



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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: Perini Management Services, Inc.

File: B-404261; B-404261.2; B-404261.3; B-404261.4

Date: December 17, 2010

James J. McCullough, Esq., and Brian M. Stanford, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP, for the protester.

Jonathan D. Shaffer, Esq., Smith Pachter McWhorter PLC, for the intervenor.

Kathleen D. Martin, Esq., and Dennis J. Gallagher, Esq., Department of State, for the agency.

Linda C. Glass, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a procurement covered by the Percy Amendment, 22 U.S.C. § 302 (2002), protest of agency's determination that awardee qualified for a 10-percent price preference as an American-owned firm is denied, where the agency reasonably considered the awardee's construction experience performed outside the United States to be similar to the work required under the solicitation.

DECISION

Perini Management Services, Inc., of Framingham, Massachusetts, protests the award of a contract to Framaco-Epik Joint Venture (FE JV)¹ of Rye Brook, New York, under request for proposals (RFP) No. SAQMMA-10-R0355, issued by the Department of State (DOS) for the design and construction of a Type 3 Barrack and infrastructure improvements on the new embassy compound in Baghdad, Iraq. Perini contends that the awardee does not qualify as an American-owned firm and was not entitled to a 10-percent price preference.

We deny the protest.

¹ FE JV is a joint venture composed of Framaco International, Inc. (an American owned company), and Epik Construction Company (a foreign owned company).

BACKGROUND

On August 5, 2010, the DOS issued the solicitation to nine firms that were identified as having the knowledge, experience, and the ability to mobilize and meet an aggressive delivery schedule. Contracting Officer's Statement at 1; Justification and Approval (J&A) For Other Than Full and Open Competition at 1. The RFP stated that the procurement was subject to section 11 of the Foreign Service Buildings Act of 1926, 22 U.S.C. § 302 (2002), as amended, commonly referred to as the Percy Amendment. RFP at 96. The Percy Amendment limits eligibility for award of certain overseas construction contracts to American-owned offerors and foreign offerors satisfying certain specified criteria (which are not at issue in this protest). 22 U.S.C. § 302(a). In addition, the Percy Amendment mandates that the prices proposed by American-owned offerors be reduced by 10 percent for evaluation purposes. 22 U.S.C. § 302(b)(2). The statute states, at 22 U.S.C. § 302(b)(4), that qualification as an American-owned offeror requires:

evidence of (A) performance of similar construction work in the United States or at a United States diplomatic or consular establishment abroad, and (B) either (i) ownership in excess of fifty percent by United States citizens or permanent residents, or (ii) incorporation in the United States for more than three years and employment of United States citizens or permanent residents in more than half of the corporation's permanent full-time professional and managerial positions in the United States.

Id. (emphasis added). The Percy Amendment also provides that “[q]ualification under this section shall be established on the basis of determinations at the time bids are requested.” 22 U.S.C. § 302(b)(5).

The RFP included DOS Acquisition Regulation (DOSAR) § 652.236-71, which implements the requirements of the Percy Amendment. This regulation contains essentially the same language as quoted above, but incorrectly recites that the Percy Amendment requires similar construction services to be performed only in the United States. DOSAR § 652.236-71(b)(1). In this regard, the regulation has not been revised to reflect that under the current version of the Percy Amendment, similar construction services may be either performed in the United States or at a diplomatic or consular establishment abroad. The DOS regulation requires, as “[e]vidence of qualification,” that the offeror describe the location, complexity, type of construction, and value of one or more similar projects in its proposal. DOSAR § 652.236-71(e). The regulation also requires that offerors certify that they meet the ownership and incorporation requirements stated in the Percy Amendment. Id.

The RFP provided that proposals would be evaluated under two evaluation factors--management and price--with award being made to the offeror who submitted the lowest-priced, technically acceptable offer. RFP at 111-12. Several firms, including

Perini and FE JV, submitted timely responses to the RFP. Both the Perini's and FE JV's proposals were determined to be technically acceptable, and FE JV's proposal was the lowest in price at \$67,455,796. Agency Report (AR), Tab 4, Price Negotiation Memo, at 7.

In its proposal, FE JV certified that it met the Percy Amendment requirements as to ownership and incorporation status.² It also listed 11 examples of construction work that it asserted were similar to the solicitation's requirements, several of which were performed in United States embassies or other diplomatic or consular establishments. These projects included a \$41.7 million renovation and construction project at an interim embassy in Bagdad Iraq, and an \$8.9 million construction project at a new consulate compound in Karachi, Pakistan.³ AR, Tab 2, Perini's Proposal, Section K.6 Certifications. The contracting officer states that he reviewed FE JV's proposal and considered the Baghdad and Karachi projects to be similar construction projects. Contracting Officer's Statement at 4. The contracting officer additionally states that he relied upon a Percy Amendment legal review completed in 2009, which afforded Framaco (the American partner of the FE JV) the Percy Amendment's 10-percent price preference in an evaluation conducted under a solicitation for an office annex and housing in Kabul, Afghanistan; that project had an estimated value of \$175 to \$200 million, which is significantly higher than the estimated value of the project here. *Id.* The contracting officer determined that, based on FE JV's similar construction experience and the prior Percy Amendment legal review, FE JV was entitled to the 10-percent price preference as an American-owned firm in accordance with the Percy Amendment. *Id.* As a result, for evaluation purposes, FE JV's price was reduced by 10 percent to \$60,710,216.40. On September 30, the award was made to FE JV, the apparent low offeror, in the amount of \$67,455,796.

The protester received a debriefing on October 12 and filed its original protest with our Office on October 15. The protester filed several supplemental protests on October 22, November 5, and November 15.

DISCUSSION

The protester argues that the agency failed to follow DOSAR § 652.236-71 and the terms of the RFP when it concluded that FE JV was American-owned for purposes of applying the 10-percent price preference under the Percy Amendment. The protester asserts that the agency's conclusion was in error because: (1) FE JV's construction

² FE JV's ownership and incorporation status are not at issue in this protest, given that one of the joint venture partners is American-owned.

³ The contracting officer in his statement mistakenly listed the value of the Karachi project as \$36 million. Contracting Officer's Statement at 4.

projects identified as similar were performed outside the United States, and (2) FE JV's construction projects are dissimilar in value, complexity, and type to the construction services procured here.⁴ Perini's Comments, Nov. 15, 2010, at 11.

The agency reports that the DOSAR clause included in the solicitation had not been updated to reflect the current provisions of the Percy Amendment, which was revised to allow consideration of similar projects performed not only in the United States but also at diplomatic or consular establishment abroad. The agency asserts that FE JV's construction projects meet the requirements of the Percy Amendment, and therefore the agency's conclusions that the projects were similar to the effort here are reasonable. Agency Response, Nov. 19, 2010, at 6, 8-9.

It is well-settled that when a statutory language provides an unambiguous expression of the intent of Congress, the unambiguous intent of Congress must be given effect. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93 at 6. Further, a regulation must be interpreted so as to harmonize with and not further conflict with the objective of the statute it implements. Trustees of Indiana University v. United States, 618 F.2d. 736, 739 (Ct. Cl. 1980).

The DOSAR regulation, recited in the RFP, makes clear that “[t]his solicitation is subject to [the Percy Amendment], as amended (22 U.S.C. [§] 301).” The Percy Amendment unambiguously states that projects performed outside the United States may be considered for purposes of determining American-owned status under the statute. Although it is true that the DOSAR clause recited in the solicitation misstates the Percy Amendment as defining American-owned firms as those that perform work in the United States, the language in the clause does not provide a basis for the agency to ignore the clear intent of Congress as set forth in the statute itself. To the extent the regulation may be interpreted as conflicting with the statute, the statute must be given effect. See Trustees of Indiana University v. United States,

⁴ In a supplemental protest, the protester argues that the agency failed to reasonably determine whether the awardee or its constituent members qualified as a “United States person” under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4852 (2000), for purposes of this RFP. Supplemental Protest, Oct. 22, 2010, at 2, 4, 6-10. However, the solicitation did not state that the Act applied here, the agency asserts that the Act does not apply to this procurement, and the protester was well aware that DOS was not engaged in prequalifying offerors as required under the 1986 Act. 22 U.S.C. § 4842 (c)(2). To the extent the protester now argues that the Act should apply to this solicitation, the issue raised after award is untimely. Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(1) (2010) (protests of solicitation improprieties must be raised prior to the date set for receipt of proposal).

618 F.2d. 736. Accordingly, we find reasonable the agency's consideration of FE JV's construction projects performed outside the United States at diplomatic or consular establishments.

With regard to the protester's argument that the agency unreasonably relied on FE JV's prior construction efforts that were dissimilar in value, complexity, and type of construction, we find the agency's analysis unobjectionable. The Percy Amendment does not provide a definition for "similar construction work," but the DOS implementing regulation required that offerors show the similarity of their projects to the work procured here by describing the location, complexity, type of construction, and value of "one or more" projects. As stated above, the contracting officer reviewed the 11 projects listed by FE JV and determined that at least 2 were similar, based on the offeror's description of the location, complexity, type, and value of the project.⁵ The contracting officer also relied upon a prior Percy Amendment review that afforded Framaco (the American partner of FE JV) "American-owned" status for a project with an estimated value of \$175 to \$200 million, which is significantly higher in value than this project. Under these circumstances, we find no basis to question the reasonableness of the contracting officer's determination that FE JV's construction experience was similar to the requirements here.

In sum, the record shows that the agency complied with the Percy Amendment and appropriately applied that 10-percent price preference to FE JV's proposal during the evaluation.⁶

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁵ To the extent that the contracting officer's mistaken determination that FE JV's Karachi project was valued at \$36 million (instead of the \$8.9 million reflected in the proposal) calls into question the reasonableness of his determination that this project was similar to the work sought here, we find no basis to sustain the protest. The RFP required "one or more" similar projects, RFP at 96, and the remaining project in Baghdad was valued at \$41.7 million and was properly found to be similar.

⁶ The protester also argued that the agency improperly executed the J&A to avoid analyzing whether FE JV was American-owned. Supplemental Protest, Oct. 22, 2010, at 2-6. However, the record shows that the J&A was used to limit the pool of competition for the subject solicitation to those vendors believed to have the ability to deliver the project in a timely fashion, and not as a means of pre-qualifying vendors as American-owned as asserted by the protester.