U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548
Comptroller General
of the United States

Decision

Matter of: Curtin Maritime Corporation

File: B-417175.2

Date: March 29, 2019

Marley Schroepfer, Esq., Curtin Maritime Corporation, for the protester.
Ann Calabrese, Esq., Allison McDade, Esq., and Schuyler Lystad, Esq., Department of the Navy, for the agency.
Elizabeth Witwer, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that the domestic shipyard preference set forth in Defense Federal Acquisition Regulation Supplement (DFARS) provision 252.247-7026 requires the agency to afford a preference to offerors that exclusively use domestic shipyards to perform overhaul, repair, and maintenance for qualifying vessels is denied where the plain language of the DFARS provision and its enabling legislation require only that an agency consider, as one of many evaluation factors, the extent to which an offeror has performed such work in domestic shipyards.

DECISION

Curtin Maritime Corporation, a small business concern of Long Beach, California, protests the terms of request for proposals (RFP) No. N32205-19-R-3300, issued by the Department of the Navy, Military Sealift Command (MSC), for a U.S. flag tug vessel. The protester contends that the solicitation's evaluation criteria violate the domestic shipyard preference set forth in Defense Federal Acquisition Regulation Supplement (DFARS) provision 252.247-7026.[1]

We deny the protest.

[1] No protective order was issued in this protest. A full version of the agency report was provided to our Office, while a redacted version of the report was furnished to the protester's counsel. In reaching our decision here, we have reviewed the entire unredacted record.

BACKGROUND

The agency issued the solicitation as a small business set-aside on December 7, 2018, pursuant to the commercial item and simplified acquisition procedures of Federal Acquisition Regulation (FAR) part 12 and subpart 13.5, respectively. RFP, at 7, 8, 46.[2] The solicitation anticipated the award of a fixed-price contract for a "U.S. flag, Jones Act compliant, coastwise endorsed, ocean-going certified tug capable of towing berthing barge YRB-36" from Guam to Hawaii. Id. at 8; Agency Response to 2d GAO Request for Information (RFI), Mar. 22, 2019, at 1. The solicitation provided that award would be made to the offeror whose proposal represented the lowest-priced, technically acceptable proposal. RFP at 47. Relevant here, the solicitation also provided that "[a]ward preferences for domestic shipyard usage (see DFARS 252.247-7026) will be applied to the Government's evaluation of offers." Id.

In this respect, the solicitation included DFARS provision 252.247-7026, Evaluation Preference for Use of Domestic Shipyards--Applicable to Acquisition of Carriage by Vessels. Id. at 33-35. As prescribed in section 247.574 of the DFARS, contracting officers shall include this provision "in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, that require a covered vessel for carriage of cargo for [the Department of Defense]."[3] DFARS § 247.574(e). The agency summarizes this requirement, explaining that the provision must be included in "solicitations for the transportation of Department of Defense cargo from U.S. port to U.S. port (commonly referred to as the Coastwise trade)." Contracting Officer's Statement (COS) at 1.

The DFARS provision advises offerors, in relevant part, as follows:

> This solicitation includes an evaluation criterion that considers the extent to which the offeror has had overhaul, repair, and maintenance work for covered vessels performed in U.S. shipyards.

DFARS provision 252.247-7026(b).

[2] References to page numbers in the agency report are to the Bates numbering provided by the agency in the redacted agency report.

[3] Covered vessels are defined as those vessels owned, operated, or controlled by the offeror and qualified to engage in coastwise and noncontiguous trade under section 27 of the Merchant Marine Act of 1920, 46 U.S.C. §§ 12101, 12132, 55102, commonly referred to as the Jones Act; 46 U.S.C. §§ 12102, 12112, 12119; and section 2 of the Shipping Act of 1916, 46 U.S. § 50501. DFARS provision 252.247-7026(a).

In accordance with the provision, MSC included the following evaluation criterion in the solicitation:

> Award preferences for domestic shipyard usage (see DFARS 252.247-7026) will be applied to the Government's evaluation of offers. Award will be made, if at all, to the lowest price, technically acceptable offeror that has a Category 1 Domestic Shipyard Usage. If there are no offerors in Category 1, award will be made, if at all, to the lowest price, technically acceptable offeror that has a Category 2 Domestic Shipyard Usage.

RFP at 47. In defining the two categories of domestic shipyard usage (DSU), the solicitation provided as follows:

> If 25% or more of the cost of overhaul, repair, and maintenance work of an offeror has been conducted within a U.S. shipyard (during the period covering the current calendar year, up to the date of proposal submission, and the preceding four calendar years), the offeror is in "Category 1." All other offerors are in "Category 2."

Id. In other words, pursuant to MSC's evaluation criterion, offerors who meet the DSU threshold are eligible for award before those who fall below the threshold.[4]

In developing the above evaluation criterion, the record reflects that MSC considered the following: (a) the practice of the United States Transportation Command (TRANSCOM), another Department of Defense (DoD) agency that includes the DFARS provision in qualifying procurements; (b) data from relevant MSC procurements over the past two years; and (c) market research. COS at 2; Memorandum of Law (MOL) at 5; Agency Report (AR), Attach. 3, Market Survey 18-087. Moreover, the record reflects that, in developing the 25 percent threshold criterion, the agency sought to encourage the use of domestic shipyards while maintaining adequate levels of competition. AR, Attach. 2, Decision Guidance Memorandum 18-19 (hereinafter "MSC Policy Memorandum"), at 67; COS at 3; MOL at 6; Agency Resp. to 2d GAO RFI at 4.

The agency represents that, since November 2008, when DoD promulgated the DFARS provision, see DFARS; Carriage Vessel Overhaul, Repair, and Maintenance (DFARS Case 2007-D001), 73 Fed. Reg. 70,909, 70,912 (Nov. 24, 2008), the agency has incorporated the DFARS provision into all qualifying solicitations. COS at 3. However, an evaluation criterion expressly detailing how the agency would take into account an offeror's use of domestic shipyards was not set forth in qualifying

[4] Important for understanding the protest here is that MSC calculates an offeror's DSU percentage by including costs incurred over the "current calendar year, up to the date of proposal submission, and the preceding four calendar years." RFP at 47. Thus, an offeror's DSU percentage is based upon costs incurred over several years.

solicitations until almost 10 years later.[5] Id.; Agency Resp. to 2d GAO RFI at 2. The contracting officer explains that, as a result of a prior GAO protest, MSC realized that it needed to establish and publish a measurable standard by which it could consider an offeror's use of domestic shipyards in future evaluations.[6] COS at 3.

To develop such a criterion, the contracting officer consulted colleagues at TRANSCOM. Protest, Exh. 3, CO's Declaration (Decl.), June 22, 2018, at 1. The record reflects that TRANSCOM includes an evaluation criterion in its qualifying solicitations that affords an evaluation preference to offerors who perform 15 percent or more of the cost overhaul, repair, and maintenance work in domestic shipyards. MOL at 5; Protest, Exh. 3, CO's Decl., June 22, 2018, at 2. On February 22, 2018, MSC issued its first solicitation containing a domestic shipyard evaluation criterion. Agency Resp. to 2d GAO RFI at 2. Similar to TRANSCOM, MSC's evaluation criterion afforded an evaluation preference to offerors who performed 15 percent or more of the cost of overhaul, repair, and maintenance work in domestic shipyards.[7] Id.; Protest, Exh. 3, CO's Decl., June 22, 2018, at 2. MSC included this same evaluation criterion in all qualifying solicitations issued in 2018, including--at least initially--the solicitation challenged here. CO's Decl., Mar. 22, 2019, at 1.

Although MSC initially included the 15 percent DSU threshold in the solicitation at issue here, the agency amended the solicitation to increase the threshold to 25 percent after Curtin Maritime protested the 15 percent threshold to our Office. We dismissed the protest on December 17 after the agency notified our Office of its intent to amend the solicitation's evaluation criteria. Curtin Maritime Corp., B-417175, Dec. 17, 2018 (unpublished decision). The record reflects that the agency's decision to increase the threshold was informed by its review of data pertaining to relevant MSC procurements in

[5] MSC represents that solicitation No. N32205-18-R-3301, issued on February 22, 2018, was the first solicitation to include an evaluation criterion expressly stating how the agency would evaluate an offeror's use of domestic shipyards. Agency Resp. to 2d GAO RFI at 2.

[6] The contracting officer refers to a post-award protest filed by Curtin Maritime on October 2, 2017, and docketed by our Office as B-415436. COS at 3. On October 20, 2017, we closed our file in the matter after the protester withdrew its protest. The agency represents, however, that despite the protester's withdrawal of its challenge, MSC continued to review the protester's concerns and consider how best to evaluate DSU in future procurements. Id.; Agency Resp. to 2d GAO RFI at 2.

[7] MSC explains that TRANSCOM's method for calculating the DSU percentage may differ from the method used by MSC. GAO Conference Call with Parties, Mar. 21, 2019s. We do not find any such difference to be relevant to the protest.

2017 and 2018, as well as market research.[8] COS at 3; MOL at 5, 6; AR, Attach. 2, MSC Policy Memorandum, at 66-67; Agency Resp. to 2d GAO RFI at 3.

The data from MSC procurements conducted over the past two years shows that a total of seven offerors submitted proposals.[9] Agency Resp. to 2d GAO RFI at 3. In 2017, offerors' DSU percentages were relatively high, with no offeror falling below 50 percent. Id. See generally id., Exh. 2, MSC Charter Data (2017-18); Protester's Comments, Exh. 1, DoD's 2017 Annual Report to Congress on Domestic Shipyard Usage (hereinafter "Annual Report to Congress").[10] In 2018, some offerors possessed DSU percentages closer to 50 percent, with one offeror falling below 50 percent.[11] Agency Resp. to 2d GAO RFI at 3. In its report, the agency did not posit any rationale for the change.

Faced with the fact that no offeror's DSU percentage was close to 15 percent, MSC represents that the 15 percent threshold may have been unnecessarily low. Id. Therefore, the agency sought to increase the threshold. Id. The record also shows,

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[8] The agency represents that it was already in the process of reconsidering the propriety of the 15 percent threshold as a result of an earlier pre-award protest filed by Curtin Maritime on June 19, 2018, docketed as B-416493. We dismissed that protest, concluding that the protester was not an interested party under our Bid Protest Regulations because it was the presumptive awardee. Curtin Maritime Corp., B-416493, July 25, 2018 (unpublished decision). Despite the dismissal, the agency states that it took "under close advisement" Curtin Maritime's arguments that the threshold was too low. Agency Resp. to 2d GAO RFI at 3; COS at 3.

[9] The data shows that nine offerors submitted proposals in response to MSC solicitations. See generally Agency Resp. to 2d GAO RFI, Exh. 2, MSC Charter Data (2017-18). This number is reduced to seven offerors when considering procurements for the carriage of cargo on the western coast of the United States, i.e., the requirement solicited here.

[10] The Annual Report to Congress is mandated by DFARS provision 252.247-7026(e).

[11] The protester disputes the agency's calculation of one offeror's DSU percentage, which we refer to as Offeror A. Specifically, the protester contends that, in 2018, Offeror A performed 100 percent of its qualifying work in domestic shipyards, while the agency maintains that Offeror A performed only 50 percent of its work in domestic shipyards. We have reviewed the unredacted version of the report and agree with the protester that the agency's 2018 data pertaining to Offeror A is flawed. It appears that the data pertaining to Offeror A's vessels was merged with that of another offeror, Offeror B. See Agency Resp. to 2d GAO RFI, Exh. 2, MSC Charter Data (2017-18), at 4-5 (Offeror A), 11-14 (Offeror B), 25-31 (Offerors A and B merged). In any event, this error does not alter our conclusion here regarding the reasonableness of the agency's selected evaluation criterion.

however, that MSC was concerned about increasing the threshold too quickly. AR, Attach. 2, MSC Policy Memorandum, at 66-67.

MSC's concern stems from the fact that there is limited competition for the types of services required here.[12] COS at 3; MOL at 6. As noted above, in the past two years, only seven offerors submitted proposals in response to MSC solicitations for the carriage of cargo on the West Coast. See generally Agency Resp. to 2d GAO RFI, Exh. 2, MSC Charter Data (2017-18). More importantly, however, MSC received two or fewer proposals in seven of the 11 qualifying procurements. COS at 3. In the remaining four procurements, MSC received only three proposals. See generally Agency Resp. to 2d GAO RFI, Exh. 2, MSC Charter Data (2017-18). Accordingly, in crafting its domestic shipyard provision, the agency sought to encourage use of domestic shipyards while maintaining adequate competition.[13] AR, Attach. 2, MSC Policy Memorandum, at 67; COS at 3; MOL at 6; Agency Resp. to 2d GAO RFI at 4.

After consideration of the historical data, MSC selected 25 percent as the appropriate DSU threshold, concluding that the selected percentage "maintains competition while encouraging our industrial partners to use domestic ship repair facilities for maintenance and repair of their respective fleets." AR, Attach. 2, MSC Policy Memorandum, at 66-67. MSC also concluded that, although a 25 percent threshold was appropriate for the current procurement, the threshold could be raised gradually over the next two fiscal years without having a chilling effect on competition. COS at 3; MOL at 6. This "phase-in" approach was suggested by industry in response to the agency's market survey. AR, Attach. 3, Market Survey 18-087, at 72; Agency Resp. to 2d GAO RFI at 4. MSC reasoned that a gradual increase in the threshold would permit "companies to plan for the future by taking these requirements into account in planning DSU over the next two years." COS at 3.

Specifically, in consultation with the Office of the Assistant Secretary of the Navy (Research, Development and Acquisition) and the Navy Office of Legislative Affairs, MSC issued Decision Guidance Memorandum 18-19, dated December 12, 2018, in which MSC set forth a policy establishing a 25 percent threshold effective immediately for the remainder of fiscal year 2019. AR, Attach. 2, MSC Policy Memorandum, at 66-67. The MSC policy memorandum further provides that the threshold will be raised to 35 percent for fiscal year 2020 and will be raised to

[12] Again, the record does not provide any basis for us to conclude that the limited competition is a result of the DSU provisions.

[13] As explained above, MSC calculates an offeror's DSU percentage by including costs incurred over the "current calendar year, up to the date of proposal submission, and the preceding four calendar years." RFP at 47. Thus, even were an offeror to increase its DSU percentage to 100 percent in the current calendar year, any prior costs incurred in foreign shipyards in the preceding four calendar years would decrease its overall percentage.

50 percent for fiscal year 2021 and beyond. The memorandum asserts that "[t]his policy balances MSC's interest in maintaining competition in the coastwise charter market while encouraging industry partners to conduct overhaul, repair, and maintenance on covered vessels in U.S. shipyards." Id. at 67.

On December 19, Curtin Maritime protested the 25 percent threshold to our Office.

DISCUSSION

Curtin Maritime alleges that the solicitation's evaluation criterion pertaining to the use of domestic shipyards violates DFARS provision 252.247-7026. Specifically, the protester argues that the DFARS provision requires MSC to afford a preference to companies that exclusively employ domestic shipyards for overhaul, repair, and maintenance work. See, e.g., Protester's Comments at 3 (arguing that "to qualify for this preference, all the work, for 'all vessels,' must have been performed in a domestic shipyard"). For this reason, the protester maintains that the solicitation's 25 percent threshold--or any threshold less than 100 percent--is "contrary to the letter and spirit" of the DFARS provision and constitutes an unauthorized deviation from the DFARS. Protest at 3. See also id. at 5, 6, 8; Protester's Comments at 1, 2, 3. The protester alleges that it exclusively employs domestic shipyards for its covered vessels and, thus, it is entitled to the preference set forth in the DFARS. Protest at 8. We have reviewed the protester's argument and find no basis upon which to sustain the protest.[14]

Interpretation of DFARS Provision 252.247-7026

The protester argues that the plain language of the DFARS provision requires the agency to afford a preference to companies who exclusively use domestic shipyards for overhaul, repair, and maintenance work. Protester's Comments at 3. For this reason, the protester contends that the solicitation's 25 percent DSU threshold does not comply with the DFARS provision.

In response, the agency argues that the plain language of the DFARS provision requires only that the agency include an evaluation criterion that "considers" the "extent" to which an offeror has used domestic shipyards for qualifying work. MOL at 4. The agency further argues that the specific criterion and the extent to which an offeror's DSU is considered by the agency are matters committed to the agency discretion. Id.

[14] Curtin Maritime raises other collateral arguments concerning the solicitation's DSU criterion. Although we do not address each of the protester's arguments, we have reviewed them and find that none provides a basis upon which to sustain the protest. For example, the protester alleged that "the two categories for domestic shipyard preference as set out in the solicitation are vague and ambiguous." Protest at 5. In response to a request for dismissal submitted by the agency, we dismissed this ground for failure to state a legally sufficient basis of protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f).

For these reasons, MSC contends that it has complied with the DFARS requirement and that the protester's argument constitutes mere disagreement with the amount of consideration agency afforded to this aspect of offerors' proposals. Id. We agree.

By way of background, section 1017 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2007, Pub. L. No. 109-364, 120 Stat. 2083, 2379 (2006), required the Secretary of Defense to issue an acquisition policy establishing, as a criterion to be considered in awarding vessel transportation contracts, the extent to which the offeror had overhaul, repair, and maintenance work for covered vessels performed in shipyards located in the United States and Guam. The relevant statutory language provides as follows:

> **SEC. 1017. OBTAINING CARRIAGE BY VESSEL: CRITERION REGARDING OVERHAUL, REPAIR, AND MAINTENANCE OF VESSELS IN THE UNITED STATES.**
>
> (a) ACQUISITION POLICY.—In order to maintain the national defense industrial base, the Secretary of Defense shall issue an acquisition policy that establishes, as a criterion required to be considered in obtaining carriage by vessel of cargo for the Department of Defense, the extent to which an offeror of such carriage had overhaul, repair, and maintenance work for covered vessels of the offeror performed in shipyards located in the United States.

Pub. L. No. 109-364, § 1017. To implement this statutory mandate, DoD issued a final rule on November 24, 2008, amending the DFARS. Carriage Vessel Overhaul, Repair, and Maintenance, 73 Fed. Reg. at 70,912. The relevant DFARS language mirrors the statutory language almost verbatim.

First, section 247.570 of the DFARS recognizes that the statute "requires consideration, in solicitations requiring a covered vessel, of the extent to which offerors have had overhaul, repair, and maintenance work performed in shipyards located in the United States or Guam[.]" DFARS § 247.570(a)(2). Section 247.574 requires, in turn, that contracting officers insert the provision at 252.247.7026 in solicitations "that require a covered vessel for carriage of cargo for DoD." DFARS § 247.572(e).

Finally, DFARS provision 252.247-7026 provides, in relevant part, as follows:

> This solicitation includes an evaluation criterion that considers the extent to which the offeror has had overhaul, repair, and maintenance work for covered vessels performed in U.S. shipyards.

DFARS provision 252.247-7026(b). To facilitate an agency's review of such work, the provision requires offerors to provide, among other things, the name of the vessel and the cost of qualifying shipyard work performed in both domestic and foreign shipyards. DFARS provision 252.247-7026(c). The provision further explains that

"[t]he Contracting Officer [w]ill use the information to evaluate offers in accordance with the criteria specified in the solicitation[.]" DFARS provision 252.247-7026(d)(1). Curtin Maritime alleges that the agency's evaluation criterion here contradicts the plain language of the DFARS provision and its enabling legislation.[15]

Our analysis begins with the interpretation of the relevant statute. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the 'language of the statute.'"). In construing the statute, "[t]he first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in this case.'" Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2001) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). In this regard, we "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009). If the statutory language is clear and unambiguous, the inquiry ends with the plain meaning. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1084). Our Office likewise applies the "plain meaning" rule of statutory interpretation. See, e.g., Oracle America, Inc., B-416061, May 31, 2018, 2018 CPD ¶ 180 at 16.

Applying the principles above to the language of section 1017 of the FY 2007 NDAA, we conclude that the plain language of the enabling legislation does not support the protester's position that an agency must afford a preference to companies that perform overhaul, repair, and maintenance work exclusively in domestic shipyards. Rather, the plain language of the statute requires only that DoD: (a) include in qualifying solicitations an evaluation criterion that (b) considers the extent to which an offeror has performed work in domestic shipyards.

The common dictionary definition of the term "consider" is to "think carefully about (something), typically before making a decision" and to "take (something) into account when making a judgment." Oxford English Dictionary, https://en.oxforddictionaries.com/definition/consider (last visited Mar. 28, 2019). Additionally, the term "extent" refers to "the size or scale of something," as well as the "particular degree to which something is." Oxford English Dictionary, https://en.oxforddictionaries.com/definition/extent (last visited Mar. 28, 2019). Accordingly, the plain language of the statute merely requires DoD to take into account the degree to which an offeror uses domestic shipyards. The statute does not prescribe any specific evaluation criterion to be included in solicitations, nor does it set forth any specific evaluation preference to be afforded to offerors meeting the established criterion. Rather, all details were left to the discretion of DoD.

[15] The protester does not contend that the statute is silent or ambiguous with respect to the specific matter at issue here. Nor does the protester contend that DoD's implementing regulations are inconsistent with the statute. Thus, we need not consider the degree of deference to be afforded to DoD's interpretation of the statute as set forth in the resulting DFARS provision.

Although the plain language of the statute is clear, Curtin Maritime urges our Office to consider legislative intent, which it claims is to provide "a preference to the domestic industrial base offerors[.]" Protester's Comments at 2-3; id. at 5 (citing H.R. Rep. No. 109-452, at 375 (2006). The legislative history does not support the protester's arguments. As an initial matter, although the statute itself provides that DoD should consider offerors' use of domestic shipyards "[i]n order to maintain the national defense industrial base," Pub. L. No. 109-364, § 1017, nothing in the quoted language expresses a Congressional intent to require DoD to afford evaluation preferences only to those offerors that exclusively perform overhaul, repair, and maintenance work in domestic shipyards. Nor does the provision require DoD to maintain the national defense industrial base to the maximum extent possible. Arguably alternative evaluation schemes to the one suggested by the protester could also assist to maintain the national defense industrial base.

Likewise, we find no support in the legislative history itself for the protester's claims. Neither the Conference Report nor the House Report accompanying section 1017 contains any language supporting the protester's interpretation of the statute. See generally H.R. Rep. No. 109-702, at 807 (2006); H.R. Rep. No. 109-452, at 375 (2006). If anything, the legislative history undermines the protester's interpretation. In this respect, the conferees failed to adopt language in a House bill that would have prohibited DoD from awarding any contract "unless the contract includes a requirement under which the contractor shall ensure that the overhaul and repair work is done in a shipyard located in the United States[.]" H.R. Rep. No. 109-702, at 807. The Conference Report reflects that this language was amended to require that DoD consider, as part of its overall evaluation, the extent to which an offeror has used domestic shipyards in the past. Id. The report states that "the conferees expect that the Secretary will establish, as an evaluation criterion in the award, the past accomplishment of overhaul, repair, and maintenance work conducted in shipyards located in the United States, similar to other considerations such as cost, schedule, capability to perform the carriage, and other independently weighted factors." Id. at 807-08. It also appears that the conferees sought to relax the requirement because, although they could have required DoD to consider the extent to which an offeror has used domestic shipyards exclusively in the past (which would align with the House bill's language), they chose not to include such language in the legislation.

We also find no support for the protester's arguments in the plain language of the DFARS provision. The DFARS provision contains language virtually identical to the enabling legislation. Compare Pub. L. No. 109-364, § 1017 (providing that DoD "shall issue an acquisition policy that establishes, as a criterion . . . the extent to which an offeror . . . had overhaul, repair, and maintenance work for covered vessels of the offeror performed in shipyards located in the United States") with DFARS provision 252.247-7026(b) (requiring DoD agencies to "include[] an evaluation criterion that considers the extent to which the offeror has had overhaul, repair, and maintenance work for covered vessels performed in U.S. Shipyards"). Accordingly, here too, we conclude that the plain language of the DFARS provision does not provide support for

the notion that the agency is required to afford evaluation preferences only to those offerors that exclusively use domestic shipyards.

The DFARS provision simply places offerors on notice that the solicitation "includes an evaluation criterion that considers the extent to which the offeror has had overhaul, repair, and maintenance work for covered vessels performed in U.S. shipyards." DFARS provision 252.247-7026(b). Like the statute, the DFARS provision does not provide specific guidance on how such information should be evaluated by the contracting officer. Rather, DFARS provision 252.247-7026(d)(1) states only that "[t]he Contracting Officer [w]ill use the information [submitted by offerors] to evaluate offers in accordance with the criteria specified in the solicitation[.]" This suggests that the criteria against which the information will be evaluated may vary from solicitation to solicitation and that the details of the specific evaluation criteria are committed to agency discretion.[16]

In sum, the crux of Curtin Maritime's argument is that our Office should read the word "exclusively" into the statute and the DFARS provision on the basis that encouraging the exclusive use of domestic shipyards would better support the objective of the statute and the DFARS provision, which is to "maintain the national defense industrial base." Pub. L. No. 109-364, § 1017. See also Carriage Vessel Overhaul, Repair, and Maintenance, 73 Fed. Reg. at 70,911. Even if we were to conclude that exclusive use of domestic shipyards would better support the drafters' objective, we cannot read the word "exclusively" into the statute or the DFARS provision when "exclusively" was not included in either. See Caddell Constr. Co., Inc., B-411005, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132 at 19. Overall, the plain language of the statute and the regulation does not convince us to interpret the requirements as Curtin Maritime suggests.

Reasonableness of the 25 Percent Threshold

In addition to arguing that the 25 percent DSU threshold is inconsistent with the DFARS provision, the protester argues that it is otherwise unreasonable. In this regard, although it is within a contracting agency's discretion to determine its needs and the best method to accommodate them, an agency's determination of its needs must still be reasonable. See Global SuperTanker Servs., LLC, B-414987, B-414987.2, Nov. 6, 2017, 2017 CPD ¶ 345 at 5. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether it can withstand logical scrutiny. Pitney Bowes, Inc., B-413876.2, Feb. 13, 2017, 2017 CPD ¶ 56 at 3.

[16] This interpretation is consistent with DoD's response to selected comments received in the course of promulgating the final DFARS provision. In particular, in responding to comments suggesting that DSU should be established as a "significant" evaluation factor, DoD stated that "[t]he decision as to the relative value of the evaluation criterion is appropriately the responsibility of the source selection authority." Carriage Vessel Overhaul, Repair, and Maintenance, 73 Fed. Reg. at 70,910.

The record reflects that, in developing the challenged evaluation criterion, the agency sought to "balance[] MSC's interest in maintaining competition in the coastwise charter market while encouraging industry partners to conduct overhaul, repair, and maintenance on covered vessels in U.S. shipyards." AR, Attach. 2, MSC Policy Memorandum, at 67. Although the agency determined that the prior threshold, i.e., 15 percent, may have been unnecessarily low, it further concluded that increasing the threshold drastically was not in the agency's best interests. Agency Resp. to 2d GAO RFI at 4. In this regard, the agency explains that "[a]ny chill on competition in these West Coast procurement could have negative impacts on the Agency's ability to meet mission requirements." Id. For instance, "[a] drastic increase to the DSU criterion could discourage offerors ineligible for a preference from offering at all, resulting in non-competitive or unfulfilled requirements." Id. For this reason, the agency sought to increase the threshold gradually over the course of the next two fiscal years "to give companies a fair chance to carefully plan their DSU[.]" Id.; AR, Attach. 2, MSC Policy Memorandum, at 66-67.

Curtin Maritime objects to the agency's decision to balance DSU with competition. Protester's Comments at 7. The protester argues that maintaining a lower threshold in order to promote competition "is contrary to [the] legal preference demanded by Congress." Id. The protester asserts that "MSC cannot skew solicitation criteria just to increase competition."[17] Id. We disagree. We find that it was reasonable, under the specific circumstances here, for MSC to consider competition--in particular the limited competition for MSC's requirements--when determining how to weigh an offeror's DSU.

[17] Relying upon our decision in Wackenhut Int'l, Inc., B-241594, Feb. 14, 1991, 91-1 CPD ¶ 172, Curtin Maritime also argues that a statutory mandate to provide an evaluation preference cannot be satisfied by merely increasing competition. Protest at 8; Protester's Comments at 7. The protester's reliance on our decision in Wackenhut is misplaced. In that case, Wackenhut alleged that the agency failed to afford it an evaluation preference under section 136 of the 1990 Foreign Relations Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-246, 104 Stat. 15, 33 (1990). Wackenhut Int'l, Inc., supra, at 4. This provision requires the Department of State to give preference in awarding contracts for guard services abroad to domestic offerors that are price competitive with nondomestic offerors and that are otherwise qualified to perform. Id. The Department of State maintained that it complied with this mandate by, among other things, synopsizing the procurement domestically. Our Office dismissed this ground as untimely raised. Id. at 5. We expressed concern, however, that the agency's measure "may well result in increased competition by domestic firms, but taking steps to increase competition in this fashion is not the same as giving domestic firms a preference, or advantage, over foreign firms in the competition itself." Id. The facts of Wackenhut are distinguishable. In Wackenhut, the agency claimed that providing opportunities for increased competition in and of itself constitutes a preference, whereas in this matter MSC makes no such claim. There is no dispute that MSC has provided an evaluation preference. The question at hand is whether the preference could (or should) be made stronger.

Within the statutory and regulatory context, it is clear that Congress and the drafters of the DFARS provision intended for the agency to give meaningful consideration to DSU "[i]n order to maintain the national defense industrial base." Pub. L. No. 109-364, § 1017. See also H.R. Rep. No. 109-702, at 808 (finding that "a strong ship repair industrial base is vital to the national security interests of the United States"); Carriage Vessel Overhaul, Repair, and Maintenance, 73 Fed. Reg. at 70,911 (providing that "[t]he objective of the rule is to maintain a strong national ship repair industrial base" and "have a positive effect on entities owning domestic shipyards, by encouraging the use of those shipyards"). That is not to say, however, that the agency may not take into account competition as well.

Indeed, as stated previously, neither the statute nor the DFARS provision requires DoD to maintain the national defense industrial base to the maximum extent possible or at the expense of all other evaluation considerations. Rather, as the legislative history demonstrates, Congress expected DoD to consider DSU "similar to other considerations such as cost, schedule, capability to perform the carriage, and other independently weighted factors." H.R. Rep. No. 109-702, at 807-08. See also Carriage Vessel Overhaul, Repair, and Maintenance, 73 Fed. Reg. at 70,910 (explaining that "[t]he decision as to the relative value of the evaluation criterion is appropriately the responsibility of the source selection authority"). In short, DSU is but one of many factors an agency may consider, including competition.

Having concluded that the agency's general methodology, i.e., balancing DSU and competition, was reasonable, we now consider whether the agency's selected evaluation criterion, i.e., a 25 percent DSU threshold, is rational under the circumstances here. We find that it is.

The protester argues that such a low threshold effectively nullifies the preference and thwarts the intent of Congress. Protest at 6-7; Protester's Comments at 3. The protester asserts that, because the threshold is so low as to render all offerors eligible to receive the preference, no offeror receives any competitive advantage. Protester's Resp. to 1st GAO RFI, Feb. 15, 2019, at 1-2, 6. The protester further argues that the result of such a low threshold is to encourage offerors to move more work to cheaper overseas shipyards to the detriment of the domestic industrial shipyard base. Id. at 2.

We find nothing objectionable in the agency's decision to set the DSU threshold initially at a level where all current offerors would likely be eligible for the preference and to gradually raise the threshold in future fiscal years to encourage offerors to maintain and/or increase their DSU. In this regard, neither the statute nor the DFARS provision indicates an intent to create a scheme in which some offerors must receive a competitive advantage. Further, while it is true that setting the threshold at 25 percent opens the door to the possibility that an offeror, such as Curtin Maritime, could lower its percentage of DSU and still achieve the threshold, the record before us fails to establish

a correlation between the inclusion of the 15 (or 25) percent threshold in MSC solicitations and a decrease in DSU.[18]

Finally, the data furnished by the agency showing that, in 2018, all offerors possessed DSU percentages close to or above 50 percent, raises the question of whether the agency could have set the initial threshold even higher without significant impact on competition. The agency represents that DSU "can be dynamic" making it difficult to predict percentages in the future. Agency Resp. to 2d GAO RFI at 3. In light of the agency's concerns regarding competition, we find the decision to increase the threshold to 25 percent to be reasonable.

The protest is denied.

Thomas H. Armstrong
General Counsel

[18] This is an aspect of the preference, however, that the agency may wish to consider in the future.