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Decision

Matter of: TransAtlantic Lines, LLC

File: B-411846.3; B-411846.4

Date: May 18, 2016

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DIGEST

Protest of an agency's price evaluation is denied where the agency reasonably evaluated the protester's ocean shipping rates consistent with the terms of the solicitation and the Cargo Preference Act of 1904.

DECISION

TransAtlantic Lines, LLC, a small business located in Greenwich, Connecticut, protests the rejection of hundreds of its proposed ocean shipping rates under request for proposals (RFP) No. HTC711-15-R-W002, issued by the Department of Defense (DOD), U.S. Transportation Command (TRANSCOM), for international cargo transportation. TransAtlantic contends that the agency's price evaluation was inconsistent with the terms of the solicitation and violated the Cargo Preference Act of 1904.

We deny the protest.

BACKGROUND

The Cargo Preference Act of 1904, as amended, (CPA) provides that:

[o]nly vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President

finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons.

10 U.S.C. § 2631(a).¹ The Act is implemented by DFARS subpart 247.5, Ocean Transportation by U.S. Flag Vessels, and subpart 247.5 of the DFARS Procedures, Guidance, and Information (PGI), as discussed below.

The RFP was issued on an unrestricted basis using the commercial item procedures of Federal Acquisition Regulation (FAR) part 12, and provided for the award of indefinite-delivery, indefinite-quantity (IDIQ) contracts (for a base year and two option years) to U.S. and foreign flag ocean carriers for international transportation of DOD related cargo.² See Agency Report (AR), exh. 7, Acquisition Plan, at 10; RFP at 4-7, 10, 62, 251.³ The RFP stated that multiple awards would be made on a lowest-priced, technically acceptable basis considering four evaluation factors: technical, past performance, small business proposal, and price. See RFP at 62-64. The solicitation instructed offerors to submit separate proposal volumes for each evaluation factor, and stated that the non-price factors would be evaluated on an acceptable/unacceptable (i.e., pass/fail) basis. Id. at 56-57, 62-63.

Offerors were to propose fixed-price rates for the shortest transit time that the carrier could offer between origin and destination for any of the thousands of trade areas, geographic zones, ocean routes, and ocean lanes identified in the solicitation's performance work statement (PWS).⁴ Id. at 60; see PWS at 120-27

¹ The Cargo Preference Act of 1904, which applies exclusively to DOD entities, is more restrictive than the Cargo Preference Act of 1954, 46 U.S.C. § 55305, which applies to the federal government generally, including DOD. In general, the 1904 Act requires that 100 percent of military cargo be transported on U.S. flag vessels, whereas the 1954 Act requires that at least 50 percent of civilian agency cargo be transported on U.S. flag vessels. DOD considers its compliance with the 1904 Act to exceed the requirements of the 1954 Act. See Defense Federal Acquisition Regulation Supplement (DFARS) § 247.570(b). Our references in this decision to the Cargo Preference Act, CPA, or the Act, are to the 1904 Act.

² Our Office previously denied TransAtlantic's pre-award protest of the RFP's price and task order award provisions and performance requirements. See TransAtlantic Lines, LLC, B-411846.2, Dec. 16, 2015, 2015 CPD ¶ 396.

³ Our references are to the conformed version of the RFP provided by the agency.

⁴ The PWS stated that many of the routes were structured into zones so that countries/ports can be grouped to best reflect market conditions and minimize the number of rates that a carrier had to propose. RFP, exh. 3, PWS at 120.

(trade areas and zones), 220-23 (route information). Offerors could propose prices for seven rate categories, including three categories of ocean rates, relevant here: (1) an ocean container rate, (2) an ocean breakbulk (*i.e.*, non-containerized cargo) rate, and (3) a “single factor” rate.⁵ See RFP at 60, 160. Offerors were to submit their proposed rates electronically using the Carrier Analysis & Rate Evaluation (CARE II) System, which is part of the agency’s web-based, integrated booking system (IBS). Id. at 56, 59-60.

The RFP provided that price proposals would be evaluated for fairness and reasonableness in accordance with FAR § 15.404-1, and that reasonableness may be determined based on a comparison to other offerors’ prices or to the government’s estimate, current market conditions, or any other price analysis technique under FAR § 15.404-1(b)(2). Id. at 64. The RFP stated that an offeror’s pricing would be evaluated on a “by-lane basis” (specific contract line item number (CLIN) in the CARE II system under various ocean routes);⁶ therefore, an offeror’s prices could be determined fair and reasonable on some lanes, but not others. Id. Offerors were eligible for contract award if any one of their proposed rates was determined fair and reasonable on at least one ocean lane. Id.

With regard to the Cargo Preference Act, the RFP provided that U.S. flag service would not be considered when rates were evaluated for contract award, but that any rate that appeared excessive (under the Act, see 10 U.S.C. § 2631(a), supra)⁷

⁵ A single factor rate is a point-to-point rate for high volume routes that includes an ocean voyage and ground transportation or some other cargo service. TRANSCOM considers a single factor rate to be an ocean rate because the ocean voyage is subject to the CPA. See AR at 21 n.7 (ocean rates include single factor rates). In addition to the three ocean rates, offerors could also propose rates for: (4) accessorial services, (5) drayage, (6) linehaul, and (7) mileage. See RFP at 156-62.

⁶ For example, Ocean Container CLIN No. 110301, Refrigerated Containers, U.S. Gulf Coast to Japan; Ocean Breakbulk CLIN No. 110763, Light Vehicles, Hawaii to U.S. West Coast; Single Factor CLIN No. 111275, Refrigerated Containers, Norfolk, Virginia, to Terceira, Azores. AR, exh. 39, 3rd Breakbulk Evaluation (Eval.), at 11; exh. 40, 3rd Container Eval., at 19; exh. 41, 3rd Single Factor Eval., at 1.

⁷ The CPA is, in part, a subsidy of the U.S. flag commercial shipping industry that recognizes that lower prices may be available from foreign flag carriers. See PGI § 247.573(b)(1)(C)(1)(i). Therefore, a lower ocean rate for use of a foreign flag vessel is not a sufficient basis, on its own, to determine that the rate proposed by a U.S. flag carrier is excessive or otherwise unreasonable. Id. In other words, as TRANSCOM explains, a U.S. flag carrier’s ocean rates may be found unreasonable
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would be further evaluated in accordance with DFARS § 247.573.⁸ Moreover, the RFP stated that the contracting officer would not consider an offer to be fair and reasonable if it contained rates higher than the highest commercial service contract rate; or contained rates that were clearly and substantially in excess of the rates stated in comparable commercial services contracts to which the offeror is a party, for the same trades and similar services. Id.

TRANSCOM received proposals from 29 carriers offering 36,254 separate cargo rates, including from TransAtlantic, an incumbent (USC-7)⁹ small U.S. flag carrier that offered 2,104 rates, including the 569 ocean rates at issue here.¹⁰ AR, exh. 42, 3rd Eval. Summ., at 1-3. Proposals were evaluated by a source selection evaluation board (SSEB) comprised of different teams for each RFP evaluation factor, including a price evaluation team (PET) that evaluated each rate category for price reasonableness. See AR, exh. 9, Source Selection Plan, at 6-8. After initial evaluations, the SSEB found that all 29 carriers proposed fair and reasonable rates on at least one lane, and the SSEB recommended that the agency hold discussions with all carriers.¹¹ See AR, exh. 21, Competitive Range Determination, at 4-5. The agency conducted two rounds of discussions with offerors.¹²

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under the FAR, yet not excessive, and therefore allowable under the CPA. See AR at 34.

⁸ The RFP stated that U.S. flag service and compliance with the CPA would be considered at the booking (i.e., task order) level, because carriers with accepted rates have the ability to change the flag of service in their vessel schedules at any time during the life of the contract. See RFP at 64, 130. In this respect, the RFP stated that all bookings will be issued in accordance with the CPA (and other preference programs), and the solicitation provided for a “Fair Opportunity Process” for booking shipments. Id. at 64, 251. The order of flag service preference for bookings is: (P1) U.S. flag service; (P2) combination of U.S. flag and foreign flag services; and (P3) foreign flag service. Id. at 135-36, 251.

⁹ The IDIQ contracts are known as Universal Service Contracts (USC). See AR, exh. 7, Acquisition Plan. The instant procurement is referred to as the USC-8 contract. The USC-7 IDIQ contracts expired on August 31, 2015. Id. at 3.

¹⁰ Specifically, TransAtlantic proposed 260 container rates, 299 breakbulk rates, and 10 single factor rates. AR, exh. 42, 3rd Eval. Summ., at 1-3.

¹¹ The RFP provided that the agency may accept some or all rates or services without conducting discussions, but that if discussions were held, they may be limited to certain rates or services. RFP at 64.

¹² Each round of rate submissions is known as an iteration, i.e., initial, revised rates, and final revised rate submissions are known as iterations 1, 2 and 3, respectively. See Contracting Officer (CO) Statement at 11. During iteration 2, the proposals of
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To evaluate whether proposed ocean rates were fair and reasonable, the PET established a range for each CLIN with the lowest rate received as the “floor price,” and the “ceiling price” set at [DELETED] percent above the lowest rate.¹³ AR, exh. 25, Pricing Guidance, at 1-2; exhs. 39-41, 3rd Ocean Rate Evals. That is, all ocean rates that were less than [DELETED] percent above the lowest proposed rate for that CLIN, were deemed fair and reasonable; ocean rates more than [DELETED] percent above the lowest-received rate were deemed not fair or reasonable.¹⁴ For any CLIN where only one offeror proposed a rate (which the agency considered to be inadequate price competition for a CLIN), the PET used other price analysis techniques, such as comparison of the proposed ocean rate to the carrier’s initial proposed rate, and, if applicable, the carrier’s USC-7 rate and/or the government estimate. AR at 19; see exhs. 39-41, 3rd Ocean Rate Evals.; see also exhs. 18-20, 1st Ocean Rate Evals.; exh. 31, 2nd Rate Evals. With respect to TransAtlantic, the PET evaluated the 569 ocean rates that the carrier proposed and found that 517 were unreasonable. AR at 6, 27; exh. 42, 3rd Eval. Summ., at 1.

After the PET’s price evaluation, the contracting officer reevaluated the ocean rates that were found unreasonable (i.e., above the [DELETED] percent price ceiling) in order to determine whether the rate should undergo a further excessiveness evaluation pursuant to the CPA; if so, he conducted a detailed analysis, described below. AR at 26; exh. 44, Price Excessiveness (Excess.) Notes; exh. 50, Determination & Findings of Price Excess. (D&F). The contracting officer documented his analysis in a Determination and Findings Report approved by TRANSCOM’s component acquisition executive. AR, exh. 50, D&F. With respect to TransAtlantic, 20 of its proposed ocean rates--rates already deemed unreasonably high by the PET--were rejected as excessive under the CPA.¹⁵ Id. at 4-8; AR at 6, 27.

A source selection advisory council (SSAC) reviewed the evaluations and agreed with the PET’s price analyses, assigned ratings, and conclusions. AR, exh. 47,

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all 29 carriers were found compliant with RFP requirements and acceptable under the non-price evaluation factors. AR, exh. 45, SSEB Rep., at 27-28.

¹³ TRANSCOM refers to this as the competitive range for each CLIN.

¹⁴ CARE II assigns an adjectival price code to each CLIN (e.g., accept or high for iteration 1; accept or reject for iterations 2 and 3). See AR, exhs. 14-20, 29, 30, 35-41, Rate Evals. (spreadsheets by iteration and rate category).

¹⁵ The contracting officer states that he did not identify any U.S. flag rate as potentially excessive unless it was at least [DELETED] percent higher than the lowest rate offered for a CLIN. See CO Statement at 37.

SSAC Rep., at 1-3. The SSAC recommended that the agency award contracts to all 29 offerors and that all approved rates be included in the carriers' IDIQ contracts. See id. at 3. The source selection authority (SSA) for the procurement reviewed the SSAC's report and agreed. AR, exh. 48, Source Selection Decision Doc.

TRANSCOM awarded contracts to all 29 offerors for almost 35,000 approved cargo rates. See id. With respect to TransAtlantic, TRANSCOM approved 1,511 of the protester's 2,104 proposed rates, including 52 of the protester's 569 proposed ocean rates.¹⁶ This protest followed.

DISCUSSION

TransAtlantic protests the rejection of its proposed ocean rates, arguing that TRANSCOM's price evaluation was inconsistent with the solicitation and the Cargo Preference Act. While we do not specifically discuss each of the parties' various arguments, we have considered all of the protester's contentions and find none furnishes a basis to sustain the protest.¹⁷

Price Reasonableness

TransAtlantic contends that TRANSCOM's price reasonableness evaluation was based on "arbitrary metrics" and "unsupported assumptions," and that the agency can provide no justification for selecting a [DELETED] percent benchmark (*i.e.*, the ceiling price for any given CLIN) for establishing whether a proposed ocean rate was fair and reasonable. See Comments at 2, 7-11. TransAtlantic argues that the benchmark was based on a cost model (namely, large carrier rates) that did not account for the actual price difference between U.S. and foreign flag carrier rates, or for the cost premium associated with U.S. flag service. For example, TransAtlantic complains that TRANSCOM did not consider a 2011 study by the U.S. Maritime Administration that found that operating costs for U.S. flag vessels are approximately 2.7 times higher due to the compliance costs of U.S. regulatory requirements for labor, insurance, liability, maintenance, repair, and the

¹⁶ Specifically, 261 breakbulk rates, 229 container rates, and 7 single factor rates were rejected as unreasonable; 18 container rates and 2 breakbulk rates were rejected as excessive. See AR at 6, 27; exh. 42, 3rd Eval. Summ., at 1; exh. 50, D&F, at 4-8.

¹⁷ For example, TransAtlantic initially challenged the rejection of two of its proposed accessorial rates. Supp. Protest at 6, 8-9. In its agency report, TRANSCOM stated that it erroneously rejected the two accessorial rates and that it would accept them. AR at 45-46.

environment.¹⁸ According to TransAtlantic, the [DELETED] percent benchmark created an artificially low floor price that resulted in an inaccurate “apples to oranges” price comparison that prejudiced small U.S. flag offerors like TransAtlantic. Id. at 6.

Based on our review of the record, we find TRANSCOM’s price reasonableness evaluation unobjectionable and consistent with the RFP and the FAR. In reviewing a protest of an agency’s evaluation of proposals, our Office will examine the record to determine whether the agency’s judgment was reasonable and consistent with the solicitation’s evaluation criteria and applicable procurement statutes and regulations. See, e.g., TransAtlantic Lines, LLC, B-401825, Nov. 23, 2009, 2009 CPD ¶ 232 at 4.

The FAR permits the use of various price analysis techniques and procedures to ensure fair and reasonable pricing, including the comparison of proposed prices to each other, to prices found reasonable on previous purchases, or to an independent government estimate. FAR § 15.404-1(b)(2); Comprehensive Health Servs., Inc., B-310553, Dec. 27, 2007, 2008 CPD ¶ 9 at 8. Consistent with the FAR, the RFP provided that price proposals would be evaluated for fairness and reasonableness, and that reasonableness may be determined based on a comparison to other offerors’ prices or to the government’s estimate, current market conditions, or any other price analysis technique under FAR § 15.404-1(b)(2). RFP at 64.

TRANSCOM explains that adequate price competition was the agency’s primary method for evaluating whether ocean rates were fair and reasonable. See AR at 19. Three carriers, for example, proposed a rate under CLIN No. 111275, therefore the agency found adequate price competition for that CLIN. See CO Statement at 10; AR, exh. 41, 3rd Single Factor Eval., at 1. For CLINs without adequate price competition, the agency compared the proposed rate to the carrier’s initial proposed rate, and, if applicable, the carrier’s previous USC-7 rate and/or the government estimate. AR at 19; see exhs. 39-41, 3rd Ocean Rate Evals.; see also exhs. 18-20, 1st Ocean Rate Evals.; exh. 31, 2nd Rate Evals.¹⁹ Only one carrier, for example, proposed a rate under CLIN No. 110301, therefore the agency considered the price difference between that rate and the carrier’s USC-7 rate. AR,

¹⁸ See Comments at 12, citing [www.marad.dot.gov/wp-content/uploads/pdf/Comparison of US and Foreign Flag Operating Costs.pdf](http://www.marad.dot.gov/wp-content/uploads/pdf/Comparison_of_US_and_Foreign_Flag_Operating_Costs.pdf) (last visited May 13, 2016).

¹⁹ The evaluation spreadsheets provided by TRANSCOM in its agency report calculate, for each of the thousands of CLINs, the percentage differences between the proposed rate over the lowest rate (i.e., the floor price), the offeror’s initial (iteration 1) proposed rate, and, where applicable, the offeror’s approved USC-7 rate.

exh. 40, 3rd Ocean Container Rate Eval., at 19. These price analysis techniques, as TRANSCOM argues, are consistent with FAR § 15.404-1. Given the unobjectionable price evaluation methodologies employed by the agency, we have no basis to question TRANSCOM's conclusions that the vast majority of TransAtlantic's ocean rates were unreasonably high.²⁰

Next, TransAtlantic argues that the agency's [DELETED] percent ceiling for determining price reasonableness was improper. The contracting officer explains that he selected a [DELETED] percent ceiling price based on numerous considerations, including the agency's most recent (2014) rate competition; the percentage of DOD cargo moved by specified carriers under the USC-7 contracts;²¹ the extent to which smaller carriers offer regularly scheduled commercial liner service; the needs of agency booking officers in that regard; and selected rates proposed by TransAtlantic during the USC-7 final option year competition that were rejected.²² See AR at 21; exh. 25, Pricing Guidance Mem., at 1-3; CO Statement at 31. The contracting officer also considered the Deep Sea Freight Index, which showed a negative 0.2 percent change in freight prices between fiscal years 2013 and 2014. See AR, exh. 25, Pricing Guidance Mem., at 11. Such historical and commercial pricing considerations are exactly the metrics envisioned by the FAR for use in price analysis. See FAR § 15.404-1(b).

While TransAtlantic apparently believes that the agency was required to use some independent analysis to calculate floor and ceiling prices for each CLIN, there is nothing inherently unreasonable or unduly restrictive of competition for an agency to use pricing ceilings to assess the reasonableness of prices, particularly here,

²⁰ For example, the PET rejected TransAtlantic's rate for Ocean Container CLIN No. [DELETED], because TransAtlantic proposed a rate for that CLIN that was 370 percent higher than the lowest commercial rate. AR, exh. 40, 3rd Ocean Container Rate Eval., at 27.

²¹ According to TRANSCOM, six carriers moved approximately 98 percent of cargo under the USC-7 contracts. See AR, exh. 25, Pricing Guidance Mem., at 1. Contrary to TransAtlantic's assumption that the agency's approach to evaluating prices harms small businesses, two of the six carriers--under the prior contracts used here for assessing prices--were small businesses. Compare AR, exh. 8, Market Research, at 2, with Comments at 5. In any event, we know of no basis to conclude that a carrier's status as a small business triggers a different standard for determining whether its proposed ocean rates are fair and reasonable. See, e.g., Affirmative Solutions, LLC, B-402996, Sept. 8, 2010, 2010 CPD ¶ 212 at 6 n.3; Theodor Wille Intertrade AG, B-409976.3, Jan. 22, 2015, 2015 CPD ¶ 65 at 5.

²² Like the USC-7 procurement, the USC-8 solicitation provided that option year rates would be re-competed and evaluated for reasonableness prior to exercise of the options. See RFP at 65, 162.

where the agency received and evaluated tens of thousands of proposed rates.²³ See, e.g., TransAtlantic Lines, LLC, B-411846.2, supra, at 10, citing, inter alia, Sea-Land Serv., Inc., B-278404.2, Feb. 9, 1998, 98-1 CPD ¶ 47 at 9.²⁴ A price reasonableness determination is a matter of agency discretion, involving the exercise of business judgment, which the protester here has not shown to be unreasonable. See Serco, Inc., B-406683, B-406683.2, Aug. 3, 2012, 2012 CPD ¶ 216 at 14.

In sum, although TransAtlantic disagrees with TRANSCOM's pricing assumptions and conclusions, the protester has not shown that the agency's price reasonableness evaluation of ocean rates violated procurement laws or regulations, or the RFP. See Serco, Inc., supra; see, e.g., American President Lines, Ltd., B-236834.8, B-236834.9, May 15, 1991, 91-1 CPD ¶ 470 at 5 (protest of Military Sealift Command's rejection of protester's rates as unreasonable is denied where the RFP provided for comparisons to competitors' rates and prior rate history under FAR part 15, and where record shows that protester's rates were substantially higher than the low rate submitted and substantially higher than prior contract prices). Accordingly, this basis of protest is denied.

Price Excessiveness

TransAtlantic next argues that TRANSCOM's price excessiveness determination was inconsistent with the Cargo Preference Act, because the contracting officer

²³ In this regard, offerors were not required to propose a unique technical approach in this procurement. Rather, in their technical proposals, offerors were to provide a profile for one ocean-going vessel (e.g., vessel name, type, capacity, and flag of registry), document the carrier's ownership or control of the vessel, and provide information such as trading partner agreements and records of vessel overhaul, maintenance, and repairs done in and outside the U.S. within the past three years. RFP at 57.

²⁴ In Sea-Land Service, Inc., the protester objected to the agency's establishment of price ceilings--based on commercial cargo contracts with more general service requirements--to evaluate proposals for customized single carrier cargo (CSS) contracts requiring more enhanced, specialized services. Sea-Land Service, Inc., supra, at 8. The protester argued that the lower ceiling price discouraged potential offerors from competing for the CSS contracts, because offerors could not factor into their prices the additional costs of providing the specialized services. Id. The argument in Sea-Land is somewhat analogous to TransAtlantic's argument that TRANSCOM's decision to use a price ceiling based on [DELETED] percent of the lowest rate submitted--in some cases, by large or foreign flag carriers--will not fully account for the cost premium associated with U.S. flag service. See Comments at 12.

only evaluated the excessiveness of some, but not all, of TransAtlantic's ocean rates. According to TransAtlantic, this effectively barred it from competing for many bookings, contrary to Act's underlying policy of subsidizing and increasing competition from U.S. flag carriers. TransAtlantic asserts that TRANSCOM had no basis to consider U.S. flag service, because the RFP did not require carriers to identify the level of flag service offered. In this respect, TransAtlantic complains, once again, that the agency relied on unfounded assumptions and "arbitrary criteria that subvert the CPA and its implementing regulations." Comments at 7. TransAtlantic also claims that TRANSCOM did not follow the applicable DFARS and PGI criteria for making excessiveness determinations.

TRANSCOM contends that it was not required to evaluate all ocean rates for excessiveness, but was only required to evaluate those rates deemed unreasonable under the agency's FAR reasonableness analysis. TRANSCOM argues that it fully complied with the CPA, because rates proposed by U.S. flag carriers were only rejected where there was still at least one other U.S. flag carrier with an accepted rate for an ocean lane that could compete at the booking level. TRANSCOM maintains that its contracting officer properly considered all applicable factors under the relevant DFARS and PGI provisions, and properly documented its excessiveness determination.

As stated above, the RFP provided that any rate that appeared excessive would be further evaluated in accordance with DFARS § 247.573.²⁵ RFP at 64. In this respect, PGI § 247.573 specifies a number of considerations for analyzing whether freight charges offered by U.S. flag carriers are excessive.²⁶ The

²⁵ We note, for the record, that TRANSCOM executed a deviation (essentially, a waiver) from the DFARS and PGI requirements to provide for the CPA award preference for U.S. flag vessels at the task order level, rather than the IDIQ contract level. AR, exh. 13, Deviation; see TransAtlantic Lines, LLC, B-411846.2, supra, at 5-6. The waiver explicitly states that the "deviation will apply the guidance at PGI [§§] 247.573(b)(2)(iii)(A) and (iv) at the task order level to ensure compliance with the CPA." AR, exh. 13, Deviation, at 1, 3 (recommending for USC-8 solicitation "approval of an individual deviation from the requirements of PGI [§§] 247.573(b)(2)(iii)(A) and (iv) to provide award preference for U.S.-flagged vessels in accordance with the CPA at the task order level vice award of the basic IDIQ contract.") (emphasis added). Notwithstanding the waiver, the RFP provided for an excessiveness determination under DFARS § 247.573 and the contracting officer conducted such a determination, and neither the agency, nor the protester addressed the apparent inconsistency of this approach with the approved deviation.

²⁶ Contracting officers must follow the procedures at PGI § 247.573(b)(2) when direct purchase of ocean transportation services is the principal purpose of the contract. DFARS § 247.573(b)(2).

contracting officer must consider that the CPA is, in part, a subsidy, and that a lower price for foreign flag service is not a sufficient basis, on its own, to determine that an ocean rate proposed by a U.S. carrier is excessive. See PGI § 247.573(b)(1)(ii)(C)(1)(i). The contracting officer may also consider a number of other factors, such as: (1) excessive profits to the carrier, if ascertainable; (2) the differential between the freight charges proposed by a U.S. flag carrier and an estimate of what foreign flag carriers would charge based on a price analysis; (3) a comparison of U.S. flag rates charged on comparable routes; (4) the efficiency of operation regardless of rate differential (e.g., vessel capacity or positioning); and--significantly--(5) “[a]ny other relevant economic and financial considerations.” See PGI §§ 247.573(b)(1)(ii)(C)(1)(ii)-(iii) (emphasis added). If, after considering such factors, the contracting officer concludes that an ocean rate is excessive, the guidance requires that the contracting officer must prepare a Determinations and Findings report that includes, “as appropriate”: (6) an analysis of the carrier’s cost under FAR subpart 15.4; (7) a description of efforts to negotiate a reasonable price under FAR § 15.405; and (8) an analysis of whether the costs are beyond the economic penalty normally incurred by excluding foreign competition. See PGI § 247.573(b)(2)(iv)(C)(1).

Here, the contracting officer’s excessiveness determination was unobjectionable and consistent with the DFARS. The contracting officer states that if a carrier’s proposed ocean rates were found not fair and reasonable by the PET, then those rates underwent further analysis to determine if they were indeed unreasonable, and to determine whether the rates were excessive. CO Statement at 24, 33; AR, exh. 44, Excess. Rate Notes, at 1. The contracting officer explains that he verified those ocean lanes in which carriers historically offered U.S. flag service and confirmed which small carriers only own or operate U.S. flag vessels.²⁷ For ocean lanes where there was only one small carrier (such as TransAtlantic) that proposed a rate--and that rate was outside the [DELETED] percent price ceiling--the contracting officer also compared the proposed rate to those of “similarly situated” carriers.²⁸ See CO Statement at 33-34; AR at 17-18, 32, 37-38. For example, if the lane was historically served by a U.S. flag vessel or by a small business carrier that only owns or operates U.S. flag vessels, and for which the offeror’s rate exceeded the [DELETED] percent threshold, then that offeror’s rate

²⁷ According to the contracting officer, small U.S. flag carriers generally only own or operate U.S. flag vessels. CO Statement at 33.

²⁸ The contracting officer assumed that all small U.S. flag carriers were offering P1 service in order to “be as inclusive as possible for U.S.-flag” vessels and “to accommodate the higher ocean rates due to the CPA” subsidy. CO Statement at 33. For example, the contracting officer states that although TransAtlantic’s revised rate proposal explained that it was offering P1 or P2 service on certain routes, he assumed that TransAtlantic was only offering P1 service. Id.

was rejected for that CLIN. See CO Statement at 33-34. Based on this process, the contracting officer found that 20 of TransAtlantic's 517 unreasonably high ocean rates appeared excessive and thus qualified for additional analysis pursuant to the CPA.²⁹ See AR, exh. 50, D&F, at 4-6.

While TransAtlantic objects to the contracting officer's various assumptions and considerations relied on in his excessiveness determination, the protester does not substantively challenge any them. For example, TransAtlantic does not dispute the contracting officer's identification of small U.S. flag carriers, carriers that historically offered U.S. flag service, or small carriers that only own or operate U.S. flag vessels.³⁰ Moreover, TransAtlantic objects to the agency's reliance on the Deep Sea Freight Index, because according to the protester it does not take into account flag service, but the protester does not otherwise challenge the actual indexes for any given fiscal year or any of the agency's comparisons in that regard. Significantly, the protester does not dispute any of the contracting officer's calculations regarding the 20 TransAtlantic ocean rates that he found excessive.³¹

Finally, we disagree with TransAtlantic that TRANSCOM was required to evaluate every ocean rate for excessiveness. The RFP advised that an offeror's rates may be determined fair and reasonable on some ocean lanes, but not others. RFP at 64. Moreover, the RFP explicitly stated that a price proposal would not be considered fair and reasonable if it proposed rates that were above the highest

²⁹ For example, the contracting officer found that TransAtlantic's proposed breakbulk rate for transporting [DELETED] was excessive, because it was 1,343 percent higher than the minimum offer for that CLIN. AR, exh. 50, D&F, at 4.

³⁰ The RFP, as described above, contemplated that a carrier's actual level of flag service (i.e., P1, P2, P3), and compliance with the CPA, would be considered at the booking level. See RFP at 64. In other words, the contracting officer, in our view, complied with the RFP provision that U.S. flag service would not be considered when rates were evaluated for contract award, because he disregarded whatever level of flag service an offeror may have proposed or identified during discussions. Instead the contracting officer only considered flag service generally and historically in evaluating price excessiveness under the CPA.

³¹ TransAtlantic originally complained that TRANSCOM did not consider a carrier's profit before rejecting an ocean rate as excessive. Protest at 20. We consider TransAtlantic to have abandoned this argument, since the agency report provided a detailed response to the protester's assertions and TransAtlantic did not reply to the agency's response in its comments. IntelliDyne, LLC, B-409107 et al., Jan. 16, 2014, 2014 CPD ¶ 34 at 3 n.3. We also note that the record indicates that, during the last USC-7 rate competition, TRANSCOM requested that TransAtlantic provide various cost and profit data, but TransAtlantic did not provide such data. See AR, exh. 25, Pricing Guidance Mem., at 10.

commercial service contract rate, consistent with the CPA. Id. Significantly the RFP stated that any rate that appeared to be excessive would undergo further evaluation in accordance with CPA regulations. Id. As discussed above, the PET reasonably concluded, based on adequate price competition and other FAR price evaluation techniques, that the vast majority of TransAtlantic's proposed ocean rates were unreasonable. As also discussed above, the contracting officer then further evaluated those rates to verify the evaluators' conclusions and to determine whether any rates should undergo a further excessiveness evaluation under the CPA. This process, in our view, was consistent with the RFP's stated evaluation process and the CPA's requirement that U.S. flag carriers not charge DOD rates that are higher than the carrier charges to private persons for transportation of like goods.

In the final analysis, TransAtlantic's challenges to TRANSCOM's price evaluations provide no basis to sustain its protest. See TransAtlantic Lines, LLC, B-411846.2, supra, at 9-10; American President Lines, Ltd., supra, at 5. Rather, in our view, TransAtlantic's protest essentially reflects the protester's continuing objection to the terms of the solicitation, and the protester's apparent view that TRANSCOM must conduct the procurement so as to provide the maximum possible CPA subsidy for all U.S. flag carriers.

The protest is denied.

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General Counsel