

118036

DECISION



21417 Weiskopf
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-202953

DATE: April 6, 1982

MATTER OF: National Data Corporation

DIGEST:

1. GAO will consider a protest of a subcontract award where the agency instructs its prime contractor not to select the protester and where the agency participates in selecting the subcontract awardee.
2. Agency's instruction to its prime contractor that it select another source besides the protester is inconsistent with the Federal norm requirement for competition to the maximum practicable extent, which was incorporated into the prime contract, where the record does not show that the protester was unavailable as a source of supply or unable to provide the services within the required time-frame.

National Data Corporation protests a subcontract award by an Environmental Protection Agency (EPA) prime contractor--Fein Marquart Associates, Inc.-- to obtain teleprocessing services for the Chemical Information System maintained by EPA,* and developed by Fein Marquart under its prime contract. The National Institutes of Health (NIH) had been responsible for obtaining teleprocessing services for the System, which National Data had provided under a subcontract with an NIH prime contractor. EPA, however,

* Section 10 of the Toxic Substances Control Act, 15 U.S.C. § 2609 (1976), requires EPA to establish, with the assistance of other agencies, a data retrieval system concerning the effects of chemical substances and mixtures on health and the environment, and authorizes EPA to enter into contracts for the development of such a system.

assumed responsibility for the teleprocessing services from NIH and directed Fein Marquart to select a source for the services; this effort apparently was within the scope of Fein Marquart's prime contract. National Data basically alleges that EPA directed Fein Marquart not to contract with National Data, and that EPA participated in the selection of Information Consultants, Inc. (ICI) without affording National Data an opportunity to compete. We sustain the protest.

Although EPA and the protester disagree as to many of the facts of this case, the following facts are uncontroverted. NIH's prime contract, under which National Data was providing teleprocessing services as a subcontractor, expired May 1, 1981, although it did contain an option for one year's renewal. NIH gave the prime contractor a deadline of April 1 to submit a proposed subcontract for a one-year extension of the services. The prime contractor and National Data, however, formally presented a contract to NIH on April 3, 1981. Meanwhile, on April 2, EPA directed its prime contractor, Fein Marquart, to select another teleprocessing source. This was to be only an interim measure since EPA intended to recompet Fein Marquart's contract with an award projected for October 1, 1981. Fein Marquart selected ICI, the only available source other than National Data.

On April 9, both proposed subcontracts were presented to the Chemical Information System Steering Committee, composed of representatives from EPA, NIH, and two other Government agencies, for "selection between them" (according to the minutes of the Steering Committee meeting). At the meeting, the Government representatives decided to approve Fein Marquart's subcontract with ICI and to allow the NIH prime contract and the National Data subcontract to expire.

Generally, the contracting practices and procedures employed by prime contractors--who normally are acting as independent contractors--are not subject to the statutory and regulatory requirements governing direct Federal procurement. See Singer Company, Inc., Kearfott Division, 58 Comp. Gen. 218 (1979), 79-1 CPD 26. Our Office, therefore, considers subcontractor protests only in limited circumstances, such as where the Government's active or direct participation in the selection of the subcontractor has the net effect of rejecting or selecting a potential subcontractor or significantly limiting subcontract sources.

Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. We consider that situation to be present here, since EPA directed its prime contractor to select a source other than National Data, and the Government, through the Steering Committee, actually selected the subcontractor. While EPA argues that Fein Marquart selected ICI as its subcontract source without any Government participation, the Steering Committee still selected between Fein Marquart's subcontract with ICI and the NIH prime contractor's subcontract with National Data. Under the circumstances, we will consider the protest's merits.

The frame of reference for our review where an agency directly participates in the selection of the subcontractor generally is the Federal norm, embodied in the procurement statutes and implementing regulations. See 47 Comp. Gen. 668 (1970). An essential element of the Federal norm is the requirement for maximum practicable competition. See General Electrodynamics Corporation--Reconsideration, B-190020, August 16, 1978, 78-2 CPD 121. In this respect, while we recognize the propriety and necessity to deviate from some details of the Federal norm where they are not appropriate for application to prime contractor procurements, see 47 Comp. Gen., supra, EPA has not argued that the requirement for maximum practicable competition should not apply here. In fact, EPA's contract with Fein Marquart expressly required competition for subcontracts to the maximum practicable extent.

We believe that EPA's instruction to Fein Marquart that it select another subcontractor other than National Data, and the consequent exclusion of National Data, did not conform to the Federal norm of maximum practicable competition. The record shows that ICI was the only available teleprocessing source other than National Data, and the effective result of EPA's instruction thus was a directed subcontract award to ICI. We believe that National Data should have been afforded the opportunity to compete for the Fein Marquart subcontract.

EPA explains that it instructed Fein Marquart to select another source because National Data and NIH's prime contractor appeared unable or unwilling to come to an agreement with NIH for continued teleprocessing services after May 1, 1981 when the prime contract was due to expire. As stated previously, NIH had given the prime contractor a deadline of April 1 to

present a subcontract agreement for such services, but did not receive the agreement until April 3. Since no contract had been delivered by the deadline, EPA, after consultation with NIH, directed Fein Marquart to locate another source to begin providing teleprocessing services until a new prime contract could be awarded.

Although EPA certainly had an urgent need to obtain teleprocessing services by May 1, that urgency did not justify eliminating National Data from competition unless EPA could reasonably conclude that National Data was not a qualified, available source of supply. We construe the requirement for maximum practicable competition in direct Federal procurements to mean that while an agency may use accelerated procurement procedures to meet an urgent need, it still must attempt to achieve competition and to treat each competitor as fairly as the circumstances will permit. Las Vegas Communications, Inc. -- Reconsideration, B-195966.2, October 28, 1980, 80-2 CPD 323. Only where the contracting officer reasonably concludes that no competition is available within the required time-frame will this Office condone a noncompetitive award for reasons of urgency. See Security Assistance Forces & Equipment OHG, B-200350, March 13, 1981, 81-1 CPD 212.

We do not see why National Data was not considered a potential subcontract source for the Fein Marquart subcontract. The record lacks any evidence that the failure of NIH's prime contractor to present a subcontract agreement to NIH by the April 1 deadline (the agreement was presented on April 3) was attributable to National Data being unavailable as a source of supply, or unable or unwilling to provide the services beginning May 1. Rather, the negotiations between NIH and its prime contractor clearly indicated National Data's interest in the teleprocessing services subcontract, although the parties involved in those negotiations may have had difficulty coming to terms. Also, as the incumbent teleprocessing services provider, National Data certainly could have met EPA's need beginning on May 1. In fact, as of April 3, two days after the deadline imposed by NIH but still six days before the Steering Committee's meeting, the Government had National Data's proposal to continue teleprocessing services past that date.

The only "competition" here at all was conducted by the Government Steering Committee. The Steering Committee reviewed Fein Marquart's sole-source subcontract with ICI for teleprocessing services, and the NIH prime contractor's proposed subcontract with National Data, and decided which it preferred. In effect, then, the Steering Committee competed the two proposed subcontracts against one another.

We believe that the Steering Committee's action simply compounded the problem, however, since it thrust the protester into a competition without its knowledge. At the time it negotiated its proposed subcontract with NIH's prime contractor, National Data was not aware that its subcontract arrangement would be in competition with any other subcontract proposals. Further, the subcontracts were negotiated by different parties, at different times, and under different ground rules. In this respect, when EPA instructed Fein Marquart to select another source, it stipulated that any subcontract must be at no cost to EPA (all users of the Chemical Information System, including EPA, pay set fees for the use of the system, and EPA wanted the subcontract cost to be fully defrayed by these fees). The record does not indicate that National Data negotiated its subcontract under a comparable constraint; in fact, the cost aspect of the ICI subcontract evidently was a critical element in the Steering Committee's choice of that firm.

We sustain the protest against the sole-source subcontract award to ICI. We do not recommend any corrective action, however, since EPA has already initiated a competitive procurement for a new prime contract and projects an award shortly. Nonetheless, by separate letter we are advising EPA of our views for purposes of future subcontract selections.

for Milton J. Arosow
Comptroller General
of the United States



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

R-202953

April 6, 1982

The Honorable Anne M. Gorsuch
Administrator
Environmental Protection Agency

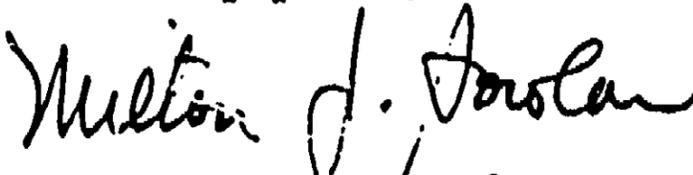
Dear Ms. Gorsuch:

Enclosed is a copy of our decision of today sustaining National Data Corporation's protest of a subcontract award by an Environmental Protection Agency (EPA) prime contractor, Fein Marquart Associates, Inc. Fein Marquart awarded the subcontract, which is to provide teleprocessing services for the Chemical Information System, to Information Consultants, Inc. on a sole-source basis after EPA directed Fein Marquart to select a source other than National Data. The protester had been providing the services under a subcontract with a National Institutes of Health (NIH) prime contractor.

We find that Fein Marquart improperly restricted competition for the subcontract and that this deficiency stemmed from EPA's direction that Fein Marquart select another source besides National Data. We also note that EPA participated with other agencies in choosing Fein Marquart's selected source over a proposed subcontract with National Data (under the NIH prime contract), and thus thrust National Data into "competition" with Information Consultants without National Data's knowledge and without established ground rules.

Since EPA has already initiated a competitive procurement for a new prime contract and expects an award shortly, we do not recommend any corrective action in this case. We recommend, however, that you take appropriate steps to prevent such problems in future subcontract selections.

Sincerely yours,

for 
Comptroller General
of the United States

Enclosure