

5141

*A. Hollings  
Page I*

**DECISION**



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

FILE: B-186258

DATE: January 23, 1978

MATTER OF: Tymshare, Inc.

**DIGEST:**

1. GAO decision recommended that Navy resolicit rather than exercising contract options, and Navy then advised GAO of its belief that in prevailing circumstances resolicitation for next year's computer timesharing services would be impracticable. After review of record, no basis is seen for objection to Navy's extension of current contract for 9 months. Protester's allegations that Navy had no intent to comply with or was disregarding GAO recommendations are without merit.
2. Objection that GAO failed to take "decisive action" on behalf of protester to stop procurement action by Navy is without merit. GAO has repeatedly rejected requests that it render interim decisions which would afford some type of preliminary relief to protesters pending final decisions on merits of protests. Moreover, issuing final written decision on merits of this case prior to Navy's action was not possible within time frame involved (June 15-21, 1977). Proper forum for seeking injunctive relief is Federal courts, not GAO.
3. Whether Navy should have reopened negotiations prior to award to give protester opportunity to propose on fixed monthly rate basis for timesharing services--optional pricing arrangement in successful offeror's revised proposal which Navy intended to utilize after making award--is moot issue where prior GAO decision recommended, for other reasons, that Navy reopen negotiations.

This is our third decision in connection with contracts awarded under request for proposals (RFP) No. N00600-76-R-5078, issued by the Washington, D.C., Naval Regional Procurement Office, Naval Supply Systems Command (NAVSUP).

Our initial decision (Computer Network Corporation et al., 56 Comp. Gen. 245 (1977), 77-1 CPD 31) sustained a protest by Tymshare, Inc., concerning the award of a contract to Computer Network Corporation (COMNET) and recommended that the Navy reopen negotiations with the offerors. Tymshare, COMNET and NAVSUP requested reconsideration of the decision. Our second decision (Computer Network Corporation, et al.-requests for reconsideration, 56 Comp. Gen. 694 (1977), 77-1 CPD 422) affirmed the first decision, but changed the recommendation for corrective action; the revised recommendation was that the Navy (1) not exercise the option years in the COMNET contract and (2) competitively resolicit for any requirement it might have for the computer timesharing services in question subsequent to the expiration of the basic term of COMNET's contract on June 14, 1977.

Today's decision is necessitated primarily by Tymshare's objections to the action taken by NAVSUP in response to our second decision. On June 15, 1977, NAVSUP advised our Office that the only feasible way of continuing the necessary computer timesharing services through June 14, 1978, would be to either extend the COMNET contract by mutual agreement between itself and COMNET, or to exercise the first option year in the contract. This position was based in part on the fact that the Secretary of the Navy had advised NAVSUP by letter received on June 10, 1977, that any requirements for the timesharing services after June 14, 1978, should be procured under the General Services Administration's Teleprocessing Services Program. Also, NAVSUP estimated that to competitively resolicit for the June 15, 1977-June 14, 1978, requirements would take about 6 to 9 months. Thus, the period of contract performance would be only about 3 to 6 months for such a procurement, making it unlikely that any vendor would be interested in submitting a proposal. In addition, NAVSUP believed it would take about 90 days to transfer data in COMNET's files to those of any other vendor.

On June 21, 1977, after several short extensions of the COMNET contract to allow NAVSUP time to consider what action to take, NAVSUP extended the contract for 9 months, the minimum period which COMNET would agree to.

Both prior and subsequent to these events, Tymshare objected that any exercise of the first option year in the COMNET contract would not be in compliance with Armed Services Procurement Regulation (ASPR) § 1-1505 (1976 ed.). Primarily, Tymshare alleged that COMNET's contract performance was "substandard." We believe NAVSUP's September 22, 1977, report to our Office, which denies Tymshare's allegations, has adequately treated these issues and in the absence of any effective rebuttal further discussion is unnecessary.

By letter to our Office dated June 22, 1977, subsequent to our second decision, Tymshare complained that the Navy was planning to exercise the first option year in COMNET's contract, and was therefore ignoring our decisions. Tymshare alleged that the Navy apparently never had any intent to comply with our Office's recommendations, and that exercise of the option demonstrated the Navy's total lack of concern for computer security. Tymshare urged that we take "decisive action" immediately. Subsequently, in its October 7, 1977, letter to our Office, Tymshare contended that the Navy had acted in wanton disregard of our decisions, and that our Office had apparently acquiesced in such action or was powerless. Our responses to these allegations are as follows:

**Allegation:** The Navy apparently never had any intent to comply with GAO recommendations because it did not take steps prior to June 1977 to prepare for conducting a possible resolicitation.

We believe Tymshare is in a weak position to make this argument in view of the fact that it contributed significantly to creating the situation of which it now complains. Our initial decision (January 14, 1977) sustained Tymshare's protest and recommended that the Navy reopen negotiations. COMNET and NAVSUP requested reconsideration of the decision. However, Tymshare itself requested reconsideration as well, alleging that the decision was erroneous in part and that Tymshare was entitled to have its contract (which had earlier been terminated for convenience by the Navy) reinstated. Thus, Tymshare placed itself in the anomalous position of challenging a protest decision which had been rendered in its favor.

B-186858

Our second decision (June 13, 1977) found that all of the requests for reconsideration failed to demonstrate errors of fact or law in our initial decision. We affirmed that our recommendation that negotiations be reopened was appropriate at the time it was made (and thus rejected Tymshare's contention that its contract should have been reinstated). In effect, reopening negotiations was the maximum possible remedy which Tymshare could have obtained. Our second decision noted, moreover, that due solely to the amount of time consumed in resolving the requests for reconsideration, reopening negotiations was no longer practicable. Accordingly, our second decision recommended instead that the options in the COMNET contract not be exercised.

Tymshare now complains that this recommendation was not carried out by the Navy. In this regard, we believe that but for the time involved in resolving Tymshare's request for reconsideration, our second decision would have been rendered prior to June 13, 1977, at a time when the implementation of a recommendation that the Navy not exercise the COMNET contract options would have been a more viable possibility. More generally, we do not believe Tymshare has made any showing as to the unreasonableness of the Navy's position that conducting a resolicitation for the June 15, 1977-June 14, 1978, requirements was impracticable.

**Allegation:** Extension of the COMNET contract demonstrates the Navy's total lack of concern for computer security.

The central issue dealt with in our two previous decisions concerned the reasonableness of the Navy's evaluation of the COMNET proposal and conclusion that the proposal adequately demonstrated satisfaction of certain computer security requirements. As explained in our second decision, this is a different issue from the question whether a contractor's performance of a contract complies with the requirements of the solicitation. The latter question is a matter of contract administration for the Navy to resolve. In a letter to our Office dated June 15, 1977, the NAVSUP Counsel stated that COMNET was in fact providing read protection

B-186858

for main memory and was complying with the security requirements of the contract. We see no basis on the record to support a conclusion that extension of the COMNET contract in the circumstances demonstrates a lack of concern by the Navy for computer security.

**Allegation:** GAO failed to take appropriate "decisive action" on behalf of Tymshare prior to the extension of the COMNET contract in June 1977.

This allegation clearly reflects a misunderstanding by Tymshare of both our function in deciding bid protests and our procedures for doing so. As stated in our Bid Protest Procedures, 4 C.F.R. part 20 (1977), our decisions on protests or requests for reconsideration are based upon a written record as submitted by the parties involved. Implicit in this is the concept that decisions are rendered only after the interested parties have been accorded a reasonable opportunity to present their views, and an adequate written record exists. Also, we have no authority to order an agency to withhold the award of a contract. Kleen-Rite Corporation, B-184917, October 21, 1975, 75-2 CPD 249.

Thus, we have repeatedly rejected requests that we render interim decisions which would afford some type of preliminary relief to a protester until a decision on the merits of the protest itself is made. See, in this regard, 46 Comp. Gen. 53 (1966); B-164736, June 10, 1969; Joseph Legat Architects, B-187160, December 13, 1977. Cf. Kleen-Rite Corporation, supra.

To the extent that Tymshare's request that we take "decisive action" contemplated injunctive relief, we note that the proper forum for seeking this would be the Federal courts, not our Office. See Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 972, 989-990 (1976), 76-1 CPD 240. To the extent that the request contemplated a decision by our Office prior to June 21, 1977, which would have recommended that the Navy not extend the COMNET contract, such action was not possible because (1) the Navy had not, prior to June 21, 1977, addressed all of Tymshare's objections to the contract extension or exercise of the contract option; (2)

COMNET had not had a reasonable opportunity to submit written comments; and (3) there was in any event insufficient time for us to process a decision during the period from June 15-June 21, 1977. Moreover, as noted elsewhere in this decision we have found no basis for objection to the Navy's extension of the contract.

**Allegation:** The Navy, in extending the COMNET contract for 9 months, acted in wanton disregard of GAO's decisions.

Where one of our decisions recommends that a contracting agency take corrective action with respect to a procurement, we have recognized that the agency may ask that the recommendation be modified or withdrawn. See, generally, Environmental Protection Agency-request for modification of GAO recommendation, 55 Comp. Gen. 1281 (1976), 76-2 CPD 50, and decisions discussed therein. In the present case, the Navy, prior to extending the COMNET contract, brought its position to our Office's attention and inquired whether we had any objections to such action. Thus, we do not think it is accurate to say that the agency was disregarding our decisions.

Tymshare raises an additional issue which relates back to the Navy's award of the contract to COMNET in August 1976. Based on information received in June 1977 and a Navy document obtained under the Freedom of Information Act, Tymshare contends that at the time of award the Navy intended to modify the COMNET contract to take advantage of an optional pricing arrangement COMNET had offered in its proposal (a fixed monthly charge for unlimited usage). Earlier in the procurement the Navy had found that both COMNET's and Tymshare's initial proposals--which offered various types of "bulk" rate arrangements--were unacceptable under the terms of the RFP because they failed to offer "pay-as-you-go" pricing. NAVSUP had instructed both offerors to offer pay-as-you-go pricing in their revised proposals. Both did so, and NAVSUP evaluated COMNET's price as lowest; also, COMNET's revised proposal offered the optional fixed monthly charge for unlimited usage. (In addition, as we have noted in our two prior decisions, Tymshare's revised proposal was unacceptable because it failed to offer firm, fixed prices as required by the RFP.)

Tymshare contends that since NAVSUP intended to switch after award from the COMNET pay-as-you-go pricing to the optional fixed monthly charge, the Navy violated the principle that a contract may not be awarded under a given specification with the intent of changing to a different specification after award, citing E.R. Hitchcock & Associates, B-182650, March 5, 1975, 75-1 CPD 133.

The basic issue raised by Tymshare's contention is whether NAVSUP--upon recognizing that COMNET's optional fixed monthly charge was advantageous to the Government and deciding to take advantage of it--was required to reopen negotiations in August 1976 to give Tymshare an opportunity to propose on this basis as well, rather than proceeding with an award to COMNET. This issue is moot. Our initial decision in this case, 56 Comp. Gen. 245, supra, recommended that the Navy reopen negotiations because it had erred in finding that the COMNET proposal demonstrated satisfaction of certain computer security requirements. Even if we upheld Tymshare's current contention, it would simply provide one more reason why negotiations should have been reopened as our initial decision recommended.

Finally, the correction of a typographical mistake in our second decision in this case (56 Comp. Gen. 694) should be noted for the record. The second sentence in the third paragraph on page 704 should have read as follows: "Similarly, the other attachments--a COMNET Facilities Guide (a manual describing services offered by COMNET), an IBM Text 360 (a manual describing the functions and use of a computer-based text and document editor) and an IBM OS COBOL Manual (a reference manual for an interactive on-line COBOL program writing debugging facility) could not provide such a basis."

In view of the foregoing, we see no basis on the record for objection to NAVSUP's action in extending the COMNET contract for 9 months. The recommendation for corrective action in 56 Comp. Gen. 694, supra, is

B-186858

accordingly withdrawn and we are closing our file in this matter. Since our earlier decisions contained recommendations for corrective action, we are furnishing copies of today's decision to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), and to the Secretary of the Navy.

*R. F. Keller*  
Deputy Comptroller General  
of the United States