



Decision

Matter of: Walsh Construction Company II, LLC

File: B-423075.2

Date: February 20, 2025

Michael E. Barnicle, Esq., and Bryan R. Williamson, Esq., Arnold & Porter Kaye Scholer, LLP, for the protester.

Reginald M. Jones, Esq., Robert D. Pratt, Esq., and Jane Jung Hyoun Han, Esq., Fox Rothschild LLP, for StructSure Projects, Inc., the intervenor.

Tamar Gerhart, Esq., Department of the Army, for the agency.

Charmaine A. Stevenson, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the amended terms of a task order solicitation, resulting from an agency's decision to take corrective action in response to an earlier protest, is denied. The agency amended the solicitation to remove the requirement for offerors to submit an executed project labor agreement with their proposals, and the protester has not established that removal of the requirement is contrary to applicable procurement law and regulation. Because the task order was competed among holders of multiple award task order contracts that do not include any clauses regarding project labor agreements, the agency properly concluded that it could not include the project labor agreement requirements in task orders issued under those contracts.

DECISION

Walsh Construction Company II, LLC, of Chicago, Illinois, protests the amendment of solicitation No. MRR-2024-002962, issued by the Department of the Army, Corps of Engineers for the repair and renewal project at Naval Hospital Bremerton in Jackson Park, Washington. The protester contends that the agency's amendment of the solicitation to eliminate the requirement that offerors submit a valid project labor agreement (PLA) with their proposals is improper and violates PLA regulatory requirements.

We deny the protest.

BACKGROUND

This protest involves a relatively new requirement that offerors submit PLAs with their proposals for construction projects that meet certain criteria. As background, Executive Order 14063, signed on February 4, 2022, established a requirement that “in awarding any contract in connection with a large-scale construction project,”¹ agencies require every contractor or subcontractor to enter into a PLA with one or more appropriate labor organizations, unless granted an authorized exception from the requirement by a senior agency official no later than the solicitation date. Executive Order No. 14063, 87 Fed. Reg. 7363, 7364 (Feb. 9, 2022). In accordance with the executive order, the Federal Acquisition Regulation (FAR) Council issued final regulations, effective January 22, 2024, to amend the FAR to include the PLA requirement (located at FAR subpart 22.5) and the required solicitation and contract clauses (located at FAR clauses 52.222-33 and 52.222-34). 88 Fed. Reg. 88708-88729 (Dec. 22, 2023).

On July 17, 2024, using the procedures at FAR subpart 16.5, the agency issued the task order solicitation to all seven holders of the Army Corps of Engineers’ multiple award task order contracts (MATOCs) for integrated design-build initial outfitting construction services in support of the Defense Health Agency’s medical sustainment, restoration and modernization mission. Contracting Officer’s Statement of Fact and Memorandum of Law (COS/MOL) at 4. The agency previously awarded the underlying indefinite-delivery, indefinite-quantity (IDIQ) MATOCs on February 9, 2023. *Id.* at 10. The project requires the contractor to replace the building automation systems, including variable air volume boxes, two chillers, and associated components (*i.e.*, pumps, piping), as well as to make repairs to building firewall penetrations. Agency Report (AR), Tab 5, Request for Proposals (RFP) at 5.²

The solicitation stated that offerors were “requested to furnish [a] proposal and completed [PLA]” by August 30, the proposal due date; MATOC holders that did not intend to provide a proposal were requested to so indicate by August 16. *Id.* at 2. The RFP included a draft PLA as an attachment. *Id.* at 4, 53 (referencing attach. 9). The RFP was amended twice to include a clarification that offerors were required to submit a fully executed PLA with their proposals. AR, Tab 12, RFP amend. 002 at 1, 3; Tab 14, RFP amend. 0003 at 1 (“A fully executed PLA is required with your proposal submittal. The PLA is not part of the total page count.”).

On September 27, following the evaluation of proposals the agency made an award to StructSure Projects, Inc. COS/MOL at 4. On October 8, Walsh filed a protest with our Office raising a variety of challenges, including an argument that the PLA submitted by the awardee was invalid. *Id.* at 5. In response, the agency notified our Office that it

¹ A large-scale construction project means a federal construction project within the United States for which the total estimated cost of the construction contract is \$35 million or more. Executive Order No. 14063, 87 Fed. Reg. 7363 (Feb. 9, 2022) (§ 2(c)).

² All citations to the record are to Adobe PDF document page numbers.

would take corrective action, specifically, that it would amend the solicitation and provide all MATOC holders an opportunity to submit proposals, and would make a new award decision; accordingly, we dismissed the protest as academic. *Walsh Constr. Co. // LLC*, B-423075, Oct. 24, 2024 (unpublished decision).

On October 25, the agency issued an amendment to the solicitation which, among other things, removed all references to the requirement that offerors submit a PLA with their proposals. AR, Tab 16, RFP amend. 0004 at 1, 4, and 58. In response to questions submitted regarding the elimination of the requirement to submit an executed PLA, the contracting officer informed offerors as follows:

The underlying [MATOC] under which the [RFP] for this requirement is issued was awarded prior to January 22, 2024, the effective date for the rule applicable to PLAs, and this MATOC has not been bilaterally modified to add the applicable PLA clause. Therefore, the PLA requirement is not applicable to this task order.

COS/MOL at 5-7. This protest followed.³

DISCUSSION

Walsh argues that the agency's removal from the solicitation of the requirement for offerors to have a valid PLA is improper and violates applicable regulations. The protester contends that the PLA requirement is applicable to this task order procurement because the solicitation was issued after the effective date of the FAR regulations related to PLAs, the value of the project exceeds the dollar threshold, and the agency has not provided a valid exception to the PLA requirement. Protest at 5-7. According to Walsh, the regulations clearly contemplate that PLAs may apply at the task order level and are required by operation of law regardless of whether the MATOCs were modified to include the FAR clause related to the PLA requirement. *Id.* at 7. The protester maintains that it is unjustly competitively prejudiced by the agency's amendment of the solicitation to eliminate the PLA requirement because it has entered into a PLA by which it will be bound when its competitors will not have such obligations. *Id.* at 2, 7-8.

³ The estimated value of the task order at issue exceeds \$25 million. Accordingly, at the time this protest was filed on November 12, 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).

The agency argues that the PLA requirements were erroneously included in the task order solicitation in the first place. In this regard, the agency contends that because the MATOCs did not include the FAR clause that would have permitted the agency to include the PLA requirement in task order solicitations, the agency properly removed this requirement in corrective action to cure this error. COS/MOL at 8. The agency argues that neither Executive Order 14063 nor the FAR permit retroactive application of the PLA requirement and continuing to include it in the task order solicitation would result in an unenforceable breach of the MATOCs, which were awarded prior to the enactment of the final FAR regulations implementing the PLA requirement. *Id.* at 9, 13-14. The agency further contends that because the PLA requirement does not apply to this task order procurement the agency does not need to demonstrate that an exception applies. *Id.* at 11-14. Finally, the agency argues that any competitive prejudice to Walsh is irrelevant because the agency's corrective action does not violate any procurement law or regulation.⁴ *Id.* at 15.

Agencies have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. *CSRA LLC*, B-418903.9, Feb. 3, 2022, 2022 CPD ¶ 54 at 4. The details of implementing corrective action largely are within the discretion of the contracting agency, and we generally will not object to any particular corrective action, provided it is appropriate to remedy the concern that prompted the agency to take corrective action. *Id.* The question is whether the agency's corrective action is reasonable in relation to the flaw that the agency believes exists in its procurement process. *Id.*; see *Mantech Advanced Sys. Int'l, Inc.*, B-421560.4, Aug. 14, 2023, 2023 CPD ¶ 210 at 11.

Based on our review of the record, we agree with the agency that it cannot include the FAR provision and clauses related to the PLA requirement in the task order solicitation without modification of the MATOCs to include FAR clause 52.222-34. Since the MATOCs were awarded prior to the enactment of the applicable FAR provisions, the agency cannot retroactively add them to the MATOCs, and consequently, the provisions cannot be included in the task order solicitation. Although the protester argues that the

⁴ On February 7, 2025, the Department of Defense issued a class deviation waiving the PLA requirements. Class Deviation 2025-O0002, https://www.acq.osd.mil/dpap/dars/class_deviations.html (last visited Feb. 20, 2025) ("Effective immediately, contracting officers shall not use project labor agreements for large-scale construction projects, implemented at [FAR] subpart 22.5 and 36.104(c). Contracting officers shall amend solicitations to remove [PLA] requirements, including any solicitation provisions and contract clauses prescribed at FAR 22.505."). Therefore, if the agency had not already done so, as of February 7, it would have been required to remove the PLA requirement from the solicitation. We also note that after this protest was filed, the U.S. Court of Federal Claims found that the executive order violated the Competition in Contracting Act because it "stifles competition and violates the statutory directive that agencies must promote 'full and open competition' in federal procurements unless a statutory justification is properly invoked." *MVL USA, Inc., et al. v. United States*, ___ Fed. Cl. ___, ___ (Jan. 21, 2025).

agency need not modify the MATOCs to add the relevant FAR provision and clauses before including them in the task order solicitation, we disagree. We find that with respect to IDIQ contracts, like the MATOCs here, the FAR provision and clauses contemplate including them in the underlying IDIQ contract before they can be applied to any resultant task order issued under that contract.

To this point and as noted above, the executive order establishing the new PLA requirement stated that “in awarding any *contract* in connection with a large-scale construction project,” agencies require that offerors enter into a PLA. Executive Order No. 14063, 87 Fed. Reg. 7363, 7364 (Feb. 9, 2022) (emphasis added). Consistent with this language, the implementing FAR provision requires as a prerequisite that “[w]hen *awarding a contract* in connection with a large-scale construction project (see 22.502), agencies shall require use of project labor agreements for contractors and subcontractors engaged in construction on the project, unless an exception at 22.504(d) applies.” FAR 22.503(b) (emphasis added). The FAR further describes the circumstances for the use of a PLA in an IDIQ contract as follows:

For indefinite-delivery indefinite-quantity (IDIQ) contracts the use of a project labor agreement may be required on an order-by-order basis rather than for the entire contract. For an order at or above \$35 million an agency shall require the use of a project labor agreement unless an exception applies. See 22.504(d)(3) and 22.505(b)(3).

FAR 22.503(d). In this regard, when describing when an agency may not include a PLA requirement in an IDIQ contract, the FAR states that “[a]n exception shall be granted prior to the solicitation date if the basis for the exception cited would apply to all orders. Otherwise, exceptions shall be granted for each order by the time of the notice of the intent to place an order (e.g., 16.505(b)(1)).” FAR 22.504(d)(3)(ii).

As these sections contemplate, agencies are to consider the timing of when to grant an exception for IDIQ contract orders prior to the solicitation date. In instances when the exception would not apply to all orders, agencies may grant exceptions on an order-by-order basis. In sum, given the timing of when an agency is to consider how to implement exceptions to the PLA requirement, it is readily apparent that an agency’s authority to include a PLA requirement in an order is dependent on the inclusion of a PLA provision or clause in the underlying IDIQ contract.

In addition, the relevant FAR provision also provides that an alternate version of the applicable FAR clauses should be included in IDIQ contracts where the PLA will be negotiated on an order-by-order basis. FAR 22.505(b)(3). That alternate version of the clause states: “When notified by the agency (e.g., by the notice of intent to place an order under 16.505(b)(1)) that this order will use a project labor agreement, the Contractor shall negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the order.” FAR clause 52.222-34(b) (Alternate II). Thus, when read together, the implementing regulations contemplate that the underlying IDIQ contract will include the applicable FAR clause to establish the

contractual basis for an agency's right to decide whether to require a PLA depending on the order, and how the IDIQ contract holders will receive notice of the agency's decision to require a project labor agreement for an order.

Moreover, neither the executive order nor the regulation requires retroactive application of these provisions and clauses to existing contracts. In this regard, the FAR also states:

Application of FAR changes to solicitations and contracts. Unless otherwise specified-

- (1) FAR changes apply to solicitations issued on or after the effective date of the change;
- (2) Contracting officers may, at their discretion, include the FAR changes in solicitations issued before the effective date, provided award of the resulting contract(s) occurs on or after the effective date; and
- (3) Contracting officers may, at their discretion, include the changes in any existing contract with appropriate consideration.

FAR 1.108(d).

On these facts, we agree with the agency's interpretation of the executive order and regulations that it did not have the authority to include the PLA requirement in the task order solicitation absent modifications to the MATOCs. As explained above, the FAR prescribes that the PLA clause be included in qualifying IDIQ contract solicitations, unless an exception to the IDIQ contract applies, and includes an alternate provision for instances where the decision regarding whether the PLA requirement applies will be made on an order-by-order basis. FAR 22.505(b)(3) ("Use [FAR clause 52.222-34] with its Alternate II in IDIQ contracts when the agency will have project labor agreements negotiated on an order-by-order basis and anticipates one or more orders may not use a project labor agreement."). The MATOCs here were awarded before the applicable FAR provision and clauses implementing the PLA requirement were enacted, and therefore the agency is not able to retroactively apply the PLA requirement to the existing MATOCs in the absence of modifications to those contracts to include FAR clause 52.222-34.

Because the MATOCs have not been modified to include the PLA requirements of FAR clause 52.222-34, the agency properly recognized that it could not include a PLA requirement in the task order solicitation issued under those contracts and thus properly sought to correct this error by amending the solicitation to remove the PLA requirement. Accordingly, the protester has not demonstrated that the agency's amendment of the solicitation to remove the PLA requirement falls outside the bounds of the broad

discretion afforded to agencies when taking corrective action. *Mantech Advanced Sys. Int'l, Inc., supra.*

The protest is denied.

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General Counsel