

C/S/91
PL-II

DECISION



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

FILE: B-220659

DATE: February 19, 1986

MATTER OF: The Caption Center

DIGEST:

1. Agency determination to procure by means of a total package rather than by separate procurements for divisible portions of the total requirement was reasonable where the agency reasonably concluded that award of a single contract could result in (1) economies of scale accruing to the benefit of the government under the cost type contract and (2) enhanced flexibility in accommodating likely television network programming and scheduling changes over the 3-year contract term.
2. Recommendation in the report of the conference committee considering the contracting agency's appropriation that the agency award multiple contracts does not establish any legal requirement for the agency to do so where Congress appropriates a lump-sum amount without statutorily restricting what can be done with those funds.
3. Protest that solicitation is unduly restrictive of competition is untimely where not filed until after the closing date for receipt of initial proposals. Alleged impropriety in a solicitation which is apparent prior to the closing date for receipt of initial proposals must be protested prior to the closing date. 4 C.F.R. § 21.2(a)(1) (1985).

The Caption Center protests any award of a contract by the Department of Education (DOEd) under request for proposals (RFP) No. 86-008, for the closed captioning of television programs for the hearing impaired. Caption Center alleges that the RFP unduly restricts competition by contemplating the award of a single contract for the closed captioning of five different types of television programming totaling approximately 675 hours per year. We deny the protest.

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Closed captioning involves the transmission over the broadcast signal of captions or subtitles which are visible only on television sets equipped with special decoders. Since the advent of closed captioning in 1980, there has been a steady increase in the types of programs and in the number of hours that are closed-captioned each year. Caption Center estimates that the National Captioning Institute (NCI)--the largest provider of closed captioning--currently provides approximately 2700 hours of closed-captioned programming per year, while Caption Center--the second largest provider--provides another approximately 500 hours per year.

Federal funds have significantly contributed to the development of both the closed captioning technology and of NCI. In addition, they currently constitute a large share of the support for closed-captioned programming. In particular, DOEd has undertaken a number of separate procurements for the two basic types of closed captioning: the "real-time"--simultaneous with broadcast--captioning of news and public affairs programs, and the captioning of pre-recorded programs--such as movies, specials and series--for later broadcast. Recent contracts for the provision of closed captioning of prerecorded programs have included a contract which, as awarded, covered the closed captioning of movies and, as modified, now also includes specials and mini-series (under which NCI captioned over 500 hours last year), a contract for prime-time regular series, and a contract for children's programming.

The current solicitation contemplates the award of a single cost-plus-fixed-fee contract for the closed captioning of approximately 675 hours of television programming per year for 3 years. The contractor will be required to submit within 30 days after award (1) letters of commitment to document access to more than one national television network, (2) a production plan providing for the closed captioning and prime time broadcast during the first year of at least 230 movies averaging 2 hours each, 15 specials averaging 1 hour, 10 mini-series averaging 6 hours and 2 regular series averaging 1 hour, and (3) a production plan providing for the closed captioning of either two children's programs (series) averaging 1 hour or four children's programs (series) averaging one-half hour each.

The solicitation requires that for purposes of evaluating technical proposals offerors should submit categorical descriptions and statements sufficient to

establish the offeror's capability to meet the delivery or performance schedule, including the "possession . . . or the ability to obtain" the necessary organization and facilities. In particular, the solicitation provides for the evaluation of technical proposals on the basis of (1) the clarity, quality and appropriateness of the procedural plan (40 percent), (2) the personnel plan, including the "[a]vailability and commitment" of personnel with appropriate competence and experience (20 percent), (3) the management plan (25 percent), and (4) the "[a]ppropriateness and availability" of the proposed resources, facilities and equipment (15 percent). The solicitation advises that award will be made to the offeror whose proposal offers the most favorable combination of technical merit and cost, with technical considerations being of paramount importance.

Prior to the closing date for receipt of initial proposals, Caption Center protested the solicitation requirement for 675 hours per year to DOEd. After the protest to the agency was denied, Caption Center filed this protest with our Office.

Caption Center contends that the solicitation, by contemplating award of a single contract for the closed captioning of approximately 675 hours per year of five different types of programming, unduly restricts competition to the benefit of NCI, currently the only firm able to produce this level of captioning without a substantial expansion of its staff and facilities. Caption Center maintains that it will need to substantially expand its staff and facilities in order to meet the requirement and argues that, given the importance accorded in the RFP to technical merit and to the availability of personnel, resources and equipment, it will necessarily suffer a competitive disadvantage in the evaluation of proposals vis-a-vis NCI and its existing capacity. Moreover, Caption Center believes that the solicitation precludes effective competition by other, smaller closed captioning firms.

DOEd, on the other hand, questions the extent to which Caption Center is prejudiced by the requirements of the solicitation. The agency notes that the protester has stated in its proposal that it has the ability to expand its staff and facilities so as to meet the specifications, including the requirement for closed captioning of approximately 675 hours of programming per year. Moreover, DOEd contends that nothing in the solicitation imposes any

"special experience" requirements or makes "preaward capacity to closed caption 675 hours annually either a prerequisite or guarantee for receiving points in the technical evaluation."

DOEd further maintains that, in any case, a single award for the closed captioning of all five types of programming for the entire requirement of 675 hours per year would best accommodate the agency's needs for closed captioning. In particular, DOEd argues that awarding a single contract for closed captioning would (1) offer cost savings from economies of scale, such as in negotiating agreements with the networks and in labor costs, (2) provide flexibility in accommodating network programming and scheduling changes by permitting substitutions between different types of programming, (3) take into account DOEd's limited administrative resources by avoiding the greater demands on personnel and other resources which would result from awarding and administering more than one contract, and (4) facilitate securing network cooperation.

The Competition in Contracting Act of 1984 (CICA) generally requires that solicitations include specifications which permit full and open competition and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency. See 41 U.S.C.A. § 253a(a)(2) (West Supp. 1985). We recognize that procurements on a total package basis can restrict competition. Accordingly, we have objected to such procurements where a total package approach did not appear to be necessary to satisfy the agency's minimum needs. Thus, for instance, we have objected to a total package approach (1) undertaken for reasons of mere administrative convenience, MASSTOR Systems Corp., B-211240, Dec. 27, 1983, 84-1 C.P.D. ¶ 23 (justified on other grounds); Hvide Shipping, Inc., B-194218, Aug. 30, 1979, 79-2 C.P.D. ¶ 166 (justified on other grounds), (2) where the agency's need for subsystem compatibility--the agency's justification for a total package approach--did not extend to the bulk of the line items being procured, Systems, Terminals & Communications Corp., B-218170, May 21, 1985, 85-1 C.P.D. ¶ 578, or (3) where the agency provided no justification for such approach, Intermen Corp., B-212964, July 31, 1984, 84-2 C.P.D. ¶ 133; cf. AUL Instruments, Inc., B-216543, Sept. 24, 1985, 64 Comp. Gen. _____, 85-2 C.P.D. ¶ 324. In addition, we note that we have also objected to commingling sole-source items with competitive items where, although

award was to be made on an item-by-item basis, discounts for the award of multiple items to a single offeror were permitted. Interscience Systems, Inc.; Cencom Systems, Inc., 59 Comp. Gen. 438, 80-1 C.P.D. ¶ 332, modified, 59 Comp. Gen. 658 (1980), 80-2 C.P.D. ¶ 106.

Where, however, it was reasonable to conclude that procurement on a total package basis was necessary to meet the agency's minimum needs, then we have denied protests against the use of that approach. Thus, for instance, we have rejected challenges to a total package approach where (1) procurement by means of separate procurements involved undue technical risk or defeated a requirement for interchangeability and compatibility within a computer system, MASSTOR Systems Corp., B-211240, supra, 84-1 C.P.D. ¶ 23 at 3; Interscience Systems, Inc.; Amperif Corp., B-201943; B-202021, Aug. 31, 1982, 82-2 C.P.D. ¶ 187; Amdahl Corp., B-198911, Mar. 27, 1981, 81-1 C.P.D. ¶ 231, (2) a single contractor was required to assure the effective coordination and integration of interrelated tasks, Batch-Air, Inc., B-204574, Dec. 29, 1981, 81-2 C.P.D. ¶ 509; Consolidated Service, Inc. of Charleston, B-199407, Sept. 21, 1981, 81-2 C.P.D. ¶ 228; Capital Recording Co., Inc., B-189319, Feb. 15, 1978, 78-1 C.P.D. ¶ 126, (3) limiting award to a single 4-year (baccalaureate) educational institution--thereby precluding 2-year educational institutions from offering the required general education courses--was necessary to assure sufficient enrollment in the 4-year institution's lower-level courses to offset the cost of low enrollment in higher level courses, Chicago City Wide College, B-218433; B-218434, Aug. 6, 1985, 85-2 C.P.D. ¶ 133, or (4) the agency's relatively small staff could not administer several contracts as effectively as one, Eastern Trans-Waste Corp., 63 Comp. Gen. 519, 84-2 C.P.D. ¶ 126.^{1/}

In addition, recognizing that an agency's minimum needs include the need to procure services and supplies on the most cost-effective basis, we have previously indicated that

^{1/} We note that the General Services Administration Board of Contract Appeals has likewise found that an agency's needs may be such as to justify narrowing competition by procuring on a total package basis. Technology Services, Inc., GSBICA Nos. 8178-P and 8179-P, December 4, 1985 (failure to purchase entire microcomputer system from a single vendor could lead to costs and inconvenience that offset any immediate savings from multiple awards).

the possibility of obtaining economies of scale or avoiding the unnecessary duplication of costs may also justify a total package approach, see Southwest Marine, Inc., B-204136, July 20, 1982, 82-2 C.P.D. ¶ 60; Secure Engineering Services, Inc., B-202496, July 1, 1981, 81-2 C.P.D. ¶ 2; Ronald Campbell Company, B-196018, Mar. 25, 1980, 80-1 C.P.D. ¶ 216; cf. International Security Technology, Inc., B-215029, Jan. 2, 1985, 85-1 C.P.D. ¶ 6. Moreover, we believe that this remains true today, since CICA's requirement to increase the use of full and open competition is primarily a means to an end--that of fulfilling the government's requirements "at the lowest reasonable cost considering the nature of the property or service procured." 41 U.S.C.A. § 414(1); see H.R. Rep. No. 98-861, 98th Cong., 2d Sess. 1434 (1984). In this regard, we note that the Small Business and Federal Procurement Competition Enhancement Act of 1984, 41 U.S.C.A. § 253f (West Supp. 1985), requires federal agencies to procure supplies in such quantity as will result in the "total cost and unit cost most advantageous to the United States." 41 U.S.C.A. § 253f(a).

We find DOEd's effort to procure captioning services at the lowest reasonable cost by achieving economies of scale accruing to the benefit of the government under the cost-type contract contemplated to constitute a valid basis for procuring on a total package basis. While we recognize that Caption Center has indicated that it has proposed to closed caption fewer hours at a slightly lesser cost per hour than it proposed for meeting the full requirement of 675 hours, we point out that NCI's proposal cautions that NCI's cost estimates are volume-sensitive estimates based on economies of scale. Moreover, our examination of the initial cost proposals submitted by NCI and Caption Center gives us no reason to question the claims of DOEd and NCI that economies of scale are possible in closed captioning. In addition, we see nothing unreasonable in DOEd's desire to avoid having to reimburse a second contractor for duplicating the work--paid for by the government--of the first contractor in negotiating agreements with each network or in undertaking other administrative tasks. Avoiding unnecessary duplication of administrative tasks is especially important here, where a substantial portion of the total costs proposed by both NCI and Caption Center are allocated to administration, travel/living, promotion, research, and overhead.

Further, we note that Caption Center has not shown that it was unreasonable for DOEd to believe that it would be easier to accommodate changes in network programming and scheduling by substitution between different types of programming where one contractor holds a single contract for all five types of programming than where there are multiple contracts.

Given our conclusions above, we need not decide whether Caption Center was in fact prejudiced by the specifications which it considers unduly restrictive, see generally Julie Research Laboratories, Inc., B-218598, Aug. 20, 1985, 85-2 C.P.D. ¶ 194; Quality Bag, Inc., B-218547, July 1, 1985, 85-2 C.P.D. ¶ 6; Lanier GmbH, B-216038, May 10, 1985, 85-1 C.P.D. ¶ 523, nor need we consider DOEd's other justifications for a total package approach.

We recognize that, as reflected in the Conference Report adopted by the Committee of the Conference considering DOEd's appropriation for fiscal year 1986, the conferees urges the agency to make multiple awards. In particular, we note that the conferees recommended that DOEd "seek every opportunity to make multiple awards among qualified captioning agencies," since, in their view, the agency's preference for "awarding single, comprehensive captioning contracts" discourages competition between qualified captioning agencies and does not serve the "long-term best interests" of the deaf and hearing impaired community. H.R. Rep. No. 99-402, 99th Cong., 1st Sess. 31 (1985).

The Act of December 12, 1985, Pub. L. No. 99-178, however, appropriated funds for the education of the handicapped--the relevant line item--without the above restriction. As we have previously indicated, when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirement

on federal agencies. LTV Aerospace Corporation, 55 Comp. Gen. 308 (1975), 75-2 C.P.D. ¶ 203; see Washington Council of Agencies, B-209598, June 1, 1983, 83-1 C.P.D. ¶ 588.2/

Finally, we note that in its December 3 comments on the administrative report responding to this protest, Caption Center for the first time alleges that the silence of the RFP as to the "phase-in period" allowed offerors proposing a significant expansion of staff and facilities is unduly restrictive of competition. Since, however, this ground of protest--which concerns an apparent impropriety in the solicitation--was not raised until after the October 11 closing date for receipt of initial proposals, we consider it to be untimely. 4 C.F.R. § 21.2(a)(1) (1985).

The protest is denied.

for Seymour E. Fros
Harry R. Van Cleave
General Counsel

2/ As we recognized in LTV Aerospace Corporation, 55 Comp. Gen. at 318, 325, 75-2 C.P.D. ¶ 203 at 14, 22, there may be practical reasons why agencies should comply with congressional expectations regarding the use of appropriated funds. We note that DOEd has advised that it is "carefully considering the comments of the conferees and preparing a response to the congress that is expected to accompany the Department's FY 1987 budget request."