In the United States Court of Federal Claims

No. 04-366C
Filed: August 31, 2004[1]
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THE ARORA GROUP, INC. **Plaintiff,** **v.** **UNITED STATES,** **Defendant,** **and** **CASEPRO, INC.,** **Defendant-Intervenor.**	**Post-Award Bid Protest; Injunctive Relief; Motion for Judgment on the Administrative Record; Proposal Evaluation.**

EDWARD J. TOLCHIN, Fettman, Tolchin & Majors, PC, Fairfax, Virginia, for the plaintiff.

HILLARY A. STERN, Trial Attorney; **BRIAN M. SIMKIN**, Assistant Director; **DAVID M. COHEN**, Director, Commercial Litigation Branch, Civil Division; **PETER D. KEISLER**, Assistant Attorney General, United States Department of Justice, for the defendant. **JONATHAN BAKER** and **KRYSTAL JORDAN**, General Law Division, Department of Health and Human Services, Washington, D.C., of counsel.

JONATHAN M. BAILEY, Bailey & Bailey, P.C., San Antonio, Texas, for the defendant-intervenor.

O P I N I O N

HORN, J.

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[1]This opinion was issued under seal on August 31, 2004. The parties were instructed to identify protected material subject to redaction. In response, the parties have stipulated that the opinion does not contain protected material. The original opinion is, therefore, reissued unsealed.

The plaintiff, Arora Group, Inc. (Arora), filed a post-award bid protest seeking to set aside the award of a contract by the United States Department of Health and Human Services (DHHS) to CasePro, Inc. (CasePro). The contract is for the acquisition of occupational health personnel to staff Federal Occupational Health Services "Service Provision Sites" in various locations in the western United States and territories of American Samoa and Guam. CasePro, the awardee, filed a motion to intervene, which the court granted. The court held a hearing on the preliminary injunction requested by the plaintiff, Arora. After consideration of the arguments presented by the parties, the court denied plaintiff's motion for a preliminary injunction. Subsequently, the parties designated an administrative record and filed cross-motions for judgment on the administrative record. The plaintiff seeks an order setting aside the contract award to CasePro and award of the contract to Arora.

FINDINGS OF FACT

On March 21, 2003, DHHS issued solicitation number 233-03-0306, a Request for Proposals (RFP) for Clinical Operations Support Services for western areas of the United States.[2] The solicitation was for a base year and three option years. Competition was limited to firms qualified under the Small Business Administration's 8(a) program.[3] The Work Statement enumerated the following responsibilities:

> The Contractor shall recruit, orient, train and oversee physicians, physician assistants, nurse practitioners, nurses, medical administrative support personnel, technical medical assistants, health educators and other professionals as necessary, to deliver required services and operate existing and future FOHS [Federal Occupational Health Services] Service Provision Sites (SPSs). Locations of SPSs include FOHS

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[2] For the purposes of the solicitation, the following states constitute "the Western Area": Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming, and the United States Territories of American Samoa and Guam.

[3] The original Small Business Act of 1953, Pub. L. No. 53-163, Title II, 67 Stat. 232 (1953), did not contain a "Section 8(a)." However, section 207(c) and section 207(d) empowered the SBA to enter into contracts with government agencies and to subcontract to small business concerns, 67 Stat. at 236. An amendment to the Small Business Act added Section 8(a) and provided, again, that the SBA could enter into contracts with government agencies and subcontract to small business concerns. Pub. L. No. 85-536, § 2 [8(a) (1), (2)], 72 Stat. 384, 389 (1958). In 1978, Section 8(a)(1)(C) was amended to include language, for the first time, which provided that the SBA could subcontract with "socially and economically disadvantaged small business concerns," Pub. L. No. 95-507, Title II, § 202(a), 92 Stat. 1760, 1761 (1978). The current version of "Section 8(a)" is codified at 15 U.S.C. § 637(a)(1)(B) (2000).

Occupational Health Centers (OHCs), FOHS Area Offices, and remote sites throughout the contract area.

Offerors also were advised that they should have "sufficient experience to provide a healthy working adult population with general types of services such as: response to emergencies; first aid and treatment for minor illnesses and injuries; health awareness and education programs using FOHS-approved training materials and protocols," in addition to other services.

The solicitation specified that offerors would be required to submit documents or present information relating to both a "Business" and a "Technical" proposal. The Business Proposal was to consist of information relating primarily to cost and pricing. The Technical Proposal was to consist of both a written and an oral component. According to the solicitation, the written portion of the Technical Proposal would include the following sections: (a) Transmittal Letter; (b) Statement of Offeror's Understanding; (c) Response to Four Elements of the Technical Evaluation Criteria (hereafter, Technical Merit), including: Experience and Capabilities, Qualifications of Key Personnel, Transition Plan, and Quality Assurance; (d) Oral Presentation Briefing Charts; and (e) Past Performance information. The oral portion of the Technical Proposal was only required of those offerors determined by the government to be within the competitive range after evaluation of the written portion of the Technical Proposal, Past Performance and Business Proposal.

The solicitation proposed award of the contract based on "the demonstrated capabilities of the Offeror in relation to the needs of the project as set forth in the solicitation." The solicitation specified that the award would be made to the responsible offeror whose proposal was "most advantageous to the Government based on the following factors: technical merit, past performance and cost." According to the solicitation, "[t]he technical proposal and past performance will receive paramount consideration in the selection of the Contractor for this acquisition. Cost/price will also be considered.[4] Therefore, in accordance with FAR 15.304(e),[5] all evaluation factors other than cost/price, when combined, are significantly more important than cost/price."

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[4] The solicitation specified that the offeror awarded the contract would "be compensated for actual hours incurred at the fully loaded fixed hourly rates" provided in the solicitation up to a specified ceiling.

[5] A solicitation must state, at a minimum, whether all evaluation factors other than cost or price when combined, are (1) significantly more important than cost or price; (2) approximately equal to cost or price; or (3) significantly less important than cost or price. See 41 U.S.C. § 253a(c)(1)(C) (2000); 48 C.F.R. § 15.304(e) (2002).

For review of an offeror's technical merit, the solicitation specified that the technical portion of each offeror's proposal would be based upon an evaluation by a Technical Evaluation Committee. According to the solicitation, each offeror's submission would be evaluated by the Technical Evaluation Committee on the basis of a 100 point scale as follows:

> Experience and Capabilities (20 Points): past experiences and current capabilities which enable the Offeror to operate a Federal occupational health program of the scope and complexity described in the Statement of Work, focusing on work successfully accomplished within the past five (5) years. The Offeror should cite the populations served, the volume and types of services provided, the range of labor categories employed, any innovations developed, significant occupational health or program management problems solved, and evidence of the client's degree of satisfaction with the program.
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> Transition Plan (15 Points): [detailed description of] the methods that will be used to ensure a smooth transition from the incumbent Contractor's operation to 100% operation by the Offeror.
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> Quality Assurance (10 Points): proposed quality assurance/quality improvement (QA/QI) plan.
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> Qualifications of Key Personnel (20 Points): Offeror's understanding of the qualifications required of the Key Personnel they propose to hire/assign to perform this Statement of Work, [including] specific requirements for the Project Director and Area Nurse Managers who have been designated as Key Personnel. . . . [Offerors were required to submit] CV's, resumes, and any other documentation deemed appropriate to demonstrate the Offeror's possession of competitively superior qualified Key Personnel.
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> Oral Presentation (35 Points): consist[ing] of evaluation of "General Technical Approach" for 15 points; "Problem Resolution" for 10 points; and responses to "Pop Quiz Questions" for 10 points.

Past performance was described in the solicitation as relating to "'quality' and how well a Contractor performed the services under a contract." According to the solicitation, offerors were to "be evaluated on their performance under existing and prior contracts for relevant services," and the government's "focus [would be] on information that demonstrates quality of performance relative to the acquisition under consideration." The solicitation provided that "[t]he Past Performance evaluation will be based on information obtained from references provided by the Offeror, as well as other relevant past performance information obtained from other sources known to the Government." Offerors were directed to submit, for both the Offeror and proposed subcontractors, "[a] list of the three (3) largest contracts awarded to the Offeror in the last three (3) years and three (3) current contracts in process that are

representative of the Offeror's ability to perform the services described in Section C of this solicitation." Included with the solicitation was a two-page "Past Performance Information Survey Questionnaire." The solicitation provided that "[i]nformation/evaluation of past performance will be randomly requested from references or other sources known to the Government utilizing the sample Past Performance Survey Questionnaire" reproduced in the solicitation documents.

The past performance questionnaires required an offeror's references to provide the "contract value," "period of performance" and a "general description or title of contract" performed by the offeror, and to rate the offeror's performance in the categories of "quality of service," "cost control," "timeliness of performance," "business relations," and "customer satisfaction." Included on the questionnaire was a five-tiered "evaluation scheme" ranging from -2 (poor) to +2 (excellent) which provided, in pertinent part:

+2	Excellent	Based on the Offeror's performance record, no doubt exists that the Offeror will successfully perform the required effort. A significant majority of sources of information are consistently firm in stating that the Offeror's performance was superior and that they would unhesitatingly do business with the Offeror again.
+1	Good	Based on the Offeror's performance record, little doubt exists that the Offeror will successfully perform the required effort. Most sources of information state that the Offeror's performance was good, better than average, etc., that they would do business with the Offeror again.
0	None	No past performance history identifiable -- neutral rating.[6]

According to the solicitation, the responses received were to be used by the government to "assess the relative risks associated with each technically acceptable Offeror. Performance risks are those associated with an Offeror's likelihood of success in performing the acquisition requirements as indicated by the Offeror's record of Past Performance." Finally, the solicitation provided that "[t]he assessment of performance risk is not intended to be the product of a mechanical or mathematical analysis of an Offeror's performance on a list

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[6] The lower tiers of the evaluation scheme, not at issue in this case, are, in descending order, -1 "Marginal Based on the Offeror's performance record, some doubt exists that the Offeror will successfully perform the required effort" and -2 "Poor Based on the Offeror's performance record, serious doubt exists that the Offeror will successfully perform the required effort."

of contracts, but rather the product of subjective judgment by the Government after it considers all available and relevant information."

The government received five timely proposals in response to the solicitation for the western area, including proposals from Arora and CasePro, both section 8(a) companies, as required by the solicitation. The four-person Technical Evaluation Committee performed a technical review of the proposals, independently utilizing score sheets and following the evaluation criteria contained in Section L of the solicitation. On May 15, 2003, the Technical Evaluation Committee panel determined by consensus that only Arora and CasePro had submitted technically acceptable proposals. On May 28, 2003, the contracting officer drafted a memorandum regarding the competitive range determination. According to this memorandum, Arora "received the highest technical score (50.25 out of 65 possible points) and is ranked first in technical merit. The Arora Group received the highest possible past performance rating of Excellent (+2) and has demonstrated that they have successfully provided services of the magnitude and scope required under this RFP." With respect to CasePro, the memorandum provided that:

> CasePro submitted a proposal that received the second highest technical score (44.75 out of 65 possible points) and is second in technical merit. CasePro a [sic] past performance rating of Good (+1). CasePro subcontracted with PPDG, the former incumbent for the FOHS services in the Western Area of the United States. While CasePro's past performance experience does not demonstrate prime contractor experience in providing services of this magnitude and scope, CasePro's subcontractor has demonstrated extensive occupational health experience and a strong history of Government experience.

On May 28, 2003, the contracting officer telephonically informed both Arora and CasePro that they were in the competitive range and scheduled oral presentations for both. The contracting officer noted that, at that time, "[i]t was determined that weaknesses/deficiencies associated with each offeror's proposal could be remedied in discussions and result in a final proposal revision that would provide either offeror a reasonable chance of being selected for contract award." The offerors' oral presentations were conducted on June 9 and 10, 2003, and then were evaluated and scored by the Technical Evaluation Committee. According to the "Composite Technical Evaluation Form" for the oral presentations, Arora received an average score of 22.25 of a total of 35 possible points, while CasePro received an average score of 24.25 of a total of 35 possible points.

Based on the Technical Evaluation Committee's comments, on June 12, 2004, the government sent written questions to the offerors along with a request for final proposal revisions. By June 20, 2003, DHHS had received final technical proposal revisions from both Arora and CasePro. The revised proposals were reviewed and, on July 11, 2003, the Technical Evaluation Committee sent the contracting officer its Final Technical Evaluation Report reflecting revised technical scores. The Report included the following final scores:

Firm Name	Original Technical Score	Revised Technical Score	Oral Presentation Score	Total Final Score
CasePro	44.75	61.75	24.25	86
Arora	50.25	58.75	22.25	81

Based on the technical evaluation consensus, the Technical Evaluation Committee recommended that CasePro be awarded the contract.

On October 6, 2003, the contracting officer prepared a Summary of Negotiations and Recommendation for Award. Noting that "CasePro, Inc. submitted the highest scored technically acceptable proposal and received a subjective past performance assessment of 'Good', posing no risk for successful contract performance, at a cost that has been determined to be fair, reasonable, realistic and is fully supported by current market place/industry cost information and projections," the contracting officer concluded that CasePro's proposal represented the best overall value to the government for successful contract performance.

Once the Small Business Administration determined that CasePro was eligible for the contract award, the government announced award of the contract to CasePro on October 14, 2003. Arora was notified of the award to CasePro on the same day. On October 15, 2003, Arora submitted a post-award debriefing request to DHHS. The contracting officer responded in writing to Arora on October 21, 2003, noting that:

> Significant areas of weaknesses/deficiencies were: Resumes of two (2) of the proposed Area Nurse Managers do not meet the AED/CPR certification requirements of RFP Section C.8.2. The Transition Plan does not demonstrate an understanding of the relationship between The Arora Group and the Contracting Officer. The Quality Assurance (QA) indicators on page 4-5 do not correspond to the QA Plan submitted in Appendix A. The proposal failed to address the indicators as requested in RFP Section C.17.7. The proposal does nott [sic] include specific methods for monitoring quality indicators. The QA Plan included a great deal of philosophy, but lacked actual detail as to "how" it will put into effect through contract performance. The QA Plan included great detail on process but failed to integrate with Federal Occupational Health Service (FOHS) QA process. The QA Plan requires Area Nurse Managers to review all patient surveys and "concern" which is unrealistic and inefficient.

Arora filed a protest contesting the DHHS' evaluation process with the General Accounting Office (GAO) on October 27, 2003. At the GAO, Arora argued that the agency's evaluation of its technical proposal, as noted in the October 21, 2003 debriefing by DHHS, was unreasonable. The GAO sustained one of Arora's three contentions, concluding that "the

only flaw in Arora's proposal under this criterion [Qualifications of Key Personnel] was an inconsequential matter of form that could not reasonably be considered a 'significant weakness/deficiency' in Arora's proposal, or provide a proper basis for differentiating between the technical merit of the proposals submitted." The Arora Group, B-293102, 2004 CPD ¶ 61, 2004 WL 437457, at *3 (Comp. Gen. Feb. 2, 2004). On February 2, 2004, the GAO dismissed Arora's remaining claims as without merit and recommended "that the agency reevaluate Arora's proposal under the qualifications of key personnel evaluation criterion and make a new source selection." Id. at *5.

On February 20, 2004, the contracting officer issued a "Revised Summary of Negotiations and Recommendation for Award" (Revised Summary) for the contract. The Revised Summary amended the July 11, 2003 Technical Evaluation Report, noting that "[t]he Contracting Officer concurs with GAO's determination that the same incumbent Area Nurse Managers are proposed by both firms. Therefore, no significant weakness/deficiency exists concerning the Area Nurse Managers proposed by AGI [Arora]." Accordingly, Arora's score for Key Personnel was revised to correspond to CasePro's score. This revision increased Arora's overall technical score by .75 points from 81 to 81.75. The Revised Summary also amended the original Past Performance Evaluation Report:

> The Contracting Officer reviewed the previously acquired Past Performance Information Survey Questionnaires submitted by two (2) of AGI's [Arora] references along with the reference information in AGI's May 2 technical proposal. Upon conclusion of the review, the Contracting Officer determined that the work performed by AGI under the listed references does not demonstrate AGI's ability to successfully perform the RFP Section C requirements, as they do not compare in size, scope or complexity. Other listed AGI references are for services that FOHS does not provide.

Accordingly, the contracting officer changed Arora's Past Performance Rating from "Excellent" (+2) to "Neutral" (0).

The contracting officer made a new source selection as reflected to her Revised Summary. Citing CasePro's "technical merit, including additional perceived technical benefits . . . [and] the results of the Past Performance Assessment," the contracting officer concluded that CasePro's proposal represented the best overall value to the government. After requesting, and receiving, a post-award debriefing, plaintiff Arora filed suit in this court.

DISCUSSION

The plaintiff has filed a post-award bid protest seeking the set aside of the contract award to CasePro and award of the contract to Arora. The plaintiff's challenge is to DHHS's evaluation of the proposals submitted. The plaintiff alleges that the government violated applicable statutes by creating and applying previously unstated past performance evaluation

criteria in determining the award to CasePro after the GAO's recommendation. Alternatively, Arora alleges that, even if the DHHS could have considered selected aspects of Arora's contract history under the Past Performance criteria, the DHHS did so unreasonably.[7] The court reviews the agency's procurement decision in this case on the basis of the administrative record filed with the court.

I. Standard of Review

The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, §§ 12(a), 12(b), 110 Stat. 3870, 3874 (1996), amended the Tucker Act and provided the United States Court of Federal Claims with post-award bid protest jurisdiction for actions filed on or after December 31, 1996. See 28 U.S.C. § 1491(b)(1)-(4) (2000). The statute provides that post-award protests of agency procurement decisions are to be reviewed under Administrative Procedure Act (APA) standards, making applicable the standards outlined in Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) and the line of cases following that decision. See, e.g., Banknote Corp. of Am. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004); Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1319 (Fed. Cir.), reh'g and reh'g en banc denied (2003); Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

Agency procurement actions should be set aside when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (2)(D) (2000).[8] In discussing the

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[7] Although plaintiff also has implied, in its complaint and other submissions, that the DHHS acted in bad faith, plaintiff's complaint did not plead bad faith and, at the May 19, 2004 hearing on the cross-motions for judgment on the administrative record, plaintiff's counsel specifically stated that bad faith was not an issue in this case, as follows:

The Court: "Bad faith is not an issue in the case, correct?"
Mr. Tolchin: "Correct."

[8] The full language of section 706 of the APA provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in

appropriate standard of review for bid protest cases, the United States Court of Appeals for the Federal Circuit has discussed specifically subsections (2)(A) and (2)(D) of 5 U.S.C. § 706. Impresa Contruzioni Geom. Domenico Garufi v. United States, 238 F.3d at 1332 n.5; see also Banknote Corp. of Am. v. United States, 365 F.3d at 1350 ("Among the various APA standards of review in section 706, the proper standard to be applied in bid protest cases is provided by 5 U.S.C. § 706(2)(A): a reviewing court shall set aside the agency action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (quoting Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1057-58 (Fed. Cir. 2000)); Info. Tech. & Applications Corp. v. United States, 316 F.3d at 1319 ("Consequently, our inquiry is whether the Air Force's procurement decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A) (2000)."); Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1085 (Fed. Cir.), reh'g and reh'g en banc denied (2001) ("The APA provides that a reviewing court must set aside agency actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A) (Supp. V 1999)."); RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1290 (Fed. Cir. 1999)

In Impresa Construzioni Geom. Domenico Garufi v. United States, the court wrote:

> Under the APA standards that are applied in the Scanwell line of cases, a bid award may be set aside if either: (1) [T]he procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure ... . When a challenge is brought on the first ground, the courts have recognized that contracting officers are "entitled to exercise discretion upon a broad range of issues confronting them" in the procurement process. Latecoere Int'l, Inc. v. United States Dep't of Navy, 19 F.3d 1342, 1356 (11th Cir. 1994). Accordingly, the

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> accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
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> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (2000).

> test for reviewing courts is to determine whether "the contracting agency provided a coherent and reasonable explanation of its exercise of discretion," id., and the "disappointed bidder bears a 'heavy burden' of showing that the award decision 'had no rational basis.'" Saratoga Dev. Corp. v. United States, 21 F.3d 445, 456 (D.C. Cir. 1994). When a challenge is brought on the second ground, the disappointed bidder must show "a clear and prejudicial violation of applicable statutes or regulations." Kentron [Hawaii, Ltd. v. Warner,] 480 F.2d [1166,] 1169 [(D.C. Cir. 1973)]; Latecoere, 19 F.3d at 1356.

Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d at 1332-33 (selected citations omitted); see also Banknote Corp. of Am. v. United States, 365 F.3d at 1351; OMV Med., Inc. v. United States, 219 F.3d 1337, 1343 (Fed. Cir. 2000).

A disappointed bidder has the burden of demonstrating the arbitrary and capricious nature of the agency decision by a preponderance of the evidence. See Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 995-96 (Fed. Cir. 1996); Labat-Andersen Inc. v. United States, 50 Fed. Cl. at 106; Emery Worldwide Airlines, Inc. v. United States, 49 Fed. Cl. 211, 222, aff'd, 264 F.3d 1071 (Fed. Cir. 2001); Dynacs Eng'g Co. v. United States, 48 Fed. Cl. at 619; Ellsworth Assocs., Inc. v. United States, 45 Fed. Cl. 388, 392 (1999), appeal dismissed, 6 Fed. Appx. 867 (Fed. Cir. 2001). The United States Supreme Court has identified sample grounds which can constitute arbitrary or capricious agency action:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also In re Sang-Su Lee, 277 F.3d 1338, 1342 (Fed. Cir. 2002) ("The agency must present a full and reasoned explanation of its decision ... . The reviewing court is thus enabled to perform a meaningful review ... . ").

Under an arbitrary or capricious standard, the reviewing court should not substitute its judgment for that of the agency, but should review the basis for the agency decision to determine if it was legally permissible, reasonable, and supported by the facts. Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43. "If the court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations." Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) (quoting M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1301 (D.C. Cir. 1971)); see also Seaborn Health Care, Inc. v. United States, 55 Fed. Cl. at 523 (quoting Honeywell, Inc. v. United States, 870 F.2d at 648 (quoting M. Steinthal &

Co. v. Seamans, 455 F.2d 1289, 1301 (D.C. Cir.1971))). As stated by the United States Supreme Court:

> Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted); see also Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974), reh'g denied, 420 U.S. 956 (1975); In re Sang-Su Lee, 277 F.3d at 1342; Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1058 (Fed. Cir.), reh'g denied (2000) ("The arbitrary and capricious standard applicable here is highly deferential. This standard requires a reviewing court to sustain an agency action evincing rational reasoning and consideration of relevant factors.") (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. at 285); Lockheed Missiles & Space Co. v. United States, 4 F.3d 955, 959 (Fed. Cir. 1993); ManTech Telecomms. and Info. Sys. Corp. v. United States, 49 Fed. Cl. 57, 63 (2001); Ellsworth Assocs., Inc. v. United States, 45 Fed. Cl. at 392 ("Courts must give great deference to agency procurement decisions and will not lightly overturn them.") (citing Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985)); Redland Genstar, Inc. v. United States, 39 Fed. Cl. 220, 231 (1997); Mike Hooks, Inc. v. United States, 39 Fed. Cl. 147, 154 (1997); Cincom Sys., Inc. v. United States, 37 Fed. Cl. 663, 672 (1997); Commercial Energies, Inc. v. United States, 20 Cl. Ct. 140, 145 (1990) ("In simple terms, courts should not substitute their judgments for pre-award procurement decisions unless the agency clearly acted irrationally or unreasonably.") (citations omitted).

Similarly, in E.W. Bliss Co. v. United States, the United States Court of Appeals for the Federal Circuit offered guidance on the applicable standard of review:

> Procurement officials have substantial discretion to determine which proposal represents the best value for the government. See Lockheed Missiles & Space Co., Inc. v. Bentsen, 4 F.3d 955, 958 (Fed. Cir. 1993); cf. Widnall v. B3H, 75 F.3d 1577 (Fed. Cir. 1996) (holding that Board of Contract Appeals should defer to agency's best value decision as long as it is "grounded in reason ... even if the Board itself might have chosen a different bidder"); In re General Offshore Corp., B-251969.5, B-251969.6, 94-1 Comptroller Gen.'s Procurement Decisions (Federal Publications Inc.) ¶ 248, at 3 (Apr. 8, 1994) ("In a negotiated procurement, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. Where an evaluation is challenged, we will examine the agency's evaluation to ensure that it was reasonable

> and consistent with the evaluation criteria and applicable statutes and regulations, since the relative merit of competing proposals is primarily a matter of administrative discretion.") (citations omitted).
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> Bliss' [other challenges to the procurement] deal with the minutiae of the procurement process in such matters as technical ratings . . . which involve discretionary determinations of procurement officials that a court will not second guess. See Lockheed Missiles & Space Co., 4 F.3d at 958; Grumman Data Systems Corp. v. Widnall, 15 F.3d 1044, 1048 (Fed. Cir. 1994) ("[S]mall errors made by the procuring agency are not sufficient grounds for rejecting an entire procurement.") ... .

E.W. Bliss Co. v. United States, 77 F.3d 445, 449 (Fed. Cir. 1996); see also JWK Int'l Corp. v. United States, 49 Fed. Cl. 371, 388 (2001), aff'd, 279 F.3d 985 (Fed. Cir.), reh'g denied (2002).

In a negotiated procurement, contracting officers are generally afforded even greater decision making discretion, in comparison to their role in sealed bid procurements. "It is well-established that contracting officials are accorded broad discretion in conducting a negotiated procurement ... ." Hayes Int'l Corp. v. United States, 7 Cl. Ct. 681, 686 (1985) (citing Sperry Flight Sys. v. United States, 212 Ct. Cl. 329, 339-40 (1977)); see also Galen Med. Assoc., Inc. v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004); Am. Tel. and Tel. Co. v. United States, 307 F.3d 1374, 1379 (Fed. Cir. 2002), cert. denied, _ U.S. _, 124 S. Ct. 56 (2003); Lockheed Missiles & Space Co. v. United States, 4 F.3d at 958; Cybertech Group, Inc. v. United States, 48 Fed. Cl. at 646 ("The court recognizes that the agency possesses wide discretion in the application of procurement regulations."). In Burroughs Corp. v. United States, the court described the broad discretion afforded a contracting officer in a negotiated procurement as follows:

> Remarking on the contracting officer's discretion in negotiation the court in Sperry Flight Systems Division v. United States, 212 Ct. Cl. 329, 339, 548 F.2d 915, 921 (1977) noted that "the decision to contract - a responsibility that rests with the contracting officer alone - is inherently a judgmental process which cannot accommodate itself to absolutes, at least not without severely impairing the quality of the judgment called for ..." and that, "effective contracting demands broad discretion." Because of the breadth of discretion given to the contracting officer in negotiated procurement, the burden of showing this discretion was abused, and that the action was "arbitrary and capricious" is certainly much heavier than it would be in a case of formal advertising.

Burroughs Corp. v. United States, 223 Ct. Cl. 53, 65, 617 F.2d 590, 598 (1980) (citation omitted; omissions in original); see also Galen Med. Assoc., Inc. v. United States, 369 F.3d at 1330; LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1555 (Fed. Cir. 1995); JWK Int'l Corp. v. United States, 49 Fed. Cl. at 388; Mantech Telecomms. and Info. Sys. Corp. v. United States, 49 Fed. Cl. at 64.

The United States Court of Appeals for the Federal Circuit also has stated that:

> Effective contracting demands broad discretion. Burroughs Corp. v. United States, 617 F.2d 590, 598 (Ct. Cl. 1980); Sperry Flight Sys. Div. v. United States, 548 F.2d 915, 921, 212 Ct. Cl. 329 (1977); see NKF Eng'g, Inc. v. United States, 805 F.2d 372, 377 (Fed. Cir. 1986); Tidewater Management Servs., Inc. v. United States, 573 F.2d 65, 73, 216 Ct. Cl. 69 (1978); RADVA Corp. v. United States, 17 Cl. Ct. 812, 819 (1989), aff'd, 914 F.2d 271 (Fed. Cir. 1990). Accordingly, agencies "are entrusted with a good deal of discretion in determining which bid is the most advantageous to the Government." Tidewater Management Servs., 573 F.2d at 73, 216 Ct. Cl. 69 ... .

Lockheed Missiles & Space Co., Inc. v. Bentsen, 4 F.3d at 958-59; see also Grumman Data Sys. Corp. v. Dalton, 88 F.3d at 995; Grumman Data Sys. Corp. v. Widnall, 15 F.3d 1044, 1046 (Fed. Cir. 1994).

The wide discretion afforded contracting officers extends to a broad range of procurement functions, including the determination of what constitutes an advantage over other proposals. See Compubahn v. United States, 33 Fed. Cl. 677, 682-83 (1995) ("[T]his court is in no position to challenge the technical merit of any comments made on the evaluation sheets or decisions made during the several stages of evaluation.") (footnote omitted). As noted above, the question is not whether the court would reach the same conclusions as the agency regarding the comparison of proposals, but rather, whether the conclusions reached by the agency lacked a reasonable basis and, thus, were arbitrary or capricious.

To prevail in a bid protest case, the protester also must demonstrate prejudice. See 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error"). Expanding on the prejudice requirement, the United States Court of Appeals for the Federal Circuit has held that:

> To prevail in a bid protest, a protester must show a significant, prejudicial error in the procurement process. See Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996); Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996). "To establish prejudice, a protester is not required to show that but for the alleged error, the protester would have been awarded the contract." Data General, 78 F.3d at 1562 (citation omitted). Rather, the protester must show "that there was a substantial chance it would have received the contract award but for that error." Statistica, 102 F.3d at 1582; see CACI, Inc.-Fed. v. United States, 719 F.2d 1567, 1574-75 (Fed. Cir. 1983) (to establish competitive prejudice, protester must demonstrate that but for the alleged error, "'there was a substantial chance that [it] would receive an award--that it was within the zone of active consideration.'") (citation omitted).

Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir.), reh'g denied

(1999) (citation omitted in original); see also Galen Med. Assoc., Inc. v. United States, 369 F.3d at 1330; Info. Tech. & Applications Corp. v. United States, 316 F.3d at 1319; Myers Investigative & Sec. Servs., Inc. v. United States, 275 F.3d 1366, 1370 (Fed. Cir. 2002); Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d at 1332-33; OMV Med., Inc. v. United States, 219 F.3d at 1342; Advanced Data Concepts, Inc. v. United States, 216 F.3d at 1057; Stratos Mobile Networks USA, LLC v. United States, 213 F.3d 1375, 1380 (Fed. Cir. 2000). In Data General Corporation v. Johnson, the United States Court of Appeals for the Federal Circuit wrote:

> We think that the appropriate standard is that, to establish prejudice, a protester must show that, had it not been for the alleged error in the procurement process, there was a reasonable likelihood that the protester would have been awarded the contract .... The standard reflects a reasonable balance between the importance of (1) averting unwarranted interruptions of and interferences with the procurement process and (2) ensuring that protesters who have been adversely affected by allegedly significant error in the procurement process have a forum available to vent their grievances.

Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996).

II. Evaluation of Past Performance

The plaintiff claims that the DHHS, in reaching its decision to award CasePro the contract, violated applicable statutes and regulations. Plaintiff argues that it was improper for the DHHS not to contact all of Arora's references even though the DHHS deemed some of the references irrelevant to the current contract because they involved different medical specialties. The plaintiff also claims that the agency's post-GAO decision consideration of the size, scope and complexity of past contracts as part of the Past Performance evaluation was a violation of 41 U.S.C. §§ 253a, 253b (2000) and 48 C.F.R. §§ 15.304 and 15.305 (2002), because such factors are inconsistent with those stated in the solicitation.

The framework within which contracting officers administer proposal review and contract award is set out in various provisions of the United States Code and Code of Federal Regulations. The guidelines for developing solicitations and performing evaluations are included in 41 U.S.C. § 253a and FAR 15.304. The regulations stand, in part, for the proposition that an agency must evaluate proposals and assess their relative qualities "solely on the factors and subfactors specified in the solicitation." 48 C.F.R. § 15.304. Pursuant to 41 U.S.C. § 253b, agencies are required to "evaluate sealed bids and competitive proposals, and award a contract, based solely on the factors specified in the solicitation." FAR 15.305(a) echoes this rule. See also Gulf Group, Inc. v. United States, 56 Fed. Cl. 391, 397 (2003) ("It is hornbook law that agencies must evaluate proposals and make awards based on the criteria stated in the solicitation.").

The FAR also states that "[p]roposal evaluation is an assessment of the proposal and the *offeror's ability to perform the prospective contract successfully*." 48 C.F.R. § 15.305(a) (emphasis added). Specifically, with respect to past performance, the FAR provides that:

> (2) Past performance information is one indicator of an offeror's ability to perform the contract successfully.... (ii) The solicitation shall describe the approach for evaluating past performance, including evaluating offerors with no relevant performance history, and shall provide offerors an opportunity to identify past or current contracts...for efforts similar to the Government requirement.... The source selection authority shall determine the relevance of similar past performance information....

48 C.F.R. § 15.305(a).

The court's review of an agency's "evaluations of an offeror's technical proposal and past performance...should be limited to determining whether the evaluation was reasonable, consistent with the stated evaluation criteria and [in] compli[ance] with relevant statutory and regulatory requirements." JWK Int'l Corp. v. United States, 52 Fed. Cl. 650, 659 (2002). In reviewing the language of the solicitation, "we must consider the solicitation as a whole, interpreting it in a manner that harmonizes and gives reasonable meaning to all of its provisions." Banknote Corp. of Am., Inc. v. United States, 365 F.3d at 1353 (citing Coast Fed. Bank, FSB v. United States, 323 F.3d 1035, 1038 (Fed. Cir. 2003)).

There is no bright-line requirement concerning which or how many past performance references a reviewing agency must contact when conducting a past performance evaluation. See Seattle Sec. Servs., Inc. v. United States, 45 Fed. Cl. 560, 567 (2000) ("Agency personnel are generally given great discretion in determining what references to review in evaluating past performance."); Forestry Surveys & Data v. United States, 44 Fed. Cl. 493, 499 (1999) ("[A]n agency, in evaluating past performance, can give more weight to one contract over another if it is more relevant to an offeror's future performance on the solicited contract."). Similarly, "[t]here is no requirement that all references listed in a proposal be checked." Seattle Sec. Servs., Inc. v. United States, 48 Fed. Cl. at 567. However, the court's deference to an agency's discretion in performing past performance evaluations is not without limit, and it is settled law that past performance evaluations are subject to the same APA review as other agency actions challenged in this court in a bid protest. See id. at 567, 569 ("[B]ound by the arbitrary and capricious standard of review, the exercise of this discretion obviously must be reasonable . . . .").

With respect to the plaintiff's allegation that it was improper for the agency to request past performance evaluations from only those of Arora's listed references involving medical specialties which the agency deemed relevant to the acquisition, plaintiff has not demonstrated that the DHHS abused its discretion by electing not to contact three of Arora's

six proffered references.[9] The court notes that the contracting officer also selectively contacted the references submitted by CasePro, choosing to contact one of the four references provided for CasePro and both of the two references provided for CasePro's subcontractor, PPDG. The solicitation informed offerors that "[t]he Government will focus on information that demonstrates quality of performance relative to the acquisition under consideration. . . . [and] is not required to contact all references provided by the Offeror." Also, the forms to be used by offerors to identify reference contacts as part of their initial proposal submission requested that offerors "[e]xplain why you consider the services *similar to the services required by this solicitation*," giving offerors notice that the similarity of services would play a role in the contracting officer's review. (emphasis added). Finally, the evaluation scheme in the solicitation provided, "[w]hen assessing performance risks, the Government will focus on the past performance of the Offeror *as it relates to all acquisition requirements* . . . ." (emphasis added). Thus, the contracting officer's selection of references based on an assessment that the references were, or were not, related to "all acquisition requirements" was well within the announced evaluation criteria included in the solicitation.

Similarly, the record does not support plaintiff's allegation that the DHHS violated applicable statutes when the contracting officer adjusted Arora's Past Performance rating downward after the GAO decision, based on a consideration of the size, scope and complexity of Arora's past performance. Plaintiff does not argue that the DHHS could not reevaluate Arora's Past Performance rating, only that its consideration of size, scope and complexity factors as part of the Past Performance evaluation violated statutory and regulatory provisions. According to the plaintiff, after the GAO decision, the DHHS' reevaluation ignored the language of the solicitation in its definition of Past Performance. The plaintiff argues that the solicitation specified that DHHS would assess the scope and complexity of Arora's past contracting experience as part of Corporate Experience, therefore, DHHS should not be allowed to assess scope and complexity as part of its evaluation of Arora's "Past Performance."

In essence, the plaintiff argues that the language of the solicitation sets forth a straightforward distinction between the evaluation of Past Performance and the evaluation of Corporate Experience which the DHHS violated. In its complaint, plaintiff asserts that "the agency explained that its evaluation of Past Performance would focus on *quality*, whereas its evaluation of Corporate Experience would focus on *quantity*." (emphasis in original). In an attempt to show that the solicitation did not contemplate that "'scope and complexity' such as the extent of the 'populations served' or the 'volume and types of services' or the 'range of labor categories employed'" would be relevant to Past Performance, plaintiff points to both the lack of specific language related to "quantity" in the Past Performance Information Survey

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[9] The administrative record includes a total of two completed Past Performance Questionnaires for Arora because the third reference contacted, the United States Immigration and Naturalization Service, did not respond to the contracting officer's request.

Questionnaire and the following statement in the solicitation: "Past Performance relates to the 'quality' and how well a Contractor performed the services under a contract. It is not to be confused with Corporate Experience." Corporate Experience is referred to in the solicitation as dealing with "past experiences and current capabilities which enable the Offeror to operate a Federal occupational health program of the scope and complexity described in the Statement of Work, focusing on work successfully accomplished within the past five (5) years."

Examining the words of the solicitation,[10] the court concludes that the solicitation puts offerors on notice that, while judgments about the "quality" of an offeror's past efforts are to be reviewed under the Past Performance heading, "quantity" considerations, in other words, evaluation of the capability of an offeror to perform an effort of the size, scope and complexity of the acquisition, informs the entire evaluation. Quantity is one element of corporate experience, but not one to be considered in isolation. Thus, the statement that Past Performance "relates to . . . 'quality' and . . . is not to be confused with Corporate Experience," considered in relation to the solicitation as a whole, serves to specify that the distinction between the evaluation of Past Performance and Corporate Experience is that Past Performance is concerned with "quality of past performance," whereas Corporate Experience is not. Furthermore, both Past Performance and Corporate Experience, under this solicitation, may review the scope and complexity of prior contract work.

The solicitation establishes that the agency's purpose in the bid process was to determine an offeror's capability to meet the needs of the acquisition, a requirement of considerable size, scope and complexity. Therefore, each evaluation factor must logically be understood as consistent with that general scheme. As one of the primary goals of the Past Performance evaluation is to assess performance risk, to the extent that the quality of an offeror's performance on past contract efforts speaks to a contractor's capability to successfully perform a prospective contract, differences in the size, scope and complexity of the past contracts and the subject contract of the solicitation may either increase or decrease the usefulness of the evaluation to the agency's determination of performance risk.

The solicitation provides that the quality of an offeror's past performance is referred to as an evaluative factor exclusively under the Past Performance factor. However, the solicitation includes consideration of factors related to size and scope in both Past Performance and Corporate Experience. In the solicitation section dealing with Past Performance, a few sentences after the statement that Past Performance "relates to . . . 'quality'," the solicitation instructs offerors to submit "[a] list of the three (3) *largest* contracts

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[10] The court notes that the solicitation as written was not a model of clarity. Nonetheless, the court is convinced that offerors were put on sufficient notice of the information to be reviewed so that after review of "all available and relevant information" evaluators could choose the offer "most advantageous to the government."

awarded to the Offeror in the last three (3) years and three (3) current contracts in process that are *representative of the Offeror's ability to perform the services described* in . . . this solicitation." (emphasis added). Also, offerors were instructed that, among other things, the "Past Performance Section of the written technical proposal shall provide . . . [a d]iscussion of the similarities and differences between this proposed effort and the contracts listed for past performance." Thus, Past Performance was reasonably concerned not only with the quality of an offeror's past performance, but also the relevance of that past performance to the prospective contract work.

With respect to the questionnaire, while the court recognizes that the Performance Information Survey Questionnaire does not include specific questions regarding scope and complexity, the record reflects the government's intent to obtain and analyze past performance data within the context of the needs of the acquisition in question. The agency's determination of the relevance of past contracts for the purposes of past performance evaluation is specifically sanctioned by the FAR[11] and, necessarily, involves an inquiry into the scope and complexity of the work performed. The evaluation scheme set forth in the solicitation at Section M.5.2 provides that the government will focus on past performance "as it relates to all acquisition requirements."

In addition, the following solicitation language demonstrates that the contracting officer's assessment of an offeror's likelihood of success based on her complete evaluation of the offeror's past performance "as it relates to the acquisition requirements" is a "factor . . . specified in the solicitation":

> The Government will assess the relative risks associated with each technically acceptable Offeror. Performance risks are those associated with an Offeror's likelihood of success in performing the acquisition requirements as indicated by the Offeror's record of Past Performance. The assessment of performance risk is not intended to be the product of a mechanical or mathematical analysis of an Offeror's performance on a list of contracts, but rather the product of subjective judgment by the Government after it considers all available and relevant information.

Ultimately, for plaintiff's argument to succeed, this court would have to accept the narrow reading of the solicitation that the plaintiff appears to advocate, in which parts of the solicitation would be read and applied in isolation and without regard to the goals of the solicitation. However, as stated earlier, this court "must consider the solicitation as a whole," Banknote Corp. of America v. United States, 365 F.3d at 1353. The court, therefore, finds that the contracting officer's critical assessment of the similarity of prior contracts to the present acquisition is an investigation sanctioned by the solicitation and the FAR. See Info. Tech. &

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[11] FAR 15.305(a)(2)(ii) ("The source selection authority shall determine the relevance of similar past performance information.").

Applications Corp. v. United States, 51 Fed. Cl. 340 (2001) (finding that, contrary to plaintiff's assertion that the defendant used evaluation criteria not stated in the solicitation, the defendant's consideration of certain factors was proper as those factors dealt with "overarching requirements" of the effort).

When a government contract award is challenged on the ground that the award was made in violation of applicable statutes and regulations, "the disappointed bidder must show 'a clear and prejudicial violation of applicable statutes or regulations.'" Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d at 1333 (quoting Kentron Hawaii, Ltd. v. Warner, 480 F.2d 1166, 1169 (D.C. Cir. 1973)). Because the DHHS' actions are not found to be in violation of the applicable statutes and regulations, the court need not reach the issue of prejudice to the protester.

Arora offers an alternative argument that, even if the DHHS' evaluation was not contrary to applicable statutes and regulations, "its definition of experience in this case as, in effect, contract 'size,'" was itself arbitrary and capricious. Plaintiff's complaint states that the definition that the DHHS provided for contract size is "simply . . . number of offices and number of employees." The thrust of Arora's argument that the DHHS acted unreasonably is, basically, that "[f]ocus on size . . . is irrational when attempting to determine scope and complexity," such that DHHS' evaluation of Arora's past performance with respect to the scope and complexity of its previous efforts was unreasonable because it focused, according to Arora, exclusively on contract size.

Recovery by Arora is dependent upon a showing of arbitrary or capricious action or some abuse of discretion by the government in its evaluation of Past Performance. 5 U.S.C. § 706(2)(A). In order to do so, Arora "must show that there was no reasonable basis for the decision" to consider contract size as a relevant indicator of the scope and complexity of previous contracts. Continental Bus. Enters., Inc. v. United States, 196 Ct. Cl. 627, 637-38, 452 F.2d 1016, 1021 (1971). The court should not substitute its judgment for that of the agency, even if reasonable minds could reach differing conclusions. CRC Marine Servs., Inc. v. United States, 41 Fed. Cl. 66, 83 (1998). Therefore, as long as a rational basis is articulated and relevant factors are considered, the DHHS' action must be upheld. See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. at 285-86.

The plaintiff alleges that the DHHS' evaluation of Arora as lacking in experience with contracts of a similar "scope and complexity" was made on the basis of information solely about the "size" of Arora's contracts. According to the plaintiff, the agency could not have considered anything other than the size of Arora's contracts: "DHHS does not have in the record real scope and complexity information about past performance references because it never sought that information as part of this procurement." Implicit in plaintiff's allegation is the incorrect assumption that DHHS made its evaluation considering solely the references provided by Arora itself and that plaintiff knew each document reviewed and each contact made by the agency during the course of the evaluation. However, the contracting officer is

specifically given the responsibility and authority to, "make findings and determinations on behalf of the Government," based on "information obtained from references provided by the Offeror, as well as other relevant past performance information obtained from other sources known to the Government." Further, the solicitation specifies that the ultimate assessment of performance risk will be made "by the Government after it considers *all available and relevant information*." (emphasis added). Even prior to the GAO protest and the subsequent downgrading of Arora's Past Performance rating, the contracting officer had made an assessment that, although Arora had received a +2 rating from its references:

> consideration must be given to relationship of the contracts that were evaluated for past performance vs. the size and scope of the services for this requirement. AIG's [Arora's] past performance evaluation revealed that they provide similar occupational health services, but the size and scope are limited to servicing one (1) Federal agency under a given contract with contract performance limited within the smaller geographical area. AIG did not demonstrate a past performance record of servicing multiple Federal agencies over a multi-state area which is necessary for successful contract performance of this requirement. Therefore, while AIG's performance risk assessment of work they current [sic] perform or have performed over the past three (3) years is representative of "no doubt of successful contract performance," there is some concern and unknown risk associated with performance of a requirement of this size and scope.

In fact, the contracting officer's assessment of Arora, as recorded in each of her post-competitive range determination evaluations, demonstrates that she concluded that while Arora received excellent reviews from its references, "they do not appear to have a record of performance (current or last three (3) years) in providing these services in the size and scope of this requirement (multi-state; multi-facility; multi-agency)." The contracting officer made a similar assessment of CasePro noting, "CasePro does not appear to have a past performance record in performing occupational health services of the size and scope of this requirement." However, because its primary subcontractor, as the incumbent, had a record of successful performance on a contract equivalent in size and complexity, the contracting officer determined that CasePro represented a lesser relative performance risk than did Arora. Such an investigation and weighing process, using "available and relevant information" falls well within the sphere of the contracting officer's responsibility to assess "the relative risks associated with each technically acceptable Offeror."

The plaintiff's argument that small contracts can be complex and, conversely, large contracts can be simple, does not necessarily demonstrate that the agency's selection of CasePro was arbitrary, capricious or not in accordance with the law. As long as a rational basis is articulated and relevant factors are considered, the action by the DHHS must be upheld. See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. at 285-86. The contract at issue involves over 2,475 interagency agreements at 54 sites, covering 13 western states and two territories. The plaintiff's references provided past performance data

for contracts involving, for the National Institutes of Standards & Technology, services at one site with a staff of one full-time and two part-time health professionals and one medical secretary; and, for the Office of Naval Research, services at one site with a staff of one full-time equivalent registered nurse (using two part-time employees). As noted by the DHHS' November 26, 2003 response to Arora's protest, the contracting officer "reasonably gave great weight to the size of prior contracts used in the evaluation, since the similarity of prior contracts is the single most important factor in evaluating risk of successful performance." The court cannot say that such a determination by the agency is arbitrary or capricious or that it falls outside the realm of the discretion reasonably accorded the agency in its evaluation and award process. The court finds that, in this case, using the size of past contracts to evaluate the size and scope of a bidder's past performance has a rational basis and must be sustained.

III. Injunctive Relief

The plaintiff seeks permanent injunctive relief, setting aside the award to CasePro and awarding the DHHS contract to Arora. requiring the Navy to: (1) cancel the award of the solicitation to Lotos; (2) evaluate Conscoop's price proposal, as submitted; and (3) award the solicitation to Conscoop, since its price proposal is lower than that of Lotos. Plaintiff alleges that it will incur 1,118,714 Euros in lost profits, if injunctive relief is not granted. Courts should interfere with the government procurement process "only in extremely limited circumstances." Banknote Corp. of Am., Inc. v. United States, 56 Fed. Cl. at 380 (quoting CACI, Inc.-Fed. v. United States, 719 F.2d 1567, 1581 (Fed. Cir. 1983) (quoting United States v. John C. Grimberg Co., 702 F.2d at 1372), aff'd, 365 F.3d 1345 (Fed. Cir. 2004))); see also Mantech Telecomms. and Info. Sys. Corp. v. United States, 49 Fed. Cl. at 64 (emphasizing that injunctive relief is not routinely granted) (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)). Because injunctive relief is extraordinary in nature, a plaintiff must demonstrate the right to such relief by clear and convincing evidence. Bannum, Inc. v. United States, 56 Fed. Cl. 453, 457 (2003) (quoting Bean Dredging Corp. v. United States, 22 Cl. Ct. 519, 522 (1991)); Seattle Sec. Servs., Inc. v. United States, 45 Fed. Cl. 560, 566 (2000); Delbert Wheeler Constr., Inc. v. United States, 39 Fed. Cl. 239, 251 (1997), aff'd, 155 F.3d 566 (Fed. Cir. 1998) (table); Compliance Corp. v. United States, 22 Cl. Ct. 193, 206 & n.10 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992) (table); but see Magnavox Elec. Sys. Co. v. United States, 26 Cl. Ct. 1373, 1378 & n.6 (Fed. Cir. 1992). The decision on whether or not to grant an injunction is within the sound discretion of the trial court. See FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993); Asociacion Colombiana de Exportadores de Flores v. United States, 916 F.2d 1571, 1578 (Fed. Cir. 1990). Once injunctive relief is denied, "the movant faces a heavy burden of showing that the trial court abused its discretion, committed an error of law, or seriously misjudged the evidence." FMC Corp. v. United States, 3 F.3d at 427.

To obtain a temporary restraining order or preliminary injunction, the plaintiff must carry the burden of establishing entitlement to extraordinary relief based on the following factors:

> (1) the likelihood of plaintiff's success on the merits of its complaint; (2) whether plaintiff will suffer irreparable harm if the procurement is not enjoined; (3) whether the balance of hardships tips in the plaintiff's favor; and (4) whether a preliminary injunction will be contrary to the public interest.

ES-KO, Inc. v. United States, 44 Fed. Cl. 429, 432 (1999) (citing FMC Corp. v. United States, 3 F.3d at 427); see also Seaborn Health Care, Inc. v. United States, 55 Fed. Cl. 520, 523-24 (2003); OAO Corp. v. United States, 49 Fed. Cl. 478, 480 (2001) ("'When deciding if a TRO is appropriate in a particular case, a court uses the same four-part test applied to motions for a preliminary injunction.'") (quoting W & D Ships Deck Works, Inc. v. United States, 39 Fed. Cl. 638, 647 (1997)); Dynacs Eng'g Co. v. United States, 48 Fed. Cl. 614, 616 (2001). The United States Court of Appeals for the Federal Circuit, in FMC Corporation v. United States, noted that:

> No one factor, taken individually, is necessarily dispositive. If a preliminary injunction is granted by the trial court, the weakness of the showing regarding one factor may be overborne by the strength of the others. If the injunction is denied, the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned the other factors, to justify the denial.

FMC Corp. v. United States, 3 F.3d at 427 (citations omitted).

The test for a permanent injunction is almost identical to that for a temporary restraining order or preliminary injunction, but rather than the likelihood of success on the merits, a permanent injunction requires success on the merits. The court in Bean Stuyvesant, L.L.C. v. United States set out the test:

> (1) [A]ctual success on the merits; (2) that [plaintiff] will suffer irreparable injury if injunctive relief were not granted; (3) that, if the injunction were not granted, the harm to plaintiff outweighs the harm to the Government and third parties; and (4) that granting the injunction serves the public interest.

Bean Stuyvesant, L.L.C. v. United States, 48 Fed. Cl. 303, 320-21 (2000) (citing Hawpe Constr., Inc. v. United States, 46 Fed. Cl. 571, 582 (2000), aff'd, 10 Fed. Appx. 957 (Fed. Cir. 2001)); see also ATA Defense Indus., Inc. v. United States, 38 Fed. Cl. 489, 505 n.10 (1997) ("'The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.'") (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987)).

In the case currently before the court, since the plaintiff does not prevail on the merits, it has failed to satisfy the first requirement for obtaining injunctive relief. Given the balancing test for injunctive relief, the remaining factors do not, under the present facts, overcome plaintiff's failure to prevail on the merits. Therefore, plaintiff's motion for injunctive relief is denied.

CONCLUSION

After careful review of the administrative record, the conclusion of the court is that the plaintiff has failed to establish that the defendant acted arbitrarily, capriciously, or not in accordance with the law during the procurement at issue. The court **DENIES** the plaintiff's bid protest and motion for judgment on the administrative record. The plaintiff's request for injunctive relief also is **DENIED**. Defendant's and defendant-intervenor's cross-motions for judgment on the administrative record are, hereby, **GRANTED**. The clerk's office shall enter **JUDGMENT** for defendant and defendant-intervenor, consistent with this opinion.

IT IS SO ORDERED.

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MARIAN BLANK HORN
Judge