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## Decision

**Matter of:** NLT Management Services, LLC--Costs

**File:** B-415936.7

**Date:** March 15, 2019

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Bryant S. Banes, Esq., and Sean D. Forbes, Esq., Neel, Hooper & Banes, P.C., for the protester.

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### DIGEST

Request for reimbursement of protest costs is denied where the agency did not unduly delay taking corrective action in the face of a clearly meritorious protest.

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### DECISION

NLT Management Services, LLC, a small business, of Ewing Township, New Jersey, requests that our Office recommend that it be reimbursed for the costs of filing and pursuing its protest challenging the award of a contract to MartinFederal Consulting, LLC, a small business, of Huntsville, Alabama, under request for proposals (RFP) No. DJA-17-AHDQ-R-0035, which was issued by the Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), for administrative and technical support services for ATF's labs.

We deny the request.

### BACKGROUND

The RFP, which was issued on June 19, 2017, and subsequently amended four times, sought proposals from Small Business Administration 8(a) business development program participants, for administrative and technical support services for ATF's labs. RFP at 1, 6-7. The RFP contemplated the award of a fixed-price contract, with a base period and four, 1-year option periods. *Id.* at 4. Award was to be on a best-value tradeoff basis, considering the following four factors: (1) personnel qualifications; (2) past performance; (3) technical/managerial; and (4) price. RFP, amend. No. 0002, at 27. Factors one and two were of equal importance and, when combined, were more

important than factor three. The non-price factors, when combined, were significantly more important than price. Id.

Under factor one, personnel qualifications, ATF was to evaluate how well the proposal demonstrated the experience and qualifications of the proposed personnel to perform the services of the statement of work (SOW), including relevant experience in managing organizational change in the government environment. Id. at 27. Under factor two, past performance, ATF was to evaluate the quality of the offeror's past and present performance as it relates to the probability of success of performing the required effort. Id. at 28. The evaluation was to be based on the degree to which available past performance information demonstrated recent and relevant past performance. Id. Offerors without available past performance information were to be evaluated as neutral. Id. Under factor three, technical/managerial, ATF was to evaluate the degree to which the offeror demonstrated a comprehensive, sound, efficient, and reasonable approach to performing the requirements and objectives as stated in the SOW, as well as the offeror's thorough knowledge and experience in administrative and technical support services for forensic and science laboratories. Id. at 28-29.

Relevant to the issues in NLT's protest, the RFP specifically required offerors to substantiate the commitment of any new personnel, subcontractors, or teaming partners to perform on the resulting contract. Under the personnel qualifications factor, offerors were required to submit with their proposals resumes or letters of commitment/intent for any new personnel proposed to work on the contract demonstrating the availability and commitment of the person for a minimum of 12 months. RFP, amend. No. 0003, at 7. Similarly, the RFP expressly cautioned that any information submitted for subcontractors or team members would only be evaluated if a firm commitment with the firm or individual was demonstrated by signed letters of intent, subcontracts, or teaming arrangements. Id. at 9.

ATF received seven proposals in response to the RFP, including from NLT, which is the incumbent, and MartinFederal. Agency Report (AR), Tab 2, Award Decision & Price Negotiation Memo., at 6. Prior to the protest at issue here, the agency previously selected MartinFederal's proposal for award, which NLT protested to our Office on January 19, 2018. Our Office subsequently dismissed the protest as premature because it was filed prior to NLT's receipt of its requested and required debriefing. NLT Mgmt. Servs., LLC, B-415936, Feb. 1, 2018 (unpublished decision). Following receipt of its debriefing, NLT again filed a protest challenging the initial award to MartinFederal. Based on the agency's represented intent to take corrective action, including reevaluating proposals, we dismissed NLT's second protest as academic. NLT Mgmt. Servs., LLC, B-415936.2, Mar. 15, 2018 (unpublished decision).

Based on ATF's subsequent reevaluation, the contracting officer, who was also the source selection official, evaluated the seven proposals under the non-cost factors as follows:

Offeror	Personnel Qualifications	Past Performance	Technical/ Management	Overall Rating
Martin Federal	Very Good	Satisfactory	Exceptional	Very Good
Offeror E	Very Good	Neutral	Satisfactory	Very Good
Offeror B	Satisfactory	Neutral	Marginal	Satisfactory
Offeror A	Satisfactory	Neutral	Marginal	Satisfactory
Offeror C	Satisfactory	Neutral	Marginal	Satisfactory
NLT	Satisfactory	Marginal	Satisfactory	Satisfactory
Offeror D	Satisfactory	Neutral	Unsatisfactory	Marginal

AR, Tab 2, Award Decision & Price Negotiation Memo., at 4-5.

The contracting officer then ranked the proposals as follows:

Offeror	Overall Rating	Price	Rank
MartinFederal	Very Good	\$9,684,844	1
Offeror E	Very Good	\$11,121,868	2
Offeror B	Satisfactory	\$14,833,306	3
Offeror A	Satisfactory	\$8,903,549	4
Offeror C	Satisfactory	\$11,172,039	5
NLT	Satisfactory	\$10,765,974	6
Offeror D	Marginal	\$5,678,208	7

Id. at 6.

The contracting officer then conducted a tradeoff analysis, and decided that MartinFederal’s proposal represented the best value to the government. Id. at 13-22. On September 21, NLT filed a protest with our Office challenging the agency’s renewed award to MartinFederal, which was docketed as B-415936.3. NLT primarily challenged ATF’s evaluations of the proposals submitted by NLT and MartinFederal.

With respect to MartinFederal’s proposal, NLT primarily alleged that the awardee lacked the requisite personnel and experience providing forensic laboratory services to warrant its assigned adjectival ratings under each of the three non-price evaluation factors. See Protest (B-415936.3) at 24-28. With respect to the evaluation of its own proposal, NLT challenged ATF’s evaluation under each of the three non-price factors. First, under the personnel qualifications factor, NLT primarily argued that the agency unreasonably failed to credit NLT for its proposed retention of its staff used in performance of the incumbent contract. Id. at 20 (“NLT is the incumbent for the RFP, the workforce proposed is the incumbent workforce, the workforce exceeds the experience and qualifications sought by the RFP, and the workforce is already in place.”). With respect to ATF’s evaluation under the past performance and technical/managerial factors, NLT challenged the agency’s six assessed weaknesses that were based on concerns identified with NLT’s performance of the incumbent requirements. NLT primarily argued that ATF was precluded from considering the information because it was “extra-proposal,” or, in the alternative, that the agency failed to reasonably consider favorable

or mitigating information, and the evaluation was otherwise unreasonable. See id. at 21-24.

On October 26, ATF submitted its first agency report; the report, however, was incomplete because it only addressed NLT's protest allegations regarding the evaluation of its own proposal, and did not address the protest allegations regarding the evaluation of MartinFederal's proposal. Upon our notice of the need for the agency to supplement its report, ATF submitted a second report responding to the remaining protest allegations on November 5. On November 6, NLT filed its first supplemental protest, which was docketed as B-415936.4. In this initial supplemental protest, NLT argued that the agency failed to give it credit for a relevant past performance reference, and failed to consider more recent past performance evaluation ratings for another reference. NLT's First Supp. Protest at 3-4. NLT also argued that the agency improperly credited the awardee for the proposed use of teaming partners because MartinFederal did not provide evidence of their commitment to perform on the resulting contract as required by the RFP. Id. at 4-5. Additionally, for the first time, NLT also alleged that the agency had engaged in disparate treatment and otherwise conducted an unreasonable cost-technical tradeoff comparison as between NLT and all of the other offerors. Id. at 7-9.

On November 15, and after the submission of its consolidated comments on the agency's reports, NLT filed its second supplemental protest, which was docketed as B-415936.5. NLT's second supplemental protest included further allegations challenging the reasonableness of the evaluation of MartinFederal's proposal, as well as alleging specific instances of alleged disparate treatment with respect to the agency's evaluation of MartinFederal's and NLT's respective proposals. NLT's Second Supp. Protest at 4-8.

On November 20, and before the due date for the supplemental agency report that was to respond to MartinFederal's two supplemental protests, ATF filed a request for dismissal of the protest as academic based on the agency's proposed corrective action. Specifically, the agency represented that it intended to terminate the award to MartinFederal, and reissue the underlying solicitation and recompute the requirement. ATF represented that it was taking the proposed corrective action because it believed that it had erred in the evaluation of MartinFederal's proposal by crediting MartinFederal for the proposed use and past performance of teaming partners where MartinFederal had failed to provide firm commitments from those entities as required by the RFP. Contracting Officer's Corrective Action Memo. (Nov. 20, 2018) at 1-2. After affording the parties an opportunity to respond to ATF's request for dismissal, our Office dismissed the protest as academic based on the agency's proposed corrective action. NLT Mgmt. Servs., LLC, B-415936.3 et al., Nov. 29, 2018 (unpublished decision).

After MartinFederal filed a subsequent protest challenging the terms of the proposed corrective action, ATF modified its proposed corrective action. Specifically, in lieu of cancelling the RFP, the agency announced that it would amend the RFP, solicit and evaluate revised proposals, and issue a new source selection decision. Contracting

Officer's Corrective Action Memo. (Dec. 20, 2018) at 2. In her corrective action memorandum, the contracting officer, in addition to addressing the other prior bases for her decision to take corrective action, explained that the agency had identified errors in its responses to offerors' questions on the RFP, as well as in the instructions for the past performance questionnaires. Id. at 1. Our Office subsequently dismissed MartinFederal's corrective action protest as academic based on the agency's amended proposed corrective action. See MartinFederal Consulting, LLC; NLT Mgmt. Servs., LLC, B-415936.6, B-415936.8, Jan. 2, 2019 (unpublished decision).

## DISCUSSION

Under our Bid Protest Regulations, if an agency decides to take corrective action in response to a protest, our Office may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. 4 C.F.R. § 21.8(e). The mere fact that an agency decides to take corrective action does not establish that a statute or regulation has been violated. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. Iron Vine Security, LLC--Costs, B-403578.3, Apr. 15, 2011, 2011 CPD ¶ 86 at 3. A protest is clearly meritorious where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Science Applications Int'l Corp.--Costs, B-410760.5, Nov. 24, 2015, 2015 CPD ¶ 370 at 3-4.

For the reasons that follow, we do not find that NLT's protest allegations were clearly meritorious. Rather, the record developed before our Office prior to ATF's decision to take corrective action demonstrated that the agency had committed certain evaluation errors, but it was not apparent that such errors were competitively prejudicial to NLT. In this regard, competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. Glen Mar Constr., Inc.--Costs, B-410603.4, Apr. 5, 2016, 2016 CPD ¶ 107 at 7. Where the record does not demonstrate competitive prejudice, we have concluded that an agency had a defensible legal position and, thus, for purposes of determining whether to recommend costs, that the protest was not clearly meritorious. Id.; Lens, JV--Costs, B-295952.4, Dec. 12, 2005, 2006 CPD ¶ 9 at 5; First Fed. Corp.--Costs, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 3.<sup>1</sup>

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<sup>1</sup> NLT raised other collateral arguments in its protest. Although our decision does not expressly address every argument raised, we have carefully reviewed all of the arguments raised and find that none were clearly meritorious on their own merits, or, even assuming that they there were meritorious, that they otherwise would impact our  
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ATF concedes that it made material evaluation errors with respect to its evaluation of MartinFederal's proposal. Specifically, the agency conceded that it erred in crediting MartinFederal for the proposed use of its teaming partners under the personnel qualification and technical/managerial evaluation factors, as well as crediting MartinFederal with a teaming partner's past performance, where MartinFederal failed, consistent with the RFP's requirements, to provide sufficient evidence demonstrating those entities' commitment to perform on the resulting contract. As a result of these errors, the agency conceded that MartinFederal's proposal should have been rated no higher than satisfactory under the technical/managerial and personnel qualification evaluation factors, and neutral under the past performance factor. See, e.g., Contracting Officer's Corrective Action Memo. (Nov. 20, 2018) at 1-2; Contracting Officer's Corrective Action Memo. (Dec. 20, 2018) at 2.

Notwithstanding these conceded evaluation errors, MartinFederal's proposal would possibly still have been technically superior--as both proposals would have been rated satisfactory for factors one and three, and NLT was rated marginal for past performance versus what would have been MartinFederal's neutral rating--and lower-priced than NLT's proposal. Additionally, even displacing MartinFederal, the source selection decision suggests that several intervening proposals were ranked higher than NLT's proposal and would have been in line for award before NLT. AR, Tab 2, Award Decision & Price Negotiation Memo., at 6.<sup>2</sup> Thus, absent NLT demonstrating that its protest allegations that ATF erred in the evaluation of its proposal were clearly meritorious, it is not apparent that the conceded evaluation errors with respect to the evaluation of MartinFederal's proposal competitively prejudiced NLT.

Turning to NLT's challenges to the agency's evaluation of the protester's proposal, we do not find that the allegations were clearly meritorious. First, in large measure, NLT's objections to ATF's evaluation of its proposal under the personnel qualifications evaluation factor reflect its belief that as the incumbent, NLT--and only NLT--merited the highest evaluation ratings. NLT's apparent belief that its incumbency status entitled it to higher ratings provides no basis for finding the evaluations unreasonable. PricewaterhouseCoopers Public Sector, LLP, B-415504, B-415504.2, Jan. 18, 2018,

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determination that NLT's protest did not readily demonstrate a likelihood that NLT was competitively prejudiced by any evaluation errors.

<sup>2</sup> As addressed above, NLT's first supplemental protest for the first time challenged the agency's relative ranking of the seven proposals, and its second supplemental protest alleged specific instances of disparate treatment in the evaluation of MartinFederal's and NLT's proposals. The agency, however, took corrective action prior to the due date for the supplemental report that would have addressed these allegations. As addressed below, as these arguments would have required further development, we do not find that they demonstrate that NLT's initial protest allegations were clearly meritorious.

2018 CPD ¶ 35 at 7. There is no requirement that an offeror be given additional credit for its status as an incumbent, or that the agency assign or reserve the highest rating for the incumbent offeror. Id.

With respect to ATF's evaluation under the past performance factor, we similarly do not find that NLT's protest allegations were clearly meritorious. As an initial matter, we find no merit to NLT's complaints that the evaluators erred by considering information about NLT's incumbent performance that was personally known to them, as opposed to restricting their review to information contained in NLT's proposal. As we have repeatedly recognized, an agency is generally not precluded from considering any relevant past performance information, including the evaluators' personal knowledge of an offeror. TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at 9; NVT Techs., Inc., B-297524, B-297524.2, Feb. 2, 2006, 2006 CPD ¶ 36 at 5. This is especially true where the RFP specifically notified offerors that ATF reserved the right to rely on past performance information other than the information provided by the offeror in its proposal submission. RFP, amend. No. 0002, at 28.

Furthermore, it is also not apparent that the parties' conflicting views regarding the quality of NLT's incumbent performance are properly a matter for our consideration as part of our bid protest function. As we have explained, a protester's challenges to the methodology utilized for assessing the contractor's performance on a predecessor contract, or the findings in connection with such performance reviews, generally involve matters of contract administration that are not for our review as part of our bid protest function. See 4 C.F.R. § 21.5(a); General Revenue Corp. et al., B-414220.2 et al., Mar. 27, 2017, 2017 CPD ¶ 106 at 39 n.26; ProActive Techs., Inc.; CymSTAR Servs., LLC, B-412957.5 et al., Aug. 23, 2016, 2016 CPD ¶ 244 at 11 n.6. Here, the parties dispute who was at fault for and the severity of the alleged problems in performance of the incumbent requirements, as well as whether the agency waived any material contractual requirements. For example, NLT contests an assessed weakness based on NLT's alleged failure to conduct monthly technical meetings and to submit monthly status reports because the agency allegedly never responded to NLT's meeting requests and/or had waived the requirements. See Protest at 22. ATF strongly disputes these allegations. See, e.g., ATF First Legal Memo. at 7-8. As addressed above, however, our Office generally will not consider protest allegations that would require us to resolve a dispute regarding the performance, enforcement, or interpretation of a separate and unrelated contract.

Even if the subject matter of the parties' conflicting views of NLT's incumbent performance were properly for our consideration as part of our bid protest function, it is not apparent that NLT's objections to the agency's consideration of the severity of and effectiveness of NLT's corrective actions taken in response to the performance issues were clearly meritorious. As we have consistently explained, an agency's past performance evaluation may be based on a reasonable perception of a contractor's prior performance, regardless of whether the contractor disputes the agency's interpretation of the underlying facts, the significance of those facts, or the significance of corrective actions. PAE Aviation & Tech. Servs., LLC, B-413338, B-413338.2, Oct. 4,

2016, 2016 CPD ¶ 283 at 5. And, although consideration of past performance trends and corrective actions is generally appropriate, an agency is not required to ignore instances of negative past performance. Id.; Vectrus Sys. Corp., B-412581.3 et al., Dec. 21, 2016, 2017 CPD ¶ 10 at 9. Therefore, on the record developed prior to the agency's decision to take corrective action, we cannot conclude that NLT's protest allegations were clearly meritorious.<sup>3</sup>

As with its challenges to ATF's evaluation under the personnel qualifications and past performance factors, it is similarly not apparent that NLT's protest allegations under the technical/managerial factor were clearly meritorious. NLT contests the agency's concern that NLT lacks an adequate pre-screening process where a recent candidate on the incumbent contract failed a background investigation. NLT argues that the weakness was unreasonable because it is based on "extra-proposal" information, and ignores that this was a single occurrence and NLT has "revamped" its pre-screening process. See Protest (B-415936.3) at 24. Even if the assessed weakness was in error, removal of the weakness would likely not result in a material improvement to NLT's competitive position, as it received no evaluated strengths under the technical/managerial factor, and would still have likely been rated "marginal" under the more important past performance evaluation factor.

In conclusion, based on the state of the record prior to ATF's decision to take corrective action, it is not apparent that NLT's protest allegations with respect to its own evaluation were clearly meritorious. Additionally, even where the agency conceded that it erred in the evaluation of MartinFederal's proposal, it is not apparent that NLT suffered any competitive prejudice as a result. Specifically, as addressed above, even acknowledging the errors with the evaluation of MartinFederal's proposal, it is not reasonably apparent that MartinFederal and additional offerors would not have remained higher ranked than NLT, and thus were in line for award ahead of NLT.

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<sup>3</sup> In light of our determination that NLT's challenge to several of the assessed weaknesses under the past performance evaluation factor were not clearly meritorious, we do not find that NLT has established a high degree of likelihood that it was prejudiced by its allegations that ATF failed to provide NLT with an opportunity to address two instances of adverse past performance information for which it had not previously had an opportunity to respond, or any of the additional alleged errors raised in its supplemental protest. In this regard, the presence of the remaining evaluated weaknesses would still likely support the agency's ultimate evaluation determination. Electrosoft Servs., Inc., B-413661, B-413661.2, Dec. 8, 2016, 2017 CPD ¶ 7 at 5.



Therefore, under the circumstances presented here, we do not believe that NLT is entitled to recovery of its protest costs.<sup>4</sup>

The request is denied.

Thomas H. Armstrong  
General Counsel

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<sup>4</sup> Although NLT also challenged the agency's consideration of intervening proposals, these issues were first raised in its supplemental protest, and ATF promptly took corrective action before the due date for the supplemental agency report. ATF would have needed to address these arguments as part of its supplemental agency report, and thus further development would have been necessary to assess the merits of these protest grounds. We have recognized that where the ultimate resolution of a protest would require further development, such required development demonstrates that the protest arguments were not clearly meritorious for the purposes of determining whether to recommend the reimbursement of protest costs. Discover Techs. LLC--Costs, B-413861.3, Mar. 29, 2017, 2017 CPD ¶ 108 at 3; Walker Dev. & Trading Grp., Inc.--Costs, B-414258.3, June 8, 2017, 2017 CPD ¶ 184 at 3, recon. denied, B-414258.4, Sept. 13, 2017, 2017 CPD ¶ 289; Apptis Inc.--Costs, B-402146.3, Mar. 31, 2010, 2010 CPD ¶ 123 at 4.