



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: TRAX International Corporation

File: B-420361.7; B-420361.8

Date: June 28, 2023

Daniel P. Graham, Esq., Tara L. Ward, Esq., Llewelyn M. Engel, Esq., and Elizabeth Hummel, Esq., McDermott Will & Emery LLP, for the protester.

J. Hunter Bennett, Esq., Jason A. Carey, Esq., Evan R. Sherwood, Esq., Chanda Brown, Esq., and Paul L. Rowley, Esq., Covington & Burling LLP, for Engineering Research and Consulting, Inc., the intervenor.

Lieutenant Colonel Michael R. Tregle, Jr., Department of the Army, for the agency. Kenneth Kilgour, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Requests to dismiss protest pursuant to Bid Protest Regulations, 4 C.F.R. § 21.11(b), are denied because ancillary litigation at the District Court that could call into question the responsibility of an awardee is not the standard GAO uses for dismissal based on concurrent jurisdiction between GAO and other forums.
2. Protest that awardee is ineligible for award for failure to provide an adequate disclosure statement is sustained where the disclosure statement provided was not the awardee's.
3. Protest challenging the agency's evaluation of awardee's proposed program management office is sustained where the evaluation contained an error of fact regarding the escalation of labor rates.
4. Allegations that the agency engaged in misleading and unequal discussions are sustained where the agency failed to discuss with protester costs the agency evaluated as unrealistic; the agency had addressed unrealistic costs with offerors in discussions and, after discussions concluded, the agency identified additional costs--unchanged since the initiation of discussions--that the agency considered unrealistic. In addition, the record substantiates that the agency conducted a final round of discussions with the awardee alone.

5. Protest challenging the agency's evaluation of the realism of direct labor rates is sustained where, to the extent the evaluation was documented, it applied fair and reasonable price analysis considerations in lieu of cost realism considerations.

6. Protest that awardee impermissibly allocated certain costs is dismissed as an untimely challenge to the terms of the solicitation, where the solicitation contains a patent ambiguity regarding the treatment of those costs.

DECISION

TRAX International Corporation, of Las Vegas, Nevada, protests the award of a contract to Engineering Research and Consulting, Inc. (ERC), of Huntsville, Alabama, under request for proposals (RFP) No. W91CRB-21-R-0016, issued by the Department of the Army for Aberdeen Test Support Services (ATSS) at the Aberdeen Test Center (ATC) at Aberdeen Proving Ground, Maryland. TRAX asserts that ERC failed to provide an adequate cost accounting practices disclosure statement, that the agency evaluation of ERC's proposed program management office (PMO) was unreasonable, that the agency's conduct of discussions was misleading and unequal, and that the agency's evaluation of the realism of ERC's indirect rates was unreasonable.

We sustain the protest.

BACKGROUND

The primary mission of ATC is to support service members by providing a flexible, responsive, innovative, and diverse set of test capabilities, assets, and services. Agency Report (AR), Tab 3a, Conformed RFP (RFP) at 7. This procurement will acquire specialized personnel and expertise to help support that mission, which includes planning, conducting, analyzing, and reporting the results of developmental tests, production tests, and other tests. *Id.*

The RFP, issued on November 24, 2020, sought proposals for the award of a single cost-plus-fixed-fee (CPFF) indefinite-delivery, indefinite-quantity contract, with firm-fixed-price (FFP) and cost-reimbursable (COST) contract line item numbers (CLINs). *Id.* at 170. Award would be made to the offeror whose proposal represented the best value to the government, considering four non-price factors--technical, small business participation, past performance, and experience--and cost/price. *Id.* at 169-170. The technical factor had three subfactors: management approach, technical approach, and compliance approach. *Id.* at 169. The technical factor--and its three subfactors--would be assigned an adjectival rating of outstanding, good, acceptable, marginal, or unacceptable. *Id.* at 172-173. The other three non-price factors would be evaluated as acceptable or unacceptable. *Id.* at 170. Only proposals evaluated as at least acceptable under every factor--and the technical factor's three subfactors--would be considered for award. In the best-value tradeoff analysis, the technical factor was significantly more important than cost/price. *Id.*

Contract performance would require 45 professional labor categories, 12 of which were new for this procurement as compared to the incumbent contract; incumbent labor rate data was therefore not available for those new categories. AR, Tab 7(c), Cost Proposal Analysis at 6. An additional 74 labor categories were governed by applicable collective bargaining agreements (CBAs) and wage determinations (WDs). *Id.* The agency estimated that 90 percent of the required labor was governed by an applicable CBA or WD. *Id.* at 6-7.

The RFP advised offerors that cost/price proposals would be “evaluated in accordance with the price and cost criteria in [Federal Acquisition Regulation (FAR)] 15.404-1 as determined necessary by the Contracting Officer based on competition and other factors.” RFP at 165. The objective of price/cost proposal analysis was “to ensure that all proposed costs are fair, reasonable and realistic.” *Id.* The RFP further advised that “the analytical techniques and procedures described in FAR 15.404-1 may be used singly or in combination with others to ensure the costs are fair and reasonable,” and that a “[c]ost realism analysis [in accordance with] FAR 15.404-1(d) will be performed only on cost reimbursable CLINs and [sub-lines] in accordance with FAR 15-404-1(d).”

The RFP contemplated a cost-reimbursement contract well in excess of the thresholds for the applicability of Cost Accounting Standards (CAS)¹. The RFP therefore included the clause at FAR 52.230-2, CAS, requiring contractors to “[c]omply with all CAS . . . in effect on the date of award of this contract,” and to “[f]ollow consistently” their disclosed accounting practices. RFP at 113. The RFP also included the provision at FAR 52.230-1, CAS Notices and Certification, requiring an offeror to provide a disclosure statement with its proposal if the offeror had not previously prepared one. *Id.* at 137. While FAR provision 52.222-46 was not included in the RFP, the RFP stated that the provision “is applicable for the Professional Labor Categories; a Total Compensation Plan shall be provided for the applicable labor categories.” *Id.* at 144.

The Army received proposals from three firms: ERC, TRAX, and the incumbent.² Because this is a follow-on procurement for professional services, the solicitation

¹ See Federal Acquisition Regulation (FAR) 30.101 CAS (noting that CAS “requires certain contractors and subcontractors to comply with Cost Accounting Standards (CAS) and to disclose in writing and follow consistently their cost accounting practices”; 48 C.F.R. § 9903.201-1(b) (exempting from the applicability of CAS to contracts or subcontracts of less than \$7.5M, except in certain circumstances not applicable here).

² This procurement has been the subject of multiple protests. TRAX was the original awardee; GAO dismissed the protest of that award when the agency took corrective action. See *Jacobs Tech., Inc.*, B-420361, B-420361.2, Jan. 25, 2022 (unpublished decision). The Army then made award to ERC; GAO dismissed both protests of that award when the agency took corrective action to reevaluate offerors’ Professional Compensation Plans in accordance with Federal Acquisition Regulation provision 52.222-46 and make a new award decision. See *Jacobs Tech., Inc.*, B-420361.3, Dec. 13, 2022 (unpublished decision); *TRAX Int’l Corp.*, B-420361.4, B-420361.5,

included FAR provision 52.222-46, which requires an agency to evaluate offerors' professional compensation plans. In performing this evaluation, the agency compared each offeror's proposed direct labor rates to the incumbent workforce at the time of solicitation. AR, Tab 7(c), Cost Proposal Analysis at 6. Incumbent data was available for 33 of the 45 professional labor categories. *Id.* That evaluation found that the "majority of proposed professional direct labor rates (including those proposed by the incumbent) were less than incumbent rates." *Id.* at 7. ERC proposed [DELETED] professional labor rates lower than the incumbent rates, and the Army determined [DELETED] unrealistic. *Id.* The Army determined unrealistic an additional [DELETED] labor rates for which there was no incumbent data. *Id.* at 8. Based on these findings, as part of its cost realism evaluation, the agency adjusted ERC's [DELETED] unrealistic labor rates upward to the established minimums, resulting in an upward adjustment to ERC's total proposed cost of \$11,441,271. *Id.* With respect to TRAX, the agency concluded that it had proposed [DELETED] professional labor rates lower than incumbent rates, and the Army determined [DELETED] unrealistic. As part of its cost realism evaluation, as it did with ERC, the agency adjusted those rates upward to the established minimums, resulting in an upward adjustment to TRAX's total proposed cost of \$4,290,000. *Id.* at 9. The agency conducted discussions with offerors, and those discussions identified labor rates that the Army considered unrealistic.³ *Id.*

Dec. 13, 2022 (unpublished decision). GAO dismissed TRAX's protest that ERC--through its acquisition of TRAX's former teaming partner, OASIS--committed a Procurement Integrity Act (PIA) violation. See *TRAX Int'l Corp.*, B-420361.6, Mar. 9, 2023, 2023 CPD ¶ 69 (dismissing protest because the dispute was between private parties and therefore not for our consideration).

³ The Army states that "did not conduct discussions with any offeror before making a most probable cost adjustment." Supp. Contracting Officer's Statement (COS) at 16. Given the multiple corrective actions in this procurement, and the multiple rounds of discussions, the record provided by the agency is unclear regarding the precise sequencing of discussions and cost adjustments. What is undisputed in the record is that the Army included labor rates it considered unrealistic in its discussions with offerors. See Protest, exh. 11, Evaluation Notice (EN) No. 3.0.1.

The table below summarizes the agency’s evaluation of those two proposals, including the costs/prices, as adjusted:

Factor/Subfactor	ERC	TRAX
Technical Factor	Good	Good
Management Approach Subfactor	Outstanding	Good
Technical Approach Subfactor	Good	Good
Compliance Approach Subfactor	Acceptable	Good
Small Business Participation Factor	Acceptable	Acceptable
Past Performance Factor	Acceptable	Acceptable
Experience Factor	Acceptable	Acceptable
Final Proposed Price	\$640,512,702	\$653,837,935
Most Probable Cost After Adjustment	\$651,953,974	\$658,127,936

AR, Tab 7(i), Source Selection Decision Document (SSDD) at 7; AR, Tab 7(h), Source Selection Advisory Council (SSAC) Recommendation at 3; AR, Tab 8(c), Debriefing Slides at 18. The SSAC noted that both proposals were evaluated as good technically and concluded that TRAX’s proposal did not justify paying a premium of approximately \$13.3M. AR, Tab 7(h), SSAC Recommendation at 4. The SSAC recommended award to ERC. *Id.*

The source selection evaluation board (SSEB) provided the source selection authority (SSA) a “detailed briefing” on the evaluation results following the second corrective action. AR, Tab 7(i), SSDD at 8. The SSA stated that the source selection was based on the SSEB report and the SSA’s “integrated assessment and comparison of the strengths, weaknesses, and risks of the proposals.” *Id.* at 1. The SSA noted the strengths that the Army identified in ERC’s and TRAX’s proposals. *Id.* at 8. The SSA considered “the potential benefits of the strengths and the merits of each proposal as a whole” and concluded that “[n]one of the strengths in TRAX’s [] proposal[] justified paying the additional cost of approximately \$13.3M.”⁴ AR, Tab 7(i), SSDD at 8. The SSA determined that ERC’s proposal represented the best value to the government. *Id.* at 9.

This protest followed.

DISCUSSION

TRAX asserts that ERC failed to provide an adequate cost accounting practices disclosure statement, because the disclosure statement the awardee provided was not its own. The protester argues that the agency’s evaluation of ERC’s proposed PMO

⁴ Throughout record development, the parties refer to a difference in price of from approximately \$13M to approximately \$15M, notwithstanding that the difference in the most probable cost, as adjusted by the agency, is substantially less.

was unreasonable because it failed to recognize that ERC proposed to reduce the salaries of the PMO employees. TRAX contends that the agency's conduct of discussions was both misleading and unequal. TRAX asserts that the Army's evaluation of the realism of ERC's indirect rates was unreasonable, where the agency failed to evaluate the most probable cost of the awardee's performance. As discussed below, we find these arguments meritorious. We find that the RFP contained a patent ambiguity regarding how offerors were to account for indirect labor, and we dismiss the allegation that the awardee impermissibly allocated those costs as an untimely challenge to the terms of the solicitation. Then, considering all the meritorious allegations, we find that TRAX was prejudiced by the flaws in the procurement and sustain the protest. We begin our discussion with a threshold issue, namely, whether GAO should retain jurisdiction of the protest, in as much as ERC has pursued the PIA-related claims, which our office dismissed, in District Court.⁵

Requests for Dismissal

As noted above, our Office dismissed a prior TRAX protest alleging that ERC--through its acquisition of TRAX's former teaming partner, OASIS--committed a PIA violation. We dismissed the allegation at that time because we concluded that the protest, in fact, concerned a dispute between private parties and therefore was not for our consideration. Prior to filing its PIA protest at GAO, TRAX sued ERC in U.S. District Court. See Comments and Supp. Protest at 38. That litigation, to which the Army is not a party, alleged four counts: (1) that TRAX's former teaming partner, Oasis, breached the terms of its contract with TRAX by competing against TRAX for the ATSS contract and by improperly retaining and disclosing TRAX's confidential information; (2) that Oasis's promises not to compete against TRAX and not to disclose TRAX's confidential information were false and made to fraudulently induce TRAX to agree to terminate an earlier agreement; and (3) & (4) that Oasis misappropriated TRAX's trade secrets in violation of the Maryland Uniform Trade Secrets Act and the Defend Trade Secrets Act of 2016, respectively. *Id.* at 38-39.

The agency requests that GAO dismiss TRAX's protest, asserting that "the subject matter of the protest is currently before a court of competent jurisdiction." Agency Request for Dismissal at 4. The intervenor, likewise, requests dismissal. Intervenor Request for Dismissal at 1. As explained below, we conclude that the arguments of the Army and ERC do not provide a basis on which to dismiss the protest.

Our Office will not decide a protest where the matter involved is the subject of litigation before a court of competent jurisdiction. 4 C.F.R. § 21.11(b); *Blue Rose Consulting Grp., Inc.*, B-421229, Nov. 22, 2022, 2022 CPD ¶ 291 at 2. Even where the issues before the court are not the same as those raised in our Office by a protester, or are brought by a party other than the protester, we will not consider the protest if the court's

⁵ We discuss many, but not all, of TRAX's protest allegations. We address all allegations that we find meritorious. Any allegation not discussed does not provide a basis on which to sustain the protest.

disposition of the matter could render a decision by our Office academic. *Id.* Where there is a possibility that the court’s consideration of an issue may render a decision by our Office academic, dismissal is appropriate. *Id.* at 3.

ERC argues that, in both forums, TRAX seeks relief that will undo the Army’s award to ERC.⁶ Intervenor Supplemental Request for Dismissal at 2. The intervenor contends that TRAX’s bid protest alleges various evaluation errors and asks GAO to recommend that the Army rescind the ATSS award to ERC and reevaluate the parties’ final proposal revisions (FPRs). *Id.* ERC argues that, based on TRAX’s theory that Oasis and ERC are one and the same company, the protester asks the District Court to enjoin ERC from performing the ATSS contract. While ERC recognizes that “any GAO recommendation would address the Army while TRAX’s requested District Court order would address ERC,” the intervenor argues that “the core relief TRAX seeks is the same: to undo the ERC contract and force the Army to make a new award.” *Id.* If TRAX were to obtain an injunction in District Court, ERC argues, the Army and ERC could not proceed on the ATSS contract no matter what GAO decides; hence, ERC maintains that a District Court injunction could render GAO’s decision academic. *Id.*

ERC also argues that “prudential considerations” “counsel in favor of ‘obviate[ing] the risk of an inconsistent resolution of the issues between the forums.’” *Id.* at 15, quoting *Intuitive Research and Tech. Corp.*, B-416820, Oct. 11, 2018, 2018 CPD ¶ 355 at 2. The intervenor asserts that, “[w]hen the same procurement is being challenged at both GAO and in a court of competent jurisdiction, GAO will dismiss the protest regardless of whether the claims in the two proceedings are similar.” Intervenor Supp. Request for Dismissal at 15, citing *Intuitive Research and Tech. Corp.*, *supra* at 2-3. ERC contends that TRAX is challenging the Army’s award of the ATSS contract to ERC in both its protest and in the District Court proceedings. Intervenor Supp. Request for Dismissal at 15. The intervenor asserts “there is a clear and present risk of inconsistent decisions here,” because “the same proposals and award are squarely at issue in both actions.” *Id.* at 16.

TRAX urges GAO to retain jurisdiction, asserting that there is no overlap between the issues at GAO and the District Court. Comments and Supp. Protest at 38. In its GAO protest, TRAX challenges the Army’s evaluation of proposals, and, TRAX argues, “[b]y contrast, the Maryland [District Court] Litigation involves three counts, each of which

⁶ The protester withdrew an allegation that served as a basis for the Army’s request to dismiss the protest. The Army argued that “TRAX is asking both GAO and the District Court to assess the impact of the corporate transaction between Oasis and ERC on the fairness and propriety of the Army’s award of the ATSS contract to ERC.” Agency Supplement to Request for Dismissal at 7. The Army contended that, “[i]f GAO finds that the Army’s assessment was reasonable, but the District Court finds the award is tainted by Oasis’ alleged corporate espionage, or vice versa, the result will be inconsistent rulings.” *Id.* The issue was rendered moot by the protester’s withdrawal of that allegation. See Comments and Supp. Protest at 4 (withdrawing allegation that Army failed to consider the effects of the Oasis-ERC transaction).

involve actions by Oasis and ERC, not the Army.” *Id.* TRAX asserts that the disposition of the District Court litigation would not render the GAO protest academic, nor is there a risk of inconsistent rulings. *Id.* at 39-40. The protester contends that “GAO’s cases applying Rule 21.11(b) ask whether ‘the court’s disposition of the matter could render a decision by our Office [resolving the GAO protest] academic.’” *Id.* at 39, *citing Blue Rose Consulting Grp., Inc., supra* at 3 (dismissing protest where the “central issue” in the GAO protest and the concurrent litigation were “the same”). TRAX asserts that “[t]his language contemplates a direct and immediate causal connection” that is lacking here. *Id.* at 39. TRAX contends, moreover, that the Army’s request for dismissal “does not argue that the District Court [litigation] will have any direct or immediate impact on this litigation.” *Id.* In fact, TRAX argues, “[t]he Army appears to concede that the District Court cannot ‘directly enjoin the Army from making award to ERC.’” *Id.* at 40, *citing Agency Supp. To Request for Dismissal* at 4 (noting that “it is unlikely that the District Court could directly enjoin the Army from making award to ERC without further process to implead the Army into the District Court litigation”).

We agree with the protester; ancillary litigation that could call into question whether an awardee would be able to perform its obligations under an awarded contract--what is in essence the responsibility of an awardee and ultimately a matter of contract administration--is not the standard GAO applies when resolving requests for dismissal of protest allegations. See Protester’s Comments and Supp. Protest at 39 (asserting that “ERC’s present responsibility is not at issue in this protest”). Such an expansive reading of our decisions, as advanced by the Army and ERC, could improperly expand the scope of acceptable bases for dismissal. Accordingly, we interpret “the matter involved,” as contemplated by our regulations, to require, at a minimum, that the agency’s procurement actions be at issue both at GAO and the court, although the specific agency actions challenged need not be the same. Here, the record is clear that the agency’s actions--that is, the evaluation of offerors’ proposals--are only at issue at GAO. And, following our Office’s dismissal of TRAX’s PIA claim in *TRAX Int’l Corp., B-420361.6, supra*, the private dispute between TRAX and ERC and Oasis is only before the District Court. For that reason, we deny the requests to dismiss the protest.

ERC’s Disclosure Statement

With regard to the protest allegations, TRAX argues that ERC is ineligible for award for failure to provide a proper CAS disclosure statement. Prior to award of this CAS-covered ATSS contract, the Army was required to determine that the awardee’s cost accounting practices are adequate. See FAR 30.202-6(b). Specifically, the FAR requires the “cognizant Federal agency official” to make “a written determination that a required Disclosure Statement is adequate.” *Id.* A disclosure statement “is a written description of a contractor’s cost accounting practices and procedures.” 48 C.F.R. § 9903.202-1.

TRAX argues that the disclosure statement provided by ERC fails to satisfy the solicitation’s requirements because it is for a different entity--Pax River Engineering Research and Consulting LLC (Pax River ERC)--that no longer exists. Comments on

Supp. AR at 4-5. The agency argues that “[t]he adequacy of that statement is left to [the Defense Contract Management Agency (DCMA)] and [the Defense Contract Audit Agency (DCAA)] to determine, which in this case, they did.” Agency Reply to Comments on Supp. AR at 4.

ERC’s proposal contains a disclosure statement for Pax River ERC, a joint venture that was 80 percent owned by ERC. See AR, Tab 17, Pax River ERC Disclosure Statement. TRAX points to numerous significant differences between the accounting practices of Pax River ERC and ERC. See Comments and Supp. Protest at 8-9. The protester notes that Pax River ERC disclosed a [DELETED]--other than general and administrative (G&A) expenses. *Id.* at 8, *citing* AR, Tab 17, Pax River ERC Disclosure Statement at IV-2 to -3. In contrast, TRAX asserts that “ERC’s Cost Narrative claims that ERC uses [DELETED], including ‘ERC’s [DELETED], which represents [DELETED],’ and a ‘[DELETED]’ which ERC uses to ‘[DELETED]’ and which ERC used for ATSS.” Comments on Supp. AR at 8, *quoting* AR, Tab 6(i), ERC Cost Proposal at 5-6. The protester contends that “ERC’s [DELETED] are not referenced anywhere in Pax River’s Disclosure Statement.” Comments on Supp. AR at 8.

TRAX further asserts that “Pax River’s Disclosure Statement indicates that Pax River does not use [DELETED].” Comments on Supp. AR at 8, *citing* AR, Tab 17, Pax River ERC Disclosure Statement at IV-5 to -6 (noting that [DELETED] are “N/A”--not applicable). The protester argues that Pax River’s Disclosure Statement further indicates that [DELETED] costs are included in [DELETED]. Comments on Supp. AR at 8, *quoting* AR, Tab 17, Pax River ERC Disclosure Statement at IV-3. TRAX contends that ERC’s cost narrative, by contrast, states that ERC employs a [DELETED] that includes [DELETED], and that those costs are allocated [DELETED] based on [DELETED]. Comments on Supp. AR at 8, *quoting* AR, Tab 6(i), ERC Cost Proposal at 5.

Lastly, the protester argues that Pax River ERC’s disclosure statement indicates that Pax River ERC did not incur [DELETED] costs. Comments on Supp. AR at 8, *quoting* AR, Tab 17, Pax River ERC Disclosure Statement at IV-7. TRAX notes, however, that ERC does incur [DELETED] costs and allocates them to [DELETED]. Comments on Supp. AR at 8, *citing* AR, Tab 6(m), ERC [DELETED] Worksheet, Row 52.

A disclosure statement is “a written description of a contractor’s cost accounting practices and procedures,” 48 C.F.R. § 9903.202-1, and we agree with TRAX that Pax River ERC’s disclosure statement does not describe the accounting practices of ERC. The intervenor does not challenge the accuracy of the protester’s comparison of Pax River ERC’s disclosure statement and ERC’s proposal. See Intervenor’s Final Brief at 4-8. Instead, ERC contends that TRAX offers “no authority requiring absolute uniformity between offerors’ proposals and their Disclosure Statements.” *Id.* at 6. That is not a standard TRAX could meet, the intervenor argues, because the protester’s proposal contains an allocated direct cost pool not found in TRAX’s disclosure statement. *Id.* at 7. We need not resolve the parties’ dispute regarding the required degree of uniformity between an offeror’s proposal and its disclosure statement. The

FAR provides that, by definition, a disclosure statement must describe an offeror's cost accounting practices and procedures. See 48 C.F.R. § 9903.202-1. TRAX argues, with particular facts, that ERC's disclosure statement does not meet that FAR definition.

The Army does not respond specifically to TRAX's argument contrasting the Pax River ERC disclosure statement with ERC's proposal. See Agency Reply to Comments on Supp. AR at 4-6. Instead, the agency asserts that "[t]he adequacy of that [disclosure] statement is left to DCMA and DCAA to determine, which, in this case, they did." *Id.* at 4. The record reflects that DCAA found the PAX River ERC disclosure statement adequate--for a different procurement and for another offeror. See AR, Tab 18, Adequate Disclosure Statement Submission, Feb. 28, 2020. The Army provided a declaration from a DCMA administrative contracting officer stating that "[o]n February 28, 2020, DCAA determined that ERC submitted a Disclosure Statement that adequately described its own accounting practices as part of a joint venture." Supp. Memorandum of Law (MOL), attach. 1, DCMA Administrative Contracting Officer Declaration, May 26, 2023.

The statements from February 2020 and May 2023 say the same thing: the Pax River ERC disclosure statement adequately described the accounting practices of the joint venture Pax River ERC. They do not address whether the Pax River ERC disclosure statement otherwise adequately described the accounting practices of ERC. We sustain the allegation that ERC's proposal failed to provide a disclosure statement describing ERC's accounting systems for this procurement.

Evaluation of PMO Costs

TRAX argues that the Army mistakenly accepted as true the statement in ERC's proposal that the awardee was escalating certain labor rates, when, in fact, ERC's price proposal reduces those rates. See Comments and Supp. Protest at 21. The RFP required specific key personnel and support staff to provide contract administration and management for the ATSS effort, which TRAX, ERC, and the Army refer to as a Program Management Office, or PMO. See RFP at 10-11, 16. The PMO includes a program manager, assistant program manager, and mission support managers, as well as other personnel identified by the offeror, such as resource management, human resources, procurement, and logistics support staff. *Id.* at 10-11. The RFP further required that, to support the evaluation of professional employees compensation under FAR provision 52.222-46, the offeror "shall provide documentation and submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract that assures that it reflects a sound management approach and understanding of the contract requirements." *Id.* at 166; see FAR provision 52.222-46(b) (requiring that where--as is the case here--an agency re-competes a services contract, "[t]he compensation levels proposed should reflect a clear understanding of work to be performed and should indicate the capability of the proposed compensation structure to obtain and keep suitably qualified personnel to meet mission objectives"). The FAR "caution[s]" "that lowered compensation for

essentially the same professional work may indicate lack of sound management judgment and lack of understanding of the requirement.” FAR provision 52.222-46(c).

ERC’s proposal stated that it “proposed an escalation of [DELETED] [percent] on Exempt labor categories.” AR, Tab 6(l), ERC Cost/Price Narrative at 3. TRAX argues that “[t]his statement is not true.” Comments and Supp. Protest at 20. The record supports TRAX’s argument; ERC’s proposal de-escalated those wages and salaries--reducing the compensation paid to PMO employees each year over the life of the contract. See AR, Tab 6(n), ERC Supp. Cost Workbook, Rates and Hours Worksheet, column A, rows 125-142. TRAX argues the Army’s lack of knowledge of the declining labor rates is evidence that the agency’s evaluation of professional employee compensation was “materially incomplete.” Comments and Supp. Protest at 21.

The Army characterizes this evaluation error as “harmless,” ignoring the fact that, under ERC’s proposal, key personnel would see a salary decrease of [DELETED] percent annually for the duration of the contract. Supp. COS at 12, *citing* AR, Tab 16, Base Award at 2. The FAR required the agency to evaluate whether the proposed compensation levels would “obtain and keep suitably qualified personnel to meet mission objectives.” Here--to the extent that the agency conducted such an analysis--it included the erroneous assumption that ERC would increase PMO salaries on an annual basis, when ERC proposed annual reductions in those labor rates. Because the evaluation contained this factual error, we sustain the challenge to the reasonableness of the agency’s evaluation of professional employee compensation.

Misleading Discussions with TRAX

TRAX argues that the Army conducted misleading discussions. Specifically, the protester asserts that its proposed professional employee compensation remained unchanged since 2021, but it was not until the final evaluation in 2022 that the Army determined that [DELETED] of TRAX’s proposed professional employee labor rates were unrealistic. Subsequently, the Army failed to inform the protester about these [DELETED] rates in discussions. Comments and Supp. Protest at 28, *citing* AR, Tab 7(c), Cost Proposal Analysis at 9. The Army made an upward adjustment of the rates that were not addressed in discussions to the “minimum rate” established by the Army, raising TRAX’s proposed cost by \$4,290,000. *Id.* The protester contends that, despite conducting multiple rounds of discussions, the Army never raised the realism of these labor rates, although discussions addressed the realism of other direct labor rates. Comments and Supp. Protest at 28. TRAX asserts that the Army could not adjust TRAX’s rates for these labor categories without raising the Army’s concerns in discussions. Protest at 22, *citing Lockheed Martin Simulation, Training & Support, B-292836 et al.*, Nov. 24, 2004, 2005 CPD ¶ 27 at 11 (where weakness, present in initial proposal, is identified for first time in re-evaluation, agency must discuss the new weakness).

In reviewing an agency’s evaluation, we will not reevaluate proposals, but we will examine the record to ensure that it was reasonable and in accordance with the stated

evaluation criteria and applicable procurement statutes and regulations. *TrailBlazer Health Enterprises, LLC*, B-310801.6 *et al.*, Oct. 6, 2008, 2013 CPD ¶ 2014 at 4. As part of this review, we will consider whether discussions are meaningful, equitable, not misleading, and fair. *Id.* An agency engages in unequal treatment in the conduct of discussions when the exchanges favor one offeror over another. *Id.* at 5-6, *citing The Boeing Co.*, B-311344 *et al.*, June 18, 2008, 2008 CPD ¶ 114 at 49-50 (noting that “procuring agencies may not conduct discussions in a manner that favors one offeror over another”). Where an agency holds “broad discussions” that go well beyond the FAR’s minimum requirements, it is incumbent on the agency to do so with all offerors equally. *AMEC Earth & Env’t, Inc.*, B-401961, B-401961.2, Dec. 22, 2009, 2010 CPD ¶ 151 at 6. Where proposal defects are first introduced either in a response to discussions or in a post-discussion proposal revision, an agency has no duty to reopen discussions or conduct additional rounds of discussions. *DRS C3 Sys., LLC*, B-310825, B-310825.2, Feb 26, 2008, 2008 CPD ¶ 103 at 11.

The Army argues that, because “these unrealistic rates did not create a deficiency or significant weakness, or otherwise impact TRAX’s eligibility for award, no additional discussions were required.” MOL at 26. Thus, the agency argues that “discussions of TRAX’s unrealistic labor categories would not have been *required* were they discovered sooner.” Supp. MOL at 38, *citing* FAR 15.306(d)(3) (this section of the FAR provides that when conducting discussions, an agency must discuss, at a minimum, “deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond”). The Army contends that “[n]either the FAR nor GAO’s decisions require discussions for unrealistic labor categories.” *Id.* at 38.

The Army’s insistence that the FAR does not require an agency to conduct discussions regarding unrealistic labor categories misses the mark and does not address the protester’s argument that the agency conducted misleading discussions. TRAX contends that the Army’s discussions were misleading because the Army had discussed other unrealistic labor rates with TRAX in prior discussions, leading TRAX to believe that there were no issues with the labor categories that the Army had not discussed. Comments and Supp. Protest at 29, *citing TDS, Inc.*, B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 5 (noting that discussions must be meaningful, equitable, and not misleading). TRAX argues that the Army conducted three rounds of discussions with the protester in 2021, during which the Army informed TRAX that proposed labor rates for four specific labor categories were “unrealistic.” Protest at 23, *citing* Ex. 11, EN Nos. 3.0.1 and 3.0.4. TRAX states that “[t]he Army made no mention of minimum labor rates for any other labor category and the Army did not inform TRAX that any other labor rates were unrealistic.” Comments and Supp. Protest at 30.

Ordinarily, an agency is not required to discuss unrealistic labor rates with offerors. See FAR 15.306(d)(3). When the agency elects to do so, however, it is required to make those discussions fair. The failure to permit TRAX the opportunity to address, in discussions, other labor rates that the agency subsequently determined unrealistic was unfair. In fact, the labor rates that were not addressed in discussions were not

introduced into TRAX's proposal during the final round of discussions; they were included in the original proposal and should have been addressed by the agency once they conducted discussion on labor rates. The agency's conduct of discussions was thus unfair to TRAX.

The Army contends that TRAX has failed to demonstrate prejudice, because the protester "alleges, without support, that it would have provided some unknown information that would have alleviated [the Army's] concerns." Supp. MOL at 37, quoting Comments and Supp. Protest at 31. The record, however, demonstrates that TRAX provided support for its claim. The protester argues that, "[w]hen the Army had raised concerns with TRAX's other rates, TRAX has successfully presented evidence to the Army that resolved the Agency's concerns without a rate adjustment." Comments and Supp. Protest at 31. Thus, the protester argues, the Army's failure to hold meaningful discussions with TRAX prejudiced TRAX. *Id.*, citing *YWCA of Greater Los Angeles*, B-414596 *et al.*, July 24, 2017, 2017 CPD ¶ 245 at 6 (noting that a reasonable possibility of prejudice is a sufficient basis for sustaining a protest).

Where, as here, an agency fails to properly conduct discussions, we will not substitute speculation for discussions, and we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester. *YWCA of Greater Los Angeles*, *supra* at 11. A reasonable possibility of prejudice is a sufficient basis for sustaining the protest. *Id.* We agree with TRAX that it has demonstrated a reasonable possibility that it was competitively prejudiced by the agency's conduct of discussions, and we sustain the protest on this basis.

Unequal Discussions with ERC

TRAX asserts that the Army conducted an additional round of discussions with ERC that the agency did not conduct with the protester. The protester contends that these discussions occurred when the agency offered ERC changed contract terms from ERC's final proposal to make clear that ERC would [DELETED] proposal costs, which ERC then accepted. Comments on Supp. AR at 19-20. The agency argues that "there was no basis for [the] minor adjustment to proposal language to constitute discussions." Agency's Reply to Comments on Supp. AR at 15. Where there is a dispute regarding whether communications between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. *Tipton Textile Rental, Inc.*, B-406372, May 9, 2012, 2012 CPD ¶ 156 at 12.

In this round of the competition, ERC lowered its price substantially, and it did so through ratification of a contract containing language that committed ERC to [DELETED] costs. See Intervenor's Comments on Supp. AR at 24 n.6 (noting that ERC reduced [DELETED] costs by approximately \$[DELETED] by [DELETED] costs and "associated [DELETED]"). ERC's final proposal, and the pre-negotiation objective memorandum (POM)/price negotiation memorandum (PNM), contained the following statement: "The decrease in our '[DELETED] FY [fiscal year] with ATSS Effort' entry compared to the [DELETED] from [DELETED] are decreasing in cost due to ERC

[DELETED] the cost of the [DELETED] cost and associated [DELETED].” AR, Tab 6(l), ERC Cost/Price Proposal at 6 (highlighting and track changes deleted); AR, Tab 7(f), POM/PNM at 17. The record reflects the contracting officer and agency counsel discussed this provision, and the agency, asserting attorney client privilege, did not produce the substance of those discussions. Email from Agency to GAO, May 19, 2023. The proposed contract language that the agency presented to the intervenor contained this provision: “[DELETED] cost and associated [DELETED] will be [DELETED] cost to the Government.” AR, Tab 16, Base Award at 2.

The Army argues that “[t]he slight modification here merely clarifies the proposed promise and seeks to ensure that the promise will not be illusory (as initially claimed by TRAX), but instead contractually enforceable.” Agency’s Resp. to Comments at 13.

Discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. *Tipton Textile Rental, Inc.*, *supra* at 12; see FAR 15.306(d). It is the actions of the parties that determine whether discussions have been held, and not merely the characterization of the communications by the agency. *Tipton Textile Rental, Inc.*, *supra*. As noted above, in situations where there is a dispute regarding whether communications between an agency and an offeror constituted discussions, the acid test is whether an offeror has been afforded an opportunity to revise or modify its proposal. *Id.*

The agency argues that this communication fails the acid test for defining discussions--whether proposal revisions were permitted--because “the Army incorporated ERC’s offer [DELETED] and associated [DELETED], which was already in its proposal, by capturing that promise in the contract.” Agency’s Resp. to Comments at 14. ERC stated that “[DELETED]” for its “[DELETED] FY with ATSS Effort” were “decreasing in cost due to ERC [DELETED] cost of [DELETED] costs and associated [DELETED].” The contracting officer states that the revised language was included in the awarded contract after the contracting officer “sought advice from my assigned field counsel to ensure the final version of the clause was legally sufficient and, most importantly, enforceable.” Supp. COS at 8. Again, the Army acknowledges that the agency revised ERC’s proposal language to ensure that the contract contained a legally enforceable promise.

Alternatively, the Army argues that “because ERC’s proposal was not rendered unacceptable by the absence of this promise [to [DELETED] costs], there was no basis for this minor adjustment to proposal language to constitute discussions.” Agency’s Resp. to Comments at 15. We disagree with the agency’s argument. In fact, the approximately \$[DELETED] dollars of [DELETED] costs [DELETED] appear to have been decisive in the award decision. See AR, Tab 7(i), SSDD at 8 (noting that none of the strengths of TRAX’s proposal “justified paying the additional cost of approximately \$13.3M”). But for ERC’s [DELETED] costs, TRAX would have enjoyed a price advantage, where the proposals received identical adjectival ratings under the technical

factors. The contract provision meant to ensure the enforceability of ERC's promise to [DELETED] costs was therefore crucial to the agency's selection of ERC's proposal as the best value to the government.

A comparison of the final proposal language with the contract provision establishes that the Army made necessary changes to the proposal language to ensure the enforceability of ERC's promise. The enforceability of that promise, in turn, was integral to the agency's selection of ERC's proposal as offering the best value to the government. The agency's alteration of the proposal to make the promise in the contract enforceable constituted discussions, where the protester was provided the opportunity to accept that revision when it accepted the contract. We therefore sustain the allegation that the Army conducted a final, unequal round of discussions with the awardee alone.

ERC's Overhead Rates

An offeror's cost proposal was required to estimate the firm's future indirect rates. See AR, Tab 3(v), RFP attach. 5, Level of Effort Spreadsheet. TRAX asserts that ERC's proposed indirect rates were unreasonably low because they were based on the awardee's unreasonably high projection of future new business. Comments and Supp. Protest at 6, *citing The Futures Grp. Int'l*, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147 (sustaining protest where the cost realism analysis accepted as realistic the awardee's proposed indirect rates that were significantly below its most recent indirect rate cost submission). The agency argues that it reasonably evaluated the realism of ERC's proposed overhead rates. Supp. COS at 6.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR 15.305(a)(1); 15.404-1(d); *ERC, Inc.*, B-404721, B-404721.2, Apr. 19, 2011, 2011 CPD ¶ 94 at 4. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR 15.404-1(d)(1). An agency is not required to conduct an in-depth cost analysis, see FAR 15.404-1(c), or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. *ERC, Inc., supra*. An agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information available to the agency as of the time of its evaluation. *Id.*

TRAX asserts that, compared to the awardee's 2021 FPR, over the 5-year life of the contract ERC reduced its current [DELETED] rate by nearly [DELETED]. Comments and Supp. Protest at 7, *citing* AR, Tab 11(c), ERC [DELETED] Rate Worksheet, rows 79-80; AR, Tab 6(m), ERC [DELETED] Rate Worksheet, rows 75-76. TRAX further asserts that, using the same comparison, ERC reduced its [DELETED] rate by

[DELETED].⁷ Comments and Supp. Protest at 7-8, *citing* AR, Tab 11(c), ERC [DELETED] Rate Worksheet, rows 58-59; AR, Tab 6(m), ERC [DELETED] Rate Worksheet, rows 64-65. TRAX calculates that ERC proposed to “grow [DELETED] [percent] from a \$[DELETED] million company (on an annual basis) in 2021 to a \$[DELETED] million company by 2027.” Comments and Supp. Protest at 9, *citing* AR, Tab 6(m), ERC [DELETED] Rate Worksheet, cells E71 & K71. Notwithstanding that substantial growth in revenue, TRAX calculates that ERC’s “annual [DELETED] expenses would increase *only* \$[DELETED], or [DELETED] [percent], or from \$[DELETED] to \$[DELETED], during that same period.” *Id.* at cells E62 & K62.

The protester contends that the RFP and FAR section 15.404-1(d) required the Army to determine ERC’s “probable cost of performance,” and that the agency failed to do so where it did not document a reasonable evaluation of increased [DELETED] and [DELETED] costs as a result of ERC’s proposed new business. Comments and Supp. Protest at 10. TRAX argues that, while the Army appears to have concluded that ERC’s [DELETED] was reduced through the awardee’s proposal to [DELETED] costs, ERC’s [DELETED] rate reductions were in fact driven by ERC’s unreasonable inflation of its [DELETED] allocation base. *Id.* at 10-11, *citing* AR, Tab 7(c), Cost Proposal Analysis at 12. TRAX contends that “[t]he Army accepted ERC’s arbitrary indirect rate reductions without any meaningful evaluation.” Comments and Supp. Protest at 10.

The contracting officer--providing no basis for the calculation--asserts that ERC’s “projected increase in business of [DELETED] [percent] over that period of time [which appears to be 6 years] is not unreasonable.” Supp. COS at 6. Aside from this unexplained calculation, the contracting officer disputes none of the figures asserted by TRAX. *See id.* The agency argues that “[t]he Government relies on offerors to estimate the projected costs over the performance period.” *Id.* “Based on ERC’s estimates,” the contracting officer asserts that “the Army determined that ERC’s indirect rates were realistic.” *Id.* The Army recognized that ERC “proposed a lower [DELETED] rate than other offerors,” the agency argues, but the agency did not consider the rate “unrealistic because [the Army] had no reason to question ERC’s reasonable projections.” *Id.*

The contracting officer’s assertion misinterprets the Army’s role in a cost realism analysis. Although the agency is not required to evaluate every element of an offeror’s proposed costs or obtain scientific certainty as to the most probable cost of performance, an agency’s failure to evaluate the realism of any of the individual rates is unreasonable. *Smartronix, Inc.; ManTech Advanced Sys. Int’l, Inc.*, B-411970 *et al.*, Nov. 25, 2015, 2015 CPD ¶ 373 at 10. Specifically, when evaluating indirect costs, GAO may sustain a protest when “the contemporaneous analysis suggests that the agency applied fair and reasonable price analysis considerations in lieu of cost realism analysis considerations.” *Id.* at 14.

⁷ As noted above, the agency has made multiple awards of this contract, which have been protested at GAO; thus, over the course of the competition, offerors have submitted more than one FPR.

The agency argues that the “[p]rotester has no idea what new business ERC entered into in the intervening timeframe, nor does protester know the first thing about ERC’s potential future business.” Supp. MOL at 21. The evaluation record suggests that the Army is likewise unaware. The agency asserts that “[i]t was entirely within the Army’s discretion to reasonably rel[y] on ERC’s exercise of business judgment in proposing its price.” *Id.* It was not. A cost realism analysis requires the informed judgment of the agency, which precludes the agency’s reliance on an offeror’s business judgment. The agency is required to determine the probable cost of performance to the government, and uncritical reliance on an offeror’s projections is inconsistent with that obligation. *Smartronix, Inc.; ManTech Advanced Sys. Int’l, Inc., supra.* Because the Army failed to conduct a proper cost realism analysis of ERC’s proposed indirect rate, we sustain this allegation.

Allocation of key personnel labor costs

TRAX contends that ERC improperly included ATSS-specific management costs in its [DELETED] pool; ERC’s [DELETED] pool allocates costs across a base comprised of [DELETED] on all of ERC’s contracts. Comments and Supp. Protest at 12, *citing* AR, Tab 6(l), ERC Cost/Price Proposal at 5-6; AR, Tab 6(m), ERC [DELETED] Rate Worksheet, Rows 53-60. TRAX asserts that, while the RFP instructed offerors to charge these management costs indirectly so that ATC can “accurately allocate these expenses to ATC’s customers over the period of performance,” RFP at 153, ERC’s proposal passes these costs onto other Government contracts that have nothing to do with ATC. Comments and Supp. Protest at 12. TRAX, asserts that ERC allocates PMO labor to other government contracts that are unrelated to ATC, which--as explained below--“is a text-book violation” of the FAR and CAS, specifically FAR 31.203 and CAS 418. Comments and Supp. Protest at 12 (footnote omitted).

The Army argues that the solicitation required offerors to propose certain costs as indirect costs, including contract administration and management costs. Supp. MOL at 25, *citing* RFP at 16, 153. The agency contends that the RFP did not specify how to incorporate these costs as indirect costs or what type of indirect cost they must be included in. *Id.*

The RFP contained the following provision:

Management Labor costs for all key personnel and any associated performance administration costs, [property, plant, and equipment], Training, and Medical costs should all be included in the offeror’s indirect rates. Contractor Furnished Equipment shall be priced in accordance with [performance work statement] Exhibit B and Attachment 2, Labor Category Qualification Requirements.

RFP at 167.

The solicitation also contained the following question and answer regarding how to account for the costs of key personnel, forklifts, and ATSS contract specific expenses:

Question 48: [In accordance with] FAR Part 2, Direct cost means any cost that is identified specifically with a particular final cost objective. The RFP requires Key Personnel, forklifts and other ATSS contract specific expenses to be bid as indirect costs. Request the Government clarify how this pricing methodology will be FAR compliant if all these expenses will be dedicated to the ATSS contract.

Answer 48: The Government has determined it is appropriate to include labor costs for Key Personnel, forklifts, and other specified expenses to the indirect rate. This approach enables ATC to accurately allocate these expenses to ATC's customers over the period of performance.

RFP at 153. The protester asserts that “[t]he RFP therefore required offerors to develop a FAR- and CAS-compliant approach to allocating ATSS-specific indirect costs to ATSS direct labor, so that the Army could pass those costs onto the various users of the ATC’s services.” Comments and Supp. Protest at 12. Section 31.203(c) of the FAR requires contractors to “accumulate indirect costs by logical cost groupings with due consideration of the reasons for incurring such costs.” This section of the FAR further requires contractors to “determine each grouping so as to permit use of an allocation base that is common to all cost objectives to which the grouping is to be allocated,” and requires that “[t]he base selected shall allocate the grouping on the basis of the benefits accruing to intermediate and final cost objectives.” Similarly, TRAX notes, CAS 418 specifically addresses the “costs of management or supervision of activities involving direct labor.” *Id.* at 13, *quoting* 48 C.F.R. § 9904.418-40(c)(1). According to TRAX, CAS 418 requires that such costs be allocated over a base “which is representative of the activity being managed or supervised.” *Id.*

As noted above, the RFP also specified that management labor costs for key personnel and other associated performance administration costs should be included in the offeror’s indirect rates. The intervenor claims that, “[i]n other words, indirect costs are spread across multiple contracts.” Intervenor’s Supp. Comments at 20. The intervenor argues that treating key personnel and other expenses as an indirect cost that is then “dedicated to the ATSS contract” makes those labor expenses a direct cost; as question 48 explains, a “[d]irect cost means any cost that is identified specifically with a particular final cost objective.” Those labor costs cannot be included in an offeror’s indirect rates--as required by the second provision above--and still be allocated to “ATC’s customers over the period of performance,” as required by the first provision.

Solicitations must contain sufficient information to enable offerors to compete intelligently and on a relatively equal basis. *Pasha Hawaii Holdings LLC*, B-419020 *et al.*, Nov. 25, 2020, 2020 CPD ¶ 386 at 10. Where requirements are not clearly defined, a solicitation may contain either a patent or a latent ambiguity. An obvious, gross, or glaring error in the solicitation is a patent ambiguity; a latent ambiguity is more subtle. *Id.* Where there is a latent ambiguity, both parties’ interpretation of the provision may be reasonable, and the appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified

requirement. *Id.* A patent solicitation ambiguity is an obvious, gross, or glaring error. *Shertech Pharmacy Piedmont, LLC*, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2. An offeror has an affirmative obligation to seek clarification of a patent ambiguity prior to the due date for proposal submission. *Pitney Bowes, Inc.*, B-294868, B-294868.2, Jan. 4, 2005, 2005 CPD ¶ 10 at 5. When a patent ambiguity exists but is not challenged prior to the proposal submission deadline, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provision. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10.

In this case, the solicitation contained a patent ambiguity. The different RFP provisions relied on by the two offerors to justify their respective treatment of indirect labor costs are irreconcilable. Under the terms of the solicitation, in order for an offeror to develop a FAR- and CAS-compliant approach to allocating ATSS-specific indirect costs to ATSS direct labor, an offeror would be required--in essence--to treat those costs as direct costs. This was the very tension identified in question 48. RFP at 153 (noting that "[d]irect cost means any cost that is identified specifically with a particular final cost objective" and that the RFP requires "Key Personnel, forklifts and other ATSS contract specific expenses to be bid as indirect costs," and asking how that "methodology will be FAR compliant"). Where a patent ambiguity is not challenged prior to submission of proposals, we will dismiss as untimely any subsequent protest assertion that is based on one of the alternative interpretations as the only permissible interpretation. *Bank of Am.*, B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶ 137 at 10. TRAX bases its challenge to ERC's proposed allocation of key personnel costs on the protester's contention that only its interpretation is permissible, when the RFP contained a patent ambiguity. We thus dismiss this allegation as untimely. 4 C.F.R. § 21.2(a).

Best-Value Tradeoff and Prejudice

Source selection officials enjoy broad discretion in making tradeoffs between the comparative merits of competing proposals in a best-value setting; such tradeoffs are governed only by the test of rationality and consistency with the solicitation's evaluation criteria. *SURVICE Eng'g Co., LLC*, B-414519, July 5, 2017, 2017 CPD ¶ 237 at 14. In a best-value tradeoff procurement, it is the function of the source selection authority to perform a tradeoff between cost and non-cost factors, that is, to determine whether one proposal's superiority under the non-cost factor is worth a higher cost. *Id.*

Here, the agency's selection and best-value tradeoff analysis were flawed because they rest on various evaluation errors. The Army unreasonably evaluated a disclosure statement prepared for a joint venture as conforming to the solicitation requirement, when the disclosure statement does not describe ERC's accounting system for this procurement. The agency unreasonably evaluated ERC's proposed compensation plan under FAR provision 52.222-46. Finally, the Army's conduct of discussions was unequal and unfair.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester

demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *SURVICE Eng'g Co., LLC, supra* at 15. We resolve any doubts regarding prejudice in favor of a protester. *Id.* Having found the violations of procurement law or regulation identified above, we consider their effect on the Army's best-value tradeoff decision--that is, whether the defects in the evaluation and the conduct of discussions resulted in prejudice to the protester. For the reasons below, we conclude that there is a reasonable possibility that TRAX was competitively prejudiced by the agency's errors.

Had the Army reasonably evaluated ERC's proposal under the disclosure statement requirement, the agency would have found the awardee's proposal unacceptable for failure to conform to a material solicitation requirement. That error, alone, was thus prejudicial. If the Army had properly evaluated ERC's proposed compensation plan under FAR provision 52.222-46, it is possible that the agency would have found risk in ERC's proposal. It is also possible that the agency would not have assigned ERC's proposal a strength for its proposed [DELETED]. Those two changes to the evaluation also might have impacted the award decision. The agency's conduct of discussions was misleading and unequal, and, as noted above, under such circumstances, a reasonable possibility of prejudice is a sufficient basis for sustaining the protest. *BC Site Servs., LLC, supra*. Thus, we find that there is a reasonable possibility of prejudice to TRAX, and on this basis, we sustain the protest.

RECOMMENDATION

We recommend that the agency conduct meaningful discussions, request revised proposals, and evaluate them consistent with this decision.⁸ We further recommend that the agency perform a new best-value tradeoff analysis, and, if an offeror other than ERC is selected, we recommend that the agency terminate the award to ERC for the convenience of the government and make a new award. Finally, we recommend that the agency reimburse TRAX its costs associated with filing and pursuing these protests, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. *Id.* at § 21.8(f).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel

⁸ While we dismiss as an untimely challenge to the terms of the solicitation TRAX's allegation that ERC's proposal improperly allocated key employee labor costs, the agency may wish to consider amending the solicitation to remove the patent ambiguity prior to the conduct of discussions.