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## Decision

**Matter of:** Duke Engineering & Services, Inc.

**File:** B-284605

**Date:** May 17, 2000

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Michael R. Charness, Esq., David R. Johnson, Esq., and Robert J. Rothwell, Esq., Vinson & Elkins, for the protester.

William A. Shook, Esq., Kelly Doran, Esq., and Gary Campbell, Esq., Preston, Gates Ellis & Rouvelas, Meeds, for Foster Wheeler Environmental Corporation, an intervenor.

Gena E. Cadieux, Esq., Scott Van Lente, Esq., and Simon Martin, Esq., Department of Energy, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that agency made award to firm that improperly frontloaded its offer in violation of the National Defense Authorization Act for Fiscal Year 1998 and advance payment prohibition in 31 U.S.C. § 3324(a) (1994) is denied where record does not establish that the firm included costs for later phases of work in its price for initial contract work.

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### DECISION

Duke Engineering and Services, Inc. protests the proposed award of a contract to Foster Wheeler Environmental Corporation by the Department of Energy under request for proposals (RFP) No. DE-RP07-99ID13729, for the design, construction, operation and maintenance of an interim dry storage facility for spent nuclear fuel (SNF) at the agency's Idaho National Engineering and Environmental Laboratory. Duke maintains that the proposed award violates the advance payment prohibition in 31 U.S.C. § 3324(a) (1994) and an additional statutory provision that the protester reads as prohibiting frontloading.<sup>1</sup>

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<sup>1</sup> In its initial protest, Duke also maintained that the agency misevaluated technical proposals and improperly failed to engage in adequate discussions with Duke and, as a consequence, made an irrational cost/technical tradeoff in selecting Foster Wheeler  
(continued...)

We deny the protest.

## BACKGROUND

The RFP contemplated a four-phase project for the design, licensing, construction, and operation and maintenance of an interim facility for the dry storage of several different types of nuclear waste referred to generically as SNF. RFP at B-1. Under Phase I-A, the contractor is required to prepare its design and an application for a Nuclear Regulatory Commission (NRC) license for an SNF storage facility. Id. Under Phase I-B, the contractor is required to obtain the license from the NRC. Id. Under Phase II, the contractor is required to construct the facility. Id. Under Phase III, the contractor is required to place SNF that is currently stored elsewhere into the storage facility. Id. Under Phase IV (which is optional), the contractor is required to operate and maintain the facility for a period of time. Id.

The RFP required offerors to submit pricing using two different formats, depending on when the contractor would be paid for the work. One format (referred to in the record as pricing method 1) was to be based on the agency not paying the contractor for work done in any of the phases until completion of the work under that phase (with certain exceptions and conditions not relevant here); the second format, (referred to in the record as pricing method 2) was more conventional and assumed that the agency would provide progress payments throughout the course of the design and construction phases.

Pricing method 1, under which no progress payments are provided, reflects the provisions of section 3132 of the National Defense Authorization Act for Fiscal Year 1998 (the 1998 Act), Pub. L. No. 105-85, § 3132, 111 Stat. 1629, 2034 (1997), which provides, in relevant part, as follows:

(a) Authority to Enter Into Contracts.--The Secretary of Energy may, using funds authorized to be appropriated by [a particular section] for a project referred to in that section, enter into a contract that--

(1) is awarded on a competitive basis;

(2) requires the contractor to construct or acquire any equipment or facilities required to carry out the contract;

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(...continued)

for award. By letter dated March 20, 2000, Duke advised our Office that it did not intend to further pursue these assertions.

(3) requires the contractor to bear any of the costs of the construction, acquisition, and operation of such equipment or facilities that arise before the commencement of the provision of goods or services under the contract; and

(4) provides for payment to the contractor under the contract only upon the meeting of performance specifications in the contract.

This protest concerns the meaning and impact of paragraph (3), requiring the contractor to “bear any of the costs of the construction, acquisition, and operation” until “the commencement of the provision of goods or services.”

The RFP reflected the statutory provision by stating that payment for Phase I-A work (the design work and preparation of the license application) would be made in the form of a lump sum provided upon completion of Phase I-A.<sup>2</sup> During Phase II work (the construction work), the contractor would receive no payment for that construction work; instead, the contractor would be paid for the construction work only during performance of Phase III (through amortization of the Phase II price over a fixed quantity of units of SNF stored during Phase III). Work under Phase III (fuel handling, packaging, and storing) would be paid on a fixed-unit-price basis as the work was completed.

DOE received three offers, including Duke’s and Foster Wheeler’s. The agency evaluated the offers from a technical and price standpoint and engaged in discussions with all three firms. After discussions and the submission of proposal revisions, the agency assigned level of confidence assessment rating (LOCAR) scores (expressed as a decimal between 0 and 1, with 1 reflecting complete confidence and 0 reflecting no confidence) to each proposal. The scoring and prices (with rounded numbers) under pricing method 1 (as well as the independent government estimate) were as follows:

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<sup>2</sup> For reasons not relevant here, Phase I-B work was handled differently and priced on a cost-reimbursement basis, with the contractor being paid on a monthly basis. Department of Energy Report to Congress, “Spent Nuclear Fuel Dry Storage Project,” DOE-ID-10717, at 20.

	Duke	Foster Wheeler	Offeror C	Gov't Estimate
LOCAR Score	.6	.9	.6	n/a
Phase I-A	\$18.8M	\$67M	\$(DELETED)	\$22.3M
Phase I-B	\$(DELETED)	\$5.5M	\$(DELETED)	\$6.6M
Phase II	\$(DELETED)	\$113.9M	\$(DELETED)	\$131M <sup>3</sup>
Phase III	\$(DELETED)	\$30.8M	\$(DELETED)	\$43M
Total	\$(DELETED)	\$217.4M	\$(DELETED)	\$208M

Of significance for purposes of the protest, the agency concluded after its initial evaluation that the Foster Wheeler proposal appeared to be materially unbalanced as between its proposed Phase I-A price and its price for the balance of the contract, and DOE brought this matter to Foster Wheeler's attention during discussions. Contracting Officer's Memorandum to the File, Oct. 7, 1999. Foster Wheeler did not significantly alter its pricing structure in response to the agency discussion question (although it did lower its Phase I-A price by approximately \$(DELETED) and raise its Phase III price by (DELETED)). Instead, it provided the agency with a narrative justification for its apparently high Phase I-A price; essentially, Foster Wheeler represented that its Phase I-A price was higher because its technical approach involved a significantly more comprehensive effort during the design phase of the project. Foster Wheeler Proposal Revision, Sept. 16, 1999, Response No. 8.

In performing its final proposal evaluation and making its source selection decision, DOE continued to express concern that the Foster Wheeler proposal reflected unbalanced pricing. It nonetheless selected Foster Wheeler for award, finding the firm's narrative explanation regarding its high Phase I-A costs persuasive, and concluding that there was little risk in accepting Foster Wheeler's apparently unbalanced offer, since the agency intended to have the contract fully performed. Final Source Evaluation Board (SEB) Report, Nov. 5, 1999, at 11-12.

#### ALLEGATION

Duke contends that Foster Wheeler's proposed price for Phase I-A includes costs that are properly attributable to other phases of the project, and therefore includes an impermissible advance payment. Duke alleges that this expressly violates the requirements of the 1998 Act, because Foster Wheeler will be paid for work other than the Phase I-A work when it receives the lump-sum payment at the conclusion of Phase I-A, despite the fact that it will have tendered only the Phase I-A deliverable. Duke also maintains that the pricing structure of the Foster Wheeler proposal will

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<sup>3</sup> For Phase II, the government estimate included two different cost estimates, one based on the use of "vault" storage technology and another based on "pad" storage technology. [DELETED].

result in a violation of the more general proscription against advance payments under 31 U.S.C. § 3324(a).

In the protester's view, the 1998 Act places limits on how the agency can use certain funds, namely, the funds in its Defense Environmental Management Privatization Account (referred to below as "privatization account funds"). It is undisputed that the agency intends to use funds from that account to pay for Phase I-A and Phase II. Agency Report at 8. The agency argues that the use of the term "may" in the statute ("The Secretary of Energy may . . . enter into a contract") is permissive and therefore does not limit the agency's authority.<sup>4</sup>

We need not resolve this dispute because, as explained below, we conclude that the record does not establish that Foster Wheeler included costs for later phases of work in its price for Phase I-A. Accordingly, even if we accept, arguendo, the protester's interpretation of how the statute applies to the facts of this case, we still have no basis to sustain the protest.

Specifically, Foster Wheeler provided to our Office, and to the parties under a protective order, cost information supporting its own and its subcontractors' prices. Our Office then provided Duke the opportunity to review that information and to identify costs included in Foster Wheeler's Phase I-A price that the protester believes reflected costs that the awardee will actually incur during later phases of the work. We have considered each of these claimed costs and, while we recognize that Foster Wheeler's cost information may not be complete or unambiguous, we see nothing that establishes a violation of paragraph (3) of the statute, even under Duke's reading of the law.

For example, Duke points to the fact that Foster Wheeler included in its Phase I-A price [DELETED] of Phase I-A labor costs for its proposed project manager, scheduler, engineers, and other personnel, even though the awardee claimed that it would complete Phase I-A in [DELETED]. Protester's May 1, 2000 Submission at 3-4. We do not view the inclusion of [DELETED] work in Foster Wheeler's Phase I-A price as a violation of paragraph (3) of the statute, as interpreted by the protester. The investment of additional effort in Phase I-A is consistent with Foster Wheeler's response to the agency's discussion question regarding apparent unbalancing and with the agency's ultimate conclusion that Foster Wheeler's extra work up front could help ensure success in the project.

Duke also views Foster Wheeler's inclusion in its Phase I-A price of a [DELETED] profit percentage and a [DELETED] as evidence that the firm improperly included large amounts "not attributable to any cost" in that price. Duke also appears to find

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<sup>4</sup> We note that DOE also contends that the solicitation "comports with the described elements set forth" in the statute. Agency Report at 13.

objectionable Foster Wheeler's inclusion of financing costs in its Phase I-A price. Protester's May 1, 2000 Submission at 4. We see nothing in any of those charges that violates Duke's reading of paragraph (3) of the statute. Nothing in that provision precludes a contractor from including Phase I-A profit, [DELETED], or Phase I-A financing costs in its Phase I-A price. The reasonableness of those amounts may be a matter that the agency would wish to pursue in discussions, although, particularly in the context of Phase I-A's fixed-price basis, the agency was also free to limit its consideration to price reasonableness.<sup>5</sup>

Finally, Duke contends that the proposal of one of Foster Wheeler's subcontractors provides a "clear example" of non-Phase I-A costs that Foster Wheeler included in its Phase I-A price. Protester's May 1, 2000 Submission at 2. That proposal, actually a series of spreadsheets, included a breakdown of the subcontractor's prices for various parts of the work. In Duke's view, a reference on one of the spreadsheets to a particular line item of a statement of work establishes that the subcontractor was including costs for Phase II work, because that line item included, among other things, at least six tasks that Duke identifies as Phase II tasks. We find Duke's inference unsupported. The spreadsheet explicitly identifies the amount under the line item as covering Phase I-A work, and separately lists, on other spreadsheets, work under that line item for Phase I-B and Phase III work. Moreover, the Phase I-A spreadsheet includes the dates of anticipated performance, [DELETED], which are roughly consistent with the period of Phase I-A performance in Foster Wheeler's proposal. We conclude that the record does not establish frontloading by Foster Wheeler of the cost of later phases into its Phase I-A price.<sup>6</sup>

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<sup>5</sup> We understand why Duke focuses on the level of Foster Wheeler's profit on Phase I-A: if a firm could earn a substantial profit in that phase without violating the 1998 Act, it could use that profit to help finance later phases of the work. Duke has failed to establish, however, that anything in the 1998 Act prohibited the contractor from including profit (even a substantial profit) in its Phase I-A price or from using that profit to help finance later phases of the work.

<sup>6</sup> Duke also alleges that Foster Wheeler included in its Phase I-A price \$[DELETED] that a law firm which was to be one of Foster Wheeler's subcontractors identified as work to be performed later. Protester's May 1, 2000 Submission at 2. According to the protester, the law firm's proposal broke down the firm's price into phases corresponding to the phases of the RFP. Because the law firm included only \$[DELETED] under item 1.A. in its proposal, Duke contends that it was improper for Foster Wheeler's Phase I-A price to also include the \$[DELETED] that the law firm identified in item 2 of its proposal. We do not view the law firm's very skeletal "proposal" as establishing evidence of frontloading. It is not clear what the purpose of the \$[DELETED] under the firm's item 2 is; it is labeled "Corrective Action Program," without explanation. We see no basis to infer that it is work to be performed during Phase II, the construction phase, as the protester suggests.

As a final matter, we briefly address Duke's allegation that award to Foster Wheeler violated 31 U.S.C. § 3324(a), which provides that, with limited exceptions, "a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered." This "advance payment" prohibition does not, in our view, require that agencies seek cost data in the context of a fixed-price procurement, such as the one at issue here.<sup>7</sup> In any event, as indicated by our discussion above, we do not believe that DOE's payment of Foster Wheeler's proposed Phase I-A price entailed an advance payment.

The protest is denied.

Comptroller General  
of the United States

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<sup>7</sup> Where, as here, an agency has concern that an offeror's prices may be unbalanced between two or more line items, it would appear prudent for the agency to review the price for each line item for price reasonableness, something which DOE apparently did not do here. *Cf.* FAR § 14.404-2(f) (unreasonableness of price includes not only the total price of the bid, but the prices for individual line items as well). Such a price reasonableness determination is subject to protest. *See, e.g., Nomura Enter., Inc.*, B-271215, May 24, 1996, 96-1 CPD ¶ 253 at 2. Assuming that the determination could withstand review in a protest, there should be no basis for concern about a potential violation of the advance payment statute, since, if it is true that the government is paying a reasonable price for each of the various line items (and overall), it should also follow that the government is not paying more than the value of the good or service being provided under each of those line items (or overall).