

Proc. 11

DECISION



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

9789

FILE: B-193157

DATE: April 12, 1979

DLG00027

MATTER OF: Downtown Copy Center

[Protest of Search Fee Limitation in RFP As Unduly Restrictive of Competition]

DIGEST:

1. Protest against amendment to solicitation prohibiting contractor from charging more than \$5 hourly search fee as unduly restrictive of competition is rendered moot by procuring activity's proposed modification to delete that requirement from solicitation and use \$5 rate as guideline.
2. Protest that proposed use of \$5 hourly search fee guideline will limit competition, give impression contractor can make profit at \$5 rate, and leave offerors in quandry as to potential profit due to undetermined labor wage is denied. Guideline does not preclude negotiation or submission of offers exceeding \$5 hourly search rate. Search and duplication fee may include factor for profit and overhead and procuring activity will evaluate offers in recognition of fact \$5 guideline does not include profit factor.
3. Department of Labor (DOL) Service Contract Act wage determination merely prescribes minimum wage and fringe benefits to be paid class of employees included in determination and other employees must be paid not less than minimum wage specified in Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, et seq. (1976). Offerors' ability to formulate technical and cost proposals on basis of information in solicitation is not impaired by fact there is no DOL wage determination for particular category of employees which may be employed in performance of contract.

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Downtown Copy Center (DCC) protests against amendments to request for proposals (RFP) No. 78-13, issued by the Federal Communications Commission (FCC), concerning the "search fee" rate to be charged by the prospective contractor.

The RFP, issued on August 9, 1978, contemplates the award of a requirements contract for the provision of supplies and services for research, duplication and sale to the public of FCC documents available for inspection pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976), and FCC regulations, 47 C.F.R. §§ 0.441-0.467 (1977), for fiscal year 1979 with two annual renewal options. The closing date for receipt of proposals was originally on September 11, 1978.

On September 7, 1978, the solicitation was amended to incorporate Department of Labor (DOL) Wage Determination No. 76-910 (Revision 3) for photocopy machine operators pursuant to the Service Contract Act of 1965, as amended (SCA), 41 U.S.C. §§ 351-58 (1976), and to extend the closing date to September 29, 1978. Amendment No. 2, issued on September 22, 1978, extended the closing date to October 13, 1978, and, among other modifications, changed the RFP heading and references from "Research Fee" to "Search Fee," and added subparagraph "f," below, to section "F," paragraph 7, of the RFP:

"The contractor will not charge more than \$5.00 per hour as a 'search fee.' Any charge over \$5.00 per hour search fee, is in violation of the Commission Rules, Section 0.466. [47 C.F.R. § 0.466 (1977).]* * *"

The RFP was further amended by telegram of October 10, 1978, indefinitely extending the closing date and advising prospective offerors of DCC's protest.

DCC, the incumbent contractor, initially protested against the search fee limitation included in the RFP by Amendment No. 2 on the grounds that the \$5 fee does not reflect the present contractor's \$10 hourly fee or the current market cost of search services, that the fixed search fee precludes negotiation of search services, forces offerors to work at a loss and, therefore, unduly restricts competition.

In prescribing the manner in which Federal agencies shall make information available to the public, FOIA requires that each agency issue regulations specifying a uniform fee schedule, limited to reasonable standard fees which allow for recovery of only the direct costs of document search and duplication. 5 U.S.C. § 552(a)(4)(A) (1976). FCC's implementing regulation, 47 C.F.R. § 0.466 (1977), specifies a charge of \$5 per hour, with certain exceptions, for searching records requested under §§ 0.460(d) and 0.461. While the regulation accurately states the search fee charged when the services are performed by FCC personnel, the FCC concedes that it is ambiguous because it fails to differentiate between the charge for work performed by FCC personnel and that done by the contractor. The FCC states that to the extent the solicitation sought to limit offerors to the \$5 hourly search fee based upon the regulation, the RFP will be modified to delete that requirement, to advise offerors that the regulation is inapposite to their offers, and to indicate the present contract price of \$10 per search hour. The FCC intends, however, to indicate in the RFP its desire to use the \$5 search rate as a guideline for offerors, recognizes that this fee does not include a profit and will evaluate offers accordingly, but feels that the guideline will apprise offerors of the agency's rough estimate of the value of this service.

DCC takes exception to the proposed modifications to the RFP, asserting that the solicitation will still be unduly restrictive of competition because it (1) effectively limits the number of contractors which will submit offers, (2) gives the impression contractors can be successful at \$5 per hour despite the fact that prior contractors did not renew options because they were not making money at the \$5 hourly rate, and (3) leaves prospective offerors in a quandary as to their potential profit by lowering the still undetermined labor wage. DCC contends that FCC should amend the present regulation to reflect the current contract rate and postpone the procurement until it receives a DOL wage determination.

We believe that the protester's objections to the search fee limitation imposed by Amendment No. 2 are moot as a result of the FCC's proposed modification to the RFP which will no longer preclude a search fee in excess of \$5 per hour.

In considering the related question of price limitations imposed by the Federal Advisory Committee Act, § 11, 5 U.S.C. app. (1976), and FOIA § 552(a)(4)(A) in formally advertised procurements of stenographic and transcript duplication services, we recognized that the actual cost of duplication to be charged to the public may include 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; B-179038, October 4, 1973, aff'd., CSA Reporting Company, B-179038, February 13, 1974, 74-1 CPD 66. We cannot, therefore, agree with the protester's assertions that offerors are forced to perform at a loss or precluded from negotiating with respect to the FCC's search service requirements. Furthermore, the FCC has stated that offers will be evaluated in recognition of the fact that the \$5 guideline does not include a factor for profit.

FCC listed both "archivist" and "copy machine operator" as classes of service employees to be employed on the contract under the RFP in the Standard Form 98, "Notice of Intention to Make a Service Contract and Response to Notice," submitted to DOL pursuant to Federal Procurement Regulations (FPR) § 1-12.905-3 (1964 ed. amend. 53) on August 29, 1978. We have informally ascertained from DOL that no wage determination has been issued for archivists. Contrary to the protester's contentions, wage determinations do not establish a maximum wage, but merely prescribe the minimum wage and fringe benefits which must be provided to the class of service employees included in the wage determination during the performance of the contract. 29 C.F.R. § 4.6(b)(1) (1978). Employees not included in the wage determination must, in any event, be paid not less than the minimum wage specified by the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, et seq. (1976); 29 C.F.R. § 4.6(b)(2) (1978). It is our opinion that offerors may adequately formulate their technical and cost proposals on the basis of the information provided in the RFP and their estimate of the wage rate employees actually will require to perform the work involved.

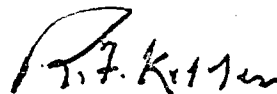
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The United States Office of Consumer Affairs, Department of Health, Education, and Welfare, submitted its views on the protest and takes the position that any search fee exceeding \$5 per hour charged by FCC or any of its contractors for duplication services pursuant to FOIA requests violates FCC regulations and, therefore, FOIA. Similarly, DCC suggests that FCC amend the present regulation to reflect the current contract rate. To the extent the regulation states the search fee for services performed by FCC personnel, it reflects the rate currently charged for that service by the FCC. Use of the agency's private contractor is at the option of the public. In

this regard, the FCC has advised that it will take appropriate steps to revise the regulations to reflect the respective search and duplication fees.

We note that the RFP does not include the Service Contract Act clause, as amended, required by FPR § 1-12.904-1 (1964 ed. amend. 190). The RFP should be amended to include the required clause before the Commission proceeds with the procurement.

Accordingly, the protest is denied.



Deputy Comptroller General
of the United States