United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1147 **September Term, 2018**

FILED ON: MARCH 5, 2019

LEADER COMMUNICATIONS, INC.,
PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION,
RESPONDENT

KARSUN SOLUTIONS LLC,
INTERVENOR

On Petition for Review of an Order of the
Federal Aviation Administration ODRA-18-826

Before: HENDERSON and ROGERS, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

J U D G M E N T

This petition for review was considered on the record from the Federal Aviation Administration ("FAA") and the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has afforded the issues full consideration and determined a published opinion is unwarranted. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the petition for review be dismissed in part and denied in part.

The FAA solicited bids for software and software support services under Screening Information Request ("SIR") DTFACT-17-R-00003 to be awarded to a small business. In evaluating the 28 submitted bids, the Product Team rated each proposal for (1) corporate experience; (2) technical performance; (3) past performance; and considered price. Leader Communications, Inc.'s ("LCI") proposal was rated "acceptable" on (1) and (2), and "satisfactory confidence" on (3). Based on the Product Team's Technical Evaluation Report and the bid price, the contracting officer and the Source Selection Official ("SSO") recommended Karsun Solutions LLC ("Karsun"), which had the highest bid price but received the highest ratings on the non-price factors. Karsun was awarded the contract. LCI unsuccessfully filed bid protests with the Office of Dispute Resolution for Acquisition ("ODRA"). It now petitions for review of the FAA's April

10, 2018 decision and order affirming ODRA. LCI contends that ODRA's decision is arbitrary and capricious and lacking substantial evidence to uphold both the flawed evaluation of LCI's bid and the eligibility of the winning bidder, Karsun, which LCI maintains may not qualify as a small business and whose price was not properly considered.

The court lacks jurisdiction to consider LCI's challenge to the FAA's price evaluation and post-award price negotiations with Karsun because LCI failed to raise these objections before the FAA. Because LCI had the information needed to make its price-related challenges when it filed its protests, LCI also fails to show a "reasonable ground" that would excuse its failure to raise these objections then. *See* 49 U.S.C. § 46110(d). LCI points to no record citations of such objections and concedes this challenge is "a variation on the theme of [another] argument," Reply Br. at 28. In the reply brief LCI urges the court to exercise its discretion to consider a newly raised issue that presents a pure question of law, relying on *White v. U.S. Dep't of the Army*, 720 F.2d 209 (D.C. Cir. 1983). That exception invokes the court's discretion with respect to forfeiture generally, *id.* at 211, but LCI cites no authority that the court has such discretion in view of Section 46110(d)'s jurisdictional bar. *See City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002).

The FAA's further view that LCI also forfeited its challenges to Karsun's small business status, because it failed to submit a supplemental protest within seven days of the issuance of the FAA's "size determination," *see* 14 C.F.R. § 17.15(a)(3)(i), is less well taken. LCI timely filed its initial protest challenging Karsun's small business status. When the FAA thereafter determined Karsun's size, LCI notified ODRA of its intent to proceed with certain aspects of its size protest, and pursuant to ODRA's order to file comments on "the issues that remain" within 10 business days, LCI filed such comments and a second supplemental protest. The FAA now appears to elevate form over substance, pointing to no authority requiring a challenge to be re-raised in a new supplemental protest in order to be timely when the same issue had already been raised in an initial protest and ODRA set a different deadline for further comments.

Turning to the merits, LCI's challenges to the evaluation of its bid proposal fail because there is substantial evidence in the record to support the FAA's adoption of ODRA's findings and its denial of LCI's challenges was not arbitrary and capricious. *See* 49 U.S.C. § 46110(c); 5 U.S.C. § 706(2)(A); *Multimax, Inc. v. FAA*, 231 F.3d 882, 886–87 (D.C. Cir. 2000). LCI maintains that it should have received higher ratings for each of the non-price factors and its proposal was graded disparately relative to Karsun's. "Where a procurement decision requires an agency to assess an offeror's qualifications to perform a contract, [the court's] review is 'especially deferential,'" *id.* at 887, and LCI has shown neither a lack of substantial evidence nor any clear error in judgment.

For the corporate experience rating, ODRA relied on substantial evidence in the record that, as the Product Team found, there were two "weaknesses" in LCI's bid proposal regarding "DevOps" and cloud management and migration. For each weakness, ODRA found the Product Team adequately considered materials in LCI's proposal that LCI claimed were not considered, and in considering the protests it reasonably deferred to the Product Team's technical judgment that the proposal did not demonstrate experience and best practices applying DevOps or experience

managing cloud infrastructure with provisioning. ODRA was not required to consider other incumbent efforts by LCI that were not included in the bid proposal, as the SIR instructs bidders to assume the FAA has no prior knowledge of their capabilities or experience and will base its bid evaluation solely on the information presented in the proposals. Screening Information Request DTFACT-17-R-00003 ("SIR") at 57. Although LCI refers to a discussion of cloud infrastructure with provisioning that it claims ODRA overlooked, Pet'r Br. 31, this comes from a different section of its bid proposal regarding its technical experience, and ODRA found nothing in LCI's argument before it showed LCI had mentioned provisioning in connection with its corporate experience. To the extent LCI urges its bid proposal was treated unequally with Karsun by the Product Team because it considered information in another section of Karsun's bid proposal in evaluating its corporate experience, this lacks any record support; a bald assertion in the FAA's brief that reliance was placed on an explanation in Karsun's technical volume is unaccompanied by a record citation to show that the Product Team considered such information.

Neither was ODRA unreasonable in dismissing LCI's concern about the Product Team's recognition that the identified weaknesses in LCI's corporate experience "will likely have little to no impact on performance." LCI maintains this conclusion is flatly inconsistent with the assignment of the weaknesses. ODRA explained that "little to no impact" recognizes a risk of negative impact on performance, however small, which comports with the SIR's definition of a weakness, *see* SIR at 71. To the extent that LCI maintains that the Product Team's identification of no "risks" is inconsistent with its "acceptable" rating, which provides that "[r]isk of unsuccessful performance is low to moderate," SIR at 69, LCI appears to be conflating the identification of specific risk factors with the overall assessment of the risk of unsuccessful performance. Similarly, as to LCI's view that it should have been awarded "strengths" based on its incumbency advantages, ODRA reasonably concluded that positive attributes alone do not justify a strength based on the SIR's definition of a strength, *see* SIR at 71. ODRA also reasonably found that LCI's and Karsun's proposals were sufficiently different for the Product Team to have rated them differently, stating upon review of the two proposals that Karsun's descriptions were quantified and more specific. The FAA's decision "may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view." *Western Air Lines v. Civil Aeronautics Bd.*, 495 F.2d 145, 152 (D.C. Cir. 1974).

For the technical rating, ODRA relied on substantial evidence in sustaining the risk the Product Team assigned because LCI's proposal underestimated the scope of the contract. ODRA found the Product Team's understanding of LCI's representation regarding its incumbency status and lack of need for transition to be reasonable and observed that even if LCI's statements were interpreted in the way LCI claims it should have been, its proposal would nevertheless have underestimated the scope of the work. ODRA also did not err in declining to reach LCI's additional arguments regarding various "strengths" of LCI that should have been acknowledged because the assessment of a moderate risk of unsuccessful performance for LCI's proposal meant that "acceptable" was the highest rating LCI could obtain under the SIR's definition of the various ratings, *see* SIR at 70.

For the past performance rating, substantial evidence supported ODRA's decision sustaining LCI's "satisfactory confidence" rating despite the highly scored Prior Performance Questionnaires ("PPQs") it submitted and concluding LCI and Karsun were not treated unequally. ODRA noted that the Product Team stated it weighed prime contractor examples more heavily than subcontractor examples consistent with the SIR, and LCI had provided only one prime contractor example whereas Karsun had provided more. Although LCI maintains it was illogical for ODRA to compare LCI's and Karsun's examples as it did (under seal), there are multiple ways ODRA could have chosen to weigh the examples, and it chose a reasonable approach. *See Western Air Lines*, 495 F.2d at 152. ODRA was not required to disqualify one of the PPQ's for Karsun (for a reason that is under seal) inasmuch as nothing in the SIR, the FAA's Acquisition Management Policy, or prior ODRA decisions prohibits consideration of such PPQs. Neither is ODRA bound by the Government Accountability Office ("GAO") decisions, regarding consideration of PPQs from affiliated companies, on which LCI relies to argue that the PPQ should have been disqualified. *See* Protest of Apptis, Inc., Docket No. 10-ODRA-00557, 2011 WL 13244155, at *18 (July 14, 2011).

LCI's remaining challenge to the FAA's decision based on Karsun's size eligibility fails because substantial evidence supports ODRA's finding that LCI was not prejudiced by the alleged errors. ODRA's regulations provide that only an "interested party" may challenge a procurement decision, 14 C.F.R. § 17.15(a), and define an interested party as "one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract," *id.* § 17.3(m). ODRA "will only recommend sustaining the Protest on [a] ground if [the protestor] can demonstrate prejudice, *i.e.*, that but for the Product Team's inappropriate action or inaction, [it] would have had a substantial chance of receiving the award." Protest of Apptis, Inc., Docket No. 10-ODRA-00535, 2011 WL 13244154, at *43 (Mar. 25, 2011); *see also Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375, 1380 (Fed. Cir. 2009). Because prejudice is a question of fact, *CliniComp Int'l, Inc. v. United States*, 904 F.3d 1353, 1359 (Fed. Cir. 2018), the FAA's finding on prejudice must be upheld if supported by substantial evidence, 49 U.S.C. § 46110(c). In view of the non-price ratings for LCI's bid proposal, which remain undisturbed on review, ODRA could conclude that LCI would not have advanced to the group of four final bidders even if Karsun were determined to be ineligible as a small business, and LCI therefore could not show a substantial chance for award regardless of any additional errors. LCI misplaces reliance on Small Business Administration ("SBA") regulations in maintaining it may initiate size protests as a bidder not excluded from competition, *see* 13 C.F.R. § 121.1001(a)(1)(i); the FAA is exempt from the Small Business Act and the SBA's regulations are not binding on it. *See* 49 U.S.C. § 40110(d)(2)(D); Protest of Alutiiq Pacific LLC, Docket No. 12-ODRA-00627, 2013 WL 12305569, at *31 (May 15, 2013). SBA regulations may be persuasive when not in conflict with the FAA's Acquisition Management Policy, *id.*, but ODRA's precedent requires a showing of prejudice and LCI cites no authority that SBA's procedural rules supplant the FAA's rules. Although ODRA's standing order on size protests acknowledges the FAA often adopts or incorporates SBA standards, this alone does not show ODRA erred, much less was arbitrary or capricious, in applying its prejudice requirement to LCI's size protest.

Accordingly, we dismiss the petition in part and deny the petition in part.

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk