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# Decision

**Matter of:** Deque Systems, Inc.--Costs

**File:** B-415965.5

**Date:** August 23, 2018

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Nora K. Adkins, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

1. GAO recommends reimbursement of the reasonable costs of filing and pursuing challenges against the agency's evaluation of the awardee's past performance and the award decision, where the agency unduly delayed taking corrective action with respect to clearly meritorious past performance evaluation arguments and the protester's arguments with respect to the agency's best-value decision were intertwined with the protester's past performance arguments.
  2. GAO does not recommend reimbursement of the costs of pursuing arguments related to the agency's evaluation of the protester's and awardee's technical approach, which were not clearly meritorious and are severable from the protester's clearly meritorious grounds.
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## DECISION

Deque Systems, Inc., a small business located in Herndon, Virginia, requests that we recommend that it be reimbursed the reasonable costs associated with filing and pursuing its protests against the award of a contract to Level Access, Inc., of Vienna, Virginia, pursuant to request for proposals (RFP) No. VA118-18-R-0143, which was issued by the Department of Veterans Affairs (VA) for Section 508 program scanning and services.<sup>1</sup>

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<sup>1</sup> Section 508 refers to the Rehabilitation Act of 1973, as amended, which generally requires that agencies' electronic and information technology be accessible to people with disabilities. See 29 U.S.C. § 794d.

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

## BACKGROUND

The VA Section 508 Office is responsible for determining the accessibility compliance levels of electronic information and technology (EIT) developed, procured, maintained, or used by VA. RFP, amend. No. 5, at 30. Part of this role is to assess the accessibility compliance level of websites, applications, eLearning courses, mobile software, and various software platforms or collaboration environments/tools. Id. To ensure compliance with the regulations set forth in Section 508, VA requires software and services to assist with the EIT compliance assessments. Id.

The VA issued the solicitation on October 6, 2017, as a small business set-aside for Section 508 accessibility compliance scanning and services, including project management; automated and manual testing; dashboard reporting; help desk activities; and training. Id. at 1-2, 33. The RFP stated that award of a fixed-price contract would be made on a best-value tradeoff basis using four evaluation factors: technical, price, past performance, and veterans involvement. Id. at 134, 144.

On January 18, 2018, the agency notified Deque that Level Access was awarded the contract. On January 26, Deque filed a protest with our Office challenging the agency's award decision, which it supplemented on January 29.<sup>2</sup> Deque's protests primarily alleged the following: (1) the agency's evaluation of the awardee's technical approach was unreasonable because all of the significant strengths and strengths were based on unstated evaluation criteria and were applied unequally; (2) the agency's evaluation of the protester's technical approach was flawed because it failed to assign multiple significant strengths and strengths; (3) the agency's evaluation of the awardee's past performance was unreasonable because it failed to follow the RFP criteria, did not include a relative risk evaluation, and failed to individually evaluate prime contractor and subcontractor references; and (4) the agency failed to properly investigate, mitigate, or resolve organizational conflicts of interests of the awardee.<sup>3</sup> Deque also filed a size status protest with the Small Business Administration (SBA) alleging that Level Access was not a small business eligible for award. On March 7, Deque filed a second supplemental protest, which argued that the agency's past performance evaluation failed to consider, among other things, whether the awardee's subcontractors met the solicitation's definition of a major subcontractor.<sup>4</sup> Deque's second supplemental protest

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<sup>2</sup> We opened protest B-415965 based on Deque's January 26 protest filing and protest B-415965.2 based on Deque's January 29 filing.

<sup>3</sup> Deque also alleged a violation of the Procurement Integrity Act which we dismissed as untimely because Deque did not report the alleged violation of the Act to the contracting agency within 14 days after becoming aware of the information or facts giving rise to the alleged violation. See 4 C.F.R. § 21.5(d).

<sup>4</sup> Deque's second supplemental protest was opened as B-415965.3.

also raised additional arguments with respect to organizational conflicts of interest of Level Access and its proposed subcontractors.

On April 18, our Office was provided a copy of the SBA decision finding that Level Access was not a small business for the current procurement. Email to GAO, Apr. 18, 2018. Thereafter, on April 19, the GAO attorney assigned to the protest requested that the VA explain the “impact of the SBA’s decision on the current GAO protest and the agency’s intended action.” GAO Email to VA, Apr. 19, 2018, at 1. The VA responded that its action was “dependent upon the GAO’s determination [] of this matter.” VA Email to GAO, Apr. 19, 2018, at 1.

On April 20, at the request of agency and after full development of the record, the GAO attorney assigned to the protest conducted an outcome prediction alternative dispute resolution (ADR) conference. The GAO attorney advised that she would likely draft a decision sustaining the protest based on the agency’s improper evaluation of the awardee’s proposed major subcontractors’ past performance.<sup>5</sup> The GAO attorney also advised that she would likely deny all other protest allegations.

On April 23, the VA advised that it would take corrective action in response to the protest. Specifically, the agency stated that it would take the following actions:

[T]he Agency has decided to take the following corrective action. The Agency will reopen the evaluation for the limited purpose of reassessing LA’s [Level Access] and Deque’s past performance (PP) proposals. The Agency will evaluate the PP proposals in strict accordance with the Solicitation, to include how it defined a major subcontractor. The new PP evaluations (i.e., the PP evaluation reports) will be presented to the Source Selection Authority (SSA). The SSA will then render a new award determination in full consideration of those revised PP evaluation reports.

Agency Notice of Corrective Action, Apr. 23, 2018, at 1.

On April 25, our Office dismissed the protest, concluding that the agency’s proposed corrective action rendered the protest academic. Deque Sys., Inc., B-415965 et al., Apr. 25, 2018 (unpublished decision.)

Following the dismissal of the protest, Deque filed this request that GAO recommend the reimbursement of its costs of filing and pursuing its protests (B-415965, B-415965.2, and B-415965.3).<sup>6</sup>

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<sup>5</sup> The GAO attorney advised that a sustain decision was likely because the agency failed to properly consider whether Level Access’ proposed subcontractors were major subcontractors in accordance with the solicitation’s evaluation criteria.

<sup>6</sup> On April 30, Deque filed a protest challenging the corrective action. We dismissed the protest as premature. Deque Sys., Inc., B-415965.4, June 13, 2018, 2018 CPD ¶ 226.

## DISCUSSION

Deque asks our Office to recommend that the VA reimburse it for the costs associated with its challenges to the agency's evaluation of the protester's and awardee's proposals and the award decision. Deque does not seek reimbursement of costs associated with its pursuit of its Procurement Integrity Act and organizational conflict of interest claims. Deque Request for Reimbursement, at 6-7. In response, the VA does not dispute that the protester should be reimbursed its costs of pursuing its challenge to the agency's evaluation of Level Access' subcontractors' past performance, but maintains that Deque's reimbursement should be limited to this issue, which was first argued in Deque's second supplemental protest. Agency Response at 2-3. For the reasons discussed below, we grant the protester's request with respect to its challenges to the agency's evaluation of past performance, without limitation, and the best-value determination. We decline to grant the protester's request in connection with its challenges to the agency's evaluation of the technical factor.

When a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) that the agency reimburse the protester its reasonable protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief.<sup>7</sup> Pemco Aeroplex, Inc.--Recon. & Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102 at 5. 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. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. A GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained only if he or she has a high degree of confidence regarding the outcome; therefore, the willingness to do so is generally an indication that the protest is viewed as clearly meritorious, and satisfies the clearly meritorious requirement for the purpose of recommending reimbursement of protest costs. National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3.

As a general rule, our Office recommends that a successful protester be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has prevailed. The Salvation Army Cmty. Corr. Program--Costs, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. In appropriate cases, however, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues

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<sup>7</sup> Here, the agency's corrective action did not occur until after full development of the record and an outcome prediction ADR. Thus, we find that the agency unduly delayed taking corrective action. National Opinion Research Ctr.--Costs, B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55 at 3 (corrective action based upon outcome prediction ADR provided after the submission of an agency report is not considered to be prompt).

as to essentially constitute a separate protest. Octo Consulting Group, Inc.--Costs, B-414801.4, Dec. 14, 2017, 2018 CPD ¶ 52 at 3. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, our Office considers, among other things, whether the successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. Genesis Bus. Sys.--Costs, B-411264.11, Dec. 10, 2015, 2015 CPD ¶ 389 at 3.

In applying these principles, we have severed costs arising from allegations of misevaluation under separate evaluation factors on the basis that they are not clearly intertwined. For example, challenges to a past performance evaluation were not clearly intertwined with clearly meritorious challenges to the technical factor evaluation and the resulting tradeoff. Chags Health Information Technology, LLC, et al.--Costs, B-413116.38, et al., Apr. 19, 2017, 2017 CPD ¶ 126 at 4, citing Genesis Bus. Sys.--Costs, supra at 4; see also Carney, Inc.--Costs, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82 at 5 (severing costs for alleged misevaluation of price from clearly meritorious challenge to technical capability factor evaluation); Loyal Source Gov't Servs., LLC--Costs, B-407791.4, Feb. 14, 2014, 2014 CPD ¶ 139 at 4 (severing costs for evaluation challenges from clearly meritorious challenge to adequacy of best-value tradeoff rationale). In a similar fashion, we severed the costs for challenges to the evaluation of the awardee and to the agency's alleged failure to amend a solicitation because those issues were not clearly intertwined with a clearly meritorious allegation of unequal discussions. VSE Corp.; The Univ. of Hawaii--Costs, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8.

With respect to Deque's challenges to the agency's evaluation of past performance, as discussed above, during the ADR conference, the GAO attorney assigned to the protests explained that we found clearly meritorious the protester's complaint that the agency failed to reasonably evaluate the past performance of the awardee's subcontractors. The agency asks, to the extent that our Office grants Deque's request for reimbursement of costs, that we limit reimbursement to only this issue, which was raised in Deque's second supplemental protest filing. We reject the agency's request to limit reimbursement in this manner because all of Deque's arguments challenging the agency's evaluation of past performance were based on the same set of operative facts. Thus, we decline to limit reimbursement, and grant the protester's request with respect to each of its challenges to the agency's evaluation of the awardee's past performance.

Regarding the costs for the best-value tradeoff protest allegations, we also grant the protester's request. The agency's tradeoff analysis required an integrated assessment of the evaluation factors including the evaluation of past performance, which as stated above was unreasonable. Since the best-value tradeoff decision was necessarily based on these flawed evaluation findings, we consider all of the protester's arguments in connection with the tradeoff decision to be intertwined with the protester's meritorious challenge to the agency's evaluation of the awardee's past performance. Accordingly, we reject the agency's arguments to sever costs related to the protester's challenge of the best-value decision.

We agree with the agency, however, that Deque's challenge to the agency's evaluation of the protester's and awardee's technical proposals should be severed in this case. On the record before us, we find no basis to conclude that the facts and legal arguments concerning the agency's evaluation of technical proposals are intertwined with the agency's evaluation of the awardee's past performance. Deque's challenges to the agency's evaluation of technical proposals concerned allegations focused on specific technical evaluation criteria regarding the assignment (or lack thereof) of significant strengths, strengths, and weaknesses, consideration of risk, and overall adjectival ratings, which were unrelated to the past performance evaluation criteria and the agency's evaluation thereunder. In addition, the technical evaluation issues were not independently clearly meritorious, and thus provide no basis on which to recommend reimbursement of protest costs.

## RECOMMENDATION

We recommend that the protester be reimbursed the reasonable costs associated with filing and pursuing its protests, including reasonable attorneys' fees, to the extent those costs were incurred in connection with challenges to the agency's evaluation of proposals under the past performance evaluation factor or challenges to the best-value decision. We do not recommend reimbursement for protest grounds challenging the agency's technical evaluation, or any other challenges not associated with the evaluation of proposals under the past performance factor or the best-value tradeoff decision. The protester should submit its claim for costs associated with the protest grounds recommended for reimbursement, detailing and certifying the time expended and costs incurred, directly to the VA within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1)

The request is granted in part and denied in part.

Thomas H. Armstrong  
General Counsel