U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: American Energy Logistics Solutions LLC

File: B-417844.3

Date: July 23, 2020

Daniel P. Graham, Esq., John M. Satira, Esq., and Peter T. Thomas, Esq., Vinson & Elkins LLP, for the protester.
Bryant E. Gardner, Esq., Zachary B. Cohen, Esq., and Allison Skopec, Esq., Winston & Strawn LLP, for Schuyler Line Navigation Company, LLC, the intervenor.
Yevgeniy P. Malashenok, Esq., and Louise E. Hansen, Esq., Defense Logistics Agency, 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

Protest challenging a determination that the protester was nonresponsible is denied where the contracting officer's judgment that protester did not have adequate financial resources to perform, or ability to obtain them, was reasonably based.

DECISION

American Energy Logistics Solutions LLC (AELS), of New York, New York, protests the award of a contract to Schuyler Line Navigation Company, LLC, of Annapolis, Maryland, under request for proposals (RFP) No. SPE604-18-R-0406, issued by the Defense Logistics Agency (DLA) for the supply and delivery of liquefied natural gas (LNG) to the Naval Station Guantanamo Bay, Guantanamo Bay, Cuba. The protester challenges the agency's finding that AELS was not responsible because the firm lacked adequate financial resources to perform the contract, or the ability to obtain them.

We deny the protest.

BACKGROUND

The RFP was issued on June 8, 2018, pursuant to the procedures set forth in Federal Acquisition Regulation (FAR) part 15, for the supply and delivery of an estimated 2,252,171 million British Thermal Units of LNG. Agency Report (AR), Tab 21, RFP at 3;

Tab 29, RFP amend. 7 at 2.[1] The solicitation contemplated the award of a fixed-price requirements contract for a 5-year period beginning in March 2021. RFP at 3; RFP amend. 7 at 2. The RFP established that award would be made to the responsible offeror with the lowest-price, technically acceptable (LPTA) proposal, based on three evaluation factors: technical capability, past performance, and price.[2] RFP at 80-81.

Three offerors, including Schuyler and AELS, submitted proposals by the October 15 closing date.[3] The agency completed its evaluation on July 25, 2019, and found AELS to be nonresponsible based on a lack of adequate financial resources to perform the contract, or the ability to obtain them. COS/MOL, B-417844, B-417844.2, Sept. 11, 2019, at 11. On July 30, the agency made contract award to Schuyler. *Id.* at 12.

On August 12, AELS filed a protest with our Office challenging DLA's nonresponsibility determination. On September 27, DLA decided to take corrective action by re-opening discussions with AELS and Schuyler, evaluating offerors' revised proposals, and making a new selection decision. We then dismissed the earlier AELS protest as academic. *American Energy Logistics Sols., LLC*, B-417844, B-417844.2, Oct. 3, 2019 (unpublished decision).

The agency thereafter conducted discussions, accepted revised proposals, and completed its reevaluation by April 3, 2020, with the final evaluation ratings and prices of the Schuyler and AELS proposals as follows:

	Schuyler	**AELS**
Technical Capability	Acceptable	Acceptable
Past Performance	Acceptable	Unknown/Acceptable[4]
Price	$44,725,444	$33,797,565

[1] The RFP was subsequently amended seven times. Unless specified otherwise, all citations are to the final version of the solicitation.

[2] An LPTA source selection process is one in which all non-price factors are evaluated for acceptability (*e.g.*, acceptable or unacceptable), and among those proposals determined to be technically acceptable in all regards, award is made on the basis of the lowest evaluated price. FAR 15.101-2.

[3] The third offeror subsequently withdrew from the competition. Contracting Officer's Statement and Memorandum of Law (COS/MOL), B-417844, B-417844.2, Sept. 11, 2019, at 2 n.2.

[4] The agency determined that AELS was a new company without a record of relevant past performance and, for purposes of this LPTA procurement, was to be rated as "acceptable" under this evaluation factor COS/MOL, B-417844, B-417844.2, Sept. 11, 2019, at 4; *see also* FAR 15.305(a)(2)(iv).

AR, Tab 15a, Source Selection Evaluation Board Report at 1.

The contracting officer, however, determined once again that AELS was not responsible and, thereby, ineligible for contract award. AR, Tab 14, AELS Nonresponsibility Determination, Apr. 3, 2020, at 1-3.

On April 3, the contracting officer, who served as the source selection authority, selected Schuyler for award. AR, Tab 15b, Source Selection Decision Document at 1-2. After providing AELS with notice of award to Schuyler on April 9, and a debriefing on April 17, this protest followed.

DISCUSSION

AELS challenges the agency's nonresponsibility determination. The protester alleges that it is financially responsible and has affirmatively demonstrated to DLA that it has access to adequate financial resources to perform the contract, and that the agency's "determination to the contrary is arbitrary, capricious, and not in accordance with the law." Protest at 10. Had DLA performed a proper responsibility determination, AELS argues, it would have been selected for award. *Id.* at 12. Although we do not address every argument raised by the protester, we have considered them all and find no basis on which to sustain the protest.

The assessment of AELS's financial responsibility has been an extensive one. As a preliminary matter, it is important to note that AELS's proposal stated it was a new entity created by its parent company, the New Fortress Energy Group (NFE), and that the offeror would rely upon the resources--including financial resources--of its parent company to perform the subject contract. AR, Tab 30, AELS Proposal at 4; *see also* Protest at 3-8.

DCMA Preaward Surveys

On February 12, 2019, as part of the evaluation of initial proposals, the contracting officer requested that the Defense Contract Management Agency (DCMA) perform a financial preaward survey of AELS. COS/MOL, B-417844, B-417844.2, Sept. 11, 2019, at 4. On April 16, DCMA completed its preaward survey and recommended against award to AELS, finding the financial capabilities of AELS and its parent NFE to be unsatisfactory. *Id.* at 4-5. On May 20, at AELS's urging, the contracting officer requested that DCMA conduct a second preaward survey, in light of new information submitted by AELS.[5] *Id.* at 6-7. DCMA completed its second preaward survey on May 31 and again recommended against award to AELS. *Id.* at 7.

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[5] At the time, AELS had provided DLA with additional documents that included a guaranty agreement (DCMA Form 1620) from its parent, NFE, as well as NFE's financial statement filings with the U.S. Securities and Exchange Commission (SEC). COS/MOL, B-417844, B-417844.2, Sept. 11, 2019, at 6.

Thereafter, on June 14, the contracting officer reopened discussions with offerors and, as part of its discussions, AELS was provided the opportunity to submit additional financial information addressing the agency's concerns that NFE had a negative working capital balance. *Id.* at 10. Final proposal revisions were due on July 11. Based on all the information provided, the contracting officer determined AELS to be nonresponsible on July 25. *Id.* at 11-12.

On October 4, as part of the agency's corrective action in response to AELS's first protest, the contracting officer reopened discussions with both offerors. COS/MOL at 2. During discussions, AELS responded to the DLA-identified deficiencies and weakness, and offered to obtain a $10 million letter of credit exclusively for this contract if selected for award. *Id.* AELS also subsequently provided to DLA a "Letter of Credit and Reimbursement Agreement" between Morgan Stanley Bank and NFE, which stated as follows:

> NFE . . . has advised Morgan Stanley Bank, N.A. . . . that in the event [NFE] is awarded a contract pursuant to Solicitation No. SPE60418R0406 (the "Contract") and a letter of credit is expressly required under the Contract, [NFE] shall be required to obtain, and [Morgan Stanley] hereby agrees to issue, subject to the terms and conditions set forth herein, such irrevocable standby letter of credit (the "Letter of Credit") in favor of The Defense Logistics Agency (the "Beneficiary"), which Letter of Credit shall be in a form to be mutually agreed and to not exceed an aggregate principal amount of $10,000,000.

AR, Tab 9b, NFE Letter of Credit and Reimbursement Agreement, Oct. 28, 2019, at 1.

On October 18, the contracting officer requested that DMCA perform a third preaward survey of AELS, in light of the NFE letter of credit; DCMA in turn requested additional financial information from AELS. COS/MOL at 2.

On December 19, DCMA completed the third preaward survey of AELS. Even considering all the newly submitted information such as the NFE guaranty agreement, the letter of credit, NFE's consolidated financial statements obtained from the SEC, and other information provided by AELS regarding NFE's banking and financial arrangements, DCMA still found the offeror's financial capabilities to be "unsatisfactory." AR, Tab 10, DCMA Preaward Survey of AELS, Dec. 19, 2019, at 1.

As part of its third preaward survey, DCMA conducted a detailed review of NFE's consolidated financial statements (*e.g.*, balance sheets, statements of income, statements of cash flow) for NFE's fiscal years (FY) 2016, 2017, 2018, as well as the interim 2019 "year to date" (YTD), which disclosed the following:[6]

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[6] The record reflects that NFE's fiscal year corresponds to the calendar year and ends on December 31 of each year. The YTD period ran from January 1 to September 30, 2019. AR, Tab 10, DCMA Preaward Survey of AELS, Dec. 19, 2019, at 4-5.

	FY Ending 31 Dec 16	FY Ending 31 Dec 17	FY Ending 31 Dec 18	YTD Ending 30 Sep 19
	(In Thousands $)			
Cash/Cash Equivalents[7]	NP[8]	84,708	78,301	178,187
Working Capital	NP	122,854	(250,975)	(282,187)
Current Assets	NP	154,953	153,780	316,828
Total Assets	NP	381,190	699,402	1,147,783
Current Liabilities	NP	32,099	404,755	599,015
Total Liabilities	NP	102,280	416,755	727,385
Net Worth	NP	278,910	282,647	420,398
Net Sales	21,395	97,262	112,301	119,373
Operating Income/(Loss)	(27,058)	(24,990)	(58,488)	(151,022)
Net Income/(Loss)	(32,926)	(31,671)	(78,076)	(165,949)
Cash Provided/(Used) by Operations	(43,493)	(54,892)	(93,227)	(154,761)

Id. at 5.

As part of its review, DCMA found that NFE had a working capital deficit of $251 million ($154 million in current assets less $405 million in current liabilities) as of December 31, 2018, indicating that current liabilities were not adequately offset by current assets. *Id.* DCMA also noted that as of September 30, 2019, NFE's working capital deficit had grown to $282 million ($317 million in current assets less $599 million in current liabilities). *Id.* at 5-6. DCMA also found that while NFE's net worth had increased by $141 million between FY 2017 and FY 2019 YTD, this was primarily due to the $268 million in proceeds from NFE's February 4, 2019, initial public offering, offset by current year net losses. *Id.* at 6.

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[7] "Current Assets" represents assets that are expected to be converted to cash, sold, or consumed in operations within 1 year of the balance sheet date. AR, Tab 10, DCMA Preaward Survey of AELS, Dec. 19, 2019, at 5. "Current Liabilities" represents liabilities expected to be payable within 1 year of the balance sheet date. *Id.* "Working Capital" represents current assets less current liabilities. *Id.* "Net Worth" represents total assets less total liabilities. *Id.* at 6. "Operating Income/(Loss)" represents "Net Sales" less the cost of sales. *Id.* "Net Income/(Loss)" represents the amount a company has earned or lost after subtracting all of the expenses of producing its goods or services from the income it has realized from sales of those goods or services, and would include non-sales related expenses such as interest costs. *Id.*

[8] "NP" stands for "not provided," and numbers in parentheticals represents a negative value on a financial balance sheet. *Id.* at 5.

DCMA also found that NFE had generated negative cash flows from its operating activities (as represented in the table by "cash provided/(used) by operating activities") from FY 2016 to FY 2019 YTD. *Id.* DCMA noted that a "successful business typically generates most of its cash from day-to-day operations." *Id.* DCMA also found that NFE had not demonstrated profitability for FY 2016 through FY 2019 YTD, as NFE had both operating losses and net losses in each reporting period during this time.[9] *Id.*

DCMA also examined NFE's "gross profit margin," as an indicator of a "company's financial health by revealing the proportion of money left over from Net Sales after accounting for the Cost of Goods Sold or Cost of Sales," and found that it had decreased to -3.23% for FY 2019 YTD.[10] *Id.* DCMA also considered NFE's "operating margin" (operating income/loss divided by net sales), as "an indicator of a company's earning power from its current operations," and found that NFE's operating margin had remained negative from FY 2016 to FY 2019 YTD (*e.g.*, $151 million operating loss ÷ $119 million net sales = -126.51% operating margin for FY 2019 YTD). *Id.* DCMA also examined NFE's "net profit margin" (net income/loss divided by net sales), as it "represents the percentage of total Revenue that a company retains as profit after accounting for all expenses . . . ," and found that it also had remained negative for the FY 2016 thru FY 2019 YTD reporting periods (*e.g.*, $166 million net loss ÷ $119 million net sales = -139.02% net profit margin for FY 2019 YTD). *Id.*

DCMA also performed various financial ratio analyses of NFE's FY 2019 YTD reporting period. DCMA determined that NFE's "quick ratio" (*i.e.*, cash, cash equivalents, and receivables divided by current liabilities) was 0.36, which was unfavorably below the 1.0 ratio preferred by financial institutions.[11] Further, DCMA found that NFE's "current ratio" (*i.e.*, current assets divided by current liabilities) was 0.53, which was unfavorably below the 2.0 ratio preferred by financial institutions.[12] Lastly, DCMA determined that

[9] "Operating Income/Loss is a measure of a company's earning power from ongoing operations," and "Net Income/Loss is the amount a company has earned/lost after subtracting all of the expenses of producing its good or services from the income or revenue it has realized from sales of those good or services." AR, Tab 10, DCMA Preaward Survey of AELS, Dec. 19, 2019, at 6.

[10] NFE's direct cost of sales are not included within the above-referenced table.

[11] The quick ratio reflects the degree to which a company's current liabilities are covered by its most liquid current assets. Any time the quick ratio is at least 1.0, the business is said to be in a liquid condition. *Id.*

[12] The current ratio is an indicator of a firm's ability to service its current obligations. The higher the current ratio, the more likely the company will be able to meet its liabilities. *Id.*

NFE's "total liabilities to net worth" ratio was 1.73, which was unfavorably above the 1.0 ratio preferred by financial institutions.[13] *Id.*

After completing all its analyses, DCMA concluded as follows:

> [W]e do not find the Guarantor [NFE] to be financially capable of supporting the Offeror [AELS], if necessary, in [AELS's] efforts to complete Solicitation No. SPE604-18-R-0406. We find [NFE's] $282 million Working Capital deficit as of 30 September 2019, along with its potential $10 million Letter of Credit, and other factors detailed in the narrative of this report, insufficient to support [AELS], if necessary, in [AELS's] effort to complete a contract award made to [AELS] under the subject Solicitation. . . . In our opinion, [NFE] has not successfully demonstrated, as required by FAR 9.104-1(a), that it has the financial resources, or the ability to obtain them, to fund additional contracting requirements . . . over a 5-year period of performance as well as support [its] current operational needs.

Id. at 4.

On January 17, 2020, after being informed of the DCMA preaward survey results, AELS then submitted more information to the contracting officer. COS/MOL at 6. Specifically, AELS informed DLA that, as of January 13, NFE had secured a new $800 million loan which was to be used for, among other things, paying off an existing $500 million loan, and thereby positively affecting NFE's working capital balance.[14] *Id.*; AR, Tab 11b, AELS Letter to DLA, Jan. 17, 2020, at 1-2.

Negative Responsibility Determination

On April 3, the contracting officer determined AELS to be nonresponsible. AR, Tab 14, AELS Nonresponsibility Determination, Apr. 3, 2020, at 1-3. The contracting officer began by reviewing and accepting the results of the most recent DCMA preaward

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[13] The "total liabilities to net worth" ratio quantifies the relative size of the claims, or liabilities, of creditors as compared to the equity of the owners. The greater the ratio, the less protection there is for creditors. *Id.*

[14] NFE's financial statements indicate the company had a $493 million loan due on December 31, 2019, and that on December 30, this loan was extended by 3 weeks, until January 21, 2020. AR, Tab 11b, AELS Letter to DLA, Jan. 17, 2020, at 1-2, 5, 14; Tab 19, NFE Form 10-K Filing, Dec. 31, 2019, at 90. NFE's new $800 million loan, obtained on January 13, was used in part to pay off its existing loan. AR, Tab 11b, AELS Letter to DLA, Jan. 17, 2020, at 5. Additionally, as the new loan was not due until January 10, 2023, NFE did not account for it as part of current liabilities (*i.e.*, liabilities expected to be payable within 1 year), but as part of its total liabilities. *Id.* at 5; Tab 19, NFE Form 10-K Filing, Dec. 31, 2019, at 90. This in turn increased the company's working capital amount (*i.e.*, current assets less current liabilities).

survey of AELS, *e.g.,* that AELS guarantor NFE: (1) had a $251 million working capital deficit as of December 31, 2018; (2) that the $10 million letter of credit NFE stated it would obtain if awarded the contract did not mitigate the risk posed by the NFE's large working capital deficit; (3) that NFE had not demonstrated profitability for FY 2016 thru FY 2019 YTD; and (4) that all financial analyses ratios for NFE were unfavorable ones. *Id.*

The contracting officer also considered the new information provided by AELS after completion of the third DCMA preaward survey, including NFE's $800 million loan. *Id.* Here the contracting officer found that the new loan did not substantially improve the financial issues highlighted by DCMA. *Id.* at 3. First, the contracting officer noted that "$492,762,000 of the new loan went towards paying off an existing term loan facility, with the remainder . . . being 'used to fund the development and construction of New Fortress's energy infrastructure projects around the world….'" *Id.*, *citing* AR, Tab 11b, AELS Letter to DLA, Jan. 17, 2020, at 1-2. The contracting officer concluded that the balance of NFE's new loan therefore represented "construction in progress," rather than cash, as NFE's balance sheet suggested. *Id.* The contracting officer also determined that the new loan would further reduce NFE's available cash flow by incurring an even larger debt instrument than it had previously. *Id.* at 3. This in turn would decrease NFE's net income, "which has been negative for the entire duration of the company's existence." *Id.* Lastly, the contracting officer found that the new loan further worsened NFE's "total liabilities to net worth" ratio, which reflected how well a company can absorb losses without reducing its ability to service current debt. *Id.* The contracting officer concluded that the ratio here "continues to illustrate a trend discussed in all three [DCMA] pre-award surveys, namely that AELS's financial position, and the position of its parent, are becoming higher risk over time." *Id.*

Ultimately, "[h]aving afforded AELS multiple opportunities to support its financial responsibility and having reviewed all of the information submitted by AELS to that effect, in accordance with FAR 9.105," the contracting officer determined that AELS was non-responsible on the basis of financial capability.[15] *Id.*

Challenges to Negative Responsibility Determination

It is an axiom of federal contracting law that contracts may only be awarded to responsible prospective contractors. FAR 9.103(a); *CapRock Gov't Sols., Inc. et al.*, B-402490 *et al.*, May 11, 2010, 2010 CPD ¶ 124 at 26. To be determined responsible, a prospective contractor must, among other things: "[h]ave adequate financial resources to perform the contract, or ability to obtain them." FAR 9.104-1(a); *see*

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[15] Subsequent to the filing of the present protest, AELS again submitted additional financial information for DLA to consider. COS/MOL at 6-7. The contracting officer reviewed the information and concluded that AELS continued to be financially nonresponsible (*e.g.*, NFE continues to operate at a loss, its debt-to-equity ratio is unfavorable, and it has an $800 million loan that will mature in full in January 2023). *Id.* at 7.

TrailBlazer Health Enters., LLC, B-407486.2, B-407486.3, Apr. 16, 2013, 2013 CPD ¶ 103 at 12 (finding reasonable a contracting officer's nonresponsibility determination even though the offeror's net worth substantially exceeded the solicitation requirements). In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer must find that the firm is nonresponsible. FAR 9.103(b).

In making a negative responsibility determination, a contracting officer is vested with a wide degree of discretion and, of necessity, must rely upon his or her business judgment in exercising that discretion. *Kompania e Sigurimeve Eurosig Sh.a*, B-414561.2, B-414561.4, Jan. 9, 2018, 2018 CPD ¶ 21 at 4; *Torres Int'l, LLC*, B-404940, May 31, 2011, 2011 CPD ¶ 114 at 4. Although the determination must be factually supported and made in good faith, the ultimate decision appropriately is left to the agency, since it must bear the effects of any difficulties experienced in obtaining the required performance.[16] *Kompania e Sigurimeve Eurosig Sh.a*, *supra*. For these reasons, we generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the part of the agency or a lack of any reasonable basis for the determination.[17] *Id.*; *Bilfinger Berger AG Sede Secondaria Italiana*, B-402496, May 13, 2010, 2010 CPD ¶ 125 at 3.

Here, the record supports the reasonableness of the contracting officer's judgment that AELS was nonresponsible because it did not have adequate financial resources or the ability to obtain them. First, as discussed above, AELS's proposal stated it was a newly-formed company that would rely entirely upon its corporate parent, NFE, for the financial resources necessary to perform the subject contract. The record also reflects that the contracting officer provided AELS with repeated opportunities between February 2019 and January 2020 to demonstrate its financial responsibility.[18] The contracting officer also utilized the inputs of DCMA, which performed three preaward surveys to assess NFE's financial capabilities. As detailed above, DCMA identified numerous aspects of NFE's financial condition that supported the conclusion that NFE did not have satisfactory financial resources to fund additional contracting requirements in addition to supporting its current operational needs. AR, Tab 10, DCMA Preaward Survey of AELS, Dec. 19, 2019, at 4. Lastly, the contracting officer reasonably fully considered the new information which AELS provided after completion of the last DCMA preaward survey. *Id.* at 3. Thus, there existed a reasonable basis for the contracting

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[16] Additionally, contracting officers are "generally given wide discretion" in determining the amount of information that is required to make a responsibility determination. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1334-1335 (Fed. Cir. 2001); *see TrailBlazer Health Enters., LLC*, *supra* at 11.

[17] The protester states it does not allege that DLA acted in bad faith in finding AELS to be nonresponsible. Comments at 1 n.1.

[18] The contracting officer even elected to consider the additional information submitted by AELS after the filing of the protest here, but did not alter her conclusion that AELS continued to be financially nonresponsible. COS/MOL at 7.

officer to determine, as she did, that AELS was not financially responsible. *Kompania e Sigurimeve Eurosig Sh.a*, *supra*.

AELS argues the agency's nonresponsibility determination was unreasonable because it was principally based on NFE's alleged "working capital deficit" which the protester claims, NFE "simply does not have" in light of its new $800 million loan. Comments at 3. In support thereof, AELS cites to its January 17, 2020, letter to DLA claiming a $531 million positive improvement in its working capital position since September 30, 2019, as well as NFE's reported $108 million working capital balance as of December 31, 2019. *Id.*, *citing* AR, Tab 11b, AELS Letter to DLA, Jan. 17, 2020, at 1, Tab 19, NFE Form 10-K Filing (Dec. 31, 2019) at 71. Because the agency failed to adequately consider NFE's positive working capital, which far exceeds the value of the contract, AELS contends that the nonresponsibility determination was in error. We disagree.

We note, as a preliminary matter, it is questionable whether NFE's working capital position actually improved by December 31, 2019, as the protester asserts. As set forth above, the record reflects that NFE did not obtain the new $800 million loan, and pay off the existing $493 million loan, until January 13, 2020. Moreover, as of December 31, 2019, NFE's $493 million loan remained due within three weeks (January 21, 2020), and therefore appeared to represent a current liability of the company. As such, it is far from indisputable, as the protester claims, that NFE had a positive working capital balance as of December 31, 2019.[19]

Further, the record reflects that the contracting officer fully and reasonably considered all impacts of NFE's new $800 million loan as part of her responsibility determination. First, the contracting officer observed that a substantial portion of NFE's new loan was being used to pay off an existing loan, and therefore did not represent a current asset. Further, the contracting officer reasonably considered NFE's statement that the remaining balance of the new loan was being "used to fund the development and construction of [NFE's] energy infrastructure projects around the world" and, if used for such, would not improve NFE's current asset, and working capital, positions. AR, Tab 14, AELS Nonresponsibility Determination, Apr. 3, 2020, at 3, *citing* AR, Tab 11b, AELS Letter to DLA, Jan. 17, 2020, at 1-2. Additionally, the contracting officer also took into account the potential impacts of NFE's new loan on the company's future cash flow, earnings, net income, and debt-to-worth ratio. *Id.* While AELS argues that the remaining new loan balance will be put "to productive, revenue-generating use," we find this amounts to mere speculation about future earnings and profits.

[19] Additionally, as the agency observes, NFE's new $800 million loan is due in full in January 2023, and will thus represent a current liability of the company (*i.e.*, payable within 1 year) beginning in January 2022, some 10 months into the performance of the 5-year contract here. COS/MOL at 8. This, the agency argues, makes NFE's current working capital surplus a temporary one. *Id.*

Lastly, as the protester itself recognizes, the record reflects that NFE's working capital balance was but one of many factors on which DLA relied when finding NFE financially nonresponsible. As set forth above, in addition to working capital balance, the DCMA preaward survey also found that NFE: (1) had generated negative cash flows from its operating activities from FY 2016 to FY 2019 YTD; (2) had not demonstrated profitability as shown by NFE's operating losses and net losses in each reporting period; (3) had a negative, and decreasing, gross profit margin for FY 2019 YTD; (4) had a negative operating margin for all reporting periods; (5) had a negative net profit margin for all reporting periods; and (6) had a quick ratio, current ratio, and "total lability to net worth" ratio for FY 2019 YTD that were all unfavorable as compared to those preferred by financial institutions. In sum, we find no merit in AELS's assertions that the agency failed to reasonably consider NFE's new loan or its impact on NFE's overall financial position, as part of its responsibility determination.

AELS also argues that the agency failed to adequately consider AELS's $10 million letter of credit. Comments at 5. Specifically, the protester contends that both DCMA and DLA unreasonably dismissed the letter of credit as inadequate to mitigate the risks allegedly posed by NFE's working capital deficit. *Id.* The agency responds that the offered letter of credit was fully considered, but that it did not overcome the negative aspects of NFE's overall financial position. COS/MOL at 8. The agency also explains that the letter of credit would not mitigate the risk of LNG supply disruption resulting from AELS's unsatisfactory financial capabilities. *Id.*

We find no merit to the protester's assertion here. First, AELS did not, in fact, obtain or provide to DLA a letter of credit. Rather, AELS provided only a letter of credit agreement, which promised to obtain a letter of credit if awarded the contract: "in the event [NFE] is awarded a contract pursuant to Solicitation No. SPE60418R0406 . . . and a letter of credit is expressly required under the Contract, [NFE] shall be required to obtain, and [Morgan Stanley] hereby agrees to issue . . ., such irrevocable standby letter of credit . . . ." AR, Tab 9b, NFE Letter of Credit and Reimbursement Agreement, Oct. 28, 2019, at 1. AELS's promise to obtain a letter of credit if awarded the contract indicates a misunderstanding of the concept of responsibility and puts the cart before the proverbial horse. An offeror is required to demonstrate its responsibility before, not after, contract award. FAR 9.103(b) ("No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility"); *see Baurenovierungsgesellschaft, m.b.H.*, B-220809.2 *et al.*, Aug. 5, 1986, 86-2 CPD ¶ 145 at 2 ("an affirmative responsibility determination is a pre-requisite to any contract award").

Further, the record reflects the agency reasonably considered AELS's offered letter of credit in the context of NFE's overall financial position. As set forth above, the record reflects that DLA found AELS's potential $10 million letter of credit, together with NFE's working capital deficit (as of 30 September 2019) and other general financial conditions insufficient to support AELS if necessary in its effort to complete the contract. AR, Tab 14, AELS Nonresponsibility Determination, Apr. 3, 2020, at 2-3. Quite simply, the agency did not disregard AELS's letter of credit as the protester contends, but neither did the agency consider the offered letter of credit to be the “silver bullet” that remedied NFE’s many identified financial shortcomings.

In sum, while AELS repeatedly focuses upon the size of the contract here as compared to NFE’s overall corporate assets, the contracting officer instead reasonably determined that NFE had not successfully demonstrated that it possessed the financial resources to fund the contract here as well as support all its other operational needs and corporate liabilities. Further, as AELS possessed no financial resources of its own, and planned to rely upon parent NFE for financial support, the contracting officer reasonably determined that AELS was not financially responsible.

The protest is denied.

Thomas H. Armstrong
General Counsel