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# Decision

**Matter of:** Wolverine Tube Inc. d/b/a Wolverine Industries

**File:** B-418339.4; B-418339.5

**Date:** July 26, 2022

Bret S. Wacker, Esq., and J. Christopher White, Esq., Clark Hill, PLC, for the protester. Paul R. Hurst, Esq., Amba M. Datta, Esq., and Caitlin T. Conroy, Esq., Steptoe & Johnson LLP, for AAR Manufacturing, Inc., d/b/a AAR Mobility Systems, the intervenor. Major Darren S. Gilkes, Colonel Frank Yoon, and Erika Whelan Retta, Esq., Department of the Air Force, for the agency. Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Protest alleging the agency's price reasonableness evaluation was improper for failing to consider and resolve an alleged error or discrepancy in the awardee's proposal is dismissed for failure to state a valid basis of protest.
2. Protest alleging that awardee's pricing is unbalanced is dismissed where the protester fails to make the threshold showing that one or more of the awardee's prices was overstated.
3. Protest alleging the agency conducted improper discussions is denied where the discussions were meaningful, not misleading or unequal, and without prejudice to the protester.

## DECISION

Wolverine Tube Inc. d/b/a Wolverine Industries, of Decatur, Alabama, protests the award of a contract to AAR Manufacturing Inc., d/b/a AAR Mobility Systems (AAR), of Cadillac, Michigan, under request for proposals (RFP) No. FA8534-19-R-0001, issued by the Department of the Air Force for the manufacture and delivery of next generation (Next-Gen) air cargo pallets. Wolverine contends the agency's evaluation of offerors' proposals and resulting award decision were improper.

We deny the protest.

## BACKGROUND

The procurement here has been a long and contentious one.<sup>1</sup> The current Air Force cargo pallet, assigned the designation 463L, is used for the transportation of air cargo throughout the agency. Contracting Officer's Statement (COS) at 1. The 463L pallet was first fielded in 1963, with few subsequent modifications. In its current design, the 463L pallet is made of a balsa wood core with an aluminum skin. *Id.* at 1-2.

The RFP was issued on August 19, 2019, pursuant to the procedures of Federal Acquisition Regulation (FAR) part 15. Agency Report (AR), Tab 4, RFP at 1.<sup>2</sup> The solicitation contemplates the award of a requirements-type contract (with fixed-price units) for the manufacture and production of an estimated 118,006 Next-Gen pallets for an 18-month base period, eight 12-month options, and one 6-month option, for a total performance period of 10 years. *Id.* at 3-61; COS at 2. The solicitation includes a technical data package detailing the exact specifications for the Next-Gen cargo pallets that the contractor is to manufacture and deliver. RFP amend. 2 at 327-335; COS at 2.

The solicitation established that award would be made based on a consideration of four evaluation factors: technical; past performance; small business participation; and cost/price (price). RFP amend. 3 at 393. The technical factor consisted of two subfactors: pallet production approach; and aluminum extrusion and friction stir welding capability.<sup>3</sup> RFP amend. 3 at 393. The RFP established that the technical and small business participation evaluation factors would be evaluated on an "acceptable/unacceptable" basis, and for those offers determined to be technically acceptable and having acceptable small business participation, "tradeoffs **may** be made between past performance and cost/price, with past performance considered approximately equal to cost/price." *Id.*

On December 11, prior to the RFP's December 12 closing date, AAR filed a protest with our Office challenging the terms of the solicitation. AAR Protest, B-418339, Dec. 11, 2019. On March 17, 2020, we issued a decision denying AAR's preaward protest. AAR

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<sup>1</sup> For additional detail regarding this procurement, see our prior decision in *AAR Mfg. Inc., d/b/a AAR Mobility Sys.*, B-418339, Mar. 17, 2020, 2020 CPD ¶ 106.

<sup>2</sup> The RFP has been amended eight times since its initial issuance. Unless specified otherwise, all citations are to the final version of the solicitation.

<sup>3</sup> Aluminum extrusion is a process by which a billet (essentially a log) of aluminum is softened by heating and is then pressed through a shaped die with a hydraulic press. This creates a fully formed piece of aluminum in the intended shape as it is squeezed through the die. *AAR Mfg. Inc., d/b/a AAR Mobility Sys.*, B-418339, *supra* at 2 n.1. Friction stir welding is a process by which a cylindrical tool is rotated along a joint line. The downward force and rotation of the tool create heat while intermixing the metal along the joint. The friction stir welding process allows the metal along the joint to fuse together without having to raise the temperature of the entire piece to its melting point. *Id.* at 3 n.5.

*Mfg. Inc., d/b/a AAR Mobility Sys.*, B-418339, *supra*. Specifically, we denied AAR's challenge that the Air Force had failed to give adequate consideration to a prospective offeror's organizational conflicts of interest (OCI) where the agency reasonably evaluated whether the prospective offeror had any impermissible OCIs. *Id.* at 6-11. We also denied AAR's challenge that the solicitation's past performance evaluation rating scheme was unduly restrictive of competition where the agency had provided a rational explanation for using the stated evaluation criteria. *Id.* at 12-15.

On April 17, 2020, AAR filed a preaward protest with the U.S. Court of Federal Claims (COFC), raising essentially the same OCI challenges as presented to our Office. On July 30, the COFC issued a decision denying AAR's protest. *AAR Mfg., Inc. v. United States*, 149 Fed. Cl. 514 (2020).

Five offerors, including AAR and Wolverine, submitted proposals by the RFP closing date. The agency evaluated proposals and on May 18, 2021, made contract award to Wolverine. COS at 4.

On June 2, AAR filed a second protest with our Office, arguing the agency's evaluation of offerors' proposals and resulting award decision were improper. On July 1, the Air Force decided to take corrective action by reopening discussions with offerors, evaluating offerors' revised proposals, and making a new award decision. Notice of Corrective Action, B-418339.2, B-418339.3, July 1, 2021. We subsequently dismissed AAR's post-award protest as academic. *AAR Mfg. Inc., d/b/a AAR Mobility Sys.*, B-418339.2, B-418339.3, July 2, 2021 (unpublished decision).

The agency thereafter conducted discussions with offerors and on February 25, 2022, requested the submission of final proposal revisions (FPR) by March 4. The Air Force completed its evaluation of FPRs by April 1, with the final evaluation ratings and prices of the AAR and Wolverine proposals as follows:

	AAR	Wolverine
Technical		
Pallet Production Approach	Acceptable	Acceptable
Manufacturing Capability	Acceptable	Acceptable
Past Performance	Substantial Confidence	Substantial Confidence
Small Business Participation	Acceptable	Acceptable
Price	\$173,530, 170	\$190,433,165

AR, Tab 36, Source Selection Evaluation Board (SSEB) Report at 43.

On April 8, an agency source selection advisory council (SSAC) conducted a comparative assessment of the AAR and Wolverine proposals. AR, Tab 37, SSAC

Comparative Assessment Report at 1-5. The SSAC concluded that the two offerors were both acceptable under the technical and small business participation factors. *Id.* at 3. The SSAC also found the AAR and Wolverine to be essentially equal as to the past performance factor, and recommended contract award to AAR, the lower-priced among equally-rated offerors. *Id.* at 5.

On April 12, the agency source selection authority (SSA) selected AAR for award. AR, Tab 38, Source Selection Decision Document (SSDD) at 1-14. Specifically, the SSA found both offerors to be acceptable as to the technical and small business participation factors, and essentially equal as to past performance (*i.e.*, “[n]o significant differences in the performance records for AAR and Wolverine were found”), such that AAR’s lower-priced proposal (among equally-rated proposals) represented the overall best value to the agency. *Id.* at 13.

After providing Wolverine with notice of award to AAR, and a debriefing, this protest followed.

## DISCUSSION

Wolverine raises a plethora of arguments challenging the agency’s evaluation and resulting award decision. The protester first challenges the agency’s price evaluation of AAR. Wolverine also alleges the agency’s conduct of discussions was improper. According to the protester, had the Air Force conducted a proper evaluation of AAR’s pricing and engaged in appropriate discussions, the agency would have rejected AAR’s “unacceptable proposal” and found that the protester represented the overall best value to the government. Protest at 26-27; Wolverine Comments at 21-22. We have considered all of the protester’s arguments, and, while we do not address them all, we find that none provide any basis on which to sustain the protest.

### Agency’s Price Evaluation of AAR

Wolverine protests the agency’s price evaluation of AAR. Specifically, Wolverine alleges that the evaluation of AAR’s price for reasonableness and balance was flawed. As detailed below, we find Wolverine fails to set forth a valid basis of protest.

In reviewing a protest challenging an agency’s evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency regarding a proposal’s relative merits, as the evaluation of proposals is a matter within the agency’s discretion. *Peraton, Inc.*, B-417088, B-417088.2, Feb. 6, 2019, 2019 CPD ¶ 190 at 5; *Del-Jen Educ. & Training Group/Fluor Fed. Sols. LLC*, B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 8. Rather, we will review the record to determine whether the agency’s evaluation was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations, and adequately documented. *Management Sys. Int’l, Inc.*, B-409415, B-409415.2, Apr. 2, 2014, 2014 CPD ¶ 117 at 5. A protester’s disagreement with the agency’s evaluation judgments, without more, is

insufficient to establish that an evaluation was improper or lacked a reasonable basis. *Lanmark Tech., Inc.*, B-408892, Dec. 19, 2013, 2013 CPD ¶ 295 at 5.

Relevant to the protest here, the RFP instructed offerors to complete and submit Attachment G (Price Model) as part of their proposals. RFP amend. 3 at 378, 384. The price model was comprised of the contract line item numbers (CLIN) and estimated quantities of the Next-Gen pallets to be ordered in each period of performance (base and each option period). The base contract period consisted of two CLINs: CLIN 0001 represented the first article units (a quantity of 6); and CLIN 0002 was for non-recurring first article costs, also referred to as non-recurring engineering costs (NRE). RFP amend. 2 at 336-338. Although not defined by the solicitation, NRE essentially represented the equipment, machinery, extrusion dies and fixtures, and upfront engineering necessary for pallet manufacturing and production. See AR, Tab 36, SSEB Report at 27; see *also* Tab 27, Wolverine Discussion Response, Dec. 28, 2021, at 3. The RFP also established that the agency would evaluate offerors' prices for reasonableness and balance. RFP amend. 3 at 401.

The record reflects that, prior to the Air Force taking corrective action, the AAR and Wolverine total evaluated prices (TEP) were \$195,836,980 and \$184,625,833, respectively. AR, Tab 36, SSEB Evaluation Report at 21, 37. After submission of FPRs on March 4, 2022, the TEPs for AAR and Wolverine were as follows:

	Description	AAR	Wolverine
<b>Base Period</b>			
<b>CLIN 0001</b>	First Article Units (6)	\$(DELETED)	\$(DELETED)
<b>CLIN 0002</b>	Non-Recurring First Article Costs	\$100,000	\$14,791,000
<b>Option I</b>	Production Units (10,000 est.)	\$(DELETED)	\$(DELETED)
<b>Option II</b>	Production Units (15,000 est.)	\$(DELETED)	\$(DELETED)
<b>Option III</b>	Production Units (15,000 est.)	\$(DELETED)	\$(DELETED)
<b>Option IV</b>	Production Units (13,000 est.)	\$(DELETED)	\$(DELETED)
<b>Option V</b>	Production Units (13,000 est.)	\$(DELETED)	\$(DELETED)
<b>Option VI</b>	Production Units (13,000 est.)	\$(DELETED)	\$(DELETED)
<b>Option VII</b>	Production Units (13,000 est.)	\$(DELETED)	\$(DELETED)
<b>Option VIII</b>	Production Units (13,000 est.)	\$(DELETED)	\$(DELETED)
<b>Option IX</b>	Production Units (13,000 est.)	\$(DELETED)	\$(DELETED)
<b>Total</b>		\$173,530,170	\$190,433,065

*Id.* at 23-24, 38; AR, Tab 29a, Wolverine FPR, attach. G, Price Model; Tab 31a, AAR Discussion Response, Oct. 15, 2021, attach. G, Price Model. As detailed below, most if not all of Wolverine's protest challenges concern the offerors' pricing, with a particular emphasis on the pricing of CLIN 0002.

#### Price Reasonableness Evaluation of AAR

Wolverine argues that the price reasonableness evaluation of AAR was flawed, because the agency failed to consider and resolve an obvious error or discrepancy in

the awardee's pricing. Wolverine Comments at 12-18; see also Supp. Protest at 7-8, 12-15. In support thereof, Wolverine refers to the following: (1) AAR's proposal stated the awardee anticipated making over a \$10 million capital investment in the necessary equipment, based upon the financial backing and commitment of its parent company; and (2) AAR's price for CLIN 0002 was only \$100,000. Wolverine Comments at 12. Wolverine argues that "because this NRE value is exactly 1% of the purported \$10,000,000.00 value of the equipment AAR's parent is 'anticipating' to finance, a possible transcription error exists," which "*must* be called to the offeror's attention and resolved -- generally through written or oral discussions." *Id.* at 12-13, citing *Centel Bus. Sys. (Centel)*, B-229059, Dec. 24, 1987, 87-2 CPD ¶ 629.

As a preliminary matter, the regulatory provisions cited in *Centel*--and upon which Wolverine bases its argument--no longer exist in the current version of the FAR.<sup>4</sup> Nor does Wolverine cite any other current procurement statute or regulation that the agency's actions violated. As such, Wolverine's reliance upon our decision in *Centel*, in which we interpreted a regulatory provision that no longer exists, is misplaced and bears no relevance to the allegation here.<sup>5</sup> *Bestcare, Inc.*, B-403585, Nov. 23, 2010, 2010 CPD ¶ 278 at 2 n.1 (finding protester's reliance upon a decision premised upon regulatory requirements no longer in effect to be misplaced); *A. G. Cullen Constr., Inc.*, B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 45 at 5 n.5.

Here, the RFP stated that the agency would only evaluate prices for reasonableness and balance. RFP amend. 3 at 401. A price reasonableness evaluation involves determining whether the prices offered are too high. *Facility Healthcare Servs., Inc.*, B-418743.2, B-418743.3, Sept. 2, 2021, 2021 CPD ¶ 313 at 7; *Root9B, LLC*, B-417801, B-417801.2, Nov. 4, 2019, 2020 CPD ¶ 4 at 7; FAR 15.404-1. Wolverine does not argue that AAR's price--in whole or for any particular CLIN--is too high, only that it

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<sup>4</sup> In *Centel*--a decision based upon FAR part 15 prior to its comprehensive rewrite (effective Jan. 1, 1998)--we sustained a protest where the agency failed to discover and call to the protester's attention an obvious proposal pricing error which should have been reasonably detected and which materially prejudiced the offeror. *Centel, supra* at 4-5; 62 Fed. Reg. 51224-51272 (Sept. 30, 1997). Specifically, the protester maintained there was an obvious mistake in its own proposal which the contracting officer should have noticed and pointed out pursuant to the duty to inspect proposals for minor informalities and irregularities and to permit offeror to correct them. We found that where an agency fails to resolve a proposal error that it should have reasonably detected and which materially prejudices an offeror, the agency failed in its obligation to conduct meaningful discussions. *Id.* at 4, citing FAR 15.607(a), 15.610(c)(4) (June 1997).

<sup>5</sup> Moreover, unlike the protester in *Centel*, Wolverine isn't alleging that there was an obvious error or discrepancy in its own proposal; rather, Wolverine alleges--apparently on AAR's behalf--that there was an obvious error or discrepancy in AAR's proposal, which AAR, itself, has never asserted.

contained an error. As the price reasonableness evaluation does not require the agency to determine whether there was an error or discrepancy in an offeror's pricing, we find Wolverine fails to set forth a valid basis of protest here. *The Green Tech. Grp., LLC*, B-417368, B-417368.2, June 14, 2019, 2019 CPD ¶ 219 at 4 (finding the agency's alleged failure to consider, as part of its price reasonableness analysis, the disparity between the awardee's low prices and the independent government estimate failed to state a valid basis of protest); *Contract Servs., Inc.*, B-407894, B-407894.2, Apr. 3, 2013, 2013 CPD ¶ 87 at 8 (finding protester's objection failed to provide a valid basis to question the agency's price reasonableness evaluation).<sup>6</sup>

### Unbalanced Pricing Evaluation of AAR

Wolverine also argues the agency's unbalanced pricing evaluation of AAR's FPR was flawed, e.g., the evaluators did not consider CLINs 0001 and 0002 as part of the evaluation. Wolverine Comments at 2-7, *referencing* AR, Tab 36, SSEB Report at 29, 41. The protester concludes that "had AAR's TEP been properly evaluated for unbalancing pricing and found to be unbalanced, AAR's proposal most likely would have been rejected, leaving Wolverine as the only offeror evaluated for award." Protest at 27.

The agency argues that its unbalanced pricing evaluation was a reasonable one. Memorandum of Law at 7. Additionally, the agency and AAR argue that Wolverine's unbalanced pricing challenge lacks a valid legal basis because Wolverine has failed to establish the necessary factual predicate that one or more of AAR's line item prices was overstated. *Id.* at 10, citing *American Access, Inc.*, B-414137, B-414137.2, Feb. 28, 2017, 2017 CPD ¶ 78 at 5; AAR Comments at 3, citing *InfoZen, Inc.*, B-411530, Aug. 12, 2015, 2015 CPD ¶ 270 at 7. According to AAR, "[w]ithout first demonstrating that one or more [AAR] prices are overstated, Wolverine cannot prevail on this balancing allegation. AAR Comments at 4.

Unbalanced pricing exists where the prices of one or more contract line items are significantly overstated or understated, despite an acceptable total evaluated price. FAR 15.404-1(g). While both understated and overstated prices are relevant for unbalanced pricing to exist, the primary risk to be assessed in an unbalanced pricing context is the risk posed by overstatement of prices because low prices (even below-cost prices) are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. *Crown Point Sys.*, B-413940, B-413940.2, Jan. 11,

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<sup>6</sup> We also find that Wolverine's related contention--that the Air Force improperly failed to reconcile offerors' divergent prices for CLIN 0002--was plainly not required as part of the RFP's price evaluation criterion nor by any procurement law or regulation. See *Verizon Bus. Network Servs., Inc.*, B 419271.5 *et al.*, Apr. 26, 2021, 2021 CPD ¶ 191 at 6; *Per Aarsleff A/S et al.*, B 410782 *et al.*, Feb. 18, 2015, 2015 CPD ¶ 86 at 18. As such, this allegation is dismissed because it also does not establish a valid basis for challenging the agency's action. 4 C.F.R. § 21.1(c)(4) and (f); *Verizon Bus. Network Servs., Inc.*, *supra*.

2017, 2017 CPD ¶ 19 at 5; *Semont Travel, Inc.*, B-291179, Nov. 20, 2002, 2002 CPD ¶ 200 at 3; see FAR 15.404-1(g).

We have repeatedly stated that to prevail on an allegation of unbalanced pricing, a protester must show that one or more prices in the allegedly unbalanced proposal are overstated; it is insufficient for a protester to show simply that some line item prices in the proposal are understated. *First Fin. Assocs., Inc.*, B-415713, B-415713.2, Feb. 16, 2018, 2018 CPD ¶ 76 at 7; *Marine Terminals Corp.-East, Inc.*, B-410698.9, Aug. 4, 2016, 2016 CPD ¶ 212 at 11. Where the protester fails to make the threshold showing, or assertion, that one or more of the awardee's prices was overstated as part of an allegation of unbalanced pricing, it fails to state a valid basis of protest. *KIRA Tng. Servs., LLC, dba KIRA Facilities Servs.*, B-419149.2, B-419149.3, Jan. 4, 2021, 2021 CPD ¶ 48 at 8 (dismissing challenge that awardee's pricing was unbalanced where the protester failed to make the threshold showing that one or more of the awardee's prices was overstated).

Here, Wolverine's unbalance pricing claim hinges on the assertion that AAR's price for CLIN 0002 is either a transcription error--i.e., the proposed unit price should have been \$10 million rather than \$100,000--or was intentionally too low. In essence, Wolverine's contention is that AAR's proposed price was unbalanced because its pricing for CLIN 0002 was significantly understated. Wolverine, however, fails to make the threshold showing--or even the assertion--that any of AAR's prices were overstated. As Wolverine has failed to make this threshold showing as part of its allegation of unbalanced pricing, we dismiss this claim because it fails to state a valid basis of protest. *KIRA Training Servs., LLC, dba KIRA Facilities Servs., supra*; *DynCorp Int'l LLC; AAR Supply Chain, Inc.*, B-415873 *et al.*, Apr. 12, 2018, 2018 CPD ¶ 157 at 6 n.7 (dismissing for failure to state a valid basis of protest the assertion that the awardee's price was unbalanced where the protester failed to show or allege that one or more prices in the allegedly unbalanced proposal was overstated).

### Challenges to the Conduct of Discussions

Wolverine also contends that the agency's discussions with offerors were improper. The protester argues generally that, as evidenced by the offerors' final prices, the discussions with Wolverine were misleading, unequal, and not meaningful. See, e.g., Wolverine Comments at 8 ("[T]he fact that the respective Wolverine and AAR TEPs went in diametrically different directions . . . is not reconcilable unless the Air Force evaluated AAR and Wolverine's proposals on different or unstated evaluation criteria or held unequal or misleading discussions"). As detailed below, in addition to finding no merit to the protester's allegations regarding the agency's conduct of discussions, we find that the protester suffered no prejudice as a result of the agency's conduct of discussions.

It is a fundamental principle of negotiated procurements that discussions, when conducted, must be meaningful; that is, the discussions must be sufficiently detailed and identify the deficiencies and significant weaknesses found in an offeror's proposal

that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award. FAR 15.306(d)(3); *General Dynamics Info. Tech., Inc.*, B-417616.2 *et al.*, Mar. 31, 2020, 2020 CPD ¶ 132 at 11; *InfoPro, Inc.*, B-408642.2, B-408642.3, Dec. 23, 2014, 2015 CPD ¶ 59 at 6. Further, an agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns, or misinform the offeror concerning a problem with its proposal or about the government's requirements. *McConnell Jones Lanier & Murphy, LLP*, B-409681.3, B-409681.4, Oct. 21, 2015, 2015 CPD ¶ 341 at 5-6; *Refinery Assocs. of Texas, Inc.*, B-410911.2, Mar. 18, 2015, 2015 CPD ¶ 116 at 6.

That said, even in a negotiated procurement conducted pursuant to FAR part 15, to satisfy the requirement for meaningful discussions, the agency need only lead an offeror into the areas of its proposal requiring amplification or revision. *MAXIMUS Fed. Servs., Inc.*, B-419487.2, B-419487.3, Aug. 6, 2021, 2021 CPD ¶ 277 at 15. An agency need not "spoon-feed" an offeror as to each and every item that could be revised to improve an offeror's proposal. *L-3 Sys. Co.*, B-404671.2, B-404671.4, Apr. 8, 2011, 2011 CPD ¶ 93 at 15. Moreover, an agency's discussions are not misleading or otherwise improper merely because an offeror makes an independent business judgment that it later regrets. *Millennium Eng'g & Integration Co.*, B-417359.4, B-417359.5, Dec. 3, 2019, 2019 CPD ¶ 414 at 7 n.9; *CSC Gov't Sols. LLC*, B-413064, B-413064.2, Aug. 10, 2016, 2016 CPD ¶ 347 at 10 n.8.

#### Adequacy of Discussions

Wolverine challenges the adequacy of the agency's discussions. Specifically, the protester contends "[n]otwithstanding that Wolverine's NRE CLIN 0002 value was approximately 15,000% larger than AAR's CLIN 002 value, the Air Force only informed Wolverine that its NRE value 'appeared to be high when compared' to AAR's NRE value." Wolverine Comments at 18. The protester further argues that by merely indicating that Wolverine's NRE value "appeared higher," the agency "did not convey the obvious and highly significant disparity the Air Force saw in Wolverine's CLIN 0002 price proposal as compared to AAR's." *Id.* at 19-20.

Regarding the adequacy of discussions involving price, an agency generally does not have an obligation to tell an offeror that its price is high unless the agency finds the offeror's price to be unreasonable or unacceptable. *Facility Healthcare Servs., Inc.*, *supra* at 6; see *Joint Logistics Managers, Inc.*, B-410465.2, B-410465.3, May 5, 2015, 2015 CPD ¶ 152 at 4. When an agency conducts discussions with an offeror concerning price, advising the offeror that its price is too high is generally sufficient. *Facility Healthcare Servs., Inc.*, *supra*; see *Northstate Heavy Equip. Rental*, B-416821, Dec. 19, 2018, 2018 CPD ¶ 430 at 5.

As part of its corrective action after the first award decision, the agency reviewed the prices of the remaining offerors for reasonableness overall and at the CLIN-level. AR, Tab 36, SSEB Report at 24-28, 38-41. The record reflects that the price analysis

technique employed by the agency was a comparison of offerors' prices against each other, using a factor of "+20%" above the average, or mean, to indicate a possibly unreasonably high price. *Id.* at 24, 38; Supp. COS at 2. After the October 15, 2021, round of discussions, Wolverine's price for CLIN 0002 was \$17,409,360 while the mean was \$7,295,779, and 20% above the mean was \$8,754,934.<sup>7</sup> AR, Tab 36, SSEB Report at 21; Supp. COS at 2.

On December 14, 2021, the agency provided Wolverine with discussions stating, "[t]he Government's review of the offeror's price proposal showed that the price appeared to be high when compared to other offerors for CLIN 0002. The offeror shall review its proposed prices and confirm that all proposed prices reflect what the offeror intended." AR, Tab 24, Agency Discussions with Wolverine, Dec. 14, 2021, at 5. In its response, Wolverine chose to leave its CLIN 0002 price unchanged. AR, Tab 25, Wolverine Discussion Response, Dec. 16, 2021, at 15 ("We have reviewed the proposed prices and confirm all proposed prices reflect that the offeror intended").

On December 21, the agency provided Wolverine with additional discussions stating, "[i]n response to [the prior exchange notice], the offeror confirmed the pricing of CLIN 0002. CLIN 0002 still appears high when compared to other offerors. The offeror shall provide a narrative statement concerning the costs that make up CLIN 0002's proposed value." AR, Tab 26, Agency Discussion with Wolverine, Dec. 21, 2021, at 3.

On December 28, Wolverine provided the requested narrative and reduced its proposed price for CLIN 0002 to \$14,791,000. AR, Tab 27, Wolverine Discussion Response, Dec. 28, 2021, at 3 (explaining that "pricing has been reduced . . . reflecting lower equipment prices after further optimization and experience that has been gained"). The agency ultimately concluded that although Wolverine's NRE price was higher than that of other offerors, "the value included in the NRE CLIN does not appear to be unreasonable." AR, Tab 36, SSEB Report at 27.

We find no merit in Wolverine's assertion that the discussions provided to it were not meaningful. As a preliminary matter, we disagree with the protester's assertion that the agency "had to inform Wolverine of the magnitude of the disparity between its TEP (and NRE price) from AAR's price" in order for the discussions to be meaningful.<sup>8</sup> Wolverine Comments at 21. In making this claim, Wolverine appears to misunderstand the nature of the requirement for meaningful discussions. An agency is not obligated, and is indeed precluded from, disclosing to an offeror a competitor's technical approach or

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<sup>7</sup> The record reflects that four offerors remained in the competitive range when the agency reopened discussions on September 15, but that one withdrew its proposal on October 16. AR, Tab 36, SSEB Report at 2-3.

<sup>8</sup> Again, the protester's argument here is based in part upon a decision issued by our Office, *Matrix Int'l Logistics, Inc.*, B-272388.2, Dec. 9, 1996, 97-2 CPD ¶ 89, and a regulatory provision, FAR 15.610(c) (June 1996), that predated the FAR part 15 rewrite and which is no longer in effect. Wolverine Comments at 19.

price; the items to be discussed are the weaknesses and deficiencies in the offeror's own proposal relative to solicitation requirements, not the merits of a competitor's proposal. FAR 15.306(d), (e); *Centerra Grp., LLC*, B-414768, B-414768.2, Sept. 11, 2017, 2017 CPD ¶ 284 at 6; *American Native Med. Transport, L.L.C.*, B-276873, Aug. 5, 1997, 97-2 CPD ¶ 73 at 8.

In addition, the record shows that the Air Force identified the specific aspect of Wolverine's price that was an issue through two rounds of discussions. AR, Tab 24, Agency Discussions with Wolverine, Dec. 14, 2021, at 5 ("The Government's review of the offeror's price proposal showed that the price appeared to be high when compared to other offerors for CLIN 0002"); Tab 26, Agency Discussion with Wolverine, Dec. 21, 2021, at 3 ("CLIN 0002 still appears high when compared to other offerors."). Wolverine was also given two opportunities to adjust its CLIN 0002 price in a meaningful way, which it, in fact, did.

Given these facts, we find that the discussions accorded Wolverine were meaningful. The agency clearly advised Wolverine that its price for CLIN 0002 was high. The discussions were also sufficiently detailed to have led Wolverine into the area of its proposal requiring amplification or revision in a manner to materially enhance its potential for receiving the award. There was simply no requirement, as the protester argues, for the agency to disclose the disparity between offerors' prices in order for the discussions to be meaningful. *Verizon Bus. Network Servs., Inc.*, *supra* at 12; *Torrent Techs., Inc.*, B-419326, B-419326.2, Jan. 19, 2021, 2021 CPD ¶ 29 at 12-13.

#### Alleged Unequal Discussions

Wolverine also alleges that the agency's discussions with offerors were unequal. Here the protester argues the fact that Wolverine's and AAR's FPR prices "went in diametrically different directions . . . is not reconcilable unless the Air Force . . . held unequal or misleading discussions." Wolverine Comments at 8. The protester also contends the discussions were unequal because while the agency "constantly quizzed" Wolverine about why its prices appeared high, Protest at 23, the agency's discussions never inquired of AAR about its "remarkably low" price. *Id.* at 25.

Contrary to the protester's assertion, the fact that AAR and Wolverine went in "different directions" with their final pricing does not, by itself, evidence unequal discussions. *Trailboss Enters., Inc.*, B-407093, Nov. 6, 2012, 2013 CPD ¶ 232 at 5 n.5 (finding an awardee's decision to lower its FPR price after discussions is not evidence that the agency conducted unequal discussions); see *Verizon Bus. Network Servs., Inc.*, *supra* at 5-6 (finding that differences in offerors' prices, alone, does not establish that the offerors failed to compete on a fair and equal basis); *Arch Sys., LLC*; *KEN Consulting, Inc.*, B-415262, B-415262.2, Dec. 12, 2017, 2017 CPD ¶ 379 at 10 (same). The prices ultimately proposed by AAR and Wolverine reflected the exercise of each firm's own business judgment, not unequal discussions by the agency. *CSC Gov't Sols. LLC*, B-413064, B-413064.2, Aug. 10, 2016, 2016 CPD ¶ 347 at 10.

We also find no merit to Wolverine's assertion that the discussions were unequal where the agency inquired about Wolverine's high price but did not inquire about AAR's low price. The RFP established the agency would evaluate prices for reasonableness, RFP amend. 3 at 401; consequently, the agency's discussions properly included instances where offerors' prices were found to be high. AR, Tab 36, SSEB Report at 24, 26-28. By contrast, the RFP did not provide for a price realism evaluation. See RFP amend. 3 at 401. Therefore, the agency was not required to inquire about instances where offerors' prices were low as part of discussions. The agency's discussions with Wolverine and AAR were not unequal, but rather, consistent with the RFP's stated evaluation criteria.

#### Alleged Misleading Discussions

Lastly, Wolverine alleges that it was misled by the agency during discussions to increase its price to account for the effects of COVID-19. In support of its argument, the protester refers to a letter which the agency sent to each offeror requesting the submission of FPRs as follows:

1. You are hereby advised that discussions concerning subject solicitation have been concluded. In accordance with Federal Acquisition Regulation (FAR) 15.307(b), you are hereby afforded an opportunity to submit a written Final Proposal Revision (FPR) for the Next Generation All Aluminum Cargo Pallet program in accordance with the instructions contained in this letter. The FPR response must be received in this office no later than 4:00 PM EST, 04 Mar 2022. . . . Before submitting your FPR, be sure to review your proposal a final time, considering all previously submitted responses to Evaluation Notices, ensuring that your FPR adequately reflects your intended offer and that your response is complete and accurate.

\* \* \* \* \*

4. Please take into consideration when proposing your Final Proposal Revision (FPR) the effects of COVID-19, if any.

AR, Tab 28, Agency Letter to Wolverine Requesting FPR, Feb. 25, 2022, at 1-2; AR Tab 34, Agency Letter to AAR Requesting FPR, Feb. 25, 2022, at 1-2.

As part of its FPR, AAR left its prior price, of \$173,530,170, unchanged. AR Tab 35, AAR FPR, Mar. 4, 2022, at 1. By contrast, as part of its FPR, Wolverine adjusted its price upward from \$[DELETED] to \$190,433,065. AR, Tab 29a, Wolverine FPR, Mar. 4, 2022, attach. G, Price Model.

Wolverine contends that the Air Force's "admonition" for offerors to take into consideration any effects of COVID-19 was a misleading "instruction" which Wolverine

heeded to its competitive detriment. Wolverine Comments at 8, *citing* AR, Tab 28, Agency Letter to Wolverine Requesting FPR, Feb. 25, 2022, at 1-2; Protest at 22.

An agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency's concerns, or misinform the offeror concerning a problem with its proposal or about the government's requirements. *McConnell Jones Lanier & Murphy, LLP, supra*; *Refinery Assocs. of Texas, Inc., supra*. Based upon our review of the record, we find that the agency's discussions with Wolverine were not misleading.

As set forth above, the FPR request sent to each offeror included language stating "[p]lease take into consideration when proposing your Final Proposal Revision (FPR) the effects of COVID-19, if any." AR, Tab 28, Agency Letter to Wolverine Requesting FPR, Feb. 25, 2022, at 1-2; Tab 34, Agency Letter to AAR Requesting FPR, Feb. 25, 2022, at 1-2. We find nothing misleading, or veiled, with such innocuous language.<sup>9</sup> Instead, the agency simply reminded offerors to take into consideration the effects of COVID-19, if any, when submitting FPRs, and left it to each offeror's independent business judgment how to ultimately propose. Quite simply, the agency's discussions here were not misleading merely because the protester made a business decision that it later regrets. *Millennium Eng'g & Integration Co., supra*.

In any event, we find Wolverine has also failed to demonstrate that it was prejudiced by any of the alleged errors in the conduct of discussion. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement were found. *Tyonek Eng'g & Agile Mfg., LLC*, B-419775 *et al.*, Aug. 2, 2021, 2021 CPD ¶ 263 at 12 n.12; *HP Enter. Servs., LLC*, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6.

As discussed above, award was to be made on a best-value tradeoff basis, considering four evaluation factors: technical; past performance; small business participation; and price. RFP amend. 3 at 393. The technical factor (comprised of two equal subfactors) and the small business participation factor would be evaluated on an acceptable/unacceptable basis. For offerors that were determined to be acceptable under the technical and small business participation factors, the solicitation explained that "tradeoffs **may** be made between past performance and cost/price, with past performance considered approximately equal to cost/price." *Id.*

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<sup>9</sup> We also find no merit to Wolverine's assertion that the Air Force conducted unequal discussions with AAR and Wolverine in this regard, Wolverine Comments at 8, where the exact same FPR request language was provided to both offerors. *Compare* AR, Tab 28, Agency Letter to Wolverine Requesting FPR, Feb. 25, 2022, at 1-2, *with* AR Tab 34, Agency Letter to AAR Requesting FPR, Feb. 25, 2022, at 1-2.

Here, the record reflects that the FPRs from AAR and Wolverine were both found to be acceptable with regard to the technical and small business participation factors (which the protester does not challenge), and considered to be essentially equal as to the past performance factor (which the protester also does not challenge). AR, Tab 38, SSDD at 3-4, 6, 13-14. Consequently, price became the determining factor for contract award. See *id.* at 14 (noting that “the TEP from Wolverine . . . and AAR . . . is the sole factor that remains in consideration for my award decision”). In order for there to be a reasonable possibility of prejudice to AAR concerning improper discussions, Wolverine would need to have proposed a price lower than that of AAR, *i.e.*, below \$173,530,170.

As part of its supplemental protest, Wolverine states as follows:

The gap between AAR’s FPR [total evaluated price] TEP and Wolverine’s FPR TEP was \$16,902,894.00. If AAR had in fact intended its CLIN 0002 value to be \$10,000,000.00, that difference would have closed to less than \$7,000,000.00. In addition, had the Air Force conducted meaningful discussions with Wolverine about its NRE CLIN 0002 value either by providing it an accurate sense of the magnitude of the difference from AAR’s NRE value, and/or informing Wolverine that the Air Force was expecting offerors to bear the cost of NRE, Wolverine might very well have reconsidered its CLIN 0002 value . . . .

Supp. Protest at 16.

We find Wolverine has failed to establish that it was competitively prejudiced. The protester has not demonstrated, or even alleged, that had the agency held adequate discussions, it would have submitted a price lower than that of AAR.<sup>10</sup> See, *e.g.*, *Online Video Serv., Inc.*, B-403332, Oct. 15, 2010, 2010 CPD ¶ 244 at (finding protester’s challenge to the adequacy of discussions to be without prejudice where the protester failed to demonstrate that, had the agency held meaningful discussions, it would have reduced its price sufficiently to have had a substantial chance at award); *American Native Med. Transport, L.L.C.*, B-276873, Aug. 5, 1997, 97-2 CPD ¶ 73 at 8-9 (finding protester was not prejudiced by the conduct of discussions where the record demonstrated the protester could not significantly improve its highly rated technical proposal and would not lower its price below that offered by the awardee); *contra Piquette & Howard Elec. Serv., Inc.*, B-408435.3, Dec. 16, 2013, 2014 CPD ¶ 8 at 10 (finding the possibility of prejudice existed where the protester submitted a declaration from its president stating that it had the ability and intention to lower its price below that of the awardee if it had been afforded the opportunity to submit a final proposal revision).

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<sup>10</sup> In fact, even if Wolverine had reduced its price for CLIN 0002--which is the sole focus of its alleged inadequate discussions--and left the remaining CLINs unchanged, Wolverine’s TEP would still remain higher than that of AAR.

Therefore, even if Wolverine's allegations regarding the conduct of discussions had merit--which we do not find--Wolverine has failed to demonstrate that it would displace AAR as the firm submitting the lowest-price among offerors with equal past performance.<sup>11</sup> As such, Wolverine cannot show that it was competitively prejudiced here. See *Avaya Gov't Sols., Inc.*, B-409037 *et al.*, Jan. 15, 2014, 2014 CPD ¶ 31 at 6.

In sum, we find no basis on which to sustain the protest. Wolverine's challenges of the acceptability of AAR's price proposal are without a valid basis and its challenges of the agency's conduct of discussions are without merit; thus, there is no basis for the protester's contention that the agency should have made award to it at almost a \$17 million price premium.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel

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<sup>11</sup> Finally, Wolverine alleges the agency improperly converted the basis of award from best value to lowest-price, technically acceptable (LPTA). Wolverine Comments at 20. We find this argument meritless as well. As set forth above, the RFP established that contract award would be made on a best-value basis, and that "tradeoffs **may** be made between past performance and cost/price, with past performance considered approximately equal to cost/price." RFP amend. 3 at 393. The SSA found AAR and Wolverine to be essentially equal as to past performance, such that no price/past performance tradeoff was necessary to determine that AAR's lower-priced proposal represented the overall best value to the agency. AR, Tab 38, SSDD at 13. Where, as here, the lower priced of two technically equal offers is selected for award, a tradeoff is not required. *General Dynamics Info. Tech., Inc.*, *supra* at 20-21; *The MIL Corp.*, B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 14. The lack of a tradeoff, when not required, simply does not evidence the agency converted the procurement into an LPTA competition, as the protester alleges.