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DECISION

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

[Protest of ICC Contract Award]

FILE: B-196359 **DATE:** March 27, 1980

MATTER OF: CSA Reporting Corporation

DIGEST:

1. Protester contends that basis of protest against IFB's improper wage determination did not arise until award of contract even though alleged impropriety should have been apparent from solicitation. Contention is without merit and basis of protest is untimely under 4 C.F.R. § 20.2(b)(1) (1979), since alleged solicitation impropriety should have been apparent and protest should have been filed prior to bid opening.

2. Untimely protest against alleged improper Service Contract Act wage determination does not present significant issue within meaning of 4 C.F.R. § 20.2(c) (1979) because in previous decisions GAO has considered issue and matter has been subject of detailed review and consideration by courts, executive branch, and Congress.

3. Based on information obtained pursuant to Freedom of Information Act, basis of protest--filed within 10 days of such receipt--against the adequacy of IFB's estimated quantities is timely under 4 C.F.R. § 20.2(b)(2) (1979) and will be considered on merits.

4. Post-bid-opening bases of protest--(1) that bid based on excessive prompt-payment discount, where such possibility was expressly permitted in solicitation, should not be considered, and (2) that all bids should be rejected because of ambiguous solicitation provision--are untimely under 4 C.F.R. § 20.2(b)(1) (1979) to the extent that they

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concern apparent alleged solicitation improprieties. Such protests must be filed prior to bid opening to be timely under GAO Bid Protest Procedures.

5. To extent that protest is against responsiveness of awardee's bid containing 30-percent prompt-payment discount, it is without merit since solicitacion did not restrict maximum prompt-payment discount

6. To extent that protest is against agency's determination not to reject all bids due to alleged noncompliance with IFB requirement labeled "(A) & (B)" but intended to read "(C) & (D)", it is without merit because intent was obvious and all bidders, including protester recognized obvious intent and bid on that basis.

7. Despite protester's view that court's decision denying protester's preliminary injunction (suit was then voluntarily dismissed) should have no effect on GAO resolution of protest, court's findings and views may be considered.

8. Protester contends that (1) Federal Advisory Committee Act prohibits contractors from charging public more than actual cost of duplication for transcript copies, and (2) low bid proposed price in excess of that limitation. Contention is without merit because act does not apply to contractors. Moreover, as practical matter, public can obtain copies from agency at $0.10 per page or contractor at $0.75 per page as it freely elects.

9. Contention--that IFB's estimated quantities were merely rounded-off figures from last year's IFB and did not reflect agency's best estimate--is not supported by record where it is shown that estimate was made in good faith and was based on number of

anticipated hearings, procedural changes, and projected use of new public reference rooms. Moreover, all bids were evaluated on same estimates and there is no indication that any bidder received any advantage.

CSA Reporting Corporation (CSA) protests the award of a contract to Alderson Reporting Company (Alderson) under invitation for bids (IFB) No. ICC-79-B-0017, issued by the Interstate Commerce Commission (ICC), for stenographic reporting, transcription, and micrographic services.

CSA's grounds of protest follow:

(A) The Alderson fixed price for copies of transcripts to the public exceeds the limitations of the Federal Advisory Committee Act (FACA), permitting the public copy charges to be used illegally to subsidize the Government's costs for reporting services.

(B) The Alderson bid is unbalanced; there is more than reasonable doubt as to whether it will result in the lowest overall cost to the Government because (1) the estimated quantities for paper and microfiche copies are not realistic, and (2) the Government may not take advantage of the 30-percent prompt-payment discount.

(C) The Service Contract Act wage determination in the solicitation is contrary to law and, thus, so deficient as to render the IFB legally defective.

(D) All bids submitted are nonresponsive. None of the bidders have complied with the specifications for pricing proposals in the IFB, requiring rejection of the bids in a formally advertised procurement.

Shortly after CSA filed its protest, Alderson asserted that with the possible exception of CSA's allegation (A), CSA's protest was untimely filed under our Bid Protest Procedures (4 C.F.R. part 20 (1979)), and that the timely portion was without merit. A few days later CSA filed a complaint in the Federal District Court for the District of Columbia, in part

to obtain injunctive relief against award and performance until our Office could issue a decision. The court issued its opinion and order, denying CSA's motion for a preliminary injunction, and CSA voluntarily dismissed the civil action at that point.

We will determine whether the bases of protest are timely, consider the impact of the court's opinion on the preliminary injunction, and consider the merits of the timely issues.

I. Timeliness

A. The Service Contract Act Issue

CSA contends that the Service Contract Act wage determination included in the solicitation and resultant contract is patently defective and in violation of the Service Contract Act, since (1) it does not determine prevailing wage rates, (2) it does not include a provision specifying prevailing fringe benefits, (3) it fails to describe any classes of service employees, (4) it erroneously establishes a nationwide rate, rather than a rate for the localities where the work is to be performed, and (5) it does not reflect consideration of the $8.42 an hour wage rate paid Federal employees performing comparable work.

Alderson argues that CSA should have protested this alleged apparent impropriety in the IFB prior to bid opening in order to be considered timely. In reply, CSA states that Alderson's argument is incorrect in this case because the failure to include a prevailing wage determination is a statutory requirement which was only violated upon award of the contract.

In CSA's view, the illegality did not exist until the contract was awarded with the defective determination. Thus, the grounds for protest did not exist until the contract was awarded and the protest filed within 10 days after contract award is timely under 4 C.F.R. § 20.2(b)(2) (1979).

CSA also notes that our Office has, on prior occasions, recognized that protests involving the Service Contract Act present issues of widespread

concern and has held that these issues should be considered on the merits as significant issues under 4 C.F.R. § 20.2(c). CSA cites our decision in High Voltage Maintenance Corp., 56 Comp. Gen. 160 (1976), 76-2 CPD 473, involving a postaward protest of the failure to include a wage determination. There, we noted that the protest was untimely but we resolved the issue on the merits because it was significant. Here CSA believes that the issue--whether a wage determination that merely specifies the minimum wage rate constitutes a valid wage determination--is a significant issue of widespread interest to the procurement community, and this issue has not been considered in prior decisions by our Office. Further, CSA contends that, citing E-Systems, Inc., 55 Comp. Gen. 307 (1975), 76-2 CPD 466, the protest raises a question of congressional intent: is the Department of Labor acting in accordance with Congress' intent in amending the SCA?

First, regarding CSA's contention that its basis of protest is against the award impropriety not the solicitation impropriety, in JDL General Contractors & Associates - Request for Reconsideration, B-183415, June 6, 1975, 75-1 CPD 344, we considered a similar contention. There, the protester objected to certain specifications as being unduly restrictive but it did not protest prior to bid opening so in our initial decision we declined to consider the matter on the merits since we considered the protest to be untimely. On reconsideration, the protester indicated that it was not objecting to the bid opening but the award. We disagreed, however, and affirmed the earlier decision since the alleged impropriety was apparent from the solicitation; therefore, the protest must have been filed prior to bid opening. The instant situation is essentially the same. Here, the alleged impropriety--the defective wage determination--should have been apparent from the solicitation. In this circumstance, our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1979), require that the protest must be filed prior to bid opening to be timely. Bucks County Association for the Blind, B-194957, June 28, 1979, 79-1 CPD 471. In our view, adopting CSA's position would completely undermine the necessary requirement that patent solicitation improprieties be protested prior to the revelation

of the competitive standings of bidders on formally advertised procurements. Accordingly, this aspect of the protest is untimely.

Second, CSA argues that this basis of protest raises a significant issue and should be considered on the merits. We disagree. CSA's contention--that it is significant because in High Voltage Maintenance Corp., supra, we viewed the lack of a wage determination as a significant issue--must fail since we have also held that where the merits of a protest involve an issue which has been considered in previous decisions, that issue is not significant within the meaning of 4 C.F.R § 20.2(c) (1979). The Public Research Institute of the Center for Naval Analyses of the University of Rochester, B-187639, August 15, 1977, 77-2 CPD 116, affirmed, November 23, 1977, 77-2 CPD 395. Similarly, CSA's contention--that the Department of Labor's wage determination was not in accord with congressional intent--must fail because this matter has been the subject of detailed consideration and review by this Office, the courts, the executive branch, and the Congress. See The Cage Company of Abilene, Inc., 57 Comp. Gen. 549 (1978), 78-1 CPD 430, where we recognized that the Department of Labor's practice of basing wage rates on wide geographic areas when the place of performance is not known is not clearly contrary to the Service Contract Act.

Accordingly, this basis of protest does not raise a significant issue.

B. The Unbalanced Bid Issue

CSA contends that the IFB's estimated quantities are only estimates from the prior year's IFB rounded off and some of them vary substantially from the actual quantities ordered under the prior year's contract. It appears to CSA that the ICC not only did not utilize or consider prior experience, it had no idea what the last year's orders had been. In sum, CSA argues that the estimated quantities did not reflect consideration of all relevant information reasonably available to the ICC and that actual quantities or better estimates may reveal that CSA submitted the low bid. Next, CSA contends that

Alderson's bid based on an excessive 30-percent prompt-payment discount is in effect an unbalanced bid since, unless the ICC can earn the discount at least half of the time, CSA's bid would have resulted in a lower cost to the Government.

Alderson contends that this aspect of CSA's protest filed after bid opening is untimely because the availability of the prompt-payment discount and estimated quanitities were apparent in the IFB. Further, Alderson argues that there is no reason to expect that the ICC will purchase more paper transcripts than it projected in the solicitation, and in fiscal year 1979 Alderson provided a prompt-payment discount of 2 percent for payment within 20 days and, in virtually every case, the ICC paid within the 20-day period and obtained the discount. It is Alderson's expectation that the same will be true of the present contract and that the offered discount of 30 percent will always be taken by the ICC. Accordingly, in Alderson's view, there is no substantial doubt that the bid of Alderson will result in the lowest cost to the Government.

In reply, CSA states that the inadequacy of the quantity estimates provided in the IFB was not known until CSA obtained figures showing the agency's actual experience under the prior year's contract, which was not available to CSA prior to bid opening. CSA obtained the information by a Freedom of Information Act request, and CSA states that it timely protested the inadequacy of the estimates following receipt of this information.

Since CSA's protest against the adequacy of the disclosed quantities is based on material outside the solicitation and since CSA protested within 10 days of receipt of that material, we cannot conclude that its protest is untimely.

However, regarding Alderson's 30-percent discount, if CSA's protest is essentially against the IFB's unrestricted prompt-payment discount, then it is based on information contained in the solicitation; since that aspect of the protest was not filed prior to bid opening, it is untimely under section 20.2(b)(1) of our Bid Protest Procedures and will not be considered. If CSA's protest is that Alderson's bid is nonresponsive and,

therefore, timely, it is without merit since the IFB did not restrict the maximum prompt-payment discount. We trust, however, that the ICC will make a reasonable effort to obtain the discount in every instance.

C. The Rejection of All Bids Issue

CSA notes that the IFB contained a note entitled "Pertains to CLIN No.'s (C) & (D) 0001 & 0002," which in text referred to items "(A) 0001 thru 0006 and (B) 0001 thru 0002." CSA argues that since all bidders based their bids on the assumption that this provision in the IFB was intended to apply to "(C) & (D)" not "(A) & (B)," all bids are nonresponsive.

Alderson notes that it was obvious that the note was ambiguous; however, the intent was unambiguous and the bids submitted clearly demonstrate that all bidders were aware of the intent and none, including CSA, was misled. In Alderson's view, CSA's protest in this regard is not timely filed.

If CSA's protest on this point relates to an apparent solicitation impropriety, then it is untimely and will not be considered since its protest was not filed prior to bid opening. If CSA's protest is that the IFB provision mentioning "(A) and (B)" actually meant "(A) & (B)" not "(C) & (D)", thus rendering all bids, including CSA's, nonresponsive, the protest basis is without merit since the intent was, in our view, obvious.

II. The Effect of the Court's Opinion on the Preliminary Injunction

CSA notes that a decision to deny a motion for a preliminary injunction is, by its nature, interlocutory and provisional; it is not a decision on the merits of the case. In CSA's view, the court's decision on CSA's motion for a preliminary injunction did not resolve the issues raised in this protest and should have no effect on our resolution of this protest.

The ICC notes that the judge listened to extensive oral argument and considered the extensive briefs, all of which were identical to papers filed with GAO in

this protest, and it was the court's judgment that CSA had no likelihood of succeeding on the merits.

While we recognize that the court's ruling on the preliminary injunction is not a final resolution of the matter, we believe that it is appropriate for our Office to consider the court's findings and views.

III. Did Alderson's Bid Violate the FACA?

CSA essentially contends that the FACA requires that rates charged by contractors for copies of transcripts of agency proceedings shall represent the actual cost of duplication and the Alderson bid price, $0.75 per page, exceeds this limitation, thus violating the FACA.

Alderson contends that CSA has misconstrued the act which does not require that contractors charge only the actual cost of duplication. In addition, Alderson notes that the ICC has installed a copying machine in its docket room. For a charge of as little as $0.10 per page any person may make a copy of any page of transcript desired. Further, Alderson states that the ICC exceeds the requirements of the FACA since the ICC has chosen to impose no charge for retrieving transcripts for the public.

Initially, the ICC refers to section 11(a) of the act, which provides that "agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts * * *." From this language, the ICC contends that the FACA's restrictions apply only to the Government; therefore, the Government must not charge the public more than the actual cost of duplicating but the act does not prohibit a contractor from charging more than the actual cost of duplication.

Next, the ICC notes that both Alderson's public charge of $0.75 per page and CSA's public charge of $0.55 per page exceeded prices which they were going to charge the Government.

Finally, the ICC notes that transcripts are immediately available in the ICC's public reference rooms for review at no charge or for copying by the public on reproduction machines provided at a charge of $0.10 or $0.25 per page or a microfiche chip can be obtained for $0.25 per frame containing approximately 60 single pages. In addition, the ICC states that the public can request that the ICC provide copies of transcripts at $0.10 per page under the Freedom of Information Act.

In reply, CSA argues that, regardless of the alternative sources for obtaining copies, a contractor may not charge a rate for copies in excess of the actual cost of duplication. In CSA's view, the legislative history of FACA clearly indicates that Congress intended the act's price limitation to be applicable to contractors. CSA relies primarily on this passage from the Senate Report accompanying the bill which resulted in the FACA:

> "The problems of a citizen being able to obtain a copy of agency transcripts at a reasonable expense has been a perennial complaint * * *. Agencies have traditionally made contracts with stenographic services which contain strong prohibitions against duplication, but little if any restrictions against the purchase of such transcripts from the contractor at the commercial rate - which in nearly all cases is prohibitory to average persons.
>
> "Stenographic services say they need this protection in order to make a profit on the extension of their services. Complainants say that they are deprived of their rights to know and to obtain due process of law when they are not allowed to copy public records of proceedings at the cost of duplication.

> "S. 2064 resolved this issue in favor of the average citizen, and, with certain minor modifications, the requirements of transcript availability have been included here." (Emphasis added.) S. Rep. No. 92-1098, 92d Cong. 2d Sess. (1972).

CSA also states that, regarding other agencies, there is a wide disparity in the prices charged for copies sold to the public; therefore, at a minimum, the confusion regarding applicability of FACA to contractors should be clarified.

When considering CSA's likelihood of success on the merits of this issue, the court concluded that CSA's argument was "without merit" because (1) the FACA requires Federal agencies to make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings; the act, however, does not impose a similar requirement on a private contractor that furnishes reporting services to a Federal agency, and (2) all ICC transcripts delivered during fiscal year 1980 will automatically become part of the public record and will be available to the public at the actual cost of duplication. Under these circumstances, the court concluded that the ICC met the requirements of the FACA.

We have carefully considered the arguments of the parties and the court's rationale, which we find persuasive. We conclude that the ICC's award based on the Alderson bid did not violate FACA. We have held that the act does not require any particular procedure on the part of agencies contracting for reporting services, so long as the public is adequately protected against paying unreasonably high prices for duplicating services. In this connection, we have recognized that such cost may include a reasonable factor for overhead and profit. Hoover Reporting Company, Inc., B-185261, July 30, 1976, 76-2 CPD 102, and decisions cited therein. Here, the ICC has not found the contractor's prices for public copies to be unreasonable and the record before us provides no basis for our Office to so conclude.

Moreover, as a practical matter, the public can obtain a copy of any public record from the ICC for $0.10 per page or from Alderson for $0.75 per page as it freely elects. We can see no problem with that choice being available to the public. Accordingly, we concur with the court in finding this aspect of CSA's protest without merit.

IV. Were the IFB's Estimated Quantities Reasonable?

As mentioned above, CSA contends that the ICC merely rounded off the estimated quantities in last year's IFB and did not consider the actual orders under that prior contract in establishing the estimated quantities for the instant solicitation.

In response, the ICC reports that actual figures for the prior fiscal year had an insignificant bearing on the new estimates and data received from the Chief Administrative Law Judge of the Commission were more significant. The ICC reports that the current estimates were based on the number of anticipated hearings, procedural changes and a fundamental change in the ICC's operating procedures for public reference rooms, whereby microfiche, rather than single paper, copies are to be used for the public record. This reportedly means that there will be a decrease in the estimated amount of paper copies for certain service categories, rendering actual 1979 data in those categories irrelevant. The ICC notes that all bidders were provided with the same estimates and offered prices based on them; no bidder had or received any special advantages, insights or data from the ICC with regard to estimated needs.

In reply, CSA contends that an examination and comparison of estimates in the subject IFB and in the IFB for the prior year indicates that the total numbers of paper and microfiche copies were comparable to the number of copies estimated for the prior year. Thus, the quantity estimates in the solicitation are no more than an ad hoc percentage increase over the past year's guesses without any review of actual experience.

When considering CSA's likelihood of success on the merits of this issue, the court found that CSA's argument was "without merit" because (1) the facts

disclose that the ICC's estimates did not violate the Federal Procurement Regulations (FPR), and (2) the ICC provided prospective contractors with estimates of the requirements under the contract based on the number of hearings anticipated by the ICC, recent changes in its operating procedure, and its actual requirements during the previous fiscal year.

We have carefully examined the arguments of the parties, the numerous decisions cited by CSA, and the court's opinion and we must conclude that, while the similarity between quantities in the current IFB and last year's IFB is striking in 8 of the 14 categories, that circumstance alone does not establish CSA's point. Instead, the entire record seems to indicate that ICC procurement officials acted in good faith and used the best information available to formulate estimated quantities in a rapidly shifting environment. We have no basis to conclude that procurement regulations were violated here.

Protest denied.

Milton J. Socolar

For the Comptroller General
of the United States