

19099 *Hordell*

DECISION



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

FILE: B-203395

DATE: August 11, 1981

MATTER OF: Milton Reporting, Inc.

DIGEST:

1. Contention that IFB provision which limits court reporting only to electronic method improperly restricts competition is denied since record shows that court's determination of its needs is supported by reasonable basis.
2. In view of agency's past unsatisfactory experience with subcontractor attempts to provide court reporting services under prime contract, agency may impose reasonable limitations on prime contractor's right to subcontract all or part of such work.

Milton Reporting, Inc. (Milton), has protested against the alleged restrictiveness in the United States Tax Court's (Court) invitation for bids (IFB) issued in April 1981, for the verbatim reporting requirements of its proceedings throughout the United States. The IFB, among other things, requires the successful contractor to utilize its own employees in at least 90 percent of the Court's sessions. In addition, the bidders were advised that they would be required to use only electronic verbal recording equipment similar in capability to Lanier Advocate II and manufactured under standards acceptable to and approved by the Court. We have been advised that three bids were received, but an award has not been made pending our decision on this matter.

Milton, in light of the two requirements mentioned above, did not submit a bid. Milton argues that these requirements unduly restrict competition and increase costs. More specifically, Milton contends that the 90-percent requirement excludes the majority of potential bidders across the country. It is Milton's position

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that, since it has successfully performed four nationwide contracts using subcontractors in those geographical areas outside of the metropolitan Washington, D.C., area, Milton can successfully perform the reporting of the Court's proceedings. Furthermore, Milton alleges that the requirement for the exclusive use of electronic verbal recording equipment is, in addition to being unduly restrictive, not cost effective. In support of its latter contention, Milton cites North American Reporting, Inc.; Ace-Federal Reporters, Inc., 60 Comp. Gen. 64 (1980), 80-2 CPD 364, aff'd., Federal Energy Regulatory Commission--Reconsideration, B-198448.3, June 24, 1981, 81-1 CPD 523, involving the converse situation, where we found a solicitation which precluded the use of tape recorders to be unduly restrictive of competition.

On January 31, 1975, we decided, among others, the same issues raised here. See CSA Reporting Corporation, 54 Comp. Gen. 645 (1975), 75-1 CPD 70. In that decision, we held:

"Based on its experience over the years the Court has come to the conclusion that for its purposes the electronic recording system 'is far superior to any other system.' In reaching this conclusion, the Court places particular emphasis on the desirability of listening to the recorded voices of the parties. By means of electronic recording the Court is able to recapture not only the exact words of the parties but also the manner in which the words were said. These features, of course, are unique to the electronic method of reporting and are not available under the more traditional methods.

"As the studies cited above indicate, differences of opinion exist as to the relative merits of electronic recording versus the more traditional methods of reporting. We have recognized, however, that where a procurement is for services or supplies of a highly technical or specialized nature, there may well be

differences of opinion as to how an agency's needs should be accommodated but that in the absence of a clear showing of unreasonableness the agency's determination in the matter will not be questioned by this Office. Matter of Digital Equipment Corporation, B-181336, September 13, 1974; B-174775, June 5, 1972. In this case although the traditional methods of reporting are being used by many Federal agencies, we cannot say that the Tax Court's determination to restrict its procurement to electronic recording systems is without a reasonable basis.

"With respect to the IFB's requirement that the successful contractor utilize its own employees in 90 percent of the Court's sessions, as the overwhelming majority of these sessions are outside Washington, D.C., the practical effect of this requirement would be to limit bidding to national contractors or those contractors with nationwide affiliations, and to discourage the competition of smaller contractors who in the past have relied heavily on subcontractors. The Court's report to this Office informs us, however, that in the past it has, as previously detailed, experienced great difficulties with subcontractor service. Accordingly, this restriction has been implemented to insure service by prime contractors.

"An agency does have authority to impose reasonable limitations on the right of the prime contractor to subcontract all or a portion of the work in question. B-149096, August 9, 1962; 37 Comp. Gen. 678 (1958). This restriction reasonably may be based on historical experience of poor performance under similar circumstances. Matter of Plattsburgh Laundry and Dry Cleaning Corp. et al., B-180380, July 15, 1974,

54 Comp. Gen. [30]. In our opinion, the Tax Court has established that, to a large extent, past subcontractor reporting service has been unsatisfactory. Therefore, we believe the agency may reasonably restrict the extent of subcontracting, and have no basis to disagree with the restriction in the subject solicitation."

Milton has not submitted any information which persuades our Office to change our prior position. In addition, we find that North American Reporting, Inc., supra, is distinguishable from the present case. In that case, the Federal Energy Regulatory Commission (FERC) failed to make the prima facie showing requisite to support the restriction of the use of tape recorders. FERC's decision was based on its administrative law judges' experience with various tape recording services which they found to be inefficient, gave poor quality transcripts and created administrative problems. However, North American, in significant detail, responded to FERC's concerns, advising FERC that its system did not suffer from the problems raised or that the problems raised were characteristic of other reporting methods. Therefore, we found that FERC could not simply exclude recording devices in the manner or for the reasons proposed. While, here, the Court, by restating its position as set forth in CSA Reporting Corporation, supra, has made the requisite showing to support the restrictions protested.

Accordingly, the protest is denied.



Acting Comptroller General
of the United States