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# Decision

**Matter of:** 2TechJV, LLC--Costs

**File:** B-420960.7

**Date:** August 27, 2024

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## DIGEST

Request that GAO recommend reimbursement of protest costs is granted in part where the agency unduly delayed taking corrective action in response to clearly meritorious protest arguments, and denied in part where other protest grounds were not clearly meritorious or where the agency took prompt corrective action.

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## DECISION

2TechJV, LLC, of Woodbridge, Virginia, requests that we recommend the Department of Labor (DOL) reimburse the firm its reasonable costs of pursuing its protest of the issuance of a task order to Addx Corporation, of Alexandria, Virginia, under request for quotations (RFQ) <sup>1</sup> No. 1605TA-22-Q-00044. DOL issued the RFQ for services that support the operations and maintenance of the Occupational Safety and Health Administration's (OSHA) information system (OIS). The protester argued that the agency's conduct of discussions was misleading, that the agency's evaluation of technical quotations was unreasonable, and that the agency's best-value tradeoff analysis was flawed.

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<sup>1</sup> Throughout the record, the agency refers to both proposals and quotations and generally refers to the firms as offerors. Our decision refers to quotations and vendors, except when quoting the record or procurement law or regulations; use of one set of terms rather than another is immaterial to the analysis of the request for reimbursement.

We grant the request in part and deny it in part.

## BACKGROUND

The RFQ, set aside for service-disabled veteran-owned small businesses, was issued in accordance with Federal Acquisition Regulation (FAR) subpart 8.4 to holders of a General Services Administration multiple award schedule contract, special item number 54151S--Information Technology Professional Services. Agency Report (AR), Tab 1a, Initial RFQ at 2. The contract will provide services that support OIS in three areas: the operations/helpdesk; maintenance; and development, modernization, and enhancement (DME). AR, Tab 5, RFQ amend. 0004, performance work statement (PWS) at 3. Those services are outlined and defined in the PWS. *Id.* The RFQ contemplated the award of a single hybrid task order with a fixed-price contract line item number (CLIN) for operations support and helpdesk and time-and-materials CLINs for maintenance and DME. AR, Tab 1a, Initial RFQ at 10. The task order period of performance would be for a base year with four 1-year options. AR, Tab 5, RFQ amend. 0004 at 8.

The task order would be issued to the vendor whose quotation represented the best value to the agency, considering three factors: technical approach, past performance, and price. *Id.* at 86. The technical approach factor was significantly more important than the past performance factor; those non-price factors, when combined, were significantly more important than price. *Id.* The technical approach factor contained four equally important sub-factors that, as noted below, were subsequently revised. AR, Tab 1a, Initial RFQ at 86.; AR, Tab 5, RFQ, amend. 0004 at 77. The agency would assign the subfactors and the factor overall a rating of outstanding, good, acceptable, marginal, or unacceptable. AR, Tab 11, Source Selection Decision (SSD) at 5. Only quotations evaluated as at least acceptable under the technical approach factor and its four subfactors would be eligible for award. AR, Tab 1a, Initial RFQ at 10 at 84.

The agency received four quotations, including those from 2TechJV and Addx. Contracting Officer's Statement (COS) at ¶ 11. After engaging in discussions with the vendors, DOL issued the task order to a third vendor. *Id.* at ¶¶ 12-13. 2TechJV protested that award decision with our Office; we dismissed the protest after the agency announced its intent to take corrective action. *Id.* at ¶¶ 16-17; see *2TechJV, LLC*, B-420960, B-420960.2, Aug. 26, 2022 (unpublished decision). As part of the agency's corrective action, DOL issued a revised RFQ that changed the type of contract from fixed-price to labor-hours for certain CLINs. AR, Tab 11, SSD at 4; COS at ¶ 18; see *also* AR, Tab 5, RFQ amend. 0004 at 5, 84. DOL also revised the subfactors under the technical approach factor and adjusted their weights.

For the revised RFQ, the technical approach subfactors were: (1) understanding the requirement; (2) staffing plan and key personnel; (3) quality control plan; and (4) transition-in plan. AR, Tab 5, RFQ amend. 0004 at 84. The subfactors for understanding the requirement, and staffing plan and key personnel were of equal importance and were significantly more important than the subfactors for the quality control plan and the transition-in plan. *Id.* The other evaluation factors and their

importance were unchanged. *Id.* In response, DOL received revised quotations from 2TechJV, Addx, and the third vendor. AR, Tab 11, SSD at 5.

DOL did not conduct discussions with the vendors following receipt of revised quotations. See COS at ¶¶ 24-29. The table below summarizes the agency’s evaluation of the revised quotations from Addx and 2TechJV:

Factors and Technical Approach Factor Subfactors	Vendor	
	Addx Corp.	2TechJV LLC
Technical Approach Overall	Good	Acceptable
Understanding the Requirement	Good	Marginal
Staffing Plan & Key Personnel	Good	Acceptable
Quality Control Plan	Good	Acceptable
Transition-In Plan	Acceptable	Acceptable
Past Performance	Very Good	Very Good
Price	\$35,997,574	\$32,595,253

AR, Tab 11, SSD at 10; AR, Tab 9, Technical Evaluation Panel (TEP) Report at 4.

The contracting officer, who was the source selection officer for this procurement, noted that, because 2TechJV’s quotation was evaluated as marginal under the understanding the requirement subfactor of the technical approach factor, the protester’s quotation was ineligible for award. AR, Tab 11, SSD at 12. Nevertheless, DOL “determined that there [was] some benefit to considering what a cost-technical tradeoff analysis would look like between [Addx and 2TechJV], if for any reason 2TechJV’s ‘Marginal’ rating for Subfactor 1 [understanding the requirement] were to be upgraded to ‘Acceptable’ and 2TechJV became eligible for consideration for award.” *Id.* The contracting officer thus considered whether Addx’s quotation offered “particular technical benefits or enhancements” that would justify a price premium of \$3,402,320 over 2TechJV’s quoted price. *Id.* The contracting officer compared the quotations’ relative strengths under the four technical approach subfactors and concluded that Addx’s superior quotation was “clearly worth” the price premium. *Id.* at 13. The contracting officer concluded that Addx’s quotation represented the best value to the government. *Id.* at 13-14. The agency subsequently issued the task order to Addx.

On April 28, 2023, 2TechJV protested with our Office the issuance of the task order to Addx, arguing that the agency conducted misleading discussions. Protest at 26-29. The protester also alleged various flaws in the agency’s evaluation of 2TechJV’s quotation under the technical approach factor. *Id.* at 15-23. Further, 2TechJV challenged as unreasonable the agency’s evaluation of the protester’s and the intervenor’s past performance. *Id.* at 23-26. Lastly, 2TechJV asserted that, because it

relied on an unreasonable evaluation, the agency's best-value tradeoff analysis was flawed.<sup>2</sup> Protest at 29-30.

DOL's agency report defended the conduct of discussions, evaluation of technical quotations, and best-value tradeoff analysis. 2TechJV timely filed comments on the agency report. See Comments at 1. Although the protester argued that, "[t]o the extent any of the arguments are viewed as beyond the scope of the arguments asserted by 2TechJV in its Protest, 2TechJV asserts those arguments here as supplemental protests because they are based upon new information in the Agency Report," Comments at 3 n.1, GAO did not docket these arguments as supplemental protests in EPDS. In its comments, the protester elaborated on its initial allegations. See Comments. As noted below, we consider some allegations contained in 2TechJV's comments to have been supplemental protest grounds.

On July 10, 2023, the GAO attorney assigned the protest conducted a litigation risk alternate dispute resolution (ADR) teleconference with the parties. During the teleconference, the GAO attorney handling the protest indicated that GAO would likely sustain the protest on all grounds but one, including the allegation that the agency conducted misleading discussions, the challenges to the agency's evaluation of the protester's quotation under the technical approach factor, the agency's evaluation of both quotations under the past performance factor, and the overall challenge to the agency's best-value tradeoff analysis.

The agency then issued a notice of corrective action that outlined a multi-step plan for the procurement. See Notice of Corrective Action. In response to the notice of corrective action, GAO dismissed the protest as academic. *2TechJV, LLC*, B-420960.4, July 25, 2023 (unpublished decision). 2TechJV subsequently filed this request that GAO recommend the agency reimburse the requester its costs of pursuing its protest.

## DISCUSSION

2TechJV requests that our Office recommend reimbursement of its attorneys' fees and costs incurred in pursuing all its protest grounds. Req. for Costs at 6-7. In support of its request, 2TechJV contends that its protest was clearly meritorious, that the agency unduly delayed in taking corrective action, and that all 2TechJV's allegations are intertwined and therefore not severable. *Id.* DOL contends that its corrective action

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<sup>2</sup> On May 23, Addx filed a request for partial dismissal, primarily arguing that 2TechJV's challenge to the agency's evaluation of Addx's past performance was speculative and failed to state a viable protest ground. Intervenor's Req. for Partial Dismissal at 1. The agency filed a response in support of the dismissal request. See Agency's Resp. in Support of Intervenor's Req. for Partial Dismissal at 1. 2TechJV opposed the intervenor's request, asserting that its challenge to Addx's past performance was not speculative and was based on specific, publicly available information. Protester's Resp. to Intervenor's Req. for Partial Dismissal at 2-7. GAO concluded that partial dismissal was not warranted at that time. Electronic Protest Docketing System (EPDS) No. 25.

was not unduly delayed and that, in any event, the allegations were not clearly meritorious. Resp. to Req. for Costs at 2-3.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs under 4 C.F.R. § 21.8(e) if we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. *Odyssey Sys. Consulting Grp., Ltd.--Costs*, B-419730.5, Sep. 30, 2021, 2021 CPD ¶ 335 at 4. This principle is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. *Id.* A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. *Octo Consulting Grp., Inc.--Costs*, B-414801.4, Dec. 14, 2017, 2018 CPD ¶ 52 at 3. While we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. *AGFA HealthCare Corp.--Costs*, B-400733.6, Apr. 22, 2009, 2009 CPD ¶ 90 at 3-4.

Based on our review of the record, and as discussed below, we conclude that 2TechJV's challenge to the conduct of discussions was clearly meritorious, as were some of its challenges to the evaluation of quotations under the technical approach factor. Other challenges to the technical approach factor evaluation were based on a common set of facts and related legal theories and are therefore not readily severable from the meritorious challenges. Nor is the challenge to the agency's best-value tradeoff analysis severable from the meritorious allegations. We also conclude, however, that the challenges to the agency's evaluation of past performance were not clearly meritorious or that the agency's response was not unduly delayed. Accordingly, we grant the request in part and deny it in part.

### Conduct of Discussions

This competition was limited to Federal Supply Schedule (FSS) vendors. The procedures of FAR part 15 governing contracting by negotiation--including those concerning exchanges with offerors after receipt of proposals--do not govern competitive procurements under the FSS program. FAR 8.404(a); *USGC Inc.*, B-400184.2 *et al.*, Dec. 24, 2008, 2009 CPD ¶ 9 at 3. There is no requirement in FAR subpart 8.4 that an agency conduct discussions with vendors. See *USGC Inc.*, *supra*. However, exchanges that occur with vendors in a FAR subpart 8.4 procurement, like all other aspects of such a procurement, must be fair and equitable; our Office has looked to the standards in FAR part 15 for guidance in making this determination. *Id.*

Based on the content of the brief explanation that DOL provided 2TechJV, the protester challenged the fairness of discussions. See Protest at 26-29; see also AR, Tab 13, Brief Explanation at 2. The protester argued that the agency flagged significant weaknesses or deficiencies in the brief explanation that it had not raised during discussions. After the production of the agency report, the record demonstrated that

two issues that 2TechJV identified as unaddressed in discussions were characterized by the agency as significant weaknesses. See AR, Tab 9, TEP Report at 9-10. The two significant weaknesses were an “[i]ncorrect understanding of capacity-based contract structure,” as evident in the protester’s expectation that the agency would issue additional task orders, and “[i]neffective risk identification.” *Id.* The protester argued that both those issues were present in its initial quotation, and, thus, the agency was required to identify those issues in discussions. Because the agency failed to do so, 2TechJV asserted that the discussions were not meaningful. Protest at 27-28.

DOL asserted three defenses to the agency’s conduct of discussions. First, DOL argued that it was not required to reopen discussions after corrective action because the procurement was conducted under FAR part 8 and the discussion rules of FAR part 15 did not apply. With respect to the second significant weakness, the agency contended that it was newly introduced in the protester’s revised quotation. Finally, DOL asserted that the agency’s conduct of the procurement was fair because DOL had put 2TechJV on notice of its concerns. We address each of these contentions below and find that none of them provide a defensible legal position.<sup>3</sup>

#### Agency Required to Conduct Discussions Fairly under FAR part 8

DOL argued that it was not obligated to reopen discussions to address any deficiencies or significant weaknesses because this procurement was conducted under FAR part 8, rather than FAR part 15. Memorandum of Law (MOL) at 21. In FAR part 15 procurements, DOL argues, “the contracting officer at a minimum must discuss with each offeror any ‘deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond.’” *Id.*, quoting FAR 15.306(d)(3). By contrast, the agency contends, “the requirement for FAR Part 8 procurements, where discussions are held, is that any discussions ‘be fair and equitable.’” *Id.*, citations omitted. GAO looks to the standards in FAR part 15 for guidance in determining whether an agency’s conduct of discussions in a FAR part 8 procurement was fair and equitable. *USGC Inc.*, *supra*.

We have repeatedly recognized that, when an agency holds discussions and seeks revised proposals in a FAR part 15 procurement, an agency’s discussions are not meaningful if they fail to address proposal flaws that were apparent at the time the agency conducted discussions but were first discovered after discussions have been completed. See, e.g., *Sungrim Eng’g, & Constr. Co., Ltd.*, B-419067.3, Aug. 6, 2021, 2021 CPD ¶ 278 at 5. We have stated that, in those situations, the agency must reopen discussions to disclose its concerns, thereby giving all offerors similar opportunities to revise their proposals. *Id.*; *Life Sci. Logistics, LLC*, B-421018.2, B-421018.3, Apr. 19, 2023, 2023 CPD ¶ 103 at 5-6. While our decisions regarding the reopening of discussions have largely reflected the regulatory requirements of FAR part 15, in our

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<sup>3</sup> Because, as discussed below, we find not meaningful the agency’s conduct of discussions with respect to the second significant weakness, we need not address the conduct of discussions with respect to the first significant weakness.

view, the underlying principle that offerors or in this case vendors, must be treated fairly, applies equally to both FAR parts 8 and 15. *USGC Inc., supra*. In this regard, fundamental fairness dictates that under the procedural posture of this FAR part 8 procurement, the agency was required to afford all offerors the same degree of specificity and directness in the conduct of discussions.

Here, there is no dispute that the agency provided the awardee with clear items for negotiation when DOL advised the awardee of the two weaknesses the agency identified with its quotation. See Addx Items for Negotiation (IFN), Suppl. Document Prod., May 8, 2024. Fundamental fairness required that the agency do the same for 2TechJV. The record, however, as discussed in more detail below, shows that the agency did not raise all significant weaknesses with 2TechJV, even though DOL had raised with the awardee all of the weaknesses it found in its quotation.<sup>4</sup> While certain significant weaknesses in 2TechJV's quotation were first discovered after discussions had been completed, this did not absolve the agency of the obligation to raise the initial significant weaknesses with 2TechJV. To address this fundamental unfairness, the agency was required to reopen discussions with 2TechJV to alert it to the significant weaknesses that the agency should have raised in its initial round of discussions. Accordingly, on this record, the agency's claim that it was not, in this instance, required to reopen discussions simply because the procurement was conducted under FAR part 8 does not provide a defensible legal position.

#### "Examples of Risks" Significant Weakness Was Not New

With regard to its second defense, the agency also argues it was not required to reopen discussions because the protester introduced a new significant weakness into its revised quotation. The agency asserts it is not required to reopen discussions when a vendor introduces new concerns into its revised quotation. MOL at 6. Based on this record, we conclude the introduction of additional information in the protester's revised quotations did not change the essential character of the initial significant weakness to such a degree as to characterize the entirety of the protester's revised quotation as a new significant weakness. As such, we find the agency argument does not present a defensible legal position.

Here, for the understanding the requirement subfactor, the RFQ advised vendors that the government would "evaluate the vendor's understanding of the specific requirements, the technical capability, and proposed methods/approaches to the work described in the PWS." AR, Tab 5, RFQ, amend. 0004 at 90. The agency assessed a second significant weakness to 2TechJV's quotation under this subfactor for the quotation's failure to "identify useful or impactful examples of risks or demonstrate significant risk mitigation capabilities that would add value to the OIS program." AR, Tab 9, TEP Report at 10. In the agency's view, "[t]he offeror identified 3 basic general risks that might apply to any software development effort." *Id.* DOL stated that, if it had

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<sup>4</sup> As part of the post corrective action evaluation, the agency evaluated the awardee's proposal as containing no weaknesses or significant weaknesses. See MOL at 29-30.

reopened discussions, it would have included this second significant weakness in discussions. MOL at 25.

2TechJV's initial quotation identified the following three risks:

[DELETED]

AR, Tab 6a, 2TechJV Initial Technical Quotation at 35, fig. 13.

2TechJV's revised quotation identified the following three risks and the only difference between the two tables is the [DELETED] and description in the initial quotation table and the [DELETED] and description in the revised quotation table:

[DELETED]

AR, Tab 7a, Final 2TechJV Technical Quotation at 23, fig. 20 (third column, Risk Mitigation Strategy, omitted). Two of those three risks were identical to the risks identified in 2TechJV's initial quotation. *Compare id. with* AR, Tab 6a, Initial 2TechJV Technical Quotation at 34-35, fig. 13. The initial quotation identified this different first risk: [DELETED]<sup>5</sup> AR, Tab 6a, Initial 2TechJV Technical Quotation at 34, fig. 13.

DOL argued that it was unnecessary for it to reopen discussions to address this issue because--from the initial to final quotation--the protester "significantly revised its identification of risks." MOL at 25. In fact, as the agency notes, the protester's initial and revised quotations contained three risks, and two of the risks were included in both quotations. In other words, from the initial to the revised quotation, the protester replaced one of the three identified risks. The agency asserts that "[t]his is not the same content in response to the same requirement," *id.* at 24-25, even though two of the three risks were the same and the significant weakness itself--the general nature of the identified risks--was unchanged from the initial to the revised quotation.

Moreover, the argument that the protester meaningfully changed its quotation does not address the core issue. The significant weakness that the agency assessed the protester's quotation was for failure to identify useful or impactful examples of risks or to demonstrate significant risk mitigation capabilities. AR, Tab 9, TEP Report at 10. The agency nowhere claimed that this significant weakness was not evident in the protester's initial quotation. See MOL at 23-27. Because the initial quotation contained no risk mitigation strategy, the significant weakness was more pronounced before the submission of revised quotations. Because the protester's initial quotation contained this significant weakness, DOL was required to address this significant weakness with the protester in the first round of discussions. The fact that 2TechJV altered its quotation is not a legally defensible argument as to why the conduct of discussions was not meaningful when the discussions omitted mention of this significant weakness.

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<sup>5</sup> The agency notes that this risk--which was removed from 2TechJV's quotation--"was actually a meaningful and useful risk to track." MOL at 24-25, n. 5 (citation omitted).



## DOL Did Not Provide 2TechJV Notice of This Significant Weakness

In asserting its third defense, the agency argued that, even if “DOL should have opened discussions in light of similar content in 2TechJV’s pre-corrective action quotation, this ground of protest fails” because “discussion questions DOL raised pre corrective action [were] sufficient to point 2TechJV to the Agency’s concerns about [DELETED].” MOL at 25. The relevant discussions question the agency provided 2TechJV consisted of the following:

[DELETED]

AR, Tab 6b, 2TechJV IFNs at-1-2.

The agency’s argument that its discussions question alerted 2TechJV to the agency’s concerns about risk is a *non sequitur*. As is clear from the record, the agency’s concern as expressed in the discussions question above [DELETED]. The discussions question did not identify risk or risk mitigation strategies as an agency concern. In this regard, the discussion questions that DOL provided 2TechJV were not sufficient to alert the protester to the agency’s concern that the protester’s quotation failed to identify useful or impactful examples of risks or demonstrate significant risk mitigation capabilities. *See id.* In sum, the agency’s argument that its discussions questions provided 2TechJV notice of the agency’s concerns with the risks the protester identified in its quotation does not represent a defensible legal position.

In summary, the record demonstrates that the protester’s initial quotation contained a significant weakness that was carried over, in modified form, in the protester’s revised quotation. A reasonable agency inquiry into the protest allegation that the agency unfairly failed to raise this significant weakness in discussions would have shown facts disclosing the absence of a defensible legal position. We thus find clearly meritorious the allegation that the agency’s conduct of discussions was unfair.

Further, our Office finds that DOL unduly delayed taking corrective action in the face of 2TechJV’s protest. As noted above, while we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt where it is taken after that date. *AGFA HealthCare Corp.--Costs, supra*. In this case, the due date for the agency report was May 30, 2023. The protester filed comments on the agency report on June 12. It was only after the GAO attorney held a litigation risk ADR conference call and advised that we would likely sustain the protest that the agency took corrective action on July 13. Thus, we find that the agency unduly delayed in taking corrective action in the face of a clearly meritorious protest, and we recommend that the protester be reimbursed the reasonable costs of pursuing its challenges to the agency’s conduct of discussions.

### Challenges to the Agency’s Technical Evaluation

DOL assessed 2TechJV's quotation a rating of marginal for the understanding the requirement subfactor of the technical approach factor. AR, Tab 9, TEP Report at 6. Under that subfactor, the agency identified two weaknesses in the protester's quotation, in addition to two significant weaknesses, one of which, ineffective risk identification, we discussed above. See *id.* at 7-10. 2TechJV challenged the reasonableness of the assessment of both significant weaknesses and both weaknesses. In our analysis below, we conclude that the agency unreasonably delayed taking corrective action regarding the clearly meritorious challenge to the first weakness.<sup>6</sup>

In reviewing protests of an agency's evaluation and source selection decision, even in a task order competition as here, we do not reevaluate quotations but examine the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. *Diamond Info. Sys., LLC*, B-410372.2, B-410372.3, Mar. 27, 2015, 2015 CPD ¶ 122 at 7.

### First Weakness

2TechJV challenged an assigned weakness that the protester's quotation did not align with the scope of operations as described in the solicitation. DOL assessed the protester's quotation a weakness for "inconsistent understanding of [the] solicitation's concept of 'Operations Support.'" AR, Tab 9, TEP Report at 7. Specifically, the agency found that 2TechJV's quotation "[DELETED]." *Id.* at 8; see also *id.* at 7, quoting AR, Tab 7a, Final 2TechJV Technical Quotation at 18 ("[DELETED]."). The TEP report quoted three passages from the solicitation without explaining why they were germane to the assessment of this weakness. See AR, Tab 9, TEP Report at 7. The description of the weakness itself provided no rationale for why the [DELETED] should not have been included in the [DELETED] of the operations portion of the quotation. See *id.* at 8.

In contrast, 2TechJV argued precisely why it was reasonable for the protester to include the [DELETED] where it did in its quotation. The protester explained that the RFQ required vendors to implement a [DELETED]. Specifically, the protester noted that section 5.2 of the PWS is "OIS Operations Support and Helpdesk Services." Comments at 4, citing PWS at 30. Under the first subtask, 5.2.1 customer support and application helpdesk services, the PWS advised vendors: "**For additional context, refer to Technical Exhibit 4--OIS Services Description.**" *Id.* Technical exhibit 4 contains a heading, "5.2.1 Customer Support and Application Helpdesk [Context]," and under that, subheading "5.4 Documentation." Comments at 4, citing PWS at 53.

Here, the PWS identified two objectives of developing and maintaining documentation of the OIS system, one of which was to "[p]rovide a records management system for OIS and maintain OIS records in accordance with current records management system

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<sup>6</sup> Because, as discussed below, challenges to the evaluation of the technical approach factor are not severable, we need not discuss whether the protester's challenge to the assessment of the second weakness was clearly meritorious.

NARA regulations and policies.” PWS at 53. The protester noted that, moreover, under subtask 5.7, system and user documentation, the PWS advised vendors that they were to “design, implement, and maintain an OIS Records Management System in accordance with [National Archives and Records Administration (NARA)], DOL, and OSHA requirements during the creation, maintenance, and disposition of OIS electronic and nonelectronic records.” Comments at 4-5, *citing* PWS at 55. 2TechJV argued that it was thus reasonable for the protester [DELETED]. Comments at 4-5.

The protester argued that it did just what the RFQ required. *Id.* at 5. 2TechJV asserts that, under its discussion of its [DELETED], the protester’s quotation stated that “[DELETED].” *Id.*, *quoting* AR, Tab 7a, Final 2TechJV Technical Quotation at 9 (emphasis omitted). The agency claimed that “2TechJV fails to understand the requirements [of] the RFQ,” without identifying the requirement at issue or explaining why the protester’s quotation is nonresponsive to a particular requirement. See MOL at 13. On this record, we conclude that the challenge to the reasonableness of the assessment of this weakness is clearly meritorious.<sup>7</sup>

### Two Significant Weaknesses

As discussed above, the agency assessed 2TechJV’s quotation two significant weaknesses for the understanding the requirement subfactor of the technical approach factor. AR, Tab 9, TEP Report at 9-10. As discussed in more detail below, for purposes of determining whether to recommend protest costs, we generally consider all issues concerning the evaluation of proposals to be intertwined--and thus not severable--and therefore will generally recommend reimbursement of the costs associated with both successful and unsuccessful challenges to an evaluation. *Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs*, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197 at 5. Allegations that an agency failed to conduct meaningful discussions and unreasonably evaluated quotations involve the same set of core facts, and we therefore consider those allegations to be intertwined for the purpose of reimbursement of protest costs. See *id.* Consequently, we need not consider whether the challenges to the assessment of these significant weaknesses are, in themselves, clearly meritorious.

### Challenges to the Past Performance Evaluation

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<sup>7</sup> This weakness had a second facet, namely, that the protester’s quotation “[DELETED].” AR, Tab 9, TEP Report at 8. 2TechJV argued that the RFQ did not require [DELETED], that vendors were required to quote three project managers, and that the RFQ did not specify a CLIN to which any of the three should be assigned. Comments at 7, *citing* AR, Tab 5, RFQ amend. 0004, PWS at 44. The agency offered no defense against the allegation that this portion of the weakness was unreasonably assessed. See MOL at 13-14. Because the agency provided no defense of the reasonableness of its evaluation, we find that the record contains no basis on which to find this allegation not clearly meritorious.

2TechJV also argued that its past performance allegations were clearly meritorious. Specifically, the protester asserted that the agency's evaluation of the vendors' past performance was irrational because, according to publicly available data, Addx has no recent or relevant experience. Protest at 23-25. For that reason, the protester contended, it was unreasonable for the agency to evaluate both quotations as very good under past performance. *Id.* at 25. The agency asserted that the evaluation was reasonable because Addx relied on the past performance of one of its proposed subcontractors, MindPetal, consistent with the terms of the RFQ. MOL at 19, *citing* RFQ at 88 (noting that the government may take into account information regarding the past performance of predecessor companies, key personnel with relevant past performance, or subcontractors that will perform key aspects of the requirement). The agency's argument represents a defensible legal position, and we therefore find the protester's challenge to the past performance evaluation was not clearly meritorious.<sup>8</sup>

### Severability

Generally, when resolving requests for recommendations for protest costs, we will recommend a successful protester receive costs incurred with respect to all issues pursued, not merely those upon which it prevails. *JRS Staffing Servs.--Costs*, B-410098.6 *et al.*, Aug. 21, 2015, 2015 CPD ¶ 262 at 5. In our view, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial Congressional purpose behind the cost reimbursement provisions of the Competition in Contracting Act, 31 U.S.C. § 3554(c)(1)(A); *Fluor Energy Tech. Servs., LLC--Costs*, B-411466.3, June 7, 2016, 2016 CPD ¶ 160 at 3. On the other hand, failing to limit the recovery of protest costs in all instances of partial or limited success by a protester may result in an unjustified windfall to the protester and cost to the government. *JRS Staffing Servs.--Costs, supra.*

Accordingly, in appropriate cases, we have limited the recommended reimbursement of protest costs where a part of the costs is allocable to a losing protest issue that is so clearly severable as to essentially constitute a separate protest. *See, e.g., VSE Corp.; The Univ. of Hawaii--Costs*, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined, that is, the extent to which successful

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<sup>8</sup> In its comments on the agency report, 2TechJV asserted that the agency disparately evaluated past performance when it used different standards for relevance for the two vendors. Comments at 17-18. 2TechJV also asserted that the agency miscalculated the quality of the performance of one of the protester's contract references. *Id.* at 18-20. These were new challenges to the reasonableness of the agency's evaluation of past performance, and the agency's corrective action following these allegations was prompt. *NARCORPS Specialties, LLC--Costs*, B-418971.4, Jan. 21, 2021, 2021 CPD ¶ 61 at 6. As a result, we conclude the agency did not unduly delay its corrective action. Thus, we do not recommend the reimbursement of protest costs for this allegation.

and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. *Deque Sys., Inc.--Costs*, B-415965.5, Aug. 23, 2018, 2018 CPD ¶ 304 at 5. In applying these principles, we have severed costs arising from allegations of misvaluation under separate evaluation factors on the basis they are not intertwined. See *Carney, Inc.--Costs*, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82 at 6 (severing costs for alleged misvaluation of price from clearly meritorious challenge to technical capability factor evaluation); see also *BluePath Labs, LLC--Costs*, B-417960.4, May 19, 2020, 2020 CPD ¶ 175 at 4 (severing costs for allegations of misvaluation of quotations from clearly meritorious allegation of unequal discussions).

2TechJV argues that GAO should recommend the reimbursement of all reasonable costs because 2TechJV would have likely prevailed across all major protest grounds that 2TechJV raised. Req. for Costs at 8. DOL argues that the protester's allegations are clearly severable and that the only allegation that "could reasonably support a recommendation for costs" is the challenge to the agency's conduct of discussions. Resp. to Req. for Costs at 3-4.

As we discussed, we found that the challenge to the conduct of discussions was clearly meritorious; intertwined with that issue was the challenge to the assessment of the significant weakness that should have been addressed in discussions. We found the challenge to the assessment of one weakness under the understanding the requirement subfactor of the technical approach factor to be clearly meritorious. Because we find 2TechJV's allegations that the agency's conduct of discussions was unfair and that the agency unreasonably evaluated quotations under the technical approach factor were clearly meritorious, we conclude that the derivative challenge to the best-value tradeoff analysis and award decision also provides a basis upon which to recommend costs. *Ruchman & Assocs., Inc.--Costs*, B-419968.3, Mar. 10, 2022, 2022 CPD ¶ 76 at 9. Because the other challenges to the evaluation of quotations under the technical approach factor share a common core set of facts and are based on related legal theories, we conclude these allegations are intertwined such that severance is not appropriate under these circumstances.

On the other hand, we find that the challenge to the agency's assessment of past performance is severable. That is, this challenge does not share a common core set of facts with the conduct of discussions and technical approach evaluation challenges and is otherwise not clearly meritorious in its own right. *BluePath Labs, LLC--Costs., supra.*

## RECOMMENDATION

We recommend that DOL reimburse 2TechJV its reasonable protest costs, including attorneys' fees, of pursuing its challenges to the agency's conduct of discussions, the evaluation of technical quotations under the technical approach factor, and the best-value tradeoff analysis. 4 C.F.R. § 21.8(d)(1). We do not recommend reimbursement of the costs associated with 2TechJV's challenge to the agency's evaluation of past performance, because those allegations were either not clearly meritorious or the

agency did not unduly delay in taking corrective action. 2TechJV's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving this decision. *Id.* § 21.8(f)(1).

The request is granted in part and denied in part.

Edda Emmanuelli Perez  
General Counsel