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Decision

Matter of: Unico Mechanical Corporation

File: B-420355.6; B-420355.7

Date: August 1, 2023

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DIGEST

Protest challenging waiver of Buy American Act is sustained where waiver request did not include a reasonable market survey to support the requester's claim of unreasonable cost.

DECISION

Unico Mechanical Corporation, a small business of Benicia, California, protests the award of a contract to McMillen, LLC, of Boise, Idaho under request for proposals (RFP) No. W9127N-21-R-0005, which was issued by the Department of the Army, United States Army Corps of Engineers (Corps), for construction at the Cougar Dam power plant in Lane County, Oregon. The protester argues that the agency improperly granted a waiver of the Buy American Act, improperly evaluated proposals, and made an unreasonable best-value tradeoff decision.

We sustain the protest.

BACKGROUND

The procurement at issue relates to the powerhouse at the Cougar Dam, which relies on two butterfly valves to shut off the flow of water to the generator turbines.

Contracting Officer's Statement (COS) at 1. These valves, which were placed into service in the 1960s, have developed defects affecting their safety and reliability.

Id. at 1-2.

On August 27, 2021, the agency issued the RFP, seeking to award a fixed-price construction contract for the replacement of these valves and associated control systems. *Id.*; see Agency Report (AR), Tab 5a, RFP.¹ The RFP provided that award would be made on a best-value tradeoff basis considering the following factors: price, past performance, work plan, and small business participation commitment.² AR, Tab 8, RFP amend. 3 at 5, 9-16.

The RFP incorporated different versions of Federal Acquisition Regulation (FAR) clauses and provisions implementing the Buy American Act, 41 U.S.C. § 8301-8305, specifically FAR clause 52.225-9 and its companion provision, 52.225-10. RFP at 44-47.

Clause 52.225-9 generally requires the contractor to use only domestic construction material in performing the contract. If the agency determines that certain specified criteria are met, the agency can list specific material excepted from this requirement. FAR clause 52.225-9(b)(3). Among these conditions are that the material is not produced domestically in sufficient quantity or quality, or that the cost of domestic material would be unreasonable. *Id.* In this regard, the clause also provides that “the cost of a particular domestic construction material subject to the requirements of the Buy American statute is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent.” FAR clause 52.225-9(b)(3)(i)(A)(1).

If the contracting officer does not identify a particular item as excepted from the Buy American Act’s domestic material requirement, FAR clause 52.225-9 allows a contractor to request a waiver (referred to as a “determination of inapplicability”) by providing specified information necessary for the government to evaluate the request. FAR clause 52.225-9(c)(1)(i). As relevant here, if the waiver request is based on the alleged

¹ The Corps amended the solicitation twelve times but did not issue a single conformed copy after issuing amendment 12. COS at 2. Accordingly, citations to the RFP in this decision refer to the initial solicitation filed by the agency at Tab 5a of the agency report. Citations to all other solicitation language will include the amendment where the relevant section of the RFP was last amended. The initial solicitation did not contain a uniform set of page numbers, so for clarity, citations to the initial RFP in this decision refer to the electronic page number of the Adobe PDF document provided by the agency.

² As relevant here, under the work plan factor, the solicitation required offerors to propose a project schedule that included “[s]ufficient time for all [g]overnment reviews.” AR, Tab 8, RFP amend. 3 at 11-12. As part of its evaluation, the agency was to consider how realistic an offeror’s proposed schedule durations were. *Id.* at 13. Notably, the solicitation defined a weakness as a “flaw in the proposal that increases the risk of unsuccessful contract performance.” *Id.* at 6.

unreasonable cost of domestic materials, the contractor's request must include a "reasonable survey of the market." FAR clause 52.225-9(c)(1)(ii).

In addition, FAR provision 52.225-10 provides that offerors may request a Buy American Act waiver prior to award. Unless the contracting officer grants a pre-award waiver, the agency may evaluate only those offerors based on the use of domestic material, and may only accept an offer that is based on the use of foreign material if it is revised during negotiations to become compliant with the domestic material restrictions. FAR provision 52.225-10(d)(3).

Here, the RFP listed no exceptions to the Buy American Act requirements.³ RFP at 44-45. Prior to the initial submission of proposals, one potential offeror submitted a request for a waiver, asserting that no domestic manufacturers could produce the required 90-inch butterfly valves. AR, Tab 9, Buy American Memorandum for Record at 1.⁴ The contracting officer evaluated this request by contacting manufacturers (including Unico) "to inquire about ability to comply with Buy American [Act] requirements." *Id.* Of the six manufacturers contacted, two indicated an ability to produce the required valves in compliance with the Buy American Act, two indicated a possibility that they could do so with additional cost or time implications, and two stated that they could not comply. *Id.* at 1-2. Accordingly, the contracting officer wrote that "there are sufficient resources existing to allow contractors to comply with Buy American [Act] requirements for the 90 [inch] butterfly valves." *Id.* at 2.

Initial proposals were due on April 20, 2022. COS at 3. The agency received nine proposals, including proposals from McMillen and Unico. *Id.* at 10.

As relevant here, McMillen's proposal relied on the use of foreign materials for the project's two 90-inch butterfly valves and one hydraulic power unit (HPU). McMillen

³ On October 28, 2021, the agency issued amendment 0004 to the RFP, removing clause 52.225-9 and provision 52.225-10, and replacing them with FAR clause 52.225-11 Alternate I and FAR provision 52.225-12 Alternate II. Following a protest of this change with our Office, the agency agreed to take corrective action by modifying the RFP's Buy American Act clauses. *Unico Mechanical Corp.*, B-420355, Nov. 23, 2021 (unpublished decision). On November 22, the agency issued amendment 0007 to the RFP, which removed FAR clause 52.225-11 Alternate I and provision 52.225-12 Alternate II, and reinserted clause 52.225-9 and provision 52.225-10. AR, Tab 15, RFP amend. 7 at 1-6. As was the case in the original RFP, the amended RFP listed no exceptions to the Buy American Act requirements. *Id.* at 4.

⁴ This document is a draft memorandum that was not signed by the contracting officer. AR, Tab 9, Buy American Memorandum for Record at 3. However, the agency relied on this document in issuing amendment 0004 to the RFP. *Unico Mechanical Corp.--Costs*, B-420355.5, Mar. 24, 2023, 2023 CPD ¶ 81 at 6 n.7. And, the agency has made no contention that the document is inaccurate. Accordingly, while our Office does not cite this document for its discretionary conclusions, we find that it accurately reflects the state of the agency's knowledge and understanding at the time it was drafted.

requested that the agency waive the Buy American Act for these items. AR, Tab 18, McMillen Buy American Waiver Request at 2. On May 18, the agency denied McMillen's request and documented its rationale for doing so. AR, Tab 24, McMillen Buy American Waiver Denial at 2. On May 31, as part of discussions, McMillen submitted additional information in support of its request. See AR, Tab 25, McMillen Revised Pricing Proposal at 14-15.

On August 24, the agency made award to McMillen. COS at 10-11, see AR, Tab 32, Original Source Selection Decision Document (SSDD). The record does not contain any indication that the agency evaluated McMillen's additional Buy American Act information or granted McMillen's waiver request prior to making this award decision. Shortly after award, the agency modified McMillen's contract to add the butterfly valves and HPU to the list of material exempted from the Buy American Act's domestic material requirement. Supp. AR, B-420355.3, Tab 6, Contract Modification P00001 at 3.

Unico timely protested the initial award to McMillen, challenging both the agency's apparent grant of a Buy American Act waiver and the agency's evaluation of proposals. AR, Tab 35, Unico Protest, B-420355.3. We dismissed this protest after the agency informed our Office that it would take corrective action by reevaluating proposals and making a new award decision. *Unico Mechanical Corp.*, B-420355.3, B-420355.4, Nov. 7, 2022 (unpublished decision).

After GAO dismissed the protest, Unico requested that our Office recommend the Corps reimburse Unico for its protest costs, arguing that the agency had unreasonably delayed taking corrective action in the face of a clearly meritorious protest. AR, Tab 39, Unico Req. for Reimbursement at 1-19. Our Office granted this request in part. *Unico Mechanical Corp.--Costs, supra*. As relevant here, our Office found Unico's Buy American Act arguments to be clearly meritorious; that is, we concluded that the agency had unreasonably waived the Buy American Act requirement, and the agency had no defensible legal position regarding this issue. *Id.* at 4-8. In particular, our decision found McMillen's survey to be insufficient to support its waiver request because the market survey did not address known domestic suppliers, such as Unico, that the agency actually knew could produce Buy American Act-compliant valves. Accordingly, we recommended the reimbursement of Unico's costs relating to this argument. *Id.* at 8.

As part of its corrective action following Unico's challenges to the agency's Buy American Act waiver, the contracting officer reconsidered McMillen's Buy American Act waiver request. Memorandum of Law (MOL) at 3; AR, Tab 41, Memorandum For Record. The contracting officer found that McMillen had conducted a market survey and "received pricing from multiple domestic and foreign concerns that provide [b]utterfly valves and HPUs compliant with the technical specifications." AR, Tab 41, Memorandum For Record at 2. Based on this survey, the contracting officer concluded that "[o]f the domestic firms, only one can provide these [Buy American Act] compliant components." *Id.*

When the contracting officer reconsidered McMillen's waiver request, he also considered whether Unico should be considered a domestic supplier capable of providing Buy American Act-compliant valves. Notwithstanding the fact that McMillen's market survey did not include any information about Unico, the contracting officer determined that Unico was not a domestic supplier. Specifically, the contracting officer found that while Unico has represented itself as a domestic supplier of butterfly valves:

[Unico's] proposal lacked the necessary component pricing. Additionally, Unico did not include all expenses for its butterfly valves when its itemized pricing was requested. In sum, Unico did not provide the necessary information to evaluate it as a domestic supplier of butterfly valves; therefore, I am unable to treat it as such for the purposes of McMillen Jacobs' Buy American Act waiver request.

Id. at 3.⁵

In conducting the review of the information contained in McMillen's market survey, the contracting officer compared the cost of butterfly valves from the one identified domestic firm to the costs of the valves from foreign firms and concluded the domestic firm's price was [DELETED] percent higher than the price submitted by the lowest-priced, foreign-source firm. *Id.* Given this price disparity, the contracting officer granted McMillen's Buy American Act waiver request based on a finding that the cost of the single domestic supplier of butterfly valves and HPU was unreasonable in accordance with FAR clause 52.225-9(b)(3)(i)(A)(1). *Id.*

Also as part of its corrective action, the agency convened a new source selection evaluation board (SSEB) to reevaluate proposals. COS at 12; see AR, Tab 43, SSEB Report. The source selection authority (SSA) reviewed and concurred with the SSEB's evaluation findings. COS at 12; AR, Tab 44, SSDD at 10.

⁵ This statement is not meaningfully explained within the contemporaneous record or the agency's legal briefing because it is not apparent to which proposal the agency is referring to when it asserts that Unico's proposal was missing component pricing. Furthermore, we cannot discern what request the contracting officer is referring to when the contracting officer states that Unico did not include all expenses for its butterfly valves when its itemized pricing was requested.

The final ratings and prices for McMillen and Unico were as follows:

	McMillen	Unico
Past Performance	Substantial Confidence	Satisfactory Confidence
Work Plan	Outstanding	Good
Small Business	Acceptable	Outstanding
Price	\$4,227,709 ⁶	\$5,095,420

AR, Tab 44, SSDD at 13.

McMillen's price included a 20 percent adjustment, in accordance with FAR section 25.204(b), to the cost of the foreign construction materials included in McMillen's proposal. *Id.* McMillen's proposal included [DELETED] of foreign construction material; therefore an additional [DELETED] was added to its price. *Id.*

For the work plan factor, McMillen received a rating of outstanding based on 17 strengths and 3 weaknesses. *Id.* at 11. For Unico, the agency identified 9 strengths in the offeror's work plan, which the Corps found reduced schedule risk, performance risk, and quality risk. *Id.* at 12. The agency also identified 7 weaknesses, which increased schedule risk, performance risk, quality risk, and safety risk. *Id.* The agency concluded, however, that the risk of unsuccessful performance was low, and therefore assigned Unico a rating of good under this factor. *Id.*

Based on these findings, the SSA determined that McMillen's proposal was both the highest-rated overall and the lowest-priced, and therefore represented the best value to the agency. *Id.* at 13-14.

On April 14, 2023, the agency upheld its prior award to McMillen. AR, Tab 45, Unsuccessful Offeror Notice at 1. This protest followed.

DISCUSSION

Unico contends that the agency improperly granted McMillen's Buy American Act waiver request. In addition, the protester contends that the agency unreasonably and unequally evaluated Unico's proposal under the work plan and past performance factors. Last, the protester argues that the agency's best-value tradeoff decision was

⁶ This evaluated price differs from the agency's original evaluation of McMillen's price. Unico initially protested the agency's price evaluation on this basis, but withdrew that protest after the agency explained that it had corrected a discrepancy in its initial evaluation of McMillen's price. Comments & Supp. Protest at 6 n.6; see AR, Tab 42, Memorandum for Record re Price Discrepancy.

flawed as a result of these errors. For the reasons discussed below, we sustain the protest.⁷

Dismissal Request

As an initial matter, the agency requests that we dismiss the protest because Unico failed to furnish a copy of the protest to the contracting officer within one day after filing its protest with our Office, as required by FAR section 33.104(a)(1). We note that a parallel requirement exists in our Bid Protest Regulations. 4 C.F.R. § 21.1(e). However, we will not dismiss a protest on this basis where the contracting officer has actual knowledge of the basis of protest, or where the agency's ability to respond to the protest was not prejudiced by the protester's noncompliance. 4 C.F.R. § 21.1(i); see also *Puerto Rico Marine Mgmt., Inc.*, B-247975.5, Oct. 23, 1992, 92-2 CPD ¶ 275 at 4 n.3.

Here, the agency timely filed its report--including the contracting officer's statement of facts--and does not otherwise explain how its ability to timely respond to the protest was harmed by the protester's noncompliance. To the contrary, the contracting officer explains that it obtained information regarding the protest "through [a]gency counsel." COS at 14. Accordingly, we find that the agency was not prejudiced by the protester's omission, and decline to dismiss the protest on this basis.

Buy American Act

Unico contends that the agency improperly granted McMillen's Buy American Act waiver. Protest at 23-27. In support of its argument, Unico points to the above-discussed decision where our Office recommended the agency reimburse Unico's costs related to its clearly meritorious protest of the prior award based on the agency's prior improper Buy American Act waiver. See *Unico Mechanical Corp.--Costs, supra*. In that decision, we found that the agency unreasonably "awarded a contract to McMillen knowing that McMillen's proposal relied on foreign construction material, but without granting a Buy American Act waiver, and without documenting a determination that a Buy American Act exception applied." *Id.* at 7. Our decision found the agency's Buy American Act waiver, for the project's two 90-inch butterfly valves, was unreasonable where "the agency had previously determined that McMillen's survey of one foreign and one domestic supplier was insufficient to support a Buy American Act waiver specifically because McMillen had not indicated that these sources were the only ones available." *Id.* In addition, our decision found McMillen's survey to be insufficient to support its waiver request where McMillen "surveyed several additional foreign suppliers but ignored additional domestic suppliers that the agency actually knew could produce Buy American Act-compliant valves." *Id.*

⁷ This decision does not address all of Unico's arguments. However, we have considered each of Unico's allegations and, with the exception of those discussed in this decision, find none provide a basis to sustain the protest.

The protester argues that the circumstances are largely unchanged here. The agency has again granted the same Buy American Act waiver based on the same market survey, despite the Corps having actual knowledge that Unico could produce Buy American Act-compliant valves. Unico contends that this was again unreasonable, and the agency therefore erred in considering McMillen's proposal, which included foreign construction materials, for award.

The agency does not discuss our prior decision in its legal briefing or within the evaluation record,⁸ but instead asserts that its Buy American Act waiver was reasonable and adequately supported by a contracting officer's memorandum for the record explaining the basis for the waiver. MOL at 3. In this regard, the contracting officer found that Unico's "proposal lacked the necessary component pricing . . . [and Unico] did not include all expenses for its butterfly valves when its itemized pricing was requested." AR, Tab 41, Memorandum for Record at 3. The contracting officer concluded that "Unico did not provide the necessary information to evaluate it as a domestic supplier of butterfly valves; therefore, I am unable to treat it as such" for McMillen's waiver request. *Id.* The agency further argues that McMillen conducted a reasonable survey of the domestic market because McMillen obtained the pricing of the only domestic supplier other than Unico, and that it would be unreasonable to "fault[] McMillen for not contacting its competitor to obtain pricing." MOL at 3.

For the reasons discussed below, we find the agency's Buy American Act waiver to be unreasonable.

The RFP here incorporated FAR clause 52.225-9 and FAR provision 52.225-10, which generally require the use of domestic construction material. Under FAR clause 52.225-9(c), a contractor may submit a request for a determination of the inapplicability of the Buy American statute provided the contractor includes adequate information for the government to evaluate the request. Under FAR provision 52.225-10(b), offerors submitting "[r]equests for determinations of inapplicability . . . shall include the information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225-9 in the request."

A requester seeking such a waiver based on unreasonable cost must provide "a reasonable survey of the market and a completed price comparison table." FAR clause 52.225-9(c)(1)(ii). While the FAR prescribes the information that offerors and contractors must submit to support a waiver request, it is the contracting officer that makes the final determination regarding the grant of a waiver. That is, even if an offeror submits the required information, the contracting officer must still determine that this information supports the grant of a waiver. FAR clause 52.225-9(c)(3) ("Unless the [g]overnment determines that an exception to the Buy American statute applies, use of foreign construction material is noncompliant with the Buy American Statute.").

⁸ We note that the agency did not seek reconsideration of our decision.

Prior to the submission of proposals on this solicitation, a third offeror requested a Buy American Act waiver for the project's two 90-inch butterfly valves, on the grounds that these valves were not available from domestic manufacturers at a reasonable cost. AR, Tab 9, Oct. 2021 Buy American Memorandum at 1. In evaluating this offeror's request, the agency conducted market research by contacting manufacturers, including Unico. Documenting her consideration, the contracting officer wrote:

Unico Mechanical Corp . . . refuted the claims asserted by [the offeror requesting a waiver]. The President/CEO [chief executive officer] of Unico Mechanical . . . identified that Unico has the ability and capacity to manufacture the [b]utterfly [v]alves required by the solicitation in compliance with the Buy American [Act]. Additionally, [Unico] identified that given the right circumstances, if approached by another contractor [it] would be willing to operate as a subcontractor.

Id. at 1-2. Unico provided the agency a rough order of magnitude price of [DELETED] for both of the butterfly valves. The agency identified at least two other domestic manufacturers that indicated an ability to provide Buy American Act-compliant valves; one provided a rough pricing estimate of [DELETED] for both valves, and one did not provide a pricing estimate. *Id.* at 2. The contracting officer's documentation of this research did not indicate that the agency had requested additional pricing from Unico or that further pricing was needed from Unico. *Id.* Based on this information, the contracting officer concluded that "there are sufficient resources existing to allow contractors to comply with Buy American [Act] requirements for the 90 [inch] butterfly valves." *Id.*⁹

On December 8, 2021, McMillen requested a Buy American Act waiver with respect to the project's two 90-inch butterfly valves and one HPU. AR, Tab 18, McMillen Waiver Request at 2. McMillen's request was based on its assertion that the price delta between domestic and foreign material would exceed 20 percent. *Id.* at 1-2. The only support McMillen provided for this was a table indicating a lump sum price of [DELETED] for the domestic material and [DELETED] for the foreign material, without breaking down that lump sum into the cost of the butterfly valves and HPU. *Id.* at 2. This table indicated that McMillen had obtained pricing from one domestic supplier and one foreign supplier. *Id.*

On May 18, 2022, the contracting officer denied McMillen's waiver request. AR, Tab 24, McMillen Buy America Waiver Denial. The contracting officer wrote:

[W]hile McMillen has identified the suppliers for both foreign and domestic materials, its supporting information consists of pricing provided by a single supplier of each construction material, with no indication that these

⁹ Ultimately, the solicitation did not list any items as exceptions to the Buy American Act's domestic material requirement. AR, Tab 15, RFP amend. 7 at 4.

sources are the only ones available. I find that this limited information is insufficient to constitute a reasonable survey of the market.

Id. at 2. Upon making this determination, the contracting officer sent McMillen a negotiation memorandum, asking McMillen to provide additional information in support of its request for a Buy American Act waiver. AR, Tab 41, Negotiation Memorandum at 3. McMillen responded on May 31 by providing a table indicating that it had surveyed four additional foreign-source manufacturers of the butterfly valves and HPU, but no additional domestic-source manufacturers. AR, Tab 25, McMillen Price Proposal at 15.

We find nothing within the subsequent evaluation record that adequately supports a waiver of the Buy American Act. In this regard, as discussed in *Unico*, the agency identified at least two domestic sources, Unico and another firm, capable of providing butterfly valves manufactured domestically. See *Unico Mechanical Corp.--Costs, supra* at 7-8; AR, Tab 9, Oct. 2021 Buy American Memorandum at 1. In addition, we note that the agency here did not solicit further information from McMillen in support of McMillen's waiver request, and instead the Corps approved the waiver based on the same waiver request we found to be insufficient in *Unico*. See MOL at 3 ("No additional information has been acquired as to this procurement in conformance with the [a]gency's representations regarding corrective action."). Further, the agency does not contend that it solicited further information from Unico. Rather, following our grant of Unico's request for a cost reimbursement recommendation, the agency determined, based only on the information it had previously collected, that it did not have enough pricing information from Unico to consider it a domestic supplier of butterfly valves "for the purposes of McMillen Jacobs' Buy American Act waiver request." AR, Tab 41, Memorandum for Record at 3. Specifically, the agency noted that Unico's proposal did not include "necessary component pricing" and, additionally, that "Unico did not include all expenses for its butterfly valve when its itemized pricing was requested." *Id.*

As an initial matter, as indicated above, the contracting officer does not explain, and it is not otherwise apparent from the record, what proposal the agency is referring to when it found that Unico's proposal lacked necessary component pricing information. To the extent the contracting officer was referring to the proposal submitted by Unico in response to this solicitation, we note that the agency does not contend that Unico's price proposal was required to include component pricing or was incomplete. See *generally*, AR, Tab 44, SSDD (considering Unico's proposal as part of the agency's source selection decision). In addition, we see nothing in the agency's memorialization of the 2021 inquiry into an earlier Buy American Act waiver request that states Unico's response was missing any pricing information. See AR, Tab 9, Oct. 2021 Buy American Memorandum at 1-2. Indeed, in 2021, the agency cited the pricing information provided by Unico in support of the contracting officer's conclusion that "there are sufficient resources existing to allow contractors to comply with Buy American Statute requirements." *Id.* at 2. Moreover, it is not clear to us--nor has the agency explained--how any purportedly missing 2021 Unico pricing would not have been stale by the time the agency conducted its April 2023 review of McMillen's waiver request.

Accordingly, in connection with its consideration of McMillen's waiver request, we find no reasonable basis for the agency's newly changed position that Unico was not a domestic supplier due to a perceived lack of necessary price information for Unico. Indeed, there is no evidence in the record that the agency requested any new pricing information from Unico in response to McMillen's waiver request. Having not demonstrated that it needed or subsequently asked for different information beyond the pricing information used to deny the prior waiver request, we find it unreasonable for the agency to cite Unico's failure to provide the missing pricing information as the reason for not considering Unico as a potential domestic supplier.

Moreover, under FAR clause 52.225-9(c)(1)(ii), a requester seeking a waiver based on unreasonable cost must provide "a reasonable survey of the market and a completed price comparison table." FAR 52.225-9(c)(1)(ii). As our prior decision noted, the prior iteration of McMillen's market survey--which surveyed only one foreign and one domestic supplier--was found by the Corps to be insufficient "because McMillen had not indicated that these sources were the only ones available." *Unico Mechanical Corp.--Costs, supra* at 8. In light of that conclusion, we found the next iteration of McMillen's market survey--the same one at issue here--to also be insufficient because it included no additional Buy American Act-compliant suppliers, including domestic suppliers (e.g., Unico) that the agency "actually knew could produce Buy American Act-compliant valves." *Id.*

We find that the factual support for our prior conclusion has not meaningfully changed. In this regard, the agency is still in the position of knowing that additional domestic suppliers could produce Buy American Act-compliant valves. See AR, Tab 9, Oct. 2021 Buy American Memorandum at 2 (noting Unico's representation that it had the ability and capacity to manufacture compliant valves, and ultimately concluding that there are sufficient resources existing to allow contractors to provide compliant valves). And, the agency still has a market survey from McMillen that does not include any information about Unico, a known Buy American Act-compliant supplier. See AR, Tab 25, McMillen Price Proposal at 15 (quoting only one supplier capable of providing compliant valves but not mentioning or quoting Unico). Ultimately, under FAR clause 52.225-9(c), it is the responsibility of the requester to provide a reasonable survey of the market. While the agency inexplicably faults Unico for not providing the Corps with valve pricing information, it is nonetheless McMillen's responsibility, not Unico's, to provide the agency with a reasonable survey of the market.¹⁰ McMillen has not done so here since its survey included only one Buy American Act-compliant supplier, despite the agency

¹⁰ We note that there is no evidence in the record that McMillen requested pricing information from additional domestic suppliers and was denied such information. The agency avers that McMillen should not be faulted "for not contacting its competitor to obtain pricing," and further notes that "McMillen did contact the sole other domestic supplier and submitted its pricing." MOL at 3. We note, however, that the FAR clause 52.225-9(c) requirement for a reasonable market survey contains no indication that a requester can ignore its competitors' pricing where, as here, doing so would lead to an inadequate market survey.

knowing of additional domestic suppliers that could produce Buy American Act-compliant valves.

In sum, we once again find it “unreasonable for the agency to have waived the Buy American Act based on this revised request.” *Unico Mechanical Corp.--Costs, supra* at 8.

Work Plan

Unico challenges each of the weaknesses the agency assessed to its proposal under the work plan factor. Protest at 30-36; Comments & Supp. Protest at 18-28. Unico alleges that absent the weaknesses the agency “unfairly assessed,” the agency would have assigned Unico’s proposal a rating of outstanding under the work plan factor. Comments & Supp. Protest at 27-28. While we find most of these weaknesses to be reasonable, as discussed below, we agree with the protester that two of the weaknesses were improperly assessed by the agency.

In reviewing a protest challenging an agency’s evaluation of proposals, our Office will not reevaluate proposals; rather, we review the record to determine whether the agency’s evaluation was reasonable, consistent with the stated evaluation criteria, adequately documented, and consistent with applicable procurement statutes and regulations. *National Gov’t Servs. Inc., B-401063.2 et al.*, Jan. 30, 2012, 2012 CPD ¶ 59 at 5. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency’s conclusions are inconsistent with the solicitation’s evaluation criteria, undocumented, or not reasonably based. *VariQ Corp.*, B-414650.11, B-414650.15, May 30, 2018, 2018 CPD ¶ 199 at 6-7.

First, Unico challenges the agency’s assessment of a weakness based on Unico’s proposed review periods for design submittals. Protest at 30-31; Comments & Supp. Protest at 18-20. The challenged weakness states in relevant part:

Task 10 in the Gantt Chart schedule does not provide sufficient detail for review period of design submittals. The 30-day period for all design submittals does not include time for any re-submittals nor differentiate between the various design submittals that must be provided, such as [hydraulic power unit] design and Butterfly Valve design.

AR, Tab 43, SSEB Consensus Report at 25.

Unico contends that the weakness is unfounded where it ignores information in Unico’s proposal that describes the different review periods for each required design submittal. Protest at 31. The protester also argues that the weakness was unreasonable because Unico met the solicitation’s minimum requirements by proposing a 30-day review period for each design submittal. Comments & Supp. Protest at 19.

The agency concedes that the protester’s proposal did describe different review periods for each required design submittal. MOL at 6; see AR, Tab 28a, Unico Technical

Proposal at 47-48 (showing Unico proposed separate 30-day periods for the review and approval of the butterfly valve design, the hydraulic cylinders and actuators design, and the hydraulic power unit design). However, the agency maintains that the weakness is warranted because Unico only proposed a 30-day review period for each design submittal. MOL at 6. In this regard, the agency notes that the solicitation required offerors to propose “adequate time” for review and approval of submitted designs. *Id.* (citing RFP at 112-113). The agency contends that its evaluation was reasonable because, under the solicitation’s language, “[t]hirty calendar days is explicitly considered a minimum” but is not necessarily an adequate time for submittal reviews. MOL at 6.

Where a dispute exists as to a solicitation’s actual requirements, we begin by examining the plain language of the solicitation. *Point Blank Enters., Inc.*, B-411839, B-411839.2, Nov. 4, 2015, 2015 CPD ¶ 345 at 4. We resolve questions of solicitation interpretation by reading the solicitation as a whole and in a manner that gives effect to all provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. *Desbuild Inc.*, B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 5. If the solicitation language is unambiguous, our inquiry ceases. *Id.*

Based on the plain language of the submission instructions and work plan evaluation criteria at issue here, we agree with the protester’s interpretation and find no merit in the agency’s argument. The solicitation contained several “general and technical specification requirements” for performance of the contract, including procedures for submittals that were “required by the solicitation.” RFP at 2, 106-117. As relevant here, paragraph 1.7 of the submittal procedures specification states:

Schedule and submit concurrently submittals covering component items forming a system or items that are interrelated. Adequate time (a minimum of 30 calendar days) must be allowed and shown on the register for Government review and approval. No delay damages or time extensions will be allowed for time lost in late submittals.

Id. at 112-113.

Separately, the solicitation required offerors to, as part of their work plan, propose “[s]ufficient time for all Government reviews” and stated that the agency would evaluate how “realistic the offeror’s schedule durations are.” AR, Tab 8, RFP amend. 3 at 12-13. However, the solicitation did not include any specific evaluation criteria for the proposed review period for design submittals.

When reading the solicitation as a whole, it is clear that the RFP’s performance requirements provided that a 30-day submittal review period would be considered “adequate” and did not otherwise inform offerors that such a proposed review period would not be considered sufficient. The solicitation specified that offerors must allow adequate time for the review and approval of submittals, an instruction that was immediately followed by a parenthetical defining adequate time as “a minimum of 30 calendar days.” RFP at 112. We are not persuaded by the agency’s unsupported

argument that the 30-day minimum is somehow “not synonymous” with adequate time when the plain language of the solicitation unambiguously states otherwise.¹¹

In light of our conclusion that the solicitation defined a 30-day submittal review period as adequate, we see no basis to conclude that Unico’s proposed 30-day review periods could reasonably be considered “[a] flaw in the proposal,” and therefore meet the solicitation’s definition of a weakness. See AR, Tab 8, RFP amend. 3 at 6. Accordingly, we conclude that the agency’s assessment of this weakness was unreasonable since it was inconsistent with the terms of the solicitation and ignored several aspects of Unico’s proposal that provided the information the agency contended was missing.

Next, Unico challenges the agency’s assessment of a weakness for Unico’s lack of proposed coordination with agency construction or operations staff during performance. Protest at 34-35. The relevant weakness states:

The workplan does not provide any mention of coordination with [Corps] construction staff or operations staff for any of the work. This lack of coordination will increase safety and operability risk to Government staff during construction. This is a flaw in the proposal that increases the risk of unsuccessful performance because it increases the risk to performance, quality, safe, and schedule for the project.

AR, Tab 43, SSEB Consensus Report at 26.

Unico argues that the weakness was unreasonable because Unico’s proposal described coordination that would take place between Unico and relevant agency staff in several places. Protest at 34-35. The agency responds that the weakness was reasonably assessed because the proposal aspects pointed to by the protester were limited in scope and not sufficiently detailed. MOL at 9-10. Notably, the agency does not dispute the protester’s argument that Unico proposed coordination with agency operations staff; rather, the agency argues that the protester’s proposal did “not evince a plan for coordination with [the Corps’] construction staff or operations staff other than work near the end of performance or in vague and contingent terms.” *Id.* at 10.

The record does not support the agency’s arguments here. For example, Unico proposed to perform “on-site testing and commissioning . . . in coordination with” Corps personnel and its proposal included discussion of how agency staff would be involved in this aspect of the work. AR, Tab 28a, Unico Technical Proposal at 44. Also, portions of Unico’s proposal discussed communication as a way to mitigate the risks of working in an operational facility and described the coordination required for concrete repairs

¹¹ We note that the agency’s own evaluation recognized that the solicitation required a 30-day submittal review period. AR, Tab 43, SSEB Consensus Report at 18-19 (stating that a proposed review duration “is less than the 30-day review period required in specification 01 33 00”).

necessitated by the performance of the work. Protest at 35; AR, Tab 28a, Unico Technical Proposal at 33, 45.

While it may be the case that the agency evaluators would have considered the scope or description of proposed coordination in Unico's proposal to warrant a weakness, the contemporaneous record provides no indication that the agency reviewed and considered the aspects of the protester's proposal that discussed coordination with the Corps's operations staff. See AR, Tab 43, SSEB Consensus Report at 26 ("workplan does not provide any mention of coordination"). In light of the weakness language absolutely disclaiming any proposed coordination with agency operations staff, we find the agency's arguments here to be inconsistent with the contemporaneous record, and therefore afford them little weight. See *Caddell Constr. Co., Inc.*, B-411005, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132 at 11. Accordingly, we agree with the protester that this weakness was unreasonably assessed.

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. *Raytheon Co.*, B-409651, B-409651.2, July 9, 2014, 2014 CPD ¶ 207 at 17. We resolve any doubts regarding prejudice in favor of a protester. *Intelsat Gen. Corp.*, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 19-20.

Here, had the Corps properly considered McMillen's Buy American waiver request, the agency may have denied it and thus not considered McMillen's proposal eligible for award or, at a minimum, conducted discussions and allowed offerors the opportunity to submit revised proposals. Accordingly, we find that there is a reasonable possibility that Unico was competitively prejudiced by the agency's actions here, and on this basis, we sustain the protest.

RECOMMENDATION

We recommend in accordance with the discussion in this decision, that the agency reject McMillen's Buy American Act waiver request, reevaluate proposals, and make a new source selection decision, or, in the alternative, engage in discussions, reevaluate proposals and make a new source selection decision.

We further recommend that Unico be reimbursed the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Unico should submit its certified claim, detailing the time spent and costs incurred, directly to the agency within 60 days of its receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel