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# Decision

**Matter of:** Next Tier Concepts, Inc.; MAXIMUS Federal Services, Inc.

**File:** B-414337; B-414337.2

**Date:** May 15, 2017

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Paul R. Hurst, Esq., Thomas P. Barletta, Esq., Michael N. Navarre, Esq., and Raquel N. Parker, Esq., Steptoe & Johnson LLP, for Primus Solutions, LLC, an intervenor.

Austin Fulk, Esq., Office of Personnel Management, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest challenging agency's evaluation of price proposals for realism is sustained where record shows that, although the agency's price evaluators found the awardee's prices so low that it might not understand the technical requirements being solicited, these findings apparently were never communicated to the agency's technical evaluators or considered in connection with the agency's source selection decision.

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## DECISION

Next Tier Concepts, Inc. (NTC) of Vienna, Virginia, and MAXIMUS Federal Services, Inc. (MF), of Reston, Virginia, protest the award of a contract to Primus Solutions, LLC (PS), of Beltsville, Maryland, under request for proposals (RFP) No. OPM15-16-R-0002, issued by the Office of Personnel Management (OPM) for investigative support services. Both protesters maintain that the agency miscalculated proposals, engaged in misleading discussions and made an unreasonable source selection decision.

We sustain the protests in part, deny them in part, and dismiss them in part.<sup>1</sup>

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<sup>1</sup> In this decision, we refer to the agency report (AR) filed in connection with NTC's protest as the NTCAR and the agency report filed in connection with MF's protest as the MFAR.

## BACKGROUND

The RFP contemplates the award, on a best-value basis, of an indefinite-delivery, indefinite-quantity contract for a base period of 2 years and three 1-year option periods to perform investigative support services. RFP at 7-14. Firms were advised that the agency would evaluate proposals considering price and several non-price evaluation criteria. Id. at 209-213. The non-price evaluation factors were listed in descending order of importance: technical approach, quality control plan, staffing plan, and past performance.<sup>2</sup> Id. The RFP further advised that the non-price evaluation factors, in combination, were significantly more important than price. Id. at 213.

With respect to price, the RFP stated that proposals would be evaluated to determine whether the offered prices were reasonable and balanced. RFP at 212. The RFP further provided as follows with respect to the evaluation of prices for realism: “In addition, the Government may conduct a price realism analysis to measure an Offeror’s understanding of the requirements and to assess the risk inherent in an Offeror’s proposal.” Id.

In response to the solicitation, the agency received five proposals. After evaluating initial proposals, the agency engaged in several rounds of discussions and ultimately solicited, obtained and evaluated final proposal revisions. After evaluating final proposals, the agency assigned the following ratings to the protesters’ and awardee’s proposals:

	<b>Technical Approach</b>	<b>Quality Control Plan</b>	<b>Staffing Plan</b>	<b>Past Performance</b>	<b>Overall Rating</b>	<b>Price</b>
NTC	Excellent	Very Good	Very Good	Good	Very Good	\$161,668,383
MF	Good	Good	Good	Very Good	Good	\$126,864,559
PS	Good	Good	Very Good	Very Good	Good	\$117,445,600

MFAR, exh. 34, Source Selection Decision (SSD) at 2; NTCAR, exh. 38, SSD at 2. On the basis of these evaluation results the agency made award to PS, finding that its proposal represented the best value to the government. After being advised of the agency’s award decision and requesting and receiving debriefings, NTC and MF filed protests in our Office.

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<sup>2</sup> The record shows that, in evaluating proposals under the non-price evaluation factors, the agency assigned adjectival ratings of excellent, very good, good, marginal, unacceptable, and for past performance, neutral. NTCAR, exh. 5 Source Selection Plan; MFAR, exh. 5, Source Selection Plan.

## PROTESTS

NTC protests the agency's evaluation of the PS price proposal; the agency's evaluation of the PS proposal under the staffing factor; the evaluation of its own proposal under the past performance factor; and the adequacy of the agency's discussions. MF protests the agency's evaluation of the PS price proposal; the agency's evaluation of the PS and MF technical proposals; the agency's evaluation of the PS proposal under the past performance factor; and the adequacy of the agency's discussions. We have considered all of the protesters' arguments and discuss our conclusions below. To the extent we do not specifically discuss an allegation, we deny it.

### Price Evaluation

Both NTC and MF challenge the agency's evaluation of PS's price proposal, maintaining that the agency should have found PS's proposed prices unrealistic and therefore should have downgraded the proposal or assigned it an elevated risk rating for a lack of technical understanding.<sup>3</sup> The protesters allege that, while the RFP was permissive concerning whether or not the agency was required to conduct a price realism evaluation, the contemporaneous record shows that the agency actually did perform some sort of realism evaluation, but that evaluation was unreasonable and the results were never provided to the technical evaluators, incorporated into the agency's technical ratings of the proposals, or considered meaningfully in connection with the agency's source selection decision. The protesters maintain that, had the agency conducted an adequate price realism evaluation, it would have discovered that PS's prices were unrealistically low and reflect a lack of technical understanding on the part of PS.

The agency responds that it was not required to perform a price realism evaluation under the terms of the RFP and that it was not necessary for it to perform what it

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<sup>3</sup> Preliminarily, the agency maintains that this aspect of MF's protest is untimely. In this connection, NTC challenged the agency's evaluation of PS's price proposal in its initial protest, whereas MF challenged the agency's evaluation of PS's price proposal for the first time in its comments responding to the agency report. The agency contends that, to be timely, MF was required to raise its challenge to the evaluation of the PS proposal at the time it filed its initial protest.

Although NTC did raise its challenge to the agency's evaluation of price realism in its initial protest, we nonetheless find this aspect of MF's protest timely. The agency specifically told MF that it did not conduct a price realism evaluation during the firm's debriefing. Under the circumstances, we conclude that MF reasonably could wait to review the agency report--where it identified evidence of the agency's price realism evaluation--before raising this allegation.

describes as a 'full' price realism evaluation.<sup>4</sup> The agency further maintains that its evaluation of price proposals was reasonable.

The nature and extent of an agency's price realism analysis largely is a matter within the agency's discretion. Navistar Def., LLC; BAE Sys., Tactical Vehicles Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 17. The Federal Acquisition Regulation (FAR) identifies a number of price analysis techniques that may be used to determine whether prices are reasonable and realistic, including a comparison of proposed prices with each other and with an independent government estimate. FAR §§ 15.404-1(b)(2)(i), (ii), (iv); In reviewing protests challenging price realism evaluations, our focus is on whether the agency acted reasonably and in a manner consistent with the solicitation's requirements. General Dynamics One Source, LLC; Unisys Corp., B-400340.5, B-400340.6, Jan. 20, 2010, 2010 CPD ¶ 45 at 9. We will object to an agency's price realism evaluation where it is unreasonable, inconsistent with the terms of the solicitation, or inadequately documented.

The contemporaneous record shows that the agency's price evaluators compared the offerors' total proposed prices and individual contract line item (CLIN) prices to one another and to an independent government estimate (IGE) prepared in connection with the acquisition. That comparison showed that PS's total price, as well as a number of its individual CLIN prices, were significantly lower than the other offerors' proposed prices, as well as the IGE. The initial total IGE was \$[deleted], and this figure was later revised downward slightly to \$[deleted]. NTCAR, exh. 16, Price Evaluation Report (PER) at 2; exh. 36, Addendum III to the PER at 3; MFAR, exh. 43, PER at 2; Addendum III to the PER at 3. In comparison, PS's initial total price was \$[deleted], and its final total price was \$117,445,600. Id. The record therefore shows that PS's total price was approximately [deleted] percent less than the IGE.

In terms of individual CLINs, the record shows that the price evaluators had concerns about the realism of a number of PS's proposed CLINs. For example, in the initial PER, the evaluators stated as follows:

Primus proposed the lowest amount among the IGCE [independent government cost estimate] and vendors for CLIN [deleted]; this CLIN is half of the price of the IGCE which may indicate the vendor does not fully understand the technical requirements of this specific CLIN. Primus has proposed \$[deleted] while the IGCE estimates \$[deleted], a difference of \$[deleted].

NTCAR, exh. 16, PER, at 6; MFAR, exh. 43, PEP Report, at 6.

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<sup>4</sup> In a declaration, the contracting officer states that the agency did not conduct what he describes as a formal price realism evaluation.

Despite engaging in three rounds of discussions with PS concerning its proposed pricing, this concern was never meaningfully resolved. The record shows that PS's proposed price for CLIN [deleted] remained significantly below the IGE. PS's final price for CLIN [deleted]--\$[deleted]--was slightly higher than its initial price for this same CLIN, but the amount in the IGE for this CLIN also was raised slightly from \$[deleted] to \$[deleted]. NTCAR, exh. 36, Addendum III to the PER, at 4; MFAR, exh. 43, Addendum III to the PER at 4.

The record shows that these concerns were not confined to just CLIN [deleted]. The agency's pre-negotiation memorandum states:

There are a number of CLINs where the proposed price is significantly lower than the IGCE, leading the PEP [price evaluation panel] to believe Primus may not fully understand the technical requirements of those specific CLINs

NTCAR, exh. 18, Pre-Negotiation Briefing Memorandum, at 5; MFAR, exh. 17, Pre-negotiation Memorandum, at 5.

The record shows that the price evaluators' concerns persisted. After the first round of discussions, the evaluators found as follows:

Primus proposed the lowest amount among the IGCE and vendors for CLIN [deleted] and [deleted]; the most significant is CLIN [deleted] which is half the price of the IGCE which may indicate the vendor does not fully understand the technical requirements of this specific CLIN. Primus has proposed \$[deleted] while the IGCE estimates \$[deleted][,] a difference of \$[deleted].

NTCAR, exh. 22, Addendum I to the PER, at 6; MFAR, exh. 43, Addendum I to the PER at 6.

The record further shows that after the second round of discussions, the price evaluators continued to identify wide discrepancies between the IGE and PS's prices for a number of CLINs. For CLIN [deleted], the IGE was \$[deleted], while PS's price was \$[deleted]; for CLIN [deleted], the IGE was \$[deleted], while PS's price was \$[deleted]; for CLIN [deleted], the IGE was \$[deleted], while PS's price was \$[deleted]; for CLIN [deleted], the IGE was \$[deleted], while PS's price was \$[deleted] and for CLIN [deleted], the IGE was \$[deleted], while PS's price was \$[deleted]. NTCAR, exh. 30, Addendum II to the PER, at 29; MFAR, exh. 43, Addendum II to the PER, at 29.

The record shows that, after the third and final round of discussions, PS's prices for all of the identified CLINs were either the same or even lower. PS's price for CLINs [deleted] remained the same, while its prices for CLINs [deleted] went down. NTCAR, exh. 36, Addendum III to the PER at 5; MFAR, exh. 43, Addendum III to the PER at 5. We note as well that the price evaluators continued to specifically voice concerns about PS's understanding of the technical requirements of CLIN [deleted]. Id. at 17.

Despite the concerns identified by the price evaluators discussed above, the record is devoid of any information showing that the technical evaluators were aware of the price evaluators' concerns, or that those concerns were resolved through an evaluation of PS's technical approach that explained the firm's significantly low pricing as compared to the government estimate and the other offerors' prices. In fact, there is nothing in the evaluation record to show that the technical evaluators even were aware of the level of effort proposed by the offerors, since that information was included only in the firms' price proposals.<sup>5</sup>

Similarly, the agency's source selection decision makes no mention of the concerns identified by the price evaluators and does not explain how those concerns may have been resolved. While source selection officials reasonably may disagree with the ratings and recommendations of lower-level evaluators, they are nonetheless bound by the fundamental requirement that their independent judgments be reasonable and consistent with the provisions of the solicitation, and adequately documented in the contemporaneous record. Metis Solutions, LLC, et al., B-411173.2, et al., July 20, 2015, 2015 CPD ¶ 221 at 6. The record here contains no explanation for why the source selection authority did not take into consideration the findings of the price evaluators, or for that matter, any evidence to show even whether or not he agreed or disagreed with those findings.

In the final analysis, while the RFP was permissive in terms of whether or not the agency was required to conduct a price realism evaluation, the record shows that the agency's price evaluators, in fact, performed an evaluation of proposed prices for realism (by comparing them to one another and to the IGE); identified concerns about PS's low prices and comparatively low level of effort for certain CLINs; and attributed those differences to a possible lack of technical understanding on the part of PS. The record also shows that those concerns were never resolved through multiple rounds of discussions, and PS's prices remained significantly low compared to both the IGE and the other offerors' prices. Despite these considerations, there is nothing in the record to

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<sup>5</sup> In addition to the price differences discussed above, the record shows that the price evaluators also compared the amount of time per task that the offerors' proposed to use in performing the work. (Each CLIN represents a specified quantity of a particular task, and firms proposed unit prices and identified the amount of time, along with the labor categories, that the firm proposed to perform the task.) The record shows that the price evaluators identified disparities between the amount of time PS proposed to perform each task and the amount of time used to calculate the IGE for each task. E.g. NTCAR, exh. 36 Addendum III to the PER, at 8; MFAR, exh. 43, Addendum III to the PER at 8. For example, the record shows that the agency used a figure of [deleted] hours per task for CLIN [deleted], while PS proposed to perform the same task using just [deleted] hours. Id. There is nothing in the record to show that the agency's technical evaluators were aware of the differences between the level of effort used to develop the IGE and the level of effort in offered in PS's proposal.

show that the price evaluators' concerns were understood or explained to the technical evaluators, and nothing in the record to show that the source selection authority took the concerns into consideration in making his selection decision. We therefore sustain this aspect of the protests.

#### PS's Program Manager

NTC argues that PS unreasonably failed to advise the agency that its program manager became unavailable after the firm submitted its proposal.<sup>6</sup> We need not consider this issue in detail because during the pendency of the protest, it became evident that, in fact, PS's program manager will not be available to perform the contract. In this connection, PS submitted several affidavits relating to this issue, the last of which was submitted by the individual that was identified as PS's program manager. In that affidavit, she explains that, on March 21, 2017, she was offered a job with another concern and she has accepted that position. Second Affidavit of PS's Program Manager. Consequently, she states that she is no longer available to perform as PS's program manager. Id.

In light of these facts, PS will necessarily have to substitute the individual identified as its program manager with another individual. Since the RFP provided that offerors were required to submit resumes and letters of intent for all key personnel, which included the program manager, such a substitution necessarily will amount to a revision to the PS proposal that constitutes discussions. Pioneering Evolution, LLC, B-412016, B-412016.2, Dec. 8, 2015, 2015 CPD ¶ 385 at 8-9. In light of these facts, as discussed below, we recommend that the agency reopen discussions with all of the competitive range offerors. Under the circumstances, we dismiss this allegation as academic based on the facts described above.

#### Past Performance Evaluation

NTC argues that the agency unreasonably assigned it a good rating for past performance. In this connection, the record shows that the agency based its assignment of a good rating to NTC, in part, on a contractor performance assessment report (CPAR) dating from 2015 that assigned NTC a marginal rating for quality in performing the predecessor contract for this same requirement. NTC argues that the agency's rating of its past performance failed to take into consideration the challenges associated with its assumption of the work under the predecessor contract.

We find no merit to this aspect of NTC's protest. The evaluation of an offeror's past performance is within the discretion of the contracting agency and we will not substitute

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<sup>6</sup> MF also challenged the agency's evaluation of the PS proposal under the staffing factor based on the availability of its program manager. After the agency filed its report responding to that aspect of MF's protest, MF withdrew this allegation.

our judgment for reasonably based past performance ratings. Computer Sciences Corp., et al., B-408694.7, et al., Nov. 3, 2014, 2014 CPD ¶ 331 at 12.

The agency explains that the CPAR that included the marginal rating for NTC in the area of quality was given to NTC for comment. In providing comments, NTC specifically stated: "NT Concepts concurs with the Quality rating of Marginal, and appreciates OPM's comments regarding the complexity and enormity of this effort during FY [fiscal year] 15." Protester's Comments, exh. A, CPAR, at 7; Agency Report at 20. Given that NTC agreed with the agency's assignment of a marginal rating at the time the CPAR was prepared, and also given that NTC acknowledged the agency's identification of the complexity of the prior effort in assigning that rating, we have no basis to object now to the agency's assignment of a good rating to NTC's past performance based on that prior marginal rating. We therefore deny this aspect of NTC's protest.

MF challenges the agency's evaluation of PS's past performance for two reasons. First, MF argues that the agency improperly gave PS credit for past performance examples performed by an affiliated concern. According to MF, the affiliate will not be performing the current requirement, and it was therefore improper to give it credit for those past performance examples.

We find no merit to this allegation. An agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror. IAP World Servs., Inc.; EMCOR Gov't Servs., B-407917.2 et al., July 10, 2013, 2013 CPD ¶ 171 at 8-9.

Here, the record shows that the past performance examples included in PS's proposal were performed by a sister concern known as InuTeq, LLC. The agency explains that PS and InuTeq are sister concerns owned by a common parent, ASRC Federal Holding Company, LLC. The agency further explains that it credited PS with the InuTeq past performance examples because those contracts, and PS's proposal for the current requirement, all relied on the corporate assets and resources of the common parent concern, ASRC. The record bears out the agency's position. See MFAR, exh. 3a, PS Technical Proposal, at 17, 46, 57, 72, 83, 89-92. Accordingly, we have no basis to object to the agency's consideration of these past performance examples.

MF also argues that the agency improperly considered a CPAR for PS that stemmed from a contract that was performed outside the period of consideration identified by the RFP for past performance information. In this connection, the RFP provided that the agency could consider past performance information relating to any contract performed within the past six years. RFP at 211. MF argues that the CPAR in question was from a contract performed more than six years ago.

Although MF is correct that the CPAR in question was from more than six years ago, we have no basis to sustain this aspect of MF's protest because we conclude that MF was not prejudiced by the agency's error. Prejudice is an essential element of every viable



protest, and where none is shown, we will not sustain a protest even if the protester is arguably correct in its allegation. Sauer, Inc., B-411137, May 22, 2015, 2015 CPD ¶ 171 at 4.

Here, the record shows that the CPAR in question was simply further information about PS's past performance which was otherwise rated uniformly high. MFAR, exh. 15, Technical Evaluation Report, at 15-16. In addition, the record shows that the CPAR included both exceptional ratings and marginal ratings, and the agency assigned PS's past performance a weakness based on the marginal ratings in addition to assigning it a strength for the exceptional ratings. Id. Under these circumstances, and in light of the fact that MF does not claim that it had positive past performance examples from outside the period of consideration that would have improved its past performance rating, MF has not shown that it was prejudiced by the agency's actions. We therefore deny this aspect of MF's protest.

#### Remaining Allegations

MF challenges virtually every finding of a weakness in its proposal, as well as every finding of a strength in the PS proposal, by the agency's technical evaluators. We have reviewed all of MF's allegations and find none of them to have merit; MF's arguments amount to no more than disagreement with the agency's evaluation findings. Such disagreement, without more, does not provide a basis for our Office to object to the agency's evaluation of proposals. n-Link/LSG Joint Venture, B-411352, 411352.2, July 1, 2015, 2015 CPD ¶ 194 at 9. In any event, these allegations largely are academic in view of our recommendation below.

Both protesters argue that the agency's discussions were misleading. We need not consider these allegations in detail. As with MF's allegations relating to the evaluation of technical proposals, these contentions are academic in light of our recommendation.

#### RECOMMENDATION

We sustain the protests for the reasons discussed above. As noted, the agency necessarily will be required to reopen discussions with PS because of the unavailability of its program manager. In light of this consideration, we recommend that the agency engage in meaningful discussions with all of the competitive range offerors and afford them an opportunity to submit revised proposals. We further recommend that the agency evaluate the revised proposals and make a new source selection decision consistent with the discussion above. Should the agency conclude that Primus is no longer in line for award, we recommend that the agency terminate its contract for convenience, and make award to the newly selected offeror, if otherwise proper. Finally, we recommend that the agency reimburse the protesters the costs of filing and pursuing their respective protests, including reasonable attorneys' fees. The protesters should submit their certified claims for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained in part, denied in part and dismissed in part.

Susan A. Poling  
General Counsel