



The Comptroller General
of the United States

Washington, D.C. 20548

Woods - PL

Decision

Matter of: Educational Computer Corporation

File: B-227078

Date: August 14, 1987

DIGEST

1. A bidder's failure in step two of a two-step sealed bid procurement to submit a price under a subitem that the agency included on the bidding schedule by mistake, and which consists of supplies already included on the schedule and priced by the bidder, does not render the bid nonresponsive.
2. Award may be made under a defective solicitation where award would satisfy the government's needs and no bidder would be prejudiced.

DECISION

Educational Computer Corporation (ECC) protests the proposed award of a contract to Fairchild Weston Systems, Inc., under invitation for bids (IFB) No. N61339-87-B-2017, issued by the Naval Training Systems Center, Orlando, Florida. The protester contends that Fairchild's bid is nonresponsive because it does not contain a price for one of the solicitation's line items. We deny the protest.

The IFB is the second step of a two-step, sealed bid procurement for precision gunnery training systems, associated support services and technical data for use by the Army and the Marine Corps. Basically, the purpose of the systems is to provide training in the use of DRAGON and TOW guided missiles without the expenditure of live ammunition. The basic requirement is for six instructor stations, three indoor student stations for each of the two weapons, and three outdoor systems for each weapon. The solicitation also provided for options that may be exercised through 1991, for up to 1,125 additional instructor stations and 2,650 additional student stations for the two Services. Three offerors qualified under the step-one request for technical proposals: Fairchild, ECC, and Teledyne Brown.

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The step-two IFB, as amended by amendment No. 1, required bidders to provide prices under option No. 5 in accordance with the following schedule:

Page 15:

<u>"ITEM</u>	<u>SUPPLIES/SERVICES</u>	<u>QTY</u>	<u>UNIT</u>	<u>UNIT PRICE</u>	<u>AMOUNT</u>
0052	Provisioned Items	XXX	XXX	XXX	XXX
0052AA	Spare/Repair Parts Instructor Station	3-10	LO	\$ _____	TBF
		11-20	LO	\$ _____	TBF
		21-30	LO	\$ _____	TBF
0052AB	Spare/Repair Parts Indoor Student Station - TOW	3-15	LO	\$ _____	TBF
0052AC	Spare/Repair Parts Instructor Station	3-10	LO	\$ _____	TBF
		11-20	LO	\$ _____	TBF
		21-30	LO	\$ _____	TBF"

Page 16 (headings omitted):

"0052AC	Spare/Repair Parts Indoor Student Stations - DRAGON	3-15	LO	\$ _____	TBF
0052AD	Spare/Repair Parts Outdoor System - DRAGON	3-15	LO	\$ _____	TBF
0052AE	Tools and Test Equipment - TOW	1-3	LO	\$ _____	TBF
0052AF	Tools and Test Equipment - DRAGON	1-3	LO	\$ _____	TBF"

Prior to the scheduled bid opening, a representative of ECC telephoned the agency to inquire about the repeat use of the designator 0052AC. The representative also noted that the subitems under item 0052 were designated in the schedule as 0052AA through 0052AF, while elsewhere in the solicitation item 0052 was described as consisting of subitems 0052AA through 0052AG. The agency's contract specialist replied that the repeat use of the designator 0052AC was an error, that the agency intended item 0052 to consist of subitems 0052AA through 0052AG, and that the item would be renumbered correctly after award. There is no indication in the record that the parties discussed the fact that what was described under the first subitem 0052AC on page 15 (spare/repair parts for the instructor station) was exactly the same as had been described under subitem 0052AA.

Fairchild submitted its bid on the forms provided, including the substitute pages 15 and 16 the agency had provided to the bidders by amendment No. 1, except that the first subitem 0052AC had been deleted entirely from the bottom of page 15. ECC inserted the same prices under this subitem as it had bid under subitem 0052AA. Teledyne did not quote prices under the first subitem 0052AC, but instead inserted the words "same as 0052AA." The agency entered all prices on the bid abstract exactly as shown on the bids. The agency then calculated a total evaluated price for each bidder, which included the option prices as provided in the solicitation. The evaluated prices were: Fairchild, \$20,110,719; ECC, \$39,467,371; and Teledyne, \$65,418,534. The evaluated prices include \$87,567 for ECC for the first subitem 0052AC but no amount for this subitem for the other two bidders.

The agency has decided to waive Fairchild's failure to submit a price for the first subitem 0052AC under Federal Acquisition Regulation (FAR) § 14.405, 48 C.F.R. § 14.405 (1986). This regulation provides for waiver of a defect in a bid where the effect of the defect on price, quantity, quality, or delivery is negligible when compared with the total cost of the supplies being procured, and waiver would not be prejudicial to other bidders. In making his determination, the contracting officer cited the difference of over \$19 million between the two lowest bids versus the \$87,567 ECC bid for the subitem that Fairchild omitted. The contracting officer also noted that subitem 0052AC on the bottom of page 15 was merely a duplicate of subitem 0052AA. The agency reports that subitem 0052AC should have read: "Spare/Repair Parts, Outdoor Systems-TOW" and says that the mistake in the IFB was an inadvertent, word processing error.^{1/} The remaining subitems should have been designated as 0052AD through 0052AG. The contracting officer reports that he received assurance from the project's logistics manager that the lack of an option to procure outdoor TOW spares under option No. 5 was inconsequential because the total requirement for such spares could be filled from other lots. The contracting officer also noted that if additional spares are needed, a reasonable price can be established

^{1/} At the conference on this protest the agency attributed the error to the use of a computer disk that had not been updated to reflect the numerous revisions made to the bidding schedule. The agency notes that changes intended to be made by amendment No. 1 were highlighted on the substitute pages of the bidding schedule. Subitem 0052AC at the bottom of page 15 was not highlighted.

based on Fairchild's prices for the same items under other options.

ECC argues that the agency should reject Fairchild's bid as nonresponsive. The protester contends that the failure to price the first subitem 0052AC cannot be waived as a minor informality under FAR § 14.405, essentially for two reasons. First, ECC says that the price impact here is not negligible since ECC's bid for the omitted item was \$87,567. Second, ECC argues that the omission also affects the quantity of items to be delivered.^{2/}

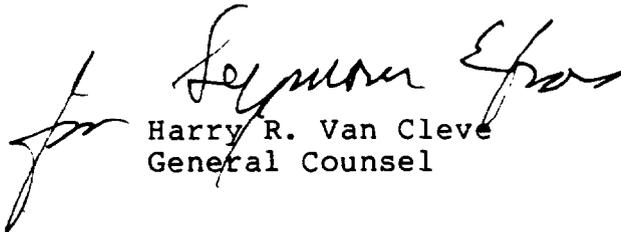
In our view, the protester's position is without merit. The essential premise of the protester's argument is that Fairchild failed to submit a price for a material requirement. This premise is not supported by the record, however, which shows that rather than creating a material solicitation requirement, the appearance of subitem 0052AC on the bottom of page 15 was purely a clerical error. The subitem, which did not appear on the IFB as originally issued, was not identified in the amendment as an intended change, duplicated a prior requirement, and carried a subitem designator that also appeared immediately on the next page. The agency says that it does not need a duplicate set of instructor station spares. Under these circumstances, we cannot conclude that subitem 0052AC on the bottom of page 15 was a material solicitation requirement such that a failure to price the subitem would render the bid nonresponsive. In this connection, we note that Fairchild did submit prices for the instructor station spares under subitem 0052AA.

Despite the protester's characterization, this matter actually involves not a defective bid but rather a defect in the solicitation. The schedule listed a subitem that the agency did not intend to include while omitting a subitem (option No. 5 outdoor TOW spares) that the agency did intend to include. The issue therefore is whether award nevertheless may be made under that solicitation. In this regard,

^{2/} Both the agency and Fairchild argue that we should dismiss ECC's protest as untimely because the error in the solicitation was apparent prior to bid opening yet ECC did not file its protest until after it learned that it was not the low bidder. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987). As we read ECC's protest, however, the firm is not complaining that the solicitation was defective. Rather, ECC's position is that submitting a price for subitem 0052AC on the bottom of page 15 was a material solicitation requirement and that Fairchild's bid was nonresponsive for failing to do so. This basis for protest is timely.

award may be made under a defective solicitation where the government would satisfy its needs and no bidder would be prejudiced. Fluid Systems, Inc., B-225880, Jan. 6, 1987, 87-1 CPD ¶ 20. Here, the agency has no current need for the omitted subitem, since it concerns an option exercisable in 1990, and the agency reports that it should be able to satisfy any need it ultimately may have for the outdoor TOW spares from other lots. We fail to see how the other bidders would be prejudiced by an award under the solicitation given the relatively minor value of the omitted subitem compared to the difference of over \$19 million between the lowest and second lowest bids.

The protest is denied.


Harry R. Van Cleve
General Counsel