U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: United Network for Organ Sharing

File: B-416248

Date: July 18, 2018

Jessica C. Abrahams, Esq., and Dana B. Pashkoff, Esq., Drinker Biddle & Reath, LLP, for the protester.
Robyn Littman, Esq., and Christian Maimone, Esq., Department of Health and Human Services, for the agency.
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the terms of a solicitation as inconsistent with statutory and regulatory requirements is denied where the statute does not support the protester's interpretation.

2. Protest challenging the terms of a solicitation as unduly restrictive of competition because they require the protester, the incumbent contractor, to change its approach to performing the work, is denied where the agency has a reasonable basis for the requirements.

DECISION

United Network for Organ Sharing (UNOS), of Richmond, Virginia, 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 solicitation contains provisions that are inconsistent with the statutes and regulations concerning the OPTN, and that those provisions are unduly restrictive of competition because they would require the protester to change its organization and approach to performing the work.

We deny 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 (last visited July 16, 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, optn.transplant.hrsa.gov/governance/about-the-optn (last visited July 16, 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. The agency has issued regulations implementing NOTA at 42 C.F.R. part 121.

As relevant here, NOTA states that HHS "shall by contract provide for the establishment and operation of an Organ Procurement and Transplantation Network." 42 U.S.C. § 274(a). HHS awarded a contract to UNOS to operate the OPTN in 1986, and the protester has received all seven contract awards since that date. Protest at 4. 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, and
>
> (B) have a board of directors--
>
> > (i) that includes representatives of organ procurement organizations (including organizations that have received grants under section 371), transplant centers, voluntary health associations, and the general public; and
> >
> > (ii) that shall establish an executive committee and other committees, whose chairpersons shall be selected to ensure continuity of leadership for the board.

42 U.S.C. § 274(b)(1).[1]

[1] 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

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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.[2] The solicitation states that proposals will be evaluated on the basis of cost and the following three non-cost factors: (1) section 508 compliance[3], (2) technical, and (3) past performance. Id. at 60. For purposes of award, the non-cost factors, when combined, are "significantly more important" than cost. Id. On April 10, prior to the due date for receipt of proposals, UNOS filed this protest.

DISCUSSION

UNOS challenges the terms of the solicitation in two primary areas. First, the protester argues that the RFP improperly imposes conditions on the OPTN that are inconsistent with the provisions of NOTA and its implementing regulations. As discussed below, UNOS's arguments are predicated on its interpretation of NOTA as requiring that the OPTN and the contractor that operates the OPTN be the same entity. The protester therefore argues that certain solicitation provisions, which the protester contends impose new oversight requirements over the OPTN by the government are improper because they are contrary to statute. Second, the protester argues that the RFP provisions, as applied to UNOS, result in an unfair competitive disadvantage. In this regard, the protester contends that certain contract requirements have a unique and unfair impact on UNOS's ability to compete, based on its status as the incumbent contractor. For the reasons discussed below, find no basis to sustain the protest.[4]

(...continued)
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).

[2] References to the RFP are to the version of the solicitation in RFP amendment No. 1 at Tab 6 of the agency report.

[3] 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.

[4] UNOS 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.

Relationship Between OPTN and the OPTN Contractor

UNOS argues that the solicitation sets forth performance requirements which, in effect, provide "HRSA significant control over and excessive oversight into the operations of the private OPTN." Protest at 6. The protester argues that the imposition of these requirements through the solicitation constitutes an improper effort by the agency to "usurp UNOS's independence and seeks to impose on UNOS burdensome and costly administrative requirements that do nothing to enhance contract performance." Id. UNOS's challenge to the terms of the solicitation is predicated on its interpretation of NOTA as requiring that the OPTN and the contractor that supports the OPTN be the same entity. For the reasons discussed below, we conclude that the protester's interpretation of NOTA is not reasonable, and therefore find no basis to sustain the protest.

As an initial matter, we address whether NOTA is a procurement statute and therefore whether the protester's arguments are within our Office's jurisdiction to review as part of our Bid Protest function. The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-3556. Our Office reviews alleged violations of procurement laws and regulations to ensure that the statutory requirements for full and open competition are met. 31 U.S.C. § 3552(a); Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. Although our Office's bid protest jurisdiction arises under CICA, we have reviewed protests alleging that the terms of solicitations conflict with statutes other than CICA, where those statutes have specific procurement-related provisions. See, e.g., Stone Hill Park, LLC, B-414555.4, July 18, 2017, 2017 CPD ¶ 226 at 1 (addressing provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207); Caddell Constr. Co., Inc., B-411005.1, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132 at 1 (addressing provisions of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4852); Crane & Co., Inc., B-297398, Jan. 18, 2006, 2006 CPD ¶ 22 at 1 (addressing provisions of statute concerning currency paper procurement, 31 U.S.C. § 5114(c)).

NOTA requires HHS to enter into a contract for the operation of the OPTN, and specifies that the OPTN shall "be a private nonprofit entity that has an expertise in organ procurement and transplantation." 42 U.S.C. § 274(b)(1)(A). The protester argues, in effect, that NOTA requires the agency to award a contract for operation of the OPTN, but does not authorize the agency to impose oversight conditions on the OPTN through that contract. Because the protester argues that the RFP's requirements are inconsistent with NOTA's provisions concerning the award of a contract, we conclude that this is a matter within our bid protest jurisdiction.

Next, we address the relationship between the OPTN and the contractor that operates the OPTN. The protester states that the OPTN's current board of directors is comprised of individuals who are also members of the UNOS board of directors. Protest at 4 n.4. The protester argues that the performance work statement (PWS) improperly requires that the contractor "create a process" to ensure that the OPTN and the contractor

maintain separate boards of directors.[5] AR, Tab 6, PWS at 15. Specifically, the contractor will be required to submit a plan to the agency within 1 month of the start of contract performance "to ensure that, as OPTN [board of directors'] terms lapse, those vacancies are filled with new (or continuing) individuals who have agreed, in writing, as a condition of serving on the OPTN [board of directors], that they shall not, during the duration of their term on the OPTN [board of directors], serve simultaneously on the Contractors['] board of directors, or be an employee or subcontractor of the Contractor." Id.

UNOS notes that NOTA provides that the OPTN must be a private organization, 42 U.S.C. § 274(b), and that the regulations implementing NOTA provide that the "OPTN shall establish a Board of Directors of whatever size the OPTN determines appropriate." 42 C.F.R. § 121.3(a). The protester argues that these provisions, read together, mean that the agency does not have the authority under NOTA to direct the OPTN to have a board of directors that is separate from the entity that is awarded a contract to operate the OPTN.

It is well-established that statutory analysis "begins with the plain language of the statute." Jimenez v. Quarterman, 555 U.S. 113, 118 S. Ct. 681, 172 L. Ed. 2d 475 (2009). If the statutory language is clear and unambiguous on its face, then the plain meaning of that language controls. Carcieri v. Salazar, 555 U.S. 379, 387, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009). When a statute is silent or ambiguous with respect to the specific issue, deference to the interpretation of an administering agency is dependent on the circumstances. Chevron U.S.A. Inc. v. Natural Res. Def. Council,

[5] The protester initially argued that four areas of the PWS are inconsistent with the statutory provision stating that the OPTN must be a private entity: (1) separation of the OPTN and OPTN contractor boards of directors; (2) separation of the OPTN and OPTN contractor finance committees; (3) creation of a new Network Operations Oversight Committee, which will assist the OPTN board of directors in its oversight of the OPTN; and (4) requirement for the OPTN contractor to provide an annual evaluation of the OPTN executive director's performance to HRSA for review. Protest at 8-13 (citing AR, Tab 6, PWS at 15-17, 19-20). The protester also argued that the RFP improperly requires the OPTN contractor to submit for review to the agency various matters prior to review by the board of directors, such as the OPTN's 5-year strategic plan, the OPTN's bylaws, and plans for oversight of OPTN network members. Id. at 13-15. HHS responded to each of UNOS's arguments in its report on the protest. Memorandum of Law at 5-12; Contracting Officer's Statement at 2-3; AR, Tab 2, Statement of Contracting Officer's Representative (COR), at 1-4. The protester's comments on the agency report, however, specifically and substantively addressed only the agency's arguments concerning the board of directors. See Protester's Comments, May 21, 2018, at 8-12. We therefore consider these additional arguments abandoned. See 4 C.F.R. § 21.3(i)(3) ("GAO will dismiss any protest allegation or argument where the agency's report responds to the allegation or argument, but the protester's comments fail to address that response.").

Inc., 467 U.S. 837, 843-45, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); see also United States v. Mead Corp., 533 U.S. 218, 227-38, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001); Caddell Constr. Co., Inc., B-298949.2, June 15, 2007, 2007 CPD ¶ 119 at 10. Where an agency engages in rulemaking or adjudication concerning an issue where the statute is silent or ambiguous, courts will defer to an agency's interpretation unless the resulting regulation or ruling is procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute (called Chevron deference). Mead, 533 U.S. at 227-31; Chevron, 467 U.S. at 843-44. However, where the agency position reflects only an informal interpretation, Chevron deference is not warranted. Mead, 533 U.S. at 227-31; Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944). Our Office has explained that an agency's interpretation of a statute expressed in a solicitation, rather than a formal rulemaking, is not entitled to Chevron deference. Intertribal Bison Cooperative, B-288658, Nov. 30, 2001, 2001 CPD ¶ 195 at 4. In these cases, the weight to be accorded an agency's judgment will depend on its relative expertise, the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. Caddell Constr. Co., Inc., supra; Gonzales v. Oregon, 546 U.S. 243, 255-256, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006); Mead, 533 U.S. at 226-27.

In response to questions from our Office, both HHS and UNOS agree that NOTA does not expressly state whether the OPTN and the OPTN contractor must be the same entity. See Agency's Response to GAO Questions, June 13, 2018, at 1; Protester's Response to GAO Questions, June 13, 2018, at 1. Based on our review of NOTA and its implementing regulations, we also see nothing that expressly addresses whether the OPTN and the contractor that runs the OPTN must be the same entity or are prohibited from being the same entity. As cited above, NOTA states that the agency "shall by contract provide for the establishment and operation of" the OPTN. 42 U.S.C. § 274(a). The statute also provides that the OPTN must be "a private nonprofit entity." 42 U.S.C. § 274(b)(1). The statute, however, does not state that the contract for the operation of the OPTN shall be with the OPTN, or with a third-party contractor.

UNOS argues that NOTA implies that the OPTN and the OPTN contractor must be the same entity because the statute states that the OPTN shall be a "private nonprofit entity." See Protester's Response to GAO Questions, June 13, 2018, at 2 (citing 42 U.S.C. § 274(b)(1)). The protester contends that the agency implicitly recognizes that the OPTN and the OPTN contractor must be the same entity because the RFP requires the OPTN contractor to also be a non-profit entity. See RFP at 63; PWS at 4. The protester further contends that UNOS has been operating as though it is the OPTN since the award of its first contract in 1986. For example, the protester notes that the board of directors for the OPTN is comprised of members of UNOS. Protest at 4 n.4. The protester contends that the agency has not previously objected to this arrangement, and that the RFP represents an improper attempt to alter this longstanding arrangement. Protester's Comments on Agency' Responses, June 15, 2018, at 5.

HHS argues that the OPTN and the OPTN contractor are not the same entity, and that NOTA does not require that they be the same entity. Agency's Response to GAO

Questions, June 13, 2018, at 1. In support of its interpretation, the agency argues that certain regulations implementing NOTA imply that the OPTN and the OPTN contractor are different entities. For example, the regulations applicable to the OPTN state that they "do not apply to any parent, sponsoring, or affiliated organization of the OPTN, or to any activities of the contracting organization that are not integral to the operation of the OPTN," and further state that "[s]uch an organization is free to establish its own corporate procedures." 42 C.F.R. § 121.3(c) (emphasis added). The regulations also provide for oversight by the Secretary of HHS of the OPTN's policies, which are set forth in NOTA and the contract awarded for the operation of the OPTN, as follows: "The OPTN Board of Directors shall be responsible for developing, with the advice of the OPTN membership and other interested parties, policies within the mission of the OPTN as set forth in section 372 of the Act and the Secretary's contract for the operation of the OPTN." 42 C.F.R. § 121.4(a) (emphasis added). Additionally, the regulations state that "the OPTN shall provide to the Secretary data to assist the Secretary in assessing . . . the performance of [organ procurement organizations] and the OPTN contractor." 42 C.F.R. § 121.8(c)(3) (emphasis added).

In sum, we conclude that NOTA is silent as to the protester's primary contention--that the OPTN and the OPTN contractor must be the same entity. Because the agency has not issued regulations formally interpreting this matter, the agency's interpretation that the OPTN and the OPTN contractor are not required to be the same entity is not owed deference under Chevron. Nonetheless, we conclude that the protester's argument that NOTA requires the OPTN and OPTN contractor to be the same entity has no support in the statute or the regulations. In contrast, we think that nothing in NOTA prohibits the agency from issuing a solicitation that treats the OPTN and the OPTN contractor as separate entities. Additionally, we think that although the regulations cited by the agency do not specifically address the matter, they are generally consistent with the agency's interpretation. See 42 C.F.R. §§ 121.3(c), 121.4(a), 121.8(c)(3). We therefore find no basis to conclude that NOTA requires the OPTN and the OPTN contractor to be the same entity, or that the agency must award contracts for the operation of the OPTN that adopts this interpretation of NOTA.

For these reasons, we conclude that UNOS's arguments concerning the RFP's improper imposition of oversight and control conditions on the OPTN fails to set forth a legal basis of protest. In this regard, UNOS argued that the agency does not have the authority under NOTA to direct the OPTN to have a board of directors that is separate from the entity that is awarded a contract to operate the OPTN because the OPTN and OPTN contractor are the same entity. However, we have found no basis to conclude that the OPTN and OPTN contractor must be the same entity. We therefore find no basis to sustain the protest.[6]

[6] Even if the protester were correct that the entities are the same, we see nothing in the text of NOTA or its implementing regulations that would prohibit the agency from imposing the oversight conditions to which the protester objects (e.g., restrictions on membership of board of directors). Again, the protester's insistence that the term

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RFP Requirements Prejudicing the Protester

Next, UNOS argues that the terms of the RFP improperly "target" the protester in an attempt to increase competition. The protester argues that the solicitation requirement concerning the OPTN board of directors uniquely disadvantages the protester based on its status as the incumbent contractor, and is therefore unduly restrictive of competition. We find no basis to sustain the protest.

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. 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.

As discussed above, UNOS argues that the RFP improperly requires the contractor to "create a process" to facilitate the separation of the OPTN board of directors from the board of directors of the OPTN contractor. See PWS at 15. The protester argues that, as the incumbent contractor, it is uniquely disadvantaged by the RFP's requirement concerning the board of directors because it has operated for more than 30 years under the assumption that the OPTN and the OPTN contractor are and must be the same entity. Protester's Response to Request for Dismissal, Apr. 19, 2018, at 5. In this

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"private non-profit entity" means that the OPTN is beyond the control or supervision of the government has no support in the terms of NOTA or its implementing regulations. NOTA and its implementing regulations already set conditions for the OPTN's board of directors, such as the requirement for members to be representatives of organ transplant organizations, 42 U.S.C. § 274(b)(1), and that "[a]pproximately 50 percent" of members be transplant surgeons or physicians and 25 percent of members be "transplant candidates, transplant recipients, organ donors and family members," 42 C.F.R. § 121.3(a)(i), (ii). Moreover, the regulations anticipate a significant level of oversight by the government over the OPTN's policies. See 42 C.F.R. § 121.10. We therefore see no basis to conclude that NOTA expressly prohibits the agency from specifying this requirement for the OPTN board of directors even if the OPTN and the OPTN contractor are considered the same entity.

regard, the protester states that the OPTN's board of directors is currently comprised of individuals who are also members of UNOS's board of directors. Protest at 4 n.4. The protester argues that changing its approach to performing the OPTN contract, such as separating the boards of directors for the OPTN and for UNOS will cause "significant upheaval" to the protester's organization, placing it at a competitive disadvantage. Protester's Comments, May 21, 2018, at 8.

The protester contends that the RFP's requirement regarding the board of directors is an improper attempt to disadvantage UNOS by "tilting the playing field towards non-incumbents." Id. UNOS argues that our Office's decision in Crane & Co. stands for the proposition than an agency may not seek to enhance competition by making it more difficult for an incumbent offeror to compete.

The agency explains that the separation of the OPTN board of directors from the contractor's board of directors is necessary to avoid any conflicts of interest between the two entities, as follows:

> While overseeing and evaluating operations of the current OPTN Board, whose membership has a one-to-one correspondence with the membership of the current contractor's Board of Directors, HRSA staff regularly observed instances where it was not clear whether the OPTN Board was acting on an OPTN-related matter or a contractor-related matter. The one-to-one correspondence between these boards amplified the lack of clarity. HRSA's prohibition on "dual-membership" was inserted in the solicitation to limit potential conflicts of interest for OPTN Board members that may result from decisions regarding contractor activities outside of the OPTN. The separation of the OPTN Board from the contractor's own Board of Directors will facilitate the ability of each respective board to make decisions in the interest of the sole entity to which it owes a fiduciary duty. The prohibition will also ensure clarity of focus when the OPTN Board is meeting, as there will be no confusion as to what "function" the OPTN Board is performing at that time.

Statement of COR at 2.

As a general matter, we think that the agency has set forth a reasonable basis for the requirement to separate the board of directors of the OPTN from the board of directors of the OPTN contractor. The agency explains that it believes that the OPTN board should focus on matters relating solely to the OPTN and its functions, without any potential conflicts arising from the separate interests of the OPTN contractor. The protester argues that the agency's focus on potential conflicts arising from dual membership in the OPTN's and OPTN contractor's boards of directors is a "fabricated" argument intended to support its effort to harm the protester's competitive position. Protester's Comments on Agency' Responses, June 15, 2018, at 5. In this regard, the protester contends that the agency has not addressed other potential conflicts of interest regarding, for example, the possibly that OPTN board members might be

medical professionals whose interests are affected by OPTN decisions. Id. The potential existence of other conflicts, however, does not demonstrate that the agency's concern regarding dual membership in the OPTN's and OPTN contractor's boards of directors is unreasonable.

To the extent the protester argues that the requirement concerning the OPTN board of directors will have an adverse effect on UNOS's operations and ability to compete for the contract, we conclude that this is not an improper or unreasonable burden on the protester. UNOS's arguments rely in large part on our decision in Crane & Co., where we sustained a protest because the agency unreasonably imposed differing solicitation provisions on the incumbent and non-incumbent offerors. We conclude that Crane & Co. is not applicable here.

The protester in Crane & Co. argued that the solicitation for the production of currency paper was improper because it allowed non-incumbent awardees to receive the award of a contract with a 6-year term, but restricted the incumbent contractor to the award of a contract with a 4-year term. We agreed with the protester that the solicitation provision concerning the contract durations was improper because, at that time, 31 U.S.C. § 5114(c) prohibited the award of contracts for currency paper for longer than four years.[7] Crane & Co., supra, at 5-6. We acknowledged that the Department of the Treasury's intent in issuing the solicitation with the differences in terms for incumbent and non-incumbent offerors was to increase competition for a contract where the protester was a 125-year incumbent, and that our decision potentially reduced the likelihood of competition. Id. at 4-5. We concluded, however, that the express provisions of 31 U.S.C. § 5114(c) dictated our decision. Id. at 5-6.

Here, UNOS contends that it is disadvantaged because, as the incumbent, it has structured its organization and business operations in a way that would need to be changed under the terms of the RFP. Unlike the circumstances in Crane & Co., however, UNOS does not argue that the solicitation provides for different contractual award terms for incumbent and non-incumbent offerors. Instead, the alleged disadvantage cited by UNOS stems from the way it has performed as the incumbent.

As our Office has explained, an agency is not required to perpetuate a competitive advantage that an offeror may enjoy as the result of its performance of the current, or a prior, government contract. See Inventory Accounting Serv., B-286814, Feb. 7, 2001, 2001 CPD ¶ 37 at 4. Conversely, an agency is not required to structure a solicitation so as to eliminate a unique disadvantage that the incumbent contractor may experience as a result of an agency's otherwise unobjectionable requirements. See Exec Plaza, LLC, B-400107, B-400107.2, Aug. 1, 2008, 2008 CPD ¶ 143 at 9-10. Here, we see no basis to conclude that the agency is prohibited from requiring a change in the composition in the OPTN board of directors, even if it will effectively require the protester to change its

[7] The statute has since been amended and no longer limits the term of the award. See 31 U.S.C. § 5114(c).

current organizational approach of having the same individuals serve on the OPTN and UNOS's boards of directors. We therefore deny this aspect of the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel