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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Surface Technologies Corporation

File: B-288317

Date: August 22, 2001

Mary C. Sorrell, Esq., for the protester.

Veronica E. Murtha, Esq., Department of the Navy, for the agency.

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DIGEST

Contracting officer's determination to solicit proposals for the awards of cost-reimbursement, as opposed to fixed-price, contracts for the performance of shipboard preservation services was reasonable where, given the unpredictable nature of the variables associated with this type of work, cost-reimbursement contracts will allow the agency to work with contractors to achieve the solicitation's preservation requirements with maximum flexibility and minimal delays.

DECISION

Surface Technologies Corporation (STC) protests the cost-reimbursement terms of request for proposals (RFP) No. N00024-01-R-4050, issued by the Department of the Navy for shipboard preservation services. STC maintains that the contracting officer's determination to solicit proposals for the awards of cost-reimbursement, as opposed to fixed-price, contracts was unreasonable.

We deny the protest.

The RFP, issued on May 4, 2001, contemplated multiple awards of cost-plus-incentive fee/level-of-effort contracts for the base period and four 1-year option periods. Under the RFP, contractors will be required to perform state-of-the-art preservation services (coating removal, surface preparation, and coating application) on commissioned naval vessels (strategic and attack submarines, carriers, and other

surface ships) in ten designated ports.¹ The preservation services will be performed in interior and exterior shipboard spaces and on shipboard equipment in accordance with naval and industrial specifications and standards, as well as all applicable safety, security, health, and environmental laws and regulations. Any space or equipment within a ship, or above the exterior waterline, may be considered within the scope of a firm's contract (for example, tight and limited access spaces, spaces with access only up or down vertical ladders, a ship's superstructure, and masts). The services will be performed while a ship is in port, but is otherwise considered operational. The typical duration of a ship's port availability is approximately 3 weeks, although this time could vary greatly. RFP at 79.

The RFP stated that the awards would be made to the responsible offerors whose proposals were determined most advantageous to the government, technical evaluation factors and cost considered. The RFP required each offeror to have an accounting system adequate for determining costs applicable to a particular contract. The RFP advised that an offeror could be determined ineligible for award if its accounting system could not determine applicable contract costs.

Just prior to the closing time for receipt of proposals on July 9, STC filed this protest. (While STC did not submit a proposal, the agency's administrative report reveals that there was considerable competition in terms of the number of offerors participating in the procurement and the number of proposals received by the closing time.) STC, "an experienced firm fixed-price contractor . . . [which does not have] a proven cost accounting background," Protest at 2, argues that the award of fixed-price contracts is required here because the "risk involved [in performing shipboard preservation services] is minimal or can be predicted with an acceptable degree of certainty." Federal Acquisition Regulation (FAR) § 16.103(b). In making this argument, STC refers to prior fixed-price contracts, which it states included the same preservation requirements as contained in the current RFP.

¹ According to the contracting officer, the RFP requires more than simple "chipping and painting" as a layman might understand these terms. Rather, the requirement for private contractors (as opposed to fleet sailors) to provide shipboard preservation services includes using state-of-the-art surface preparation and coating application processes, procedures, equipment, and quality assurance methods. When applied properly, the new technology coatings are expected to last far longer than the old technology coatings applied by fleet sailors doing "the mundane tasks of 'chipping and painting.'" Agency Report (AR), Tab 13, Contracting Officer's (CO) Memorandum to File, at 1.

The selection of the appropriate contract type is committed to the sound judgment of the contracting officer. FAR § 16.103(a). We will review the contracting officer's determination as to contract type to ascertain whether that decision was reasonable. United Food Servs., Inc., B-220367, Feb. 20, 1986, 86-1 CPD ¶ 177 at 6. As relevant to this protest, FAR § 16.301-2 provides that "[c]ost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract."

In reaching his conclusion that cost-reimbursement, as opposed to fixed-price, contracts will provide the necessary flexibility to enable the agency to work with contractors to accomplish the RFP's preservation requirements in a timely manner, the contracting officer considered, as described above, that the specific conditions of a ship and its equipment often are not known until after the work actually begins and that the time during which a ship is in port and available for preservation work is subject to change. For example, under the RFP, contractors are required to handle and dispose of hazardous materials (asbestos, lead, and other toxic materials). The types of hazardous materials generated and the appropriate methods of disposal cannot be known until a specific job has begun. As another example, preservation priorities, including the assignment of particular labor category personnel, are subject to change should a ship need to be deployed on a different schedule than originally planned. AR, Tab 13, CO Memorandum to File, at 1-4.²

In circumstances such as these, where ship conditions and required work cannot be predicted in advance and where timely performance is critical, the contracting officer concluded that the award of fixed-price contracts would not be appropriate since the risks involved are not predictable with any acceptable degree of certainty and the costs of the work cannot be estimated with sufficient accuracy. Instead, the contracting officer concluded that cost-reimbursement contracts will allow the agency to work with contractors to achieve the RFP's preservation objectives with maximum flexibility and minimal delays. Id.

Other than disagreeing with the contracting officer's rationale, STC has offered no meaningful basis to question the reasonableness of the contracting officer's determination. In this respect, while STC, which concedes that it does not have a proven cost accounting background, argues that prior preservation requirements have been procured on a fixed-price basis and therefore risks can be predicted and costs can be estimated, we are unpersuaded by this argument since each procurement must stand alone. United Food Servs., Inc., supra, at 6. On this record,

² Contrary to the assertion of STC, the contracting officer's memorandum documenting his rationale for soliciting proposals on a cost-reimbursement basis was prepared in February 2001, prior to the issuance of the RFP.

we have no basis to question the reasonableness of the contracting officer's acquisition strategy.³

The protest is denied.⁴

Anthony H. Gamboa
General Counsel

³ In its August 6 comments on the agency's administrative report, STC argued for the first time that shipboard preservation services are "commercial items," as defined in FAR § 2.101, and, therefore, the agency was prohibited from procuring these services on anything but a fixed-price basis. See FAR § 16.301-3(b). However, it was clear from the face of the RFP that the agency was not conducting a "commercial item" acquisition. For example, the solicitation did not include mandatory provisions and contract terms for the acquisition of commercial items (i.e., instructions to offerors, offeror representations and certifications, and contract terms and conditions). FAR § 12.301. Thus, to the extent STC maintains that this procurement should have been a commercial item acquisition requiring the awards of fixed-price contracts, STC's post-closing time argument, which involves an alleged solicitation impropriety, is untimely and will not be considered by our Office. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2001).

⁴ In its initial protest, STC also challenged the RFP's evaluation scheme (specifically, that this scheme would unfairly favor offerors with prior experience in performing cost-type contracts) and the sufficiency of the amount of time afforded offerors to timely submit initial proposals after the issuance of amendment No. 11. In its administrative report, the agency addressed these matters. In its comments on the agency report, STC did not rebut the agency's positions. Accordingly, we deem these grounds for protest to be abandoned. See Heimann Sys. Co., B-238882, June 1, 1990, 90-1 CPD ¶ 520 at 4 n.2.