

## Court reporters crying foul over transcription bidding

By Kris Olson

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Lawyers who have come to rely on the services of trusted private court reporters may soon face a difficult decision: Stop using them, or pay a second time for a transcript prepared from a recording if the attorneys pursue an appeal.

The reason, according to those court reporters, is a “request for providers” issued by the Trial Court on Dec. 12, which opened up the Office of Transcription Services’ approved transcriber list for the first time since 2008.

But some of the would-be respondents say the RFP has been flawed from the start and sets the bar unfairly high in allowing them to fully serve their clients.

### Rollout questioned

As reported in Lawyers Weekly last August, reopening the approved transcribers list had been a priority of the Massachusetts Court Reporters Association when it met with Trial Court Administrator Lewis H. “Harry” Spence over the summer to discuss a number of subjects, including the fate of the courts’ official court reporters.

Assured that the RFP was forthcoming, court reporters dutifully registered as vendors in COMMBUYS, the state’s online procurement portal.

However, when the RFP did go live Dec. 12, many court reporters say they were not alerted as expected. They believe a coding error by the Trial Court’s procurement director is to blame, though in a Jan. 11 letter, Trial Court Deputy Legal Counsel Gwen A. Werner disputed that assertion.

Werner was responding to a letter from MCRA President Carolyn J. Rogers to Lon F. Povich, the governor’s chief legal counsel.

Lisa Starr, a registered professional reporter and a certified real-time reporter, said her firm, Copley Court Reporting, has been registered for at least 15 years with the state’s various procurement systems and has been registered as a vendor under the “legal services” code — the one the Trial Court insists it used — with COMMBUYS since its inception. However, this is the first time she has not received an automatic notification when a bid has been opened in that category.

Given that the MCRA had twice met with Spence, the Trial Court should have been aware that the Massachusetts Court Reporters Association was anxious to receive notice about the RFP, she says.

“We made it clear we were chomping at the bit,” Starr says.

The glitches did not end with the lack of notification, according to the court reporters. Through discussions with COMMBUYS’s customer service, they determined that they were seeing neither the questions other vendors were posting nor the Trial Court’s responses, a feature of COMMBUYS that seeks to ensure all potential bidders are on equal footing.

The problem, they determined, was that the Trial Court procurement director had failed to click a box within the COMMBUYS system that would allow the questions and responses to appear.

A spokesperson for the Trial Court did not respond to questions from Lawyers Weekly before deadline.

### Obstacles aplenty

Glitches with the rollout aside, the court reporters say the real problem with the RFP is its contents, particularly the hoops it requires vendors to jump through.

For one thing, the RFP requires vendors to have three years of experience transcribing from digital audio recordings, which they note is something of a Catch-22 situation. Given that they have until now been excluded from the approved transcribers list, such experience has been difficult, if not impossible, to obtain.

Moreover, the RFP also asks for a certification many Massachusetts court reporters do not hold: one from either the American Association of Electronic Reporters and Transcribers or the National Court Reporters Association.

To be sure, the court reporters do hold certain certifications, ones that they say entail passing much more stringent testing to obtain. For example, while the American Association of Electronic Reporters and Transcribers — or AAERT — requires transcribers to type at 55 words a minute, court reporters who have obtained the Certified Shorthand Reporter certification from the Massachusetts Court Reporters Association have demonstrated an ability to record live testimony at a rate of 210 words per minute.

“Some people have to take the exam 10 times to pass,” Starr says. “They freeze up. It’s very intense.”

Based in part on what they argue is a more stringent form of certification, the court reporters have requested that the Trial Court accept a Certified Shorthand Reporter designation in lieu of the AAERT or NCRA certification, but those requests thus far have been rebuffed.



Starr estimates that it would cost several hundred dollars to obtain the AAERT designation. Now semi-retired, she used to be a member of the NCRA but let that credential lapse several years ago. It would cost about \$2,000 to get those credentials reinstated, even though the Massachusetts Court Reporters Association’s exam is sanctioned by the NCRA, she says.

“If our exam is sanctioned, what’s the problem?” she asks.

Also rebuffed have been requests to spare the state’s official court reporters from having to endure the RFP process.

The only conclusion the court reporters can draw, Starr says, is that the Trial Court is “being very exclusionary here because they don’t want us on the list,” instead gearing the RFP to those with the AAERT certification.

In her letter, Werner wrote that the AAERT or NCRA requirement is designed “to standardize qualifications especially in view of technological and production advances.”

She added: “It is also unclear from your letter how the RFP restricts competition when it allows for any individual or firm to apply to be on the approved list.”

For some court reporters, obtaining the added certification makes even less sense, given that they have no interest in competing for work on state-assigned cases, for which the statutory compensation is \$3 a page. Rather, they merely want to be able to fully serve their clients, providing transcripts that

the attorneys will be able to use in filings with the Appeals Court.

That the records they are creating will not be accepted in the Appeals Court is just one of the Trial Court’s responses to vendors’ questions on COMMBUYS that have raised concerns. Starr also points to the requirement that vendors submit three years’ worth of tax returns, ostensibly to prove that their enterprises are financially viable. Even a 42-page RFP from the Department of Revenue to which her firm responded didn’t ask for that, she notes.

### Intruding into the private sector

The “stranglehold” that the Office of Transcription Services holds on Massachusetts transcription work isn’t necessarily new, according to Lisa Phipps, a certified real-time and shorthand reporter. But the RFP threatens to tighten that stranglehold, she says.

Moreover, the court reporters continue to have questions regarding nearly \$275,000 in payments made to a vendor not on the approved transcribers list, eScribers, LLC, of Arizona and New York.

In the Lawyers Weekly story last summer, Spence attributed the awarding of that work to eScriber’s capacity to accept electronic transmittal of recordings, though the court reporters say the Trial Court administration has yet to address how the company overcame its absence on the approved transcribers list.

Now, through the RFP, eScribers, which boasts online of its “AAERT

certified transcribers,” is poised to gain entry onto the list, while Massachusetts-based, largely women-owned businesses remain on the outside looking in, which does not sit right with Phipps.

“The Trial Court is taking away from the women taxpayers of the commonwealth the right to earn a living, to provide for themselves and their family,” she says. “There is no need to outsource this work to any out-of-state company. There are plenty of hardworking, qualified people who reside in Massachusetts that are ready, willing and able to perform this work.”

Given the statutory rate for transcription services, the court reporters note that the Trial Court will not save any money by making the official transcribers list more exclusive. It is hard for them not to wonder, in Starr’s words, whether there is “some sort of deal going on,” especially given the overlap in the leadership of AAERT and the CEO and president ranks of eScribers and For the Record, the vendor the Trial Court hired to install digital recording systems throughout the state.

Responding to a court reporter’s inquiry as to how the Trial Court would “ensure equal distribution of the work” to members of the approved transcribers list, the Trial Court responded: “The assignment protocol being developed will be consistent with all statutes, rules and case law as well as Mass. [Appellate Procedure Rule] 8, which is now in the process of being promulgated.”

It would be one thing if eScribers or another approved transcriber working off a recording produced a record with fewer errors or “inaudible” sections. But the court reporters say the opposite is the case.

Starr says she just finished a two-year medical-malpractice trial with multiple psychopharmacology and biopharmacology expert witnesses.

“The terminology was brutal,” she says.

As a real-time reporter, she could pause the proceedings or interact with the witnesses to gain clarification, but had she needed to transcribe that trial from an electronic recording, it would have been a “disaster,” she says.

Not only that, but her clients paid tens of thousands of dollars to have the benefit of real-time reporting and nightly drafts during the trial. To think that those clients would have to pay on top of that for a transcript to use in an appeal is “crazy,” she says, a view she suspects would be shared by the judges who granted motions to allow her into the courtroom.

The court reporters also believe the Trial Court now has proof of the difference in quality.

As a result of their conversations with Spence, the court reporters say a test was conducted to compare the records created by a real-time reporter in the courtroom and a transcriptionist working with a recording. Through their Norwood attorney, Tracey A. Brown, the court reporters on Jan.

11 requested the last six months’ worth of results from testing in Massachusetts courtrooms.

The court reporters say they have yet to receive a response.

### End game

Starr notes that the court reporters tried to lodge a formal bid protest, speaking to the inspector general, among others.

“Everyone points fingers in different directions because no one has jurisdiction” over the Trial Court, she says. “They are their

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own island, and it’s a problem.”

As things stand now, those who would like a spot on the approved transcribers list have until 3 p.m. on Feb. 27 to complete and return the RFP.

The RFP notes that the list of approved court transcribers will not be capped or restricted to a maximum number of vendors. If an applicant meets all the requirements of the RFP, they will be added to the list.

The Trial Court is also accepting applications from “conditional applicants”: those who meet the other requirements of the RFP and who have registered for an upcoming certification test.

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### Post-deadline interview with a spokesperson for the Trial Court:

**Q.** Is the Trial Court administration confident that this RFP reached all who may have been interested in responding to it? (My understanding is that there was an issue with a box not being checked to reach all who registered with a certain vendor code with COMMBUYS.)

**A.** On December 14, 2016, the Office of Transcription Services (OTS) staff emailed every transcriber on the current approved court transcribers list and every transcriber that emailed the OTS Office seeking to be added to the list, with notice that the RFP had been posted and the email included a link to the RFP itself. The email also informed the recipients of the UNSPSC code of the RFP. In addition, a meeting was held in October 2016 at which the Court Administrator informed the MCRA and other court reporters that the RFP would be posted soon. Please note that the deadline for filing applications is February 27, 2017.

The state’s online procurement system, COMMBUYS, requires use of a United Nations Standard Products and Services Code (UNSPSC). The Trial Court used the “legal services” code, since there is no code for court reporters and transcription. Any vendor that

registered prior to the posting of the RFP received notification from CommBuys, while anyone who registered after the posting date did not. In development of the RFP an effort was made to not single out or eliminate anyone. Once any RFP is issued, all communication related to that RFP must be done as part of the official Q & A process via the COMMBUYS website.

**Q.** What would you say to private court reporter who are concerned that the RFP was written in such a

and how did they get it?

**A.** Escribers is not on the court transcriber list used by the majority of clerks and registers offices – those offices use transcribers from the approved list. Escribers was enlisted to assist OTS with a backlog of predominantly criminal cases because they had the ability to transfer files electronically, making the process more efficient.

**Q.** In response to a question asked about the RFP (No. 25 in the document in which the answers are compiled), about later filing in the Appeals Court of an official record created by a real-time reporter hired by a private client, the Trial Court responds, “Any transcripts that are filed as part of any appeals process in the Judiciary require transcripts transcribed by Approved Court Transcribers.”

a. It’s been suggest to me that many attorneys who have developed relationships with and come to trust the work of certain real-time reporters will be dismayed to learn that, if they have to file an appeal, they will have to pay a second time for a transcript that their real-time reporter has already created.

b. Not only that, but the real-time reporters suggest that this transcript produced from the For the Record recording of the proceedings will be inferior to the one produced by the real-time reporter. Why would the Trial Court’s official position be that this allegedly inferior transcript should nonetheless be the only acceptable one for the Appeals Court, especially if the real-time reporter is willing to comply with the UTF format?

**A.** A transcript assignment protocol being developed at this time will be consistent with all statutes, rules and case law, as well as proposed amendments to Mass. R.A.P. 8 currently being developed. The protocol will provide guidance on the ordering and assignment of transcribers and will accommodate the needs of the courts and the bar with the goal of enabling a quality transcript of proceedings. The real-time reporter certificate will be accepted under the RFP and real-time reporters should apply to be on the list so that attorneys may enlist their services.

**Q.** I’ve been told that there was a test undertaken by the Trial Court to compare the results of a real-time reporter in preparing a transcript to someone working with the digital recording. Are you able to share the results of this test? I understand that the Massachusetts Court Reporters Association, through its attorney, has requested a copy of the results of that test. Was that request received? Why hasn’t it been responded to yet?

**A.** The Trial Court developed a review process to examine the completeness and quality of court transcripts produced using audio recordings captured by FTR. A preliminary review of this internal process is underway and final recommendations have yet to be developed. **MLW**

way as to make it very difficult, if not impossible, for them to get on the approved transcriber list? Issues I’ve heard about are at least two-fold:

a. The requirement that the respondent have “a minimum of three (3) years or more of full-time professional experience in preparing official, verbatim transcripts of court proceedings from digital audio recordings.” (If court reporters have previously been precluded from gaining a spot on the list, how would they gain that experience, they ask.)

b. The certification requirement: It sounds like many of our private court reporters have other types of certification that AAERT and indeed believe the certifications they have attained involve more rigorous requirements than AAERT, but subjecting them to the time and expense of attaining another certification is an obstacle.

**A.** The Trial Court’s goal in preparing the RFP was to standardize the qualifications, particularly in view of technological and production advances. The required certifications demonstrate competency and a knowledge base of digital court reporting and transcription. A wide range of certifications will be accepted – AAERT, or NCRA, or NVRA, or NSVRA certifications are required.

The RFP includes court reporters who have three or more years of full-time experience preparing official, verbatim transcripts of court proceedings from digital audio recordings. (Section 11Cv)

Court reporters are not required to get an AAERT certificate under the terms of the RFP. The RFP requires that transcribers, not court reporters, have an AAERT certificate. OTS will accept a certificate from NCRA, (National Court Reporters Association) or NVRA or NSVRA from court reporters.

**Q.** ESCRIBERS, LLC is shown as having secured \$274,435 in payments as a vendor, according to the state’s open checkbook. Yet I don’t believe they are on the approved transcribers list. What is this work,