



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DECISION FOR PUBLIC RELEASE

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release.

Matter of: Cornet, Inc.; Datacomm Management Services, Inc.

File: B-270330; B-270330.2

Date: February 28, 1996

Stephen P. Flott, Esq., Lisa A. Federici, Esq., and Miriam Lavanya Shashikant, Esq., Flott, Rosner & O'Brien, for Cornet, Inc.; and William A. Roberts III, Esq., Lee Curtis, Esq., Jerone C. Cecelic, Esq., Marcia L. Stuart, Esq., and Karen L. Manos, Esq., Howrey & Simon, for Datacomm Management Services, Inc., protesters. Neal Walters, Esq., and William Kenny, Esq., Archer & Greiner, and Donald J. Mulvihill, Esq., Kathy Siberthau Strom, Esq., Paul W. Butler, Esq., and Barbara O. Brincefield, Esq., Cahill, Gordon & Reindel, for Telenex Corporation, an intervenor. Nicholas P. Retson, Esq. and Thomas J. Duffy, Esq., Department of the Army, for the agency. Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where protest initially raises only general allegations and is subsequently supplemented in protester's comments by specific allegations, specific arguments must independently satisfy timeliness requirements; where record shows that protester could have advanced specific allegations in initial protest, these contentions are dismissed as untimely.
2. Protest allegations relating to technical acceptability of awardee's product are dismissed as untimely where not raised until after protester's receipt of agency report, even though allegations are based upon commercial information available to protester at an earlier time.
3. Protest against agency's decision to make award based on initial proposals is dismissed where solicitation advised offerors of agency's intent to award without discussions, and agency's decision that discussions were not necessary is not shown to be incorrect.
4. Protest by concern that initially filed protest at General Services Board of Contract Appeals is dismissed as untimely where, despite protester's position to the

contrary, record shows that firm had knowledge sufficient to formulate bases for protest more than 14 days prior to filing at General Accounting Office.

DECISION

Cornet, Inc. and Datacomm Management Sciences, Inc. protest the award of a contract to Telenex Corporation under request for proposals (RFP) No. DAEA32-95-R-0003, issued by the Department of the Army to acquire a quantity of telecommunications matrix switches. The protesters principally maintain that the evaluation of their proposals as unacceptable, and Telenex's as acceptable, was improper.

We dismiss the protests.

BACKGROUND

The RFP called for offers to furnish up to 20 matrix switches and advised offerors that the agency would make award to the firm submitting the proposal representing the best overall value to the government based on cost and numerous technical evaluation factors. The Army received four initial proposals, but ultimately found only Telenex's to be completely technically acceptable. The Army thus awarded a contract to Telenex based on its initial proposal on August 25. Cornet filed a protest in our Office on September 1, and Datacomm filed a protest at the General Services Board of Contract Appeals (GSBCA) on September 5. After learning of Datacomm's protest at the GSBCA, Cornet filed as an intervenor in that proceeding. Both firms were debriefed on September 11. Because of the pendency of Datacomm's protest at the GSBCA, our Office dismissed Cornet's protest on September 22. See 4 C.F.R. § 21.3(m)(6) (1995). Thereafter, on October 12, the GSBCA dismissed Datacomm's protest for lack of jurisdiction. Both firms subsequently filed protests in our Office on October 26.

CORNET'S PROTEST

In its initial, September 1 protest, filed in our Office prior to the debriefing, Cornet raised three general contentions: the agency improperly failed to engage in discussions; Telenex's switch failed to meet the requirement that the switches be 100 percent redundant;¹ and the agency improperly evaluated the Cornet and

¹Specifically, Cornet's protest stated that Telenex does not offer fully redundant switches "as that phrase is defined by [the agency] and as per specification ASQB-94276." We interpret this as a reference to the RFP's specification for the technical control facility matrix switch, which is designated ASQB-94276A, dated March 15, 1995. This broad specification describes all attributes of the matrix switches, and

(continued...)

Telenex proposals on an "apples and oranges" basis because Cornet's proposal allegedly was based on a 4,000 port capacity matrix switch while Telenex's was based on a 1,000 port capacity switch.² Cornet's October 26 protest was a refile of its September 1 protest letter (with a nonsubstantive cover letter attached), with no new arguments raised or information presented.

On December 6, the Army submitted its agency report. In commenting on that report, Cornet challenged several specific areas of the evaluation for the first time, arguing that: (1) several specific areas of its proposal were misevaluated; (2) Telenex's switch—in particular, the standard switching boards (SSB)—improperly was evaluated as meeting the 100 percent redundancy requirement; (3) the Telenex switch experiences impermissible "port degradation" when all 4,000 ports are used at certain specified high-speed data rates; (4) Telenex is unable to provide a "ringer equivalency number" and, thus, cannot furnish the required "2-wire interface"; and (5) Telenex improperly proposed a proprietary management information base (MIB) for simple network management protocol (SNMP) control. Cornet also alleged that the agency improperly failed to conduct discussions prior to award.³

Timeliness

Under our Bid Protest Regulations, section 21.2(a)(2), 60 Fed. Reg. 40,737, 40,740 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.2(a)(2)), protests must be filed in our Office within 14 days of when a protester knows or should know of its basis for protest. We find that much of Cornet's protest was not filed in a timely manner.

¹(...continued)

not just the redundancy requirement; paragraph 3.2.20 of this specification states "provide 100 percent redundancy of all internal systems except ports." Cornet's protest did not specify what components of the Telenex matrix switch allegedly failed to meet the redundancy requirement

²Cornet also maintained generally that "on information and belief, Telenex does not currently meet further specifications as specifically required by the RFP." Cornet did not specify which requirements Telenex allegedly did not meet.

³Cornet also asserted that, due to its pricing, the Army should have suspected a mistake in Cornet's proposal and invoked the mistake in bid/offer price procedures. As we find that Cornet has not raised timely challenges to the Army's technical evaluation, and there thus is no basis to question the agency's conclusion that Cornet's proposal was technically unacceptable, this argument is academic. SSI Servs., Inc., B-254269.2; B-254269.3, Sept. 2, 1994, 94-2 CPD ¶ 85.

1. Evaluation of Cornet's Proposal

During Cornet's September 11 debriefing, the Army advised the firm in significant detail of the specific reasons why its proposal was rejected as technically unacceptable. However, as discussed, Cornet's October 26 protest consisted of a refile of its September 1 protest, and did not challenge any of the specific bases for rejection provided to Cornet in the debriefing; rather, again, Cornet's comments responding to the agency's administrative report set forth for the first time its disagreement with the bases for rejection. Since Cornet's detailed arguments concerning the evaluation were not raised in the October 26 resubmission of its original protest, they are untimely and will not be considered. Cornet's original general allegations were too nonspecific to constitute a valid basis for protest, Ebon Research Sys., B-253833.2; B-253833.3. Nov. 3, 1993, 93-2 CPD ¶ 270, and do not render its later raised specific arguments timely. Id.; see also Battelle Memorial Inst., B-259571.3, Dec. 8, 1995, 95-2 CPD ¶ 284 (even where general allegation is timely raised, later raised specific arguments must independently satisfy timeliness requirements).

2. Evaluation of Telenex's Proposal

In its September 1 and October 26 protests, Cornet alleged only generally that the Telenex matrix switch was not 100 percent redundant as required by the RFP; Cornet did not specify that it was the SSB component of the switch that it believed lacked redundancy. As discussed above, protesters cannot initially raise general arguments and only later provide specifics; such arguments will be dismissed as untimely. QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94; tg Bauer Assocs., Inc.-Recon., B-229831.7, Mar. 2, 1989, 89-1 CPD ¶ 218. While it is not clear precisely when Cornet became aware of the specific SSB redundancy issue, since no other specific argument has been raised we can only assume that the alleged SSB problem was the basis for Cornet's original general redundancy argument; in other words, it appears Cornet was aware of its specific argument as of September 1. In any case, Cornet's own statements show that it had adequate knowledge to raise the issue no later than October 26, that is, when it resubmitted its protest to our Office. In this regard, Cornet states in a February 12, 1996, filing that "Cornet was aware [at the time of an October 25 meeting] that the Telenex switch would allow a certain number of ports to fail at any given time [because the SSBs lacked redundancy], and thus was not 'fully redundant' as that term is understood in the industry." Further, Cornet's December 20 comments state: "[n]ote in Telenex's own brochure, which is commercially available . . . , the definition of port and switch. It was clear from the brochure that the SSB is part of the matrix switch [as opposed to the port card] and the switch therefore does not provide 100 percent redundancy." Since the referenced brochure is dated 1991, there is no reason to believe that Cornet was unaware of it until it filed its report comments. As Cornet was aware of the alleged SSB redundancy problem well

before raising the argument in its December 20 comments, the argument is untimely and will not be considered.⁴

Cornet's allegation that Telenex could not provide a "ringer equivalency number" and, as a consequence, could not provide a "2-wire interface," is untimely for the same reason. Cornet's December 20 submission states that "it was commercially believed that Telenex did not have this capacity." As this argument is based on Cornet's "commercial belief," there is no reason why it could not have been raised as a specific argument in Cornet's October 26 refiled protest. Because it was not, we will not consider it.

Abandoned Issues

As noted above, Cornet argued for the first time in its comments that Telenex's proposal was technically unacceptable because it must have relied on a "proprietary MIB" for SNMP control. Although not stated by the protester, Cornet apparently reached this conclusion based on its reading of the Telenex proposal which, according to the protester, showed that [deleted]. This alleged deficiency relates to the RFP's requirement that the switch offered provide an "open architecture" to support a variety of devices, networks, and protocols; essentially, use of a proprietary MIB would be inconsistent with the open architecture requirement because the various devices, networks, and protocols that may be directed through the switch will be unable to interface with it.

The Army specifically addressed this allegation in a supplemental agency report, explaining that the Telenex proposal described the VARCOM VC-1000 Network Management System, which can interface with a wide variety of open network system protocols; the agency stated that it considered this aspect of the Telenex matrix switch acceptable from the standpoint of meeting the open architecture requirement. In its comments on this supplemental report, Cornet did not address the agency's explanation, or in any way refute its position that the VARCOM VC-1000 Network Management System meets the open architecture requirement. (Cornet's only reference to this issue in its supplemental comments related to the timeliness of the argument.) Under these circumstances, we consider the issue abandoned. Battelle Memorial Inst., supra.

⁴Moreover, Cornet's general contentions that the Telenex switch was not 100 percent redundant as well as its more generalized contention that Telenex did not meet "further specifications", without more, were insufficient to establish a valid basis of protest. As with its general allegation relating to the evaluation of its own proposal, these allegations were so nonspecific that they failed to state a valid basis for protest. Sector Technology, Inc., B-239420, June 7, 1990, 90-1 CPD ¶ 536; see also Ebon Research Sys., supra.

Cornet also argued in its December 20 comments that the Telenex switch experienced "port degradation"--and that all 4,000 required ports would not be available regardless of port population or interface data rate--at data rates of 256 Kilobytes per second (Kbps) or higher.⁵ Again, however, the agency fully explained its position in its report--the Telenex switch in fact would have all 4,000 ports available regardless of port population or interface data rates through the use of [deleted]. Cornet did not rebut the agency's position, and we thus consider this contention abandoned as well. Battelle Memorial Institute, supra.⁶

Failure to Conduct Discussions

Cornet maintains that the agency erred in failing to engage in discussions prior to awarding the contract to Telenex because the solicitation did not advise offerors of the possibility that award might be made without discussions, none of the proposals was technically compliant with the requirements of the solicitation, and the offerors did not compete on the basis of a common understanding of the requirement.⁷

⁵Although not specifically stated by Cornet, we presume that by port degradation Cornet means that the Telenex switch would "consume" more than one port at interface data rates above 256 Kbps. The RFP required that the offered matrix switch have a capacity of up to 4,000 ports and that all 4,000 ports be available regardless of port population or interface data rates. Some switches lose port capacity as higher interface data rates are utilized. For example, a switch may use one port for any interface data rate from 0 to 64 Kbps, but at a higher rate--for example at a rate of 128 Kbps--may require two or more ports. In the above example, one port is "consumed" for every 64 Kbps, and therefore two ports would be necessary to support the 128 Kbps interface data rate.

⁶We also find that Cornet abandoned its initial allegation that the agency's evaluation was improper because it essentially amounted to an "apples to oranges" comparison between the two firms. According to its initial protest, Cornet offered a 4,000 port capacity switch while Telenex offered only a 1,000 port capacity switch. The protester's subsequent submissions make no mention of this "apples to oranges" comparison and, in any case, the record shows that Telenex in fact offered a 4,000 port switch.

⁷Cornet's contention that none of the firms was technically compliant is based on its untimely and abandoned assertions that the Telenex switch was not compliant with various aspects of the specifications. Since Cornet has either abandoned its contentions or failed to timely challenge the acceptability of the Telenex switch, we have no basis for questioning the agency's conclusion that the Telenex switch was technically acceptable. Thus there is no legal basis for finding, as Cornet suggests, that all firms were technically unacceptable.

Cornet's assertion that the RFP did not advise offerors of the possibility of award without discussions is incorrect. In fact, the RFP included the provision at Federal Acquisition Regulation (FAR) § 52.215-16 Alternate III, which specifically provides that the government intends to make award without conducting discussions. Where an RFP sets forth FAR § 52.215-16 Alternate III, a contracting agency properly may make award without discussions, provided the contracting officer determines that discussions are unnecessary. FAR § 15.610(a)(4); Lloyd-Lamont Design, Inc., B-270090.3, Feb. 13, 1996, 96-1 CPD ¶ ____.

The agency determined that discussions were not necessary in light of its finding that Telenex submitted the only acceptable initial proposal and also offered a clearly superior technical solution. There has been no timely argument or showing by either Cornet or Datacomm that the agency's determination in this regard is incorrect. Since the agency also determined that Telenex's price was fair and reasonable, there is no basis for us to object to the Army's award without discussions. Although Cornet maintains that all offerors based their proposals on erroneous assumptions regarding the agency's requirements, the record does not support this assertion; Telenex's proposal was found to fully meet the agency's requirements, and Cornet has not specified any erroneous assumptions on which the Telenex proposal was based.⁸

DATACOMM'S PROTEST

As noted, Datacomm initially filed a protest with the GSBCA on September 5, which was dismissed for lack of jurisdiction on October 12. On October 13, officials from the Army and Datacomm held a previously scheduled meeting during which the parties engaged in settlement discussions. Datacomm filed its protest in our Office on October 26. We find that Datacomm's arguments are untimely or without merit.

Redundancy of the Telenex SSBs

Datacomm's allegation that the Telenex switch does not meet the 100 percent redundancy requirement because Telenex's SSBs—which Datacomm maintains are part of the switch rather than the port—are not 100 percent redundant, also is untimely. The record contains numerous examples where the protester clearly acknowledged this as a basis for its GSBCA protest. For example, in its requests

⁸Datacomm also contends that the Army improperly made award without conducting discussions. Since Datacomm was advised of the Army's award decision on August 28, and also knew at that time that the agency had not conducted discussions, it was required to allege this basis for protest within 10 working days of that date. 4 C.F.R. § 21.2 (1995). Since Datacomm did not file in our Office until October 26, its protest on this basis is untimely.

for admissions submitted to the agency on September 15, the protester asked the agency through numerous questions to admit that the Telenex switch did not meet the redundancy requirement because its SSBs were not redundant. One request for admission provided "The awardee's proposal offers equipment which has no redundancy provision in the event of a failure of a single SSB (Standard Switching Board) module, and therefore fails to comply with the . . . requirement that the switch shall provide 100 percent redundancy of all internal systems except ports." The record thus shows that the protester had sufficient information to frame this issue no later than September 15.⁹ While Datacomm asserts that it was not until the October 13 meeting that it was advised that the Army considered the SSB to be part of the port rather than the switch, the fact remains that the Army considered all components of the Telenex switch, including the Telenex SSBs, to meet all specifications, including the redundancy requirement.¹⁰

Telenex's Ability To Meet The 4,000 Port Capacity and Commercial Availability Requirements

Datacomm alleges that Telenex did not meet the 4,000 port capacity requirement or, if it did, the firm was proposing new technology that did not meet the RFP's commercial availability requirement.¹¹ These allegations relate to an allegedly new capability of the Telenex product [deleted].

These allegations are untimely because Datacomm was provided with a copy of the Telenex proposal on September 18 in connection with its protest at the GSBCA, and the proposal shows both that Telenex offered to meet the 4,000 port availability requirement regardless of the interface data rate, and that it could modify existing,

⁹The record also contains a deposition taken on October 6 from one of Datacomm's engineers. During this deposition he explained in great detail his view regarding the function of the SSBs as well as their lack of redundancy.

¹⁰We note as well that the Datacomm protest also states "[t]he noncompliance of the Telenex switch with the requirement for 100 percent redundancy was apparent in the Telenex proposal." Datacomm was provided a copy of Telenex's proposal in connection with the GSBCA protest.

¹¹The RFP required firms to offer only products that were commercially available; a product is commercially available under the terms of the RFP if it is regularly used for other than government purposes and is sold or traded to the general public in the course of normal business operations. The RFP does allow firms to offer commercially available equipment that has been subject to a "special engineering change" provided that the modification can be made and the product supplied within the delivery schedule stated in the solicitation.

standard port interfaces to accommodate user-unique requirements. Specifically, the proposal provides:

"[Deleted]."

Elsewhere, the proposal states that the Telenex [deleted] matrix switch can ". . . accommodate maximum port capacity for the size of the switch selected regardless of the port population." The Telenex proposal thus specifically represents the firm's capability to meet the 4,000 port capacity requirement without regard to interface type.

The proposal goes on to describe Telenex's ability to modify existing interfaces to meet particular user needs. The proposal states :

"[Deleted]."

Since it is clear from Telenex's proposal that it both offered to comply with the agency's 4,000 port capacity requirement, and represented that it could easily modify any standard port interface card to meet the particular user needs, in this case, the need to have all 4,000 ports available regardless of port population or data transmission rate, and Datacomm had a copy of Telenex's proposal no later than September 18, these arguments were untimely raised in its October 26 protest.¹²

Datacomm's Noncompliance With Unstated 4,000 Circuit Availability Requirement

Datacomm maintains that it learned at the October 13 meeting with the Army that its switch was rejected for failing to provide 4,000 circuits, a requirement that it maintains is not outlined in the RFP. This argument is without merit. Datacomm's understanding of the October 13 meeting notwithstanding, the evaluation and source selection materials clearly show that the Datacomm switch was found technically unacceptable because it could not provide 4,000 ports at data rates exceeding 64 Kbps, not because it did not have the capacity to provide 4,000 circuits at all interface data rates. To the extent Datacomm's protest can also be read to assert that rejection based on the 4,000 port requirement was improper, the protest is

¹²In its comments on the agency's administrative report filed on February 8, Datacomm alleges for the first time that the Telenex switch does not meet the RFP's redundancy requirement for a new reason—because the switch "consumes" two or more paths at higher data rates the "spare" paths relied on for redundancy purposes are not available. As with the 4,000 port capacity and commercial availability arguments, this contention is untimely because Datacomm had a copy of the Telenex proposal on September 18.

untimely. The record shows that Datacomm was advised of this reason for rejection at the September 11 debriefing, more than 14 days before its October 26 protest was filed.

The protests are dismissed.¹³

Comptroller General
of the United States

¹³Datacomm requests that we consider its protest under the "good cause" exception to our timeliness requirements. Under that exception, we may consider an otherwise untimely protest where some compelling reason beyond the protester's control prevents it from timely submitting its protest. Bid Protest Regulations, section 21.2(c), 60 Fed. Reg. supra (to be codified at 4 C.F.R. § 21.2(c)); Oracle Corp., B-260963, May 4, 1995, 95-1 CPD ¶ 231. The only cause preventing Datacomm from filing in our Office, however, was its decision to pursue its protest initially at the GSBICA. Since this was a matter entirely within Datacomm's control, we find no basis to invoke the good cause exception here.