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Andrew Gallagher
Chairman
Panel I



DECISION

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

FILE: B-186858

DATE: January 14, 1977

MATTER OF: Computer Network Corporation; Tymshare, Inc.

DIGEST:

1. To extent that protest against Navy's cost reevaluation--which found that award was erroneously made to other than lowest cost offeror--implicitly calls into question sufficiency of RFP evaluation factors, it is without merit. RFP adequately described evaluation factors and their relative importance; also, provisions are not viewed as defective or ambiguous when read together with agency instructions to offerors on pricing of discounts.
2. Where initial cost evaluation considered only cost of one computer benchmark at \$50,000 point, and Navy later conducted cost reevaluation which considered proposed prices in terms of monthly expenditure rate of \$50,000, no grounds are seen to object to cost reevaluation, because under RFP provisions as supplemented by instructions to offerors benchmark portion of offerors' pricing was to be based on monthly usage rate of \$50,000.
3. Protest which caused agency to terminate contract and make award to protester was timely filed within 10 working days after protester knew basis of protest. Issues in counter-protest by contractor whose contract was terminated are also timely, with exception of allegation that substantially higher price level should have been used in benchmark portion of cost evaluation. Contractor, as incumbent at time proposals were solicited, should have raised this issue prior to closing date for receipt of revised proposals.
4. Agency properly declined to consider contractor's reduction in contract price in reaching decision to terminate contract for convenience of Government and reaward to offeror which was actually lowest in overall cost, because in prevailing circumstances price reduction amounted to late modification of unsuccessful proposal.

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5. Proposal for computer time sharing services which reserved offeror's right to revise computer algorithms failed to conform to material RFP requirement that offerors submit fixed prices, because algorithm is directly related to proposed prices.
6. Where RFP for computer time sharing services established benchmark requirements which related primarily to technical acceptability of proposals, and Navy regarded offeror's several performance discrepancies (time exceeded on 3 of 135 tasks, degradation factor exceeded on 1 of 3 benchmark runs) as minor, Navy's acceptance of proposal is not clearly shown to be without reasonable basis insofar as protester's numerous objections concerning benchmark performance, memory allocation feature and 30-day contractor phase-in requirement are concerned.
7. Where RFP for computer time sharing services required that main memory protection must ensure integrity of user's area during operations, Navy's acceptance of proposal lacked reasonable basis, because upon technical review proposal does not demonstrate that approach proposed by offeror meets requirement.
8. Since protester's proposal was unacceptable due to failure to offer fixed prices as required by RFP, primary remedy requested in its protest--reinstatement of its contract which Navy terminated for convenience--is precluded.
9. Where Navy accepted proposal which did not meet material RFP computer security requirement, protest is sustained and GAO recommends that Navy renew competition by reopening negotiations, obtaining revised proposals, and either awarding contract to protester (if it is successful offeror) or modifying contractor's contract pursuant to its best and final offer (if it remains successful offeror).

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I. Introduction

This is our decision on protests by Computer Network Corporation (COMNET) and Tymshare, Inc., in connection with request for proposals (RFP) No. N00600-76-R-5078, issued by the Naval Regional Procurement Office, Naval Supply Systems Command, Washington, D.C.

The Navy awarded a contract to Tymshare under the RFP. COMNET protested to our Office, contending that it should have received the award. In accordance with our Bid Protest Procedures (4 C.F.R. 20 (1976)), we requested a documented report from the Navy responsive to the protest.

On examining COMNET's protest the Navy concluded that it was meritorious. The Navy made preparations to terminate Tymshare's contract for the convenience of the Government and award to COMNET. When it learned of these developments, Tymshare protested to our Office against any such action.

In its August 6, 1976, report to our Office concerning the two protests, the Navy explained the reasons for its belief that termination and reaward was appropriate, and also recommended denial of Tymshare's protest. Shortly thereafter, the Navy proceeded to terminate Tymshare's contract and award to COMNET. In the present posture of the case, Tymshare is thus the real complaining party. Tymshare seeks termination of COMNET's contract and either a reinstatement of its contract or a resolicitation. Alternatively, Tymshare believes that, at a minimum, the options in the COMNET contract should not be exercised.

The major issues presented involve (1) the cost evaluations conducted by the Navy and (2) COMNET's performance on the benchmark test and the technical acceptability of its proposal.

II. Background

The RFP called for computer time sharing services for a period of 1 year, with options for two additional 1-year periods. It established a sequence consisting of submission of technical proposals, which would be evaluated to determine their acceptability, to be followed by benchmark testing, and finally submission of price proposals. Section D of the RFP set forth the evaluation factors, and provided in pertinent part:

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"A. Technical Proposal

"The technical proposals will be evaluated and reviewed to ensure offerors comply in all areas of the specifications set forth in Section F. All elements of the specifications are of equal importance and shall be evaluated as such.

"B. Price Proposal

"The price proposals will be evaluated on the following, listed in descending order of importance:

- "1. Benchmark invoice costs
- "2. On-line storage costs
- "3. Connect-time (User terminal and RDS)
- "4. Other costs (Training, Documentation, Software Engineer, etc.)

"Award will be made to the technically acceptable offeror who offers the lowest overall cost to the Government." (Emphasis original.)

Section XVIII of the RFP also provided the following information on the relationship of the benchmark to the cost evaluation:

"F. An invoice for each Benchmark process and a sum total invoice shall be prepared using dollar amounts. Invoices are to be given to Naval Regional Procurement Office representatives at the end of each Benchmark session. Benchmark cost figures will be used in the cost evaluation phase.

"I. If applicable, use of discounts proposed will be illustrated on the Benchmark prices."

Appendix E to the RFP further provided:

"A billing invoice for each process listed on Attachment 1 will be required to be submitted after successful demonstration of the benchmark. For each process the following information is required on the invoice: date and time of demonstration, process name, quantity and units of all resources used in the billing algorithm, and total cost for the process. The billing charges for the three data bases are to be accumulated under the Data Base Monitor processes. * * *"

COMNET's and Tymshare's technical proposals were evaluated as acceptable and both passed the benchmark to the satisfaction of the Navy. The Navy's March 16, 1976, letter requested submission of price proposals and stated in pertinent part:

"Page 43 of the solicitation contains the statement 'If applicable, use of discounts proposed will be illustrated on the Benchmark prices'. For purposes of illustrating discounts on the Benchmark prices (if any), a monthly invoice for all charges (before discounts) of greater than \$50,000.00 can be assumed."

The Navy's April 14, 1976, letter to the offerors further stated:

"* * * Benchmark price quotes should be based on a monthly usage rate of \$50,000 exclusive of permanent disk storage costs (as suggested in amendment number 3). A price schedule that includes usage quantities from \$0 to unlimited per month (i.e. pay as you go service schedule) is required."

Tymshare's final price proposal provided:

- "1. The following price schedule is based on a discount from TYMSHARE's standard prices and is provided for the Bureau of Naval Personnel, the Future System only, in three levels as per below:

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"a. Level 1

"The first \$45,000 billed within any month for connect hours and TRU's will be charged at the following:

<u>Connect Hour Rate</u>	<u>TRU Rate</u>
\$10	\$.25

"b. Level 2

"From 0 to 1000 connect hours in excess of the first \$45,000 billed within any month, TYMSHARE will provide up to 1000 hours of dedicated terminal connect time and 175,000 TRU's at a flat rate of \$42.50 per dedicated terminal connect hour. (Terminal connect hour is defined as up to 30 CPS terminal speed.)

"c. Level 3

"For usage above the initial \$45,000 in any month, and usage above either, or both, the 1000 terminal connect hours and the 175,000 TRU's, the following schedules will apply:

CONNECT HOUR SCHEDULE

<u>No. of Hours</u>	<u>Hour/Rate(\$)</u>
1001 to 5000	8
5001 to 7500	7
Over 7500	6

TRU SCHEDULE

<u>No. of TRU's</u>	<u>TRU/Rate(\$)</u>
175,001 to 350,000	.2250
350,001 to 700,000	.2000
700,001 to 1,050,000	.1875
1,050,001 to 1,400,000	.1750
Over 1,400,000	.1500"

(Emphasis in original.)

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In the evaluation of the price proposals, the Navy used a numerical scoring scheme which had not been disclosed in the RFP. Numerical weights were given to the 4 subcriteria listed under price:

- | | |
|----------------------------|------|
| 1. Benchmark invoice costs | (40) |
| 2. On-Line storage costs | (30) |
| 3. Connect time | (20) |
| 4. Other costs | (10) |

There was a further breakdown of the benchmark subcriteria weight in that the various benchmark functions or jobs were weighted relative to each other. For each subcriteria, the offeror with the lowest cost was to be awarded the maximum number of points and the other offeror would receive proportionally fewer points in accordance with the following formula:

$$\frac{\text{Lowest price} \times \text{weight}}{\text{Individual price}} = \text{points}$$

In the Navy's evaluation, Tymshare received 72.335 out of a possible 100 points, COMNET received 79.452, and award was therefore made to Tymshare.

After the award to Tymshare, COMNET protested. Among other objections, COMNET challenged the Navy's evaluation of the Tymshare price proposal insofar as benchmark invoice costs and connect time were concerned. COMNET argued that the Navy erred in applying Tymshare's level 2 pricing for benchmark invoice costs and Tymshare's level 1 pricing for connect time. The net effect of this, in COMNET's view, was that Tymshare's low level 2 price for processing was evaluated without evaluating Tymshare's high level 2 price for connect time--even though the Navy would be billed the low processing charge only when it paid the high connect time charge. COMNET contended that either level 1 or level 2 had to be used consistently throughout the evaluation, and that whichever was used, COMNET's price was lower than Tymshare's.

Stated somewhat differently, COMNET's contention was that one cost element of the Tymshare proposal (connect time) was evaluated at one volume level (the first \$45,000 billed within any month) whereas another cost element (benchmark) was evaluated at a different volume level (in excess of the first \$45,000 billed within any month). COMNET pointed out that since the Navy had stated that discounts would be evaluated assuming \$50,000 in billings per month, it would be appropriate to use Tymshare's level 2 pricing consistently in reevaluating Tymshare's proposal.

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The Navy's report to our Office dated August 6, 1976, stated:

"As a result of COMNET's protest, the Navy reevaluated the relative costs of both COMNET and TYMSHARE. In the reevaluation the Navy calculated the average cost per bench mark using a monthly expenditure rate of \$50,000 instead of using the cost of one bench mark at the \$50,000 point. The use of average costs changed the bench mark portion of the cost evaluation dramatically because it took into account the high costs TYMSHARE proposed for the first \$45,000.

"In the reevaluation the average bench mark cost for COMNET was only \$1598.59, compared to \$2699.41 for TYMSHARE. Overall, COMNET scored 99.989 points to TYMSHARE's 66.033."

It appears that the Navy's reevaluation took a somewhat different approach from what COMNET had suggested, because rather than consistent pricing of different elements at a given cost level, the Navy recalculated benchmark costs assuming monthly expenditures up to a \$50,000 level. However, the result was nonetheless that COMNET's proposal was determined to be lower in overall costs than Tynshare's.

Based on the reevaluation, and despite Tynshare's protest, the Navy terminated Tynshare's contract and made an award to COMNET.

III. Cost Evaluation

While it appears that the RFP requested offerors to submit prices for the work to be done, it also spoke in terms of lowest overall costs and cost evaluation, and for the most part we will discuss the issues raised in terms of costs rather than prices.

Sufficiency of RFP

Tynshare's first major contention is that the Navy's initial cost evaluation properly concluded that its proposal was lowest in cost, based upon the RFP's evaluation criteria. Tynshare believes that any subsequent indication that Tynshare is not the

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low offeror means that the RFP evaluation criteria were faulty. Tymshare points out that offerors must be advised of the evaluation factors and their relative importance (citing AEL Service Corporation, et al., 53 Comp. Gen. 800 (1974), 74-1 CPD 217) and contends that if a contract is improperly awarded because of ambiguous evaluation criteria, the proper remedy is to resolicit, with the existing contract being terminated for convenience only after resolicitation (citing Linolex Systems, Inc., 54 Comp. Gen. 483 (1974), 74-2 CPD 296; New England Engineering Co., B-184119, September 23, 1975, 75-2 CPD 197, and Santa Fe Engineers, Inc., B-184284, September 26, 1975, 75-2 CPD 198). Tymshare strenuously objects to a termination followed by an award to another offeror on the basis of a reevaluation applying evaluation criteria which were never disclosed in the RFP.

In this regard, we do not believe that the RFP's statement of evaluation factors was defective. We believe that RFP section D, supra, adequately described the evaluation factors, subfactors, and their relative importance. As we read the RFP, the decisive criterion was price or cost--i.e., given acceptable technical proposals, the one lowest in overall cost would be selected. Moreover, the subfactors or subcriteria under price proposals--benchmark invoice costs et al.--were listed in descending order of importance, which has been viewed as an appropriate method of showing relative importance. See BDM Service Company, B-180245, May 9, 1974, 74-1 CPD 237, and decisions discussed therein. In contrast, we note that the critical point discussed in AEL Service Corporation, supra, was that failure to disclose the relative importance of subfactors or subcriteria which were essential characteristics or measurements of end item performance would be objectionable. As far as the undisclosed numerical weights attached to the price subcriteria are concerned, we note that Armed Services Procurement Regulation (ASPR) 3-501(b)(3) section D(1) (1975 ed.) prohibits the disclosure to offerors in the RFP of the numerical weights to be employed in the evaluation of proposals. There is no basis in this case to conclude that the undisclosed numerical weights actually applied by the Navy in its cost evaluation were so out of line with the RFP as to be objectionable. See Bayshore Systems Corporation, B-184446, March 2, 1976, 76-1 CPD 146. Further, we do not see any defect or ambiguity when the RFP evaluation factors are considered together with the additional information provided to the offerors in the Navy's March 16 and April 14 letters. See the discussion infra. In short, the issue as we see it is not the sufficiency of the RFP, but rather the propriety of the Navy's initial cost evaluation and reevaluation.

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In this connection, the decisions cited by Tymshare in which our Office recommended resolicitations are distinguishable from the present case, because they involved situations where the solicitations were ambiguous or otherwise defective. If an RFP is satisfactory but the agency errs in failing to properly evaluate the successful proposal, it may be appropriate and feasible to reevaluate, terminate for convenience and reward to the offeror or offerors which should have received award in the first place. See, for example, Computer Machinery Corporation, 55 Comp. Gen. 1151 (1976), 76-1 CPD 358.

2. Propriety of Cost Reevaluation

A second major argument advanced by Tymshare is that the Navy's cost reevaluation itself was improper because it was "outside" the terms of the published RFP evaluation factors. The protester reviews the pertinent RFP provisions set forth supra and stresses that the Navy's March 16, 1976, letter specifically stated that a monthly invoice for all charges (before discounts) of greater than \$50,000 could be assumed. Tymshare's July 28, 1976, letter to our Office summarizes its argument:

"There is only one way in which the [pertinent RFP provisions] can be interpreted. If a contractor has a discount beginning at \$50,000 or less in any given month, the invoices submitted for the work actually performed on the Benchmark must be (or may be) at the discount rate. In other words, for purposes of the specific invoices submitted in response to the RFP, monthly invoices prior to the particular ones submitted of \$50,000 have been assumed. Therefore, when Tymshare's proposal was analyzed and evaluated in accordance with the terms of the RFP, the invoice costs over \$50,000 alone were considered. The reevaluation process engaged in by the Navy which shows Tymshare as the second low bidder, while purporting to be based upon invoice costs, is actually an evaluation of the amount of work performed during the initial \$50,000 billing, an evaluation criterion never disclosed to any of the parties."

Stated differently, the argument is essentially that the RFP as amended specifically determined to evaluate prices only at discount for benchmark evaluation purposes. This argument hinges on the language in the Navy's March 16, 1976, letter to the offerors that monthly charges of greater than \$50,000 could

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be assumed. However, as the Navy and COMNET point out, when the full text of the pertinent language is examined, it is clear that offerors were to assume monthly billings greater than \$50,000 for the purpose of illustrating discounts, if any. Moreover, the Navy's April 14, 1976, letter, when read together with the earlier letter and pertinent RFP provisions, does not, in our opinion, offer any support for an interpretation that benchmark invoice costs would be evaluated "at discount." It must be noted that the Navy's stated objective pursuant to RFP section D was to determine which proposal offered the lowest overall costs. It would appear that the only reasonable interpretation is that which the Navy applied in making its cost reevaluation, i.e., that the benchmark should be costed using a monthly expenditure rate of \$50,000 rather than the cost of one benchmark at the \$50,000 point. We see no basis to object to the Navy's position in this matter.

A point related to the cost reevaluation is Tymshare's contention that its "connect time" should have been evaluated at less than the \$10 figure (level 1 pricing) cited in its proposal. We think the only answer required for this allegation is that the offerors proposed certain prices in their offers, and any evaluation by the agency, whether an initial, erroneous evaluation or a corrected reevaluation, would necessarily be on the basis of the prices proposed.

3. Timeliness of Protests

Tymshare has further contended that COMNET's protest to our Office was untimely, citing Fairchild Industries, Inc., B-184655, September 8, 1975, 75-2 CPD 140, a case where the protester was familiar with the type of evaluation formula used in the RFP, but failed to file its protest prior to the closing date for receipt of initial proposals. However, it seems clear that the genesis of COMNET's protest was not the statement of evaluation factors contained in the RFP, but the way the Navy initially applied the factors to the pricing in Tymshare's proposal. COMNET states that it did not learn this information until after the award to Tymshare when it received certain contractual documents on June 18, 1976, from the Navy pursuant to a Freedom of Information Act request. COMNET's protest to our Office was filed on July 1, 1976, fewer than 10 working days later.

Another argument presented by Tymshare is that neither COMNET nor the Navy has shown that the benchmark element of the cost evaluation presented a totally accurate picture of actual costs to

the Government. Tymshare believes that there is, therefore, no reason to assume that the benchmark reevaluation is any more accurate a reflection of actual costs than the initial evaluation. Further, Tymshare points out that the reevaluation was based upon monthly billings up to \$50,000, and alleges that a larger volume of use is actually contemplated. Tymshare contends that if billings at \$87,500 are considered, Tymshare's average cost per benchmark is lower than COMNET's.

This contention involves several points. First, in awarding a requirements contract there is no such thing as absolute assurance of total costs to the Government. The total costs are not known until the contract is performed. The objective in evaluating bids or proposals is to obtain reasonable assurance that a selected offer will provide lowest overall costs. Second, we note that this contention does not involve the manner in which various cost elements of a competitor's proposal were evaluated (the subject of COMNET's protest) nor the propriety of the Navy's reevaluating benchmark costs to take into account monthly expenditures up to \$50,000 (which Tymshare protested after it learned of the reevaluation). Rather, it involves a question as to whether some level of expenditure substantially higher than the \$50,000 figure cited in the Navy's March 16 and April 14 letters would have been more appropriate for use in the cost evaluation. We note that Tymshare was the incumbent contractor at the time price proposals were solicited in March and April 1976. If Tymshare had reason to believe that use of a substantially higher expenditure level was appropriate, it should have brought this point to the Navy's attention and protested, if necessary, prior to the closing date for receipt of revised price proposals (April 26, 1976). See 4 C.F.R. 20.2(b)(1) (1976). Unlike some of the other issues regarding the cost evaluations, which indirectly (though properly) call into question the sufficiency of the RFP, we believe this particular objection is untimely.

4. Tymshare Contract Price Reduction

Tymshare also points out that on August 9, 1976, it unilaterally reduced its contract price--making continuation of its contract a more advantageous alternative than termination and award to COMNET. Tymshare believes the Navy erred in making an award to COMNET under these circumstances.

We see no merit in this contention. Contracts are to be awarded on the basis of the ground rules for the competition laid down in the RFP as properly applied to the proposals, consistent with applicable law and regulations. Developments

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occurring later, during contract performance, are not dispositive of the question of which offeror is or was entitled to award under the RFP. See Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201 (1975), 75-2 CPD 144; Computer Machinery Corporation, supra. Tymshare's contract price reduction amounted to a late modification to its proposal, and it would have been improper for the Navy to have considered it for the purpose of determining which offeror was entitled to the award.

5. Requirement for Fixed Prices

A final issue which should be addressed is COMNET's contention that Tymshare's proposal failed to offer fixed prices. In this regard, the RFP (page 18) required price proposals to respond to the following provision:

"Cost proposals must contain a full description of the vendor's algorithm for processing charges including the factors involved, component costs, the measurements taken, how units are measured, the points at which measurements are taken, and the weights applied to these measurements in arriving at billable charges. Also identified must be all overhead charges that are in addition to hardware-processing charges. Also included must be any variation in price due to priority level or time of day."

Tymshare's initial price proposal provided:

"The TRU algorithm is proprietary and shall only be used by those Navy personnel evaluating TYMSHARE's services.

"TYMSHARE reserves the right to revise its algorithm during the life of the contract to reflect changes in hardware costs, inflationary pressures, operating system improvements, etc. Should an algorithm change be considered, an analysis of the impact of these changes on Navy operations will take place, and appropriate negotiations conducted."

Tymshare's revised price proposal did not withdraw or modify these provisions. Also, we note that the RFP provided at page 14:

"Method of Procurement is two-step negotiation. The first step calls for the submittal of a technical proposal only. After evaluation by the Government technical personnel, Offerors whose offer has been determined to be technically acceptable will then, and only then, proceed to step two.

"The second step is the submittal of a price proposal and performance of the Benchmark test. The resulting contract will be a fixed price requirements contract." (Emphasis added.)

Further, Amendment No. 2 to the RFP, December 8, 1975, contained the following question submitted by a prospective offeror and the Navy's answer:

"46. Q. Is it correct to assume that prices are only firm for the first year and can be revised for the second and third year?

A. No, firm prices are to be submitted for all years. Award prices are not subject to change. See page 141 Section J." (Emphasis added.)

The issue of failure to offer a fixed price more commonly arises in formally advertised procurements than in negotiated ones. See, for example, Joy Manufacturing Company, 54 Comp. Gen. 237 (1974), 74-2 CPD 183. See, however, Computer Machinery Corporation, supra, where we held that a portion of the successful proposal which failed to offer fixed or determinable prices--a material RFP requirement--should have been rejected. We think it is clear that the RFP in the present case established fixed prices as a material requirement notwithstanding some references to offerors' "costs." Since the algorithm is related to the TRU's, and since Tymshare's pricing, supra, is expressed with reference to the number of TRU's, Tymshare did not offer fixed prices and its proposal in our view was unacceptable. While the Navy apparently did not rely on this point as a basis for terminating Tymshare's contract, it furnishes another justification for that action.

In view of the foregoing, we see no basis to object to actions taken by the Navy in regard to the cost reevaluation.

IV. COMNET Benchmark Results and Technical Acceptability

Tymshare has contended that award could not have been made to COMNET because COMNET failed the benchmark test, and because COMNET's proposal was technically unacceptable.

RFP section XVIII required a benchmark/demonstration of system capabilities, and RFP appendix E described a number of different benchmark tasks and specified, inter alia, maximum acceptable execution times. It appears that the benchmark was intended to serve a number of different functions in the procurement. The Navy's August 6, 1976, report suggests that the benchmark results had a bearing on confirming the technical acceptability of proposals, as well as determining a prospective contractor's responsibility. As already discussed, the benchmark provided information to be used in the cost evaluation phase. The RFP benchmark provisions also appear to establish, in part, a liquidated damages provision in the event of inadequate contractor performance (in regard to minimum response time limits). Overall, we think (as Tymshare apparently does) that in all probability the benchmark was primarily related to the question of technical acceptability of proposals.

At the outset, it is important to note that it is not the function of our Office to evaluate the technical acceptability of proposals. Evaluation of proposals is primarily the function of the contracting agency, and our examination of such issues in protests is limited to considering whether the agency's evaluations and conclusions are clearly without a reasonable basis. See Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232, and decisions cited therein.

Also, in considering technical acceptability of proposals as it relates to a benchmark requirement, as well as in other contexts, we have observed that the rigid concept of responsiveness, which applies to bids submitted in formally advertised procurements, is not directly applicable to proposals submitted in a negotiated procurement which are initially determined to be technically acceptable. Thus, in Linolux Systems, Inc. et al., 53 Comp. Gen. 895 (1974), 74-1 CPD 296, we noted the flexibility inherent in negotiated procurement procedures in holding that an offeror should have been given a further opportunity to run a live test demonstration of its equipment. See, also, 47 Comp. Gen. 29 (1967).

This flexibility is further illustrated by Sycor Inc., B-180310, April 22, 1974, 74-1 CPD 207, where an offeror was given several days to correct some minor oversights in connection with a live test demonstration of a data entry system. We note that a decision cited by Tymshare (Information Consultants, B-183532, August 8, 1975, 75-2 CPD 96) involved review of an agency's determination that six specific deficiencies in benchmark performance, as well as a delay of more than a month in running the benchmark, were sufficiently serious to justify rejection of a proposal as technically unacceptable. Compare, also, Unidynamics/St. Louis, Inc., B-181130, August 19, 1974, 74-2 CPD 107, with the decisions discussed above.

1. Benchmark Issues

Tymshare has contended that COMNET exceeded the minimum 5-second response time specified in the benchmark requirements. The contracting officer disagrees, and believes that Tymshare has misinterpreted the RFP; Tymshare disputes this. In any event, we note as did COMNET that while this requirement was included in the benchmark provisions, it essentially establishes a liquidated damages provision which applies in the event of deficient performance during the course of the contract. In this light, we think it would be difficult to conclude that a failure to meet the requirement on the benchmark demonstration, even if established, would necessarily call for rejection of a proposal as unacceptable.

Tymshare also contended that COMNET exceeded the maximum acceptable clock time on 7 of the 135 benchmark tasks. The contracting officer has pointed out that COMNET exceeded the limits on 3 tasks, not 7, and that Tymshare itself exceeded the limits on 1 task. We see no basis to disagree with the contracting officer's view that any performance discrepancies in this regard were relatively minor. See, also, Elgar Corporation, B-186660, October 20, 1976, 76-2 CPD 350, where we declined to find that either of two offerors was prejudiced where both had performed a benchmark under certain relaxed standards.

Tymshare has contended, in considerable detail, that COMNET's benchmark was conducted in a manner which could not be duplicated under actual operating conditions, as, for example, where 16 or more users are on the system simultaneously. The contracting officer replies, essentially, that Tymshare's peak loading hypothesis is quite unrealistic, and that COMNET's system can do the job. Tymshare, unconvinced, remains of the belief that more than 15 concurrent jobs will result in a "reduction in efficiency" of

COMNET's system. We do not think Tymshare's response demonstrates the unreasonableness of the contracting officer's position, considering the contracting officer's additional observations that peak loading problems may slow down Tymshare's or any other contractor's system, and that Tymshare's argument is grounded on the assumption--invalid, in the Navy's view--that the benchmark does not reflect the way the Navy would actually use COMNET's system during performance of the contract.

A further contention by Tymshare is that COMNET performed its benchmark runs over a period of several days (March 19, 22, 25, 1976) and failed to successfully complete the three required benchmark runs consecutively or on 1 day, citing RFP appendix E, page 2. The RFP provision required three benchmark demonstration runs, and stated: "The start times of the demonstrations are 10 a.m., 2 p.m. * * *. If no discount shift is proposed the third run of the benchmark will commence at 8 p.m. (est)." While COMNET's demonstrations did not follow this schedule exactly, for reasons which need not be discussed in detail here, the language of the RFP is not, in any event, sufficiently strong to establish that deviation from the schedule would necessarily call for rejection of an offeror's proposal as unacceptable.

Tymshare's protest also asserted that coincidental duplications of certain time elements in successive COMNET benchmark runs cast doubts on the accuracy of the benchmark results, and also that COMNET's benchmark run sheets do not match the detailed billing or accounting information subsequently furnished by COMNET to the Navy. The contracting officer reported, essentially, that both problems were due to malfunctioning Navy equipment, which Tymshare, based on its experience in performing the benchmark, doubts was the case. Tymshare continues to maintain, in some detail, that COMNET failed to meet the requirement for detailed billing invoices (RFP appendix E) and that there are discrepancies between the detailed billing invoices and the terminal run sheets. COMNET has responded, in summary, that Tymshare is misreading the pertinent data and does not understand the manual keyboard entry function of COMNET's system, which allows a small tolerance in entry of commands but does not impact on the accuracy of the detailed accounting information. We see no indication in the record that the Navy did not give due consideration to these issues in making an award to COMNET, and do not believe that the arguments presented by Tymshare establish any sufficient grounds for a conclusion that the Navy's position in this matter was clearly lacking a reasonable basis.

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Further, Tymshare has protested that COMNET exceeded the degradation factor specified in the RFP on 2 of its 3 benchmark runs. The contracting officer reported, however, that the degradation factor was exceeded in only 1 of the 3 runs, and since COMNET established its technical competence by completing the other 2 runs satisfactorily, the Navy did not require an additional benchmark to be run.

This point, and the excessive times on 3 of the benchmark tasks, discussed supra, appear to be the only areas in which the record clearly establishes that COMNET did not meet benchmark requirements. In general, the Navy's position is that while neither offeror met all the benchmark requirements, the discrepancies in performance were so minor that further benchmark runs were not considered necessary. The Navy, in short, was satisfied that both offerors performed adequately on the benchmark.

The RFP did establish certain benchmark requirements, and any failure to fully meet the requirements is not a matter to be taken lightly. However, to apply the philosophy expressed in Tymshare's protest would suggest that the immediate rejection of an offeror's proposal as technically unacceptable is mandated when there is any shortcoming of any kind in performing the benchmark requirements. While an RFP could presumably be structured to this degree of strictness, a reading of the present RFP does not offer much support for such an approach. For instance, the RFP does not contain statements that rerunning of a benchmark would not, in the agency's discretion, be permissible, or language that failure to meet particular requirements might or would be cause for proposal rejection.

In addition, it is arguable that such rigidity, as a general proposition, would not be fully consistent with the past recognition of flexibility in applying benchmark requirements (see Sycor, Inc., supra), or with the usual purpose of a benchmark (to establish the technical capability of an offeror's proposed equipment and approach). After reviewing all the issues associated with COMNET's performance on the benchmark, we cannot conclude that the information presented by Tymshare demonstrates that the Navy's position has no reasonable basis to support it.

2. Memory Allocation and Phase-In

An additional technical issue raised by Tymshare is that COMNET's proposal did not comply with the memory allocation requirements established in RFP section IV.A. In its initial protest submissions, Tymshare asserted that "program linking and overlay capability" would be necessary for COMNET's proposed equipment to meet the requirement, and that this capability was not specified in COMNET's proposal. As with the other technical issues raised, COMNET offered information refuting this allegation. The Navy considered and rejected Tymshare's contention. The contracting officer reported that in the Navy's technical judgment, program linking and overlay structures are part of the COMNET system, and that COMNET's memory size exceeds the RFP minimum requirement by 50 percent, and also greatly minimizes the need for overlay structures or excessive linking operations. In light of these observations, not responded to in Tymshare's comments, we are unable to conclude that the conflicting technical viewpoint expressed in Tymshare's protest is sufficient to show that the Navy's evaluation and judgment in this matter was clearly without a reasonable basis.

Tymshare further contends that COMNET is unable to convert 150 COBOL programs and to achieve satisfactory operation of the system within 30 days after the award of a contract, as required by RFP section XVII. Tymshare believes that these requirements are evidently being relaxed, because the Navy's August 6, 1976, report (prior to the award to COMNET) indicated that it would take COMNET 60 days to perform these tasks. However, the Navy later stated that the reference to 60 days was phrased merely as an estimate of the total time needed to switch from Tymshare's system to COMNET's, and that the 30-day conversion period would be included within the 60-day period. COMNET also stated that it did not know why the Navy used the 60-day figure, but affirmed in any event that it would complete the necessary conversion within 30 days. Under the circumstances, we are unable to see any basis for objection to the Navy's position.

3. Privacy Act and Computer Security

The final and most serious issue regarding COMNET's technical acceptability pertains to the "Privacy" and "Security" requirements of the RFP. RFP sections VI and VII stated as follows:

"VI. Privacy.

"A. The contractor must be thoroughly familiar with the provisions of the Privacy Act of 1974 and must demonstrate that the proper administrative procedures, technical safeguards and contractor personnel training have been initiated to ensure that the Bureau of Naval Personnel can comply fully with the provisions of the Act while using the contractor's services.

"B. The system will be used for the storage of personnel information that must, under the provisions of the Privacy Act of 1974, be safeguarded against unauthorized access and/or disclosure. Hence the system must:

"1. Provide assurance that no users other than those specifically designated may gain access to the TOTAL data base or any user maintained files (reference paragraph VII).

"2. Provide assurance that listings, data dumps, tapes or any other aggregates or extracts cannot be prepared from the data base by software other than that specifically approved by, and under the control of, the Bureau of Naval Personnel.

"3. Provide required audit trails and logs of any accesses required by the contractor for purposes of routine hardware and software maintenance or backup.

"4. Provide assurance of the ability to conform to additional modified statutes or regulations that may be issued.

"5. Ensure that any system or network changes will permit the Bureau of Naval Personnel and the vendor to continue to comply with provisions of the Act.

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"VII. Security.

"A. No classified data is scheduled under this announcement; however, all considerations for the system and network must be made to prevent unauthorized access to data, to ensure integrity of data, to provide continuity of service, and to prevent unintentional or intentional intrusion into user memory during operations. These considerations dictate the following:

"1. Administrative security by means of custody logs, access logs, check out procedures, control of user numbers and access criteria, and control of Government account records.

"2. Physical security to prevent unauthorized access to computer hardware or to records that provide control over data access. Protective measures must also be provided to ensure the integrity and consistency of the operation of the system and network in case of natural or man made disaster.

"3. Technical security that provides:

"(a) Password security at the operating system level.

"(b) Both read and write protection at the file level.

"(c) An on-line implementation of TOTAL that includes the following access provisions:

"(1) Vendor must provide a method of passing TOTAL calls and data from multiple user-task coding areas through a single Data Manager coding area (and return).

"(2) Vendor must provide a method for the Bureau of Naval Personnel to intercept, trap,

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check, and modify user TOTAL calls within the Data Manager's coding area. The code itself used to intercept, trap, and modify user TOTAL calls and data will be provided by the Bureau of Naval Personnel. This code will be called the Data Manager's Security Code and will not be used in the Benchmark.

"(3) Vendor must provide safeguards to prevent all TOTAL calls originating outside the Data Manager's Security Code from accessing the production data base until it has been passed within the Data Manager's Security Code.

"(4) Vendor must provide a duplicate capability described in paragraphs (1.) through (3.) above, and in Appendix C, in order to test new Data Manager code and user application code against completely separate test data bases.

"(d) Main memory protection must ensure the integrity of a user's area during operations.

"4. Training of all contractor personnel is required to ensure knowledge of the security safeguards and procedures.

"5. The proposal must include a detailed description of all security measures and procedures.

"B. The Government retains the right to test and evaluate security procedures of the network and system at any time during the life of the contract. These evaluations may be made at any Navy site on the network or at the central computer site.

"C. The Bureau of Naval Personnel will not develop and operate an advanced manpower and personnel management information system that does not meet the above security standards. Failure to maintain security of the system and network

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as evidenced in a system test or by unauthorized disclosure may be considered default of the terms of this announcement and/or lead to nullification of any charges for the duration that the condition exists.

"D. The basic reference for security guidelines is: Federal Information Processing Standards Publication 31 (FIPS PUB 31), Guidelines for Automatic Data Processing Physical Security and Risk Management, JUNE 1974, U.S. Department of Commerce/National Bureau of Standards."

In addition, the RFP at page 143(a) contained recently published ASPR clauses (ASPR §§ 7-104.05, 7-2003.72, Defense Procurement Circular No. 75-5, November 17, 1975) which note, inter alia, that violations of the Privacy Act may result in civil liabilities or criminal penalties.

Tymshare principally has contended that the OS/MVT system proposed by COMNET lacks the basic design features necessary to insure the security of records and cites, inter alia, a National Bureau of Standards publication (NBSIR 76-1041, "Security Analysis and Enhancements of Computer Operating Systems") as evidencing the ability to deliberately or accidentally violate the security of the OS/MVT.

COMNET's July 26, 1976, letter to the Navy responded to Tymshare's arguments. COMNET pointed out that it had developed considerable modifications to the normal OS/MVT security features. Specifically, COMNET stated that it would provide a "full function security system" as opposed to merely the standard OS/MVT password data set protection system provided by the operating system. Also, COMNET stated that extensive modifications were made to the TOTAL Supervisor Call Routine so as to insure system integrity. Further, COMNET asserted that its system provides memory and storage protection in all areas of the machine, including user areas and user data sets. Also, COMNET stated that it has been processing the Guaranteed Student Loan Program for the Department of Health, Education, and Welfare, and asserted that in this program, which involves conditions similar to the present procurement, security has been maintained in full compliance with the Privacy Act (5 U.S.C. § 552a (Supp. IV, 1974)).

The Navy's position is that COMNET's proposal was carefully evaluated and was found to meet the requirements of the RFP. The Navy states that it has no doubts that COMNET can furnish a system which will meet the requirements of the Privacy Act.

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In PRC Computer Center, Inc., et al., 55 Comp. Gen. 60, 91-95 (1975), 75-2 CPD 35, we considered a question as to whether an OS/MVT operating system used on the IBM 370/168 CPU satisfied an RFP requirement that "The system shall provide for protection of user programs, the operating system, and the areas in which their code resides, from read or write access by other users." In reviewing this issue, in consultation with technical experts, our Office concluded that the successful offeror's proposal failed to meet this material RFP requirement insofar as read protection was concerned. Since a similar issue appears to be involved in the present case, GAO staff members with technical expertise in this area have reviewed the compliance of COMNET's proposal with the RFP privacy and security requirements.

Initially, it must be noted that a number of the RFP requirements are stated in general terms. Where an RFP requires merely that offerors show familiarity with certain requirements, provide assurances that certain safeguards will be established, or provide a detailed description of proposed methods and procedures, the agency's determination that an offeror proposal shows a familiarity or provides the requested assurances and descriptions obviously involves a considerable degree of judgment. For instance, we note that the Privacy Act requires the establishment of appropriate administrative, technical and physical safeguards to protect the security and confidentiality of records (5 U.S.C. § 552a(e)(10)), but neither the act nor the implementing regulations specify design criteria or particular features and mechanisms to do this. Hence, insofar as the more general requirements are concerned--for example, that an offeror be familiar with the act's requirements--it would be extremely difficult to conclude that the agency's acceptance of an offeror's assurances in this respect has no reasonable basis.

Some of the RFP provisions are thus subject to interpretation as to what might constitute a minimally adequate offeror response. In this connection, it must also be noted that the state of the art in computer security is such that no vendor can provide absolute assurance that unauthorized access to information contained in a computer system will be precluded. However, we believe the RFP indicates that the Navy had determined that a reasonable degree of protection could be provided if the technical security specifications in section VII, supra, were met. We note that some of these provisions are stated in specific and clearly mandatory terms. While we have examined the COMNET proposal's compliance with several of these provisions, the most important point involves RFP section VII. A.3.d., which provides that "main memory protection must ensure the integrity of a user's area during operations."

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We believe this requirement is open to only one reasonable interpretation, namely, that an offeror's hardware/operation system configuration must include "read" protection. After reviewing COMNET's proposal, we conclude that the hardware/operating system configuration it proposed--the OS/MVT operating on the IBM 360/65--cannot protect against read access to the main memory of the CPU without considerable modification. While COMNET's submissions in the protest proceedings state that it has made considerable modifications to the standard OS/MVT, after reviewing the COMNET proposal we do not believe the proposal demonstrates that the memory protection requirement has been met. Based upon this and our examination of the record of the Navy's technical evaluation of proposals, we believe the Navy's acceptance of the proposal in this respect lacked a reasonable basis, and amounted to an improper relaxation of a material security requirement without amending the RFP pursuant to ASPR § 3-805.4 to allow further competition on the basis of the relaxed requirement.

V. Conclusion

Since the Navy erred in accepting the COMNET proposal, which did not comply with a mandatory security provision, there is the question of what corrective action, if any, should be recommended. As noted supra, Tymshare protested seeking the following alternative remedies, in order of preference: (1) reinstatement of its contract; (2) a resolicitation; or (3) non-exercise of the 2 option years.

Initially, reinstatement of Tymshare's contract is precluded, because Tymshare's proposal was unacceptable due to its failure to offer fixed prices.

Further, we do not believe that a resolicitation, as such, would be appropriate, because there is no indication in this case that the RFP is defective. However, it conceivably could be in the best interests of the Government to recommend that the Navy renew the competition by reopening negotiations with Tymshare and COMNET, awarding a contract to the successful offeror, and terminating for convenience COMNET's contract, if necessary.

In this connection, we understand that the estimated total price for the first year of the contract is about \$1.8 million. It must be noted that the Navy has already incurred some costs due to its previous termination for convenience of Tymshare's contract. Tymshare has asserted that settlement of this termination will cost the Navy \$495,987, but the Navy considers this

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estimate to be unrealistically high. Also, COMNET has commenced performance of its contract. Termination for convenience of COMNET's contract would necessarily involve additional costs to the Government.

However, we believe that if Tymshare were the successful offeror in any renewal of competition, this would ameliorate the Government's liability in settling the previous termination of Tymshare's contract. On the other hand, if COMNET remained the successful offeror in a renewal of competition, the Government would be in no worse position in regard to settling the termination for convenience of Tymshare's contract.

Accordingly, we recommend that the Navy reopen negotiations with Tymshare and COMNET, obtain revised proposals, and either (1) award a contract to Tymshare (if it is the successful offeror) and terminate for convenience COMNET's contract, or (2) modify COMNET's contract pursuant to its best and final offer (in the event that COMNET remains the successful offeror in the renewal of competition). By letter of today, we are advising the Secretary of the Navy of our recommendation.

Since this decision contains a recommendation for corrective action to be taken, we are furnishing copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the Committees of Government Operations and Appropriations concerning the action taken with respect to our recommendation.

In view of the foregoing, COMNET's protest to our Office has been satisfied by the Navy's actions and is academic. Tymshare's protest is sustained.

Deputy


Comptroller General
of the United States