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Mr. Boyle 14

DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

[Protest of NLRB Contract Award]

FILE: B-196545 **DATE:** June 20, 1980

MATTER OF: CSA Reporting Corporation

DIGEST:

1. In view of holding in CSA Reporting Corporation, 59 Comp. Gen. ___ (B-196359, March 27, 1980), 80-1 CPD 225, contention that IFB and resultant contract contained improper Service Contract Act wage determination is untimely under GAO Bid Protest Procedures and will not be considered since it was not filed prior to bid opening. Further, matter is not significant issue within meaning of 4 C.F.R. § 20.2(c) (1980) because GAO has considered issue in previous decisions.

2. In view of holding in CSA Reporting Corporation, 59 Comp. Gen. ___ (B-196359, March 27, 1980), 80-1 CPD 225, GAO has no basis to object to agency's determination that bid price of $0.75 per page for public copies is not in excess of actual cost of duplication, where such cost includes reasonable factor for overhead and profit.

3. Contention--first made after bid opening--that IFB is defective for not providing for evaluation of duplicate copy rates for copies to be ordered by procuring agency--is untimely under 4 C.F.R. § 20.2(b)(1) (1980) and will not be considered since it involves alleged IFB impropriety and it was not filed prior to bid opening.

4. Protester contends that agency's post-bid-opening action to reduce low bidder's public copy rate from $0.75 to $0.71 was improper since its initial rate was excessive within meaning of Federal Advisory Committee Act, thus requiring

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rejection of its bid. Since GAO concludes that low bidder's initial public copy rate was not excessive within meaning of that act, contention must fail.

CSA Reporting Corporation (CSA) protests the award of a contract to Acme Reporting Company, Inc. (Acme), under invitation for bids (IFB) No. 041-80-B-0002 issued by the National Labor Relations Board (NLRB) for stenographic reporting, transcription and micrographic services. CSA contends that: (1) the Service Contract Act wage determination in the IFB is contrary to law, thus rendering the IFB legally defective; (2) Acme's bid price per page for copies of transcripts to the public exceeds the limitations of the Federal Advisory Committee Act (FACA), thus permitting the public copy charges to be used illegally to subsidize the Government's cost for reporting services; (3) the IFB was deficient because it did not provide for the evaluation of duplicate copy rates for copies for the NLRB; and (4) the NLRB's post-bid-opening action resulting in Acme's reduction (from $0.75 to $0.71) of its bid price per page for copies to the public was improper because Acme's original price was excessive, necessitating the rejection of Acme's bid.

Shortly after CSA filed its protest, CSA filed a complaint in the Federal District Court for the District of Columbia, in part to obtain injunctive relief against performance until our Office could issue a decision. About 2 weeks later, the court issued its opinion and order denying CSA's motion for a preliminary injunction; later, the court permitted CSA to dismiss its suit without precluding any of the parties from raising any claims or defenses before our Office. While this matter was pending before our Office, we issued our decision in CSA Reporting Corporation, 59 Comp. Gen. ___ (B-196359, March 27, 1980), 80-1 CPD 225, which concerned a CSA protest after bid opening involving a substantially similar solicitation issued by the Interstate Commerce Commission (ICC) for stenographic reporting, transcription, and micrographic services. CSA advised our Office

that two issues (the Service Contract Act matter and the FACA matter) raised in the ICC case were the same as the first two issues in this matter.

We have carefully considered CSA's advice and argument, and we conclude that the resolution of the Service Contract Act and FACA issues here has already been determined as a result of our March 27, 1980, decision. Briefly, there we held that: (1) the protest against the alleged improper Service Contract Act wage determination should have been apparent from the solicitation and since the protest was not filed prior to bid opening it was untimely under 4 C.F.R. § 20.2(b)(1) (1980); (2) the protest against the alleged improper wage determination did not present a significant issue within the meaning of 4 C.F.R. § 20.2(c) (1980) because our Office had considered the issue and the matter had been the subject of detailed review and consideration by the courts, the executive branch, and the Congress; and (3) the record provided no basis for our Office to conclude that the ICC contractor's price of $0.75 per page for public copies was unreasonable or in excess of the actual duplication cost, where such cost includes a reasonable factor for overhead and profit; and as a practical matter we noted that the public could obtain copies from the ICC for $0.10 per page. In the instant matter, CSA presents the same arguments on both issues and the facts are substantially the same--there the price per page was $0.75 and here it was $0.75 initially and is $0.71 finally. CSA has not presented any argument that would require a different result in this case. Accordingly, the first two bases of CSA's protest here are denied.

CSA's third basis of protest is that the IFB is defective because it did not provide for the evaluation of duplicate copy rates for copies for the NLRB. In CSA's view, the failure to evaluate this material item does not ensure that award will be made to the low bidder.

In response, the NLRB points out that the IFB expressly stated that the duplicate copy rate would not be evaluated; therefore, in NLRB's view, CSA should have raised its objection prior to bid opening. The NLRB also

reports that, CSA, as the incumbent contractor, should have known that the NLRB orders very few duplicate copies; and on only three occasions over the 2 past fiscal years did the NLRB order copies. Thus, in the NLRB's view, the duplicate copy rate was an insignificant cost.

In our view, this basis of CSA's protest concerns an alleged impropriety in the IFB which should have been apparent prior to bid opening. Under 4 C.F.R. § 20.2(b)(1) (1980), such protests must be filed prior to bid opening in order to be timely. Since this basis of CSA's protest was not filed prior to bid opening, it is untimely under our Bid Protest Procedures and will not be considered.

Finally, CSA contends that the NLRB's post-bid-opening action to reduce Acme's public copy rate from $0.75 to $0.71 was improper because Acme's initial price was excessive; thus, Acme's bid should have been rejected instead of made acceptable. The foundation of CSA's argument rests on its belief that Acme's initial price of $0.75 was unreasonable or excessive in the context of the FACA. Since we have concluded above that Acme's initial price was not excessive in that context, CSA's contention must fail. We have long held that an otherwise acceptable low bid can be modified after award to make it more acceptable if done voluntarily by the bidders and if no prejudice to other bidders arises by that action.

The protest is denied in part and dismissed in part.

Shelton J. Dorsey

Acting Comptroller General
of the United States