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Decision

Matter of: Sauer Construction, LLC

File: B-423138; B-423138.3

Date: February 4, 2025

Lawrence M. Prosen, Esq., Eric W. Leonard, Esq., and Matthew J. Howell, Esq., Cozen O'Connor, for the protester.

Richard J. Pinto, II, Esq., Marks & Pinto, LLP, for RQ Construction, LLC, the intervenor.
David L. Nimmich, Esq., Department of the Navy, for the agency.

Uri R. Yoo, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest arguing that agency failed to evaluate whether the awardee's project labor agreement (PLA) complied with FAR provision 52.222-33, as required by the solicitation, is denied where the protester fails to establish that it was competitively prejudiced by the agency's failure to evaluate the awardee's PLA.

DECISION

Sauer Construction, LLC, of Jacksonville, Florida, protests the issuance of a task order to RQ Construction, LLC, of Carlsbad, California, under request for proposals (RFP) No. N40085-24-R-2546, issued by the Department of the Navy, Naval Facilities Engineering Command for building construction and renovation services. The protester alleges that the agency failed to evaluate the awardee's project labor agreement (PLA) in accordance with the solicitation and applicable laws and regulations.

We deny the protest.

BACKGROUND

On June 26, 2024, the Navy issued the task order solicitation, using the ordering procedures of Federal Acquisition Regulation (FAR) subpart 16.5, to holders of the agency's multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts for large general construction projects in the Hampton Roads area of responsibility. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2; Agency Report (AR), Exh. 1, RFP at 1-2. The agency sought proposals for renovation and repair services for

up to three buildings located at Naval Station Norfolk in Norfolk, Virginia. *Id.* The solicitation contemplated the issuance of a single fixed-price task order with a period of performance of 1,580 calendar days. RFP at 2-3.

The solicitation provided that the task order would be awarded to the responsible offeror offering the best value to the government using tradeoff procedures considering three factors: (1) technical solution; (2) past performance; and (3) price. *Id.* at 5. In the tradeoff, the technical solution and the past performance factors were to be of equal importance, while the combined non-price factors would be approximately equal to price in importance. *Id.*

As relevant here, the solicitation required offerors to submit “a signed [PLA] (signed by both the Contractor and the Labor Organization) with their Price Proposal submission, in accordance with FAR Provision 52.222-33 and FAR Clause 52.222-34.” *Id.* at 8. Offerors were advised that the solicited requirement was considered a “Large-scale Construction Project” as defined in FAR section 22.502, and thus, “the requirements of FAR Subpart 22.5 will apply.” *Id.* The solicitation also warned that “Offerors that do not include a signed [PLA] complying with the terms of FAR 52.222-33 and 52.222-34 shall be considered nonresponsive and ineligible for award.” *Id.*

The RFP instructed offerors that price proposals “shall be submitted separately,” advising that “any price information included in the non-price/technical proposal will not be considered” and “non-price/technical information included in the price proposal will not be considered.” *Id.* The solicitation also provided that the agency would “evaluate price based on the total lump sum price” using various techniques “to ensure a fair and reasonable price.” *Id.*

The agency received timely proposals from three offerors, including Sauer and RQ. COS/MOL at 2-3. After convening a task order evaluation board (TOEB), the agency’s technical evaluators evaluated non-price proposals, while the contract specialist evaluated price proposals, which included the offerors’ PLAs. *Id.* at 2. The contract specialist conducted a limited review of the offerors’ PLAs, which confirmed that each PLA was signed by the offeror and a labor organization, and then concluded that all offerors had submitted acceptable PLAs. *Id.* at 2-3.

The TOEB prepared a report documenting the evaluation of the three proposals and recommending RQ’s proposal for award as offering the best value to the government. *Id.* at 3. After reviewing the TOEB report and conducting a tradeoff analysis, the source selection authority concurred with the TOEB’s conclusion that RQ’s proposal provided the best value to the government. *Id.* Neither the TOEB report nor the source selection decision document included any reference to PLAs. *Id.*

On September 27, the agency notified Sauer that award had been made to RQ for a total evaluated price of \$82,215,440. Protest, Exh. A, Notice of Award at 1. After requesting and receiving a debriefing, Sauer filed this protest with our Office.¹

DISCUSSION

The protester contends that the agency's selection decision was erroneous because the awardee failed to submit a PLA that complied with the requirements set forth in FAR provision 52.222-33.² Protest at 10-16. In response, the agency concedes that it failed

¹ The awarded value of the task order at issue exceeds \$25 million. Accordingly, at the time this protest was filed on October 28, 2024, this procurement was within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts that were awarded under the authority of title 10 of the United States Code. 10 U.S.C. § 3406(f)(1)(B); see National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159, ____ Stat. ____ § 885 (2024) (amending jurisdictional threshold to \$35 million for protests of orders placed under IDIQ contracts awarded under authority of title 10, effective December 23, 2024); *Technatomy Corp.*, B-405130, June 14, 2011, 2011 CPD ¶ 107 at 5-6 (changes to jurisdiction will not be given retroactive effect, absent specific statutory direction).

² While we do not address every argument Sauer raises, we have considered each one and find no basis to sustain the protest. For example, Sauer challenges the agency's evaluation of RQ's technical and price proposals, arguing that, without a compliant PLA in place, the awardee cannot meet the technical requirements or perform at the awarded price. Protest at 13-15; Comments & Supp. Protest at 10-14. We dismiss these challenges because they fail to establish sufficient factual and legal grounds for the protest as required by our Bid Protest Regulations. See 4 C.F.R. § 21.1(c)(4), (f).

First, we note that nothing in the solicitation required the agency to consider an offeror's PLA in the technical evaluation. See RFP at 6-7. Moreover, the RFP instructed offerors to submit PLAs as part of their price proposals. *Id.* at 8. As noted, price proposals were to be submitted separately from technical proposals, and offerors were informed that the agency would not consider any price information in the non-price/technical proposal, or any non-price/technical information in the price proposal. *Id.* at 8. Therefore, the protester's assertion that the agency did not consider RQ's PLA in the evaluation of the awardee's technical proposal fails to state a valid basis of protest.

Second, while the solicitation instructed PLAs to be submitted as part of the price proposal, nothing in the solicitation required the agency to consider the sufficiency of the PLA in the price evaluation. In addition, Sauer's allegation that RQ could not perform at its proposed price amounts to an argument that the agency should have conducted a price realism analysis to assess whether offerors could perform at their proposed prices. The RFP for this fixed-price task order, however, did not provide for a price realism analysis. Absent a price realism provision, agencies are neither required nor permitted to conduct a price realism evaluation in making a fixed-price award. See *Talion Construction, LLC*, B-422299.2, July 16, 2024, 2024 CPD ¶ 164 at 3.

to evaluate offerors' PLAs in accordance with the solicitation, *i.e.*, for compliance with FAR provisions 52.222-33 and 52.222-34. COS/MOL at 2-3. The agency argues, however, that its failure to contemporaneously evaluate PLAs did not competitively prejudice the protester. *Id.* at 3-11. As discussed below, we agree.

As relevant here, FAR subpart 22.5 prescribes "policies and procedures to implement Executive Order 14063," which requires agencies to use PLAs "in large-scale construction projects to promote economy and efficiency in the administration and completion of Federal construction projects." FAR 22.501, 22.503. The subpart also requires agencies to insert FAR provision 52.222-33 and FAR clause 52.222-34 in solicitations for such large-scale construction projects. FAR clause 52.222-34 defines a PLA as "a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project," while FAR provision 52.222-33 sets forth various requirements for PLAs.

Specifically, FAR provision 52.222-33 requires offerors to "[n]egotiate or become a party to a [PLA] with one or more labor organizations" and to "[r]equire its subcontractors to become a party to the resulting [PLA]." FAR provision 52.222-33(b). The provision also enumerates six requirements for a PLA as follows:

- (c) The [PLA] reached pursuant to this provision shall
 - (1) Bind the Offeror and subcontractors engaged in construction on the construction project to comply with the [PLA];
 - (2) Allow the Offeror and all subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;
 - (3) Contain guarantees against strikes, lockouts, and similar job disruptions;
 - (4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the [PLA];
 - (5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and
 - (6) Fully conform to all statutes, regulations, Executive orders, and agency requirements.

FAR provision 52.222-33(c).

As noted above, the solicitation here identified the requirement as a large-scale construction project to which the requirement for a PLA under FAR subpart 22.5 would apply. RFP at 8. As a result, the solicitation instructed offerors to submit a PLA "in accordance with FAR Provision 52.222-33 and FAR Clause 52.222-34." *Id.* The solicitation informed offerors that their proposals would be considered nonresponsive and ineligible for award if they did not include signed PLAs "complying with the terms of" these FAR provisions. *Id.*

The record, however, does not include any contemporaneous documentation of the agency's evaluation of offerors' PLAs, and the agency concedes that it did not conduct a contemporaneous assessment of the PLAs for compliance with the terms of the FAR provisions, as required by the solicitation. COS/MOL at 2-3. In this regard, the agency explains that the contract specialist who reviewed the PLAs as part of her evaluation of price proposals confirmed that the agreements were signed by the offeror and a labor organization, but "did not review the agreement to ensure they complied with all the substantive requirements of" the FAR provisions. *Id.* at 3. The agency also states that the contract specialist's review was not documented in either the TOEB's evaluation report or the source selection decision. *Id.*

In light of the agency's concession, the only issue remaining before us is whether the protester was prejudiced by the agency's failure, prior to award, to evaluate offerors' PLAs in accordance with the solicitation. Competitive prejudice is an essential element of every viable protest; where the protester fails to demonstrate a reasonable possibility that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding competitive prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *Environmental Chem. Corp.*, B-416166.3 *et al.*, June 12, 2019, 2019 CPD ¶ 217 at 14; see *Octo Consulting Grp., Inc.*, B-413116.53, B-413116.55, May 9, 2017, 2017 CPD ¶ 139 at 10.

Here, the agency contends that its failure to properly assess the offerors' PLAs before award did not prejudice the protester because, upon reviewing the awardee's PLA in response to the protest, it is apparent that the awardee's PLA, on its face, met the FAR requirements. COS/MOL at 3-11. In this regard, the agency asserts that compliance with FAR provision 52.222-33 is "objective in nature" and that the objective nature of the required review supports the finding that the protester was not prejudiced by the agency's failure to conduct that review prior to award.³ *Id.* at 12.

In support of this assertion, the agency provides a post-protest assessment of the awardee's PLA against each of the requirements of the FAR, concluding that the awardee's PLA satisfies each requirement. See *id.* at 3-9. For example, the agency notes that the awardee's PLA is with [DELETED], which has been registered with the Department of Labor (DOL) as a labor organization since at least [DELETED]. *Id.* at 5-6; AR, Exh. 2, RQ PLA at 1, 10; AR, Exh. 4, DOL Registry at 1-2. The agency also states that the awardee's PLA contains provisions specifically addressing each element required by the FAR. For example, RQ's PLA expressly states that "[a]ny contractor or

³ The agency also argues that the protester was not prejudiced because the substantive contents of the awardee's PLA were indistinguishable from those of the protester's PLA. COS/MOL at 10-11. In this regard, the agency details, for each FAR provision requirement, the similarity between the protester's PLA and the awardee's PLA. *Id.* at 6-8. The protester does not rebut the agency's analysis, except with respect to FAR provision 52.222-33(c)(6), which requires the PLA to "[f]ully conform to all statutes, regulations, Executive orders, and agency requirements," arguing that its PLA "certif[ied]" compliance with the requirement. Comments & Supp. Protest at 5-6.

subcontractor working on the Project shall, as a condition to working on said Project, become signatory to and perform all work under the terms of” the PLA, which satisfies the requirement for subcontractors to become a party to and comply with the PLA. AR, Exh. 2, RQ PLA at 5; FAR provisions 52.222-33(b), 52.222-33(c)(1). Given our conclusions below, we need not resolve the agency’s contentions as we conclude the protester has failed to establish competitive prejudice.

Specifically, the protester, while not disputing that “the plain text of the Awardee’s PLA purports to facially comply with the first five [] requirements set forth” in FAR provision 52.222-33, argues that the awardee’s PLA does not meet the requirement to “[f]ully conform to all statutes, regulations, Executive orders, and agency requirements.” Comments & Supp. Protest at 5; see FAR 52.222-33(c)(6). In this regard, the protester contends that RQ’s PLA “does not affirmatively certify conformance with all applicable requirements, such as the FAR and [executive orders].” *Id.* at 5-6. The protester also asserts that the awardee’s PLA violates Executive Order 14063 because it is signed by an organization that is not an “appropriate labor organization.” *Id.*

As an initial matter, we note that the FAR provision does not require parties to a PLA to certify conformance with the requirement, but instead requires that the PLA itself “conform to all statutes, regulations, Executive orders, and agency requirements.” See FAR 52.222-33(c)(6). Accordingly, the lack of an affirmative certification provision does not render the PLA non-compliant with the requirement of paragraph 6 of the FAR provision. To the extent the protester asserts that the PLA does not conform to Executive Order 14063, as discussed below, we are not persuaded by the protester’s argument.

In this regard, Sauer contends that the awardee’s PLA violates Executive Order 14063 because [DELETED] is not an “appropriate labor organization” as required by the executive order’s mandate. Comments & Supp. Protest at 5-10; Supp. Comments at 3-4; see Executive Order No. 14063 at § 3, 87 Fed. Reg. 7363, 7364 (Feb. 9, 2022). In support of this contention, Sauer asserts that [DELETED] lacks “basic elements” of a union, such as a pension fund or health and welfare funds for its members, certified apprenticeship programs, or any existing collective bargaining agreement in the geographical area of the work to be performed. Comments & Supp. Protest at 6-7. Relying on an internet article, the protester contends that [DELETED] is, in fact, a “fake union.” *Id.* at 8; see Comments & Supp. Protest, Exh. C, Robert, Chris, “At least 10 fake unions identified in California marijuana industry,” *MJBizDaily* (Aug. 31, 2023).

The protester also argues that there is “no realistic possibility” that [DELETED] “could possibly perform, or provide [the] work force to perform, all services pursuant to the RFP or has in place underlying agreements for services with all necessary trades or other subcontractors.” Comments & Supp. Protest at 9. The protester claims, instead, that the labor organization with which it entered into a PLA, Hampton Roads Building Construction Trades Council (HRBTC), is the “central organizer for all of the different local construction trade unions” in the Hampton Roads area and thus the only labor organization “appropriate” for the solicited requirement. *Id.*

We find that these arguments fail to demonstrate that the awardee's PLA was noncompliant with the FAR requirements. As discussed above, nothing in the RFP or the FAR provisions indicates that the agency was required to look beyond the face of the submitted agreement when evaluating the PLA. We also note that none of the protester's objections to the use of [DELETED] rely on a law or regulation with which the awardee's PLA purportedly does not comply. In this regard, neither the executive order nor the implementing FAR provisions define what constitutes an "appropriate labor organization."

Moreover, we note that the protester's list of the "basic elements" of a legitimate union was derived from an informational guide published by DOL, rather than any applicable law or regulation. Supp. Comments at 3-4, *citing* DOL, "Project Labor Agreement Resource Guide" (<https://www.dol.gov/general/good-jobs/project-labor-agreement-resource-guide>). In addition, we agree with the agency that the protester's assertion that [DELETED] will be unable to perform as a PLA partner is entirely speculative and lacks a factual basis. Last, to the extent Sauer argues that HRBTC is the only appropriate labor organization for this procurement, we find this argument to be inconsistent with the FAR provision and the executive order, both of which provide that an agency may *not* "require contractors or subcontractors to enter into a [PLA] with any particular labor organization." FAR 22.504(c); *see* Executive Order No. 14063 at § 7, 87 Fed. Reg. 7363, 7365 (Feb. 9, 2022).

In sum, given the protester's concession that the awardee's PLA essentially complied with the FAR and our conclusion that the protester otherwise failed to demonstrate that the awardee's PLA was noncompliant with the FAR, we find that the protester has failed to demonstrate that, but for the agency's actions, the protester would have had a substantial chance of receiving the award. To establish competitive prejudice, Sauer must demonstrate a reasonable possibility that, had the agency conducted a contemporaneous assessment of the offerors' PLAs, the protester would have had a substantial chance of award. *See Octo Consulting Grp., Inc., supra*. Because the protester has failed to establish that the awardee's PLA is noncompliant with FAR provision 52.233-33, there is no basis to conclude that the agency would have reached a different conclusion had it considered the matter prior to award. Consequently, Sauer cannot show that there was a substantial chance that it would have received the award but for the agency's failure to conduct a contemporaneous assessment.

As noted, competitive prejudice is an essential element of a viable protest. Where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding competitive prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *Environmental Chem. Corp., supra*. Here, we find that the

protester has failed to demonstrate a reasonable possibility that it was competitively prejudiced by the agency's error.

The protest is denied.

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