

DECISION



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

FILE: B-185712

DATE: August 10, 1976

MATTER OF: Bowers Reporting Company

DIGEST:

An IFB for reporting and transcript services precluding a monitored multi-microphone tape recording system which has a successful record of performance in other agencies in similar circumstances unduly restricts competition in the absence of inadequate performance or unacceptable shortcomings demonstrated by experience of the agency or others, engineering analysis or other logical basis.

Bowers Reporting Company (Bowers) has filed a protest before award under Invitation for Bids (IFB) No. DJ-A-76-10 issued by the Department of Justice (DOJ) for the acquisition of stenographic reporting services and the furnishing of transcripts of depositions, hearings, conferences and other proceedings from February 1, 1976 through January 31, 1977. The bid opening was scheduled for January 19, 1976 but upon being informed of this protest, DOJ extended the bid opening date indefinitely.

By letter of January 14, 1976, Bowers protested the issuance of the IFB on the grounds that its specifications were restrictive and prevented full and free competition. The protest is directed at that portion of Article 4 of the IFB which reads as follows:

"Recordings hereunder shall be taken by reporters qualified in shorthand or steno-type, and when permitted by the Presiding Official, by stenomask. If stenomask recording is permitted, the system used must be of such quality as to insure against error, misinterpretation, or loss of voice; the equipment must contain simultaneous playback, listening, and preamplification facilities. The recording of a proceeding by tape recorder alone is not acceptable." (Emphasis supplied.)

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Bowers contends that the actual need of the DOJ is the accurate reporting of the proceedings and complete transcripts and that unreasonable restrictions on the method unduly limits the number of bidders contrary to the requirements of 41 U.S.C. 253 and FPR 1-2.101. Bowers contends that its monitored multi-microphone tape recording system can meet the actual needs of the DOJ. It notes that its system has been successfully used by other governmental agencies and judicial tribunals.

In response, DOJ states that it carefully analyzed the various methods of recording prior to the issuance of its IFB and that it received from its various legal activities no favorable comments regarding the tape alone method of recording. It states that its experience with tape alone systems have included instances of total inaudibility, difficulty due to the accents and words used by speakers and the need to reschedule meetings due to the poor quality of the recordings. It does not state that it has ever used or tested the Bowers system which is constantly monitored by an operator listening to the tape with a one second delay from the actual spoken word and who concurrently records the identification of each speaker. However, the DOJ states that the use of tape systems whether monitored by well or poorly qualified operators "could very likely result" in problems of speaker identification, getting testimony repeated, equipment malfunction, recognition and background noises drowning out speakers voices. As support for its position, DOJ cites CSA Reporting Corporation, B-182161, 54 Comp. Gen. 645 (1975); 75-1 CPD 70 holding that U.S. Tax Court could limit its IFB for stenographic reporting to electronic methods only. In that case the Tax Court had used both the traditional methods of stenographic reporting and the electronic systems. Based on its experience over the years, it had concluded that the electronic system was far superior especially because of its play-back features which enable the recapture of the exact words and the manner in which they were spoken. In the instant case, the system used by Bowers, which apparently has features exceeding those of the machines used by the Tax Court, have not been used or tested by DOJ.

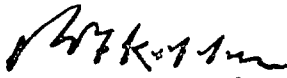
DOJ also cites National Stenomask Verbatim Reporters Association, B-183837, August 5, 1975, 75-2 CPD 84 where this Office approved an IFB provision precluding the stenomask method of reporting unless no other alternative was possible. There the U.S. Court of Claims had actually used the stenomask system and had found that the operator's voice, though muffled, may be distracting to a witness and that in many instances there is an absence of a tape back-up.

A reasonable determination by the using agency of how its needs for services of a highly technical or specialized nature should be met will not be disturbed. Digital Equipment Corporation, B-181336, September 13, 1974, 74-2 CPD 167. Therefore, in the cases discussed, specific and logical deficiencies in a system as related to the agency's needs have been held to justify the exclusion of or requirement for particular methods. Such limitations may properly be based on actual experience by the agency or others, engineering analysis, logic or similar rational bases. The specific objections raised in this case fall into two categories; experience and logic. Under the experience category, DOJ points to instances of inaudibility, difficulty with speakers' accents and words and poor recording quality. Under a system such as Bowers' the actual recording is continuously monitored almost instantaneously by an operator who in instances of the shortcomings specified would immediately request--as would a stenographer or stenograph reporter--that the statement be repeated. The second category of objections relate to speaker identification, getting testimony repeated and inaudibility due to such matters as equipment malfunction or background noises. No reason is shown, however, why these problems should be regarded as inherent in the system. Rather, they appear to be problems of responsibility. No bidder is eligible for award unless he is found responsible.

Changes proposed in methods of operation frequently encounter opposition. Some of this resistance is well-founded but any such change should not be rejected out-of-hand merely because it has never been done before or that the people involved are more comfortable with the old method. We do not believe that a collection of impressions, gained from experience on other equipment and predictions are sufficient justification for excluding a new system especially in the light of its acceptable use by other agencies in similar circumstances.

Exclusion of the monitored multi-microphone recording system in the circumstances constitutes an undue restriction on competition contrary to the purposes of the procurement statute.

The protest is sustained.


Deputy Comptroller General
of the United States