



# Decision

**Matter of:** Caduceus Healthcare, Inc.

**File:** B-414965; B-414965.2

**Date:** November 1, 2017

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GAO, participated in the preparation of the decision.

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## DIGEST

Protest challenging solicitation requirements as unduly restrictive of competition is denied where the agency articulated reasonable related basis for the requirements.

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## DECISION

Caduceus Healthcare, Inc., of Atlanta, Georgia, protests the terms of request for proposals (RFP) No. HSBP1017R0029, issued by the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), for support services to meet a nationwide recruitment and hiring of frontline employees. Caduceus argues that the RFP contains terms that are unduly restrictive of competition.

We deny the protest.<sup>1</sup>

## BACKGROUND

CBP, a component within the DHS, is the nation's largest federal law enforcement agency charged, in part, with securing the nation's borders. Agency Memorandum of Law (MOL) at 1. On January 25, 2017, in Executive Order 13767, "Border Security and

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<sup>1</sup> Our Office did not issue a protective order in connection with this protest because one was not requested by the parties. A full version of the agency report was provided to our Office, while a redacted version of the report was furnished to the protester. We have reviewed the entire unredacted record in camera. Therefore our discussion of the independent government cost estimate (IGCE) is necessarily limited.

Immigration Enforcement Improvements,” the President of the United States mandated that “the Secretary [of DHS], through the Commissioner of U.S. Customs and Border Protection, shall take all appropriate action to hire 5,000 additional Border Patrol agents, and all appropriate action to ensure that such agents enter on duty and are assigned to duty stations as soon as is practicable.” Agency Report (AR), Tab B, Executive Order No. 13767, 82 Fed. Reg. 8793 § 8 (2017). To this end, the agency developed an expanded requirement to address CBP’s need to recruit and hire 7,500 frontline personnel over a five-year period, including 5,000 border patrol agents, 2,000 CBP officers, and 500 air and marine interdiction agents. Contracting Officer’s Statement (COS) at 1. The objective of this procurement is for the contractor to recruit enough highly qualified frontline candidates to successfully meet the requirements of the Executive Order over the course of the contract. AR, Tab D, RFP, Attachment 1, Statement of Objectives at 2.<sup>2</sup>

The agency announced the scope of this procurement in a pre-solicitation notice posted on the Federal Business Opportunities (FedBizOpps) website on April 20. AR, Tab C, Pre-Solicitation Notice (Apr. 20, 2017), at 1. The RFP was issued on July 7, using Federal Acquisition Regulation (FAR) parts 12 and 15 procedures, and contemplated the award of a single indefinite-delivery/indefinite-quantity (IDIQ) contract, under which fixed-price task orders would be issued for a 1-year base period and four 1-year option periods. RFP at 3. The solicitation established a contract ceiling of \$297 million, with a minimum guarantee of \$5 million. Id. The RFP included a statement of objectives along with a description of each objective. The RFP’s objectives included the following: recruiting, coordination with CBP Hiring Center on the posting of vacancy announcements, applicant support/care, application intake and applicant processing,<sup>3</sup> reporting, security and management of employment data, system interfaces, and program management. RFP, Attachment 1, Statement of Objectives at 3-5.

The RFP provided that the agency would make award to the offeror with the highest technically rated proposal with a fair and reasonable price. RFP at 60. The agency would identify the highest technically rated proposal through an evaluation utilizing the following technical factors: relevant experience project size and complexity, leading edge talent acquisition methodologies relevant experience, performance work statement, and past performance. Id. at 60-64. The RFP provided a total of 45,550 possible points under these factors. Id. at 70.

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<sup>2</sup> Our citations are to the conformed RFP. AR, Tab D, RFP; MOL at 1 n.1.

<sup>3</sup> This objective involves the full life cycle of the hiring process from job posting to processing new entry-level CBP hires. The specific pre-employment process for border patrol agents, air and marine interdiction agents, and CBP officers, which are different for each type of employee, were explained in this section. RFP, Attachment 1, Statement of Objectives at 3-4.

Regarding the relevant experience project size and complexity (PSC) factor<sup>4</sup>, the solicitation stated the following:

For a maximum of three (3) relevant experience projects submitted, using Attachment 5 - Relevant Experience Project Size and Complexity Project Template, the Offeror will receive points in accordance with 3.0, Scoring Table, if the project value meets or exceeds the following:

- Project value is greater than or equal to \$200 Million and above
- Project value is greater than or equal to \$125 Million to \$200 Million
- Project value is greater than or equal to \$50 Million to \$125 Million

RFP at 60-61. Attachment 5 of the RFP entitled, “Relevant Experience Project Size and Complexity Template,” was divided into three sections: part I: project identification, solicited information regarding the project such as project value and the duration of the project; part II: project reference information, solicited information regarding the project reference, and part III, product description, where the offeror could include a narrative description of the project. RFP, Attachment 5.

The RFP stated that the agency would first rank proposals from highest point score to lowest point score using the scoring table found in section 3.0 of the addendum to FAR 52.212-2 of the solicitation. RFP at 60. The proposal with the highest technical score would then be verified, and once verified, that offeror’s price proposal would be evaluated for fairness and reasonableness. Id. If the highest technically rated offeror’s price proposal was determined to be fair and reasonable, the agency would award the contract to that firm. In the event the highest technically rated offeror’s price proposal was not found to be fair and reasonable, the proposal would be excluded from further consideration and the agency would conduct a price reasonableness review of the next-highest technically rated proposal. The process would continue until an offeror with a fair and reasonable price was determined. Id.

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<sup>4</sup> As stated above, the solicitation had the following two experience evaluation factors: relevant experience project size and complexity, and leading edge talent acquisition methodologies relevant experience. RFP at 60-61. In this decision references to relevant experience are to the relevant experience project size and complexity evaluation factor.

The solicitation included seven amendments. Of relevance to this protest, amendment No. 6 included the following question and answer exchange:

118. Page 53: Section 2.1—Should Volume I (Relevant Experience) of the IDIQ response include information from both the Prime Contractor and subcontractors? Or just the Prime Contractor?

**ANSWER: The Prime Contractor**

RFP, amend. 6, attach. 2 at 2 (emphasis in original).

The RFP established August 8 as the due date for the submission of proposals. Caduceus filed this timely protest on July 21, which it supplemented on July 31.

**DISCUSSION**

The protester contends that the solicitation's evaluation scheme is unduly restrictive of competition because offerors would only receive points for relevant experience if the offeror had experience with a contract valued at \$50 million or more, even though the anticipated contract amount could be a minimum of \$5 million. Protest at 1. In addition, Caduceus complains that offerors would not receive points for projects with a contract value of less than \$50 million "regardless of that contract's complexity." Id. at 4. Caduceus contends that awarding points based on size alone would render "meaningless the use of the term 'complexity.'" Id. at 5. The protester further alleges that the agency's consideration of only the prime contractor's experience and projects is not necessary to meet the CBP's legitimate needs.<sup>5</sup> Supp. Protest at 4. While we do not discuss all of the protester's arguments and variants thereof below, we have considered them all and find that none provides a basis upon which to sustain the protest.

Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the

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<sup>5</sup> The protester also argues in its initial comments that the \$200 million threshold required to receive the maximum amount of points under relevant experience project size and complexity, as well as the \$50 million minimum threshold to receive any points, is restrictive of competition, and not necessary to meet the agency's needs. In its supplemental comments the protester argues that complexity or relevance is not defined in the solicitation. Caduceus Comments at 4; Caduceus Supp. Comments at 2. These arguments are untimely and we will not consider them further as they should have been raised prior to the closing time for receipt of proposals and were not. 4 C.F.R. § 21.1(a)(1) (2017); National Customer Eng'g, B-251166, Feb. 9, 1993, 93-1 CPD ¶ 118 at 3; see also JAVIS Automation & Eng'g, Inc., B-290434, B-290434.2, Aug. 5, 2002, 2002 CPD ¶ 140 at 7 n.11 (piecemeal presentation of protest grounds, raised for the first time in comments, are untimely).

specification or requirement is reasonably necessary to meet the agency's needs. See Streit USA Armoring, LLC, B-408584, Nov. 5, 2013, 2013 CPD ¶ 257 at 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. Air USA, Inc., B-409236, Feb. 14, 2014, 2014 CPD ¶ 68 at 5. The determination of a contracting agency's needs, including the selection of evaluation 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.

The agency argues that setting a minimum project value threshold of \$50 million aligns with its needs because the "present requirement is also anticipated to be large and complex." MOL at 9. CBP explains that it utilized the IGCE to assist in establishing the minimum threshold for earning points for relevant experience for projects at or above \$50 million. The IGCE was generated during acquisition planning and equally divided the overall requirements across five years (the base period and four 1-year option periods), contemplating the hiring of 1,500 employees in the base year and in each of the four option years (100 border patrol agents, 400 CBP officers, and 100 air and marine interdiction agents). Id. The agency notes that the IGCE relied partly on CBP's actual fiscal year 2016 costs for hiring border patrol agents, CBP officers, and air and marine interdiction agents. Id.

In contrast, CBP explains that it used a minimum guarantee of \$5 million because this was the amount of funds available to CBP at the time of planning this acquisition. COS at 2. The agency goes on to state that only \$5 million is available for this project in fiscal year 2017. While the agency notes that available funding is anticipated to increase, at the time of the preparation of the agency report there were no guarantees of future funding beyond the \$5 million. Id.

We find that the agency's approach of only awarding points for relevant experience if the offeror has experience with a contract valued at \$50 million or more is reasonable and not overly restrictive of competition. The agency reasonably utilized the IGCE, which showed both the annual and the five-year estimated total for this contract effort, in its determination that offerors would only receive points for relevant experience PSC contracts with a contract value of \$50 million or more. Further, considering that the contract ceiling of this contract will be \$297 million, it is not unreasonable for the agency to insure that the offerors have experience with contracts valued at a minimum of \$50 million. CBP, in our view, has established that it has a reasonable need for a contractor with experience with contracts of \$50 million or larger.

Caduceus also contends that under the solicitation's evaluation scheme, offerors would not receive points for relevant experience for projects with a contract value of less than \$50 million "regardless of that contract's complexity." Protest at 4. The protester contends that awarding points based on size alone would render "meaningless the use of the term 'complexity.'" Id. at 5.

The contracting officer (CO) responds that experience is commonly understood by federal contracting and program management professionals to encompass both the size (in this case the dollar amount) and complexity of a contract. Supp. COS at 2. The CO maintains that the agency's purpose in evaluating the size and complexity of the submitted relevant experience PSC projects was to focus upon the offeror's experience as it relates to the complexity of project management or administration of high dollar value services contracts. Id. at 1. The CO further states that there is usually a strong and direct correlation between size and complexity in services contracts. Id. at 2. That is, a contract with a high degree of managerial or administrative complexity may be expected to also have a higher dollar value. Id.

We find reasonable the agency's explanation that project value may encompass both size, as well as the complexity of the contract. As the CO explained there is usually a strong and direct correlation between size and complexity regarding services contracts. Therefore, we conclude that the agency's experience factor took into account the complexity of the contract by considering project value. See NITCO, B-246185.3, Sept. 17, 1992, 92-2 CPD ¶ 183 at 7. Accordingly, this protest ground is denied.

Next, Caduceus argues that the agency's decision to consider only the experience of the prime contractor was unduly restrictive of competition because the agency did not show that its needs could not be satisfied by a subcontractor with relevant experience. Id. at 5.

The agency argues that this procurement is for a large and complex, high visibility requirement which involves a contractor's engagement with the public, as the face of the agency, through a wide range of recruitment and applicant processing efforts. CBP also argues that it plans to reduce its risk by ensuring that the agency has privity of contract with a firm that has direct experience performing this type of work. COS at 4. The agency explains that it is seeking a contractor capable of successfully assisting the agency to hire 7,500 new employees across the country over a five-year period. The contracting officer also explains that the successful contractor will be responsible for meeting the demands of at least five different offices with the CBP that each contributed to the requirements of this solicitation.<sup>6</sup> COS at 1.

The agency further explains that the goal of this procurement is for the contractor to produce employees "who actually enter on duty," which means that these are individuals who have completed the application, successfully passed the entrance exam, meet the physical requirements, are suitable for employment at CBP (which means they can pass a demanding background investigation), can pass a polygraph

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<sup>6</sup> The five offices within CBP which contributed to the requirements in this solicitation are: U.S. Border Patrol, the Office of Field Operations, Air and Marine Operations, the Office of Human Resource Management, and the Office of Professional Responsibility. COS at 1.

examination, have the highest integrity, and are compatible with the rigors of Border Patrol training and operational environments. RFP, Attachment 1, Statement of Objectives at 2. CBP points out that currently more than 133 initial applicants must be recruited in order to successfully hire and place one border patrol agent. COS at 1. The CBP states as well that the successful contractor must undertake both local and nationwide efforts to deliver a large volume of interested and qualified applicants for law enforcement positions “from among a shrinking pool of highly sought-after candidates,” and that some of these positions are in geographic areas and locations that have historically been difficult to staff. Id.

We think the record supports the agency’s position that the prime contractor experience restriction is reasonably related to its needs. In this regard, the agency claims it needs to limit the risk of unsuccessful performance with respect to this high-visibility project. As we have concluded in similar circumstances, an agency’s desire to reduce the risk of unsuccessful performance can be rationally achieved by restricting consideration of experience and past performance to the firms contractually obligated to meet the agency’s requirements. See Diversity Marketing and Communications, LLC, B-412196.2, Mar. 9, 2016, 2016 CPD ¶ 84 at 4 (solicitation requirement that limited agency’s experience evaluation to prime contractor experience was reasonable given the high visibility of the work to be performed); Valor Constr. Mgmt., LLC, B-405365, Oct. 24, 2011, 2011 CPD ¶ 226 at 3 (agency’s decision not to consider team member’s experience and past performance was not unduly restrictive of competition); see Emax Fin. & Real Estate Advisory Servs., LLC, B-408260, July 25, 2013, 2013 CPD ¶ 180 at 6 (agency’s concern with limiting risk of unsuccessful performance by favoring experience of firms that will be in privity with the government reasonably relates to agency’s needs in choosing a contractor that will best serve its interests with respect to a complex project).

The fact that a requirement may be burdensome, or even impossible for a particular firm, does not make it objectionable if it meets the agency’s needs. Advanced Comm. Cabling, Inc., B-410898.2, Mar. 25, 2015, 2015 CPD ¶ 113 at 6-7. A protester’s disagreement with the agency’s judgment concerning the agency’s needs and how to accommodate them does not show that the agency’s judgment is unreasonable. Exec Plaza, LLC, B-400107, B-400107.2, Aug. 1, 2008, 2008 CPD ¶ 143 at 5.

The protest is denied.

Susan A. Poling  
General Counsel