Guarantee Letters from Pernix Group Inc and BE[&]K Building Group indicating that Pernix Group and BE&K's technical and financial resources will be combined with those of Pernix Federal to perform the above noted project, and that Pernix Group and BE&K will be responsible and individually and severally liable for the full performance of and resolution of any and all respects of any contract awarded to Pernix for the Adana NCC.

AR, Tab 2, Pernix Phase 1 Submission at 1. Letters from Pernix Group and BE&K, provided on their respective letterhead and included in the phase 1 submission, specifically identified Pernix Federal, LLC as the entity that would be the offeror to whom a contract should be awarded:

This letter is to confirm that Pernix Group, Inc. has entered into a de facto joint venture relationship with its wholly owned subsidiary's BE&K Building Group and Pernix Federal LLC and as such its technical and financial resources will be utilized in support of completing the above referenced project. Furthermore[,] Pernix Group, Inc. agrees that it will be responsible and individually and severally liable for the full performance of and resolution of any and all respects of any contract awarded to Pernix Federal, LLC. for the above referenced project and matters arising out of any such contract.

\* \* \* \*

This letter is to confirm that BE&K Building Group is a 100 [percent] wholly owned subsidiary of Pernix Group, Inc., and has entered into a de facto joint venture relationship with Pernix Group, Inc. and Pernix Federal, LLC and as such its technical and financial resources will be utilized in support of completing the above referenced project. Furthermore BE&K Building Group agrees that it will be responsible and individually and severally liable for the full performance of and resolution of any and all respects of any contract awarded to Pernix Federal, LLC. For the above referenced project and matters arising out of any such contract.

*Id.* at 2-3.

On August 18, 2020, Pernix submitted its phase 2 submission. Pernix again provided its submission on Pernix Federal, LLC letterhead and stated: “Our Design-Build team for this effort is Pernix Federal, LLC and Hellmuth, Obata & Kassabaum, PC (HOK).” AR, Tab 6, Pernix Phase 2 Submission at 2. There is no dispute that Pernix relied on the construction experience of Pernix Group and BE&K in its phase 2 submission to meet the prior construction experience requirements by including two construction projects performed by each of its *de facto* co-venturers. *Id.* at 4-65.

In both phases 1 and 2, the agency advised Pernix that the following team prequalified: “Pernix Federal (defacto JV with Pernix Group & BE&K) & HOK Inc.” AR, Tab 4, Pernix Phase 1 Successful Offeror Notice; Tab 8, Pernix Phase 2 Successful Offeror Notice. In the public notices identifying the firms prequalified to participate in phases 2 and 3 of the procurement, the agency stated that the following team had prequalified: “Pernix Federal & HOK, Inc.” AR, Tab 5, Phase 2 Prequalified Offeror Shortlist at 1; Protest, Exh. 6, Record of Offerors – Prequalification, Apr. 27, 2020; Protest, exh. 8A, Phase 3 Offeror Participation List at 116. For example, the phase 2 request for submissions identified the “Design-Build teams . . . determined to be pre-qualified” and listed “Pernix Federal & HOK, Inc.” AR, Tab 5, Phase 2 Prequalified Offeror Shortlist at 1.

Regarding phase 2 prequalification, the RFP also stated:

Offerors have been pre-qualified during Phase 2 of this acquisition. This section describes evaluation factors and procedures for Phase 3. Offerors will be considered for award of contracts for only those projects for which they have been expressly prequalified. Phase 3 proposals must be submitted by the same Offeror prequalified in Phase 2. If the Offeror proposed as a [joint venture], the [joint venture] member entities must be the same.

AR, Tab 9, RFP at 166.

On July 13, 2023, Pernix submitted its phase 3 proposal, identified the name of the offeror as “Pernix Federal, LLC” in the completed and signed standard forms (SF1442 and SF30s), and stated as follows:

#### COMPANY FINANCIAL STATEMENT

Since 2012, Pernix Federal, LLC has been a wholly owned, managed, and controlled entity of Pernix Group, Inc., however its operations were very limited until 2019. In 2019, Pernix Group, Inc. streamlined its corporate structure and all assets related to Federal Government construction work were transferred to Pernix Federal, LLC. This includes all relevant personnel and financial resources used on [Department of State] projects. Subsequently all current [Department of State] contracts were novated from Pernix Group to Pernix Federal.

After the corporate restructure, Pernix Federal, LLC remains a wholly owned, managed, and controlled entity of Pernix Group, Inc. and is considered a domestic disregarded entity. As such, its revenues and expenses are included in the audited annual financial statements and the annual consolidated federal income tax return of Pernix Group, Inc. As evidence of Pernix's financial capability, we are providing a copy of the latest audited financial report, as well as the latest unaudited financials for Pernix Federal, the offeror.

AR, Tab 10, Pernix Price Proposal at 5-9, 44. As noted above, Pernix Federal, LLC was awarded the contract. Thereafter, a protest was filed by B.L. Harbert, and due to the agency's decision to take corrective action we dismissed the protest as academic. *B.L. Harbert Int'l, LLC*, B-422122, Nov. 9, 2023 (unpublished decision).

On October 27, the contracting officer sent an email to the protester to "confirm whether the Pernix Federal, LLC de facto [joint venture with] Pernix Group, Inc. and BE&K Building Group that was pre-qualified for Phase 1 and 2, was registered and an active entity in SAM.gov at the time of Phase 3 proposal submission[.]" AR, Tab 12, Corrective Action Clarification Emails at 1. Pernix replied:

A "de facto" joint venture is not a separate legal entity, and as such it is the sum of its component parts. Each of the component parts of the Pernix Federal, LLC de facto joint venture with Pernix Group, Inc. and BE&K were registered in [SAM] at the time of Phase 3 proposal submission. Accordingly[,] the "de facto" joint venture was registered in SAM.

*Id.*

On December 8, the agency informed Pernix that "Pernix Federal LLC (as a stand-alone entity) was not the 'Offeror' prequalified under Phase 1 and evaluated under Phase 2," therefore Pernix was not eligible to submit a phase 3 proposal and its proposal should have been excluded and not evaluated per the terms of the RFP. AR, Tab 13, Pernix Eligibility Notice, at 1. Specific to phase 1, the agency noted:

In Phase 1, Pernix submitted [a Security Act] prequalification proposal as a [*de facto* joint venture] comprised of Pernix Federal, Pernix Group, and BE&K. The [*de facto* joint venture] Offeror was the entity that was pre-qualified and was deemed eligible as a 'U.S. Person' to compete for the Adana project. Only those Offerors that were pre-qualified were eligible to advance to Phases 2 and 3 of the acquisition.

*Id.* at n.1. Regarding phase 2, the agency further noted: "In Phase 2, Pernix continued to rely upon its [*de facto* joint venture] entities to meet the experience requirements and was evaluated as a [*de facto* joint venture]." *Id.* at n.2. The agency also stated that

“because the Pernix *de facto* [joint venture] was not registered in SAM at the time of the Phase 3 proposal submission, it is ineligible for award.” *Id.* at 1.

Pernix has challenged both of these findings, arguing that it is eligible to compete under the Security Act requirements and that it has met the SAM registration requirements of the solicitation. As discussed below, we sustain the protest and find that the agency’s determination of ineligibility under both the Security Act and SAM registration requirements was unreasonable.

### Pernix’s Eligibility Under the Security Act

The protester challenges the agency’s determination that Pernix Federal, LLC, as a stand-alone entity, is not eligible to compete under the Security Act because it was not the same entity that was prequalified in phases 1 or 2. Pernix argues that the phase 1 and 2 submission requirements and the agency’s repeated past practice allowed Pernix to qualify as a *de facto* joint venture in phase 1 and thereafter for Pernix Federal, LLC, as a stand-alone entity, to be the offeror in phases 2 and 3. Protest at 1, 13. In essence, the agency argues that the entity that was prequalified under phases 1 and 2 of the procurement, invited to submit a phase 3 proposal, and eligible to receive award were required to be the “same.” COS at 25 (“Having elected to propose as a [*de facto* joint venture] and in fact prequalifying under the [Security] Act as a [*de facto* joint venture] in Phase 1, Pernix was required to maintain this structure unless it sought prequalification under [the Security Act] as a different entity – it never did.”); Memorandum of Law (MOL) at 4-5, 11-12, 18-21. On this record, we find that Pernix may reasonably be considered both a *de facto* joint venture and the offeror eligible to submit a phase 3 proposal.

As noted, consistent with the agency’s regulations, the prequalification requirements permitted “a *de facto* joint venture where no formal agreement has been reached, but *the offering entity* relies upon the experience of a related U.S. firm that guarantees performance” to be eligible to participate in phase 3 and submit a proposal in response to the RFP. 48 C.F.R. § 652.236-72 (emphasis added); AR, Tab 1, Adana Phase 1 Prequalification Submission Requirements Notice at 4-5; Tab 5, Phase 2 Prequalified Offeror Shortlist at 1-2. In all its submissions to the agency, Pernix identified Pernix Federal, LLC as “the offeror” or the entity to which a contract would be awarded. AR, Tab 2, Pernix Phase 1 Submission at 1-3; Tab 6, Pernix Phase 2 Submission at 2; Tab 10, Pernix Price Proposal at 5-9, 44. In other words, Pernix Federal, LLC was always “the offering entity.” Indeed, as noted, the agency initially awarded a contract to Pernix Federal, LLC.

Thus, Pernix’s submission of its phase 2 submission and phase 3 proposal as a stand-alone entity is consistent with the process contemplated by the agency’s own implementing regulations. Here, Pernix Federal, LLC was the “offering entity” of the *de facto* joint venture that relied on the experience of related firms to guarantee performance. Moreover, nothing in the record--in either Pernix’s phase 2 submission or phase 3 proposal--indicates that Pernix no longer maintained the *de facto* joint venture



structure or was no longer relying on its related entities to guarantee performance.<sup>2</sup> As the regulation states, a *de facto* joint venture is one “where no formal agreement has been reached, but the offering entity relies upon the experience of a related U.S. firm that guarantees performance.” 48 C.F.R. § 652.236-72. The regulations therefore do not contemplate that a *de facto* joint venture is a separate legal entity itself. As a result, the agency could not enter into a contract with the *de facto* joint venture and would have to award the contract to one of the entities that was a member of the *de facto* joint venture, *i.e.*, “the offering entity” contemplated by the regulation. *Id.* The agency recognized this approach upon making the initial award to Pernix Federal, LLC, as a stand-alone entity. Thus, given the nature of a *de facto* joint venture as contemplated by the regulations and the prequalification requirements, one of the entities that makes up the *de facto* joint venture must act as the offering entity and be allowed to do just that: submit the offer.

Based on our review of the record and the applicable laws and regulations, we find that where a company chooses to utilize a *de facto* joint venture to qualify as a United States person in 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. Thus, here we find that the same prequalified entity--*i.e.*, Pernix’s *de facto* joint venture--submitted the phase 2 submission and phase 3 proposal. Accordingly, it was unreasonable for the agency to conclude that Pernix was no longer eligible to compete because its phase 2 submission and phase 3 proposal were from a different entity than the one that was prequalified. We therefore sustain the protest on this basis.<sup>3</sup>

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<sup>2</sup> The record here does not include Pernix’s phase 3 technical proposal, the agency’s evaluation, or any post-award communications between Pernix and the agency regarding the contract performance guarantees from its co-venturers. Thus, we are unable to determine whether in its proposal Pernix does not “[rely] on its related entities for meaningful involvement and contract performance” and will provide the required guarantees from its *de facto* joint venture members. However, the agency has not represented that the phase 3 technical proposal showed that Pernix no longer maintained the *de facto* joint venture structure, *i.e.*, that Pernix now either intended to rely on its related entities for meaningful involvement in contract performance, or no longer intended to provide those guarantees.

<sup>3</sup> Pernix also argues that the agency’s failure to engage in discussions regarding its eligibility during its corrective action violates FAR section 15.306. Protest at 13-14; Comments at 15. We need not resolve this issue since we conclude that Pernix, as a stand-alone entity, was eligible to submit a phase 3 proposal. *But see Caddell Constr. Co. Inc.*, B-298949.2, June 15, 2007, 2007 CPD ¶ 119 at 5 n.3 (finding prequalification to compete under the Security Act analogous to matters of responsibility and that the agency properly may obtain information from a contractor regarding its prequalification at any time until award is made).

## Pernix's Eligibility Under the SAM Registration Requirements

Pernix also challenges the agency's conclusion that Pernix is ineligible for award because the *de facto* joint venture was not registered in SAM at the time it submitted its phase 3 proposal. Regarding SAM registration, the RFP stated:

### L.18 52.204-7 SYSTEM FOR AWARD MANAGEMENT (OCT 2018)

NOTE: Offerors, including any offeror organized as a joint venture, to include a *de facto* joint venture, must have an active SAM registration at the time of proposal submission and throughout the procurement process. Any offeror whose registration is not active in SAM at the time of proposal submission will be excluded from the process and their proposals will not be evaluated.

To the extent an Offeror relies on its related entities for meaningful involvement and contract performance, the Department considers those entities to be the "Offeror" for purposes of SAM registration and for evaluation purposes under this Solicitation. Note: For purposes of this Solicitation, *de facto* joint ventures are not entities where both firms share in the performance of the work but merely an arrangement where one firm guarantees the performance of another.

RFP at 141; see *also id.* at 147 (RFP section L.23.2.1.10, Joint Venture Agreement Description of Partnership, if Applicable, stating substantially the same). Pernix does not dispute that it formed a *de facto* joint venture to prequalify in phase 1 or that it relied on the experience of its co-venturers in its phase 2 submission. Rather, Pernix contends that it is impossible for a *de facto* joint venture to register in SAM and therefore it was unreasonable for the agency to remove Pernix from the competition for this reason.

As an initial matter, we recognize that Pernix's challenge to the agency's post-award interpretation of the RFP is untimely under our Bid Protest Regulations because Pernix did not protest the terms of the solicitation prior to the time set for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1). In this regard, the language in the RFP stating that "a joint venture, to include a *de facto* joint venture, must have an active SAM registration at the time of proposal submission" is an unambiguous requirement for a *de facto* joint venture to be registered in SAM, something Pernix now argues is an impossibility. If Pernix believed this to be the case, the defect with the terms of the solicitation should have been readily apparent to Pernix from the face of the solicitation and therefore should have been challenged prior to the deadline for submission of proposals. *Id.* However, notwithstanding the fact that Pernix's allegation is an untimely challenge of a patent solicitation defect, we consider the issue raised to be a significant one that should be decided on the merits. Accordingly, we find that the issue is appropriate for consideration under the "significant issue" exception to our timeliness rules. 4 C.F.R. § 21.2(c).

What constitutes a significant issue is to be decided on a case-by-case basis. *Tiger Truck, LLC*, B-400685, Jan. 14, 2009, 2009 CPD ¶ 19 at 7 n.9. We generally regard a significant issue as one of widespread interest to the procurement community and that has not been previously decided. *Celadon Labs., Inc.*, B-298533, Nov. 1, 2006, 2006 CPD ¶ 158 at 4. The issue here--the agency's failure to harmonize its regulations implementing the Security Act, and the phase 1 and 2 submission instructions that permitted a *de facto* joint venture to prequalify as a U.S. Person eligible to compete for the requirements, with the RFP's requirement that a *de facto* joint venture be registered in SAM--is not one that we have previously decided and is one that can be expected to arise in future Department of State procurements.

As noted above, the protester argues that it is impossible for a *de facto* joint venture to register in SAM, and that the agency was aware of this fact prior to the due date for submission of phase 3 proposals. Comments at 11-12. In this regard, the record includes a variety of communications between Pernix and the agency that span the intervening years between Pernix's phase 2 prequalification and contract award regarding the requirement to register in SAM related to this and other agency procurements for embassy construction in which Pernix participated. Most notably, by email on May 9, 2022, Pernix advised the contracting officer about multiple procedural and technical impediments that did not permit a *de facto* joint venture to register in SAM.<sup>4</sup> AR, Tab 17, De Facto Joint Venture Registration Emails at 3; see also Comments, exh.1, Decl. of Pernix Vice President of Marketing & Facility Security Officer at 21-22. On May 25, the contracting officer advised that a *de facto* joint venture would need to register in SAM, and explained as follows:

We are the only agency with necessity to allow companies to utilize a [*de facto* joint venture] in order for them to use the experience of a parent or subsidiary firm to qualify under the [Security Act]. We can get through the [prequalification] stage because that submission is not considered a

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<sup>4</sup> For example, the protester explains that to register in SAM, an entity must provide proof of its business name and address, and proof of the entity's start year and state. Examples of the documents most commonly used as proof include the following: articles of incorporation, organization, or formation; bank statements; certificates of formation or organization; a Department of Treasury, Internal Revenue Service letter assigning the entity identification number; or a Secretary of State certificate of filing. None of these documents exist for a *de facto* joint venture because no formal agreement has been reached and it is not a separate legal entity. See Supp. Decl. of Pernix Vice President of Marketing & Facility Security Officer at 1-2; *id.*, attach. B, GSA Entity Validation Documentation Requirements List. The protester also states that it contacted the Federal Service Desk, the entity that provides technical support for SAM, and was told that it needed a tax identification to register in SAM and that registering a *de facto* joint venture in SAM was impossible. Supp. Decl. of Pernix Vice President of Marketing & Facility Security Officer at 2-3.

proposal so the [*de facto* joint venture] does not have to be registered in SAM. If a firm originally qualified as a [*de facto* joint venture] and/or now needs to use a [*de facto* joint venture] to qualify technically it has to go through the steps to create a registration in SAM. This includes all the steps to get there as well as creating a tax [identification] even if it will never be used.

I don't see any way around it.

AR, Tab 17, De Facto Joint Venture Registration Emails at 1.

Given the lack of clarity in the record regarding this issue, our Office requested that the agency file a supplemental agency report to “explain how a *de facto* joint venture can register in SAM.” GAO Request for Supplemental Agency Report and Comments at 1. The agency responded that a *de facto* joint venture could register as a partnership or limited liability partnership, or alternatively elect to form an actual joint venture and register that entity in SAM. Supp. COS at 16; Supp. MOL at 30 (“Pernix had ample time to form a formal [joint venture] that could easily register in SAM; could have formed a Partnership; could have proposed as a Prime sub; or come up with another business arrangement that could have satisfied the requirements.”). To the extent that the agency’s position is that Pernix should have formed an entity other than a *de facto* joint venture in order to register in SAM, to do so would mean that the newly formed entity would not be the same entity prequalified in phases 1 and 2. For example, the regulations distinguish between a formal joint venture, in which the co-venturers have reduced their arrangement to writing, and a *de facto* joint venture where no formal agreement has been reached. 48 C.F.R. § 652.236-72. In such a case, the agency has stated the newly formed entity would not be eligible for award if it was not the same as the entity that was prequalified.

Accordingly, the agency has not reasonably explained how a *de facto* joint venture could comply with the requirement to be registered in SAM and therefore has not meaningfully refuted Pernix’s claim that it is impossible to do so. Nor has the agency provided any justification or explanation for why it is necessary for a *de facto* joint venture be registered in SAM to meet the agency’s needs.<sup>5</sup> As a result, the agency has

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<sup>5</sup> In this regard, the agency contends the FAR requires the *de facto* joint venture itself to be registered in SAM. Specifically, the agency states that “after an adverse decision at the Court of Federal [Claims] relative to one of the Department’s local guard contracts awarded to a [*de facto* joint venture] that was not itself registered in SAM, the Department began to update its Solicitations across all programs and enforce the 2018 FAR updates to the SAM registration requirements.” Supp. MOL at 24. The agency argues that “[w]hile it may be true that in the past the Department recognized separate SAM registrations for [joint venture] members rather than the [joint venture] entity itself [], the FAR council revisions to the SAM deleted and replaced a subsection giving contracting officers discretion as to when to require an offeror to register in SAM.” *Id.*

(continued...)

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. Moreover, the phase 1 and 2 notices and the agency's regulations invited offerors to compete and prequalify as a *de facto* joint venture only to run into the impossibility of registering that *de facto* joint venture in SAM as part of phase 3. In essence, the requirement that a *de facto* joint venture be registered in SAM unduly restricted competition because it prevented such an offeror from submitting a phase 3 proposal even if it had prequalified as a *de facto* joint venture. On this record, we find that the agency's decision to find Pernix ineligible to compete because the *de facto* joint venture was not registered in SAM was unreasonable and sustain the protest on this basis as well.

In addition, Pernix argues that it reasonably interpreted the solicitation as allowing compliance with the SAM registration requirement as long as Pernix itself was registered in SAM, even if it maintained its status as a *de facto* joint venture for the procurement. In this regard, Pernix points to the language in the solicitation that explained that "de facto joint ventures are not entities where both firms share in the performance of the work but merely an arrangement where one firm guarantees the performance of another." RFP at 141, 147; see Comments, exh.1, Decl. of Pernix Vice President of Marketing & Facility Security Officer at 23 ("[A]t Phase 3, knowing that only Pernix Federal would have meaningful involvement in contract performance, we identified the Offeror as Pernix Federal which was and is registered in SAM.").

Where a dispute exists as to a solicitation's actual requirements, we begin by examining the plain language of the solicitation. *Point Blank Enters., Inc.*, B-411839, B-411839.2, Nov. 4, 2015, 2015 CPD ¶ 345 at 4. We resolve questions of solicitation interpretation by reading the solicitation as a whole and in a manner that gives effect to all provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. *Unico Mech. Corp.*, B-420355.6, B-420355.7, Aug. 1, 2023, 2023 CPD ¶ 182 at 13.

As noted above, we find that Pernix was the "offering entity" of the *de facto* joint venture and therefore properly submitted its phase 2 submission and phase 3 proposal as a stand-alone entity. Consistent with the language in the solicitation defining a *de facto* joint venture, all of Pernix's submissions demonstrated that Pernix itself would perform the contract and its *de facto* co-venturers would not be involved in the performance of

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at 29. Notwithstanding the agency's views on the SAM registration requirements of the FAR, the question here is not *when* an offeror is required to be registered in SAM, but rather whether it is possible for a *de facto* joint venture to be registered in SAM at any point. The FAR provision at issue here does not specifically address the registration of *de facto* joint ventures. See FAR provision 52.204-7. Moreover, this argument fails to provide any rationale for why the agency requires that a *de facto* joint venture entity itself be registered in SAM to justify the exclusion of entities that its regulations otherwise permit to qualify to compete for purposes of the Security Act.

the contract. Thus, we find that for purposes of SAM registration, the protester reasonably interpreted the SAM registration requirement as allowing Pernix Federal, LLC to be the offeror that was registered in SAM at the time of proposal submission. To the extent that the agency argues that the *de facto* joint venture itself had to be registered in SAM, as noted above, because the agency has not rebutted the protester's argument that this is an impossible requirement, it is not a basis on which to exclude Pernix from the competition.

In sum, the RFP included an impossible requirement for a *de facto* joint venture to register in SAM. This requirement could not be harmonized with the phase 1 and 2 prequalification notices and the Department of State's current regulations that permit a *de facto* joint venture to qualify under the Security Act, and specifically, for the offeror to be awarded a contract and provide performance guarantees from its affiliates. Because Pernix could reasonably be considered the prequalified offeror eligible to submit a phase 3 proposal and to whom the SAM registration requirement applies, the agency's ineligibility determination is unreasonable.

## RECOMMENDATION

We recommend that the agency consider Pernix Federal, LLC, as a stand-alone entity, the offering entity of a *de facto* joint venture that is eligible to submit a phase 3 proposal and reinstate Pernix in the competition. In addition, the agency should amend the RFP to eliminate or revise the impossible requirement that a *de facto* joint venture be registered in SAM in order to clarify SAM registration requirements with respect to *de facto* joint ventures members, and thereafter proceed with the procurement as appropriate in accordance with this decision, the FAR, and applicable regulations. Finally, we recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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