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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** Next Tier Concepts, Inc.

**File:** B-406620.3; B-406620.4

**Date:** November 13, 2012

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Donald J. Walsh, Esq., Offit Kurman, for the protester.  
Bradley D. Wine, Esq., Morrison & Foerster LLP, for Emagine IT, Inc., an intervenor.  
Heather M. Self, Esq., Department of Agriculture, for the agency.  
Mary G. Curcio, Esq., and David A. Ashen, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that debriefing after initial award became discussions which were required to be meaningful when the agency took corrective action and accepted revised quotations is denied.
2. Protest that awardee gained an unfair advantage when it hired a former government employee is denied where the record contains no "hard facts" to demonstrate that the former government employee had access to inside information or assisted the awardee in preparing its quotation.

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### DECISION

Next Tier Concepts, Inc., of Vienna, Virginia, protests the Department of Agriculture's issuance of a delivery order to Emagine IT, Inc., of Fairfax, Virginia, under request for quotations (RFQ) No. AG-3144-S-12-0007-000002, for support services for the National Resources Conservation Service-Office of the Chief Information Officer (NRCS-OCIO). Next Tier asserts that the agency failed to provide it with meaningful discussions and unreasonably evaluated its proposal. Next Tier also complains that Emagine gained an unfair competitive advantage through hiring a former government employee.

We deny the protest.

## BACKGROUND

The RFQ, issued on February 16, 2012 for commercial IT services, contemplated the issuance of a fixed price delivery order on a best value basis, based on the following equally weighted evaluation factors: past performance, price, and management approach. The management approach factor in turn was comprised of 6 subfactors: management practices approach; CIO strategic management support; IT governance, data quality, and project management office support; IT security management; enterprise architecture; and infrastructure management and support.

Following the March 21 submission and evaluation of quotations, a delivery order was issued to Next Tier. Subsequently, two unsuccessful vendors protested the award to our Office. In response, the agency took corrective action. Specifically, the agency cancelled the award; amended the solicitation to include four documents providing vendors with information on the agency's requirements and the performance work statement; and requested and evaluated revised quotations. With respect to its revised quotation, Next Tier was rated green for management practices; yellow for CIO strategic management support, IT governance, and infrastructure management; red for IT security management and enterprise architecture; and limited confidence for past performance.<sup>1</sup> Next Tier Consensus Evaluation. Next Tier offered to perform for \$32,683,011.02. Id. Emagine was rated blue for management practices, IT governance, and IT security management; green for CIO strategic management support, enterprise architecture, and infrastructure management; and satisfactory confidence for past performance. Emagine offered to perform for \$30,655,778.20. Emagine Consensus Evaluation. The delivery order was issued to Emagine based on its higher technical ratings and lower price. Following a debriefing, Next Tier submitted this protest to our Office.

## DISCUSSION

### Initial versus Reopened Competition

Next Tier protests that the agency failed to hold meaningful discussions with the firm. Next Tier does not assert that the agency opened formal discussions at any time, but instead contends that the debriefing it was provided following the initial award and before the agency took corrective action constituted discussions. Next Tier explains that during this debriefing the agency informed it of the weaknesses in its quotation. According to Next Tier, it relied on this information in preparing its

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<sup>1</sup> The adjectival ratings for management approach were blue-exceptional, green-acceptable, yellow-marginal, and red-unacceptable. The past performance ratings were substantial confidence, satisfactory confidence, limited confidence, no confidence and unknown confidence.

response to the amended solicitation; addressed only the weaknesses noted during the debriefing; and overall did not change its quotation substantially. Next Tier complains that during the subsequent debriefing following the corrective action, the agency listed a number of weaknesses in its quotation that were not pointed out during the first debriefing. Next Tier concludes that the debriefing conducted after the initial award took the place of discussions, and since several weaknesses were not pointed out at that time, the agency failed to hold meaningful discussions.

Next Tier's argument is without merit. Discussions are exchanges between the government and offerors that are undertaken prior to award with the intent of allowing offerors to revise their proposals. See Federal Acquisition Regulation (FAR) § 15.306(d). In contrast, the purpose of a debriefing is not to give offerors the opportunity to cure deficiencies for the instant procurement, but instead to furnish the basis for the selection decision and contract award so they can better compete in the future. See Eggs & Bacon, Inc., B-310066, Nov. 20, 2007, 2007 CPD ¶ 209 at 4 n.5; Consolidated Eng'g Servs., Inc., B-293864.2, Oct. 25, 2004, 2004 CPD ¶ 214 at 5; OMV Medical, Inc.; Saratoga Medical Center, Inc., B-281388, Feb. 3, 1999, 99-1 CPD ¶ 53 at 9 n.3. The subsequent reopening of the competition did not transform the debriefing into discussions.

#### Unfair Competitive Advantage

Next Tier protests that the awardee, Emagine, hired Mr. JH, the former acting director for IT governance for the NRCS IT Services Division. According to Next Tier, Mr. JH was involved in drafting and overseeing the procurement, including the evaluation process. Next Tier believes that Mr. JH possessed intimate knowledge about the specific needs of the agency, the price and approaches of various offerors, and the evaluation of the quotations.

Contracting agencies are required to avoid even the appearance of impropriety in government procurements. FAR § 3.101-1. Where a firm may have gained an unfair advantage through its hiring of a former government official, the firm can be disqualified from a competition based on the appearance of impropriety, even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on facts, and not mere innuendo or suspicion; there must be "hard facts" establishing the person's access to nonpublic information which could provide a firm with an unfair competitive advantage. Health Net Federal Services, LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 29, 30.

Here, there is no basis for concluding that hiring Mr. JH provided Emagine an unfair competitive advantage in the competition. In this regard, the awardee denies that Mr. JH assisted in its proposal preparation. Specifically, Emagine explains that it approached Mr. JH about employment sometime after August 9, well after the July 27 closing date for submission of revised quotations and shortly after the August 7 notice of award; and only sent Mr. JH an offer of employment (on a

different project) by letter of August 15, resulting in him commencing employment only on September 4. Declaration of President of Emagine; Offer of Employment, August 15, 2012. Next Tier has offered no convincing rebuttal to these dates, which by themselves preclude the possibility of Emagine gaining an unfair competitive advantage in the competition by hiring Mr. JH. Moreover, while the Army acknowledges that Mr. JH assisted in preparing the performance work statement and the evaluation criteria, Contracting Officer's Declaration at 2, the agency denies that Mr. JH was otherwise involved in the procurement. Specifically, the agency reports that Mr. JH did not evaluate proposals, have access to any source selection information, or otherwise take part in the procurement. Id. at 3. Given this absence of any "hard facts" to show an apparent impropriety in the procurement process, there is no basis to conclude that Emagine had an unfair competitive advantage that should result in its exclusion from the competition.

#### Technical Evaluation

Next Tier generally complains that the ratings for its revised quotation were substantially reduced from those initially received. As noted by the agency, however, the quotations submitted in response to the amended RFQ were evaluated by a new panel which also had an enhanced understanding of the agency's needs from the documents provided in the amended RFQ. Further, the agency expected that vendors would submit substantially more detailed offers based on the enhanced understanding that these documents provided. Agency Report at 3. Indeed, the amended solicitation specifically advised vendors that: "The information submitted in response to this amended RFQ will be evaluated completely on its own. No reference to the old information submitted will be given to the evaluators." Amend. 2 Summary. Furthermore, we have long recognized that different evaluation panels could reasonably reach different conclusions regarding the quality of an offeror's proposal given the subjective judgment necessarily exercised by evaluators. See SOS Interpreting, Ltd., B-293026.4, B-293026.5, Aug. 25, 2004, 2005 CPD ¶ 25 at 7; Warvel Prods., Inc., B-281051.5, July 7, 1999, 99-2 CPD ¶ 13 at 10-12; tg Bauer Assocs., Inc., B-229831.6, Dec. 2, 1988, 88-2 CPD ¶ 549 at 7.

Next Tier specifically protests that the agency unreasonably evaluated its quotation under two subfactors under the management approach factor. In this regard, Next Tier asserts that the agency unreasonably assigned weaknesses to its quotation for failing to adequately address memorandums of understanding under the CIO strategic management support subfactor and not addressing technology standards and standardization of processing under the enterprise architecture subfactor; and unreasonably rated its past performance limited confidence, rather than unknown confidence.

Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate prejudice, our Office will not sustain a protest. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3. Here, Next Tier

has challenged the evaluation of its quotation under two subfactors of the management approach factor--the CIO strategic management support subfactor for which it was rated yellow or marginal, and the enterprise architecture subfactor for which it was rated red or unacceptable. In each case, Next Tier has challenged one weakness. The agency, however, assigned Next Tier's quotation five weaknesses under the first subfactor and six weaknesses under the second subfactor. Thus, even if Next Tier is correct about the challenged weaknesses, there appears to be no basis for concluding that its ratings for these two subfactors would substantially increase. Further, even if its ratings for these two subfactors increased to green, Next Tier would still have less than acceptable ratings on at least 3 subfactors, and Emagine's quotation would still have higher ratings than Next Tier's for at least 4 subfactors. Furthermore, even if Next Tier is correct in its assertions with respect to past performance, Next Tier would only be rated unknown confidence in contrast to Emagine's rating of satisfactory confidence. Since Next Tier also proposed a higher price than Emagine, there simply is no basis to conclude that Next Tier suffered any prejudice from the alleged evaluation errors.

The protest is denied.

Lynn H. Gibson  
General Counsel