U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: MAXIMUS Federal Services, Inc.

File: B-422676

Date: September 16, 2024

Kara L. Daniels, Esq., Ian Hoffman, Esq., Roee Talmor, Esq., Nicole Williamson, Esq., and Jillian Williams, Esq., Arnold & Porter LLP, for the protester.
Douglas Kornreich, Esq. and Pamela Waldron, Esq., Department of Health and Human Services, for the agency.
Todd C. Culliton, Esq. and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that a "labor harmony agreement" (LHA) clause is unreasonable because it violates the Labor Management Relations Act and is preempted by the National Labor Relations Act is dismissed because our Office does not review violations of or preemption by those statutes.

2. Protest that an LHA clause is unreasonable because it violates or is not authorized under Federal Acquisition Regulation 22.101-1 is denied where the clause does not violate or conflict with the authority provided under that regulation.

3. Protest that the LHA clause is unduly restrictive of competition is denied where the clause is consistent with the agency's needs and does not otherwise limit competition.

4. Protest that the LHA clause is ambiguous is sustained where the clause does not reasonably articulate the period of time during which an apparent successful offeror will have to negotiate a pre-award LHA with any qualifying labor organization.

DECISION

MAXIMUS Federal Services, Inc., of McLean, Virginia, the incumbent contractor, protests the terms of request for proposals (RFP) No. 75FCMC24R0010, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), for contact center operations support services. MAXIMUS primarily

argues that the RFP contains an unreasonable "labor harmony agreement" (LHA) clause.

We sustain the protest in part and deny it in part.

DISCUSSION

To meet national program missions and strategies, as well as legislative mandates, CMS operates a toll-free, nation-wide, and continuously operating contact center operation (CCO), which provides customer service to federal health insurance recipients, as well as support to persons inquiring about benefits available under the Affordable Care Act. Contracting Officer's Statement (COS) at 1; Agency Report (AR), Tab 2A, RFP at 2. The CCO customer service channels are a critical source of information and assistance for consumers enrolled in Medicare or insurance plans sold through the federal health insurance marketplace. COS at 1. CMS handles more than 35 million inquiries annually (over 95,000 per day on average) at call centers located across the country. *Id.* at 1-2.

Since 2018, MAXIMUS has managed the CCO as the prime contractor under two different federal contracts.[1] *See* Protest at 12; AR, Tab 12, HHS Acquisition Plan at 3. During this period, MAXIMUS and its subcontractors have operated eleven call center locations throughout the United States, including sites at Bogalusa, Louisiana; Hattiesburg, Mississippi; London, Kentucky; and Chester, Virginia. COS at 2.

Starting in 2022, CMS explains that "several job actions" have occurred at call center locations. COS at 2. Specifically, the agency identifies the following "labor strikes" having occurred:

- March 23, 2022 -- Strikes at Bogalusa, Louisiana; and Hattiesburg, Mississippi.
- May 23 - 24, 2022 -- Strikes at Bogalusa, Louisiana; and Hattiesburg, Mississippi.
- August 8, 2022 -- Strikes at Bogalusa, Louisiana; Hattiesburg, Mississippi; London, Kentucky; and, Chester, Virginia.
- November 1, 2022 -- Strikes at Bogalusa, Louisiana; Hattiesburg, Mississippi; London, Kentucky; and, Chester, Virginia.
- May 23, 2023 -- Strikes at Strikes at Bogalusa, Louisiana; Hattiesburg, Mississippi; and Tampa, Florida.
- June 5, 2023 -- Strikes at Bogalusa, Louisiana; Hattiesburg, Mississippi; Phoenix, Arizona; Tampa, Florida; Chester, Virginia; and, London, Kentucky.

[1] Most recently, MAXIMUS was awarded the incumbent contract on August 31, 2022. COS at 2. That contact contemplated a roughly two-week transition period and nine 1-year option periods at an estimated value of $6.6 billion. Protest at 14.

- November 9, 2023 -- Strikes at Bogalusa, Louisiana; Hattiesburg, Mississippi; Phoenix, Arizona; Tampa, Florida; Chester, Virginia; and, London, Kentucky.

Id. at 2-3. Additionally, the agency explains that a labor organization conducted a rally, on December 12, 2023, outside the Department of Health and Human Services' (HHS) headquarters. *Id.* at 3.

Although these demonstrations did not affect CCO customer services, CMS concluded that they indicated future labor disruptions were likely. *Id.* Thus, CMS sought to modify MAXIMUS's incumbent contract with a "Labor Harmony Term and Condition," but CMS and MAXIMUS were unable to reach an agreement. *Id.*

CMS then opted to recompete the CCO requirement and include a "Labor Harmony Agreement" (LHA) clause and related requirements as part of a new solicitation.[2] COS at 3. On May 16, 2024, CMS issued the new solicitation. *See* RFP at 1-2. The RFP contemplates the award of a cost-plus-award-fee contract to be performed over a 1-year base period, nine 1-year option periods, and one 6-month extension period. RFP at 2, 69.

The LHA clause is contained at "Section H.16" of the RFP and provides, in relevant part, the following:

(a) *Definitions.* As used in this term and condition-

> *Demonstrates intent to represent* means when a labor organization takes action that the Contractor knows, or reasonably should know, displays an intent to represent service employees performing work under this contract. Such actions include, but are not limited to, the distribution of flyers, picketing, strikes, use of local media, and direct notification of the Contractor.
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> * * * * *
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> *Labor harmony agreement* means a written agreement between a Contractor with a labor organization that represents, or demonstrates intent to represent, service employees that contains, at a minimum, a provision prohibiting the labor organization and its members from

[2] An LHA is an agreement between a labor organization and an employer before the union has been selected or recognized as the collective bargaining representative of the employer's personnel. Protest at 19. Under a typical LHA, the labor organization will give up its right to strike, and the employer will provide numerous concessions, including permitting the labor organization to recruit and organize its employees, remaining neutral in any organizing campaign, and providing employees' names and contact information. *Id.* at 19-20.

engaging in any picketing, work stoppage, boycott, or other economic interference with the service Contractor's operations under this contract for the duration of this contract.

* * * * *

(b) The Contractor shall maintain in a current status throughout the life of the contract any [LHA] entered into prior to the award of this contract (as applicable).

(c) If at any point after contract performance begins a labor organization demonstrates intent to represent service employees performing work under this contract, within 5 days of that demonstration, the Contractor shall notify the Contracting Officer that it will commence to negotiate [an LHA] with the labor organization. The executed [LHA] shall be provided to the Contracting Officer within 120 days of the demonstration of intent.

(d) Remedies. If the Contracting Officer determines that the Contractor has not complied with the requirements of this term and condition, the Government may pursue all remedies as may be permitted by law or this contract in order to protect the interests of the United States.

AR, Tab 3B, RFP, amend. 1 at 64-65. Under section F.3, the contractor is required to maintain any pre-award LHAs, negotiate an LHA with any labor organization demonstrating intent to represent the firm's employees during performance of the contract, and deliver a copy of any LHA to the agency within 120 days of when a labor organization demonstrates intent to represent the service employees. *Id.* at 8.

When making award, the RFP provides that the agency will use a best-value tradeoff scheme considering various technical evaluation criteria (*i.e.*, corporate experience; contact center operations; small business utilization, program management, transition, and past performance), and proposed costs. RFP, amend. 1 at 121-127. The agency will conduct the evaluation in two phases. *Id.* at 122-123.

In phase one, the agency will evaluate each offeror's corporate experience proposal based on its demonstrated experience handling a CCO contract of similar size, scope, and complexity. RFP, amend.1 at 123. As part of the corporate experience criterion, the agency will examine each offeror's experience working with labor unions and negotiated LHAs or collective bargaining agreements (CBA). *Id.* at 124. During phase two, the agency will evaluate proposals under the remaining technical criteria, as well as evaluate proposed costs. *Id.* at 124-127.

Additionally, the RFP provides the following instruction at section L.15.9:

> Labor Harmony Agreement (LHA)
>
> There is no requirement to provide a labor harmony agreement with your proposal. However, the apparent successful offeror will be asked to negotiate and provide a copy of [an] LHA prior to award being formalized if there has been demonstrated intent to represent its employees prior to contract award.

RFP, amend. 1 at 118. In reviewing the apparent successful offeror's compliance, the RFP provides the following advisement at section M.8:

> The Government will review the apparent successful offeror's [LHA] (if applicable) for adherence to the requirements of agency specific term and condition at H.16, Labor Harmony Agreement. This review will not result in a score/rating as it is only applicable to the apparent successful Offeror.

Id. at 128.

Prior to the June 28, 2024, close of the solicitation period, MAXIMUS filed this protest with our Office.

DISCUSSION

MAXIMUS raises multiple challenges to the LHA clause and related requirements. The protester argues that including the LHA clause in the solicitation is improper because the clause violates the Labor Management Relations Act (LMRA) or is preempted by the National Labor Relations Act (NLRA). Protest at 48-63. MAXIMUS also argues that the LHA clause and related requirements violate or are not authorized under Federal Acquisition Regulation (FAR) section 22.101-1. *Id.* at 34-45. Finally, MAXIMUS argues that the LHA clause and related requirements are unduly restrictive of competition or are otherwise ambiguous. *Id.* at 63-92.

> Challenges Under the LMRA and the NLRA

MAXIMUS contends that the LHA requirement violates section 302(a) of the LMRA, 29 U.S.C. § 186, because the LMRA prohibits an employer from delivering money or any "thing of value" to a labor organization in order to establish "labor peace." Protest at 48-53. MAXIMUS argues that it will have to provide several "things of great value" to a labor organization (*e.g.*, access to its facilities, a list of employee's names and contact information, and a pledge to remain neutral in any labor organizing campaign) in order to persuade the labor organization to enter into an LHA, and that making these concessions will violate the LMRA. *Id.* CMS responds that the employer concessions do not constitute "things of value." Memorandum of Law (MOL) at 14-15.

MAXIMUS also contends that the LHA requirement is preempted by the NLRA. Protest at 53-63. MAXIMUS argues that the NLRA has been judicially interpreted as establishing a balance of protection, prohibition, and laissez-faire with respect to union organization, collective bargaining, and labor disputes, and that the federal government may not intrude upon the established relationships. *Id.* MAXIMUS also argues that the NLRA has also been judicially interpreted as prohibiting the government from regulating any conduct that the NLRA protects. *Id.* To this end, MAXIMUS argues that the NLRA provides employers with certain powers, such as engaging in free speech during an election campaign, petitioning the National Labor Relations Board to hold a secret ballot election, and capability to refuse giving unions access to its workplace facilities, but that the LHA requirement both intrudes upon and regulates them. *Id.* CMS responds that the NLRA does not preempt the LHA requirement because the NLRA does not apply to labor-related conditions imposed through a government contract. MOL at 19.

We must first consider whether violations of the LMRA or whether the NLRA preempts the agency's action fall within the bid protest jurisdiction of this Office.

Our Office is authorized to decide bid protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. §§ 3552, 3553(a). Although protests usually involve alleged violations of statutes that are indisputably procurement statutes, such as the Competition in Contracting Act, we will hear protests alleging violations of other statutes or regulations when those statutes or regulations have specific procurement-related provisions. *Compare Caddell Constr. Co., Inc.*, B-411005.1, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132 at 1 (addressing provisions of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4852); *Crane & Co., Inc.*, B-297398, Jan. 18, 2006, 2006 CPD ¶ 22 at 1 (addressing provisions of statute concerning currency paper procurement, 31 U.S.C. § 5114(c)) *with Second Street Holdings, LLC et al.*, B-417006.4 *et al.*, Jan. 13, 2022, 2022 CPD ¶ 33 at 12-15 (dismissing challenge that agency failed to comply with 40 U.S.C. § 3307(a)(2) because agency allegedly failed to honor collateral obligations); *Alliant Enter. JV, LLC*, B-410352.5, B-410352.6, July 1, 2015, 2015 CPD ¶ 209 at 5, n.8 (dismissing allegation of a violation of the voluntary services prohibition and, in turn, the Antideficiency Act because the Antideficiency Act is not a procurement statute); *Sam Gonzales, Inc.--Recon.*, B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306 at 2 (provision of the Bankruptcy Act prohibiting discrimination against debtors did not bear directly on a federal agency procurement for purposes of determining jurisdiction, although GAO issued a decision on the merits at the request of the agency and the Bankruptcy Court).

Of specific relevance is *NOVAD Management Consulting, LLC*, B-419194.5, July 1, 2021, 2021 CPD ¶ 267, in which the protester alleged that "property charge" provisions (*i.e.*, requirements that the loan servicer make property charge payments on behalf of a delinquent mortgagor before a penalty date) contained in a solicitation were inconsistent with Department of Housing and Urban Development (HUD) regulations concerning the home equity conversion mortgage program. *NOVAD Mgmt. Consulting, supra* at 7. We found that this allegation was outside our jurisdiction because it did not allege a violation of a procurement law or regulation. *Id.* at 8. In so finding, we explained that the mere

fact that the regulations were directly relevant to the performance of the services being procured did not confer jurisdiction because the regulations, by themselves, did not contain procurement-related provisions or otherwise dictate how the agency may seek to procure mortgage servicing support services. *Id.*

A contrasting example is *Merck & Company, Inc.*, B-295888, May 13, 2005, 2005 CPD ¶ 98, wherein we concluded that a statute establishing a process for an agency to make formulary decisions concerning which pharmaceutical agents to make available to beneficiaries was a procurement statute because agency decisions made under the statute would lead directly to the purchase of pharmaceutical agents using the Federal Supply Schedules. *Merck & Co., Inc.*, *supra* at 8. In other words, we concluded that the statute was a procurement statute because decisions made under the relevant statutory provisions would effectively decide future procurements of goods by federal agencies. *Id.*

Similarly, in *Waste Mgmt., Inc. of Florida*, B-421918, Nov. 20, 2023, 2023 CPD ¶ 263, our Office determined that we had jurisdiction to consider a challenge that a solicitation violated section 6001 of the Resource Conservation and Recovery Act of 1976 (RCRA). We reached that conclusion because section 6001 of the RCRA requires federal agencies to comply with local solid waste collection laws, and, therefore, dictates how the government will acquire those services. *Waste Mgmt., Inc. of Florida*, *supra* at 2 n.2.

Another instructive example is *NFI Mgmt. Co.*, B-238522, B-238522.2, June 12, 1990, 90-1 CPD ¶ 548, wherein a protester challenged the General Services Administration's (GSA) award of a leasing contract to another firm. As relevant here, the protester alleged that the award was unreasonable because GSA failed to prepare an environmental impact statement in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*. *NFI Mgmt. Co.*, *supra* at 10. We dismissed the allegation, explaining that "[w]hile we appreciate the protester's stated concern for compliance with the NEPA, it is not our function to enforce environmental legislation through our bid protest process." *Id.* Thus, we dismissed the challenge because our Office lacked jurisdiction to consider any alleged violations of NEPA.

Here, we do not find that the LMRA or the NLRA may appropriately be viewed as procurement statutes. These statutes exist to define the scope of the employer-employee relationship and regulate employer-labor union conduct. *See, e.g.*, 29 U.S.C. § 141 (purpose of the LMRA is to prescribe the legitimate rights of both employees and employers in their relations affecting commerce); § 151 (policy of the United States is to protect workers' freedom of association); § 157 (employees have the right to self-organization); § 158 (identifying unfair labor practices); § 186 (an employer may be criminally liable for providing any money or other thing of value to a labor organization that seeks to represent the employees of such employer). Further, neither the LMRA nor the NLRA dictates how the government will acquire goods or services. Finally, we note that, like *NFI Mgmt. Co.*, our function is not to enforce or review violations of the LMRA or NLRA. Thus, even though the LMRA and the NLRA may be

relevant to the general propriety of a "labor harmony agreement," we do not have jurisdiction to review violations of or whether they preempt the LHA clause. Accordingly, we dismiss these allegations.[3]

Challenges Concerning FAR Section 22.101-1

Next, MAXIMUS contends that inclusion of the LHA clause violates FAR subsection 22.101-1(b)(1) because the agency is not remaining impartial with respect to labor management relations as required by the regulation. Protest at 34-38; Comments at 16-22. Alternatively, MAXIMUS argues that FAR subsection 22.101-1(d) does not provide authority to impose the LHA requirement. *See* Protest at 38-45; Comments at 22-32. The agency counters that MAXIMUS's interpretations of the regulation are unreasonable. MOL at 6-13.

A contracting agency has the primary responsibility for determining its needs and the best method of accommodating them. *JCS Sols., LLC*, B-422249, Mar. 13, 2024, 2024 CPD ¶ 71 at 3. In this regard, an agency may not accommodate its needs through a method that violates procurement laws or regulations. *Id.* Where a protester challenges a solicitation term as violating applicable procurement laws or regulations, it bears the burden of demonstrating such violation. *Id.*

Further, where parties disagree as to the interpretation of a regulation, our analysis begins with the language of the disputed provision. *TLS Joint Venture, LLC*, B-422275, Apr. 1, 2024, 2024 CPD ¶ 74 at 4. If the regulation has a plain and unambiguous meaning, the inquiry ends with that plain meaning. *Id.* Further, it is a fundamental canon of interpretation that words contained within a regulation, unless otherwise

[3] MAXIMUS argues that CMS unreasonably incorporated the LHA clause into the solicitation because the agency's action constitutes a new procurement policy that should have been subject to public comment in the Federal Register under 41 U.S.C. § 1707. *See* Comments at 33-36. CMS responds that the LHA requirement is not a procurement policy, but rather a contract term in a single solicitation; therefore, the agency argues 41 U.S.C. § 1707 is inapplicable. MOL at 13.

We do not view alleged violations of section 1707 as arising under our bid protest jurisdiction. Section 1707 requires agencies to publish new procurement policies, regulations, and forms in the Federal Register prior to them taking effect. 41 U.S.C. § 1707(a). While we recognize that an agency may create new procurement policies by complying with this statute, we note that section 1707, by itself, does not dictate any procurement procedures. *Cf. NOVAD Mgmt. Consulting, supra* at 7-8. Indeed, reviewing the protester's challenge would have us consider whether the government appropriately observed public comment, not whether the government complied with a specific procurement directive, which, as noted above, is our authorized practice. We consider this distinction to be significant and as divesting us of any authority to review this challenge. Accordingly, we dismiss the allegation.

defined, will be interpreted consistent with their ordinary, contemporary, and common meaning. *Id.*

We address the challenges in turn.

Agency's Failure to Remain Impartial

The relevant subsection provides as follows:

> (b)(1) Agencies shall remain impartial concerning any dispute between labor and contractor management and not undertake the conciliation, mediation, or arbitration of a labor dispute. To the extent practicable, agencies should ensure that the parties to the dispute use all available methods for resolving the dispute, including the services of the National Labor Relations Board, Federal Mediation and Conciliation Service, the National Mediation Board and other appropriate Federal, State, local, or private agencies.

FAR 22.101-1(b)(1).

MAXIMUS argues that this subsection prohibits the agency from incorporating the LHA clause into the solicitation and any resulting contract. MAXIMUS argues that, by doing so, the agency effectively fails to "remain impartial" because the LHA clause effectively confers an enhanced bargaining position on any interested labor organization. *See* Comments at 21-23; Protest at 35-38. In this regard, MAXIMUS explains that no labor organization faces the same stakes as the protester when negotiating the LHA during the 120-day period because the labor organization will not lose the contract if the parties fail to agree and can, therefore, hold out for greater concessions. *See* Protest at 37.

CMS responds that this subsection does not apply to the current situation. *See* MOL at 8-9. CMS explains that the plain language of the subsection makes clear that FAR subsection 22.101-1(b)(1) applies to situations involving an active "labor dispute." *See id.* CMS primarily explains that no labor dispute exists here; rather, the agency simply wants to protect itself against the possibility of future work stoppages. *See id.*

After reviewing the regulation, we agree with CMS that the subsection does not prohibit the agency from incorporating the LHA clause into the solicitation. In reaching this conclusion, we are guided by the fact that the subsection provides that the agency "shall remain impartial *concerning any dispute*," and then provides that the agency should "ensure that the parties to a dispute use all available methods for resolving the dispute." FAR 22.101-1(b)(1) (emphasis added). In other words, the plain language of the subsection contemplates a situation involving an active labor dispute, and mandates that the agency remain impartial and encourage the parties to use dispute resolution services. Thus, the subsection does not prohibit an agency from incorporating

solicitation terms designed to prevent future disputes because it simply does not speak to that situation.[4]

Also, we disagree that the agency has failed to remain impartial. Significantly, the LHA clause does not mandate any outcome, such as wage rates or employer concessions. *See* MOL at 8; *see also* COS at 8. Instead, the LHA clause only requires that the employer and labor organization reach an agreement not to disrupt the agency's acquisition of the CCO support services; in this way, the LHA clause does not represent a failure to remain impartial because it does not advance any particular outcome but rather simply seeks to protect the agency's interests.

Additionally, while MAXIMUS may complain that imposition of a 120-day negotiating period may negatively affect the contractor's bargaining position relative to any labor organization, we do not see how that demonstrates a failure on the agency's part to remain impartial concerning a dispute. While it may, as the protester argues, put pressure on the chosen contractor to reach an agreement within the 120-day period, we do not find that objectionable. After all, an agency may provide for a competition that imposes maximum risks on the contractor and minimum burdens on the agency, and here, the negotiating deadline is designed to ensure the agency's timely receipt of uninterrupted CCO services. *See American Eagle Protection Servs. Corp.*, B-422346, May 7, 2024, 2024 CPD ¶ 103 at 3-4. Accordingly, we deny the protest allegation.

Authority to Include the LHA Clause

Next, we address MAXIMUS's argument that the agency lacks authority to use the LHA clause under FAR subsection 22.101-1(d). This subsection provides as follows:

> (d) Agencies should take other actions concerning labor relations problems to the extent consistent with their acquisition responsibilities. For example, agencies should –
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> (1) Notify the agency responsible for conciliation, mediation, arbitration, or other related action of the existence of any labor dispute affecting or threatening to affect agency acquisition programs;
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> (2) Furnish to the parties to a dispute factual information pertinent to the dispute's potential or actual adverse impact on these programs, to the extent consistent with security regulations; and
>
> (3) Seek a voluntary agreement between management and labor, notwithstanding the continuance of the dispute, to permit uninterrupted acquisition of supplies and services. This shall only be done, however, if the attempt to obtain voluntary agreement

[4] In this regard, MAXIMUS expressly admits "there is no labor dispute affecting or threatening to affect the agency's acquisition." Protest at 40-41.

> does not involve the agency in the merits of the dispute and only after consultation with the agency responsible for conciliation, mediation, arbitration, or other related action.

FAR 22.101-1(d).

MAXIMUS argues that the subsection does not authorize the use of the LHA clause because the subsection dictates that an agency may only act when a labor dispute exists. Protest at 38-45; *see also* Comments at 26-27. In so arguing, MAXIMUS points out that the three identified examples provide solutions to labor disputes, as opposed to more general labor relations issues, and that, therefore, we should interpret the subsection as limited to actions of the same general character (*i.e.*, involving labor disputes). *See* Comments at 27-28.

CMS responds that the subsection has a broader application in that it encourages agencies to take actions concerning any "labor relations problems," as opposed to limiting actions to disputes. MOL at 10-11.

On this record, we do not have any basis to object to CMS's interpretation. The plain language of the phrase "[a]gencies should take other actions concerning labor relations problems" plainly speaks to a broader application than only "labor disputes." Further, interpreting "labor relations problems" as synonymous with "labor disputes" would seem counterintuitive because the FAR council already used "labor disputes" throughout this section and subsection and would therefore have simply used that phrase again if that were its intent. *Cf. Russello v. United States*, 464 U.S. 16 at 23 ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.") (*quoting United States v. Wong Kim Bo*, 472 F.2d. 720, 722 (5th Cir. 1972); Acting Comptroller General Elliot to the Administrator of Veterans' Affairs, A-94590, May 4, 1938, 17 Comp. Gen. 909 (explaining that agency's interpretation of "busses" as encompassing "station wagons" in an appropriation statute was unreasonable where the statute also distinguished "station wagons" from "busses" in another subsection). Thus, we disagree with MAXIMUS's interpretation because we think it ignores the plain meaning and significance of the phrase "labor relations problems."

Moreover, we are unpersuaded that the identified examples should limit "labor relations problems" to only "labor disputes." On this point, MAXIMUS argues that the interpretive canon, *expressio unius est exclusio alterius* (*i.e.*, the expression of one thing means the exclusion of another), should apply. *See* Comments at 27. We disagree because this interpretive canon applies only when circumstances support such inferences being made. *See National Labor Relations Board v. SW Gen., Inc.*, 580 U.S. 288, 290 (2017) (explaining that *expressio unius est exclusio alterius* "applies, however, only when 'circumstances support[] a sensible inference that the term left out must have been meant to be excluded.") (*quoting Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002).

Here, the circumstances do not support that inference because the identified examples are introduced using the phrase "[f]or example," which is neither used customarily nor grammatically to describe a complete or exhaustive list. Indeed, we think it simply means exactly what it says--that is, the identified actions are merely examples of conduct that an agency may take to address "labor relations problems" and that an agency may take other actions as deemed appropriate. Accordingly, we deny this protest allegation.[5]

In any event, even if FAR subsection 22.101-1(d) should be interpreted as giving agencies only authority to take actions involving "labor disputes," we would still not object to the incorporation of the LHA clause and related provisions based on the protester's argument. This is because FAR section 1.102(d) provides that an agency "may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority." Thus, because we conclude that FAR subsection 22.101-1(b)(1) does not prohibit the use of an LHA clause (and the protester does not identify any other violations of procurement statutes or regulations), we have no basis to object to the inclusion of the clause in the solicitation since the agency may otherwise assume that this strategy is permissible.

Unduly Restrictive of Competition

MAXIMUS argues that the LHA requirement and the corporate experience requirements unduly restrict competition because these provisions favor offerors with unionized employees. Protest at 65-70. MAXIMUS further argues that the provisions are unnecessary because there have been no prior labor disruptions. *Id.* at 70-79.

CMS responds that it reasonably incorporated the LHA and the corporate experience requirements into the solicitation because the agency has a legitimate need for uninterrupted service, and that an LHA requirement will discourage future strikes. MOL at 26-28.

As referenced above, the agency will evaluate corporate experience as part of offerors' phase I proposals. RFP, amend. 1 at 124. The RFP instructs offerors to demonstrate experience with call centers of similar size, scope, and complexity. *Id.* at 105. Offerors are instructed to demonstrate experience in multiple areas, including handling at least

[5] MAXIMUS also argues that FAR subsection 22.101-1(d)(3) restricts the government to seeking only a "voluntary agreement" between parties to a labor dispute; in contrast, MAXIMUS argues that the LHA imposes a mandatory agreement. *See* Comments at 30-32. In light of our conclusion above that this subsection is not limited to labor disputes, we conclude that the factual premise of the protester's argument--the government's actions are limited to circumstances surrounding labor disputes, does not provide us with a basis to sustain this protest allegation.

20 million inbound customer service representative calls, staffing call center representatives, and using data analysis to improve business decisions. *Id.* Significantly, and as relevant here, the RFP also instructs offerors to demonstrate experience working with labor organizations and negotiating LHAs and CBAs. *Id.* at 106. Offerors will then be evaluated based on their quality and levels of experience in these areas. *Id.* at 124.

Government procurement officials who are familiar with the conditions under which services have been used in the past, and how they are to be used in the future, are generally in the best position to know the government's actual needs, and therefore, are best able to draft appropriate specifications. *See, e.g.*, *Nick Chorak Mowing*, B-280011.2, Oct. 1, 1998, 98-2 CPD ¶ 82 at 3-4. Consequently, we will not question an agency's determination of its actual minimum needs unless there is a clear showing that the determination has no reasonable basis. *Ray Serv. Co.*, B-217218, May 22, 1985, 85-1 CPD ¶ 582 at 4.

Where a protester challenges a term as unduly restrictive of competition (*i.e.*, a term that limits competition by including a requirement that exceeds the needs of the government), the burden is on the procuring agency to establish support for its position that the restriction imposed is necessary to meet its needs. *Colonial Press Int'l, Inc.*, B-418718, July 10, 2020, 2020 CPD ¶ 233 at 2. GAO will examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. *Id.* Once the agency establishes support for the provision, the burden shifts to the protester to show that the requirement is clearly unreasonable. *Id.*

On this record, we conclude that CMS has reasonably determined that its minimum needs include both terms. As to the LHA requirement, the record shows that a labor organization, the Communications Workers of America Union (CWA), has launched ongoing membership drives and encouraged employees to strike on at least eight occasions. COS at 2-3. The record also shows that CWA is working with some MAXIMUS employees to unionize and protest poor working conditions. *See, e.g.*, AR, Tab 8D, CWA Press Release, Organizing Update, Aug. 11, 2022 at 1 ("The Maximus call center workers, who are organizing to a form a union with CWA, went on strike to protest poor working conditions, including unfair attendance and restrictive bathroom break policies.").

As an example of one of the labor demonstrations, CWA conducted a rally outside HHS headquarters on December 12, 2023. This rally consisted of approximately [DELETED] persons, including some MAXIMUS employees. *See* AR, Tab 8I, Protest Update 12:30 pm, Email from MAXIMUS Senior Director-Corporate Communications to MAXIMUS Labor Relations (8:32 AM) (naming at least [DELETED] of the rallygoers as MAXIMUS employees); AR, Tab 8I, Protest Update 12:30 pm, Email from MAXIMUS Senior Director-Corporate Communications to MAXIMUS Senior Director-Labor Relations (9:56 AM) (analyzing a photograph as probably including multiple MAXIMUS employees). The rally was also attended by at least four members of Congress. AR, Tab 8I, CWA

Press Release, CWA Leaders and Federal Call Center Workers Arrested While Demanding Good Jobs, at 1. Additionally, a MAXIMUS employee was quoted as saying:

> It's unacceptable that we work for a federal contractor making billions of dollars from government contracts, but we don't even get a living wage and affordable health care.

Id.

As another example, on November 9, 2023, CWA staged a labor demonstration at multiple CCO locations. CWA representatives obtained support from at least [DELETED] CCO MAXIMUS employees and [DELETED] CCO subcontractor employees. AR, Tab 8H, CCO Protest Report 12:00 PM ET, Email from MAXIMUS Director-Operations to MAXIMUS Staff (9:55 AM). Demonstrators conducted loud chanting of "[b]etter environment, better pay, put the phones down, close them down." *Id.* Demonstrators also erected a large inflatable rat with a sign reading "rats get crumbs."[6] Additionally, one MAXIMUS employee was quoted as saying:

> As we approach the busiest time of the year at the CMS call centers, we need to show MAXIMUS that we won't stand for its mistreatment. We're putting down our headsets and striking for what's right--the better working conditions, wages, and medical coverage we deserve.

AR, Tab 8H, CWA Press Release, MAXIMUS Workers Organizing with CWA Stage Largest Federal Call Center Strike in History, Nov. 16, 2023, at 1.

While these demonstrations have not yet impacted CCO operations or delivery of service, CMS explains that these multiple, repetitive labor organizing drives indicate an "ongoing" increasing risk of labor disruptions. *See* COS at 2 ("While the activity did not result in disruption[s] to CMS CCO service, employee organizing activities at several of the contractor's facilities pointed to an ongoing risk of labor disruptions."). Further, CMS explains that any labor disruptions could erode consumer confidence in federal health insurance programs because any disruption would prevent Medicare and marketplace participants from accessing critical health coverage information. *See* COS at 1-2, 13.

Given CWA's efforts, the documented support from at least some MAXIMUS employees, the significance of maintaining uninterrupted service for Medicare and marketplace participants, and the wide discretion afforded agency officials in determining their minimum needs, we do not find the agency lacked a reasonable basis for its position that an LHA clause is necessary. Although MAXIMUS may view the LHA

[6] Participants conduct the labor demonstrations close to CCO locations. For example, they erected the inflatable rat at an adjacent Circle K convenience store. AR, Tab 8H, CCO Protest Report 12:00 PM ET, Email from MAXIMUS Director-Operations to MAXIMUS Staff (9:55 AM).

clause as a disproportionate response, the agency does not need to experience a disruption before it pursues a course of action to militate against the risk of a possible strike; rather, the agency has simply demonstrated a forward-thinking approach to an impending problem. Accordingly, we deny the protest allegation.[7]

Turning to the corporate experience criterion, as stated above, MAXIMUS argues that the corporate experience requirements unduly restrict competition because its provisions favor offerors with unionized employees. We point out that agency acquisition officials have broad discretion in the selection of evaluation criteria, and our Office will not object to the presence of evaluation criteria, so long as the criteria reasonably relates to the agency's needs. *AAR Manufacturing Inc., d/b/a AAR Mobility Systems*, B-418339, Mar. 17, 2020, 2020 CPD ¶ 106 at 13.

Here, CMS explains that the agency will assess each offeror's experience working with labor organizations and negotiating LHAs and CBAs to support a geographically dispersed population. MOL at 26-28. The agency explains that this evaluation criterion is reasonably necessary because it demonstrates the likelihood that each offeror will be able to negotiate an LHA successfully to ensure undisrupted delivery of service. *Id.* at 28. Further, we agree with the agency that the evaluation criterion is reasonable because the multiple, repeated organizing rallies during the past two years indicate that the selected contractor will have to deal with increasingly frequent unionization or labor organization efforts. COS at 3.

Additionally, we do not find that the protester has demonstrated that the terms of the corporate experience criterion are clearly unreasonable. In this regard, MAXIMUS fails to demonstrate that the terms actually limit competition, such that they could be considered "unduly restrictive." Indeed, the agency shows that the terms do not prevent MAXIMUS from competing; rather, they simply put MAXIMUS at a competitive disadvantage relative to firms with unionized labor or experience negotiating LHAs and CBAs. *See* MOL at 26-27. While MAXIMUS may view this possible disadvantage as restricting its ability to compete, the fact that some firms may experience disadvantages does not demonstrate that a solicitation's terms are unreasonable. *See Ray Serv. Co.*, *supra* at 4-5. Accordingly, we deny the protest allegation.

Vague and Ambiguous Requirements

As a final allegation, MAXIMUS raises multiple arguments about how the LHA clause and related requirements are vague and ambiguous. First, MAXIMUS argues that the LHA clause is vague regarding how long of a negotiating period the apparent successful offeror will have to reach an agreement with an interested labor organization. Second,

[7] To the extent MAXIMUS complains that the agency has less restrictive measures available, such as developing business contingency and continuity plans for "unforeseen events," we are unpersuaded. *See* Comments at 73-74. The agency explains that it considered these measures and found them insufficient because they do not eliminate the possibility of a strike. COS at 13.

MAXIMUS argues that the LHA clause is vague as to when a pre-award LHA must be negotiated. Third, MAXIMUS complains that the LHA clause is vague regarding the duration of any LHA. Fourth, MAXIMUS complains that the RFP's requirements to demonstrate and evaluate experience working with labor organizations is ambiguous. CMS counters broadly that the RFP is not ambiguous or vague regarding the duty to negotiate a pre-award LHA, or how the RFP will evaluate experience working with labor organizations.

Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. *IDS Int'l Gov't Servs., LLC*, B-419003, B-419003.2, Nov. 18, 2020, 2020 CPD ¶ 383 at 4. Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Id.* An ambiguity exists when two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *Id.* A party's interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation is reasonable and susceptible of the understanding it reached. *Id.*

We discuss the challenges in turn.

Length of the Negotiating Period for a Pre-Award LHA

MAXIMUS complains that the RFP is ambiguous as to how long the apparent successful offeror will have to negotiate a pre-award LHA because the RFP does not contain any clear deadlines. Protest at 84-85. CMS responds that the RFP, when read as a whole, provides direction as to the timeframe for negotiating a pre-award LHA. In this respect, the agency points to sections H.16(c), L.15.9, and M.8. *See* MOL at 29-30; COS at 15.

For ease of reference, we provide the text of the relevant provisions. Section H.16(c) provides as follows:

> If at any point after contract performance begins a labor organization demonstrates intent to represent service employees performing work under this contract, within 5 days of that demonstration, the Contractor shall notify the Contracting Officer that it will commence to negotiate [an LHA] with the labor organization. The executed [LHA] shall be provided to the Contracting Officer within 120 days of the demonstration of intent.

RFP, amend. 1 at 65. Section L.15.9 provides the following:

> There is no requirement to provide a labor harmony agreement with your proposal. However, the apparent successful offeror will be asked to negotiate and provide a copy of [an] LHA prior to an award being

> formalized if there has been demonstrated intent to represent its employees prior to contract award.

Id. at 118. Finally, section M.8 provides as follows:

> The Government will review the apparent successful offeror's [LHA] (if applicable) for adherence to the requirements of agency specific term and condition at H.16, Labor Harmony Agreement. This review will not result in a score/rating as it is only applicable to the apparent successful Offeror.

Id. at 128.

Here, we agree with MAXIMUS that the RFP does not provide clarity as to how long the apparent successful offeror will have to negotiate a pre-award LHA. The fact of the matter is that, while sections L.15.9 and M.8 provide that the apparent successful offeror must enter into a pre-award LHA and that the government will review that LHA for compliance with the solicitation's requirements, no provision explains how long the negotiating period will last. While CMS points out that the last sentence of section H.16(c) provides, "[t]he executed [LHA] shall be provided to the Contracting Officer within 120 days of the demonstrating of intent," we cannot ignore that this sentence follows the requirement for negotiating an LHA during performance of the contract. Accordingly, the 120-day period cannot be read as applying to both pre- and post-award LHAs.

Further, we do not find that any other solicitation term offers clarity. While section F.3 addresses LHAs, it also does not establish a clear timeline. As reference, this section provides:

> The deliverables to be furnished must be delivered in accordance with the delivery schedule as specified in the Statement of Work Section 16 and below:
>
> [. . .]
>
> Labor Harmony (See Section H.16)
>
> - The Contractor shall maintain in a current status throughout the life of the contract any labor harmony agreement entered into prior to the award of this contract (as applicable).
> - Contractor shall notify the Contracting Officer that it will commence to negotiate a labor harmony agreement with the labor organization within 5 days of when a labor organization demonstrates intent to represent service employees performing work under this contract.
> - The executed labor harmony agreement shall be provided to the Contracting Officer within 120 days of the demonstrated intent.

RFP, amend. 1 at 8. While the third bullet point could be interpreted as creating a general deadline of 120 days that would apply to pre-award LHAs, this does not appear to be the only reasonable interpretation; the fact of the matter is section F.3 directly references section H.16, which we already explained expressly ties the 120-day negotiating period to post-award LHAs. Thus, we do not think section F.3 provides the requisite clarity because it is susceptible to multiple reasonable interpretations. Accordingly, we sustain the protest allegation because the RFP does not unambiguously articulate when a firm must present a copy of a pre-award LHA after being notified that it is the apparent successful offeror.

We also note that the agency offers conflicting interpretations of the pre-award LHA negotiating period. The MOL provides that "[o]nce notified, if the apparent awardee has experienced a demonstration of intent, then the H.16 requirement will be triggered and it will have to provide a LHA within 120 days before the contract will be awarded." MOL at 29. However, the contracting officer provides the following explanation as to how the negotiating period will operate:

> Only the Apparent Successful Offeror is required to submit [an LHA] prior to an award being formalized and then only if there has been demonstrated intent to represent its employees prior to contract award. If notice of intent has been provided, then the Apparent Successful Offeror would have up to 120 days from the demonstration of intent to represent. The Contracting Officer will rely on the apparent successful offeror to indicate if such intent was provided. If there was no such intent, then the award will be made without delay and without an LHA. It is also possible once an Apparent Successful Offeror is identified that an offeror may present an LHA to the CO [contracting officer] upon notice that they are the Apparent Successful Offeror. It is also possible that an award may be delayed for up to 120 days while an LHA is negotiated between the Apparent Successful Offeror and the labor organization assuming intent was not established until the award notice was provided to the offeror. There are any number of other scenarios that may be realized however, it is not possible to address every hypothetical situation at this time. Each will be addressed as it occurs.

COS at 15.

Thus, while the MOL explains that the 120-day negotiating period will be uniform, the contracting officer's explanation appears to contemplate a scenario where the apparent successful offeror will have less than 120 days post-notification if the firm was previously aware that a labor organization sought to represent its employees.[8] In this

[8] If the agency's position is that any firm has only 120 days to negotiate an LHA following demonstration of intent even if that intent occurs more than 120 days before notification that a firm is the apparent successful offeror, we note that would present an (continued...)

way the agency's own conflicting interpretations illustrate the very problem MAXIMUS complains about, and, as a result, we think the agency should resolve the RFP's lack of clarity.[9]

When Must a Pre-Award LHA Be Negotiated

MAXIMUS complains that the RFP is ambiguous as to when a pre-award LHA must be negotiated. MAXIMUS argues that section H.16(b) provides that the apparent successful offeror must enter into a pre-award LHA, but that "the trigger for such an agreement" is when a labor organization demonstrates intent to represent service employees under *this contract*. Protest at 83 (emphasis added). Thus, MAXIMUS argues that the obligation is inconsistent with "the trigger" because a labor organization cannot demonstrate intent until after "this contract" is awarded. Comments at 77 ("Since 'this contract' that is, the awarded contract, has not yet been awarded, the apparently successful offeror cannot reasonably determine if it has seen a 'demonstration of intent' such that the pre-award LHA requirement is 'applicable' to it.").

CMS responds generally that the duty to negotiate a pre-award LHA "will be triggered" when a labor organization has demonstrated intent prior to award. *See* MOL at 29-30.

Here, we do not find that the RFP is ambiguous or vague as to when the duty to enter a pre-award LHA is triggered. The duty to enter a pre-award LHA is located at section L.15.9, which provides the following instruction:

> There is no requirement to provide a labor harmony agreement with your proposal. However, the apparent successful offeror will be asked to negotiate and provide a copy of [an] LHA prior to an award being formalized if there has been demonstrated intent to represent its employees prior to contract award.

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impossible situation for MAXIMUS since the firm first experienced labor demonstrations in 2022.

[9] As a related allegation, MAXIMUS argues that the RFP is ambiguous as to how a pre-award LHA will be reviewed for compliance because the LHA clause sets forth definitions and requirements that apply only post-award. *See* Comments at 79-81. We are unpersuaded by the protester's argument because section M.8 explains that any pre-award LHA will be evaluated for compliance with section H.16. In this way, section H.16(a) defines an LHA as a provision prohibiting a work stoppage. While we acknowledge that the definition explains that an LHA is a written agreement between a contractor with a labor organization, as opposed to a written agreement between a contractor or the apparent successful offeror and a labor organization, we think section H.16, when read in context, still makes clear that any LHA, to be valid, must prohibit work stoppages. Thus, while we would encourage the agency to expand the definition to encompass both pre- and post-award LHAs, we do not think that the protester advances a reasonable interpretation. Accordingly, we deny the allegation.

RFP, amend. 1 at 118; *see also* AR, Tab 3C, RFP, amend. 1, Questions-and-Answers at 12 ("H.16 contemplates the apparent awardee entering into [an LHA] if it has seen demonstrated intent to represent. If it has not noted a demonstrated intent to represent prior to contract award, then it would need to comply with H.16 requirement if/when it does see a demonstrated intent to represent its employees.").[10]

Section H.16(a) defines "[d]emonstrates intent to represent" as the following:

> [W]hen a labor organization takes action that the Contractor knows, or reasonably should know, displays an intent to represent service employees performing work under this contract. Such actions include, but are not limited to, the distribution of flyers, picketing, strikes, use of local media, and direct notification of the Contractor.

RFP, amend. 1 at 64. Based on these provisions, the RFP is clear that the apparent successful offeror has a duty to enter an LHA when it is aware, or reasonably should be aware, that a labor organization has demonstrated intent (*e.g.*, picketing or distribution of flyers) to represent the firm's service employees under this contract. Further, the apparent successful offeror's duty to negotiate and enter a pre-award LHA only arises after it has been notified by the agency of its selection.

While MAXIMUS may argue that the "triggering event" is unclear because a labor organization cannot demonstrate intent to represent employees under "this contract" until after "this contract" is awarded, we are not persuaded. This argument ignores that actions may be taken in advance of an expected subsequent event. Indeed, a labor organization could communicate directly to CCO contractors that if any of the firms receive award, then the labor organization would like to represent those firm's service employees. Similarly, a labor organization could take general actions informing the CCO contracting community at-large that it wishes to represent the service employees on any contract resulting from this solicitation. Thus, we deny this protest allegation because we do not think the RFP is ambiguous as to when a pre-award LHA must be negotiated.

[10] The RFP uses the term "formalized" to refer to the actual signing of the contract. *See* COS at 15.

Duration of the LHA

MAXIMUS asserts that the LHA clause is ambiguous as to the ultimate duration of the agreement. MAXIMUS argues that the LHA clause is unclear as to what happens to the LHAs after employees elect representation and negotiate a CBA with the contractor. Comments at 86. For instance, MAXIMUS argues that the RFP is ambiguous as to what happens when a contractor negotiates two LHAs with two different labor organizations and enters into a CBA with one of the labor organizations; under this scenario, MAXIMUS argues that the RFP is ambiguous as to what happens to the meaningless LHA. *Id.*

CMS responds that the LHA clause is unambiguous. CMS explains that the contractor must maintain any negotiated LHA for the duration of the contract. MOL at 36. In this regard, CMS responds to MAXIMUS's posited hypothetical by explaining that any CBA would not affect the validity of an LHA negotiated with a separate labor organization. *Id.*

As referenced above, section H.16(b) provides that "[t]he Contractor shall maintain in a current status throughout the life of the contract any [LHA] entered into prior to the award of this contract (as applicable)." RFP, amend. 1 at 64.

Here, we do not find that the duration of the clause is ambiguous because we agree with CMS that the clause contains a clear performance requirement--that is, the contractor must maintain any LHA (*i.e.*, keep any LHA active) throughout contract performance. While MAXIMUS may argue that any contractor will be unable to satisfy this performance requirement because any LHAs will be superseded or rendered superfluous by a CBA, we fail to see how that means that the LHA clause is ambiguous. Instead, whether the contractor will be able to satisfy the LHA clause after a CBA is formed constitutes a matter of contract administration which is not for our review. 4 C.F.R. § 21.5(a); *see IDIS, Corp.*, B-414429, B-414429.2, June 12, 2017, 2017 CPD ¶ 186 at 5 (compliance with performance requirements are matters of contract administration). Accordingly, we deny the protest allegation.

Experience Working with Labor Organizations

MAXIMUS argues that the corporate experience evaluation criterion is ambiguous because it does not clarify what type of experience with LHAs will be evaluated favorably. Protest at 90-92. To illustrate its confusion, MAXIMUS explains that an offeror could reasonably interpret the requirement as encompassing any kind of experience with labor organizations versus experience only negotiating LHAs with labor organizations. *Id.* at 90. CMS responds that the criterion is unambiguous because the RFP provides that experience working with labor organizations, and negotiating LHAs or CBAs would satisfy this area of corporate experience. MOL at 36-37; COS at 22.

As relevant here, the RFP instructs offerors to demonstrate experience in multiple areas, including the following:

> Working with labor organizations and/or negotiating [LHAs] and/or [CBAs] to support a geographically dispersed labor population.

RFP, amend. 1 at 106. Additionally, the RFP advises offerors that it will evaluate corporate experience to determine the extent to which the referenced experience is similar in size, scope, and complexity to the CCO requirement. *Id.* at 124.

On this record, we conclude that the corporate experience evaluation criterion is unambiguous. Consistent with the agency's position, we interpret the RFP as clearly explaining that an offeror's referenced experience working with labor organizations or negotiating LHAs and CBAs will be evaluated based on whether such experience is similar to the requirements of this acquisition. In this way, we disagree with MAXIMUS that the RFP could contemplate any type of experience working with a labor organization because we think that position ignores the advisement that experience will be evaluated based on similarity. Indeed, we interpret the RFP as plainly advising that an offeror need demonstrate experience showing that the firm has engaged labor organizations as part of a successful CCO requirement, or otherwise successfully negotiated LHAs or CBAs with labor organizations to support a CCO. Accordingly, we deny the protest allegation.

COMPETITIVE PREJUDICE

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions--that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *CWTSatoTravel*, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 at 11-12. In the context of a protest challenging the terms of a solicitation, competitive prejudice occurs where the challenged terms place the protester at a competitive disadvantage or otherwise affect the protester's ability to compete. *Id.*

Here, MAXIMUS explains that it does not propose a unionized workforce and would need to negotiate a pre-award LHA if selected as the apparent successful offeror. Protest at 93. Without a clear deadline for how long the firm would have to negotiate a pre-award LHA, we agree that the firm's ability to compete would be compromised because the firm cannot properly prepare for potential negotiations with interested labor organizations.

RECOMMENDATION

We sustain the protest on the narrow ground that the solicitation is ambiguous as to the length of time the apparent successful offeror will have to negotiate an LHA with any labor organization demonstrating intent to represent service employees under this contract. We recommend that the agency revise the solicitation to make the length of the negotiating period clear. For example, if the agency intends for the apparent successful offeror to have a 120-day negotiating period, then the RFP should advise that, following selection and notification that a firm is the apparent successful offeror,

the apparent successful offeror will have 120 days to negotiate and enter into an LHA with any labor organization that has previously demonstrated or is currently demonstrating intent to represent the firm's service employees under this contract. Conversely, if the agency intends that an alternate timeline apply, then the agency should articulate such timeline appropriately.

We also recommend that MAXIMUS be reimbursed its costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). In accordance with 4 C.F.R. § 21.8(f)(1), the protester's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Edda Emmanuelli Perez
General Counsel