



**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:** Maersk Logistics and Services USA, Inc.

**File:** B-421982.3; B-421982.5

**Date:** October 30, 2024

---

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

James Y. Boland, Esq., Christopher G. Griesedieck, Jr., Esq., Lindsay M. Reed, Esq., and Kelly M. Boppe, Esq., Venable LLP, and Kara M. Sacilotto, Esq., Brian G. Walsh, Esq., Gary S. Ward, Esq., and Cara L. Sizemore, Esq., Wiley Rein LLP, for Crowley Government Services, Inc., the intervenor.

Colonel Nina R. Padalino, Siobhan K. Donahue, Esq., Nicholas T. Iliff, Esq., Kurt M. Vanbennekorn, Esq., Todd P. Federici, Esq., and Robert J. Depke, Esq., Department of Defense, for the agency.

Sarah T. Zaffina, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

1. Protest arguing the agency performed an unreasonable price reasonableness evaluation is denied where the price reasonableness evaluation was consistent with the solicitation and applicable procurement law and regulations.
2. Where the agency did not consider the protester's price unreasonable, agency had no obligation to advise the protester its price was high in comparison to competitors' prices.
3. Protest asserting the agency's past performance evaluation was unreasonable because the agency ignored adverse close at hand information is denied where the record demonstrates that the contracting officer considered the potentially adverse information about the awardee's performance of the incumbent contract and determined the information was insufficient to override the agency's high expectation of the awardee's successful performance.
4. Protest asserting that the agency failed to provide historical data necessary for offerors to compete intelligently and equally is dismissed as untimely when filed after award.

5. Protest alleging the agency failed to mitigate the awardee's unequal access to information organizational conflict of interest is dismissed as untimely where the protester failed to raise allegations within 10 days after it knew or should have known that the agency intended to award the contract to the incumbent firm.

---

## **DECISION**

Maersk Logistics and Services USA, Inc. (Maersk), of Florham Park, New Jersey, protests the award of a contract to Crowley Government Services, Inc. (Crowley), of Jacksonville, Florida, under request for proposals (RFP) No. HTC711-23-R-R009, issued by the Department of Defense, United States Transportation Command (USTRANSCOM), for freight transportation services in the continental United States and Alaska, Puerto Rico, and Canada on occasion. Maersk challenges the agency's price and past performance evaluations and contends that the agency failed to conduct meaningful discussions. Maersk also argues that the agency failed to provide available historical data and ensure that offerors were competing on an equal basis. Maersk asserts further that the agency failed to consider and mitigate Crowley's unequal access to information organizational conflict of interest (OCI).

We deny the protest.

## **BACKGROUND**

USTRANSCOM provides transportation support to the Department of Defense. Agency Report (AR), Tab 4, Conformed RFP attach. 1, Performance Work Statement at 2. In support of this function, USTRANSCOM issued the defense freight transportation services (DFTS) II solicitation on July 27, 2023, in accordance Federal Acquisition Regulation (FAR) part 12, Acquisition of Commercial Items, and FAR part 15, Contracting by Negotiation. AR, Tab 3, Conformed RFP at 1, 36-37.<sup>1</sup> DFTS II is the "follow-on" contract to DFTS I, awarded to Crowley for \$2.23 billion in 2017. Contracting Officer's Statement (COS) at 2.

The solicitation contemplated the award of a single indefinite-delivery, indefinite-quantity contract with a 2-year base period and five 1-year option periods; the value of the contract is not to exceed \$2.3 billion. Conformed RFP at 4-9, 20, 37. Award would be made to the offeror with the proposal that represented the best value to the government, considering three technical factors--business proposal, technical capability, and past performance--and price. *Id.* at 37. The business proposal and technical capability factors were to be evaluated on an acceptable/unacceptable basis. *Id.* Past

---

<sup>1</sup> The solicitation was amended ten times; references herein to the RFP are to the conformed version provided by the agency unless otherwise noted. Citations to the record for this document use the Adobe PDF or Microsoft Word pagination of the electronic document provided in the agency report and cell number for Microsoft Excel documents produced in the agency report.

performance was then to be traded off against price in accordance with FAR section 15.101-1, with the two factors considered approximately equal in weight.”<sup>2</sup> *Id.* With respect to price, offerors were to complete a pricing rate table that the agency would use to calculate a total evaluated price (TEP) for each proposal. *Id.* at 36, 41. The agency would evaluate offerors’ price proposals for completeness, fair and reasonable pricing, and balanced pricing. *Id.* at 41. Not all prices were included in the TEP, however, and the solicitation designated certain shipments as “non-TEP.” *Id.*; AR, Tab 11, Conformed RFP attach. 2, Pricing Rate Table. The agency excluded the non-TEP prices from the TEP because “appropriate historical data either did not exist to create estimated quantities” or “foreseeable estimated quantities could not be determined by the Government due to the variability of shipping requirements.” AR, Tab 80, Price Analysis at 2. Although excluded from the TEP, the RFP provided that the non-TEP unit prices would be evaluated for fair and reasonable pricing under FAR section 15.404-1(b)(2). Conformed RFP at 41.

Nine offerors, including the protester and the awardee, timely submitted proposals. AR, Tab 83, Competitive Range Decision Document (CRDD) at 1. One offeror withdrew from the competition and the agency conducted an initial evaluation of eight proposals. *Id.* at 2, 8. In accordance with FAR section 15.306(c)(1), the agency established a competitive range of five proposals including those of Maersk and Crowley and conducted discussions. *Id.* at 8-13. During discussions, the agency provided offerors with five interim rounds of evaluation notices (ENs). *Id.* at 14-18. After discussions concluded, the five competitive range offerors submitted final proposal revisions (FPRs).

The source selection evaluation board (SSEB) report summarized the evaluation of Maersk’s and Crowley’s proposals as follows:

---

<sup>2</sup> For past performance, proposals would be assigned one of the following ratings: substantial confidence, satisfactory confidence, neutral confidence, limited confidence, or no confidence. Conformed RFP at 40.

	<b>Maersk</b>	<b>Crowley</b>
<b>Business Proposal</b>	Acceptable	Acceptable
<b>Technical Capability</b>	Acceptable	Acceptable
<b>Past Performance</b>	Substantial Confidence	Substantial Confidence
<b>Total Evaluated Price (TEP)</b>	\$3,931,305,714	\$1,702,075,581
<b>Complete</b>	Yes	Yes
<b>TEP Fair &amp; Reasonable</b>	Yes	Yes
<b>Non-TEP Fair &amp; Reasonable</b>	No <sup>3</sup>	Yes
<b>Balanced</b>	No <sup>4</sup>	No

AR, Tab 84, SSEB Rept. at 31. The source selection advisory council (SSAC) conducted a comparative analysis of the proposals in the competitive range, concluded that Crowley's proposal represented the best value, and recommended Crowley for award. AR, Tab 85, SSAC Rept. at 4-6.

The source selection authority (SSA) then reviewed the contract file documentation and found the source selection was conducted in accordance with FAR part 15, as supplemented; the approved acquisition plan; and the solicitation, as amended. AR, Tab 88, Source Selection Decision Document (SSDD) at 1. The SSA read the SSEB and SSAC reports and accepted the findings and recommendation in those reports. *Id.* The SSA further conducted an integrated analysis of Maersk's and Crowley's proposals and determined there was no discernable difference between their past performance proposals and that Crowley provided a more advantageous price than Maersk. *Id.* at 4. The contracting officer then investigated Crowley's responsibility and based on responses from its financial institution, among other things, determined Crowley was a responsible contractor. COS at 15; AR, Tab 86, Crowley Responsibility Determination. The agency awarded the contract to Crowley, and after receiving a debriefing, Maersk filed this protest.

## DISCUSSION

Maersk alleges the agency's evaluation of proposals included a panoply of errors. The protester challenges multiple aspects of the agency's evaluation of proposed pricing, to include arguing that USTRANSCOM unreasonably found its TEP to be fair and

<sup>3</sup> Offeror's non-TEP prices were not fair and reasonable; however, the agency found the non-TEP prices were not materially overstated and therefore did not pose an unacceptable risk to the Government of paying an unreasonably high price overall. AR, Tab 84, SSEB Rept. at 31.

<sup>4</sup> Maersk's and Crowley's price proposals were unbalanced; however, the agency determined that the balance of the offerors' price proposals did not pose an unacceptable risk to the government. *Id.*

reasonable. The protester also argues the agency engaged in misleading discussions about its pricing. Further, Maersk challenges the agency's responsibility determination and past performance evaluation. Finally, the protester argues that offerors were not competing equally or intelligently because USTRANSCOM failed to provide all available historical data and failed to mitigate Crowley's alleged unequal access to information OCI.<sup>5</sup> We have considered all the protester's arguments and while our decision does not address every variant, we find Maersk's grounds of protest to be without merit.

### Price Reasonableness Evaluation

At the core of the protester's price reasonableness challenge is not an argument that the awardee's price is unreasonable; but rather, Maersk's contention that the agency should have found the protester's own TEP unreasonable. Had the agency properly done so, Maersk argues that the agency would have alerted Maersk to the fact that its price was unreasonably high during discussions. In arguing that the agency failed to reasonably identify its price as unreasonable, Maersk asserts that the agency's price reasonableness analysis was unduly mechanical and based on arbitrary baselines. Supp. Protest at 3-12. More specifically, the protester argues that USTRANSCOM's reasonableness analysis was based on a standard deviation methodology that the agency mechanically applied without identifying and excluding outlier prices. *Id.* at 3-7. Further, the protester argues that the agency failed to exercise any judgment or additional analysis to ensure that its methodology yielded a reasonable result. *Id.* at 3-7, 9. Maersk also argues that the baselines that USTRANSCOM used for its analysis were unreasonable because they included pricing from proposals that the agency considered unacceptable or ineligible for award. *Id.* at 7-8. The agency responds that its evaluation of proposed prices was reasonable and in accordance with the methodology established in the solicitation and FAR section 15.404-1(b)(2). The agency maintains that the protester's allegations boil down to a disappointed offeror's disagreement with the agency's award determination. Supp. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 5-38. As explained below, we deny this protest ground.

### Price Evaluation--Methodology

As relevant here, the solicitation explained that price would be evaluated for completeness and reasonableness but would not be rated.<sup>6</sup> Conformed RFP at 41. For

---

<sup>5</sup> The protester also alleged that USTRANSCOM failed to evaluate the risk associated with Crowley's unbalanced pricing; however, upon receipt of the agency report, the protester withdrew this protest ground. Comments at 2.

<sup>6</sup> For their price proposals to be determined complete, offerors were required to insert prices for all cells in the pricing rate table. Conformed RFP at 36, 41. All offerors in the competitive range were determined to have complete pricing. AR, Tab 80, Price Analysis at 11. Completeness is not at issue in this protest, and we do not discuss it further.

an offeror to be eligible for award, its TEP had to be determined fair and reasonable using one or more of the techniques set forth in FAR section 15.404-1(b)(2). *Id.* Unit prices not included in the TEP, as identified in RFP attachment 2, pricing rate table, would also be evaluated for reasonableness using such techniques. *Id.*; see AR, Tab 11, Conformed RFP attach. 2, Pricing Rate Table, tab Guide to Pricing Rate Table, & tab Total Evaluated Price. The RFP also advised offerors that, in accordance with FAR section 15.404-1(g), the government might determine an offeror ineligible for award if prices proposed were materially unbalanced and posed an unacceptable risk to the government.<sup>7</sup> *Id.*

Offerors were instructed to propose prices only for the base year; the agency would calculate the prices for the remaining contract years using price escalation rates and discounts set forth in the pricing rate table. AR, Tab 11, Conformed RFP attach. 2, Pricing Rate Table, tab Total Evaluated Price, cells A3-I3; A4-I4; A5-I5. USTRANSCOM calculated the TEP using the data offerors submitted in the pricing rate table.<sup>8</sup> AR, Tab 80, Price Analysis at 3. The agency multiplied the offerors' proposed rates for various types of shipment by the corresponding estimated quantities, escalated prices using a stated cost index adjustment, and applied the discounts proposed by offerors in their proposals. *Id.* The agency also calculated offerors' prices for a 6-month extension using the proposed rates as escalated and discounted for the final year of performance. *Id.* at 3-4.

USTRANSCOM's price analysis relied on price competition, *i.e.* prices received from offerors responding to the solicitation. *Id.* at 2. The agency used a two-step statistical approach to determine whether offerors' initial and revised TEPs were fair and reasonable. COS at 18; AR, Tab 80, Price Analysis at 5, 13, 20, 40, 64, 93, 130.

For step one, the agency organized prices from highest to lowest and then calculated the median, the 25th percentile, and the 75th percentile of the group. AR, Tab 80, Price Analysis at 5.<sup>9</sup> The agency used these numbers to develop an interquartile range (IQR)

---

<sup>7</sup> The RFP explained that “[u]nbalanced pricing exists when, despite a fair and reasonable TEP, the price of one or more line items is significantly overstated or understated.” Conformed RFP at 41.

<sup>8</sup> As noted above, certain shipments were excluded from the TEP because “appropriate historical data either did not exist to create estimated quantities” or “foreseeable estimated quantities could not be determined by the Government due to the variability of shipping requirements.” AR, Tab 80, Price Analysis at 2.

<sup>9</sup> The agency used the same two-step methodology for its price analysis for the initial evaluation, each interim round of evaluations during discussions, and for the evaluation of FPRs. To simplify citations, we cite to the initial evaluation description of the specific methodology unless otherwise noted.

measure of statistical dispersion.<sup>10</sup> *Id.* The agency then calculated upper and lower limits as 1.5 times the IQR. *Id.* TEPs within the upper and lower limits were considered fair and reasonable because they suggested a low variability relative to the median. *Id.* Any TEP above the upper limit indicated high variability relative to the median and USTRANSCOM considered such pricing not fair and reasonable.<sup>11</sup> *Id.* Applying this methodology, the agency determined that the TEPs of the two highest-priced proposals were not reasonable. *Id.* at 6-7.

For step two, the agency calculated the average TEP of the remaining six proposals and a standard deviation of 0.5 from that average. *Id.* at 7. The agency considered any TEP more than 0.5 standard deviation above the average not fair and reasonable based on the competition. *Id.* Applying the step two methodology, the agency determined that the TEP of the third highest priced proposal was also not reasonable. *Id.* at 7-8.

The agency also evaluated each individual non-TEP price for reasonableness using the methodology described in step two above. *Id.* at 9-10. That is, the agency calculated the average price for each item and any price more than 0.5 standard deviation above the average was considered not fair and reasonable. *Id.*

Further, although not required by the RFP, the agency evaluated the individual TEP prices for “every individual TEP domestic and international origin or origin and destination.” *Id.* at 10. Here, the agency calculated the average price and if an offeror’s price was greater than the average by three percent, the agency flagged the price as appearing to be high. *Id.*

#### Price Evaluation--Initial Evaluation

The agency eliminated the three highest priced proposals--Offeror A (\$1.65 trillion), Offeror B (\$201 billion), and Offeror C (\$34 billion)--from the competition after concluding that their TEPs could not be made fair and reasonable via discussions because these offerors would need to completely rewrite their proposals. *Id.* at 4, 11. The table below summarizes the proposed TEPs of all eight offerors and the agency’s two-step analysis of those TEPs.

Offeror	TEP
---------	-----

<sup>10</sup> As explained in the price analysis report, “IQR is a measure of statistical dispersion, defined as the difference between the 75th and 25th percentiles of the data.” AR, Tab 80, Price Analysis at 5 n.1.

<sup>11</sup> The RFP did not require a price realism evaluation, which is concerned with prices that are too low; therefore, USTRANSCOM did not apply the same analysis to TEPs below the lower limits for its fair and reasonable pricing analysis. *Id.* at 5 n.2; see also *Bannum, Inc.*, B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 4 (“Whether a proposed price is too low concerns price realism.”).

Offeror A	\$1,655,803,992,286
Offeror B	\$201,541,467,294
<b>Upper Limit (Step One)</b>	<b>\$184,260,000,000</b>
3rd Quartile	\$75,780,000,000
Offeror C	\$33,853,186,422
<b>0.5 Standard Deviation Above Average - Upper Limit (Step Two)<sup>12</sup></b>	<b>\$14,357,460,031</b>
Average (Step Two)	\$8,700,379,286
Offeror D	\$5,632,603,420
Median (Step One)	\$5,060,000,000
Maersk	\$4,478,941,919
Offeror E	\$3,835,606,598
1st Quartile	\$3,450,000,000
Offeror F	\$2,288,497,083
Crowley	\$2,113,440,274
Lower Limit (Step One)	(\$105,040,000,000)

*Id.* at 4, 6-7.

The agency found that the remaining five offerors, including Crowley and Maersk, had proposed overall TEPs with fair and reasonable pricing. *Id.* at 11. The agency further found that while some non-TEP pricing was not fair and reasonable, the agency anticipated that the pricing could become fair and reasonable during discussions without the need for offerors to completely rewrite their proposals. *Id.*

#### Price Evaluation--Evaluations During Discussions

USTRANSCOM conducted discussions with the five offerors in the competitive range, which comprised five interim discussion rounds of ENs issued by the agency, revisions from the offerors, and evaluations, before the agency requested FPRs. AR, Tab 83, CRDD at 19. The agency issued ENs to the offerors on December 1, 2023 (interim round 1); January 12, 2024 (interim round 2); February 9 (interim round 3); March 7 (interim round 4); March 19 (interim round 5). COS at 12.

Upon establishment of the competitive range, the agency issued interim discussion round one ENs to offerors based on its initial evaluation. At this time, the agency did not address Maersk's overall TEP because after the initial evaluation, the agency concluded that Maersk's TEP was fair and reasonable; however, the agency issued two ENs to Maersk related to price. Protest at 6. The agency advised Maersk of individual TEP prices that appeared to be high and notified Maersk that its non-TEP price proposal was not fair and reasonable. *Id.*

---

<sup>12</sup> The agency did not calculate a lower limit for step two.



After receiving revised pricing in response to interim discussion round one ENs, the agency reset the baseline for evaluating fair and reasonable pricing using the same two-step statistical analysis described above. The price analysis only included offerors in the competitive range. AR, Tab 45, Round 2 EN Clarifications Email from Agency to Maersk, Jan. 17, 2024 at 1; see also AR, Tab 99, Round 2 EN Clarifications Email from Agency to Crowley, Jan. 17, 2024 at 1. In its interim round one evaluation, the agency found all five offerors to be fair and reasonable under the step one analysis. AR, Tab 80, Price Analysis at 14. After its step two analysis, however, the agency found that two offerors--Offeror D and Maersk--did not have fair and reasonable TEPs because their prices were more than 0.5 standard deviation above the average TEP of the competitive range offerors. *Id.* at 14-15, 18.

The table below summarizes the agency's two-step analysis of the five offerors in the competitive range after the baseline for the price analysis was reset.

Offeror	TEP
<b>Upper Limit (Step One)</b>	\$7,320,000,000
Offeror D	\$5,583,865,157
3rd Quartile	\$4,300,000,000
Maersk	\$4,295,275,338
<b>0.5 Standard Deviation Above Average - Upper Limit (Step Two)</b>	\$4,238,109,641
Median (Step One)	\$3,790,000,000
Offeror E	\$3,787,132,671
Average (Step Two)	\$3,555,893,010
1st Quartile	\$2,280,000,000
Offeror F	\$2,279,954,626
Crowley	\$1,833,237,259
Lower Limit (Step One)	(\$740,000,000)

*Id.* at 12-15.

When USTRANSCOM issued its interim round two discussion ENs to offerors, after the interim round one evaluation, the agency informed offerors it had reset the baseline and explained that there might be instances where “prices determined fair and reasonable in the first round of ENs are now considered not fair and reasonable in the second round of ENs” because the baseline had been reset. *Id.*

As relevant here, the agency issued Maersk deficiency EN No. MSK-V4-1001 stating that Maersk’s TEP was not fair and reasonable and requesting revised prices or an explanation as to why the prices were fair and reasonable as currently submitted. AR, Tab 46, Maersk EN No. MSK-V4-1001. The agency also identified the individual TEP prices that the agency considered high to assist Maersk in “providing the most competitive proposal.” AR, Tab 50, Maersk EN No. MSK-V4-1003. USTRANSCOM also evaluated the offerors’ non-TEP individual prices and issued deficiency ENs to those offerors, including Crowley and Maersk, with pricing the agency did not consider

to be fair and reasonable. AR, Tab 80, Price Analysis at 18; see also AR, Tab 48, Maersk EN No. MSK-V4-1002

In response to EN No. MSK-V4-1001, issued during interim round two of discussions, Maersk submitted revised overall TEP pricing that USTRANSCOM determined was fair and reasonable. AR, Tab 46, Maersk EN No. MSK-V4-1001. The agency then closed the EN after the interim round two evaluation. *Id.* In this regard, after the interim round two evaluation, Maersk’s TEP was \$4,087,925,063, which was below both the step one and the step two upper limits of the reset reasonableness baselines. AR, Tab 80, Price Analysis at 19-22. Notwithstanding the revised pricing Maersk submitted, the agency’s interim round two evaluation also identified individual TEP prices the agency considered high and non-TEP prices the agency determined were not fair and reasonable. *Id.* at 23, 25, 38; see also AR, Tab 54, Maersk EN No. MSK-V4-2001; AR, Tab 46, Maersk EN No. MSK-V4-2002.

For the agency’s evaluation of responses to ENs issued in interim rounds three, four, and five, the agency considered Maersk’s overall TEP to be fair and reasonable. AR, Tab 80, Price Analysis at 38, 63, 91, 128, 164. Maersk’s revised TEPs for the interim rounds of discussions were:

EN Interim Round	TEP
1	\$4,295,275,338
2	\$4,087,925,063
3	\$3,913,018,909
4	\$3,936,723,287
5	\$3,936,723,287

*Id.* at 15, 21, 42, 66, 95.

In interim discussion round three, as it had in interim discussion round two, the agency issued Maersk an EN identifying for Maersk every individual TEP price that appeared high even though Maersk’s overall TEP was considered fair and reasonable at this time. AR, Tab 57, Maersk EN No. MSK-V4-2002; AR, Tab 58, Maersk EN No. MSK-V4-2002, attach. After its interim round three evaluation, the agency closed the other-than-deficiency EN No. MSK-V4-2002 identifying high individual TEP pricing because Maersk had a fair and reasonable overall TEP and the agency concluded that Maersk’s response to the EN was sufficient even if some high individual TEP prices remained in the proposal. AR, Tab 57, Maersk EN No. MSK V4-2002.

Regarding non-TEP individual pricing, USTRANSCOM continued to issue ENs to Maersk in interim discussion rounds three, four, and five because the agency did not find Maersk’s revised pricing fair and reasonable when evaluating revisions during those interim rounds of discussions. AR, Tab 54, Maersk EN No. MSK-V4-2001 (round 3); AR, Tab 60, Maersk EN No. MSK-V4-3001 (round 4); AR, Tab 64, Maersk EN No. MSK-V4-4001 (round 5).

## Price Evaluation--Final Proposal Revisions

After concluding discussions, USTRANSCOM issued offerors a request for final proposal revisions. The agency again advised Maersk that its overall TEP was considered fair and reasonable. AR, Tab 75, Maersk Revised FPR Req. at 2. The agency also informed Maersk that some of its non-TEP prices were not considered fair and reasonable, but that the agency determined the pricing did not present an unacceptable risk to the government. *Id.* at 2-3. Lastly, the agency notified Maersk that even though its overall TEP was considered fair and reasonable, there were some areas where individual TEP pricing appeared high and the agency again identified every price that was high. AR, Tab 75, Maersk Revised FPR Req. at 2-3; *see also* AR, Tab 69, Maersk Revised FPR Req., attach. 3 – Maersk FPR TEP Individual High Prices.

Maersk's final TEP submitted in response to USTRANSCOM's request for FPRs was \$3,931,305,714, which represented a 13 percent decrease from its initial TEP. AR, Tab 80, Price Analysis at 162. The agency determined Maersk's price proposal was complete and its TEP was fair and reasonable. *Id.* at 164. The agency also found that while Maersk proposed pricing that was not balanced and some of its non-TEP prices were not considered fair and reasonable, Maersk's pricing did not present an unacceptable risk to the government of paying an unreasonably high price. *Id.*; *see also* AR, Tab 84, SSEB Rept. at 21.

With respect to Crowley, the agency evaluated its final price proposal as complete, and its TEP and non-TEP pricing as fair and reasonable. AR, Tab 80, Price Analysis at 164. Further, USTRANSCOM determined that Crowley's pricing, while not balanced, did not pose an unacceptable risk to the government. *Id.*; *see also* AR, Tab 84, SSEB Rept. at 18. Crowley proposed a final TEP of \$1,702,075,581, which was a 21 percent decrease from its initial TEP. AR, Tab 80, Price Analysis at 162. The agency further compared Crowley's and Maersk's TEPs and found that Crowley's TEP was approximately \$2.23 billion--or 79 percent--less than Maersk's. *Id.* at 163.

## Price Evaluation--Reasonableness

The protester contends the agency failed to inform Maersk that its price was unreasonable because the agency's price reasonableness determination was based on a mechanically applied methodology that did not involve a valid means for identifying and excluding outlier prices. Supp. Protest at 3-7. Specifically, Maersk challenges the agency's use of IQRs to identify outliers in step one of the agency's price analysis and takes issue with the resulting wide range of prices considered fair and reasonable. *Id.* at 3-5. The protester also contends that the agency's step two price analysis did not properly identify outliers and was therefore meaningless. *Id.* at 5.

A price reasonableness determination is a matter of administrative discretion involving the exercise of business judgment by the contracting officer that we will question only where it is unreasonable. *AAR Airlift Grp., Inc., B-414690 et al.*, Aug. 22, 2017, 2017 CPD ¶ 273 at 9. The depth of an agency's price analysis is a matter within the sound

exercise of the agency's discretion, and we will not disturb such an analysis unless it lacks a reasonable basis. *Id.* A protester's disagreement with the agency's judgment, without more, is not sufficient to establish that an agency acted unreasonably. *Trilogy Fed. , LLC*, B-418461.11, B-418461.18, Feb. 23, 2021, 2021 CPD ¶ 144 at 5.

Based on our review of the record, we find the agency's price analysis was reasonable. The solicitation advised offerors that the agency would evaluate price reasonableness using one or more of the techniques set forth in FAR section 15.404-1(b)(2). Conformed RFP at 41. The FAR provides that the agency "may use various price analysis techniques and procedures to ensure a fair and reasonable price," including comparison of the proposed prices received--because "[n]ormally, adequate price competition establishes a fair and reasonable price." FAR 15.404-1(b)(2)(i). The agency elected to compare the proposed prices received, using IQR and standard deviation methodologies, and applying those methodologies, found Maersk's price to be fair and reasonable.

Here, the agency not only compared the protester's TEP to a price range derived from offerors' proposed prices using two different methodologies, but also provided reasoned analysis of its findings. We find no support for the protester's contention that the agency mechanically applied the calculation without further analysis, as the agency's evaluation included not only the results of calculations from applying the IQR and standard deviation methodologies, but also detailed analyses of those results. While the protester disagrees with the agency's conclusions, such disagreement does not provide a basis for our Office to find the agency's evaluation unreasonable. Accordingly, we deny the protester's allegations in this regard.

As an alternative argument, Maersk contends that even assuming the agency could rely on the two-step price analysis methodology, the agency's price reasonableness evaluation was improper because it should have excluded "outliers" from the calculation of the baseline after the interim round one evaluation. Supp. Protest at 3, 5, 7. According to the protester, the agency should not have used Offeror D's TEP when it calculated the baseline for determining price reasonableness because Offer D's price was an outlier. Offer D's price was an outlier according to the protester because, after the interim round one evaluation, the agency identified Offeror D's price as unreasonably high. This was due to the fact that Offeror D's price was above the third quartile under step one of the agency's price reasonableness analysis and above the 0.5 standard deviation upper limit for step two. *Id.* at 3-5. Maersk argues further that it was unreasonable for the agency to include its own price in the baseline calculation because the agency also did not consider Maersk's price fair and reasonable after the interim round one evaluation. *Id.* at 5, 7. The protester also argues that the agency should have reset the baseline following every interim round of discussions. *Id.* at 6.

In addition, the protester contends that the agency, when creating its price reasonableness baseline, was required to exclude from consideration prices offered by

firms deemed unawardable for non-price reasons.<sup>13</sup> Supp. Protest at 7-8. In support of its argument, the protester cites *Lifecycle Construction Services, LLC*, B-406907, Sept. 27, 2012, 2012 CPD ¶ 269, which, Maersk maintains, stands “for the straightforward principle that a benchmark based on unacceptable pricing is an unacceptable benchmark.” Supp. Comments at 5; see also Supp. Protest at 7-8. Maersk argues that our decision in *American Roll-On Roll-Off Carrier Group, Inc.*, B-418266.9 *et al.*, Mar. 3, 2022, 2022 CPD ¶ 72, extends this principle to benchmarks based on technically unacceptable or ineligible proposals and contends that such benchmarks are also unacceptable. Supp. Comments at 4, 6-7. USTRANSCOM defends its price evaluation as reasonable, and consistent with the solicitation and the FAR. Supp. COS/MOL at 5-37.

We have reviewed the record and we find nothing objectionable with the agency’s calculation of the reasonableness baseline in the interim round one evaluation. Nothing in FAR part 15 requires an agency to recalculate fair and reasonable pricing thresholds after establishing a competitive range. See, e.g., *American Roll-on Roll-Off Carrier Grp., Inc.*, *supra* at 23 (denying argument that prices of offerors excluded from the competitive range should not have been included in the calculation of evaluation benchmarks). Rather, all that FAR part 15 requires is that there be adequate price competition, which is not disputed here, and a comparison of the competitive prices received.<sup>14</sup> See FAR 15.404-1(b)(2)(i).

---

<sup>13</sup> In this connection, the protester asserts that even though the agency substantially redacted the competitive range determination and the SSEB report, these documents “indicate[] that the evaluators had extensive concerns regarding each offeror under each of the non-Price factors, issuing numerous additional ENs” to the offerors in the competitive range. Supp. Protest at 8; see also AR, Tab 83, CRDD at 7 (“Deficiencies were documented and assessed at the factor and subfactor level.”). Because the protester did not challenge the agency’s evaluation of non-price factors, the agency did not provide detailed information about these aspects of offerors’ proposals. The agency simply stated that no offerors were considered technically acceptable after initial evaluations and that after discussions the agency determined all offerors were technically acceptable. Supp. COS/MOL at 26-28; see also AR, Tab 83, CRDD at 8-19; AR, Tab 85, SSAC Rept. at 3-4. Assuming that the protester is correct and the agency included offerors with unacceptable proposals in developing the agency’s reasonableness baseline after the competitive range was established, as discussed below, the agency’s action is unobjectionable where the agency conducts discussions with offerors whose proposals are capable of being made acceptable through discussions.

<sup>14</sup> To the extent the protester also argues that the agency unreasonably used the baselines established in the interim round one evaluation to assess reasonableness in the subsequent discussion rounds when the TEPs continued to drop in each round, we have no basis to find the agency’s actions unreasonable. The agency expressly decided not to reset the baselines with each round as prices went down to avoid “continuously resetting the Government’s fair and reasonable threshold, likely

(continued...)

As discussed above, the record demonstrates that the agency, consistent with the requirements of the FAR, compared the competitive prices it received to assess the reasonableness of the offered prices. Using the price evaluation methodology outlined above, which we did not find unreasonable, the agency identified the TEP for three offerors as unreasonable where they were many multiples higher than those submitted by the five other offerors and eliminated their proposals from the competition.

The record also demonstrates that the agency went beyond the FAR's requirements. In this regard, the agency reset the price reasonableness baseline based on a comparison of the prices proposed by the firms that the agency included in the competitive range--the set of offerors the agency determined had correctable deficiencies. In this connection, after the agency reset the baseline, the agency informed offerors that the baseline had been reset and warned offerors that proposals that had previously been considered fair and reasonable after the initial evaluation might not be after the agency's interim round one evaluation when the baseline was reset. Indeed, the agency expressly advised the protester that its price was unreasonable because of these circumstances. The protester, as a result, lowered its price to fall within the baseline of prices that the agency considered to be fair and reasonable as determined from the distribution of competitive prices it received from the offerors that had made it into the competitive range. Although Maersk disagrees with USTRANSCOM's reasonableness baselines and what represents an unreasonable price, Maersk has not shown that the agency's price reasonableness evaluation, which compared prices received in a procurement with adequate price competition, violated procurement laws, regulations, the RFP, or was otherwise unreasonable.

Moreover, we find the protester's reliance on *Lifecycle* is misplaced because it involves circumstances not present in this protest. In *Lifecycle*, offerors proposed price coefficients and the agency calculated the median of the coefficients proposed for its price realism analysis. *Lifecycle Constr. Servs., LLC, supra* at 8. The agency included price coefficients that it considered unreasonably high and price coefficients from offerors whose proposals the agency determined were unacceptable or otherwise ineligible for award in its price analysis. *Id.* By way of example, one price coefficient the agency considered unreasonably high was 65 percent above the government estimate. *Id.* at 4. Using the unreasonably high price, the agency then calculated the median which the agency used in its price realism analysis that the agency used to reject the protester's price as too low. *Id.* at 5. In *Lifecycle*, GAO expressly concluded that certain of the offerors' coefficients used in calculating the median coefficient were drawn from proposals whose prices should not reasonably have been included in the price analysis because the agency considered the prices unreasonably high or the

---

eliminating at least one Offeror from the fair and reasonable range even if the Offeror provided a lower TEP than the TEP found to be fair and reasonable at the establishment of the Competitive Range." AR, Tab 80, Price Analysis at 20. Given the discretion afforded agencies in conducting their evaluations, we have no basis to find the agency's exercise of that discretion in this respect to be improper.

technical proposals were unacceptable or ineligible for award prior to the price analysis. *Id.* at 8. Furthermore, in *Lifecycle*, the agency only evaluated proposed coefficients from two locations instead of all fourteen locations as described in the solicitation, which we also found was unreasonable. *Id.*

The facts that led to our decision in *Lifecycle* are not similarly present here. Here, the agency did not consider any of the price proposals included in the competitive range and used to calculate the reset reasonableness baseline unreasonably high before the agency conducted its price analysis in interim discussions round one. Furthermore, in the present case, with several rounds of discussions, the competitive range offerors had the opportunity to resolve technical or price deficiencies which allowed their proposals to become technically acceptable or reasonably priced and consequently, preserved the ability of their proposals to be considered for award. We find therefore, the agency reasonably included those proposals in its price analysis. See, e.g., *American Roll-on Roll-Off Carrier Grp., Inc.*, *supra* at 23 (finding that the agency reasonably included prices from offerors not included in the competitive range in its price analysis where “the record provides no support for an assertion that the agency should have found those prices unreasonable before conducting a price analysis”).”

The FAR mandates that the agency must “discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond.” FAR 15.306(d)(3). Meaningful discussions must be sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror’s potential for receiving the award. *Id.*; *Ad Hoc Research Assocs., LLC*, B-420641, B-420641.2, July 5, 2022, 2022 CPD ¶ 154 at 7-8. In this connection, through discussions, an offeror with an unreasonably high price or a proposal that is not presently awardable may resolve flaws in its proposal and improve its potential for award, as the protester did here after interim discussions round one. If an agency could consider only prices from proposals determined to be acceptable and awardable when determining price reasonableness, the agency would be able to conduct its price reasonableness analysis only after all discussions had closed. See FAR 15.306(d). In the circumstances here, we find it unobjectionable for USTRANSCOM to have included the prices from all offerors in the competitive range, including unacceptable proposals, in calculating the baseline used in the agency’s price reasonableness evaluation.<sup>15</sup>

In sum, the record here supports the agency’s assertion that its price reasonableness analysis was conducted in a manner consistent with the FAR and the RFP. We find that USTRANSCOM reasonably conducted its price analysis and concluded that Maersk’s TEP was fair and reasonable and therefore we deny this protest ground.

---

<sup>15</sup> Further, we do not agree with the protester’s characterization of *American Roll-On* as standing for the proposition that establishing a benchmark using price proposals that are technically unacceptable or otherwise ineligible for award is unreasonable.

## Misleading Discussions

The protester also argues that USTRANSCOM failed to conduct meaningful discussions, and that the agency's discussions were misleading. Protest at 11-14. Specifically, the protester contends that the substantial price disparity between Crowley and Maersk established that Maersk's TEP was facially unreasonable, *i.e.* too high. *Id.* at 12. In the protester's view, the agency was obligated to inform the protester that its TEP was too high during the subsequent rounds of discussions. *Id.* at 12-13. Maersk also contends that the ENs, and the FPRs, which stated that Maersk's TEP, "while fair and reasonable, appear[ed] to be high," misled Maersk into believing its price was competitive and that Maersk could improve its competitive position by making adjustments to individual prices. *Id.* at 13 (quoting AR, Tab 75, Maersk Revised FPR Req. at 2-3); Supp. Protest at 12-15.

In response, the agency maintains that its price evaluation was consistent with the FAR and the RFP, and that it reasonably determined Maersk's TEP was fair and reasonable, such that USTRANSCOM was not obligated to provide additional pricing information to Maersk during discussions. Memorandum of Law (MOL) at 17-23. The agency further responds that even though it was not required to inform Maersk of high individual prices, the agency informed Maersk several times that its TEP included individual pricing that appeared high, identified every price for Maersk, and provided Maersk with an opportunity to revise its prices. *Id.* at 23-26; Supp. COS/MOL at 43-50.

Agencies have broad discretion to determine the content and extent of discussions, and we limit our review of the agency's judgments in this area to a determination of whether they are reasonable. *InfoPro, Inc.*, B-408642.2, B-408642.3, Dec. 23, 2014, 2015 CPD ¶ 59 at 9. Discussions must be meaningful, equitable, and not misleading. *International Dev. Grp. Advisory Servs., LLC*, B-416551, B-416551.2, Oct. 15, 2018, 2018 CPD ¶ 358 at 6. At a minimum, the agency must discuss deficiencies, significant weaknesses, and adverse past performance information to which an offeror has not yet had an opportunity to respond. FAR 15.306(d)(3).

Where an offeror's price is high in comparison to competitors' prices or the government estimate, the agency may, but is not required to, address the matter during discussions. *IAP World Servs., Inc.*, B-297084, Nov. 1, 2005, 2005 CPD ¶ 199 at 4. That is, there is no requirement that an agency inform an offeror during discussions that its price may be too high where the offeror's price is not considered excessive or unreasonable. *Southeastern Kidney Council*, B-412538, Mar. 17, 2016, 2016 CPD ¶ 90 at 4. Thus, if an offeror's price is not so high as to be unreasonable and unacceptable for contract award, the agency reasonably may conduct discussions without advising the offeror that its prices are not competitive. *AAR Airlift Grp., Inc.*, *supra*; *IAP World Servs., Inc.*, *supra*.

Here, the agency considered the protester's price to be unfair and unreasonable only after interim round one and at that time advised Maersk that its price was unreasonably high. Subsequently, Maersk reduced its price in response to this information, and the



agency considered Maersk's price fair and reasonable in the following interim rounds of discussions.<sup>16</sup> As discussed at length above, USTRANSCOM's price evaluation was reasonable. As such, the agency was under no obligation to inform Maersk that its TEP was high in comparison to Crowley's TEP.

Moreover, the record shows that the agency discussions and the FPR were meaningful and not misleading. The RFP did not require the agency to evaluate individual TEP items for fair and reasonable pricing, and yet the agency did so. USTRANSCOM also advised Maersk of every individual TEP price appearing to be high to assist Maersk in preparing the most competitive proposal possible on multiple occasions during discussions and in its FPR request. On this record, we conclude this challenge has no merit and we deny this protest ground.

### Responsibility Determination

Next, Maersk challenges the agency's conclusion that Crowley is a responsible contractor. Protest at 19-20. In this connection, the protester alleges that the magnitude of disparity between its TEP and Crowley's TEP "necessarily means that Crowley priced the contract at a drastic loss," calling into question Crowley's ability to successfully perform the contract. *Id.* at 19. According to the protester, it "appears" that the agency did not meaningfully evaluate Crowley's financial information. *Id.* at 20; see *also* Comments at 8 (conceding that the record shows USTRANSCOM did review Crowley's financial information, but asserting the analysis was "perfunctory"). In the agency report, USTRANSCOM contends that this allegation is speculative and does not meet our standard for reviewing an agency's determination of responsibility. MOL at 35-36, 38.

Our Office generally will not consider a protest challenging the agency's affirmative determination of an offeror's responsibility. 4 C.F.R. § 21.5(c). We will only decide a protest challenging an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. *Peraton, Inc.*, B-420919.2, B-420919.3, Dec. 8, 2022, 2022 CPD ¶ 312 at 11-12. We have further explained that the information in question must concern very serious matters, for example, potential criminal activity or massive public scandal. *PDS Consultants, Inc.*, B-419300, Dec. 16, 2020, 2021 CPD ¶ 137 at 5.

We conclude that the protester has failed to present such evidence here. We agree with the agency that Crowley's alleged submission of a below-cost offer does not meet our threshold for review of the responsibility determination. See *M-Cubed Info. Sys., Inc.*, B-284445, B-284445.2, Apr. 19, 2000, 2000 CPD ¶ 74 at 9-10 (allegation that the agency should have considered the protester's alleged below-cost offer as part of the

---

<sup>16</sup> We note Maersk did not propose the highest price of the offerors in the competitive range; rather, Offeror D had the highest-priced proposal.

responsibility determination did not meet our threshold for review). Indeed, our Office has explained that the submission of a below-cost offer is not in itself legally objectionable, and does not, by itself, cast any doubt upon the reasonableness of the responsibility determination. *Peraton, Inc., supra*. Accordingly, we dismiss the protest allegation.

## Past Performance

Maersk also challenges USTRANSCOM'S past performance evaluation, arguing the agency ignored adverse information regarding Crowley's performance under the DFTS I contract. Protest at 20-22. Specifically, the protester points to numerous audits the General Services Administration (GSA) conducted that identified overcharges by Crowley under the DFTS I contract and the wide-ranging litigation by Crowley challenging GSA's audit findings. *Id.* at 20-21. In the protester's view, USTRANSCOM unreasonably assessed a rating of substantial confidence to Crowley and determined there was no discernable difference between Crowley's past performance and its own. *Id.* at 22.

The agency responds that its evaluation was reasonable and the protester's complaints simply amount to disagreement with the agency's decision-making. COS at 45-51; MOL at 39-46. In particular, the agency asserts that it specifically considered the overcharge notices from GSA and the ensuing litigation in its analysis, and because the amount and the number of transactions at issue was minimal in relation to the total contract, this information alone was insufficient to show that Crowley did not merit a past performance rating of substantial confidence. COS at 46-48.

Our Office will review an agency's evaluation of an offeror's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, as determining the relative merit of an offeror's past performance is primarily a matter within the agency's discretion. *TeleCommunication Sys., Inc.*, B-413265, B-413265.2, Sept. 21, 2016, 2016 CPD ¶ 266 at 7; *American Env'tl. Servs., Inc.*, B-406952.2, B-406952.3, Oct. 11, 2012, 2013 CPD ¶ 90 at 5. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; an offeror's disagreement with an agency's evaluation, by itself, does not demonstrate that those judgments are unreasonable. *Cape Env'tl. Mgmt., Inc.*, B-412046.4, B-412046.5, May 9, 2016, 2016 CPD ¶ 128 at 8.

Based on our review, we find that the agency's evaluation of Crowley's past performance was reasonable. The solicitation instructed offerors to submit no more than three past performance references for the offeror itself and no more than nine references for affiliated, subsidiary, or subcontractor firms for services performed within the previous three calendar years similar in nature to the services described in this solicitation. Conformed RFP at 35. Offerors were advised that their past performance would be evaluated using past performance questionnaires and performance

information independently obtained from government or commercial sources. Conformed RFP at 39.

The agency would first determine the recency of each past performance reference; a recent past performance contract was defined as one with ongoing performance or one that was performed within three calendar years of the due date for proposal submission. *Id.* Scope, magnitude of effort, and complexity are collectively defined as providing services in the following areas: (1) subcontractor management (subcontractor selection, capacity management, performance management); (2) transportation services (pickup and delivery of shipments, equipment management, claims processing); (3) information technology ([Transportation Management System] interface with customer systems, in-transit visibility, reports generation); and (4) small business subcontracting utilization (compliance with small business clauses and goals when established). *Id.* at 40.

The agency would determine the relevance of each past performance reference and then assign each proposal a past performance assessment rating of substantial confidence, satisfactory confidence, neutral confidence, limited confidence, and no confidence. *Id.* As relevant to this protest, the agency would assign a proposal a past performance assessment rating of substantial confidence when, based on the offeror's recent contract performance record, the government has a high expectation that the offeror will successfully perform the required effort. *Id.*

Crowley submitted three past performance references--one reference for itself and two references for a subcontractor. AR, Tab 81, Crowley Past Performance Evaluation at 1-7. The agency found that all three references were recent. *Id.* at 7. The agency determined that two references were very relevant and one reference was relevant to the DFTS II scope of work, with one very relevant reference demonstrating experience in all four service areas specified in the RFP. *Id.* Further, all three references demonstrated essentially the same magnitude as the DFTS II contract in terms of dollar value and annual value. *Id.* at 7-8. Based on the past performance questionnaires received, USTRANSCOM deemed the quality of Crowley's past performance efforts to range from very good to exceptional, with Crowley's performance quality for the DFTS I contract rated as exceptional. *Id.* at 7.

Next, USTRANSCOM searched governmental performance reporting databases for information about Crowley. In the contractor performance assessment reporting system (CPARS), the records for Crowley ranged from satisfactory to exceptional where applicable. *Id.* at 8. The agency also checked the electronic subcontracting reporting system (eSRS), which showed that Crowley complied with small business reporting requirements and that the government accepted all relevant reports. *Id.* Further, the agency reviewed Crowley's supplier performance risk reports (SPRS), which "retrieves item, price, quality, delivery, and contractor information from contracts in Government reporting systems in order to develop risk assessments (i.e., Supplier Risk Score) of contractors," and determined Crowley's score was acceptable and no suspected counterfeit items were reported. *Id.* Although the agency searched, it was unable to

find other government contracts, CPARS, SPRS, or eSRS reporting histories for Crowley's subcontractor and therefore, the agency did not have any additional resources outside the past performance questionnaires to evaluate its past performance. *Id.*

Finally, USTRANSCOM considered potentially adverse past performance information in its evaluation. *Id.* In this connection, the agency reviewed the demand letter that it sent to Crowley on July 11, 2023, which identified systemic overcharges by Crowley in the performance of the DFTS I contract.<sup>17</sup> *Id.* The demand letter sought approximately \$2.9 million related to "at least 1,720 invoices." *Id.* The agency explains that the total demand for payment represent 0.21 percent of the total contract value and 0.09 percent of the total contract transactions between August 2018 and July 2023. *Id.* Crowley denied overcharging the agency and notified the agency that it would respond to the demand letter with a transaction-by-transaction response; however, as of January 10, 2024, the agency had not received a response to its demand letter. *Id.* The shipments involving the demand letter are at issue in litigation at the U.S. Court of Federal Claims and no decision has been made. MOL at 41; see also *Crowley Gov't Servs., Inc. v. United States*, No. 21-1405 (Fed. Cl. 2021).

In addition, the agency considered the impact of the 1,720 transactions at issue in the demand letter on Crowley's on-time delivery performance, which was a key performance indicator. AR, Tab 81, Crowley Past Performance Evaluation at 8. Crowley performed the contract with a 95.55 percent on-time delivery rate for the base period (August 2017 through July 2019), and a 97.81 percent on-time delivery rate for the option one period (August 2019 through July 2020). *Id.* The agency recalculated Crowley's on-time delivery rate related to the 1,720 transactions identified in the demand letter. *Id.* The agency found that 1,691 transactions, including 37 undated shipments, occurred during the base period and reduced Crowley's on-time delivery rate by 0.34 percent to 95.21 percent. *Id.* at 8 & n.6. The remaining 29 transactions occurred during the first option period and reduced Crowley's on-time delivery rate by 0.01 percent to 97.80 percent. *Id.* The agency concluded that the limited number of overcharges did not by themselves lead the agency to determine that Crowley does not merit a substantial confidence rating for past performance. *Id.* USTRANSCOM has a high expectation that Crowley will successfully perform the contract. *Id.*

As noted above, Maersk takes issue with the agency's assessment of substantial confidence. Based on our review, we find that the record supports USTRANSCOM's evaluation and demonstrates that the agency carefully considered potentially adverse past performance information. Moreover, despite the ongoing litigation concerning GSA audits of Crowley invoices and the notices of overcharges that GSA has issued to Crowley, of which we are intimately familiar, see our decision, *Crowley Government*

---

<sup>17</sup> The contracting officer noted that Crowley's past performance evaluation mistakenly noted the demand letter was issued on June 9, 2023, and provided the correct date of the letter as July 11, 2023. COS at 46 n.32. This typographical error is not relevant to the agency's evaluation or our decision.

*Services, Inc.*, B-421982, Dec. 19, 2023, 2024 CPD ¶ 9, no court has issued a decision regarding the accuracy of GSA's overcharge notices. MOL at 41. Throughout the litigation, Crowley has disputed the accuracy of GSA's audit findings and the USTRANSCOM contracting officer for the DFTS I contract, who issued final decisions in response to contract claims Crowley submitted pursuant to the Contract Disputes Act and DFTS I's contract dispute clause FAR 52.233-1, has agreed with Crowley that GSA's interpretation of the DFTS I contract and the overcharges identified were invalid. *Id.*; see also *Crowley Gov't Servs., Inc.*, *supra* at 3. Significantly, in the past performance questionnaire for Crowley's performance of the DFTS I contract, USTRANSCOM affirmed that it had no reservations about having Crowley perform one of its "critical and demanding programs" and that Crowley is "proven to have the network and ability to sustain and support the DoD needs in the Continental United States and Canada." The agency further noted that "Crowley's ability to support our largest customer DLA and flexibility has proven to be paramount for mission success and support to the Warfighter." AR, Tab 81, Crowley Past Performance Evaluation at 2-3. Accordingly, we deny this protest ground.

#### Competition on an Equal Basis and Unequal Access to Information OCI

Maersk alleges that the offerors were not competing on an equal basis because the agency failed to provide all available historical data. Supp. Protest at 15-18. Maersk also contends that Crowley's knowledge of the DFTS I contract data as the incumbent contractor created an unequal access to information OCI that the agency failed to mitigate. *Id.* As explained below, we dismiss these allegations as untimely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see *AmaTerra Envtl. Inc.*, B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

Here, USTRANSCOM issued the solicitation on July 27, 2023, and the closing date for receipt of proposals, as amended, was September 8, 2023. The RFP included historical data from DFTS I for the years between 2021 and 2023 in attachment 10. AR, Tab 25, RFP amend. 2 at 1 (incorporating historical data from DFTS I into the solicitation). In addition, USTRANSCOM restated in questions and answers (Q&As) prior to the deadline for receipt of proposals that attachment 10 comprised all the historical data the agency intended to include in the RFP. AR, Tab 34, RFP amend. 7, Questions and Answers at 1-3, 6-7, 9-10. Maersk was aware before proposals were due on September 8, 2023, that USTRANSCOM was not providing all the historical data from the DFTS I contract. Moreover, USTRANSCOM awarded the DFTS I contract to Crowley in November 2016, which was publicly available information, so Maersk should have known that historical data provided in the DFTS II solicitation did not encompass

all the available data under the previous contract. Accordingly, for Maersk's allegations about the completeness or sufficiency of the historical data provided in the RFP to be timely, the protester was required to raise them before the closing date for initial proposals. 4 C.F.R. § 21.2(a)(1). Maersk did not, and thus we find this protest ground untimely and dismiss it.

Turning to the protester's allegation that Crowley's knowledge of DFTS I contract data created an unequal access to information OCI that USTRANSCOM failed to mitigate, a protester's allegation that another firm has a conflict of interest is generally premature when filed before an award has been made. *REEP, Inc.*, B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 1-2. This conclusion reflects the underlying principle that a protester is charged with knowledge of the basis for protest only at the point where the agency conveys to the protester the agency's intent to follow a course of action adverse to the protester's interests. *CDR Enters., Inc.*, B-293557, Mar. 26, 2004, 2004 CPD ¶ 46 at 3. In the context of an alleged organizational conflict of interest, that point typically is when the protester is notified of the agency's selection decision. *Guident Techs., Inc.*, B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 5.

The record shows that the information on which Maersk based its OCI allegation was available when USTRANSCOM notified Maersk of the award to Crowley. In this connection, Crowley's status as the incumbent contractor was publicly available, and as the incumbent contractor, its access to all the historical data for the DFTS I contract is self-evident. On June 25, and throughout the post-award required debriefing process, which closed on July 16, the protester was on notice that the agency awarded the contract to Crowley. AR, Tab 89, Unsuccessful Offeror Notice; AR, Tab 90, Maersk Post-Award Debriefing; AR, Tab 91, Maersk Expanded Post-Award Debriefing. If Maersk had concerns that Crowley had an unequal access to information OCI, Maersk should have raised that issue with the agency within 10 days after its required debriefing closed. 4 C.F.R. § 21.2(a)(2) (prescribing protests other than those alleging solicitation improprieties "shall be filed not later than 10 days after the date on which the debriefing is held."). Because all the information upon which Maersk bases its OCI allegation was available to Maersk before Maersk filed its initial protest on July 22, Maersk could not wait until it filed its supplemental protest on September 3 to raise its OCI allegation. We therefore dismiss this allegation as untimely.

In summary, based on this record, we find no merit to Maersk's grounds of protest. We conclude USTRANSCOM conducted a reasonable price analysis that determined the protester's TEP was fair and reasonable. We also conclude that the agency's conducted meaningful discussions with the protester. Furthermore, we find that USTRANSCOM's past performance evaluation of Crowley was reasonable.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel