

**DECISION**
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

 WASHINGTON, D. C. 20548  
 80-2 CPD 364

FILE: B-198448

DATE: November 18, 1980

MATTER OF:

 North American Reporting, Inc.;  
 Ace-Federal Reporters, Inc. ✓

DIGEST:

1. Solicitation for recording and transcript services which precludes use of electronic tape recording devices on basis of agency personnel past experience with other systems and difficulties which concern bidder responsibility, thereby excluding monitored multimicrophone tape recording system with successful record of performance in similar proceedings in other agencies which procuring activity has neither tested nor used, unduly restricts competition.
2. Solicitation for requirements-type contract which fails to include estimates upon which bids will be evaluated and to define "other service" delivery basis upon which bids are sought precludes preparation and evaluation of bids on equal basis. Solicitation should be amended before agency proceeds with procurement to either include estimates and definition or to stipulate ceiling price for services in question.

North American Reporting, Inc. (NAR), and Ace-Federal Reporters, Inc. (Ace), have protested against alleged deficiencies in the Federal Energy Regulatory Commission's (FERC) invitation for bids (IFB) No. FERC-80-B-0001 for stenographic reporting services. NAR contends that the IFB is unduly restrictive of competition because it prohibits the monitored electronic recording method of reporting. Ace, on the other hand, asserts that the IFB is ambiguous because it does not provide estimates for the evaluation of all bid items, define "other services" for which a

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bid is required, or include sufficient information from which to bid on accelerated delivery services. The protesters conclude that the solicitation is so defective as to preclude adequate competition for the agency's requirements and that it should be rewritten to correct these deficiencies before proceeding with the procurement. The FERC has postponed bid opening pending resolution of the protests.

The IFB contemplates the award of a requirements-type contract under which the successful bidder acts as the official FERC stenographic reporter, produces transcripts, and furnishes copies of the transcripts to the FERC and the public. The IFB divides the FERC's reporting needs into three categories--Schedules "A," "B," and "C"; the latter two schedules pertain to nonpublic proceedings and sale of these transcripts is restricted.

Paragraph "D," page 29, of the IFB states that "(e)lectronic tape recording devices are not acceptable in administrative proceedings before Administrative Law Judges." NAR claims that this provision is unduly restrictive of competition because it excludes a method of reporting already proven before other Federal agencies, citing our decisions in Bowers Reporting Company, B-187512, August 10, 1976, 76-2 CPD 144; National Stenomask Verbatim Reporters Association, B-183837, August 5, 1975, 75-2 CPD 84; CSA Reporting Corporation, 54 Comp. Gen. 645 (1975), 75-1 CPD 70. NAR also refers to many favorable experiences and comparison tests with its equipment by other Government agencies and courts in support of its assertions that the firm's monitored multimicrophone system of direct recording can meet the FERC's actual needs. The protester characterizes those needs as accurate reporting of proceedings and complete transcripts and concludes that the FERC should be concerned with the quality and timely receipt of transcripts rather than with the reporting process itself.

The FERC states that the restriction to which NAR objects does not apply to proceedings which are not before administrative law judges. It is based upon

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the following three categories of problems identified by the judges through past use of monitored and unmonitored tape recordings services which they found can: (1) be inefficient due to numerous disruptions and delays, (2) give poor quality transcripts caused by the service or equipment, and (3) create administrative problems in the hearing room. The procuring agency also enumerated the reasons the judges found that tape recording services can have each of these types of problems. The FERC asserts that contrary to NAR's suggestion, a demonstration to compare the protester's direct recording system with stenographic services is neither necessary nor appropriate because an after-the-fact demonstration is irrelevant to the question of the propriety of the agency's use of its administrative discretion in drafting the IFB specifications, citing our decision in Digital Equipment Corporation, B-181336, ✓ September 13, 1974, 74-2 CPD 167. Furthermore, the FERC emphasizes that the restriction applies equally to all recording services or companies and does not single out NAR for exclusion from the competition.

We have held that the determination of what will satisfy the Government's needs is primarily within the discretion of the procuring officials. We will not interpose our judgment for that of the contracting agency unless the protester shows that the agency's judgment is in error and that a contract awarded on the basis of such specifications would be a violation of law by unduly restricting competition. Essex Electro Engineers, Inc., B-191116, ✓ October 2, 1978, 78-2 CPD 247; Joe R. Stafford, B-184822, ✓ November 18, 1975, 75-2 CPD 324.

Similarly, we will not disturb a reasonable determination by the using agency of how its needs for services of a highly technical or specialized nature should be met. Therefore, in the CSA Reporting Corporation and National Stenomask cases, cited above, specific and logical deficiencies in a system as related to the agency's needs justify the exclusion of or requirement for particular methods. Such restrictions may properly be based upon actual experience by the agency or others, engineering analysis, logic, or similar rational bases. Bowers Reporting Company, supra. In our opinion, the reasons set forth by the FERC, however, do not meet this standard.

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We believe that our decision in Bowers Reporting Company, supra, is controlling here. In the Bowers case, the agency sought to exclude recording by tape recorder alone on the basis of its experience with tape recording systems which included inaudibility, problems with speakers' words and accents, and the necessity of rescheduling meetings due to poor quality recordings, but did not state that it had ever tested or used the protester's sophisticated, monitored system. We held that difficulties with speaker identification, repetition of testimony, equipment malfunction, and inaudibility caused by predominating background noise (also alleged here by the FERC), which are not shown to be peculiar to the system, are problems of bidder responsibility. As such, they are adequately protected against because an affirmative determination of a bidder's responsibility is prerequisite to award of a contract.

However, among the reasons enumerated for the three categories of problems listed above, the FERC further explains that the judges found that recording services can be inefficient due to disruptions and delays because there can be a need to stop the hearing every 30 to 45 minutes to change the tape. Similarly, it found that the services can create problems in the hearing room because, among other things, it is often impractical to place enough microphones in the room to accommodate the number of speakers and the wires running throughout the room create a potential safety hazard. NAR states, however, that its system does not require stopping hearings for any reason at any time, that it has reported many hearings (for specified Government agencies and the Congress) identical to and larger than FERC proceedings, that there are no exposed wires or safety hazards and that no one has ever been injured with NAR's system. The FERC, however, takes the position that whether NAR has specifically experienced these problems is irrelevant because the FERC considered the entire field of electronic recording services as a whole and did not consider or compare the merits or demerits of other types of services or contractors in preparing the IFB. While the reasons suggested relate to the method of service and the equipment to be used and therefore do not pertain to bidder responsibility, we believe that the Bowers case is nonetheless dispositive.

In our opinion, the FERC's objections merely relate to possible problems which could occur in using some tape recording devices rather than features inherent in all recording devices which necessarily result in the problem phenomena. We note, too, that they may also be problems to which other types of stenographic equipment and services are subject. Moreover, objectionable features, such as frequent tape changes and exposed wires, could be proscribed by the IFB specifications. Finally, NAR has uncategorically stated that these problems are not applicable to its system. We find that the FERC's reasons are no more than a collection of impressions, gained from experience on other equipment and predictions, which we have held insufficient to justify excluding a system, particularly one which has been found acceptable by other agencies in similar circumstances. Therefore, we cannot concur in the FERC's generic exclusion of a reporting method on the basis of features which are not characteristic of the entire class of devices or services using that equipment. Consequently, we conclude that the IFB provision prohibiting the use of electronic tape recording devices, quoted above, is unduly restrictive of competition and NAR's protest on this ground is sustained.

Ace's protest pertains primarily to that portion of the IFB concerning duplicating services for the public and its objection to the FERC's failure to provide transcript duplication estimates is twofold. Initially, the protester asserts that the absence of estimated quantities for accelerated duplication service to the public precludes bidders from bidding on a rational basis. Ace contends that the IFB therefore also fails to state the quantities upon which bids for accelerated duplication services for the public will be evaluated so bidders do not know the basis upon which their bids are to be evaluated and the successful bidder could well be determined by the evaluation quantity chosen rather than by the lowest bid price.

Section "D" of the IFB provides that bids will be evaluated for each period or option period on the following four cost factors: 1) cost of original and specified copies to the Government, 2) cost to the

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public and to the FERC of reproduced copies, 3) minimum charges, and 4) surcharges. Ace takes the position that part "B" of the section, "Cost to Public," as amended, requests per page bid prices for tables "A" and "B" for five types of accelerated delivery services (same day, overnight, 3-day, 5-day, and other service) without providing any estimates of the number of transcript pages which may be required contrary to Federal Procurement Regulations (FPR) § 1-3.409(b)(1) (1964 ed. circ. 1) and prevents bidders from knowing the basis on which their bids will be evaluated. Because the IFB prescribes a \$0.25 per page rate for regular delivery service (furnished within 10 days of receipt by the FERC) to the public, and bidders are required to bid on same day, overnight, 3-day, and 5-day delivery service, Ace contends that the term "other service" upon which a bid is also required is ambiguous.

The FERC states that the term "other service" is not ambiguous because it has only one reasonable meaning and obviously means every service offered by the contractor not otherwise enumerated. The "other service" category, in the agency's opinion, permits the contractor the flexibility to state a price for service not otherwise specified in the solicitation while at the same time meeting the FERC's requirement that fees be fixed in advance, 18 C.F.R. § 1.21(a) (1980). In answer to Ace's hypothetical question as to whether the term might include delivery performed in 3 hours and 42 minutes, the FERC explains that if Ace has such a service for sale it should quote its price, but that unless Ace advises the FERC of this particular service, it would not be permitted to offer this "other service" to the public.

We agree with the protester that the term "other service" as used in the amended IFB is ambiguous. If, as the FERC suggests, the term is a catchall category for accelerated delivery services other than those listed, it would appear to include 4-day, as well as 6- through 9-day, delivery at the same price per page--a rate presumably lower than that bid for 5-day service. More importantly, according to the FERC's response to Ace's hypothetical question, the term "other service" may be any other delivery service each bidder cares to

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offer as long as the FERC is so advised. Thus, the bidders are, in effect, defining the term and, as they do so differently, their bids are not comparable because they are not bidding on the same delivery bases. See 39 Comp. Gen. 570, 572 (1960). Therefore, we believe that this portion of the IFB accelerated delivery specification is not sufficiently definite to permit the preparation and evaluation of bids on a common basis. M. J. Rudolph Corporation, B-196159, January 31, 1980, 80-1 CPD 84; 36 Comp. Gen. 380, 385 (1956).

Similarly, we believe that the FERC's failure to provide estimates for duplication services to the public in violation of FPR § 1-3.409(b)(1) also precludes the preparation and evaluation of the bids on a common basis known to the bidders. Although estimates for its own transcript and duplication requirements for the base and option years were incorporated in the IFB by amendment, the FERC states that no estimates for services to the public have been provided because the incumbent contractor is not required to keep sales data or provide them to the FERC and it is not administratively feasible for the FERC to independently estimate public sales. The FERC contends that it is not soliciting bids for the needs of the public and is not required to estimate those needs, but believes that "Cost to the Public" must be evaluated because it is a required feature of the contract. Bids for transcript duplication services to the public, the agency explains, will be evaluated, therefore, by selecting arbitrary evaluation estimates which will be split equally among the schedules and delivery bases and concludes that application of the same arbitrarily selected estimates to all bids will result in their evaluation on an equal basis.

With regard to requirements contracts, our Office has held that, where the quantities of the items to be procured are not known, the IFB must provide some basis for bidding, such as estimated quantities for the various items; and that where it is not administratively feasible to estimate future

requirements, the IFB may instead list past orders. 52 Comp. Gen. 732, 737 (1973). Estimates are essential in helping bidders prepare reasonable, intelligent bids and ensure award of the contract to the lowest bidder. Edward E. Davis Contracting, Inc., B-192707, April 20, 1979, 79-1 CPD 280; Michael O'Connor, Inc., 56 Comp. Gen. 108, 109 (1976), 76-2 CPD 456. Therefore, without estimates, bidders are not provided all the information that might be important to formulate an intelligent bid on a common basis and have to guess the anticipated reproduction requirements of the public. Elrich Construction Company, B-187726, February 14, 1977, 77-1 CPD 105; Instant Replay Equipment Company, et al., B-193826, June 15, 1979, 79-1 CPD 423.

Finally, due to the omission of estimates for duplication services to the public, the IFB not only fails to inform bidders of the basis upon which their bids for these services will be evaluated, but also leaves the overall evaluation method to the bidders' speculation and invites unbalanced bidding. Bidders cannot compete on an equal basis as required by law unless they know in advance the basis on which their bids will be evaluated. At a minimum, the basis of evaluation must be stated in the IFB with enough clarity to tell bidders before bid opening the objectively determinable factors (factors which can be stated or ascertained by bidders at the time they are preparing bids) from which a bidder can reasonably estimate the effect of applying these factors to his bid in relation to other possible bids. 36 Comp. Gen. 380, 385 (1956). We have held that, if the bid evaluation provisions of an IFB do not adequately express the procuring agency's intent or reflect the reported actual needs of the agency, the solicitation is defective. Crown Laundry and Cleaners, B-196118, January 30, 1980, 80-1 CPD 82, aff'd, April 2, 1980, 80-1 CPD 245. We therefore have found evaluation factors based primarily on a subjective determination announced at or after bid opening violative of this requirement because they cannot be determined by the bidders during bid preparation. 36 Comp. Gen. 380, 385 (1956). Consequently, we find the evaluation of bids for duplication services



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to the public on the basis of unannounced, arbitrary evaluation estimates similarly objectionable because they are not ascertainable in advance by the bidders and preclude bidding on an equal basis.

For the reasons discussed above, we recommend that the instant IFB be amended to correct the aforementioned deficiencies before the FERC proceeds with the procurement. First, the IFB should be amended to omit the restriction excluding the use of the monitored multimicrophone recording system for stenographic reporting services. Second, the term "other service" for accelerated duplication service to the public should be defined if a bid for delivery on that basis will be required. Finally, estimates for anticipated accelerated duplication services to the public must be provided to bidders if the FERC intends to include bids for those services as factors in its bid evaluation. These estimates would also serve to inform bidders of the basis upon which their accelerated service bids and overall bids are to be evaluated. If, on the other hand, the FERC is unable to estimate the anticipated duplication requirements of the public, it may stipulate a ceiling charge for duplication services rendered on various accelerated bases, as it has done with regard to regular delivery service to the public, and evaluate bids only on the basis of the price for duplication services to the FERC. See B-179038, ✓ October 4, 1973, aff'd, CSA Reporting Company, B-179038, ✓ February 13, 1974, 74-1 CPD 66. In that case, however, the FERC must determine that the ceilings for duplication services for the public are reasonable pursuant to the requirements 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. Securities Exchange Commission, B-184420, ✓ July 2, 1975, 75-2 CPD 9; see Hoover Reporting Company, Inc., B-185261, ✓ July 30, 1976, 76-2 CPD 102.

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Accordingly, the protests are sustained.

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For The Comptroller General  
of the United States