



## Decision

**Matter of:** Organs for Life

**File:** B-416248.2

**Date:** July 30, 2018

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### DIGEST

1. Protest challenging a solicitation's minimum experience requirement is denied where the agency reasonably concluded that offerors must demonstrate at least 3 years of organizational experience performing relevant work.
  2. Where the protester acknowledges that it cannot meet the solicitation's experience requirements, it is not an interested party to challenge other solicitation terms.
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### DECISION

Organs for Life (OFL), of Chapel Hill, North Carolina, challenges the terms of request for proposals (RFP) No. 18-250-SOL-0017, which was issued by the Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA), for operation of the Organ Procurement and Transplantation Network (OPTN). The protester argues that the terms of the solicitation are unduly restrictive of competition.

We deny in part and dismiss in part the protest.

### BACKGROUND

The OPTN is part of HRSA's organ donation and transplantation program, and serves as "the national system that allocates and distributes donor organs to individuals waiting for an organ transplant." Healthcare Systems Bureau, [www.hrsa.gov/about/organization/bureaus/hsb/index.html](http://www.hrsa.gov/about/organization/bureaus/hsb/index.html) (last visited July 26, 2018). The OPTN is a "unique public-private partnership that links all professionals involved in the U.S. donation and transplantation system." About the OPTN,

the-optn (last visited July 26, 2018). The OPTN was established by the National Organ Transplant Act (NOTA), which was enacted in 1984 to “provide for the establishment of the Task Force on Organ Transplantation and the Organ Procurement and Transplantation Network, to authorize financial assistance for organ procurement organizations, and for other purposes.” Pub. L. No. 98-507, Oct. 19, 1984; 42 U.S.C. §§ 273-274g.

As relevant here, NOTA states that HHS “shall by contract provide for the establishment and operation of an Organ Procurement and Transplantation Network.”<sup>1</sup> 42 U.S.C. § 274(a). In addition, NOTA provides that the OPTN must meet the following requirements, set forth here in relevant part:

The Organ Procurement and Transplantation Network shall carry out the functions described in paragraph (2) and shall--

(A) be a private nonprofit entity that has an expertise in organ procurement and transplantation. . . .

42 U.S.C. § 274(b)(1).<sup>2</sup>

HHS issued the solicitation on March 30, 2018, seeking proposals to operate the OPTN. The RFP anticipates the award of a cost-sharing contract with a base period of 1 year and four 1-year options. Agency Report (AR), Tab 6, RFP amend. 1, at 2, 9.<sup>3</sup> The solicitation advises that proposals will be evaluated on the basis of cost and the

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<sup>1</sup> The incumbent contractor is United Network for Organ Sharing (UNOS), which has performed the contract since 1986. Our Office issued a separate decision addressing UNOS’s protest of the terms of the solicitation. United Network for Organ Sharing, B-416248, July 18, 2018, 2018 CPD ¶ \_\_.

<sup>2</sup> The functions to be performed by the OPTN include the following: establish a national list of individuals who need organs, and a system to match donated organs to those individuals; establish membership and medical criteria for allocating organs; assist organ procurement organizations in the distribution of organs; adopt standards of quality for the acquisition and transportation of donated organs; coordinate the transportation of organs; provide information to physicians and other health professionals regarding organ donation; collect, analyze, and publish data concerning organ donation and transplants; carry out studies and demonstration projects; work to increase the supply of donated organs; and submit to HHS an annual report concerning transplants. 42 U.S.C. § 274(b)(2).

<sup>3</sup> References to the RFP are to the version of the solicitation in RFP amendment No. 1 at Tab 6 of the agency report.

following three non-cost factors: (1) section 508 compliance<sup>4</sup>, (2) technical, and (3) past performance. Id. at 60. The technical evaluation factor has the following four subfactors: (1) understanding of the project and technical approach, (2) management and staffing plan, (3) organizational and personnel experience and expertise, and (4) equipment and facilities. Id. at 61. For purposes of award, the non-cost factors, when combined, are “significantly more important” than cost. Id. at 60. On May 2, prior to the due date for receipt of proposals, OFL filed this protest.

## DISCUSSION

OFL raises the following four primary challenges to the terms of the RFP: (1) the RFP did not provide offerors sufficient time to prepare and submit proposals; (2) the RFP’s transition-in requirements are unclear or inconsistent; (3) the RFP does not provide adequate information concerning the hardware, software, and personnel requirements to perform the contract; and (4) the RFP’s experience requirement is unreasonable.<sup>5</sup> Protest at 2-5. For the reasons discussed below, we conclude that the RFP’s experience requirement is reasonable. Because the protester acknowledges that it cannot meet the RFP’s current experience requirement, we conclude that the protester is not an interested party to raise the other challenges to the solicitation, and therefore dismiss those arguments.

### Experience Requirement

OFL argues that the RFP’s requirement for experience is unduly restrictive of competition and is intended to favor the incumbent contractor. For the reasons discussed below, we find no merit to this argument.

Agencies must specify their needs in a manner designed to permit full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agencies’ legitimate needs or as otherwise authorized by law. 41 U.S.C. § 3306(a). Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency’s needs. Remote Diagnostic Techs., LLC, B-413375.4, B-413375.5, Feb. 28, 2017, 2017 CPD ¶ 80 at 3-4. We examine the adequacy of the agency’s justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. Coulson Aviation (USA), Inc., B-414566, July 12, 2017, 2017 CPD ¶ 242 at 3. The determination of a contracting agency’s needs, including the selection of evaluation

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<sup>4</sup> Though not at issue in this decision, section 508 refers to the Rehabilitation Act of 1973, as amended, which generally requires that agencies’ electronic and information technology be accessible to people with disabilities. See 29 U.S.C. § 794d.

<sup>5</sup> OFL raises other collateral issues. Although we do not address every issue, we have reviewed them all and find that none provides a basis to sustain the protest.

criteria, is primarily within the agency's discretion and we will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. SML Innovations, B-402667.2, Oct. 28, 2010, 2010 CPD ¶ 254 at 2. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not establish that the agency's judgment is unreasonable. Protein Scis. Corp., B-412794, June 2, 2016, 2016 CPD ¶ 158 at 2.

The organizational and personnel experience and expertise subfactor of the technical evaluation factor states that offerors will be evaluated based on the following standard: "The Vendor (organization) experience as not-for-profit entity in the field of organ transplantation based on a minimum of three (3) years of corporate experience in managing projects of similar scope and complexity in the field of organ transplantation." Id. at 63.

The protester argues the RFP's requirement for 3 years of experience in the field of organ transplantation is not reasonable because it is not specifically required by NOTA. The protester states that "[a]lthough OFL is a 'young' corporation, it has partnered with seasoned proposed subcontractors that have considerable relevant experience." Protest at 5. In this regard, the protester explains that it intends to propose subcontractors who have "many years of relevant experience handling sensitive health care data in large databases." Id. The protester further states that OFL board members and officers have extensive experience in the field of transplantation. Protester's Response to GAO Questions, June 11, 2018, at 1. The protester acknowledges, however, that it cannot meet the RFP's experience requirement, as it is currently stated: "To answer your question explicitly, Organs for Life and its team of subcontractors who would direct a new OPTN would not meet this specific requirement as it is worded." Id. at 2.

HHS states that it interprets the provisions of NOTA, along with the agency's need to ensure continued critical life-saving services associated with the OPTN, to require the agency to award a contract to a firm with organizational experience in organ transplantation. Memorandum of Law (MOL) at 2-3. With regard to NOTA, the agency cites the requirement that the OPTN "be a private nonprofit entity that has an expertise in organ procurement and transplantation." 42 U.S.C. § 274(b)(1)(A). The agency states that it interprets this requirement for the OPTN to require the contractor who will operate the OPTN to also have organizational expertise in the field of organ transplantation. MOL at 2.

The agency also contends that the requirement for 3 years of organizational experience in the field of organ transplantation is reasonable in light of the agency's "legal and programmatic mandate . . . to oversee the operations of the OPTN and to ensure that critical life-extending and life-saving transplants are able to occur efficiently, safely, and in a timely manner, consistent with legal obligations." Decl. of Contracting Officer's Representative/Technical Evaluation Panel Chair, at 1. The agency explains that it set the experience requirement at 3 years based on the following considerations:

Given the complexity and breadth of the requirements in the OPTN solicitation with respect to organ matching, policy development, policy compliance, and patient services, an organization with a minimum of three years of experience is likely to have established a basic level of corporate stability, professional expertise, and record of necessary collaboration with transplant stakeholders to allow it to successfully manage the contract requirements. . . . The OPTN contractor needs to manage more than 20 policy development committees establishing, reviewing and updating complex organ-specific allocation policies. Less than three years' experience in organ procurement and transplantation would increase the likelihood that policies could be developed that are not aligned with appropriate medical considerations and legal requirements of NOTA and the OPTN regulation.

Id.

As explained above, the agency has discretion to establish requirements necessary to satisfy its needs. See SML Innovations, *supra*. Additionally, a requirement for specialized experience is not unduly restrictive of competition where the agency reasonably concludes that the experience is necessary for the performance of the agency's requirements. Harbor Branch Oceanographic Institution, Inc., B-243417, July 17, 1991, 91-2 CPD ¶ 67 at 4. Here, we find that the agency reasonably concluded that because NOTA requires the OPTN to be a non-profit entity with expertise in organ transplantation, the contractor that will operate the OPTN must also have relevant experience in this area. We also find that the agency reasonably concluded that the nature and complexity of the work requires the contractor to demonstrate a minimum of 3 years of relevant organizational experience. Although the protester disagrees with the agency's judgment as to the type and amount of experience required, this disagreement does not provide a basis to sustain the protest.

#### Interested Party Status Regarding Other Challenges

OFL's remaining arguments challenge the RFP's provisions concerning the proposal due date, the transition-in requirement, and information concerning hardware, software, and personnel requirements. We conclude that the protester is not an interested party to raise these arguments because it concedes that it does not meet the RFP's experience requirement. We therefore dismiss these arguments.

Under the bid protest provisions of the Competition in Contracting Act of 1984, only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. DNC Parks & Resorts at

Yosemite, Inc., B-410998, Apr. 14, 2015, 2015 CPD ¶ 127 at 12. Whether a protester is an interested party is determined by the nature of the issues raised and direct or indirect benefit or relief sought. RELM Wireless Corp., B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2.

As discussed above we find no merit to OFL's argument that the RFP's requirement to demonstrate a minimum of 3 years of organizational experience in the field of organ transplantation is unreasonable. As also discussed above, the protester acknowledges that it cannot meet this requirement. Protester's Response to GAO Questions, June 11, 2018, at 2. A protester is not an interested party to challenge the terms of a solicitation where the record demonstrates that it could not meet the solicitation's other requirements. Government & Military Certification Sys., Inc., B-413576.2 et al., Dec. 22, 2016, 2016 CPD ¶ 375 at 6 n.5. Here, we conclude that the protester is not an interested party to raise its remaining challenges to the terms of the solicitation because, even if those arguments had merit, the protester effectively concedes it would be ineligible for award of the contract based on its inability to meet the RFP's experience requirement.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong  
General Counsel