

DECISION



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

PETIT
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FILE: B-198448.3

DATE: June 24, 1981

MATTER OF: Federal Energy Regulatory Commission--
Reconsideration

DIGEST:

Decision holding solicitation provision which precludes use of electronic tape recording devices as method of stenographic reporting is unduly restrictive of competition is affirmed where agency has presented no new factual grounds showing exclusion is reasonably related to agency's needs. Objectionable features of reporting system are not shown to be inherent in recording devices and concern matters of bidder responsibility which may be specified or proscribed in solicitation.

The Federal Energy Regulatory Commission (FERC) requests reconsideration of a portion of our decision in North American Reporting, Inc.; Ace-Federal Reporter, Inc., B-198448, November 18, 1980, 60 Comp. Gen. (1980), 80-2 CPD 364, in which we sustained protests against deficiencies in FERC invitation for bids (IFB) No. FERC-80-B-0001 for stenographic reporting services. In so doing, we held that the IFB provision that "(e)lectronic tape recording devices are not acceptable in administrative proceedings before Administrative Law Judges," protested by North American Reporting, Inc. (NAR), was unduly restrictive of competition. The FERC asks that we reconsider only this issue and, alternatively, requests a detailed explanation of the factors which an agency may properly consider in determining its specific stenographic needs for administrative hearings and the method of accommodating those needs.

The FERC has presented no new factual grounds demonstrating that our earlier decision was erroneous, but asserts that our assessment of the record before us was in error due to allegedly erroneous findings of fact, resultant legal conclusions and application of pertinent case law and the burden of proof.

[Request for Reconsideration]
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While the FERC obviously disagrees with our conclusion, the agency has not raised any matters which were not fully considered and discussed in the decision and has done no more than reiterate its original position in requesting reconsideration of the case.

When a protester challenges a specification as unduly restrictive of competition, it is incumbent upon the procuring agency to establish prima facie support for its contention that restrictions it imposes on competition are reasonably related to its needs. The adequacy of its explanation will be evaluated not simply in regard to the reasonableness of the rationale asserted, but by examining the analysis given in support of those reasons. Constantine N. Polites & Co., B-189214, December 27, 1978, 78-2 CPD 437; Oshkosh Truck Corporation, B-198521, July 24, 1980, 80-2 CPD 161. While, as the FERC states, the burden of proof remains on the protester, that burden is to show that the requirements complained of are clearly unreasonable, ibid., and it devolves upon the protester subsequent to the agency's establishment of the requisite support for the restrictions in question.

NAR contended that the above-quoted prohibition of electronic tape recording devices was unduly restrictive of competition because it excluded NAR's monitored multimicrophone system of direct recording which the protester asserted was an already proven method of reporting that could meet FERC's actual needs. The FERC, however, stated only that the exclusion was based upon problems identified by the agency's administrative law judges through use of various tape recording services which they found can be inefficient, give poor quality transcripts and create administrative problems in hearing rooms. The FERC simply did not make the prima facie showing requisite to support the generic restriction it proposes. In this regard, we have held that while agency specifications complained of by a protester may have a reasonable basis, absent a substantiation from the procuring agency other than unsupported conclusions, we have found the protester's arguments persuasive. Lanier Business Products, Inc., B-193693, April 3,

1979, 79-1 CPD 232 (reversed on new evidence in Interstate Commerce Commission--Reconsideration, June 11, 1979, 79-1 CPD 409, aff'd, Lanier Business Products, Inc.--Reconsideration, August 3, 1979, 79-2 CPD 78). Furthermore, NAR responded to the problems raised by the FERC by stating either that its system did not suffer from those problems, that the firm had never experienced the enumerated problems, or that the problems identified were characteristic of other reporting methods. We believe that the protester has sufficiently demonstrated that the FERC's restriction is too broad. While the FERC insists that the reasons adduced for the IFB restriction are based on the actual experiences of its judges, the agency expressed the opinion that it is not required to have specific experience with either NAR or the firm's system of direct recording or to search out and examine every firm or system of stenographic service to decide that a particular system should not be allowed to compete for a contract. Finally, the FERC also stated that whether NAR ever experienced the problems raised by the judges was irrelevant and that a demonstration of NAR's services was neither necessary nor appropriate.

Although the FERC characterizes our decision as substituting our opinion for that of the contracting agency, we did not state that the FERC must allow recording devices to be used in its administrative proceedings. We merely found that the FERC could not properly exclude them in the manner and for the reasons proposed.

We remain of the opinion that our decision in Bowers Reporting Company, B-185712, August 10, 1976, 76-2 CPD 144, is both appropriate to and dispositive of the facts pertaining to the FERC procurement. In Bowers, the contracting agency sought to exclude the recording of proceedings by tape recorder alone from its IFB for stenographic reporting services. Bowers, like NAR, asserted that its monitored multimicrophone tape recording system could meet the agency's actual needs. The contracting agency explained that it analyzed various recording methods before issuing the IFB and received no favorable comments from its legal activities on the tape alone method, that its experiences with

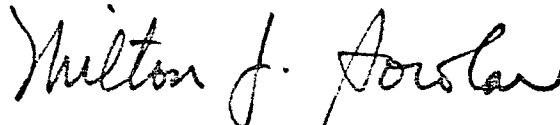
such systems included problems similar to those raised by the FERC, but that it never used or tested Bowers' system. The FERC seeks to distinguish Bowers on the basis that the agency in that case did not consider factors which pertained to the method of service and the procedures to be used or factors inherent in the excluded method of reporting. The FERC cites the following concerns as factors inherent in the electronic tape recording devices it seeks to exclude:

- (1) the systems use a time consuming process to provide the play back of witness testimony;
- (2) there can be a need to postpone entire hearings because an original recording device and the back-up recording devices malfunction at the same time;
- (3) by its nature the tape record can be accidentally erased;
- (4) it is often impractical to place enough microphones in the room to accommodate the number of speakers present; and
- (5) speakers assume the microphones amplify what is said and they must be continuously reminded to speak louder.

Contrary to the FERC's interpretation, we stated in Bowers that getting testimony repeated and problems due to equipment malfunction were not shown to be inherent in the system, but were problems of bidder responsibility. Similarly, while play-back time, microphone arrangement and sufficiency and preservation of the record may be problems of some recording devices or services, we cannot conclude that they can reasonably be classified as problems inherent in electronic tape recording devices as a class. Exclusion of tape recording devices alone does not eliminate the problems with which the FERC states it is concerned in acquiring stenographic reporting services.

We find no basis in the FERC's submission upon which to reverse our determination that the above-quoted provision of the IFB is unduly restrictive of competition. Moreover, we believe that our decision provided guidance concerning the factors which may properly be considered in formulating a specification reflective of the agency's actual minimum needs. In short, the agency's needs do not warrant the exclusion of a particular method of providing the services required. We noted that problems identified by the FERC may also be problems to which other types of stenographic equipment and services are subject and that these objectionable features could be proscribed by the IFB specifications. Required equipment features and unacceptable equipment features and performance parameters can be specified. Similarly, matters which pertain to bidder responsibility can be stated as definitive responsibility criteria.

Accordingly, our decision and recommendation are affirmed.

A handwritten signature in dark ink, reading "Milton J. Fowler". The signature is fluid and cursive, with the first name "Milton" and last name "Fowler" clearly legible. The middle initial "J." is smaller and less distinct.

Acting Comptroller General
of the United States