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Decision

Matter of: Wartsila Defense, Inc.

File: B-401224

Date: May 26, 2009

Daniel Weckstein, Esq., William M. Dozier, Esq., and Gretchen M. Baker, Esq., Vandeventer Black LLP, for the protester.

Scott E. Pickens, Esq., and Richard H. Streeter, Esq., Barnes & Thornburg LLP, for the intervenor.

Bryan H. Wood, Esq., and Robert Swennes, Esq., Office of Naval Research, for the agency.

Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly rejected protester's fixed-price proposal in research and development procurement is denied where the record shows that the agency reasonably determined that award of a cost-type contract was required.

DECISION

Wartsila Defense, Inc., of Helsinki, Finland, protests the Department of the Navy's decision not to award it a phase two research and development contract under Broad Agency Announcement (BAA) No. BAA06-011, for the development of a Compact High Power Density Waterjet.

We deny the protest.

The BAA contemplated a two-phase award process for the development and testing of a prototype waterjet to eventually be utilized in advanced Navy ships. For phase one, the solicitation required offerors to propose pump design, model fabrication, and a large-scale demonstration plan. Phase two required large-scale at-sea demonstrations and testing. The solicitation stated that "it is anticipated that ONR [Office of Naval Research] will award one or more Cost type contracts for this effort." BAA at 7.

Wartsila and one other firm received phase one contract awards under the solicitation. While the other firm received a cost-plus-fixed-fee contract as anticipated by the solicitation, ONR issued Wartsila a fixed-price contract because Wartsila did not have an accounting system approved by the Defense Contract Audit Agency (DCAA), and could not be awarded a cost-type contract. Agency Motion to Dismiss, Apr. 9, 2009, Contracting Officer's Affidavit, at 1. After Wartsila was awarded a fixed-price phase one contract, Wartsila suggested to ONR that it might submit a fixed-price proposal for the upcoming phase two award. In response, ONR stated by email that it "awarded the first contract as a FFP [firm-fixed-price] to allow Wartsila time to implement an approved accounting system. ONR will not award Phase II as a FFP contract." Id.

Phase two proposals consisted of a technical volume and a cost volume. Both Wartsila and the other phase one awardee submitted phase two proposals to the ONR program officer, who conducted the technical review. After this review the program officer selected both proposals for phase two contracts in accordance with the solicitation evaluation criteria. The program officer then forwarded the proposals to the contracting officer for a cost analysis and for contract negotiation.

The contracting officer encountered two major obstacles to an award to Wartsila. First, the contracting officer found that Wartsila's cost proposal did not provide the level of detail required by the solicitation, preventing the contracting officer from proceeding with the cost analysis. Second, although Wartsila's cost proposal stated that Wartsila could accommodate a fixed-price, time and materials, or cost-type contract award, the contracting officer found that Wartsila essentially insisted that the award be made on a fixed-price basis, and eventually determined that Wartsila was ineligible for a cost-type award.¹ Id. Negotiations between the contracting officer and Wartsila continued for several months, but were unsuccessful.

In March 2009, Wartsila discovered that a phase two award had been made to the other phase one contract holder on March 23. On March 26, Wartsila contacted the agency to request confirmation of the award and a post-award debriefing. The agency orally confirmed the award, but did not offer a debriefing. Wartsila then filed this protest with our Office on March 27.² Wartsila challenges the rejection of its

¹ In August 2008, the contracting officer contacted DCAA and was informed that Wartsila's accounting system had not been approved. DCAA stated that it would assign an auditor to complete the accounting system review, but after additional discussions, Wartsila decided not to submit to the audit. Wartsila was therefore ineligible to receive a cost-type contract award. See Federal Acquisition Regulation (FAR) § 16.301-3(a); A-TEK, Inc., B-299557, May 3, 2007, 2007 CPD ¶ 89.

² The agency initially filed a motion to dismiss on the ground that the protest was untimely because Wartsila knew or should have known in October 2008 that its proposal had been eliminated from the competition. We concluded that the

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proposal, arguing that the solicitation did not require submission of a cost-type proposal but merely stated that the agency anticipated making a cost-type contract award, and that the agency properly could consider Wartsila's fixed-price proposal.³

A fixed-price proposal generally may be considered by an agency notwithstanding that the agency otherwise indicated a preference for a cost-type award. See Warren Pumps, Inc., B-248145.2, Sept. 18, 1992, 92-2 CPD ¶ 187 at 4 n.3; Marine Mgmt. Sys., Inc., B-185860, Sept. 14, 1976, 76-2 CPD ¶ 241 at 6-7. As explained in FAR § 16.103(a), the agency's objective is to select a contract type that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance. Thus, while the FAR calls for the use of fixed-price contracts when the risk involved is minimal or can be predicted with an acceptable degree of certainty, it states that other contract types should be considered where a reasonable basis for firm pricing does not exist. FAR § 16.103(b)

More specifically, in the R&D context, the FAR states:

Although the Government ordinarily prefers fixed-price arrangements in contracting, this preference applies in R&D contracting only to the extent that goals, objectives, specifications, and cost estimates are sufficient to permit such a preference. The precision with which the goals, performance objectives, and specifications for the work can be defined will largely determine the type of contract employed. The contract type must be selected to fit the work required.

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communications purporting to inform Wartsila that its proposal had been rejected were unclear, and that Wartsila had timely filed its protest within 10 days of notice of the award of a phase two contract to another firm.

³ Throughout its protest Wartsila also asserts that it has a non-developmental product that is compliant with the solicitation and capable of performing the required functions. On that basis Wartsila contends that the agency is improperly procuring research and development (R&D) efforts where there is an existing product that will meet its needs, and is subsidizing Wartsila's competition. This argument essentially challenges the agency's R&D procurement approach, which was clearly stated in the BAA, and is untimely here. A protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1) (2009). To the extent Wartsila also argues that its technical proposal should have been more highly rated for this reason, Wartsila's technical ability is not in dispute here. As explained below, Wartsila's proposal was properly rejected after the contracting officer reasonably determined that a fixed-price contract could not be awarded for this effort.

FAR § 35.006(b); see also FAR § 35.006(c) (the use of cost-type contracts is usually appropriate in R&D procurements). Further, as relevant here, the Defense FAR Supplement (DFARS) prohibits the use of fixed-price contracts unless certain stated conditions are met, as follows:

For other than major defense acquisition programs—

(A) Do not award a fixed-price type contract for a development program effort unless—

- (1) The level of program risk permits realistic pricing;
- (2) The use of a fixed-price type contract permits an equitable and sensible allocation of program risk between the Government and the contractor; and
- (3) A written determination that the criteria . . . of this section have been met is executed.

DFARS § 235.006(b)(ii).⁴

Ultimately, selecting the appropriate contract type is the responsibility of the contracting officer, as informed by obtaining the recommendations of technical personnel. FAR § 35.006(b). The contracting officer's decision, as with any other exercise of discretion, must have a reasonable basis. Surface Tech. Corp., B-288317, Aug. 22, 2001, 2001 CPD ¶ 147 at 3. Here, we conclude that the contracting officer had a reasonable basis to conclude that the criteria set out in DFARS § 235.006(b)(ii) were not met and that a fixed-price contract therefore could not be awarded for this R&D procurement. As a result, we see no basis to object to the contracting officer's refusal to consider Wartsila's fixed-price proposal.

As explained above, during contract negotiations, the agency reminded Wartsila that ONR anticipated awarding cost-type contracts under the solicitation, and explained that "ONR considers sufficient uncertainties to be involved with any effort under this program to not allow for the use of a fixed-price contract." Wartsila Response, Apr. 15, 2009, Exh. 1, Email from ONR, Oct. 20, 2008. Further, the BAA for phase two describes a substantial development process leading up to at-sea demonstrations of a large-scale waterjet. BAA at 4. The record also includes an affidavit supplied by the program officer that explains the "uncertainties" involved in the procurement as they relate to the choice of contract type. The program officer states that some of the costs to the companies under the phase two contract could

⁴ The intervenor raised the issue of DFARS § 235.006(b)(ii) in its response to the agency's motion to dismiss. Wartsila argued that this issue involved the merits of the protest and therefore was not appropriate for consideration in the context of a motion to dismiss. We agreed with Wartsila that resolving this issue called for issuing a decision on the merits, and we determined that the record was sufficiently developed to do so.

not be reasonably quantified in advance. These costs include “ship hull modifications to accommodate instrumentation, such as sensors, needed to measure the prototype’s at-sea performance.” Agency Supplemental Submission, Apr. 21, 2009, Program Officer’s Affidavit, at 1. The program officer also states that he reviewed DFARS § 235.006(b)(ii) and concluded that “[t]he work needed to do detailed design, construction, delivery, and installation of a complete 21-22 megawatt large scale waterjet for at-sea testing on a candidate platform not yet constructed cannot be realistically priced at this time. Use of a fixed-price contract by any company for this effort would not permit an equitable and sensible allocation of program risk between the contractor and the Government.” Id. at 2.

In sum, based on the record here, we conclude that the contracting officer reasonably determined that the conditions required for the award of a fixed-price contract under DFARS § 235.006(b)(ii) were not present in this procurement and thus properly decided not to consider Wartsila’s fixed-price proposal for a phase two contract award.

The protest is denied.

Daniel I. Gordon
Acting General Counsel