A. Z. Herman
Proj. II

DECISION

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

7553

FILE: B-191264

DATE: September 6, 1978

MATTER OF: Cohu, Inc.

DIGEST:

1. Where Department of Energy (DOE) contract with prime management contractor for operation and management of DOE facilities, requires contractor to award subcontracts on basis of fair and equal treatment of all competitors, the "Federal norm" provides an appropriate frame of reference for determining if fair and equal treatment has been provided in specific situations.

2. Fair and equal treatment of competing offerors is not provided when, after cutoff date for receipt of quotations, operating contractor permits one offeror to submit price based on offeror's suggested alternate approach but does not provide competitor with opportunity to furnish quote based on that approach.

3. Although protest is sustained, requested relief that contract be terminated at midpoint and award for balance of supplies be made to protester is inappropriate since protester has not shown entitlement to award. Also, recompetition would not be in the best interest of Government at stage of contract where 50 per cent or more of performance had been completed.

Cohu, Inc. (Cohu) protests the award to RCA Corporation (RCA) of a contract for 319 "off the shelf" security monitoring television cameras by Sandia Corporation (Sandia) under Sandia Request for Quotation (RFQ) No. CRB/07-1369. Sandia is the

operating contractor for the Department of Energy's (DOE) Sandia Laboratories. The cameras were being purchased for the Air Force under agreements between DOE's predecessor agencies (the Atomic Energy Commission and the Energy Research and Development Administration [ERDA]) and the Air Force pursuant to the Economy Act, 31 U.S.C. 686 (1970).

Cohu complains that, contrary to Federal procurement practices, Sandia reopened negotiations with RCA after receipt of best and final offers, without affording Cohu the same opportunity to negotiate further, with the result that RCA became the low offeror.

Sandia (a subsidiary of Western Electric) operates Sandia Laboratories under a cost type, no profit, no fee contract with DOE. The contract provides that Sandia's procurement policies and practices will be as agreed by Sandia and DOE. The DOE/Sandia agreement does not require Sandia to procure goods and services under the provisions of the Federal Procurement Regulations (FPR), although it does require Sandia to include specific clauses in its contracts "as are required by statute, and Executive Order."

The material facts in this case are not in dispute, and are chronologically set forth below:

August 16, 1977	Sandia issued Request for Quotation No. CRB/07-1350 to Cohu and RCA.
September 2, 1977	RCA submitted an offer of $659,188 and Cohu submitted an offer of $743,104.
September 1977-January 1978	The procurement was held in abeyance pending resolution of a protest involving this procurement raising issues unrelated to those now under consideration. See General Electrodynamics Corporation, B-190320, January 31, 1978, 78-1 CPD 78.

February 1, 1978	RCA and Cohu were requested to reconfirm and extend their offers (no request for price changes were made) because both had expired during the pendency of the protest.
February 2-3, 1978	The Sandia Contracting Representative informed both RCA and Cohu by telephone that the cutoff date for final offers would be noon, Albuquerque time, February 6, 1978.
February 3, 1978	By identical TWXs to both RCA and Cohu, the Contracting Representative confirmed that the cutoff date was noon, Albuquerque time, February 6, 1978.
February 6, 1978	By letters, RCA lowered its offer to $623,779, and Cohu lowered its offer to $622,451.
February 7, 1978	The contracting representative telephonically requested RCA to furnish a price for its proposed alternate for item 10, which had not been priced in RCA's offer. Item 10 called for the delivery of a theoretical reliability analysis. RCA's alternative offer was for an analysis based on actual test data.
February 8, 1978	By telephone and letter, RCA offered a price of $7,200, on the basis of which RCA's total offer was $599,479.
February 10, 1978	The contract in the amount of $599,479 was awarded to RCA.

DOE's regulatory provisions applicable to subcontracting by DOE's operating contractors are set forth in 41 C.F.R. Part 9-50 (1977). Pertinent portions of these regulations provide as follows:

"9-50.302 Subcontracting policies and procedures.

9-50.302-1 General

Procurement activities of operating and other onsite contractors are governed by contract provisions. Federal Procurement regulations generally are not directly applicable. There are, however, requirements of certain Federal laws, executive orders, and regulations, including Federal Procurement Regulations, which pertain to procurements by these contractors. These requirements, together with implementing ERDA procurement regulations which apply to contractor procurement, are identified in this section." (Emphasis added.)

* * * * *

9-50.302-3 Policies

"The following policies apply to contractor procurement. Within these policies it is expected that procurement systems and methods will vary according to the types and kinds of procurement to be made, the needs of the particular programs, and the experience, methods and practices of the particular contractor.

* * * * *

"(b) Procurement should be effected in the manner most advantageous to the Government--price, quality, and other factors considered. In order to assure this objective and the award of business on an impartial basis, procurement (from other than Government

sources) shall be effected by methods calculated to assure such full and free competition as is consistent with securing the required supplies and services. Generally, procurement actions are carried out through one of the following methods:

(1) Competitive offers or quotations and award. The competitive offer or quotation and award method of procurement, which normally assures the greatest degree of full and free competition, generally involves the following basic steps and objectives:

* * * * *

(iii) Handling solicitations in a manner which provides fair and equal treatment to all prospective contractors.

(iv) Making an award to the prospective contractor whose offer, in response to the solicitation, will be most advantageous to the Government, price and other factors considered. However, if upon evaluation it is determined to be in the best interests of the Government to enter into negotiations with prospective contractors before award, such negotiations should be conducted in accordance with (2) below with respect to according fair and equal treatment to prospective contractors.

(2) Negotiation. Procurement by this method normally should be conducted by competitive negotiations through the solicitation and evaluation of proposals, from an adequate number of qualified sources to assure effective competition, consistent with securing

> the required supplies or services. * * * Requests for proposals should describe the property or services required as completely as possible; allow sufficient time for the submission of proposals; and establish a closing date for receipt of proposals. Proposals should be handled in a manner which provides fair and equal treatment to all prospective offerors. Selection of offerors for negotiation and award shall be consistent with FPR 1-3.805 and ERDA-PR 9-3.805."

ERDA (now DOE) PR 9-3.805 is not germane to this case. FPR 1-3.805-1 provides in pertinent part that:

> "(a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and other factors considered * * *.
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> (5) * * *[W]hen the proposal most advantageous to the Government involves a material departure from the stated requirements, consideration shall be given to offering the other firms which submitted proposals an opportunity to submit new proposals on a technical basis which is comparable to that of the most advantageous proposal: Provided, that this can be done without revealing to the other firms any information the offeror does not want disclosed to the public (see § 1-3.103(b)).
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> (b) * * * Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations

> (see § 1-3.805-1(a) shall be offered an equitable opportunity to submit such price, technical or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals should be submitted by that date. In addition, all such offerors shall be informed that, after the specified date for the closing of negotiations, no information (other than pre-award notice of unacceptable proposals or offers) will be furnished to any offeror until award has been made. * * *
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> (d) When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements, such change or modification shall be * * *furnished to each prospective contractor."

Although DOE's regulatory provisions distinguish between the "competitive" procurement (a method somewhat akin to the Federal procurement concept of formal advertising) and methods to be used by DOE operating contractors, we find that the Sandia procedures approved by DOE do not define "competitive" or "negotiated" procurement and do not clearly distinguish the two. For example, Sandia Procurement Instruction (P.I.) 8.01 ¶ 7.01 states:

> * * * * the award decision, whether based on competitive or negotiated pricing, shall in addition to other considerations, be based on fair and equitable treatment of all quoters * * * ." (Emphasis added.)

While, P.I. 8.01 ¶ 7.02 states:

> "In competitive situations, if discussions are conducted with or changes granted to one quoter, the other responsive quoters must be afforded equal treatment. * * *"

In addition, P.I. 8.14 ¶ 2.1 describes competitive purchases as follows:

> "A purchase is categorized 'competitive' when the award is based on adequate price competition, i.e., two or more responsive quotations from responsible quoters. * * *
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> "A purchase will also be categorized "competitive" when more than one proposal is received and the primary basis of selection is best proposal/approach submitted and the price/cost arrangement is the secondary basis of selection." (Emphasis in the original.)

It seems apparent that the "competitive situations" mentioned in ¶ 7.02 are not intended to be the same as the competitive pricing mentioned in ¶ 7.01 or in the DOE definition of "competitive offers" and the term "competitive" as it is used in P.I. 8.14 ¶ 2.1, clearly has two meanings--one consistent with the DOE regulatory definition of "competitive offers" and the other meeting the DPE definition of competitive negotiations.

The DOE/Sandia position is simply that the procurement was proper because it was conducted in accordance with Sandia's approved procedures and that the complained of action--requesting a price from RCA for an alternative approach proposed by RCA for a small portion of the contract--was not prejudiced to Cohu.

We do not agree. Both the DOE regulations and the Sandia P.I. require that Sandia's practices

foster the "fair and equal" treatment of all competitors. That term is not defined, so that what constitutes fair and equal treatment in a given case obviously must be determined on the basis of the facts and circumstances involved. In determining whether a particular course of action results in fair and equal treatment, we of course recognize that the practices and procedures of the Government's prime contractors are not by themselves subject to the statutory and regulatory requirements governing direct procurements by the Federal Government, 51 Comp. Gen. 329, 334 (1971); 49 id. 668 (1970), and have stated that therefore the propriety of a prime contractor award "must be considered in light of relevant prime contract provisions" rather than those statutory and regulatory provisions. Tennecomp Systems, Inc., B-180907, April 22, 1975, 75-1 CPD 244. However, since the subcontract awards are regarded as "for" the Government, we have also stated that the award actions should be measured against the "Federal norm," that is, the general basic principles which govern the award of contracts by the Federal Government, see Fiber Materials, Inc., B-191318, June 8, 1978, 57 Comp. Gen.___, 78-1 CPD 422, so that the prime contractor's procurements will be consistent with the policy objectives of the Federal statutes and regulations. See Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10; General Electrodynamics Corporation--Reconsideration, B-190020, August 16, 1978, 78-2 CPD___. Thus, in defining for a specific situation, the fair and equal treatment requirement inherent in Sandia's approved procurement procedures, we believe the "Federal norm" provides the appropriate frame of reference.

In this case it is not clear whether Sandia was conducting a "competitive" type procurement or a "negotiation" type procurement, since elements of both appear to be present. In either event, we are unable to conclude that fair and equal treatment was afforded to Cohu because it is clear that RCA was provided an opportunity to revise its offer while Cohu was not.

In this regard, we point out that a fundamental precept of any competitive procurement system is that

all competitors must be given the opportunity to submit offers on a common basis. Computek Inc., et al., 54 Comp. Gen. 1080 (1975), 75-1 CPD 384; 53 Comp. Gen. 32 (1973); 51 id. 518 (1972); 39 id. 570 (1960); Homemaker Health Aide Service, B-188914, September 27, 1977, 77-2 CPD 230. Thus, when formal advertising type procedures are utilized and one bidder offers a product which varies from the advertised requirements, the bid may not be accepted even though it would in fact meet the procuring activity's actual needs. Instead, the activity is required to readvertise so that all bidders are afforded an equal opportunity to compete on the same basis--that of the activity's actual needs. 43 Comp. Gen. 209 (1963); 52 id. 815 (1973). Similarly, when negotiation type procedures are used, and

> "* * * there is a change in an agency's stated needs or * * * an agency decides that it is willing to accept a proposal that deviates from those stated needs, all offerors must be informed of the revised needs, usually through amendment of the solicitation, and furnished an opportunity to submit a proposal on the basis of the revised requirements. Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201 (1975) 75-2 CPD 144; Computek Incorporated, et al., supra; Unidynamics/St. Louis, Inc., B-181130, August 19, 1974, 74-2 CPD 107; Annandale Service Company, et al., B-181806, December 5, 1974; 48 Comp. Gen. 663 (1969)." Union Carbide Corporation, 55 Comp. Gen. 802, 807 (1976), 76-1 CPD 134.

In this case, Sandia sought competition on the basis of, inter alia, a theoretical reliability analysis. One competitor, RCA, offered an alternative approval. Sandia's willingness to consider that approach was not communicated to the other offeror, (there is no suggestion here that "technical transfusion" would have resulted, such as in Raytheon Company, 54 Comp. Gen. 169 (1974), 74-2 CPD 137), and as a result of Sandia's seeking a price from RCA for the alternate approach, RCA was given an opportunity to revise its price quotation while the other

offeror was not. As a result, RCA and Cohu neither competed on an equal basis (in connection with the reliability analysis) nor had the same opportunity to submit final pricing.

DOE and Sandia maintain that no prejudice accrued to Cohu because Cohu could not have lowered its price sufficiently on the basis of a change in the Item 10 reliability analysis requirement to overcome the RCA price change. (Cohu's price for item 10 was $2,300, so that even if Cohu reduced its price to zero, RCA's alternate proposal price could "still be $20,622" lower than Cohu's overall price). Cohu doesn't dispute those figures. It does, however, disagree with the DOE/Sandia position, which Sandia states as follows:

> "It is Sandia's position that 'equal treatment' does not require Sandia to permit Cohu to requote all 10 items of the RFQ when RCA was only given an opportunity to price the RCA alternate proposal with respect to Item 10.
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> "It would have been unequal treatment of RCA to have permitted Cohu to reprice its quote after having only permitted RCA to price its alternate proposal for Item 10. It should be pointed out that RCA did not know whether Sandia would award the contract based upon original Item 10 or the RCA alternate proposal for Item 10, an option that remained open to Sandia up until the time the contract was finally awarded. It should also be pointed out that RCA did not know whether Cohu was being asked to price the RCA alternate proposal. In fact, RCA did not know at any time whether Cohu was the low quoter or the high quoter nor was Cohu ever advised prior to contract award whether RCA was the low quoter or the high quoter. All RCA knew was that Sandia was interested in their alternate proposal for Item 10 and desired to have the price for that alternate proposal.

> "Inasmuch as any quote by Cohu on the RCA alternate proposal for Item 10 could not possibly result in Cohu being the low quoter, it was not 'unequal treatment' for Sandia to award the contract to RCA without requesting Cohu to price the RCA alternate proposal."

Cohu maintains that Sandia was required to request revised pricing from it just as Sandia requested pricing from RCA, and that Sandia could not properly have limited Cohu to a price revision for item 10 only.

It is the general rule in Federal procurements that offerors have the right to change their proposals in any manner they see fit so long as negotiations remain open, University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD 201; PRC Information Sciences Company, 56 Comp. Gen. 768 (1977), 77-2 CPD 11; 49 Comp. Gen. 402 (1969), and it has been recognized that when an opportunity for further discussion is provided, offerors may offer substantial price reductions that are unrelated to any changes made in the Government's stated requirements or may otherwise completely restructure their pricing. See Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168, and cases cited therein. This aspect of Federal negotiated procurement is based in part on a recognition that offerors initially may structure their price proposals in myriad ways. For example, where several line items are involved, some offerors may propose very realistic prices for each line item, while others may assign a large portion of overall costs to a particular line item and propose a very low price on other line items. Other offerors may propose high prices on all or most line items, thereby retaining the option of significantly reducing their individual item and/or overall pricing should the opportunity arise. Contracting officers, of course, generally are not in a position to know precisely how each offeror has structured its pricing in such situations.

This case provides a good example of the disparate pricing approaches competitors may take. RCA's original quotation was $659,188, while Cohu quoted a significantly higher $743,104. However, when some months later RCA and Cohu were asked to confirm those prices, RCA lowered its price approximately 5 percent, to $623,779, while Cohu lowered its price approximately 16 percent to $622,451. For item 10, RCA originally proposed a price of $31,500 while Cohu's price for the item was $2,700. It may be that Cohu's item 10 price was unrealistically low, that the RCA price was reasonable, and that RCA's drastic reduction for the item 10 alternate approach was also realistic. On the other hand, it may also be that Cohu's item 10 price was the realistic one, and that RCA's price was realistically unrelated to the actual cost for the item 10 wrok. In that case, RCA, merely by being asked to quote a price for the alternate approach, would have been given an opportunity to substantially revise its overall price proposal under the guise of modifying only its item 10 price.

In light of the wide variety of pricing approaches which competing offerors may take, we do not think contracting officials properly can limit proposal revisions to individual aspects of the proposals. Rather, we believe basic fairness requires that if some change is made in the procuring activity's requirements, offerors generally must be permitted to modify their proposals however they wish since only they know how the change will impact on their overall proposal as submitted. In this case, RCA may well have had that opportunity as a result of its high item 10 price. It would be manifestly unfair to Cohu, we think, for it to be denied an opportunity to revise its proposal merely because it structured its individual item pricing differently.

We appreciate Sandia's statement that RCA had merely been asked to quote on the alternate approach without being told that Sandia would procure on that basis. However, in view of Sandia's expressed interest in the alternative approach, RCA could have reasonably believed that the approach was acceptable to Sandia and that a price reduction could only help its competitive position.

In short, we believe that Sandia, could not provide the fair and equal treatment called for by its procedures without providing both RCA and Cohu the opportunity to revise their proposals on the basis of the item 10 alternative approach.

Cohu originally requested that Sandia terminate its contract with RCA and award the contract to it. Subsequently, "because the interests of many parties must be considered in this matter," Cohu recognized that this Office "may be unable to grant the requested relief" and suggested instead that RCA be permitted to deliver "approximately the first half of the cameras and Cohu then commence delivery, without interruption, of the balance." Cohu maintains that while this result would satisfy neither RCA nor Cohu, it would, in view of the circumstances, offer a measure of fairness and equal treatment. Cohu also contends that this would result in only "slight additional cost," because the companies were to provide off-the-shelf models, and RCA could sell the undelivered cameras to its commercial customers without sustaining a loss. Finally, Cohu asserts that this proposal would permit both companies to compete for follow-on procurements.

Sandia, however, asserting that its "experience" indicates that such a termination would result in RCA being paid substantially the full contract price and claiming that 80% of the contract price would be a "conservative estimate" for termination at the midpoint of performance, avers that such a termination would result in more than "slight additional cost." Sandia also states that the introduction of a second camera into the system would cost "at least $100,000," and consequently says that it is "presently evaluating whether follow-on purchases should be on a sole source or a competitive basis." RCA contends that the termination costs would be $70,000 higher than estimated by Sandia if its contract were terminated midway.

In our view, none of the information offered by the parties is of any particular value in our consideration of the relief, if any, to be accorded Cohu. Clearly Cohu has no basis to conclude that termination costs would be minimal, save for its

assumption that RCA could sell all of the undelivered cameras in the commercial market-place. On the other hand, neither Sandia nor RCA has documented its estimates nor considered the commercial value of the undelivered cameras in those estimates. However, cost to the Government is but one aspect of our consideration of whether it is in the best interest of the Government to take corrective actions which might entail termination of an improperly awarded contract. Other considerations would include the seriousness of the procurement deficiency, the degree of prejudice to Cohu, the good faith of the parties or the extent of performance. Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD 256.

At this point, of course, Cohu has not shown that it was entitled to the award--only that it was improperly denied the right to compete for the contract under the modified specifications, hence a partial termination of RCA's contract would not be proper. It may well be that the requirement to furnish actual test data rather than the theoretical data upon which Cohu's quotation was based would be more costly to Cohu. Thus Cohu may have raised rather than reduced its price if it were unaware of RCA's quotation. Whether Cohu would ultimately have been the low offeror had it been originally accorded the opportunity to revise its quotation is mere speculation. Recompetition would be the more appropriate remedy, but we do not believe that it would be in the best interest of the Government to recompete the contract or any portion thereof at this time. There is, for example, no evidence to suggest, nor do we have any reason to believe, that the Sandia contracting representative acted in bad faith. Also, 50 percent or more of the contract has been performed, and costs in excess of that are likely to have already been incurred. In addition, the award was delayed several months because of the earlier protest, and any recompetition would necessarily entail even further delay. We thus do not believe there is any practical way we can afford any meaningful relief in this case.

We are bringing this matter to the attention of the Secretary of Energy.

Deputy Comptroller General
of the United States