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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Sprint Communications Company, L.P.

File: B-256586; B-256586.2

Date: May 9, 1994

Julie Lunceford Witcher, Esq., for the protester.
Michael A. Hordell, Esq., Gadsby & Hannah, and Linda P. Armstrong, Esq., for MCI Telecommunications Corporation, an interested party.
Jesse E. Lasken, Esq., National Science Foundation, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under the Competition in Contracting Act of 1984 and General Accounting Office's (GAO) Bid Protest Regulations, GAO will generally not review protests regarding the award of cooperative agreements; GAO will only review timely protests that an agency is using a cooperative agreement where a procurement contract is required.

DECISION

Sprint Communications Company, L.P. protests the National Science Foundation's (NSF) award of a cooperative agreement under program solicitation No. NSS 93-52 to MCI Telecommunications Corporation to provide "very high speed Backbone Network Services" (vBNS) to support the NSF's computer data network (NSFNET).

We dismiss the protest.

NSFNET consists of a variety of NSF-supported computer data networks that since 1986 have supported the research and education community. Under the High Performance Computing Act of 1991, 15 U.S.C. § 5501 et seq. (Supp. IV 1992), NSF is required to upgrade NSFNET and to "provide computing and networking infrastructure support for all science and engineering disciplines, and support basic research and human resource development in all aspects of high-performance computing and advanced high-speed computer networking." 15 U.S.C. § 5521(a).

The program solicitation, issued May 6, 1993, sought proposals to perform four distinct projects, including the vBNS project, in support of upgrading and maintaining NSFNET. Offerors were informed that NSF contemplated the award of two or more cooperative agreements to provide the required operational support for each project. In this regard, the solicitation stated that it was:

> "issued pursuant to the National Science Foundation Act of 1950, as amended, (42 U.S.C. § 1861 et seq.) and the Federal [Grant and] Cooperative Agreement Act (31 U.S.C. § 6305) and is not subject to the Federal Acquisition Regulation [FAR]."[1]

The solicitation provided proposal preparation instructions and evaluation factors for each project that would be used to identify the "proposals offering the greatest overall merit in meeting the requirements of NSFNET projects."

NSF received proposals for the vBNS project from offerors, including Sprint and MCI, by the August 17, 1993, closing date for receipt of proposals.[2] On February 11, 1994, MCI's vBNS proposal was determined to offer the greatest overall merit and was selected for award of a cooperative agreement. This protest followed.

Sprint challenges the award to MCI on the basis that a contract, rather than a cooperative agreement, should have been awarded. Sprint alleges that it was prejudiced because the award was not made in accordance with the stated evaluation criteria and does not satisfy the solicitation's requirements; that NSF did not consider price in its source selection; that NSF failed to conduct meaningful discussions with Sprint; that NSF failed to inform offerors other than MCI of the amount of permissible commercial use of the network; and that federal funds are improperly being used to underwrite MCI's commercial development of an asynchronous transfer mode service. Sprint also argues that NSF's award selection was tainted because a member of NSF's evaluation committee had a conflict of interest.

Under the Competition in Contracting Act of 1984 (CICA) and our Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts

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[1]The FAR is not applicable to the award of cooperative agreements. See FAR §§ 1.103, 2.101.

[2]Sprint and MCI also submitted proposals for the other NSFNET projects.

for the procurement of goods and services, and solicitations leading to such awards. 31 U.S.C. §§ 3551(1), 3552 (1988); 4 C.F.R. § 21.2(a) (1993). We generally do not review protests of the award, or solicitations for the award, of cooperative agreements because they do not involve the award of a "contract." See Federal Grant and Cooperative Agreement Act, 31 U.S.C. §§ 6303, 6305 (1988); Resource Dev. Program & Servs., Inc., B-235331, May 16, 1989, 89-1 CPD ¶ 471. We will review, however, a timely protest that an agency improperly is using a cooperative agreement, where under the Federal Grant and Cooperative Agreement Act a "procurement contract" is required, to ensure that an agency is not using a cooperative agreement to avoid the requirements of procurement statutes and regulations. Id.; Renewable Energy, Inc., B-203149, June 5, 1981, 81-1 CPD ¶ 451.

Sprint initially protested that the "appropriate vehicle for award is a contract, not a cooperative agreement," and that our Office therefore has jurisdiction to consider this protest. NSF responded that Sprint's protest should be dismissed as untimely because the program solicitation informed offerors that the agency intended to issue cooperative agreements for the NSFNET requirements. In reply, Sprint acknowledges that the program solicitation clearly announced that the agency would award cooperative agreements and that any post-closing date challenge to this solicitation provision would be untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1).

Sprint argues however, that "it is not the fact that a cooperative agreement was contemplated by the solicitation which is troubling to Sprint. What Sprint objects to is the award to MCI which contravenes the very legislation which authorizes it." In Sprint's view, the particular award to MCI was contrary to the requirements of the High Performance Computing Act, which it asserts is a procurement statute providing CICA jurisdiction. In other words, Sprint argues that we should expand our jurisdiction to consider protests against the awards of grants or cooperative agreements when an allegation is made that such awards would violate the statute authorizing the government program that the grant or cooperative agreement is intended to support.

We disagree. As noted above, under CICA and our Bid Protest Regulations, our review is limited to protests that the award, or solicitation contemplating the award, of a "contract" violates procurement laws and regulations, and thus in the context of protests of awards of cooperative agreements, our review is limited to protests that a cooperative agreement was used where a contract was required. Resource Dev. Program & Servs., Inc., supra. Sprint's protest concerns only the selection of MCI for the

award of a cooperative agreement, and not whether the vBNS project services should have been acquired by means of a contract as opposed to a cooperative agreement. In this regard, the High Performance Computing Act, which authorizes NSF's upgrade of the NSFNET, does not specify whether the required NSFNET upgrade must be done by contract or cooperative agreement and does not provide a basis for us to reinterpret our CICA jurisdiction. Since Sprint's protest against the award of a cooperative agreement to a competitor does not concern the award of a contract, it is not within our bid protest jurisdiction, as defined by CICA and our Regulations, and is dismissed.[3]

Sprint also protests that the selection of MCI for receipt of a cooperative agreement is improper because of a conflict of interest involving a member of NSF's evaluation committee. The agency responds that a member of its National Science Board is the president of a university, which is entitled to a seat on the board of directors of MCI's principal subcontractor, but that the president himself is not a member of the subcontractor's board of directors and, in any event, the president did not participate in the selection of MCI for award.

Prior to the enactment of CICA, we stated that while we generally did not review the award of cooperative agreements, we would consider, consistent with our authority to investigate the receipt, disbursement, and application of public funds, see 31 U.S.C. § 712 (1988), an allegation that the award of a cooperative agreement was tainted by a conflict of interest (or, as discussed above, an allegation that a contract should have been used rather than a cooperative agreement). See Burgos & Assocs., Inc., 59 Comp. Gen. 273 (1980), 80-1 CPD ¶ 155 (alleged conflict in the selection of a grant recipient). In some cases after the enactment of CICA, we made similar statements but we did not actually review the award of a cooperative agreement on

[3]Sprint cites a number of our cases discussing whether a particular statute was a procurement statute in support of its arguments that we have jurisdiction over the protest. However, in each of the cited cases, a "contract" award was made or contemplated, and they are thus inapposite to the present situation. See, e.g., RJP Ltd., 71 Comp. Gen. 333 (1992), 92-1 CPD ¶ 310 (competition for acquisition of real property by contract) and Alpine Camping Servs., B-238625.2, June 22, 1990, 90-1 CPD ¶ 580 (competition for concession contracts).

this basis. See, e.g., Avante Int'l Sys. Corp., B-227951, July 17, 1987, 87-2 CPD ¶ 63.

Prior to CICA, we decided bid protests under our authority to settle accounts set forth in 31 U.S.C. § 3526 (1988). See Monarch Water Systems, Inc., 64 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146. In enacting CICA, Congress both strengthened and defined our bid protest authority to establish "a strong enforcement mechanism . . . to ensure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief." See House Conference Report No. 98-861, 98th Cong., 2d Sess., 1435 (1984), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 2109, 2123. As discussed above, CICA provided for our review of an interested party's protest of the award, proposed award or solicitation for the award of a contract by a federal agency. 31 U.S.C. §§ 3551(1), 3552. While the statute provided an explicit statutory basis for our review of bid protests, it also described a narrower jurisdiction than we previously exercised. As a result, we no longer consider some types of protests that we considered under our account settlement authority. See, e.g., PolyCon Corp., 64 Comp. Gen. 523 (1985), 85-1 CPD ¶ 567 (potential supplier not an "interested party" as defined by CICA); Rohde & Schwarz-Polarad, Inc.--Recon., B-219108.2, July 8, 1985, 85-2 CPD ¶ 33 (CICA protest jurisdiction only encompasses subcontract awards that are "by or for" the government).

We find no basis in CICA to conclude that Congress intended for this Office to review under its bid protest authority any challenge to the award of a cooperative agreement. Because CICA limits our jurisdiction to the review of awards or proposed awards of procurement contracts, we do not review protests of cooperative agreement awards based on allegations of a conflict of interest.

The protest is dismissed.

Robert P. Murphy
Acting General Counsel