



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** National Customer Engineering

**File:** B-251166

**Date:** February 9, 1993

Thomas N. Jones for the protester.  
Alex D. Tomaszczuk, Esq., and John E. Jensen, Esq., Shaw, Pittman, Potts & Trowbridge, for Computervision Corporation, an interested party.  
Theresa A. McKenna, Esq., Department of the Navy, for the agency.  
Stephen J. Gary, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Protest that agency improperly combined requirements for computer hardware and software maintenance in a single procurement is untimely where not raised until time of exercise of option, 15 months after closing date for receipt of proposals for the original award.
2. Protester is not an interested party to allege improprieties in agency's exercise of an option extending a computer maintenance contract, where protester acknowledges it would not be able to meet the requirements of that contract.

## DECISION

National Customer Engineering (NCE) protests the Department of the Navy's exercise of an option under a contract with Prime Computer, Inc., awarded in July 1991, under request for proposals (RFP) No. N00123-91-C-0190, for computer hardware and software maintenance services.<sup>1</sup> NCE asserts that the hardware maintenance portion of the contract should be competed rather than satisfied through exercise of the option, and that the agency did not comply with pertinent regulations in exercising the option.

We dismiss the protest.

<sup>1</sup>Prime's name subsequently has been changed to Computervision Corporation.

## BACKGROUND

The original solicitation called for computer hardware and software maintenance services at Puget Sound Naval Shipyard in Washington; it encompassed a 3-month base period and two 1-year options. Cost would be evaluated on the basis of total proposed prices for hardware and software maintenance for the base period and both option years; award would be made to the technically acceptable, responsible offeror that proposed a fair and reasonable price. The solicitation was issued to 11 prospective offerors; only Prime submitted a proposal. Based on the Navy's finding that Prime was technically acceptable, responsible, and offered a fair and reasonable price, the Navy awarded the contract to that firm in July 1991.

The agency exercised the first option in September 1991. Near the end of the first option period, on September 14, 1992, NCE submitted an unsolicited proposal for the hardware maintenance portion of the contract for consideration "as an alternative to renewal of the last option year of the existing contract." After reviewing the proposal, the Navy determined that it did not offer an acceptable alternative to exercise of the option. Among other things, although the shipyard required both hardware and software maintenance (and Prime's contract provided for both), NCE's proposal did not cover software maintenance. The Navy concluded that NCE did not offer a viable alternative to exercise of the option. Accordingly, the contracting officer exercised the second option and formalized the action on October 6 through a modification to the contract. On September 29, NCE challenged exercise of the option in an agency-level protest. By letter dated October 14, the contracting officer denied the protest. NCE then filed this protest with our Office on October 30.

## SEPARATION OF HARDWARE AND SOFTWARE MAINTENANCE

NCE acknowledges that Prime "holds exclusive rights in data to the operating system and applications software," and that NCE therefore "is not requesting the GAO recommend the Navy refrain from the exercise of the options under the contract regarding software maintenance." The protester argues, however, that NCE should be allowed to compete for the hardware portion of the contract. In that regard, NCE asserts that the Navy's combining software and hardware maintenance requirements in one contract was improper, since it limited competition to the one firm that had exclusive rights to the software.

These arguments are untimely. The procurement information-- including the fact that the contract would include 2 option years and would encompass both hardware and software maintenance---was synopsized in the Commerce Business Daily (CBD) on January 11, 1991. Proposals were required to be submitted by May 23. Our Bid Protest Regulations require that a protest such as this, based on an alleged solicitation impropriety apparent before the closing time for receipt of proposals, be filed before that time. 4 C.F.R. § 21.2(a)(1) (1992). Since publication in the CBD is constructive notice of a solicitation and its contents, Federal Servs. Group, B-224605, Dec. 23, 1986, 86-2 CPD ¶ 710, NCE was on notice of the combined-maintenance provisions prior to the closing date, and was required to protest them prior to that date. NCE did not protest the combination of hardware and software requirements until 15 months later; consequently, this aspect of the protest is untimely and will not be considered. Id (protest that agency improperly included both computer equipment and maintenance in the same procurement, and that requirements should be competed separately, dismissed as untimely where procurement was synopsized in CBD and protest was not filed until time of option exercise).<sup>2</sup>

#### IMPROPER EXERCISE OF OPTION

NCE further alleges that the Navy did not comply with the provisions of FAR § 17.207(c), providing that a contracting officer may exercise an option only after determining that (1) funds are available; (2) the requirement covered by the option fulfills an existing government need; and (3) the exercise of the option is the most advantageous method of fulfilling the government's needs, price and other factors considered. Specifically, NCE asserts that the agency did not, based on either an informal price analysis or an examination of the market, rationally determine that the exercise of the option was the most advantageous alternative to the government. NCE also complains that the market changed too dramatically since the time of contract award to have justified a conclusion, on the basis of the original

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<sup>2</sup>NCE attempts to show that this issue was timely raised, based on AAA Eng'g & Drafting, Inc., B-236034.2, Mar. 26, 1992, 92-1 CPD ¶ 307, where we stated that an agency must undertake a de novo review of the circumstances of the acquisition each time it considers exercising an option. That statement, however, referred to the protester's challenge to the agency's determination that exercising the option was in the best interest of the government--i.e., the circumstances surrounding option exercise--not to the provisions of the original solicitation.

award, that exercising the option would be the most advantageous alternative.

NCE is not an interested party for the purpose of raising these allegations. Under our Regulations, a party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. 4 C.F.R. §§ 21.0(a) and 21.1(a). Here, since NCE has offered to provide only hardware maintenance services, and acknowledges that it cannot provide the software maintenance services also required by the contract, it would not be in line for award even if its protest on these issues were sustained. Accordingly, NCE is not an interested party to challenge the Navy's exercise of the option under the contract with Prime. Motorola, Inc., B-247913.2, Oct. 13, 1992, 92-2 CPD ¶ 240.

The protest is dismissed.



John M. Melody  
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