The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fairchild Weston Systems, Inc.

File: B-230224.2

Date: December 19, 1988

DIGEST

1. Exclusion of proposal from competitive range was reasonable where proposed equipment did not comply, at a minimum, with critical specification requirements.

2. Protests involving alleged apparent solicitation defects are untimely filed with the General Accounting Office when initially filed months after closing date for proposals. Alleged earlier oral protests to contracting agency involving some of defects are not recognized under Federal Acquisition Regulation, 48 C.F.R. § 33.101 (1988).

DECISION

Fairchild Weston Systems, Inc., protests the rejection of its proposal under request for proposals (RFP) No. F04700-87-R-0119, issued to nine prospective offerors by the Flight Test Center, Edwards Air Force Base, California, for providing rack-mountable, wide-band instrumentation tape recorders with supporting manuals. The RFP required the supply of a brand name product (Racal Recorders, Inc., "Store House" model) or equal products that met listed "minimum specifications." These recorders (15 14-track units and 15 28-track units) are to be used in ground stations to record and store data transcribed from various on-board recorders on aircraft being tested. Data stored on tapes is routinely used at locations apart from the recorders. The Air Force will regularly use the recorders at remote field locations.

The RFP contemplated the award of a requirements contract on a fixed-price-per-recorder basis. Fairchild protests the Air Force's determination to eliminate its proposal from the competitive range based on the Air Force's finding that

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Fairchild failed to comply with four separate technical requirements of the RFP with respect to the 28-track recorders and one technical requirement with respect to the 14-track recorder.

We deny the protest in part and dismiss it in part.

The Air Force reports that the initial closing date (September 23, 1987), was changed several times to resolve specification problems but that initial proposals were finally received on February 16, 1988. The RFP, as amended prior to receipt of initial proposals, provided that descriptive literature of the apparent low offeror would be technically evaluated by the Air Force and that, should the Air Force determine the descriptive literature to be unacceptable, the offer would be rejected. Proposals were submitted by Racal and Fairchild as well as Honeywell, Inc., who earlier had filed a timely protest with our Office against allegedly restrictive specifications in the RFP. After we denied Honeywell's protest (Honeywell, Inc., B-230224, June 14, 1988, 88-1 CPD ¶ 568), the Air Force states it finally proceeded with technical evaluation of the three proposals in July 1988.

Honeywell's and Fairchild's proposals were both then found by the Air Force to contain areas that were not in compliance with the RFP requirements. The Air Force states that it then decided to schedule a "factfinding briefing and demonstration with all the offerors for the purpose of discussing technical deficiencies and [to allow all the offerors] to offer a validation demonstration." Honeywell declined to participate.

The Air Force then conducted "factfinding" with Racal on July 27, and subsequently found Racal's proposal to be acceptable. Thereafter, on August 2, the Air Force conducted "factfinding" with Fairchild. As a result of these discussions, Fairchild's proposal was still found not to be compliant with the RFP. The Air Force states that it then offered yet another briefing to Fairchild to discuss those proposal areas which were still not in compliance with the specifications, but Fairchild immediately filed a protest.

The Air Force found Fairchild's proposal to deviate from the RFP's specifications for both types of tape recorders in cross-setup (paragraph 4.2.3), and for the 28-track recorder in the area of physical requirements (portability, paragraph 5.1, size, paragraph 5.4, and weight, paragraph 5.5).

Fairchild essentially contends that the Air Force has either erroneously evaluated its proposal in these technical areas or has improperly restricted competition by setting forth specifications which improperly restrict competition.

The evaluation of proposals and the resulting determination as to whether an offeror is in the competitive range are matters within the discretion of the contracting activity, since it is responsible for defining its needs and for deciding on the best methods of accommodating them. Harbert International, Inc., B-222472, July 15, 1986, 86-2 CPD ¶ 67. Generally, offers that are unacceptable as submitted and would require major revisions to become acceptable are not for inclusion in the competitive range. Essex Electro Engineers, Inc., et al., B-211053.2 et al., Jan. 17, 1984, 84-1 CPD ¶ 74. Further, in reviewing an agency's evaluation, we will not reevaluate the technical proposals, but instead will examine the agency's evaluation to ensure that the evaluation was reasonable. Syscon Corp., B-208882, Mar. 31, 1983, 83-1 CPD ¶ 335. We find that the Air Force reasonably evaluated Fairchild's proposal as discussed below.

Cross-Setup

With regard to the cross-setup requirement, paragraph 4.2.3 of the RFP specifications stated in pertinent part:

> "4.2.3 Cross-Setup. To facilitate cross-play between similar systems, the recorder/reproducer shall provide cross-setup. Cross-play refers to reproducing a previously recorded tape on a recorder/reproducer other than that used to record the tape. Cross-setup refers to setting up the reproduce amplifiers in the reproducing system from parameters previously recorded on the tape by the recording system. Minimally, the following cross-setup functions shall be provided:
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> (1) Write the currently active setup parameters on the tape.
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> (2) Read the setup parameters from the tape and use them to set up the reproduce amplifiers." (Emphasis added.)

Fairchild admits that both of its recorders do not meet this section of the specifications, which requires the writing of parameters directly on the tape header.

Nevertheless, Fairchild argues that its substitute solution, which uses a plug-in module to record the tape parameters on a programmable memory chip, should be considered acceptable.

Although one of the Air Force's evaluators thought that Fairchild's alternate design satisfied the minimum performance requirement contemplated by the section, other Air Force evaluators, and the contracting officer, insisted that Fairchild's failure to comply literally with the design characteristic for recording on tape should result in Fairchild's proposal being found unacceptable in this area for both type of recorders. Even the Air Force evaluator who found Fairchild's alternate design to be minimally acceptable from a performance viewpoint shared the other evaluators' reservations about Fairchild's alternate method. Specifically, this evaluator stated that what the Air Force really wanted was to be able to store several sets of parameters concurrently in the recorder/reproducer but that Fairchild proposed a method that allowed the Air Force to change parameters by plugging in different memory modules. All the Air Force evaluators foresaw problems which would arise from the use of Fairchild's alternate method.

First, it was noted that the recorders would be used on certain test programs for the F-16 aircraft (and also on future F-15, C-130 and C-17 test programs). Under Fairchild's approach, a module must accompany every tape. This was seen by the evaluators as creating problems in the storage, transfer, and retrieval of modules in the F-16 program, which would routinely entail the shipment of tapes out-of-state, thereby greatly increasing the risk that modules might be inadvertently separated from tapes. This, in turn, raised the possibility that data might be rendered inaccessible. If data were to be inaccessible because of misplaced modules, Air Force missions would have to be reflown or if modules were misplaced confusion in readings would result.

Second, given the need for thousands of tapes and the associated need for thousands of modules for these programs, the Air Force estimated that the total life-cycle cost for purchasing additional modules from Fairchild above the eight "free" modules which Fairchild offered for each recorder would probably exceed $500,000. In view of these considerations, the Air Force rejected Fairchild's proposed substitute technical approach.

Fairchild argues that its modules have been used widely and none of the users has ever expressed concern, as has the Air Force, about procedures for module storage and shipping. To the contrary, Fairchild asserts that its module approach is

preferred by industry. Further, Fairchild argues that the Air Force's comments concerning the additional costs associated with module use are speculative and should not be considered since these costs were not listed in the RFP as an evaluation standard. Fairchild also argues that since the Air Force has accepted its proposal for another feature, setup memory (paragraph 4.2.2), the Air Force must also accept its proposal for cross-setup. Indeed, Fairchild says that in our decision on the Honeywell protest, we found as a fact that Fairchild had an acceptable technical approach to the RFP requirements.

We find no merit in Fairchild's positions. First, we conclude that the Air Force has amply demonstrated its valid concerns about the inadequacy of Fairchild's storage module approach for the Air Force's needs under this RFP notwithstanding Fairchild's alleged experience with satisfied users in other circumstances. Next, we do not see any valid reason for doubting the Air Force's cost estimate for the additional modules that would be needed if Fairchild's approach were to be used. Since Fairchild's costs were for proposing a substitute technology rather than the stipulated one, we conclude that these additional costs could not be ignored by the Air Force. In any event, the Air Force had valid reasons for rejecting Fairchild's substitute technology based on the module storage and retrieval inadequacies in the Fairchild approach.

As to the Air Force's alleged by inconsistent acceptance of Fairchild's setup memory feature, we cannot say that the Air Force unreasonably drew a distinction between these technologies in that setup memory technology is permanently enclosed within the recorder, whereas Fairchild's cross-setup does not write information on the tapes as specifically required by paragraph 4.2.3 of the RFP specifications. We also think our earlier decision in Honeywell, Inc., B-230224, supra, cannot reasonably be read as establishing that Fairchild's technical proposal was acceptable. There, we noted only the Air Force's view that Fairchild had a "somewhat limited Cross-Setup capability," but we did not in any way purport to imply that Fairchild's cross-setup proposal was acceptable, especially since the Air Force did not formally evaluate the proposal until July 1988, 1 month after the issuance of our decision.

It therefore does not appear that the Air Force unreasonably concluded that Fairchild's cross-setup proposal for both recorders was unacceptable.

Portability, Size and Weight

With regard to the 28-track recorders, the Air Force states it required ease of portability of these units by specifying that they were to be single1/ enclosure units, weighing no more than 150 pounds, and having a height of no greater than 36 inches. Nevertheless, the descriptive literature submitted by Fairchild for the 28-track unit depicted a double enclosure.

Fairchild argues that it anticipated that the units would be only rack-mounted and that the only portability required would be that necessary to move the recorders to the rack position. Therefore, Fairchild states, it did not expect the Air Force to have substantive objections about its proposed dual enclosure units which, at 200 pounds, exceed the required weight limit by 50 pounds and the maximum height by more than 2 inches. Nevertheless, Fairchild says that it offered, in an August 1, 1988, letter to the Air Force, to modify its rack height and to provide a single enclosure for its recorder whose weight was still to be maintained at 200 pounds since Fairchild apparently felt the Air Force would not insist on the stated weight limit.

The RFP states that the recorders are to be "rack-mountable." This statement should not have been reasonably interpreted, as Fairchild apparently argues, that the recorders would only be rack-mounted. Further, paragraph 5.1 of the specifications states that the recorder/reproducer shall be "readily transportable" and to facilitate portability a single enclosure shall be provided. Consequently, Fairchild should have known that the Air Force requirements involving portability, (namely: configuration, dimensions, and weight) were critical requirements.

Fairchild's August 1 letter to the Air Force (which did not contain descriptive literature) offered to provide, if necessary, a configuration which reduced the enclosure height to the specified minimum; however, in the "weight" portion of that letter not only did Fairchild insist on keeping its weight to 200 pounds, but it once again expressly referred to a dual enclosure for the recorder.

1/ The Air Force says it required a single enclosure to decrease set-up time at, for example, remote locations, to increase reliability, and to decrease repair costs associated with interconnecting and operating "at least 28 multi-pinned ribbon cables" between dual system units. Damage to just one pin, the Air Force says, would render a dual enclosure system inoperable.

Further, Fairchild's unit demonstrated at the August factfinding session was, even according to Fairchild, "not the exact unit" required. Even if we accept, for the purpose of this decision that Fairchild did, in fact, offer sufficient compliance with the height limit by means of the statements in this letter,2/ there remains in this letter Fairchild's clear statement insisting on its double enclosure approach, which it now says it disavows, in favor of the required single enclosure. In any event, Fairchild admittedly insists on a deviation from the Air Force's weight limit--a weight limit which we find reasonable given the Air Force's need to field the recorder in locations where only two people will be available to move the recorders.

Given the findings that Fairchild's proposal for both types of recorders deviated from the Air Force's critical requirement for cross-setup and that, in addition, Fairchild's 28-track proposal deviated, at a minimum, from the Air Force's weight requirement, we find reasonable the Air Force's decision to exclude Fairchild's proposal from the competitive range.

Fairchild also alleges that the exclusion of its proposal must be the result of bias on the part of the evaluators against it and for Racal. We see nothing in the present record which constitutes probative evidence to support this allegation. Consequently, we deny it. See Mictronics, Inc., B-228404, Feb. 23, 1988, 88-1 CPD ¶ 185.

Alternative to its above main grounds of protest, Fairchild argues that the Air Force's specifications improperly restrict competition and that the cross-setup specification for writing on tape rather than also permitting module technology allegedly defeats the purpose of relevant Federal standards incorporated in the RFP. Fairchild also argues that the RFP's specification of Racal's recorder as the acceptable brand name product is also faulty given that Racal's recorder allegedly cannot meet certain of the specifications. Finally, Fairchild argues that many of the specifications are patently ambiguous.

All of the above alternative grounds of protests are untimely filed with our Office because they concern apparent

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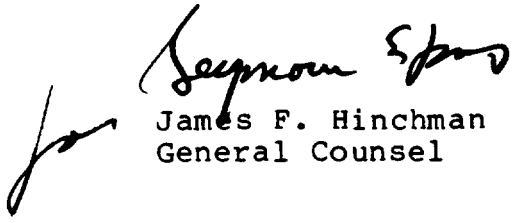
2/ The Air Force disputes Fairchild's proposed solution to conform to the height requirement because, among other objections, the solution involves the back-to-back mounting of the dual enclosure which, the Air Force states, severely inhibits needed access to the enclosures.

RFP defects which were not made the subject of protest until months after the closing date for the RFP. Although Fairchild insists it also filed oral protests with the Air Force on some of these bases much earlier, oral protests are not recognized. See Federal Acquisition Regulation, 48 C.F.R. § 33.101; Paramount Systems, Inc., B-229648.2, Dec. 30, 1987, 87-2 CPD ¶ 640. Consequently, we dismiss these other grounds of protest. 4 C.F.R. § 21.2(a) (1988).

The protest is denied in part and dismissed in part.



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