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DECISION

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

FILE: B-208964, B-208964.2 **DATE:** March 1, 1983

MATTER OF: National Labor Relations Board - Request for Advance Decision; Acme Reporting Company, Inc.

DIGEST:

IFB for transcription services was not worded so as to obligate any bidder to provide copies of transcripts to the public; nevertheless, procuring agency apparently intended to require contractor to provide this copy service. Consequently, the entire procurement should be resolicited unless the procuring agency, itself, intends to provide this copy service.

The National Labor Relations Board (NLRB) requests an advance decision concerning the propriety of rejecting the apparent low bid of Acme Reporting Company, Inc. (Acme), submitted pursuant to invitation for bids (IFB) No. 83-B-100, for verbatim reporting and transcription services. Acme has also filed a protest against the rejection of its bid.

The NLRB rejected Acme's low bid because of the company's alleged unreasonable price for copies of transcripts sold to the public, the price of which was not to be evaluated in determining the low bidder. The protester and the NLRB devote considerable argument to the issue of Acme's price to the public. Nevertheless, we do not need to discuss this issue because we conclude that the NLRB--contrary to its apparent intent--failed to write a requirement into the IFB that would obligate the contractor to furnish copies of transcripts to the public.

In prior years under similar NLRB contracts, the contractor furnished copies of transcripts to the public. Indeed, it was the apparent intent of the NLRB to so word the present IFB that the contractor would be required to

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provide copies of transcripts to the public--and at a reasonable cost. In the NLRB's view, this requirement would carry out the purpose of the Federal Advisory Committee Act, § 11, 5 U.S.C. app. (1976), and the Freedom of Information Act, 5 U.S.C. § 552 (1976), which limit the cost of duplication to be charged to the public to the actual cost of duplication, including a reasonable factor for overhead and profit.

But the present IFB does not contain a firm requirement for the contractor to furnish copies of transcripts to the public at any cost, let alone a reasonable cost. This conclusion follows from examination of several IFB provisions.

Under the IFB, the low bid was to be primarily determined based on the prices bid for the estimated number of pages of transcripts that would be generated by the NLRB's hearings. The estimates that were to be used in preparing bids--and in the resulting bid evaluation--were described in terms of the numbers of pages of "ordinary copy" and "prompt copy." It is clear, therefore, that these ordinary and prompt copies were required to be furnished at a stated price to the NLRB.

The IFB also contained a definition of "duplicated copy," the price of which, so said the IFB, was not to be evaluated in determining the "apparent low bidder"; nevertheless, the IFB's schedule contained a price blank for this copy service, and bidders were warned that the apparent low bidder would be required to "support [the] price offered for duplicated copy." The definition, on page 14 of the IFB, stated that duplicated copy was an "additional copy * * * that is ordered prior to the start of a hearing, by the Board or any interested person [--apparently not the general public]." The IFB further provided that, should the NLRB "decide to order additional duplicated copies, the contractor shall provide such additional duplicated copies at the same price awarded in the schedules of rates for duplicated copy."

Notwithstanding the absence of the word "public" in the definition of "duplicated copy," pages 26 and 38 of the IFB suggested that this category of copy might be sold by the contractor to the public.

Page 26 stated only that the NLRB reserved the "right to make * * * copies * * * available to the public at the actual cost of duplication," but that the contractor "[might] also sell copies to the public" at its schedule price for duplicated copy. Page 38 provided only an estimate of "pages of duplicated copies to be ordered by the public" from the contractor based on sales of the "first six-months of the FY '82 contract." Neither of these pages, therefore, mandated the contractor to provide copies to the public, and we find no other IFB provision which requires the contractor to provide copies to the public.

Consequently, the rejection of Acme's bid was improper because, even if it is assumed that Acme's proposed price to the public is "unreasonable," the alleged unreasonableness goes to a matter which was not made the subject of a binding work requirement. In other words, even if Acme had proposed what the NLRB considered to be a reasonable price for copies to the public, Acme would not have been legally bound to furnish these copies.

Therefore, to the extent that the NLRB contemplates that the contractor, rather than the NLRB, should provide copies of transcripts to the public, the procurement should be resolicited. If the NLRB itself intends to provide copies directly to the public, then award may be made to Acme if otherwise proper.

The NLRB has also requested our recommendations concerning future procurements for verbatim reporting and transcription services. In its submissions, the NLRB has suggested three alternatives for this type of procurement. They are: (1) incorporate the price for duplicated copy to the public as an IFB evaluation item; or (2) establish a fixed price for duplicated copy; or (3) base the price for the copy on a formula that relates to the price ordinarily charged for the Government copy.

The Federal Property and Administrative Services Act, 41 U.S.C. § 251, et seq. (1976), and its implementing regulations, Federal Procurement Regulations § 1-2.101 (1964 ed., amend. 95), require that contracts for property and services for the Government be awarded to the low, responsive and responsible bidder, that is, the low bid based on the cost to the Government. Our concern with suggestion

No. 1 is that it would seem to provide for an award to other than the low bidder (based on costs to the Government). In other words, the low bidder based on both cost to the Government and to the public might not be the low bidder based solely on cost to the Government. We think this would be contrary to the statutory requirement to make award to the low bidder. On the other hand, we have no objections to suggestion No. 2 or 3.

for Milton J. Socolar
Comptroller General
of the United States