MEMORANDUM FOR Heads of Contracting Offices
FROM: Joyce A. Cavallini
Chief, Procurement Management-Division
SUBJECT: Acceptance of "Bonus Bids"

Attached is an October 22 memorandum from the Office of Federal Procurement Policy (OFPP) on acceptance of "bonus bids" for stenographic reporting services. Due to a recent court decision, OFPP advises that such bids should not summarily be considered nonresponsive.

Incidences of "bonus bids" are expected to be rare, however, the attached memorandum outlines the OFPP policy and guidelines for handling them. That office does not anticipate initiating FAR coverage on this subject.

Based on Congressional interest, OFPP is also requesting agencies to notify them of requirements other than stenographic reporting services for which "bonus bids" are received. The attached memorandum does not address whether or not "bonus bids" on other requirements may be accepted; they are only asking to be informed of their existence. If your office receives "bonus bids" on other than stenographic services, please notify us immediately of the type of requirement, the estimated cost, and the location of the services. This information may be sent to the attention of Martha Lanigan who can be reached on 202-377-4248.

Attachment
Earlier this year, one of the Federal Government's regulatory commissions received an adverse decision from a U.S. District Court regarding the commission's refusal to consider a bid (U.S. District Court for the District of Columbia, Civil Action No. 90-0287). The bid in question was for stenographic reporting services of regulatory hearings in which the bidder offered to pay the Government to perform the contract. The commission's refusal to consider receipt of payment and the publicity it generated prompted an inquiry from Congress regarding the extent to which "bonus bids" are, or should be, used. This Office was requested to consider establishing Government-wide guidelines to address this issue.

The purpose of this memorandum is to provide guidelines to be used by agencies when contracting for stenographic reporting services when there is a potential for receiving "bonus bids". A "bonus bid" is a bid or offer in which the offeror would pay the Government to perform a contract which would, under normal circumstances, be expected to be paid for by the Government from appropriated funds. A "bonus bid" situation would most likely occur when the payment offered to the Government would be recouped through profits from selling transcript copies to the public.

Agency selection of the method for solicitation and evaluation when acquiring stenographic reporting services need not be arbitrarily restricted by the possibility of receiving "bonus bids." Depending on an agency's mission and the nature of the requirement, sealed bidding and negotiation are both acceptable methods for solicitation and evaluation.

While the likelihood of receiving a "bonus bid" for stenographic reporting services should not be widespread, agencies shall not determine "bonus bids" to be nonresponsive. However, when contracting with firms responding to solicitations with "bonus bids," agencies must

1. determine that prices of transcript copies charged to the public will be fair and reasonable, and
2. deposit any contractor payments received into the U.S. Treasury.

When the acquisition of stenographic reporting services involves dissemination of information to the public through the sale of hearing or meeting transcripts, agencies shall comply with OMB Circular A-130, Management of Federal Information Resources. The Circular provides, in Appendix IV, Section 8, paragraph a. (11) (a), that "When agencies use private sector contractors to accomplish dissemination, they must take care that they do not permit contractors to exercise monopolistic controls in ways that defeat the agencies' information dissemination obligations, for example, by setting unreasonably high prices."

Therefore, agencies shall prevent contractors from recovering their "bonus bids" by charging the public excessive costs for transcript copies. Agencies shall, at a minimum, specify in the solicitation document that prices of transcript copies charged to the public will be evaluated on the basis of reasonableness, and that award will not be made to a firm that charges unreasonably high prices to the public.

For example, when sealed bidding is used, prices charged to the public can be directly evaluated by being included in the "prices" section of the invitation for bids and/or the responsibility determination required by FAR 14.407-2, Responsible Bidder--Reasonableness of Price. When negotiation is used, appropriately weighted evaluation factors and/or the determination of price reasonableness performed in accordance with FAR 15.608(a)(1) can be used to ensure prices charged to the public are reasonable. In all instances, agencies shall ensure that the prices charged to

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the public are incorporated into the resulting contracts.

The statute governing miscellaneous receipts, 31 U.S.C. 3302, Custodians of Money, requires agencies to deposit any money received from outside sources into the general funds of the U.S. Treasury and not into the agencies' own accounts, barring statutory authority to the contrary.

It is possible that "bonus bids" may occur in situations other than stenographic reporting services where contractors, in performing Government contracts, obtain something of value which they may, in turn, sell to other parties for a profit. For purposes of this memorandum, these could also include requirements which contractors are willing to perform for free or token amounts, but exclude contracts which do not evolve from the appropriations process (e.g., sales and concessions). Agencies shall inform this Office of any such situations involving other than stenographic reporting services. This information will be used to determine whether additional guidance is needed on this matter.

These guidelines shall be implemented immediately. Any questions, comments or information regarding this approach should be referred to Mr. Stanley Kaufman, Deputy Associate Administrator. Mr. Kaufman may be reached at (202) 395-6803.