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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Southern Scrap Material Company

File: B-401059

Date: April 29, 2009

Marc C. Hebert, Esq., Stanley A. Millan, Esq., and Michael C. Drew, Esq., Jones, Walker, for the protester.

Janis P. Rodriguez, Esq., and Ryan Kabacinski, Esq., U.S. Maritime Administration, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that liquidated damages provision in solicitation for ship sale/dismantlement is improper because agency profits from sales program, and thus suffers no loss from breach, is denied where agency reasonably determined that it will suffer damages as a result of delayed performance; fact that program under which contract is issued generates revenue is irrelevant to propriety of provision.

DECISION

Southern Scrap Material Company, of New Orleans, Louisiana, challenges the inclusion of a liquidated damages provision in solicitation No. SDPEXC-08001, Announcement 12_22_08, as amended on January 16, 2009, issued by the U.S. Maritime Administration (MARAD) for a contractor to purchase and dismantle certain “non-retention” vessels held in the National Defense Reserve Fleet. Southern maintains that liquidated damages provisions are inappropriate for sales contracts such as this.

We deny the protest.

The solicitation requests offers to purchase, dismantle, and dispose of specific listed vessels; the financial incentive for a contractor to perform this contract is retention of the proceeds of recycled materials. Agency Report (AR) at 20. In responding to the solicitation, offerors were required to propose a schedule that included, among other things, remediation of hazardous wastes and dismantling the ship. Solicitation at 6. The solicitation includes a liquidation damages provision stating that the contractor will be liable for damages in the amount of \$600 for each day of delayed

performance, unless the time period for performance has been extended.¹
Solicitation Amendment.

Southern principally maintains that liquidated damages are inappropriate where, as here, a sales contract is to be awarded. According to Southern, since the agency is paid for the vessel under the sales contract, and the sales program as a whole generates revenue for the government, there is no basis for the agency to be compensated for increases in program costs that result from performance delays by the contractor. This argument is without merit.

Liquidated damages are fixed amounts set forth in a contract at the time it is executed that one party to the contract can recover from another upon proof of violation of the contract terms, without the need for proof of actual damages sustained. Wheeler Bros., Inc., B-223263.2, Nov. 18, 1986, 86-2 CPD ¶ 575 at 6. Under Federal Acquisition Regulation (FAR) § 11.501(a), liquidated damages provisions are authorized where timely performance is so important that the government reasonably expects to suffer damages if there is a delay, and the extent of such damages is difficult to ascertain.²

We find nothing in the FAR standard or elsewhere—and the protester has cited no authority—that precludes an agency from including a liquidated damages provision in a contract simply because the program under which the contract is issued generates revenue from sales proceeds or otherwise. To the contrary, since a liquidated damages provision is part of a particular contract, the propriety of such a provision necessarily must turn on the circumstances surrounding that contract. See generally Integrity Mgmt. Int'l, Inc., B-260595, B-260595.2, June 27, 1995, 95-2 CPD ¶ 126 at 5 (liquidated damages to be assessed may properly consider losses beyond the reduced value of the services performed under the contract). Under the current solicitation, the contractor will be required to purchase the vessel, remediate hazardous wastes, and dismantle the vessel, in accordance with a schedule that the contractor proposes and to which the agency agrees. We see nothing inherent in the contract to be awarded—and, again, the protester cites nothing—that would make it legally impermissible for the agency to provide for recovery of liquidated damages

¹ The solicitation contains different liquidated damages provisions applicable to different aspects of performance. The only provision challenged here is that addressing delays by the contractor in dismantling the ships.

² Since, as a result of the sale, no appropriated funds will be used in connection with the contract to be awarded here, the FAR is not applicable. See FAR § 2.101. We consider the FAR only to the extent that it may provide useful guidance in the matter. See generally Alamo Aircraft Supply, Inc., et al., B-278215.4, Mar. 11, 1998, 98-1 CPD ¶ 76.

reflecting the monetary harm to the agency that will result if the contractor breaches the contract terms by delaying performance.

The record shows that the agency has determined that it will be harmed monetarily if the purchased vessel is not dismantled in accordance with the schedule under the contract. It has determined that \$600 per day reasonably reflects the measurable portion of that monetary harm (other more difficult to assess damages--in particular, environmental impact--are omitted from this amount).³ We find nothing objectionable in this provision addressing the eventuality of the contractor's delaying the dismantling of the vessels in violation of the terms of the contract. Again, the fact that the agency will receive proceeds from the sale of the vessel, or that the vessel sale/dismantlement program generates revenue for the government, has no bearing on the propriety of this liquidated damages provision.

The protest is denied.

Gary L. Kepplinger
General Counsel

³ While the agency calculated the \$600 liquidated damages amount with reference to actual pay rates, historical work efforts, and actual third party contract costs, it attributes the necessity for the provision to the need to ensure timely contract performance due to the "potential threats" the vessels pose to the environment until they are deconstructed. Determination and Finding, Tab 2A, at 1.