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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: ESCO Marine, Inc.

File: B-401438

Date: September 4, 2009

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DIGEST

1. Where, in connection with task order for dismantling ships, offerors are required to sell the scrap resulting from the ship dismantling, are permitted to retain the scrap sale proceeds, and are required to offset their proposed prices by the scrap sale proceeds, the determination of whether the task order is "valued" in excess of $10 million--as part of a determination of GAO's jurisdiction to review a protest of the task order placed under an indefinite-delivery/indefinite-quantity contract--is not limited to consideration of offerors' proposed prices but properly includes consideration of estimated ship scrap values.

2. Protest challenging the evaluation of technical proposals is denied where the record establishes that the agency's evaluation was reasonable, consistent with the stated evaluation criteria, and adequately documented.

3. Affirmative determination of awardee's financial responsibility under task order for ship dismantling services was not reasonable where, notwithstanding the fact that the awardee's proposal expressly represented that it planned to tow and dismantle three ships simultaneously, the contracting officer nevertheless based his determination of adequate financial resources on the awardee incurring the towing and dismantling costs sequentially.

DECISION

ESCO Marine, Inc., of Brownsville, Texas, protests the issuance of a task order to International Shipbreaking Limited LLC (ISL), of Brownsville, Texas, under a request for proposals (RFP) issued by the Department of the Navy, Naval Sea Systems Command, Supervisor of Shipbuilding, Conversion & Repair, for the towing and dismantling of three decommissioned Navy ships--the ex-Saipan, the ex-Austin, and the ex-Fort Fisher. ESCO argues that the agency's evaluation of offerors' proposals and resulting award determination were unreasonable.

We sustain the protest in part and deny it in part.

BACKGROUND

On December 30, 2004, the Navy awarded indefinite-delivery/indefinite-quantity (ID/IQ) contracts to both ESCO and ISL for a period of 5 years for towing, dismantling, environmental remediation, and disposal services in support of the Navy's Ship Disposal Program. In general terms the ID/IQ contracts required the contractors to provide all personnel, equipment, materials, facilities, and any other items necessary to perform the required services, on an "as needed" basis, for various inactive government vessels.

The RFP here, issued on March 27, 2009, contemplated the issuance of one or more fixed-price task orders for the Navy's Third Quarter, Fiscal Year 2009, ship disposal requirements, specifically, the towing and dismantling of the ex-Saipan, ex-Austin, and ex-Fort Fisher.[1] The solicitation set out five evaluation criteria in descending order of importance: price; past performance on earlier task orders; facility workload and capacity; proposed schedule; and scrapping plan. The RFP also established that price was significantly more important than the other evaluation factors individually, and that the task order(s) would be issued to the offeror(s) whose proposal(s) represented the "best value" to the government, all factors considered. RFP at 6.

Importantly, with regard to the offerors' price proposals in response to the RFP, the underlying ID/IQ contracts state that,

> Any scrap or reusable equipment/material removed [by the contractor] from the ship is required to be sold or disposed of in accordance with Clause C.4.2 within 30 days after completion of dismantling of the ship. Estimated proceeds from sales should be factored into the price

[1] The Navy reserved the right to issue multiple task orders. Accordingly, offerors were permitted to submit different pricing strategies based on one-, two-, and three-ship options.

proposed to the Government. The contractor shall use the sale proceeds to offset the price or cost of work covered by this contract.

Agency Report (AR), Tab 1, ISL Contract, § B; Tab 2, ESCO Contract, § B.

Both ISL and ESCO submitted proposals in response to the RFP by the April 30 closing date. Each offeror's proposal included, among other things, a scrapping plan detailing the estimated scrap value of the three ships: ISL's estimated scrap proceeds totaled $13,272,532 while ESCO's estimated scrap proceeds totaled $13,091,233. Id., Tab 7, ISL Proposal, Exh. 4, Scrapping Plan; Tab 8, ESCO Proposal, at 22-24 (Projected Scrap Proceeds). The offerors' proposed prices were radically different, however; ESCO's proposed price was $4,679,726, while ISL's was $.06.

The Navy evaluated offerors' proposals using an adjectival rating system (i.e., "highly acceptable," "acceptable," or "unacceptable"), with the evaluation ratings of the proposals as follows:

Factor	ISL	ESCO
Price	$.06	$4,679,726
Past Performance	Acceptable	Acceptable
Facility Workload and Capacity	Acceptable	Acceptable
Proposed Schedule	Acceptable	Acceptable
Scrapping Plan	Acceptable	Acceptable

Id., Tab 13, Agency Best Value Analysis Comparison, at 6-7, 15.

The contracting officer subsequently determined that ISL's proposal, being the lower-priced of the two proposals found to be technically equal, was the best value to the government. Id. at 17; Contracting Officer's Statement, June 30, 2009. This protest followed.

DISCUSSION

ESCO's protest raises numerous challenges to the Navy's evaluation of the offerors' proposals and selection decision. Among other things, ESCO challenges the reasonableness of the Navy's evaluation of ISL's financial ability to perform the task order at its proposed price.[2] As detailed below, we find that the Navy's financial

[2] ESCO also protested that the Navy should have rejected ISL's proposal as a "buy-in" and/or a predatory price scheme. We previously dismissed this basis of protest. The fact that a firm, in its business judgment, submits an offer that may not include any profit or be below-cost, or may be an attempted buy-in, does not render the firm ineligible for award, IBM Corp., B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 (continued...)

responsibility determination of ISL was unreasonable. Although we do not specifically address all of ESCO's remaining issues and arguments, we have fully considered all of them and find they provide no basis on which to sustain the protest; we discuss some illustrative examples below.

Jurisdiction

As a preliminary matter, the Navy argues that we should dismiss ESCO's protest for lack of jurisdiction because the task order issued to ISL is in the amount of $.06 and our jurisdiction to review task order protests is limited to those valued in excess of $10 million (except under certain limited circumstances not applicable here). ESCO disagrees, arguing that our Office has jurisdiction because the value of the task order should include consideration of the ship scrap values, which both offerors estimated to be in excess of $13 million and which offerors were required to factor into their proposed prices.

The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, § 1004, 108 Stat. 3243, 3252-53 (1994), codified at 10 U.S.C. § 2304(c) (2006), provides that "[a] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." However, section 843 of the National Defense Authorization Act of Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3, 236-39 (2008) (to be codified at 10 U.S.C. § 2304c(e)) modified FASA's prior limitations on task order protests. Specifically, the NDAA provides that, in addition to previously permitted task order protests, a protest is also authorized with regard to "an order valued in excess of $10,000,000." 122 Stat. 237 (to be codified at 10 U.S.C. § 2304c(e)(1)).

Here, the protester does not allege that the task order will exceed the scope, period, or maximum value of the underlying ID/IQ contract. Nor is there any dispute that offerors' proposed prices for the task order are less than $10 million, while the sum of each offeror's price and estimated scrap value was, in both instances, in excess of $10 million. Rather, the determination of GAO's jurisdiction turns on the meaning of the term "valued" as used in the NDAA.

In matters concerning the interpretation of a statute, the first question is whether the statutory language provides an unambiguous expression of the intent of Congress. If it does, then the matter ends there, for the unambiguous intent of Congress must be

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(...continued)
at 13 n.17, and allegations of predatory pricing practices are reserved for review by the Department of Justice as part of its enforcement of the antitrust laws and are not a matter for review by our Office. Banknote Corp. of Am., Inc., B-245528, B-245528.2, Jan. 13, 1992, 92-1 CPD ¶ 53 at 7.

given full effect. Connecticut National Bank v. Germain, 503 U.S. 249, 253-54 (1992) (when the words of a statute are unambiguous, the judicial inquiry is complete); Robinson v. Shell Oil Co., 519 U.S. 337, 340-41 (1997) (when the statutory language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case, the judicial inquiry must cease). It is a fundamental canon of statutory construction that words, unless otherwise defined by the statute, will be interpreted consistent with their ordinary, contemporary, common meaning. State of California v. Montrose Chem. Corp., 104 F.3d 1507, 1519 (9th Cir. 1997); GAO, Principles of Federal Appropriations Law, vol. 1, at 2-89 (3d ed. 2004); see Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 301 (1989).

The NDAA provision at issue here extends GAO's jurisdiction to protests involving the issuance of task orders of a certain size--those "valued" in excess of $10 million. However, neither the language of the statute nor the legislative history of the NDAA defines the term "valued." Without specific definitions to guide our review, we look to the plain meaning of the word used in the statute.

The ordinary and commonly understood meaning of the term "value" is "a fair return or equivalent in goods, services, or money for something exchanged," Merriam-Webster's Dictionary (http://www.merriam-webster.com/dictionary/value), or "an amount, as of goods, services, or money, considered to be a fair and suitable equivalent for something else." The American Heritage Dictionary of the English Language (4th ed. 2004). As explained below, while an order's "value" often may be synonymous with its price, under the procurement scheme here, we think it is proper to take into account the estimated scrap values when determining the "value" of the task order in question.

As set forth above, the provisions of the underlying ID/IQ contracts require the contractor to sell or dispose of any scrap or reusable equipment/material removed from the ship as part of the dismantling efforts. Further, the contractor was to retain the proceeds of the scrap sales. Accordingly, the contractors were required to factor estimated proceeds from scrap sales into their task order prices for towing and dismantling services. Specifically, the contracts state that "[t]he contractor shall use the [scrap] sale proceeds to offset the price or cost of work covered by this contract," and that "**[t]he Contractor shall retain proceeds from the sale of scrap and reusable equipment/material from the vessel being dismantled . . . and shall apply them to the cost of performance of the contract.**" AR, Tab 1, ISL Contract, §§ B, C.4.2; Tab 2, ESCO Contract, §§ B, C.4.2.

The terms and procedures of the ID/IQ contracts here implement the provisions of 10 U.S.C. § 7305a, Vessels stricken from Naval Vessel Register: contracts for dismantling on net-cost basis, which states:

> (a) Authority for net-cost basis contracts. When the Secretary of the Navy awards a contract for the dismantling of a vessel stricken from

> the Naval Vessel Register, the Secretary may award the contract on a net-cost basis.
>
> (b) Retention by contractor of proceeds of sale of scrap and reusable items. When the Secretary awards a contract on a net-cost basis under subsection (a), the Secretary shall provide in the contract that the contractor may retain the proceeds from the sale of scrap and reusable items removed from the vessel dismantled under the contract.
>
> (c) Definitions. In this section:
>
> (1) The term "net-cost basis", with respect to a contract for the dismantling of a vessel, means that the amount to be paid to the contractor under the contract for dismantling and for removal and disposal of hazardous waste material is discounted by the offeror's estimate of the value of scrap and reusable items that the contractor will remove from the vessel during performance of the contract. . . .

10 U.S.C. § 7305a.

The ID/IQ contracts awarded to both ISL and ESCO also contain Federal Acquisition Regulation (FAR) clause § 52.245-2, Government Property (Fixed-Price Contracts) (May 2004), which states in relevant part that "[t]he contractor shall credit the net proceeds from the disposal of Government property to the price or cost of work covered by this contract or to the Government as the Contracting Officer directs." FAR § 52.245-2(i)(9).

The task order issued here essentially provides the contractor with two different forms of payment for the towing and dismantling services being supplied to the Navy: 1) payment in appropriated funds (i.e., the price); and 2) payment-in-kind (i.e., the right to keep the scrap sale proceeds). As evidenced by their proposals, both ESCO and ISL valued the payment-in-kind at more than $13 million. In fact, the only reason the Navy received the prices that it did from ISL and ESCO was because of the additional $13 million in payments-in-kind that the contractor would receive as part of the task order. Under the payment scheme contemplated by the applicable statute and the ID/IQ contracts themselves, we think that the price of the task order does not represent the task order's entire value, and that consideration of the estimated scrap value is also necessary to determine the task order's value.

As the "value" of the task order here, as measured by sum of ISL's price and estimated scrap value proceeds, is in excess of $10 million, we conclude that we have jurisdiction to review ESCO's protest of the task order issued to ISL.

Technical Evaluation

ESCO protests the agency's evaluation of offerors' proposals under the various technical evaluation factors as being unreasonable, inconsistent with the stated evaluation criteria, or inadequately documented. The protester argues, among other things, that the Navy failed to provide ESCO with a fair opportunity to be considered for the task order by failing to make clear that a landing craft would be left onboard the ex-Saipan for dismantling and/or salvage purposes. ESCO also contends that the agency failed to conduct a "best value" procurement as required by the RFP. As noted above, although we do not specifically address all of ESCO's challenges to the agency's evaluation of technical proposals, we have fully considered each of them and find that they provide no basis on which to sustain the protest.

For example, ESCO protests that the Navy failed to provide ESCO with a fair opportunity to be considered for the task order by failing to expressly advise the firm that a landing craft would be left onboard the ex-Saipan for dismantling and/or salvage purposes. The protester maintains that it priced the task order with the understanding that the landing craft--a separate vessel--was not to be part of the dismantling effort, while ISL included the landing craft in its proposal.

The RFP provided offerors with the opportunity to conduct site visits of all three ships, during which they could inspect the ships, take environmental samples, and review copies of ship-specific documentation.[3] The RFP also identified a specific government point of contact (POC) for each site. In the case of the ex-Saipan, the Navy POC was the director of the NISMO Philadelphia facility. RFP at 2-3. At the time of the site visit, the ex-Saipan had a landing craft (the ACU2-26) onboard its flight deck; it was the Navy's intention that the landing craft was to remain onboard the ex-Saipan and become part of the ship dismantling effort. AR, June 30, 2009, at 6; Contracting Officer's Statement, June 26, 2009, at 1. Further, for each ship being dismantled, the RFP included a list of specific materials that were not part of the dismantling effort and that the contractor was to remove and set aside for government pick-up. The material-removal list for the ex-Saipan included items such as the ship's propellers, an air conditioning plant, and steam control valves; it did not include the landing craft. RFP at 7.

ESCO did not ask the contracting officer, the designated agency POC for the ex-Saipan site visit, or the Navy's overall NISMO director whether the landing craft was part of the ex-Saipan dismantling effort. Contracting Officer's Statement, June 26, 2009; AR, Tab 4, Statement of NISMO Philadelphia Director, Tab 5, Statement of

[3] The ex-Saipan and ex-Austin were both located at the Naval Sea Systems Command (NAVSEA) Inactive Ships Onsite Maintenance Office (NISMO), in Philadelphia, Pennsylvania, while the ex-Fort Fisher was located at the Maritime Administration Suisan Bay Reserve fleet, in Benicia, California.

NISMO Director. Instead, ESCO asked various NISMO contractor employees, who said that the landing craft onboard the ex-Saipan was to be removed, and thereby would not be part of the required dismantling effort. Protest, May 29, 2009, attach. 1, Statement of ESCO President, at 3.

Oral advice does not operate to amend a solicitation or otherwise legally bind the agency. Shaw Envtl., Inc., B-297294, Dec. 2, 2005, 2005 CPD ¶ 218 at 5; Digital Imaging Acquisition Networking Assocs., Inc., B-285396.3, Nov. 8, 2000, 2000 CPD ¶ 191 at 5 n.6. An offeror chooses to rely on oral explanations of the solicitation at its own risk. Orion Constr. Co., Inc., B-294014, June 30, 2004, 2004 CPD ¶ 136 at 4; Northrop Grumman Tech. Servs., Inc.; Raytheon Tech. Servs. Co., B-291506 et al., Jan. 14, 2003, 2003 CPD ¶ 25 at 13. Here, not only did ESCO choose to rely on oral advice regarding the RFP's dismantling requirements, but it relied on oral advice from contractor employees, who were clearly private parties and not government representatives. Quite simply, if ESCO was unsure whether the landing craft was part of the ex-Saipan dismantling requirement, it should have raised the matter prior to the closing date with the contracting officer rather than faulting the Navy, after the fact, for not expressly advising offerors.[4]

ESCO also protests the Navy's evaluation of proposals under the facility workload and capacity evaluation factor. The protester argues that its shipyard has a greater capacity to handle ships than does ISL's. ESCO also argues that it has made substantial improvements and innovations to its facilities--at the agency's repeated urgings--for which it should have received credit in the evaluation of proposals. The protester further contends that the Navy's evaluation does not address the substantial benefit to the government of its various improvements. We find the protester's challenges here to be without merit.

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[4] Further, to the extent the site visit introduced ambiguity into the RFP as to whether the landing craft was part of the ex-Saipan dismantling effort, we find any such ambiguity was readily apparent, as evidenced by ESCO's inquiries regarding the matter. Thus, to be timely, any protest on this ground had to be filed prior to the closing time for submission of proposals. AST Envtl., Inc., B-291567, Dec. 31, 2002, 2002 CPD ¶ 225 at 3; see 4 C.F.R. § 21.2(a)(1) (2009). ESCO also fails to show how it was prejudiced here. 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. Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 7; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). While ESCO contends that it would have lowered its proposed price if it had it known that the landing craft was part of the ex-Saipan dismantling effort, ESCO fails to establish that it would have lowered its price below that of ISL.

The RFP instructed offerors to address their facility workload and capacity for ship dismantling during the proposed schedule; offerors were also to provide a summary of their current backlog and ability to dismantle additional ships, including the type of ship. RFP at 5. The solicitation also established that the evaluation of facility workload and capacity would be based on the offeror's capacity, including ships currently in backlog in addition to other potential awards. Id. at 6.

ISL's proposal detailed its facility capacity to handle all three ships under the RFP here. Specifically, ISL's proposal demonstrated that its larger slip could accommodate the largest ship (the ex-Saipan), and that its facility could handle all three ships simultaneously. ISL also had only one ship currently being dismantled, scheduled to be completed by August 28, 2009. Similarly, ESCO's proposal detailed its facility capacity to work on 10 ships at a time as well as its ability to handle any award under the RFP. ESCO indicated that it had four ships in various stages of dismantling, with one to be completed by the May 1 and two others to be completed by May 31.

The agency found both the ISL and ESCO proposals to be acceptable as to facility workload and capacity. The Navy determined that both offerors possessed adequate available facility capacity to successfully handle any possible award scenarios, including a three-ship award.

In reviewing an agency's evaluation, we will not reevaluate offerors' proposals; instead, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and procurement statutes and regulations. Urban-Meridian Joint Venture, B-287168, B-287168.2, May 7, 2001, 2001 CPD ¶ 91 at 2. Here, we find the agency's evaluation of offerors' proposals as to the facility workload and capacity factor to be reasonable and consistent with the stated evaluation criteria. The agency reasonably determined that both ISL and ESCO possessed available facility capacities that were adequate to perform the work; notwithstanding any backlog or other work, each possessed the ability to handle any or all of the ships being dismantled here.

ESCO contends that it should have been given credit for its greater facility capacity, as well as the various facility improvements and innovations as part of the evaluation of proposals under the facility workload and capacity evaluation factor. We disagree. First, the Navy reasonably determined that ESCO's greater facility capacity was of no value to the agency when only a three-ship capacity was required to perform the work. The protester's assertion amounts to mere disagreement with the agency's judgment, which does not render it unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7. Moreover, we find ESCO's assertion that it should have received credit for its various facility improvements and innovations to be inconsistent with the stated evaluation criteria, which was defined as an evaluation of available facility capacity.

In sum, we find the agency's evaluation of the ISL and ESCO proposals under the various technical evaluation factors was reasonable and consistent with the RFP's stated evaluation criteria. Further, as the Navy found the technical proposals of both offerors to be essentially equal, it was not necessary for the Navy to perform a price/technical tradeoff as part of its best value award determination.

ISL's Responsibility

ESCO protests the reasonableness of the cash-flow assessment that the Navy performed to determine ISL's financial ability to perform at the proposed price of $.06. Specifically, the protester argues that the Navy's cash-flow analysis was improperly premised on the assumption that ISL would generally work on only one ship at a time (and thereby incur the estimated upfront costs of performance sequentially), although ISL's own proposed schedule stated otherwise. ESCO also argues that the Navy's cash-flow analysis was improperly computed, thereby underestimating the total upfront costs that ISL was likely to incur in advance of any scrap sale proceeds. Since the total upfront costs that ISL would incur were substantially higher than the offeror's documented line of credit, ESCO argues, the Navy's determination that ISL possessed the financial ability to perform the task order at the price proposed was materially flawed.

The record shows that the Navy evaluators recognized both the substantial price disparity between the ISL and ESCO proposals, and that ISL would not be receiving any significant payment from the agency as part of performance of the awarded task order (i.e., task order payments could not finance the offeror's performance). In light thereof, in order to ensure that ISL was "financially responsible at the price [it] proposed," AR, Tab 13, Evaluation Report, at 15, the Navy evaluators decided to conduct a cash-flow analysis of ISL and determine whether the offeror possessed sufficient financial resources to cover the total estimated upfront costs of towing and dismantling the ships in advance of any returns on scrap sale.

The Navy's cash-flow assessment of ISL was based on information that the agency possessed regarding the dismantling of a similarly sized ship, the ex-Camden. The evaluators assumed that the contractor would incur 10 percent of total dismantling costs, as well as the estimated towing costs, before it would begin to realize any cash inflow from scrap. The evaluators then made the following calculations:

Ship	Ton-nage	Cost /Ton	Total Dis-mantling Costs	Costs at 10% Completion	Tow Estimate	Total Up Front Cost
ex-Camden	20,717	$126	$2,611,617	$261,161		
ex-Saipan	27,165	$126	$3,422,790	$342,279	$869,280	$1,211,599
ex-Austin	9,201	$126	$1,159,326	$115,932	$300,000	$415,932
ex-Fort Fisher	8,714	$126	$1,097,694	$109,769	$1,300,000	$1,409,769

Id.

After completing this computation, the Navy found ISL to be financially responsible at the price proposed. Specifically, the evaluators concluded, "The contractor stated that they were free of debt and has an unused and revolving credit line of $[DELETED]. Whereas, their proposed schedule plans staggered start dates for each ship, this should be sufficient to cover expenses." Id.

The Navy's determination that ISL's financial resources were sufficient to meet estimated total upfront costs was premised on the assumption that ISL would incur the estimated upfront costs sequentially (i.e., that ISL's staggered start dates for each ship would result in the estimated upfront costs for each ship not occurring simultaneously). Contrary to the agency's assumption, however, ISL's proposal included a work schedule indicating that the three ships essentially would be towed and dismantled simultaneously: the towing and dismantling of the ex-Saipan was to occur from May 6, 2009, to July 7, 2010; the towing the dismantling of the ex-Austin was to occur from June 3, 2009, to April 21, 2010; and the towing and dismantling of the ex-Fort Fisher was to occur from June 3, 2009, to July 7, 2010. AR, Tab 7, ISL Proposal, exh. 1, 3-Ship Work Schedule. Moreover, ISL's schedule indicated that the towing of all three ships would occur before the point in time at which the Navy estimated that ISL would begin to realize returns on the sales of scrap from any ship.[5] Id. As computed by the Navy, the upfront costs for all three ships total $3,037,300, substantially higher than ISL's $[DELETED] line of credit.

Further, in computing the dismantling costs that ISL would incur before realizing the sale of any scrap, the Navy utilized an average dismantling cost of $126 per ton. This figure was apparently derived by dividing the dismantling costs for the ex-Camden

[5] ISL's schedule indicated that the tow of the third ship, the ex-Fort Fisher, would be completed the week of September 16, 2009, while the Navy estimated the contractor would begin to realize scrap sales proceeds from the dismantling of the first ship, the ex-Saipan, the week of September 9. Id.

by its tonnage ($2,611,617 / 20,717 = $126).[6] ESCO Comments, July 10, 2009, exh. 2, ex-Camden Cost Report Summary, at 1. In fact, the $2,611,617 figure represented only the direct dismantling costs for the ex-Camden, and did not include the contractor's costs for hazardous waste services, overhead, and general and administrative (G&A) expenses. Id.; Contracting Officer's Statement, Aug. 28, 2009, at 3. (The agency does not dispute that ISL's dismantling work for the three ships here would also include costs for hazardous waste services, overhead, and G&A expenses.) As the total dismantling costs for the ex-Camden were actually $5,240,792, ESCO Comments, July 10, 2009, exh. 2, ex-Camden Cost Report Summary, at 1, the average cost is $252 per ton ($5,240,792 / 20,717 = $252). Using this per ton figure, the upfront dismantling costs computed by the Navy as part of ISL's cash-flow assessment were understated by a total of $567,980, thereby resulting in an adjusted total estimated upfront cost for all three ships of $3,605,280.

The record shows that the Navy's decision to perform a cash-flow assessment was done "to ensure that ISL [was] financially responsible at the price they proposed."[7] AR, Tab 13, Agency Evaluation Report, at 14. Responsibility is a contract formation term that refers to the ability of a prospective contractor to perform the contract for which it has submitted an offer; by law, a contracting officer must determine that an offeror is responsible before awarding it a contract. See 41 U.S.C. § 253b(c), (d); FAR § 9.103(a), (b); Advanced Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 at 5. Consistent with this statutory and regulatory framework, once an offeror is determined to be responsible and is awarded a contract, there is no requirement that an agency make additional responsibility determinations during contract performance. Advanced Tech. Sys., Inc., supra. While there likewise exists no requirement that an agency conduct an additional responsibility determination when placing a task order under an ID/IQ contract, see FAR § 16.505, neither is an agency precluded from doing so, as the Navy chose to do here.

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[6] The ISL cash-flow assessment was conducted by a Navy contract intern under the direction of the contracting officer. The contracting officer accepted and relied on the computed average dismantling cost of $126 per ton, but did not himself review the source documentation to ensure that it was accurate. Contracting Officer's Statement, Aug. 28, 2009, at 3.

[7] Contrary to the protester's position, we find that the Navy's cash-flow assessment of ISL was not part of the evaluation of the offeror's scrapping plan, which was limited to consideration of the estimated revenues that the contractor would generate from scrap sales as well as how the contractor planned to achieve those revenues (i.e., the estimated amounts of scrap by category and corresponding scrap prices). The scrapping plan evaluation factor did not extend to the offeror's prices or its financial ability to perform at the prices offered.

Since the determination of whether a particular contractor is responsible is largely a matter within the contracting officer's discretion, our Office, as a general matter, will not consider a protest challenging an affirmative determination of responsibility, except under limited, specified circumstances--where it is alleged that definitive responsibility criteria in the solicitation were not met or evidence is identified that raises serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c); Greenleaf Constr. Co., Inc., B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19 at 13-14. This includes protests where, for example, the protester offers 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. Greenleaf Constr. Co., Inc., supra, at 14 (contracting officer ignored known information and instead based his determination of the awardee's financial responsibility on information known to be inaccurate); Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 8-10 (contracting officer failed to consider serious, credible information regarding awardee's record of integrity and business ethics in making his responsibility determination). We think the circumstances here warrant our review of the reasonableness of agency's responsibility determination regarding ISL.[8]

As set forth above, the Navy's determination that ISL had sufficient financial resources to cover estimated upfront costs for all three ships was premised on the assumption that ISL would incur the estimated upfront costs sequentially (i.e., that ISL's staggered start dates for each ship would result in the estimated upfront costs for each ship not occurring simultaneously). In making this assumption, the Navy ignored the information in ISL's own proposal which clearly indicated that the offeror planned to tow and dismantle the three ships simultaneously, and would thereby incur the estimated upfront costs for each ship largely simultaneously. This erroneous assumption was key to the contracting officer's affirmative responsibility determination. When it is corrected to account for ISL's plan to service the ships

[8] While, as noted above, there was no requirement to make a responsibility determination here, given that the agency elected to do so based on concerns about the contractor's financial ability to perform the task order at the price proposed, and then relied on the results of the responsibility determination in its selection decision, we will review the agency's actions, consistent with our general standards for review of affirmative responsibility determinations. See DAV Prime, Inc., B-311420, May 1, 2008, 2008 CPD ¶ 90 at 2 (when a contracting agency undertakes an analysis, even when discretionary, the conclusions drawn from the analysis must be reasonable). To the extent that our decision in Advanced Tech. Sys., Inc., supra, can be read for the proposition that a discretionary responsibility determination such as the one at issue here cannot give rise to a valid basis of protest, that aspect of our decision will no longer be followed.

simultaneously, it appears from the record that, using the Navy's own method of calculation, ISL does not in fact have adequate financial resources to cover the estimated upfront costs of all three ships simultaneously. For example, ISL's schedule indicates that the firm plans to tow all three ships before the point in time at which the Navy estimated that ISL would begin to realize returns on the sales of scrap from any ship. The towing expenses estimated by the Navy alone total $2,469,280, substantially more than the financial resources that the agency's analysis deemed available to cover the estimated upfront costs (a $[DELETED] line of credit). In addition, the Navy's analysis underestimated by half the upfront dismantling costs that ISL would occur for each ship. When corrected, at the point in time at which the Navy estimated that ISL would first begin to realize returns on the sales of scrap, the contractor would have total upfront costs of approximately $3,153,838--towing costs of $2,469,280 plus $684,558 in upfront dismantling costs for the ex-Saipan.

Subsequent to the filing of the ESCO protest, the Navy presented additional, new information that purportedly supports its financial responsibility determination of ISL--for example, that ISL would realize profits from its recent completion of another ship-dismantling contract. Contracting Officer's Statement, Aug. 28, 2009, at 3. The record clearly reflects that the agency did not consider this information in its evaluation of ISL's financial responsibility. To the extent the Navy now asserts that its conclusion regarding ISL's financial responsibility should be based on this information, we give this post hoc justification little weight. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

In sum, we conclude that by ignoring what ISL actually proposed and instead basing his determination of financial responsibility on information contradictory to what the offeror has proposed, the contracting officer unreasonably failed to consider available relevant information and ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. As a result, we sustain the challenge to the affirmative responsibility determination.

RECOMMENDATION

We recommend that the agency make a new determination of ISL's responsibility which takes into account the total estimated costs (properly computed) associated with ISL's plan to perform the towing and dismantling services for the three ships simultaneously. If, as a result of this reevaluation, the agency determines that the task order should not be issued to ISL, the agency should terminate ISL's task order and proceed in accordance with the RFP and the evaluation results. We also recommend that ESCO be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees, limited to the issue on which the protest was sustained. 4 C.F.R. § 21.8(2)(1). In accordance with 4 C.F.R. § 21.8(f)(1), the

protester's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained in part and denied in part.

Daniel I. Gordon
Acting General Counsel