24246

DECISION

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

FILE: B-208881.2 DATE: February 9, 1983

MATTER OF: Interstate Court Reporters

DIGEST:

1. Protester's allegation that solicitation requirement for 10-day delivery of transcripts of hearings is restrictive of competition and unreasonable is denied where the agency establishes that the provision represents its legitimate minimum needs.

2. Under solicitation for court reporting services, allegation that solicitation should have included provision guaranteeing a minimum fee for providing court reporting services at a hearing is denied where protester has not shown that the exclusion of such a provision was unreasonable or prevented bidders from competing on a common basis.

Interstate Court Reporters, Inc. (ICR), protests invitation for bids (IFB) No. D/L 82-11, issued by the Department of Labor (DOL) for court reporting services at hearings conducted by DOL, Office of Administrative Law Judges (OALJ). ICR contends the solicitation is defective for two reasons. First, ICR contends that the solicitation requirement that the contractor deliver transcripts of hearings within 10 days of a hearing is unduly restrictive and overstates the agency's minimum needs. Second, ICR protests the failure of DOL to include in this IFB a provision which was contained in the prior year's contract for a guaranteed minimum fee for attending a hearing to provide court reporting services.

We deny the protest.

Six bidders, including ICR, submitted bids under this IFB. Although the protest was filed prior to award, DOL has advised us that award has been made, while the protest was

124575

pending, to Milton Reporting, Inc. (MRI), and contract performance began on November 1, 1982.

Initially, we note that ICR objects to our consideration of a December 10, 1982, letter from DOL because this unsolicited agency rebuttal was not timely filed with GAO. Our Bid Protest Procedures state that unsolicited agency rebuttals shall be considered if filed within 5 days after receipt by the agency of the comments to which the rebuttal is directed. 4 C.F.R. § 21.3(d) (1982). ICR states that its comments dated November 10, 1982, were delivered to DOL on November 15, 1982, and that DOL's letter of December 10, 1982, is clearly late and should not be considered.

This Office has considered agency rebuttal comments which were filed late. See, for example, Universal Analytics, Inc., B-200938, July 7, 1981, 81-2 CPD 11. Furthermore, DOL properly delayed filing its rebuttal comments until after MRI filed its comments. In its response to the agency report, ICR alleged that MRI, the awardee, was unaware that the contract did not contain the minimum guarantee fee clause and intended to negotiate a change in its contract which would incorporate the clause into the contract if the protest was denied. ICR specifically requested that we invite comments from MRI concerning this allegation. MRI did not file its comments dated November 30, 1982, until December 2, 1982. DOL apparently waited until it received these comments, sometime after November 30, 1982, before filing its final rebuttal with GAO. Since DOL could not be sure how MRI would respond to ICR's allegation and whether DOL would need to respond to MRI's comments, DOL's decision to wait for receipt of MRI's comments before filing comments with GAO was appropriate under the circumstances. Also, depending on when DOL received MRI's comments, DOL could be considered to have filed timely its rebuttal comments with this Office on December 15, 1982.

ICR asserts that the 10-day deadline requirement exceeds OALJ's needs. ICR states it has performed the previous three contracts, with the 10-day requirement, and has consistently experienced problems meeting this delivery schedule because many hearings are held in remote areas

which has also raised ICR's costs, because it must use express mail and pay for overtime. Furthermore, ICR points out that the Administrative Law Judges (ALJ) do not use the transcripts promptly because of a substantial backlog of cases. ICR quotes two ALJ's who have stated at hearings on the record that they will be unable to decide the case for 4 or 5 months and that the agency report shows that the ALJ's who reported problems in obtaining transcripts never requested that a transcript be delivered within 10 days. Thus, in ICR's view, DOL's report supports its contention that the 10-day requirement overstates the agency's needs.

DOL advises that the 10-day delivery requirement has been included in the OALJ contracts for the last 3 years, without complaint. This year, DOL added a liquidated damages clause which provides a penalty for late delivery of the transcripts. Thus, DOL states that, for the first time, it can enforce the provision without defaulting the contractor and that it has implemented a program this year to "track" cases and, therefore, will be better able to monitor contract performance and enforce the 10-day delivery requirement.

DOL advises that the primary reason for the 10-day delivery requirement and penalty provision was delivery problems under prior contracts and provides several case studies where ICR delivered transcripts 2 or 3 months late and in two cases never delivered the transcripts. As a result, two hearings had to be entirely reheard. In another case in which the parties needed the transcript to submit written briefs, the case was delayed beyond the original schedule for submission of the briefs because ICR did not timely provide the transcript. The record contains letters from ICR, acknowledging these problems. DOL contends GAO should consider ICR's poor performance in meeting the 10-day requirement under the prior contract as the reason for the emphasis on 10-day delivery. DOL further advises it is attempting to achieve faster turnaround to foster timely OALJ performance of its mandated mission.

A protester who objects to the requirements in an RFP bears a heavy burden. The contracting agency has the primary responsibility for determining its minimum needs and for drafting requirements which reflect those needs. Romar Consultants, Inc., B-206489, October 15, 1982, 82-2

CPD 339; Dynalectron Corporation, B-198679, August 11, 1981, 81-2 CPD 115. It is the contracting agency which is most familiar with the conditions under which the services and supplies have been and will be used, and our standard for reviewing protests challenging agency requirements has been fashioned to take this fact into account. Specifically, our Office will not question agencies' decisions concerning the best methods of accommodating their needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Four-Phase Systems, Inc., B-201642, July 22, 1981, 81-2 CPD 56. While agencies should formulate their needs so as to maximize competition, burdensome requirements which may limit competition are not unreasonable, so long as they reflect the Government's legitimate minimum needs. Educational Media Division, Inc., B-193501, March 27, 1979, 79-1 CPD 204.

We think DOL has adequately established the reasonableness of the enforceable 10-day requirement. In this regard, DOL indicates that this 10-day deadline has been included in the contract the last 3 years, without resistance from the vendor community. The prior contract contained a 1-day and 3-day delivery provision, in addition to a 10-day delivery requirement and, in fact, DOL has relaxed its requirements to require the 10-day delivery generally. Furthermore, five bidders, in addition to ICR, submitted bids under the IFB without objection to the protested provision. This indicates that at least these five bidders expected to be able to meet the delivery requirements. ICR speculates that these bidders, unlike ICR, lack experience with this requirement, because, according to ICR, under the prior contract, 95 percent of the hearings were held at remote locations and, therefore, they did not understand sufficiently the effect of this requirement. However, the delivery requirement and financial penalty provision were stated clearly in the IFB, and the IFB also contained a list of hearing locations under the prior year's contract. Therefore, the information needed to make an informed judgment as to the alleged burdensome effect of the delivery requirement was contained in the IFB, and we do not agree with ICR's contention that other bidders did not object to the delivery requirement due to lack of knowledge of the possible onerous effect of the requirement.

Although DOL's report indicates that transcripts are rarely used within 10 days and the ALJ's did not complain about delay until several months had elapsed from the date of the hearing, we disagree with ICR's conclusion that the delays in issuing decisions demonstrate that the delivery requirement is unreasonable. As indicated by the record, the documented delay in the delivery of transcripts and, in some cases, failure to deliver a transcript at all contribute to the delays in deciding the cases. The record further indicates that DOL is attempting to improve case management and speed up the issuance of decisions. Obviously, without the transcript, an ALJ cannot decide the case. An enforceable delivery schedule provides a quick and efficient way to determine if a transcript is lost or unavailable. It also provides prompt delivery of copies to the parties which will result in quicker closing of the record where these parties must submit closing briefs as in one example contained in the record.

We have already noted that the determination of an agency's minimum needs is largely a matter of discretion on the part of the agency's contracting officials. It is also important to note that a procuring agency's technical conclusions concerning its actual needs are entitled to great weight and will be accepted unless there is a clear showing that the conclusions are arbitrary. Industrial Acoustics Company, Inc., et al., B-194517, February 19, 1980, 80-1 CPD 139. ICR has not shown that DOL's determination was arbitrary or unreasonable and has not satisfied its burden of proof. Walter Kidde, Division of Kidde, Inc., B-204734, June 7, 1982, 82-1 CPD 539. Therefore, we have no basis to find the delivery requirement is unreasonable. See Alan Scott Industries, B-193142, May 8, 1979, 79-1 CPD 316; National Computer Systems, B-171345, March 7, 1972.

ICR also protests DOL's failure to include a guaranteed minimum fee for hearings under this IFB. The purpose of such a clause is to insure that the contractor has a way to cover the costs of providing a reporter where the hearing is short and only a few pages are transcribed. ICR argues that because the IFB does not provide an estimate as to how many short hearings will occur, it could not bid intelligently as to the price per transcribed page in order to compensate for

its inability to cover its costs for its services at short hearings. ICR further contends that the failure to provide this estimate violated Federal Procurement Regulations § 1-3.409(b)(1) (1964 ed., circ. 1) in that bidders were not provided with all the information that might be important to formulate an intelligent bid on a common basis and would have to guess the anticipated number of short hearings.

This allegation is without merit.

DOL reports that the minimum charge was intended to cover a contractor's costs such as travel costs where short scheduled hearings did not result in a full day's work. However, DOL advises it is its practice to schedule several hearings in 1 day in one location, that the contractor therefore incurs no additional travel costs since there is no travel to another location on the same day, and that the contractor is adequately compensated on a total per page basis for its work at that one location. Also, DOL found that the average number of pages per transcript over the duration of the contract adequately compensated for the short hearings since overall revenues based on average transcript size appeared adequate. Thus, DOL did not think a minimum charge was needed.

DOL also points out it wanted to avoid paying the minimum charge several times a day on a per transcript basis. DOL determined that this resulted in higher costs to DOL than incurred by other agencies and commercial firms for court reporting services which did provide for minimum charges. In its view, the minimum charge provision was both unnecessary and costly. DOL states the contractor under the new contract will not have its revenue decreased substantially, but that DOL would pay less for many transcripts.

DOL's intent under the contract is to pay only for pages transcribed and asserts that it provided the information necessary to enable prospective bidders to accurately price their bids. In this connection, the IFB provided estimated number of transcribed pages per month, estimated number of pages per transcript, and the estimated number of transcripts per month. DOL concludes that this information was adequate to permit pricing of a bid.

We find the information provided an adequate basis upon which to bid. By basing its price on the average number of

pages per transcript, the bidder would cover the costs of both short hearings and long hearings. ICR is concerned that it will have many more out-of-town short hearings where its costs are higher and, thus, will not be adequately compensated for providing these services. However, the IFB contained a list of the prior year's hearing locations and the number of hearings held at each of these particular locations. With this information, bidders could estimate how often it would need to provide the more costly out-of-town services and adjust their per page price accordingly.

Our decision, Elrich Construction Company, B-187726, February 14, 1977, 77-1 CPD 105, cited by ICR in its submission in support of its view that the absence of a minimum fee clause renders the solicitation defective, is a case in which we found the IFB defective because no estimate of work was provided. Here, DOL provided estimates of work. ICR merely argues it needed another type of estimate. The other decision cited, 52 Comp. Gen. 732 (1973), approved use of estimating needs based on prior sales history--the approach used in this case. In our view, these cases do not support the protester's contention that the estimates of the type provided here were insufficient to permit intelligent bidding, or bidding on a common basis.

As noted, DOL received six bids, including ICR's, under this IFB. The prices were determined reasonable, and there was no evidence of extreme variations in prices. Accordingly, we conclude that OALJ's decision to eliminate the minimum charge was not unreasonable or prevented informed bidding.

Finally, ICR alleges that MRI, the new contractor under this IFB, was unaware of the absence of the minimum guarantee clause and did not consider that factor in this bid. ICR asserts that MRI intends to negotiate a change to its contract that will incorporate the minimum guarantee clause into its contract and asks that we request MRI to comment on ICR's protest.

MRI submitted comments, but did not confirm ICR's assertions concerning MRI's proposed contract modifications, and recommends rejection of ICR's protest. MRI also advises

it had no difficulty in estimating its cost and revenue and that the failure to provide a minimum charge was not improper.

Since ICR has submitted no evidence that the agency intends to make such a change after award and MRI took no exception to the specifications and is bound to comply with the contract terms, we reject this aspect of ICR's protest. Cf. Riverport Industries, Inc., B-205791, April 22, 1982, 82-1 CPD 368.

We deny the protest.

Milton J. Socolar

for Comptroller General
of the United States