The COOK Report on Internet ➤ NREN

Vol. III, No. 1, April 1994
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ISSN: 1071-6327

Sprint Versus MCI & NSF: HPCC Backbone Awards Draw Protests

Comparison of Protests Provides Insight into Evolution of MCI & Sprint Understanding of the Public Relations Stakes

Sprint Starts Out Weak But Rises Quickly to the Challenge

Editor's Note: from trusted sources we recieved faxes of both MCI's protest of Sprint's second win or ESnet and Sprint's protest of MCI's apparent win of the NSF vBNS. We also received a copy of Sprint's March 15 follow-up submission to GAO. Sceptical of MCI's apparently favored position at the National Science Foundation, we hoped that the Sprint position would be strong and that of MCI weak. What started as precisely the opposite instance now shows signs of evolving into a strong Sprint position.

The Background

Now that the NSF has announced its intent to make awards for NSF 93-52, we have now learned a bit more about how, what seems to be a self-perpetuating aristocracy inside the beltway, has worked to give us the next five to 7.5 years of MERIT, IBM, MCI, ANS and NT.

NSF defines an ostensible network backbone research service (the vBNS) on which it is going to spend taxpayer money. Because this research service is open to some university computational science types, its legal department can say it is done for the benefit of the R&E community as well as the government and can therefor be a cooperative agreement rather than a contract.

It then holds discussions with identifiable members of the network community at large about what its solicitation will request. However when it gets raked over the coals in the response to its draft solicitation, it goes essentially into executive session with a group of insiders whose names it does not reveal in order to plan its ultimate objective. Nine months later and a year behind its self imposed schedule, it comes out with a solicitation subtly tailored to the incumbents who by definition will have the best understanding of NSF goals since they have helped to guide and shape them for nearly seven years.

Now we get to the interesting part. Not having publicly released the names of those upon whom it relied to draft the final product, the NSF recruits a review panel. The review panel (many of whom are probably among those who shaped the solicitation itself) is told that their participation in the review will be confidential and that presumably their names will never be publicly released even to a FOIA request. (This was confirmed in a letter to the Editor on March 17, 1994 denying our request for the review panel findings on the grounds of "exemption 5, which pertains to the deliberative decision making process of the Foundation and exemption 6 which pertains to the right of privacy.")

So the ostensibly independent review panel, whose identities only those inside the castle of the NSF will ever know, then does its work. The proposal of the incumbent is judged technically superior. And then they look at the prices. And lo, the incumbent is even better! And what is more interesting, the solicitation itself is the criterion for judging technical merit. So even if an review panel member who is not from the inner circle thinks the solicitation's aim is flawed, or that someone has come up with a better way in the mean time, he or she must grade the proposals on how close they come to giving NSF what it asked for not on what he or she believes to be the most sound approach.

What Justification for NSF Secretiveness ?

Sometimes we wonder why the NSF doesn't turn this into a Black Budget

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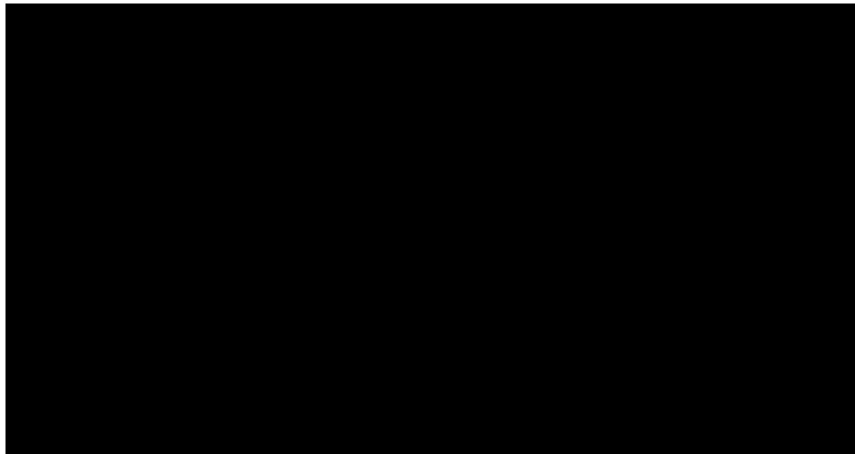
military contract in order to remove it completely from public view?

Where are the checks and balances? Where can we be assured that the composition of the review panel isn't the same as those insiders who finally crafted the solicitation? We can't because everything - even the identity of the panel members - is held in incestuous confidence. Right up to the DNCRI director who makes the final decision, gets the routine approval from his boss and the next rubber stamp from the new NSF director to the National Science board which (by the public admission of Steve Wolff, the DNCRI Director), meeting in executive session, is told certain things about the proposed award that are privileged and proprietary and then applies its own rubber stamp as the culmination of a supposedly democratic process. With the result that six weeks later the public has still not seen any details about the winning proposal because MCI really hasn't won yet since Steve Wolff - having the authorization he wants - hasn't yet signed the document on the bottom line.

The real trouble is that they are wasting the taxpayer's money instead of spending it on real leadership. MCI, which does not have a commercial ATM service as opposed to Sprint and AT&T which do is given $50 million to learn how to get into and establish itself in the very high speed ATM data networking business. And Congress having been sold the bill of goods by Mike Nelson and other staffers that the "NREN" program as presently established was going to enhance our technology capability sits blissfully by as we, the American people pay for MCI's ability to get up to speed and compete commercially against the supercomputer center high speed ATM network program that Sprint released last fall.

What Would We Like to See?

We admire Sprint's leading edge technology ability and its willingness to test it in a contract situation in ESnet. We are unhappy with MCI's ability to continue to exploit its favored relationship with the National Science Foundation. However the vision of what we would like to see prevail was jolted when sources delivered to us copies of both the MCI protest of Sprints win of ESnet and Sprints protest of MCI's win of the vBNS. We offer a comparative analysis



of the two protests. Unfortunately Sprint was a little slow to catch on to the problem and its initial protest had to be rushed to get it to GAO within the necessary time limits. While the first protest of February 28 appears to be on weak ground, on March 15 Sprint submitted a much improved follow up. During this same time Sprint is facing a meticulously engineered MCI protest that, to us - while admittedly based solely on the knowledge the facts as MCI presents them - seems likely to prevail. We look first at MCI.

The MCI Protest

On February 14, 1994, the day that the NSF Press Office announced the NSF's intention to award the vBNS to MCI, the Washington law firm of Patton, Boggs & Blow hand delivered to the Procurement Law Control Group at the General Accounting Office, a protest against the award by the Lawrence Livermore National Laboratory of the ESnet backbone. (Editor's Footnote: On Friday March 18 AT&T apparently also delivered a second protest to GAO.)

The award to Sprint was the second time it had won a contract for a commercial ATM backbone for the Department of Energy's component of the NREN program. AT&T protested in October 1992. On March 30, 1993 GAO sustained the first protest of AT&T, suggesting that Lawrence Livermore "revise the solicitation to accurately describe the state of development it considers acceptable for equipment proposed for initial implementation, open negotiations with all offerors and then request best and final offers."

As early as September 9, 1993, in MCI's view, things began to get muddy. On that date MCI was informed that it should proceed with its best and final offer. According to the MCI protest, MCI was told that revisions to the RFP's requirements specifications document were *not* necessary and that Lawrence Livermore was providing only "further clarification" of the major technical issues raised by the AT&T protest. But Livermore went on to explain in great detail what additional information would be required to establish the ability of the bidders to provide ATM or SMDS in "end-to-end (i.e. router to router) operation at the time of initial installation of service. . ."

On page three of its protest MCI notes that: "questions concerning "this clarification" were to be submitted by September 16 1993. Then even *before* offerors had submitted revised technical-management-pricing proposals, the University [which manages Lawrence Livermore] said it would have 'oral discussions with each offeror' which would *then* lead to the submission of the revised technical-management-pricing proposals, a submission that the University said would be treated as a best and final offer."

Convoluted Instructions from Livermore

Here MCI seems to be implying that Livermore was taking an opportunity to meet one-on-one with individual bidders and thereby create a situation where it could give data on its wants to some but not to others. At

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So the ostensibly independent review panel, whose identities only those inside the castle of the NSF will ever know, then does its work. The proposal of the incumbent is judged technically superior. And then they look at the prices. And lo, the incumbent is even better!

this point due dates for the revised RFP had apparently not been announced by Livermore.

"On September 16 MCI submitted seven questions concerning the RFP" and requested that its discussion meeting with Livermore be held on October 4, 1993. By an letter dated October 1, 1993 Livermore responded to the MCI questions of September 16. It also stated "that 'the schedule for discussions to be held regarding the *subject RFP*' would be on October 4, 1993. (Emphasis added.) Attachment 4. (Note, at this point in time, the offerors still had not been asked to submit their revised technical-management-pricing proposals based on the earlier GAO decision and the University's letter of September 9, 1993.)"

MCI's point apparently is that it was being asked to discuss an RFP as though it were one with concrete criteria and submission date when such criteria and date had not been established. MCI quotes from Livermore's October 1, 1993 response where it talked about submission of *revised* proposals and then another response where it is implied that the *original* proposals are under discussion. According to the University [Livermore] "the necessity for further discussions, and/or best and final offers, will be determined after evaluation of *revised* proposals based on the original evaluation criteria."

Again MCI's point seems to be that Livermore was very confusing in its instructions and use of language mixing at will criteria from original and from revised proposals and then using the term best and final offer (bafo) in a conditional sense when the revised proposals were to be considered "bafos". It is certainly clear that the two sides were not communicating well with each other.

On October 8 Livermore advised MCI that "discussions regarding proposals submitted in response to subject RFP are now closed." MCI points out that the phrase "submitted proposals" must refer to the *1992* proposals "because at this time the offerors still had not been asked to submit heir revised technical/pricing proposals," based on the GAO decision. It was only with the October 8 response that Livermore gave MCI a two week deadline of October 22 for the submission of final proposals.

According to MCI' "by a fax transmittal of October 14 1993, the university answered further written questions of the offerors which in turn generated additional questions from the offerors. In this correspondence the University again repeated the same notion concerning 'discussions' concluding before the submission of the revised technical-management-pricing proposals." MCI seems to be driving home a point that Livermore was not being consistent Saying that all discussions are closed on October 8 yet answer further questions from the offerors on October 14 and *again* on October 21 just one day before submission of the revised proposals.

The protest states: "On October 22 1993 MCI submitted its revised technical-management-price proposal to the University." Its first proposal was based on an SMDS solution. In view of the progress of ATM during the intervening 18 months, MCI's offer of an ATM solution lead to a revised proposal that was "totally different from that previously evaluated and considered by the University."

On November 5. 1993 the University [Livermore National Laboratory] advised MCI that its representatives "would visit MCI's site for a demonstration of capabilities on November 11, 1993. It further stated that the university had determined that further discussions are necessary in order to make a final competitive range determination, and that these discussions with MCI would be held during the November 11 visit with any supplemental information to be submitted by MCI by November 16, 1993."

During the November 11 site visit MCI was informed of only two deficiencies, one in its technical proposal and one in its pricing proposal. On November 16 by letter, MCI delivered information to address both points. However on December 13 the University informed MCI that it had "made *a final competitive range determination. We regret to inform you that your proposal is not within this range and is no longer eligible for award.*" Sprint, it said, was the winner once more, "based on a proposal which is both technically superior and the low apparent offer. Although your proposal met the requirements of the solicitation and was rated as technically *satisfactory*, the University has determined that the technical and pricing portions of your proposal cannot be sufficiently improved to maintain a reasonable chance to be selected for award."

MCI was "surprised that it was determined not to be within the competitive range since earlier the university had disclosed only two minor deficiencies in its proposal. Accordingly, MCI asked that it be debriefed by the University which in turn advised that debriefings would not be made until after the contract award."

"On February 4, 1994 representatives of MCI and the University met for the oral debriefing." There MCI was told that technical proposal counted 85% and the management 15%. The respective components of each were graded: Excellent, Very Good, Satisfactory, Marginal and Unsatisfactory. "In summary fashion the University cited some twenty categories in which MCI's proposal had been rated, with MCI receiving a Very Good in eight categories, a Satisfactory in eight, and three in the Marginal category. [Here MCI's tightly written response slips up. The categories listed add to 19 not 20.] In the four categories under the management proposal, the University gave MCI Very Good in two and Satisfactory in two."

"Protest Grounds: The University Failed to Conduct Meaningful Discussions"

We cite this section in full: "Based on the ten ratings MCI received in the Satisfactory grade and three in the Marginal, it is evident that the University mislead MCI during the November 11, 1993 site visit and discussion session where it cited only two deficiencies and no weaknesses. Second, it was improper to exclude MCI from the competitive range since it had not conducted meaningful discussions with MCI during the November 11 session that would have enabled MCI to improve its proposal, it was improper of the University not to request the submission of BAFOs. In point of fact the University intentionally blended the 'termination of discussions,' the submission of revised proposals, the 'site visit/demonstration' and 'discussions,' the determination of a competitive range, and the selection for award in such a convoluted manner that it denied MCI a fair and equal opportunity to compete."

"It is well-established that 'discussions are required to be meaningful; that is an agency is required to point out weaknesses, excesses or deficiencies in proposals.' E.L. Hamm & Assoc. Inc., B-250932, Feb. 19, 1993, 93-1 CPD ¶156 at 3; FAR 15.610(c); 48 CFR §915610 (c). (DOE Acquisition Regulation ('DEAR') requires that Contracting Officer shall point out to each offeror within the competitive range any ambiguities or uncertainties in its proposal. . .[and] should point out instances in which aspects of a proposal *contain a weakness* in relation to the governments requirements.') [**Editor's Note**: But Livermore (the University) had never placed MCI "within the competitive range."] Furthermore '[d]iscussions cannot be meaningful if offeror is not advised, in some way, of the weaknesses, excesses or deficiencies in its proposal that must be addressed in order for the offer to be in line for an award.' Id. at 4. Note too that DEAR 915.610(c) places an *additional requirement* on the University to discuss not only deficiencies, but also weaknesses in the proposal. Diversified Systems Resources Ltd., GSBCA No. 8493-P, July 27, 1988, 88-3 BCA ¶21017 At 106,171. As we have demonstrated, the University failed to do its duty to conduct meaningful discussions because the discussions did not alert MCI of alleged deficiencies and weaknesses in its BAFO.[1] The GAO routinely sustains protests where the procuring activity has failed to identify alleged deficiencies and weaknesses. *E.g.*, EL Hamm & Assoc., Inc., 93-1 CPD ¶156, at 6-7; Eldyne, Inc., B-250158, Jan. 14, 1993, 93-1 CPD ¶430 at 6; ITT Electron Technology Div., B-242289, Apr. 18, 1991, 91-1 CPD ¶383, at 6-7."

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1. FAR 15.611(c) provides that:
" 'After receipt of best and final offers, the contracting officer should not reopen discussions unless it is clearly in the Government's interest to do so. . . *If discussions are reopened, the contracting officer shall issue an additional request for best and final offer within the competitive range*." (Emphasis added.)'

Here it cannot seriously be disputed that, after receipt of BAFOs, the University conducted discussions with the offerors. Once it conducted the additional discussions, the University was required to issue an additional request for BAFOs. FAR 15.611(c); SWD Associates, B-226956.2, Sept. 16 1987, 87-2 CPD ¶256, at 4."

The bottom line is that the Government has to tell you where you screwed up, but it can't tell you why someone else did much better without essentially giving away proprietary information. Therefore, just meeting the requirements alone isn't going to get you an award. You have to be the best bidder in order to win. This may seem unfair, but it really isn't. For, after the award is made, you can look at the contract that's in place to see what services they other guy provided (though it's unlikely to contain details about how he provides them)

Request for Relief

MCI asked that the Comptroller General rule in favor of MCI on the protest. Ask the University to "re-open discussions with MCI and the other offerors and that the University conduct 'meaningful' discussions followed by the submission of BAFOs." Declare that MCI "is entitled to its costs of (a) filing and pursuing its protest, including attorney's fees, and (b) bid and proposal preparation costs."

Finally MCI submitted under a separate letter a request for an astonishingly broad range of documents. The range essentially defined the entire paper trail that was generated by the Lawrence Livermore evaluation procedure. The MCI protest is signed by Robert H. Koehler and Michael J. Schaengold of Patton Boggs and Blow and by Robin Redfield, Corporate Counsel of MCI.

Does MCI Tell the Full Story? The Government Viewpoint

A knowledgable observer who looked at an early draft of this article commented: If a company scores satisfactory or even very good in lots of areas, this does not mean that they are automatically in the competitive range. The issue is that scores range from unsatisfactory, to marginal, to satisfactory to very good to excellent. If another bidder were rated excellent in all the areas in which the first were rated satisfactory or very good, it would still be way ahead. For example if you scored satisfactory, that meant you met the requirement, but did not exceed it significantly. Moreover if you then ask why you recieved only a satisfactory when someone else better, you can't really be told. Why? Because that would be giving out information about the other proposal that was proprietary, and essentially leveling the bidders, since armed with the info about what the Government thought was excellent, you could redo your proposal to do what the other bidder did.

The bottom line is that the Government has to tell you where you screwed up, but it can't tell you why someone else did much better without essentially giving away proprietary information. Therefore, just meeting the requirements alone isn't going to get you an award. You have to be the best bidder in order to win. This may seem unfair, but it really isn't. For, after the award is

made, you can look at the contract that's in place to see what services they other guy provided (though it's unlikely to contain details about how he provides them).

The real issue is that the Government can't play favorites by telling you what to do to be rated excellent. It can only tell you about how your bid scores, and if there are problems, it can point them out. It can't tell you *how* to fix the problems you have, or how to score better than someone else. That's the value a bidder brings to the table.

One more thing. Sprint is veiwed as a leader in the ATM community. They have more commercial ATM customers than anyone else, and even in NREN, they have some ARPA contract for the Magic Testbed that seems to be working out OK.

Analysis

We are not well versed in the specifics of the ESnet bid and rebid controversy. Therefore we cannot judge the MCI protest from the same level of detail as we can evaluate the Sprint document. We note that the protest is dated only 10 days after the MCI debriefing of February 4. Sprint's is dated 17 days after the February 11 announcement on com-priv of the NSF award. Of course MCI knew about is demise before the February 4 date since the contract was awarded to Sprint in late January. Sprint either knew or should have known about its own demise well before the February 11 1994 date. We published a prediction of the MCI win on January 29. From the first week of January onward we were increasingly hearing that MCI had won.

From the evidence at hand it seems that both parties handled their protests rather differently. MCI brought in a top Washington law firm and apparently its top corporate attorney. MCI's document is a focused recitation of facts documented by attachments. Those facts are cogently marshaled in such a way that the grounds for protest seem inevitable, expected and difficult to refute.

Sprint's Counter Attack

On the other hand Sprint apparently left the matter in the hands of a single corporate attorney rather than bringing top flight outside legal talent. Judging by some weak arguments, at least one glaring inaccuracy, and a failure to use documents publicly available in the Sprint protest, we surmise that Sprint probably did not decide to protest until the last moment and lost the advantage of time to build its case that seems to have served MCI so well. As further evidence for our surmise, we have heard, but cannot substantiate, that Sprint did not decide to move forward until, with Ellen Messmer's article in the February 21 *Network World* and our post to com-priv a few days later, it became clear that the award was for an ATM network. If this is an accurate assumption, it becomes some what more clear why, with only about four days to prepare, Sprint's initial effort was so weak. Perhaps Sprint was doing what was necessary to get its foot in the door, knowing that once it was there, it would have an opportunity to weigh in with more evidence?

The Sprint case depends first on getting GAO to take jurisdiction by showing either, that NSF should have used a contract, or that it allowed the selection process to become compromised by conflict of interest. Unfortunately its arguments in both areas are weak. Where MCI appear to rely on concrete evidence that says at every turn who said and did what at what point in time, Sprint relies on interpretive stretches and allegations. Let's turn to the Sprint document.

It begins by noting that NSF has announced its intention to award the vBNS to MCI. "Regardless of this stated intention," it adds, "the appropriate vehicle for an award is a contract not a cooperative agreement." Why? Because, unless Sprint can carry this point, GAO will not even have jurisdiction.

GAO & the Jurisdiction Argument

According to Sprint: "[GAO] generally do[es] not review protests concerning the award of cooperative agreements, unless there is some showing that the agency is using a cooperative agreement where a contract is required, that is the agency is using the cooperative agreement award process to avoid the competitive requirements of the procurement laws, or that a conflict of interests exists."

Sprint goes on to cite the Ship Analytics 1987 case where the Comptroller General had agreed with the argument that US Maritime Administration was operating the entity to "serve the needs of MARAD (Maritime Administration) and other government agencies and that . . . the proper instrument for this type of relationship is a contract and not a cooperative agreement." GAO went on to point out that the question raised was whether the principal purpose of the transaction is to transfer a thing of value to carry out a public purpose of support or stimulation authorized by law, or whether it is to acquire property or services . . . for the direct benefit or use of the United States. If the former, a grant or cooperative agreement is proper, if the latter, then a procurement contract is to be used"

Sprint cites the relevant parts of the solicitation in an attempt to show that the NSF is proposing to acquire services for the direct benefit or use of the United States. Emphasis is placed on "NSF-specified customers" as though they were government agencies, when in point of fact they are university-based supercomputer centers that the NSF provides major funding for. Sprint's argument unfortunately cannot withstand scrutiny.

What is ironic and shows that Sprint very likely assigned its protest to someone not well versed in the complexities of the issues at hand is that there was extremely relevant information published in the January *COOK Report* of which Sprint seems to have been unaware. Aside from the question of whether they should or could have gotten it directly from this newsletter, we made no secret of the fact that we possessed the data when we published on December 30, 1993, a brief summary of it in the same com-priv mail list from which Sprint did get data mentioned later in its protest. What Sprint missed was a very professional legal brief by UUNET, PSI, NETcom and Internetworks against the solicitation as a cooperative agreement rather than a contract. This brief was delivered to the NSF Office of General Counsel in mid November, and the NSF General Counsel's rebuttal of the same data was issued on December 9. We published this material in full in our January issue.

This publicly available brief cites the same 1987 case and makes a largely

unsubstantiated assertion that services for the government are being obtained. It then goes on to make the argument which should have occurred to Sprint. Namely, that, in carrying out their portion of the same high performance computing and communications act responsibilities DOE and NASA had chosen to use the vehicle of a contract. Sprint won this bid the first time and then, as we have seen earlier in this article, won it a second time with just the DOE participating.

While Sprint cites the ambiguous NSF boilerplate approving the making "of a grant, contract, or other arrangement with MCI" as being proof positive that the "NSF's own actions confirm that a contract rather than a cooperative agreement is the appropriate procurement vehicle," the UUNET brief states that the NSF has recognized the value of procurement contracts and cites the February 8, 1993 Federal Register as proof. The UUNET brief also shows intimate knowledge of the NSF Inspector General Review of NSFnet and uses that report in a number of ways to show that the public interest was poorly served by the use of a cooperative agreement.

From the fact that the Sprint protest amazingly never mentions the IG Review, we conclude that until MCI hit Sprint in February with a one two punch of a protest of the Sprint win and beating Sprint for the vBNS, Sprint's legal staff wasn't even tracking the issue of what was happening with NSF and the NSFnet -- surprising considering the amount of controversy surrounding it and considering the prestige value of building the vBNS.

UUNET's law firm also goes on to show how NSF use of the cooperative agreement was discriminating against its clients in the commercial market place, an opportunity missed by the Sprint attorney. Finally from the material we published we also get the NSF rebuttal that its use of a cooperative agreement is appropriate because it is in support of its role in transporting a "thing of value to carry out a public purpose" namely its Congressionally assigned role in carrying out HPCC.

Allegations on an Internet Mailing List

Sprint is grasping at a thread. Almost as though admitting that it knows this, we read: "In the alternative, [i.e. if you don't accept the pro contract argument, here is a fresh tack] Sprint asserts that jurisdiction over this protest is also appropriate under the 'conflict of interest' basis described in the aforementioned GAO decisions. In this case Sprint sets forth as a separate ground of protest an assertion that the NSF may have a conflict of interest inasmuch as allegations have been made on the internet that a National Science Board Member is a member of the Board of Directors of MCI's principal subcontractor and business partner, ANS." Unfortunately for Sprint this assertion is false.

More over no such assertion was ever made on com-priv. Joe Stroup *did* say the award was going to MCI's Richard Liebhaber who was also on the Board of ANS. Unfortunately Liebhaber is not a member of the National Science Board. Brock Meeks some weeks earlier had mentioned conflict of interest allegations against Dr. Duderstadt who is President of the University of Michigan and the National Science Board, but who, alas, is not on the Board of ANS. (Doug van Houweling is the University of Michigan Representative on the ANS Board.) Unfortunately the Sprint protest seems to have been developed with such haste and so little internal support that it was unable to get these fundamental issues straight.

Facts

In this section Sprint states that it submitted its proposal on August 17, 1993 and that "no discussions were held with Sprint at any time after the submission of its vBNS proposal. On October 13, 1993, Sprint submitted an unsolicited price reduction proposal for its vBNS offer which would have significantly reduced the price the government would pay for Sprint's vBNS services." Sprint then notes Steve Wolff's February 11, 1994 post to com-priv of NSF's intention to award the vBNS to MCI, saying it believed that this was the first announcement that MCI would win the award. We observe that it depends what one means by announcement. *The COOK Report* on January 29 predicted that MCI would win. On February 9, 1994 it posted the same prediction to com-priv.

Sprint continues by saying that "information obtained on the public internet indicates that NSF was holding discussions with MCI during the evaluation process" and "that NSF may have changed and/or clarified for MCI its actual needs" while adding that no changes or clarification's to the vBNS portion of the solicitation were formally published, nor were any changes or clarifications to the Solicitation provided to Sprint. . ." The protest lists an attachment 4 which we do not have. We do somewhat vaguely recall in early December posting to com-priv that we had heard that the NSF had essentially made up its mind about the vBNS and was conducting discussions with the probable awardee. The problem is that the Solicitation, properly or not, was not held under the Federal Acquisition (FAR) regulations. For a Solicitation held under the cooperative agreement guidelines, the NSF, apparently, has freedoms not available to it under FAR. Sprint knew that the rules that it was playing by would be very different than FAR. Yet it decided to play anyway. Having lost, it seems to us, as observers sympathetic to Sprint, that Sprint may be criticizing NSF for playing by rules that were applicable to cooperative agreements as though they should have been bound by the more strict contract regulations.

These issues not withstanding Sprint goes on to make the very reasonable assertion that MCI has won an ATM award without having any publicly announced ATM capability. What Sprint does not say is that, under the loose rules of cooperative agreements, if MCI can make the assertion to NSF that it will do *useful research* on ATM, NSF is very likely free to go ahead with MCI since the NSF is charged with pushing the research envelope. We have been told by a source who has read the Merit Review panel's findings that proposals from both Sprint and AT&T tended to emphasize commercial, off-the-shelf implementations which MCI's pushed a research agenda. Another source emphasized that Sprint understood the solicitation requirement to demand a vBNS that worked at 155 Mgbs from day one.

Sprint seems to have thought that an off-the-shelf bid was the only way to go. Why it did is a mystery to us. The solicitation does say an *initial* speed of 155 Mgbs. It does not define however whether the winner would be required to have the vBNS fully operational on day one of the contract. Questions to the solicitation and the NSF's answers did make clear that a transition period was likely. And anyone familiar with the history of the current cooperative agreement well knows that MCI was *not required* to deliver T-3 speed at the in-

ception of payments to it for doing so.

Finally, stated as a fact is the allegation that ANS is "MCI's teaming partner on the vBNS and that a member of ANS's Board of Director was sitting on the National Science Board which awarded the vBNS to MCI." Two problems emerge here. As already pointed out, the assertion about the National Science Board member is not correct. We had published on com-priv a complete list of Science Board members in January. Finally, a minor but significant point. Sprint says "ANS is the incumbent contractor on the NSFnet." Not true. ANS is according to its 501(c)(3) filing papers a sub-contractor. While according to the NSF IG Review, ANS is the holder of a sub cooperative agreement. If Sprint had better support and more time to prepare their protest, they could have saved themselves this embarrassment. Unfortunately most of what Sprint offers in its section of "facts" are unsubstantiated *allegations*.

Grounds of Protest

1. Failure to Award based Upon Announced Evaluation Criteria

Knowing that it is the leader in ATM technology Sprint confidently states that "the vBNS provider was to have been an offeror which could 'demonstrate leadership in the development and deployment of high performance data communications networks.'" Sprint doesn't seem to realize that MCI could say that they were the only one who matched this criteria since only they had been the transport provider for ANS/NSFnet the only T-3 TCP/IP Internet in operation, and that if one pointed out that they hadn't yet reached T-3 they could still say that they had reached higher speeds and carried more data than any other TCP/IP internet.

For the next two pages of its protest Sprint lists the solicitation evaluation criteria and then says: "Sprint, as the only ATM provider with an operational commercial ATM network, should have received superior ratings under these evaluation criteria to MCI. Therefore NSF must have departed from these announced evaluation criteria in selecting MCI for award over Sprint in violation of the Competition in Contracting Act of 1984, 41 USC §253b(a). What Sprint doesn't say is that the NSF made it clear that research issues and not an operational-on-day-one commercial network were what it wanted.

2. NSF Selected MCI for Award Without Consideration of Sprint's Significantly Reduced Price, and

3. NSF Failed to Communicate Changes in its Requirements to Sprint

The protest points out that both of these assertions are violations of the Competition in Contracting Act. Unfortunately for Sprint the solicitation was not being played by the rules of the Competition in Contracting Act. Presumably any validity of these assertions rests on Sprint's ability to convince the GAO that the NSF's grounds for use of the cooperative agreement were invalid. The difference between MCI's assertions in its protest and Sprint's assertions now becomes instructive. MCI states its problems as meetings held and statements made and provides letters and other documents to back up its statements. Sprint is making these assertions: "on information and belief," without verifiable backup other than hearsay.

4. NSF Failed to Provide Sprint with Meaningful Discussions

Sprint says: "On information and belief, NSF held discussions with MCI regarding its proposal, possibly resulting in proposal revisions submitted by MCI and considered by NSF's evaluators. NSF did not conduct discussions with Sprint, nor did it provide Sprint an opportunity to revise its technical proposal. Such action violates the Competition in contracting Act of 1984. . . ." Again Sprint says in effect: we think something bad *may* have happened. Sprint lists 6 attachments three of which are NSF documents where the facts asserted within are not under dispute. The remaining are assertions from the com-priv mail list that in a legal sense must be regarded as hearsay evidence and in one of the three cases is inaccurate on the surface of the evidence available. Sprint unfortunately has no solid proof. No smoking gun.

5. NSF is Using Federal Funds to Underwrite MCI's Commercial Development of its Network

We believe that from a policy point of view this is the most serious charge and is a valid one. While Sprint states that this sponsorship of MCI's commercial product is violative of the purpose and intent of the Solicitation as well as the purpose and intent of the High Performance Computing and Communications Act (HPCC), Public Law 102-194, and the pending 'Boucher bill' legislation (H.R. 757) it does *not* cite any specific arguments for why. Not having seen the UUNET legal brief of November which was publicly available, it also is unable to take advantage of the argument expressed there by UUNETs lawyers as well attempt to deal with the NSF rebuttal of December 9. Not having followed com-priv closely enough it is also unaware that NSF's Steve Wolff has stated there that he believes the Boucher provided acceptable use policy amendment that became law in late 1992 actually authorizes the NSF to use public money to underwrite private commercial use of the network. We question whether his was the legislative intent behind the Amendment. It is especially unfortunate that Sprint did not also do so.

6. MCI's Proposal is Not Compliant with Solicitation Requirements

"The Solicitation required the 'use of innovative (but not untested) approaches'. (Solicitation at 13). MCI's use of an ATM solution which is not in operation today constitutes an 'untested' approach to the vBNS. Consequently, MCI cannot receive the award." Unfortunately a look at the solicitation reveals that Sprint is talking about an evaluation criteria not a *requirement* . Moreover it was only the 4 out of seven listed. Furthermore NSF could easily argue that the language was meant to say that approaches suggested should have been tested somewhere by someone (perhaps Sprint?) and not necessarily by the proposer.

7. The National Science Board Was Impaired in Its Evaluation by a Conflict of Interest.

This is the same charge mentioned at two earlier places by Sprint and one which is demonstrably false.

Sprint concludes: Based on the forgoing, Sprint respectfully requests that the NSF stay the award of the subject vBNS. Further Sprint requests that the GAO hear this protest; grant discovery as requested in the attached Request for Discovery Documents; determine that the NSF conduct meaningful discus-

sions with Sprint and any other offerors in the competitive range; and recommend that the agency award the contract in accord with the applicable law and criteria."

Signed,

Julie Lunceford Witcher
Counsel for Sprint Communications Company, LP

March 15: Sprint Opposes NSF Request for Summary Dismissal

Soon after the Sprint protest NSF moved for the GAO to dismiss Sprint's complaint. We don't have this NSF text but we do have and reprint in full the 16 page text of Sprint's March 15 "Protestor's Opposition to Respondent's Motion to Dismiss." This document, for which Sprint has obviously had greater preparation time, is far stronger than Sprint's quick and dirty initial foot-in-the-door protest.

If it wished to stay out of Federal Court in its initial protest Sprint has a choice of going to the NSF or GAO. NSF would hardly be a friendly venue. On the other hand GAO would have jurisdiction only if Sprint could show that the vBNS award should have been for a contract. But as we have pointed out above the catch twenty two for Sprint in this argument was that it agreed to participate in a soliciation for a cooperative agreement and could presumably not insist after the fact that the rules under which it had decided to play be changed.

What it has done is construct a brilliant argument, apparently butressed by legal precedent that says in effect that the award process for a cooperative agreement must be just as competitive as that for a contract, and that if it is not the awarding agency looses the ability to operateunder the shield of the cooperative agreement act and that the award process from that point forward is to be jusged as though it were a contract procurment. Thus Sprint says that it started out in good faith with the NSF under the cooperative agreement process, that the NSF changed the rules in mid stream, and that because the NSF in effected biased the award process, the award becomes subject to to the Federal contracting process and to the GAO's authority.

Under this line of argument Sprint gives up its earlier attempt to show that the purpose of the NSF's efforts was *something other than the* "transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government: . . ." (Sprint 3/15, p.2)

"Curiously, NSF focuses only on Sprint's allegation that the award to MCI should have been a contract rather than a cooperative agreement in seeking summary dismissal of the protest. . . . . The NSF misunderstands Sprint's protest. Sprint has not protested the fact that the NSF used a cooperative agreement in place of a contract. As discussed more fully below, until the award was announced, Sprint did not believe the use of a cooperative agreement was inappropriate for this Solicitation." (page 2)

GAO's jurisdiction is not based upon a demonstration by the protester that the agency violated the Federal Grants and Cooperative Agreements Act. Rather, it is based upon "some showing that the agency is using a cooperative agreement where a contract is required. That is the agency is using the cooperative agreement award process to avoid the competitive requirements of procurement laws, or that a conflict of interest exists." Avante International Systems Corporation, B.227951, 87-2 CPD 63 (1987). (page 3)

NSF Violated Provisions in the HPCA by Awarding vBNS to MCI

Sprint finds that if the use of a cooprative agreement were proper "the transfer of a thing of value must be made to the recipient to "carry out a public purpose of support or stimulation authorized by a law of the United States". (page 3) It then notes that "the stated "public purpose of support or stimulation authorized by a law of the United States" which justifies the NSF award of a cooperative agreement for the vBNS is the requirement "to upgrade the National Science Foundation funded network" found in the High Performance Computing Act of 1991, 15 U.S.C. 5511,

Sprint: NSF Has No Regard for Rules and Regulations

Says Agency Violated GAO Protective Order in Giving Portions of Sprint Proposal to MCI

By exceeding the scope of its authorization, the NSF has violated the terms under which it was entitled to award a cooperative agreement. Therefore, the GAO may hear the protest.4

4 Sprint is troubled by the National Science Foundation's lack of regard for rules and regulations. The problem appears to be systemic of the organization. For example, AT&T has advised Sprint that despite the fact it offered a proposal for the vBNS portion of the Solicitation, it has yet to be advised by the NSF of Sprint's protest as required in 4. CFR 21.3(a). Similarly, the agency ignored the terms of the Protective Order and of the proprietary legend on Sprint's vBNS proposal in sending its request for Summary Dismissal including several pages from Sprint's proprietary proposal to MCI, a direct competitor of Sprint and a non-party to the litigation at the time of disclosure. The document was not marked with any proprietary legend, let alone the appropriate legend as required by the GAO's Protective Order. Nonetheless, of greatest concern to Sprint is NSF's expressed lack of concern about breaching its responsibilities to Sprint in this manner. (page 7)

et seq." However this network upgrade being obtained by NSF is to be a part of NREN (page 4) and as required by HPCA NREN shall

"(3) be designed. developed. and operated in a manner which fosters and maintains competition and private sector investment in high speed data networking within the telecommunications industry;

(8) be developed by purchasing standard commercial transmission and network services from vendors whenever feasible, in order to minimize Federal Investment in network hardware;" (page 5)

Sprint now offers evidence that NSF actions violated both of these criteria:

"While it may be effectively argued that the HPCA's mandate that the network "be designed, developed, and operated in a manner which fosters and maintains competition requires NREN awards be made under the Competition in Contracting Act of 1984, Public Law 98-369, competition is not necessarily inconsistent with a cooperative agreement. In fact, when Sprint submitted its proposal for the vBNS portion of the Solicitation. It was with the understanding that the NSF would strive for maximum competition. Nonetheless, as stated in Sprint's Protest Complaint and as expounded upon further herein, Sprint now believes that "competition" for the vBNS award was completely thwarted.

Similarly, the HPCA required that NREN awards "be designed, developed, and operated in a manner which fosters and maintains . . . private sector investment in high speed data networking within the telecommunications industry." NSF's award to MCI also violates this provision of its authorizing legislation insofar as NSF intends to award a $50 million contract to MCI for an ATM network. Unlike Sprint which has the first national ATM network in place today, MCI has not yet even announced its ATM strategy! As published on February 28. 1994 in *Communications Week*, "MCI will announce its ATM strategy after it merges its data services with those of BT North America Inc., an MCI spokeswoman said." " (page5)

Also (we offer a three pargraph direct quote from pages 5 and 6)

"Finally, NSF violated its vBNS authorizing statute insofar as that the HPCA requires that the network "be developed by purchasing standard commercial transmission and network services from vendors whenever feasible, in order to minimize Federal investment in network hardware". As with the previous violation of the HPCA discussed above, award to MCI for ATM service is totally inappropriate where Sprint, and possibly other vBNS offerors, has "standard commercial [ATM] transmission and network services". Moreover, this capability was developed by Sprint commercially and without the use of Federal funds. In contrast, the NSF has just signed up to infuse MCI with $50 million of taxpayer dollars to develop its version of commercially-available ATM technology.

It is Sprint's contention that. while a cooperative agreement for the vBNS may have been an appropriate vehicle for solicitation,3 once the NSF made an award which violated the requirements of the very statute which enabled it, a cooperative agreement was no longer authorized or appropriate. This view is supported by the language of the Federal Grant and Cooperative Agreement Act; Federal common law; and Comptroller General Report, "Agencies Need Better Guidance For Choosing Among Contracts, Grants and Cooperative Agreements", GGD-81-88, September 4, 1981.

As previously quoted, the Federal Grant and Cooperative Agreement Act permits the use of cooperative agreements "to carry out a public purpose of support or stimulation authorized by a law of the United States". 31 U.S.C. 6305(1). In the instant case, the purpose authorized by law is actually being undermined by the award to MCI. Therefore. the "purpose . . . authorized by [] law" is not being carried out via a cooperative agreement award. and such an award, therefore, cannot be justified under the Federal Grant and Cooperative Agreement Act."

Having Failed to Follow Requirements of HPCA, NSF Becomes Vulnerable to Contracts Requirements

Sprint then states: "It is Sprint's position that the NSF's disregard for the authorizing legislation of the HPCA has caused the NSF's action to be reviewable by GAO because NSF has attempted to use a cooperative agreement which exceeds the scope of the award permitted: and because, by this action, the NSF has demonstrated its attempt to use "the cooperative agreement process to avoid the competitive requirements of procurement laws". See, Protest Complaint, at 2-3." (page8).

Sprint asserts: "The NSF's intention to infuse MCI with taxpayer dollars in order to assist MCI, a large, for-profit commercial entity, to develop a service which is already available from other sources, defies logic. Such a tortured use of an "assistance" agreement should not be sanctioned by this forum. Assistance contracts should be reserved for entities conducting legitimate research and development--not those playing industry catch-up."

Furthermore Sprint finds that "infusion of capital into a company which lags behind the industry in the development of the technology acquired is inappropriate use of assistance [cooperative agreement] funds."

Sprint asserts: "As stated previously, this award, as part of the HPCC's NREN, was to minimize Federal investment in commercial products and services while maximizing the private sector investment. The NSF's intention to infuse MCI with taxpayer dollars in order to assist MCI, a large, for-profit commercial entity, to develop a service which is already available from other sources, defies logic. Such a tortured use of an "assistance" agreement should not be sanctioned by this forum. Assistance contracts should be reserved for entities conducting legitimate research and development--not those playing industry catch-up." (page 8)

Sprint very bluntly concludes that using taxpayer money to underwrite the development of a commercial of a commercial service by a very large for profit company is a misuse of public funds. Sprint continues: "By infusing MCI with $50 million over the next five years in order to operate a backbone network connecting five supercomputer sites, the NSF is, in effect, underwriting MCI's development and deployment of a commercial service, which service is already commercially available by at least one offeror for this award."

"The actions of the NSF which exceed the requirements and limitations of the Act which the NSF claims to be implementing, should be declared illegal. The NSF should not be permitted to hide behind legislation which permits flexibility and maximum discretion in obtaining goods and services through cooperative agreements rather than procurement contracts when the agency has demonstrated such a cavalier disregard for the laws of Congress and such abuse of the public trust. In this case, the agency should not be entitled to shield its actions from review through its claimed ability to award cooperative agreements for a "public purpose"--the public is far better served by imposing some accountability on this errant agency."

And then in deservedly strong language Sprint concludes: "The actions of the NSF which exceed the requirements and limitations of the Act which the NSF claims to be implementing, should be declared illegal. The NSF should not be permitted to hide behind legislation which permits flexibility and maximum discretion in obtaining goods and services through cooperative agreements rather than procurement contracts when the agency has demonstrated such a cavalier disregard for the laws of Congress and such abuse of the public trust. In this case, the agency should not be entitled to shield its actions from review through its claimed ability to award cooperative agreements for a "public purpose"--the public is far better served by imposing some accountability on this errant agency." (page 9)

Why Sprint's Action is Viable

On page 10 Sprint states: "it is the NSF's intention to award to MCI which appears to violate the very terms of the legislation which authorizes the award, which has caused Sprint to claim that a contract, not a cooperative agreement, is the appropriate vehicle." Sprint reminds the GAO and NSF that its claim is viable because "the authority cited by the NSF . . . , actually requires competition. 15 U.S.C. 5S12(c)(3). Relying on this statutory language, Sprint assumed that the cooperative agreement specified would be the result of full and open competition. Such competition is not inconsistent with award of a cooperative agreement. Sprint was never put on notice that competition tenets and rules of fundamental fairness would be suspended for this procurement." (page 10)

Unknowingly Sprint Enters a Minefield in Acceptable Use Arguments

Sprint complains that the "NSF's stated intention to permit MCI to sell access on an unrestricted basis to its commercial customers violates the solicitation's requirements for . . . acceptable use and. consequently violates the HPCA requirement for competition." Sprint notes that the "Solicitation requires that '[t]raffic on the vBNS must be in support of research and education.' It also notes the NSF's response to a question asked about the solicitation as saying that the NSF and the vBNS winner would work together to "implement appropriate use of the vBNS. NSF is responsible for enforcing the NSFNET AUP." (page 11)

Then is contrasts these pre-award stipulations with the post award environment. "According to a recent quotation of Steve Wolff, Director of the NSF's Division of Networking and Communications Research and Infrastructure, the NSF has no intention of limiting commercial traffic on MCI's network. In a recent article in *Communications Week*, Mr. Wolff stated: "There will be no prohibition of commercial traffic on the vBNS. . . MCI will get valuable experience selling this type of service to their clientele.'" (page 12)

Sprint concludes that it has been the loser in bait and switch scheme. "Since the NSF has now apparently changed the ground rules set forth in the solicitation without notice to Sprint and presumably other offerors for the vBNS, competition for that portion of the Solicitation has not been achieved. Further, as discussed supra, competition was mandated by the HPCA, 15 U.S.C. 5512(c)(3). The NSF's announced intention to permit commercial traffic on the vBNS in violation of the AUP of the Solicitation abrogates the award to MCI. Consequently, the GAO should hear this protest and grant Sprint its requested relief." (page 12)

Sprint finds that "The MCI award appears to replicate the prior NSFNET situation where the National Science Foundation provided funds and a competitive commercial advantage to a for-profit enterprise thereby effectively foreclosing the market to non subsidized commercial entities."

Showing a healthy increase in sophistication Sprint has read the March 1993 IG Report on earlier mishandling of the backbone. It finds that "The MCI award appears to replicate the prior NSFNET situation where the National Science Foundation provided funds and a competitive commercial advantage to a for-profit enterprise thereby effectively foreclosing the market to non subsidized commercial entities."

Sprint recounts some of the historical highlights from the IG Report and then states "What the IG Report does not adequate [sic] cover, is the well-known debate over the monopoly which ANS exercised over the NSFNET after commercial use was permitted. Ultimately, due to public outrage, ANS was forced to permit other commercial providers access to the NSFNET."

Here Sprint unwittingly accepts the NSF fiction created more than a year after the fact (early 1993 when the events referred to happened in 1991) that other commercial providers were given access to the NSFNET backbone service on the same terms as ANS. With the backbone privatized the NSF had lost the ability to lay down conditions for use. The other commercial providers were archrivals of ANS and there would be no way that it would let them use ANSnet on equal terms. The NSF claimed that as a part of the cooperative agreement with MERIT it could require MERIT to require ANS to discuss this possibility and try to work something out. What it didn't say was that 8 weeks of such talks amount the early members of the CIX, ANS, NSF and the EFF had been held with no positive results in October, November and December of 1991.

Sprint then walks blindly into an NSF potential trap. "As a result of the IG's Recommendations, the NSF promised to take certain actions. One of the recommendations and resulting promises most critical to this protest follows:

RECOMMENDATION 7: NSF should ensure that the AUP ("acceptable use policy) is made a part of the award conditions both for Merit as well as for any organization that later receives NSF funding pursuant to the proposed solicitation.

[NSF RESPONSE]: NSF generally agrees with this recommendation and will enter into negotiations with Merit to amend the Cooperative Agreement to require compliance with the AUP. NSF will also make AUP compliance part of the award conditions for the vBNS and NAP/vBNS interface." "Mr. Wolf's comments to the press that "there will be no prohibition of commercial traffic on the vBNS" belies the promises made by the NSF to the Inspector General. and by extension, to the general public. At a minimum, these types of comments. made on the heels of what the industry perceives as a bitter struggle with the NSF and ANS concerning commercial advantages, undermine public confidence in the process. At worst. they indicate the NSF's intention to cavalierly disregard its promises to the Inspector General and to proceed with what has become its practice of providing ANS and MCI with commercial advantages without the benefit of competition." (page 14)

"Thus, MCI will be receiving a $50 million tax payer subsidy for development of a service which is already commercially available, plus, it will be able to use its Government-subsidized network to sell commercial service with an unfair competitive advantage.

If the NSF had articulated the terms upon which it ultimately intends to award to MCI in its solicitation, it could have obtained true competition for those requirements. However. to the extent that the NSF altered its requirements after receipt of proposals and failed to advise the other offerors and/or receive revised offers. It did not achieve competition for the services. Sprint could not have been aware of these violations prior to the NSF's announced award to MCI. Thus the protest is timely and the GAO should consider the merits of the protest. In addition, the GAO should recommend action which permits Sprint an opportunity to compete for the NSF's *true* requirements." (pages 14-15)

Sprints thinks it has been the victim of bait and switch. Unfortunately it doesn't realize that in the NSF's next move Steve Wolff will say that he believes he has explicit Congressional statutory authorization for allowing MCI commercial resale of the vBNS. Under the alibi Steve has hatched, he interprets the Boucher-led Congressional liberalization of

Steve Wolff Says Congress Gave Green Light to NSF Decision to Authorize MCI Commercial Use of vBNS

Date: Wed, 29 Dec 1993 17:52:42 -0600 (EST)
From: Stephen Wolff <steve@nsf.gov>
Subject: Re: what has NSF done to follow congressional AUP mandate?

COOK Report: Lets talk about this sacred AUP Steve

Wolff: Didn't know you worshipped it; I don't.

COOK Report: Has the NSF updated it since June of 1992? I don't think so.

Wolff: No, we haven't.

COOK Report: The new legisaltion said something like: *any* use that furthers the NSFnet's ability to support the general goals of R&E is acceptable.

Wolff: The new legislation, which we welcome (i.a., for reasons evident below) is an amendment to the NSF Act; it says:

"In carrying out section (a)(4) of this section, the Foundation is authorized to foster and support access by the research and education communities to computer networks which may be used substantially for purposes in addition to research and education in the sciences and engineering, if the additional uses will tend to increase the overall capabilities of the networks to support such research and education activities."

The crucial clause is the last: "...if the additional uses will tend to increase the overall capabilities of the networks to support such research and education activities." The focus is still research and education. Additional uses must in some sense "pay their way" (not necessarily in cash or in kind), so as to "...increase the overall capabilities of the networks..."

It is under this rubric that, in the "new NSFNET solicitation" (NSF 93-52)

(1) shared use of the vBNS by its provider is explicitly allowed, and
(2) NAPs are completely level, AUP-free playing fields where all packets and all providers are treated equally.

As you know, under the new architecture outlined in 93-52, the long-haul commodity-level transport function of the current NSFNET Backbone Service is replaced by service of private carriers; i.e., that function's fully privatized. NAPs will be AUP-free and the services of the RA will be open to all. Only the vBNS, which takes over the high-speed experimental function of the current NSFNET Backbone Service, will restrict traffic.

We are grateful to Mr. Boucher and the Congress for explicitly giving NSF the freedom in law to support these network enhancements in a way that will benefit not only the research and education communities, but also other users of the emerging National Information Infrastructure. In the new scheme of things, we haven't "updated" the AUP, we've all but done away with it.

AUP at the end of 1992 to give NSF the right to let MCI resell commercial use under the guise that such use will facilitate MCI's ability to bankroll and expand the vBNS and that such expansion will benefit its academic users. According to Wolff: "We are grateful to Mr. Boucher and the Congress for explicitly giving NSF the freedom in law to support these network enhancements in a way that will benefit not only the research and education communities, but also other users of the emerging National Information Infrastructure."

We attended the March 1992 hearing out of which this legislation grew and will flatly state that the intent was just the opposite. Namely the discussion centered on removing AUP from the backbone so that ANS as the sole possessor would no longer have the sole right to sell commercial use on a backbone encumbered by AUP. (See the accompanying text box for the comment made by Wolff on December 29, 1993 on com-priv - no doubt in a moment of excessive confidence.)

NSF Tells *COOK Report* it Has No Foundation for Wolff's Interpretation

In the past "cost sharing" has been an explanation for NSF's grants of commercial use of the current back bone to ANS. The "justification" has always been that the recipient of an NSF award commits more money to carrying out the award that it receives from NSF. Therefore the facility really belongs to it as much as to NSF and NSF is not justified in insisting that it restrict use solely to government purposes.

On March 1 1994 we sent a FOIA request to NSF. In this request we asked about cost sharing: "Also I note that Dr. Wolff has stated that there "will be no prohibition of commercial traffic on the VBNS. . . . MCI will get valuable experience selling this type of service to their clientele." That he feels it appropriate for MCI to resell commercial access to a government funded service is apparently an off shoot of the "cost sharing" argument. I have two requests: one for an explicit statement of the legal authority by which the NSF believes itself empowered to grant this privilege to MCI and two for the NSF's calculation of what costs MCI is sharing. In other words what evidence doe it have that MCI will have to spend more than $50 million on the delivery of this service and precisely how much more will MCI be spending? I expect to see the data MCI provided to justify this special treatment by the NSF."

In a letter dated March 17, 1994 Raymond E Bye Jr., Director, NSF Office of legislative and Public Affairs replied: "No documents specifically responsive to these two requests have been found." In other words when challenged to provide evidence of cost sharing by MCI, NSF had no such evidence.

In our same FOIA request dated March 1 we asked: Finally, if Dr Wolff feels that his authority to engage in cost sharing comes from the amendment to the NSF AUP introduced by Congerssman Boucher and passed last year, I wish to know what evidence the NSF has to assume that the legislative intent of Congress was to enable the NSF to continue to grant its awardees a unique position in the commercial market place rather than to remove that ability on the part of the NSF.

To this question Bye also replied: "No documents specifically responsive to this request have been found." In other words when challenged to say whether it backs Wolff's December 29 1993 com-priv assertion that the Boucher ammendement gives NSF the right to allow MCI commercial resale of the backbone, the NSF is unable to provide legal backup for the limb on which the DNCRI Director has perched himself.

To this question Bye also replied: "No documents specifically responsive to this request have been found." In other words when challenged to say whether it backs Wolff's December 29 1993 com-priv assertion that the Boucher ammendement gives NSF the right to allow MCI commercial resale of the backbone, the NSF is unable to provide legal backup for the limb on which the DNCRI Director has perched himself.

NSF Refused to Take a Specific Position on vBNS Commercial Use

While the solicitation anticipated some degree of commercial use of the vBNS, the NSF refused to clarify its thinking. In a letter to D. Mitchell at NSF dated May 14, 1993 we submitted the following questions:

"How does the requirement to "be able to distinguish between NSF customer traffic and that of other customers and to gather and report traffic statistics (such as throughput and delay) based on these categories" differ from the current conditions that exist on the ANSnet backbone? This seems to imply that such traffic would be distinguishable from R&E traffic in ways more sharply definable than present. True? If so, please elaborate.

The solicitation also seems silent on whether such apparently commercial traffic could be directed at the supercomputer centers which are allowed to have commercial customers. Will the vBNS winner in effect get an exclusive commercial franchise for use of the vBNS in general and for traffic to and from the super computer centers in particular? If so is anything like an Infrastructure pool contemplated?"

Our May 14, 1993 letter concluded: "I didn't notice cost sharing language or terminology (although NAP fees certainly imply cost recovery and the language about other customers for the vBNS also implies this). Please state clearly the solicitation's expectations on cost sharing."

In its responses to questions released in June 1993, the NSF chose not to give any answer to our questions. We note that these questions have considerable relevance to the issues debated by Sprint in its protest. Finally we also note that UUNET Technologies, feeling that NSF was non responsive to its requests, has initiated a FOIA lawsuit against NSF. Our letter has become letter of May 14 1993 has some how become involved in that suit. (We know this only because on March 9, 1994 NSF Office of the General Counsel wrote us to enquire if we objected to its release of our May 14 letter to UUNET. Since we had published the letter last July, we obviously had no objection.

Sprint Concludes that Conflict of Interest Grounds Alone Adequate to Support GAO Inquiry

Sprint states that: "While the record on any potential conflict of interest between the National Science Foundation and the MCI/ANS team is undeveloped at this time, there is ample evidence to support proceeding with the protest on this issue alone. In its protest, Sprint alleged a possible conflict of interest between the NSF and MCI's team partner and partially-owned subsidiary, Advanced Network & Services, Inc. ("ANS").

The history of this procurement, and the continuing commentary by interested observers, indicates that the public is guarded if not concerned over the relationship between the MCI/ANS team and the NSF. We have attached a copy of the *Cook Report* of 1992, [Sprint here becomes careless. It is our May-June 1993 newsletter in the attachment] wherein Mr. Gordon Cook describes some of the areas in which the public has expressed its concern about this relationship. See Attachment 5 hereto. It is significant that the public concerns culminated in an IG investigation which concluded about one year ago.

At a minimum, there is sufficient evidence of a possible conflict of interest to justify the Comptroller General in taking, jurisdiction over this protest and investigating Sprint's challenge. Even if the GAO determines that the award instrument was appropriately a cooperative agreement and that the NSF did not exceed its authority in making the award to MCI, jurisdiction is appropriately based upon an alleged conflict of interest on the part of the agency."

Conclusions

As our introduction makes clear, we believe that the public interest is *not* being served by the NSF's actions in the entire solicitation process and that Federal money is being used to assist a private commercial venture in ways that, if Congress understood what was going on, Congress would be unlikely to approve. Finally that Federal money is being used once more to help the same collection of favored corporations play technology catch up in a way contrary to Congress' intent that HPCC support the quickest possible development and transfer of high performance communication technology into the marketplace.

The fresh irony that emerges here is that Sprint, the network technology leader, has come very close to allowing itself to be out flanked and outrun by MCI which seems to be better at playing political and legal hardball behind the scenes than Sprint. While Sprintlink may be selling better than the ANS solution to network connectivity, the general public hasn't a clue that this is the case. What will have an impact on the public mind is that MCI has won the key information super highway. To see this, one need only look at the new MCI commercials that began airing in February.

On March 16, 1994 the NSF filed a MOTION TO STRIKE AND COMMENT ON PROTESTER'S OPPOSITION TO RESPONDENTS MOTION TO DISMISS with GAO. This motion fails to take Sprint's jurisdictional strategy centered on the requirements of cooperative agreement being superseded by requirements of contract law seriously, calling it "contrived." NSF also asserts that "disagreements over evaluation procedures cannot convert a valid assistance agreement in a procurement that is subject to GAO's jurisdiction." On the question of whether Sprint has a valid complaint ("timely" in legal jargon) NSF states that Sprint is proceeding on a "spurious line of argument.," saying that the 'propriety of the use of an assistance mode was in no way dependent on the nature of the proposals generated or [on] the evaluation process."

The NSF seems to talk past Sprint's arguments on these points rather than to meet them head on. Perhaps it will turn out to be significant that the NSF does not attempt to attack the legal underpinnings in Sprint's March 15 document? Whether it can do so and didn't because one day did not allow it adequate time remains to be seen. Finally and not surprisingly considering its aims, NSF dismisses Sprint's use of a "report" by a "private party, Gordon Cook" saying that Sprint should have known about this before it decided to enter the solicitation process and play by Sprint's rules. NSF objects to Sprint's "piecemeal presentation of its case."

In a game where image outclasses technology, Sprint's image is in danger of being that of an "also-ran." Twice knocked down for ESnet, loosing to MCI for the vBNS. Moreover Sprint isn't even making the charts in the business press on the Internet . In an otherwise misleading article the *Internet Business Report* in March named ANS, PSI, UUNET, and NETcom as the top four providers of internet services. Sprint didn't make the dollar chart of the top four, although it is mentioned as a long term player that is likely to have impact thanks to its size and its otherwise unpublicized alliance with MCC in Austin Texas.

Sprint's action in the early stages of the protest of the vBNS award process was an embarrassment. Though Sprint's March 15 brief is a much improved document, the still unanswered question is whether embarrassment will turn into a wake-up call. Possibly it might prevail within GAO, but, if dismissed from GAO, will Sprint tuck tail between legs and go on selling Sprintlink accounts or will go into Federal Court?

Whatever happens we take considerable gratification from the fact that a 10 billion dollar a year major corporation has become alerted to some of the same political and policy issues on which we have hammered for the past two years. And Sprint appears not only alerted to the issues but also willing to adjudicate them.

Those of cynical persuasion might say that Sprint is protesting to GAOin order to have a bargaining club against MCI. You drop your protest against us we'll do the same for you. If this were ever Sprints strategy, and we tend to doubt it, it is no longer viable because AT&T has now filed its own protest of the ESnet award.

The NSF is making the argument that Sprint is changing its presentation and that such actions are inadmissable. We have no way of knowing whether these arguments on the part of the NSF will prevail. We certainly wonder whether Sprints new claims of NSF misconduct in footnote 4 on page 7 will begin to impact the case. There is ample evidence to support further action and it is likely that further surprises lie ahead. Sprint, which was initially told that GAO would rule before April 1, has now been given the promise of an April 8 response.

PROTESTER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

The Complete Text of Sprint's March 15 Submssion to GAO

Sprint

I3221 Woodland Park Road
Herndon VA 22071

March 15, 1994

Guy Pietrovito. Esq.
U.S. General Accounting Office Via Facsimile and Mail
441 G Street. N W.
Washington. D.C. 20548

ATTN: Procurement Law Control Group

RE: National Science Foundation
Solicitation No. NSF 93-52. B-256586

Dear Mr. Pietrovito:

PROTESTER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Sprint Communications Company. L.P. ("Sprint") hereby submits this Opposition to Respondent's Request for Summary Dismissal Under 4 CFR 21.3(m). For the reasons stated herein, summary dismissal is inappropriate in this matter. Consequently, Sprint respectfully requests the Comptroller General to assume jurisdiction over this matter and to fully and fairly review all of the issues raised by Sprint on the merits.

I. THE SUBJECT AWARD SHOULD BE FOR A PROCUREMENT CONTRACT

A. Where, As Here, a Federal Agency Exceeds Its Authority To Use Assistance Type Awards, the Agency Is Required To Perform Its Actions Through The Procurement Process.

A Federal Agency has only that authority which is given to it by Congress. Federal Crop Insurance Corporation v. Merrill, 332 US 380, 384, 68 S. Ct 1. 92 L.Ed 10 (1947); see also, U.S. Const. art. I § 8. cl. 18. Failure to comply with the statutory limits on that authority negates the agent's authority to act on behalf of the Government. See generally Id., Utah Power vs. U.S., 243 U.S. 389 (1917); United States v. Amdahl Corporation, 786 F.2d 387, 392 (Fed Cir. 1986); Schoenbrod v. U.S., 410 F.2d 400 (Ct. Cl. 1969).

The National Science Foundation argues that the Federal grant and Cooperative Agreement Act of 1977, 31 U.S.C. 6301 et seq., coupled with

the statutory sections creating the NSF. 42 U.S.C. 1862. 1870. gives NSF the authority to award a cooperative agreement to MCI for the vBNS portion of the Solicitation. See, Request for Summary Dismissal. at 2. As conceded by NSF, the criteria for determining the appropriate use of a cooperative agreement is established in 31 U.S.C. 6305 as follows:

An executive agency shall use a cooperative agreement as the legal Instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when--

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government: . . .

Curiously, NSF focuses only on Sprint's allegation that the award to MCI should have been a contract rather than a cooperative agreement in seeking summary dismissal of the protest. The NSF states: "Protester has not provided any information or basis upon which the GA0 could conclude the NSF violated or might have violated the provisions of 31 U.S.C. 6301 - 6308 relating to the choice of award instruments. So here, as in Blackhorse, the protest should be summarily dismissed. Request for Summary Dismissal, at 3.

The NSF misunderstands Sprint's protest. Sprint has not protested the fact that the NSF used a cooperative agreement in place of a contract. As discussed more fully below, until the award was announced, Sprint did not believe the use of a cooperative agreement was inappropriate for this Solicitation. Sprint has protested the award to MCI on the following bases:

That the National Science Foundation:

(1) Failed to make an award in accordance with the announced evaluation criteria;

(2) Failed to adequately consider pricing in its award decision:

(3) Failed to identify to Sprint changes in its requirements;

(4) Failed to provide Sprint with meaningful discussions;

(5) Inappropriately used Federal funds to underwrite MCI's commercial development of an ATM service in violation of the HPCA;

(6) Awarded to an offeror which failed to comply with the requirements of the solicitation; and

(7) Was impaired in its award decision by a conflict of interest.

Sprint's position that a cooperative agreement is an inappropriate vehicle for award of the vBNS to MCI is a jurisdictional issue rather than a basis for protest. Thus, NSF's position that Sprint's protest should be dismissed for what it claims as Sprint's failure to substantiate a violation of the Federal Grant and Cooperative Agreements Act, fails to recognize the nature of the protest. The GAO regulation and cases cited by NSF refer to the protester's "grounds of protest". not to a threshold jurisdictional issue.l

GAO's jurisdiction is not based upon a demonstration by the protester that the agency violated the Federal Grants and Cooperative Agreements Act. Rather, it is based upon "some showing that the agency is using a cooperative agreement where a contract is required. That is the agency is using the cooperative agreement award process to avoid the competitive requirements of procurement laws, or that a conflict of interest exists." .Avante International Systems Corporation, B.227951, 87-2 CPD 63 (1987). See also, Sprint's Protest Complaint, at 2-3. Here, Sprint has made a showing that many of the competitive requirements of the Competition in Contracting Act of 1984 may have been circumvented. Therefore, GAO jurisdiction is appropriate in this matter.

l. The National Science Foundation Violated the Provisions in the High Performance Computing Act by Awarding the vBNS Portion of the Solicitation to MCl.

As stated previously, and as conceded by the Respondent, the circumstances under which a cooperative agreement may be awarded are prescribed by the Federal Grant and Cooperative Agreement Act. 31 U.S.C. 6305. One of the limitations on the NSF's authority to award a cooperative agreement for the vBNS, as described in the Federal Grant and Cooperative Agreement Act. is that the transfer of a thing of value must be made to the recipient to

"carry out a public purpose of support or stimulation authorized by a law of the United States". Id.

In its Solicitation the NSF stated:

NSFNET also supports the goals of the High Performance Computing and Communications (HPCC) Program which was delineated in the President's Fiscal 1992 and 1993 budgets and which became law with the passage of 'The High Performance Computing Act of 1991 (Public Law 102-194). The National Research and Education Network (NREN/l/) Program. one of the four components of the HPCC Program, calls for gigabit-per

1. Sprint believes that the NSF's reference to "4 C.F.R. 21.2(c)(3) and (e)" was meant to refer to 4 C.F.R. 21.1(c)(4) and 21.1(e). The provisions actually cited are nonexistent. Therefore this argument addresses the logical provisions of the GAO regulations to which NSF appears to be referring.

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second networking for research and education by the mid-1990's. As steps towards achieving the goals of the NREN Program, "the National Science Foundation shall upgrade the National Science Foundation funded network, assist regional networks to upgrade their capabilities, and provide other Federal departments and agencies the opportunity to connect to the National Science Foundation funded network. (Public Law 102-194--Dec. 9, 1991. 15 USC 5521 (Section 201)) *This program solicitation relates directly to these activities.*

Solicitation, at 1. (Emphasis added.) Thus, the stated "public purpose of support or stimulation authorized by a law of the United States" which justifies the NSF award of a cooperative agreement for the vBNS is the requirement "to upgrade the National Science Foundation funded network" found in the High Performance Computing Act of 1991, 15 U.S.C. 5511, et seq.

The portion of the HPCA specifically relied upon by NSF in its Solicitation is Section 201, National Science Foundation Activities. 15 U.S.C. 5521(a). Paragraph (b) of that section includes the authorization of appropriations for this endeavor. The Introductory language in Paragraph (a) of Section 201 states: "As part of the Program described in title I--". This is followed in Subparagraph (a)(4) by the language cited in the Solicitation requiring the NSF to upgrade its funded network. Thus, the authorizing statute for the subject Solicitation is "part of the Program described in title I (of the HPCA)". Further, as defined in the HPCA, "'Program' means the National High-Performance Computing Program described in section 101." 15 U.S.C. 5503(5).

In accordance with section 102 of the HPCA, a National Research and Education Network (the "Network") is to be established by "the National Science Foundation, the Department of Defense the Department of Energy, the Department of Commerce, the National Aeronautics and Space Administration, and other agencies participating in the Program. . ." 15 U.S.C. 5512(a).2 As required by the HPCA:

(c) . . . The Network shall--

2 It is interesting to note that the Department of Energy, through its management and operations contractor Lawrence Livermore National Laboratory, has issued a competitive solicitation for its portion of the HPCA. Likewise, NASA has announced in the Commerce Business Daily its intention to competitively award a contract under the HPCA. These agencies, under the same guidance from Congress, deemed the appropriate procurement vehicle for the HPCA competitive contracts rather than cooperative agreements.

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(3) be designed, developed, and operated in a manner which fosters and maintains competition and private sector investment in high speed data networking within the telecommunications industry;

o o o o o

(8) be developed by purchasing standard commercial transmission and network services from vendors whenever feasible, in order to minimize Federal Investment in network hardware;

o o o o o
15 U.S.C. 5512(c).

The cited statutory provisions of the HPCA indicate the requirements under which the NSF was authorized to "upgrade the National Science Foundation funded network". Consequently, the NSF's authority to make an award for the vBNS is proscribed and limited by the HPCA requirements cited.

While it may be effectively argued that the HPCA's mandate that the network "be designed, developed, and operated in a manner which fosters and maintains competition requires NREN awards be made under the Competition in Contracting Act of 1984, Public Law 98-369, competition is not necessarily inconsistent with a cooperative agreement. In fact, when Sprint submitted its proposal for the vBNS portion of the Solicitation, it was with the understanding that the NSF would strive for maximum competition. Nonetheless, as stated in Sprint's Protest Complaint and as expounded upon further herein, Sprint now believes that "competition" for the vBNS award was completely thwarted.

Similarly, the HPCA required that NREN awards "be designed, developed, and operated in a manner which fosters and maintains . . . private sector investment in high speed data networking within the telecommunications industry." NSF's award to MCI also violates this provision of its authorizing legislation insofar as NSF intends to award a $50 million contract to MCI for an ATM network. Unlike Sprint which has the first national ATM network in place today, MCI has not yet even announced its ATM strategy! As published on February 28. 1994 in *Communications Week*, "MCI will announce its ATM strategy after it merges its data services with those of BT North America Inc., an MCI spokeswoman said." See Attachment 1 hereto.

Finally, NSF violated its vBNS authorizing statute insofar as that the HPCA requires that the network "be developed by purchasing standard

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commercial transmission and network services from vendors whenever feasible, in order to minimize Federal investment in network hardware". As with the previous violation of the HPCA discussed above, award to MCI for ATM service is totally inappropriate where Sprint, and possibly other vBNS offerors, has "standard commercial [ATM] transmission and network services". Moreover, this capability was developed by Sprint commercially and without the use of Federal funds. In contrast, the NSF has just signed up to infuse MCI with $50 million of taxpayer dollars to develop its version of commercially-available ATM technology.

It is Sprint's contention that. while a cooperative agreement for the vBNS may have been an appropriate vehicle for solicitation,3 once the NSF made an award which violated the requirements of the very statute which enabled it, a cooperative agreement was no longer authorized or appropriate. This view is supported by the language of the Federal Grant and Cooperative Agreement Act; Federal common law; and Comptroller General Report, "Agencies Need Better Guidance For Choosing Among Contracts, Grants and Cooperative Agreements", GGD-81-88, September 4, 1981.

As previously quoted, the Federal Grant and Cooperative Agreement Act permits the use of cooperative agreements "to carry out a public purpose of support or stimulation authorized by a law of the United States". 31 U.S.C. 6305(1). In the instant case, the purpose authorized by law is actually being undermined by the award to MCI. Therefore. the "purpose . . . authorized by [] law" is not being carried out via a cooperative agreement award. and such an award, therefore, cannot be justified un-

der the Federal Grant and Cooperative Agreement Act.

Similarly, Federal common law confirms this conclusion. As discussed more fully in Section l.A. supra, agencies are creatures of legislation. As such, they are bound by the statutes which define and enable them. Any act which violates those statutes is ultra vires, without force and effect. By seeking to award a contract to MCI in direct contravention of the mandates of Congress as set forth in the HPCA, the NSF actions are without effect. The NSF simply is not authorized to award a cooperative agreement (or even a contract) to MCI in violation of the HPCA.

Finally, the determinations of the Comptroller General are in accord with this proposition. In its Report, "Agencies Need Better Guidance For

3 In its Protest Complaint, Sprint argued that a contract, rather than a cooperative agreement, was the appropriate award vehicle for the vBNS portion of the Solicitation. While that contention may be subject to disagreement, 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, and the NSF's efforts to shield its noncompetitive award process from public scrutiny while paying lip service to the goals of competition in its Solicitation.

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Choosing Among Contracts. Grants and Cooperative Agreements", GGD-8188, September 4, 1981, the Comptroller General stated:

. . . [O]nly when an agency has statutory authority to support or stimulate someone else can it use a grant or cooperative agreement, and then, only for the recipients and purposes authorized. This constitutes the scope of the agency's assistance responsibilities. Basically, except where this kind of authority is present, the agency is responsible for performing all other actions itself or through procurement contracts and other arrangements authorized by law. Id., at 11. Thus, the Comptroller General has considered situations similar to the instant case as instances where an agency attempted to exceed its scope of authority thereby creating a circumstance requiring the use of a contract rather than a cooperative agreement. Clearly, NSF has exceeded the scope of its authorizing legislation by failing to ensure competition and by seeking to subsidize the development of technology which is commercially available through competing vendors today. By exceeding the scope of its authorization, the NSF has violated the terms under which it was entitled to award a cooperative agreement. Therefore, the GAO may hear the protest.4

2. Having Failed to Follow the Provisions of the Performance Computing Act in Awarding the vBNS to MCI. the National Science Foundation Violated Any Exception It May Have Had From the Requirements of the Competition in Contracting Act,

In 1984, Congress enacted the Competition in Contracting Act in order to reduce the costs of goods and services to the United States by fostering competition and creating fairness in the bidding process. Public Law 98-369. That Act states in pertinent part:

Except as provided in subsections (b), (c), and (g)5 and except in the case of procurement procedures otherwise expressly

4 Sprint is troubled by the National Science Foundation's lack of regard for rules and regulations. The problem appears to be systemic of the organization. For example, AT&T has advised Sprint that despite the fact it offered a proposal for the vBNS portion of the Solicitation, it has yet to be advised by the NSF of Sprint's protest as required in 4. CFR 21.3 (a). Similarly, the agency ignored the terms of the Protective Order and of the proprietary legend on Sprint's vBNS proposal in sending its request for Summary Dismissal including several pages from Sprint's proprietary proposal to MCI, a direct competitor of Sprint and a non-party to the litigation at the time of disclosure. The document was not marked with any proprietary legend, let alone the appropriate legend as required by the GAO's Protective Order. Nonetheless, of greatest concern to Sprint is NSF's expressed lack of concern about breaching its responsibilities to Sprint in this manner.

5 These exceptions are inapplicable to the instant award.

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authorized by statute. an executive agency in conducting a procurement for property or services--

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title. . .

41 U.S.C. 253(a)(1). Only where the agency has a specific procurement process authorized by law is it exempt from the Competition in Contracting Act. Consequently, if the agency exceeds the scope of the "procurement procedures otherwise expressly authorized by statute", it must follow the Competition in Contracting Act provisions.

It is Sprint's position that the NSF's disregard for the authorizing legislation of the HPCA has caused the NSF's action to be reviewable by GAO because NSF has attempted to use a cooperative agreement which exceeds the scope of the award permitted: and because, by this action, the NSF has demonstrated its attempt to use "the cooperative agreement process to avoid the competitive requirements of procurement laws". See, Protest Complaint, at 2-3.

B Infusion of Capital Into A Company Which Lags Behind The Industry In the Development of the Technology Acquired Is Inappropriate Use of Assistance Funds.

One of the central themes of this protest is Sprint's shock and concern over the NSF's inexplicable decision to award an ATM-based vBNS agreement to MCI, a vendor which admittedly has not yet even announced its ATM strategy. See Attachment 1. Such an action runs afoul of the type of commercial development which the HPCA seeks to foster.

As stated previously, this award, as part of the HPCC s NREN, was to minimize Federal investment in commercial products and services while maximizing the private sector investment. The NSF's intention to infuse MCI with taxpayer dollars in order to assist MCI, a large, for-profit commercial entity, to develop a service which is already available from other sources, defies logic. Such a tortured use of an "assistance" agreement should not be sanctioned by this forum. Assistance contracts should be reserved for entities conducting legitimate research and development--not those playing industry catch-up."

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C Providing Federal Dollars to a Large, For-Profit Corporation Which, In Effect, Underwrites that Corporation's Development and Deployment of A Commercial Service Where the Commercial Service Is Currently Available From Other Vendors Without Government Subsidy Constitutes a Misuse of Public Funds.

The National Science Foundation. as a part of the executive branch of Government, has a fiduciary obligation not to misuse public funds. The situation complained of herein constitutes a breach of the public trust and a misuse of public funds which have been entrusted to the NSF for a specified purpose. See. HPCA. 15 U.S.C. 5501 et seq.

By infusing MCI with $50 million over the next five years in order to operate a backbone network connecting five supercomputer sites, the NSF is, in effect, underwriting MCI's development and deployment of a commercial service, which service is already commercially available by at least one offeror for this award.

The actions of the NSF which exceed the requirements and limitations of the Act which the NSF claims to be implementing, should be declared illegal. The NSF should not be permitted to hide behind legislation which permits flexibility and

maximum discretion in obtaining goods and services through cooperative agreements rather than procurement contracts when the agency has demonstrated such a cavalier disregard for the laws of Congress and such abuse of the public trust. In this case, the agency should not be entitled to shield its actions from review through its claimed ability to award cooperative agreements for a "public purpose"--the public is far better served by imposing some accountability on this errant agency.

II. SPRINT'S CONTENTION THAT THE AWARD SHOULD HAVE BEEN FOR A PROCUREMENT CONTRACT IS TIMELY BECAUSE IT IS THE NSF'S AWARD DECISION AND NOT THE SOLICITATION WHICH VIOLATES THE LAW

A It Was Not the Purpose of the Solicitation As Outlined In the Solicitation Document Which Created the Alleged Illegality, But the Announced Award to MCI.

Sprint is not protesting the Cooperative Agreement per se. On the contrary, Sprint is protesting the announced award to MCI and apparent violations of the solicitation and enabling statute occasioned by the award as announced. Sprint did not object to the Solicitation's statement that a cooperative agreement was contemplated. In the abstract, a cooperative agreement for the vBNS portion of the contract may have been reasonable.

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However, it is the NSF's intention to award to MCI which appears to violate the very terms of the legislation which authorizes the award, which has caused Sprint to claim that a contract, not a cooperative agreement, is the appropriate vehicle.

The NSF claims that Sprint is untimely in this assertion because it
knew prior to submission of its proposal for the vBNS, that the NSF contemplated award of a cooperative agreement. This is true. Sprint dl know that the NSF intended to award a cooperative agreement/ cooperative agreements. However. this intention was never a certainty until the NSF announcement. Moreover. Sprint never contemplated that the NSF would violate the terms of the HPCA in making the award and then attempt to shield this action from review by claiming that Sprint should have known before award of the actions of which it now complains.

Interestingly, the authority cited by the NSF for the "public
purpose authorized by law" which. NSF maintains, permits the use of a cooperative agreement in this circumstance, actually requires competition. 15 U.S.C. 5S12(c)(3). Relying on this statutory language, Sprint assumed that the cooperative agreement specified would be the result of full and open competition. Such competition is not inconsistent with award of a cooperative agreement. Sprint was never put on notice that competition tenets and rules of fundamental fairness would be suspended for this procurement.

As stated in its Protest Complaint, Sprint filled its protest within 10 working days of the date it knew or should have known of the basis for its protest. 4 C.F.R 21.2(a)(2). In fact. out of an abundance of caution, Sprint actually filed its protest at the earliest date upon which Sprint could have been charged with notice, despite the fact that some of the facts which Sprint now possesses were still unclear in that time period.

1. Unlike Other vBNS Offerors Such As Sprint, MCI Does Not Have An ATM Service And Is, Therefore, Not Qualified to Receive A Cooperative Agreement.

Prior to the award notification, Sprint could not have known that the NSF would make an ATM-based vBNS award to MCI. Certainly, since the HPCA required maximization of private-sector investment as well as procurement of commercial services wherever feasible, Sprint could not have been on notice that the NSF intended to violate these provisions at any time before it received notice of the award.

MCI is not qualified under the solicitation or the HPCA to receive this award since MCI does not have an ATM commercial service, the type of service which the NSF now declares it will obtain with this award to MCI.

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See Attachments l and 2. Sprint. on the other hand. does have the desired ATM commercial service in a national network. The Solicitation requires that "the vBNS Provider will demonstrate leadership in the development and deployment of high performance data communications networks." Solicitation, at 2. In making award to MCI, NSF totally disregarded this provision, thereby undermining the integrity of the award.

2. The NSF's Stated Intention To Permit MCI To Sell Access On an Unrestricted Basis to Its Commercial Customers Violates The Solicitation's Requirements for Meritorious Service and Acceptable Use and. Consequently Violates the HPCA Requirement for Competition.

The Solicitation requires that "[t]raffic on the vBNS must be in support of research and education." Solicitation, at 2 (I., Purpose of This Solicitation). In addition, the solicitation provided:

The vBNS may have connections and customers beyond those specified by NSF, *provided that the quality and quantity of required services for NSF-specified customers are not affected*. In this regard, the vBNS Provider must be able to distinguish between NSF customer traffic and that of other customers and to gather and report traffic statistics (such as throughput and delay) based on these categories. *It must also be able to assure proposed service levels for NSF-specified customers.*

Solicitation, at 8 (III. Network Architecture and Project Requirements, D. Very High Speed Backbone Network Services Provider Project) (emphasis added). Taken together, these "acceptable use policies" ("AUP") provide constraints on the anticipated use of the vBNS network.

In response to a vendor's question concerning the AUP of the vBNS, the NSF stated

The intent of NSF is that the vBNS be used for high bandwidth applications. As stated in section E.2.a, the vBNS is expected to propose participation in the development of advanced routing technologies and to propose quality of service metrics including the ability to verify and assure proposed service levels for NSF specified customers. The vBNS provider will work with the NSF to measure and implement appropriate use of the vBNS. NSF is responsible for enforcing the NSFNET AUP.

Solicitation, Amendment 2 (Attachment 2 to the Protest Complaint), Answer #9, at 2.

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According to a recent quotation of Steve Wolff, Director of the NSF's Division of Networking and Communications Research and Infrastructure, the NSF has no intention of limiting commercial traffic on MCI's network. In a recent article in *Communications Week*, Mr. Wolff stated: "There will be no prohibition of commercial traffic on the vBNS. . . MCI will get valuable experience selling this type of service to their clientele.' See Attachment 2 hereto.

Since the NSF has now apparently changed the ground rules set forth in the solicitation without notice to Sprint and presumably other offerors for the vBNS, competition for that portion of the Solicitation has not been achieved. Further, as discussed supra, competition was mandated by the HPCA, 15 U.S.C. 5512(c)(3). The NSF's announced intention to permit commercial traffic on the vBNS in viola-

tion of the AUP of the Solicitation abrogates the award to MCI. Consequently, the GAO should hear this protest and grant Sprint its requested relief.

3. The MCI Award Appears to Replicate the Prior NSFNet Situation Where the National Science Foundation Provided Funds and A Competitive Commercial Advantage to A For-Profit Enterprise Thereby Effectively Foreclosing the Market To Non Subsidized Commercial Entities.

A brief historical perspective of the NSFNET is helpful to an understanding of Sprint's concern over the NSF's previous use of public funds to endow commercial enterprises with a competitive commercial advantage, and how that eventuality could be repeated.

The NSFNet in operation today was originally awarded to the Michigan Educational Research Information Triad ("Merit"). a non-profit corporation managed by a consortium of eight Michigan universities, on October 16, 1987. MCI and IBM played significant roles in Merit's proposal.6

In February 1989, at the request of the NSF Division of Networking and Communications Research and Infrastructure, Merit proposed to expand the NSFNET. In June of that year. the National Science Board approved an increase in funding for the NSFNET from $14 million to $20 million. Again in April 1990 and August 1990, Merit proposed upgrades to the network in order to convert the network from T-l to T-3 speeds across the backbone which upgrades were approved and authorized at an additional $8 million.

6 The factual information contained in this section is derived from a document published by the Office of Inspector General National Science Foundation on March 23,1993, entitled "Review of NSFNET." This document was published on the internet on April 22, 1993. A copy of this document will be provided to the parties and to GAO by overnight mail due to the length of the document.

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In September 1990, Merit. IBM and MCI formed a nonprofit corporation called Advanced Network & Services. Inc. ("ANS"). NSF permitted the assignment of the cooperative agreement from Merit to ANS and also permitted ANS to solicit commercial users to connect to the network, notwithstanding that commercial use was not contemplated under the NSFNET solicitation. In May 1991, ANS created ANS CO+RE Systems, Inc. ("CO+RE"), a for-profit corporation to receive the profits of the commercial service which NSF had permitted on the NSFNET.

While the Inspector General stated:

It is clear that Merit, AND, [sic -editor ANS is meant] and CO+RE have benefited from CO+RE's ability to sell use of the network to commercial entities in a manner not anticipated when Merit and NSF entered into the NSFNET Cooperative Agreement.

Attachment 3 hereto, IG Report. at 26. Nevertheless, it determined that

. . . in view of the fact that the objectives of the program were furthered by commercial use of the network, the mere fact that an unexpected benefit accrued to the awardee is not objectionable and would not require a re-solicitation.

Attachment 3 hereto, IG Report. at 26-27.

What the IG Report does not adequate [sic] cover, is the well-known debate over the monopoly which ANS exercised over the NSFNET after commercial use was permitted. Ultimately, due to public outrage, ANS was forced to permit other commercial providers access to the NSFNET. The IG addresses this controversy peripherally by chastising the NSF for failing to announce its decision to permit ANS to carry commercial traffic on the NSFNET. See, Attachment 4 hereto, Conclusions and Recommendations.7 In addition, the IG stated that

By making a public announcement, NSF could have avoided a controversy which we believe was generated primarily by (l) ignorance of the facts regarding the commercial access available to the T3 backbone, and (2) a mistaken perception that the agency was endeavoring to keep its actions from the public.

Attachment 4, at 8 (first page of attachment).

7 The Conclusions and Recommendations section of the NSF IG's Report on the NSFNET, as well as the NSF's response to the IG was republished in the May-June 1993 *Cook Report*. This format is much easier to read than the Internet format of the principal document. Therefore it has been attached as Attachment 4 here to.

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As a result of the IG's Recommendations, the NSF promised to take certain actions. One of the recommendations and resulting promises most critical to this protest follows:

RECOMMENDATION 7: NSF should ensure that the AUP ("acceptable use policy) is made a part of the award conditions both for Merit as well as for any organization that later receives NSF funding pursuant to the proposed solicitation.

[NSF RESPONSE]: NSF generally agrees with this recommendation and will enter into negotiations with Merit to amend the Cooperative Agreement to require compliance with the AUP. NSF will also make AUP compliance part of the award conditions for the vBNS and NAP/vBNS interface.

Attachment 4, at 12 (fifth page of attachment).

Mr. Wolf's comments to the press that "there will be no prohibition of commercial traffic on the vBNS" belies the promises made by the NSF to the Inspector General. and by extension, to the general public. At a minimum. these types of comments. made on the heels of what the industry perceives as a bitter struggle with the NSF and ANS concerning commercial advantages, undermine public confidence in the process. At worst. they indicate the NSF's intention to cavalierly disregard its promises to the Inspector General and to proceed with what has become its practice of providing ANS and MCI with commercial advantages without the benefit of competition.

4. Sprint, As An Offeror on the vBNS Portion of the Subject Solicitation, Was Not Given a Fair Opportunity to Compete for a vBNS Award Which Was Free of the Acceptable Use Restrictions Contained in the Solicitation.

If the *Network World* article correctly quoted NSF's Steve Wolff (and Sprint has seen no retraction or correction of this statement on the Internet), then "[t]here will be no prohibition of commercial traffic on the vBNS. . . MCI will get valuable experience selling this type of service to their clientele." See Attachment 2. Obviously, the NSF's requirements for meritorious traffic and its announced Acceptable Use Provisions ("AUP") have been abandoned for the benefit of MCI. This means that MCI will be able to resell its service commercially and to profit commercially from its vBNS award despite language to the contrary in the solicitation.

Thus, MCI will be receiving a $50 million tax payer subsidy for development of a service which is already commercially available, plus, it

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will be able to use its Government-subsidized network to sell commercial service with an unfair competitive advantage.

If the NSF had articulated the terms upon which it ultimately intends to award to

MCI in its solicitation, it could have obtained true competition for those requirements. However. to the extent that the NSF altered its requirements after receipt of proposals and failed to advise the other offerors and/or receive revised offers. It did not achieve competition for the services. Sprint could not have been aware of these violations prior to the NSF's announced award to MCI. Thus the protest is timely and the GAO should consider the merits of the protest. In addition, the GAO should recommend action which permits Sprint an opportunity to compete for the NSF's true requirements.

III. THERE IS AMPLE EVIDENCE AT THIS EARLY STAGE TO JUSTIFY THE GAO'S INVESTIGATION INTO SPRINT'S ALLEGATION THAT THERE MAY HAVE BEEN CONFLICT OF INTEREST

While the record on any potential conflict of interest between the National Science Foundation and the MCI/ANS team is undeveloped at this time, there is ample evidence to support proceeding with the protest on this issue alone. In its protest, Sprint alleged a possible conflict of interest between the NSF and MCI's team partner and partially-owned subsidiary, Advanced Network & Services, Inc. ("ANS"). As evidence of this possible conflict of interest, Sprint attached to its protest messages taken from the com.prlv internet bulletin board which pointed to the relationship between ANS and a member of the National Science Board. See, Protest Complaint, at 4-5, II.

The history of this procurement, and the continuing commentary by interested observers, indicates that the public is guarded if not concerned over the relationship between the MCI/ANS team and the NSF. We have attached a copy of the Cook Report of 1992, [sic. It is our May-June 1993 newsletter in the attachment] wherein Mr. Gordon Cook describes some of the areas in which the public has expressed its concern about this relationship. See Attachment 5 hereto. It is significant that the public concerns culminated in an IG investigation which concluded about one year ago.

At a minimum, there is sufficient evidence of a possible conflict of interest to justify the Comptroller General in taking, jurisdiction over this protest and investigating Sprint's challenge. Even if the GAO determines that the award instrument was appropriately a cooperative agreement and that the NSF did not exceed its authority in making the award to MCI,

Guy Pietrovito, Esq.
March 15, 1994
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jurisdiction is appropriately based upon an alleged conflict of interest on the part of the agency.

IV. CONCLUSION

For the reasons stated herein. Sprint asserts that summary dismissal of its protest is inappropriate. In making its award to MCI for the vBNS portion of the Solicitation, the National Science Foundation violated the very statute which it purported to be furthering, High Performance Computing Act. Since exceptions to the competitive requirements of the Competition in Contracting Act are narrowly drawn, NSF's disregard for the requirements of the HPCA cause the vBNS award to forfeit its cooperative agreement (and shelter from GAO oversight) status. In addition, there is evidence to support a finding that the Solicitation for the vBNS should have been a procurement contract and/or that the NSF is using the cooperative agreement vehicle merely as a means to avoid competitive procurement requirements. Moreover, there is ample evidence to question the NSF's relationship with the MCI/ANS team. The possibility of a conflict of interest independently justifies a continuation of this protest.

Sprint respectfully requests the GAO to deny the NSF's Request for Summary Dismissal of its protest. In addition, Sprint requests a hearing on the merits of this protest in accordance with 4 C.F.R 21.5(a) for the purpose of developing the facts surrounding the MCI/ANS relationship with the NSF. These facts cannot be adequately developed without oral testimony.

Respectfully submitted,

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The Conclusions of Sprint's March 15 Filing with GAO

I. THE SUBJECT AWARD SHOULD BE FOR A PROCUREMENT CONTRACT

A. Where, As Here, a Federal Agency Exceeds Its Authority To Use Assistance Type Awards, the Agency Is Required To Perform Its Actions Through The Procurement Process.

l. The National Science Foundation Violated the Provisions in the High Performance Computing Act by Awarding the vBNS Portion of the Solicitation to MCl.

2. Having Failed to Follow the Provisions of the Performance Computing Act in Awarding the vBNS to MCI. the National Science Foundation Violated Any Exception It May Have Had From the Requirements of the Competition in Contracting Act,

B Infusion of Capital Into A Company Which Lags Behind The Industry In the Development of the Technology Acquired Is Inappropriate Use of Assistance Funds.

C Providing Federal Dollars to a Large, For-Profit Corporation Which, In Effect, Underwrites that Corporation's Development and Deployment of A Commercial Service Where the Commercial Service Is Currently Available From Other Vendors Without Government Subsidy Constitutes a Misuse of Public Funds.

II. SPRINT'S CONTENTION THAT THE AWARD SHOULD HAVE BEEN FOR A PROCUREMENT CONTRACT IS TIMELY BECAUSE IT IS THE NSF'S AWARD DECISION AND NOT THE SOLICITATION WHICH VIOLATES THE LAW

A It Was Not the Purpose of the Solicitation As Outlined In the Solicitation Document Which Created the Alleged Illegality, But the Announced Award to MCI.

1. Unlike Other vBNS Offerors Such As Sprint, MCI Does Not Have An ATM Service And Is, Therefore, Not Qualified to Receive A Cooperative Agreement.

2. The NSF's Stated Intention To Permit MCI To Sell Access On an Unrestricted Basis to Its Commercial Customers Violates The Solicitation's Requirements for Meritorious Service and Acceptable Use and. Consequently Violates the HPCA Requirement for

Cont'd on page 24

Controversy Over NSF Network Access Points

UUNET and PSI Question NSF Motives - Say They See No Reason To Connect - Potential Impact on Internet Connectivity Unknown

In early March we posted a comment on com-priv that said the largest internet commercial service providers (PSI and UUNET) might not join the NSF sponsored Network Access Points. Professor Marvin Sirbu, who apparently had not thought the matter through, commented that our supposition was "absurd on its face." Subsequent comment showed that we were correct.

Cost of Connection Estimated at $100,000 Per Year

On March 7 UUNET CEO Rick Adams responded in com-priv:

My rough guess is that it would cost me $100,000 per year to connect to all four NAPS with no benefit. Add to that NSF's proven track record of not enforcing any quality standards on its awardees and you now have the problem of paying a large amount of money for something that probably won't work. No thanks. I'd rather bet my connectivity on someone that has a financial incentive to make it work. (E.g. if MFS doesn't make MAE-EAST work well enough, we'll switch to Bell Atlantic SMDS.)

And on March 9 Adams wrote the following analysis for David Farber's Interesting Persons list.

The controversy regarding the NSF solicitation stems from a single fundamental flaw - NSF's attempt to procure services under a co-operative agreement instead of the more appropriate contract. The NAP section of the solicitation is probably the strangest. It is technically, politically and financially flawed.

The NAP award provides for 4 NAPs - Washington, DC, New York City, Chicago and San Francisco Bay area. Examining these on a city by city basis proves illuminating.

The Washington DC NAP is undoubtably the most perverse case . First, there already exists an active, successful, non-federal funded "NAP" called MAE-EAST. MAE Stands for Metropolitan Area Ethernet. Participants are interconnected at 10 MBPs speeds. It works. It's available now. It costs $2000 per month per participant. It's provided by a neutral by pass carrier called MFS.

Why Does NSF Pay To Duplicate Existing DC NAP?

Strangely, NSF has chosen to pay the same MFS to create an NSF funded NAP in the same area to interconnect the existing participants. Current pricing estimates for the NSF sponsored NAP are about 75% more expensive that the existing facility. There is no technical benefit to the participants from the "new" NAP at a significantly higher price. (Of course NSF has a list of what it considers advantages, but none of the MAE EAST participants seem to agree with them.) [Editor's Note: Adams seems to be saying that he has no intention of allowing the current MAE East facility to become the Washington DC NAP.]

The New York City NAP is also questionable. There is no technical merit to putting a NAP in New York City. There aren't even any regional networks there to attempt to subsidize. There is an advantage to a New York City NAP if you happen to be a large phone company. All of the International Circuits from Europe make landfall in NYC. Obviously, it's cheaper for a phone company to drop them there. However, if you are a mere customer of the phone companies, they provide a drop at no extra charge in any major city on the East Coast from Boston to Atlanta. Yes, that includes Washington, DC where an existing "NAP" is in place and where most of the European connections already terminate.

Chicago is merely pointless. Its sole apparent function is to subsidize the few regional carriers in the mid-west. It has no technical merit. Give the regionals a check instead of cloaking the subsidy in a NAP.

The Bay Area actually has technical merit. Unfortunately, there is no requirement to waste government money providing it. There has been an effort to create a Bay Area "NAP" for about 6 months. It keeps failing because Pac Bell has been unable to deliver reasonably priced high speed SMDS service. Interestingly, the NSF awardee is Bellcore/Pac Bell. Given that Bellcore invented SMDS, want to bet that the Bay Area NAP is built out of that same SMDS technology currently priced out of reach for most providers. MAE-West will exist without NSF funding or interference if Pac Bell will simply set its tariffs to a reasonable level (e.g. what what Bell Atlantic is already charging).

An additional piece of data that has recently come to light is that the NSF subsidies to regional networks *require* that the service provider the regional buys service from be connected to all four NAPS! Why? Wouldn't it be better to require "full connectivity" or even even trust the regional to spend the money on a provider who can serve their needs? I suppose this is the only way NSF can force providers to connect to all of the NAPS (except for MCI who NSF is *paying* to connect to all the NAPs as part of the vBNS award).

[Gordon Cook asked] Wouldn't it be funny if NSF funded four NAPs and no one came?

I'll bet they're thinking exactly that.

NSF Trying to Force Flawed Technical Interconnect Architecture

In summary, despite their (assumed) best intentions, NSF is grossly confusing and distorting the existing commercial marketplace both by forcing flawed technical interconnect architectures on commercial providers and by providing direct financial support to the regional networks who are directly competing with subsidized commercial concerns. NSF created the current Internet industry and they deserve its gratitude, however, it's past the time when they should have

declared victory and let the child grow up on its own.

On March 6 Dan Lynch asked:

Are you saying that there is no technical reason (that is, packets would still flow to/from all destinations on the Internet) and no financial reason (that is, it does not save (or make) you money) for your company to utilize the NAPs?

PSI: Cost Benefit Ratio of NAP is Infinite

From: "Martin L. Schoffstall"
Date: Fri, 11 Mar 1994 17:10:42

Dan,

It is an interesting question. How can anyone answer this question without facts in a dozen areas from price to performance to security?

But let's start at the baseline - If a service organization had conectivity to all the places that it needs to communicate through other means, why connect to a NAP? Seems like the cost/benefit ratio is infinity.

On another baseline issue, the NSF and its contractors have wiretapped information out of the NSFNet for years, fundamentally ignoring the complaints of many organizations. I believe that many of the commercial Internet providers now get much less than 10% of their traffic from/to the NSFNet.

Assuming the NAPs will not guarantee a NSF/Government no-wiretap interconnect, do we want to perpetuate the wiretapping that the NSF started long ago for another generation of Internetworking for that <10% traffic. Or is it time to take another evolutionary/revolutionary step as was taken in 1990 with commercial access?

Marty

The vBNS: What MCI Offered that AT&T and Sprint Did Not

A Source Recollects Content of Merit Review Panel Findings

Editor's Note: The following is an exchange with a source whom we have known for over a year. This source talks about the contents of the Merit Review Panel's findings for NSF 93-52. So far it is the only report we have gotten from someone who claims direct knowledge of the findings. Although we have been unsuccessful in getting independent verification for these statements, we publish them in an effort to shed some like into the darkness of the NSF's way of doing things, and because we believe the source to be highly trustworthy.

COOK Report: What if Steve Wolff gave us NAPs and no one came?

Source: That's the key question. In the Minutes of the Merit Review Panel I read (which officially I have zero knowledge of), it was clear that many members of the panel argued that NAPs aren't necessary and shouldn't be awarded. I don't remember the reasoning of the others, but it seemed to make some sort of twisted sense when looked at from an honest government employee's point of view.

I was shown a copy of some email sent from an NSF employee to the members of the Panel, all of whom were listed in the email headers. The copy was printed out, but I imagine that everyone archived their electronic copies. I imagine that the person wants to avoid trouble in any legal or political sense that could be suffered due to that kind of leak.

Memo to the Science Board: The panel felt that the MCI proposal demonstrated the greatest sense of vision for high speed networking combined with a deep understanding of detail and potential problems. A permanent experimental facility is a particularly valuable feature of the MCI proposal. MCI proposes an aggressive path of upgrades over the lifetime of the project thereby ensuring the vBNS stays at the leading edge of networking technology.

Source: This is much what the minutes and the panelist I know said. MCI was the only proposal that planned on a fixed testbed network for experimental purposes, something that is quite important, and probably learned from observing ANS's operations. MCI also was the only proposal which offered a dynamic network -- one that would grow with new technology available over the period indicated in the RFP.

AT&T apparently offered both too-managed (i.e., non experimental) a network, and too few staff to deal with the bugbears everyone knows will creep into things in the real world. I can't remember details about Sprint's bid, other than it was short on staff and a couple of other details.

Prices weren't in what I read, but it was clear that MCI was the technical and operational choice before the panelists knew the prices. After they knew the prices, the consensus was that MCI had the best bid overall, and in terms of price-performance.

Source: This is hinted at below.

Memo to the Science Board: Based on the technical superiority of the MCI proposal, the panel recommended that NSF award the vBNS to MCI. When pricing information was introduced, the conclusion of the panel remained the same with an even larger edge given to MCI for its favorable pricing.

Finally,

Memo to the Science Board: NSF has asked MCI for more budget detail and is negotiating with MCI to strengthen the quality of service metrics for their proposed network as suggested by the panel.

Source: AT&T and SPRINT offered more stable, less-experimental networks. Given that some of the panel argued that vBNS ought not be issued because it called for what has become current, commercially-available networking services, it makes sense that the consensus developed towards the bid which actually planned on pushing the envelope of networking technology, and which would work best with R&Ders in practice. In short, MCI won in large part because the people on the panel felt it showed the best knowledge of what the networking community wants and does. Ironic, perhaps?

An Executive Summary of Articles in this Issue - A Quick Guide to Issues That Affect You -

Sprint Versus MCI & NSF: HPCC Backbone Awards Draw Protests, pp. 1- 13.

We examine very closely the MCI protest of Sprint's win of the ESnet backbone, Sprints filing of February 28 with GAO in protest over the MCI pre-award of the vBNS, and finally Sprint's March 15 filing in opposition to NSF's Motion for Summary Dismissal. (Length just over 12,000 words.)

We learn that MCI has a fine tuned legal department that, when it wants to, strike moves swiftly and professionally. We also learned some points behind the evaluation process that MCI, understandably, seems to have ignored.

We see that Sprint has been caught off guard, has not had its legal department tracking these developments and when it decided to protest was left with only a few days to build both its strategy and supporting case. In its February 28 appeal to GAO it had to first establish that GAO had jurisdiction. To do this it had to show that the NSF solicitation should have been for a contract and not a cooperative agreement and to explain why it went along with the solicitation process rather than challenge it initially. It also tried to establish GAO jurisdiction of the grounds that NSF allowed a conflict of interest to exist with MCI subcontractor ANS having a board of directors member who was also a member of the National Science Board. Unfortunately for Sprint this conclusion was false.

NSF responded with a Motion for Summary Dismissal and on March 15 Sprint replied with a 7,000 word rebuttal. This document is vastly improved. Sprint now argues that while the NSF may have had the right to run the solicitation as a cooperative agreement, such solicitations must be run in a competitive manner. It accuses NSF of pledging to its own Inspector General to run the VBNS in accord with a strict acceptable use policy and then when the intent to award is announced, abandoning that policy by allowing MCI commercial resale of the vBNS.

It introduces legal precedent that says if a procurement under a Coopartive Agreement is run in a non competitive manner such procurement must then be treated by all parties according to contract rules and not those that govern Cooperative Agreements. Thus GAO has jurisdiction and its complaint is timely because, when it decided to compete under the C. A. rules, it could not have been expected to know that the NSF would corrupt the procurement process!

As part of its argument it says that NSF is violating the intent of PL 102-194 by using Federal money to allow a large profit making Federal company to play technology catch up and, worse, to fund the development of a commercial service by that company. Its language becomes quite scathing.

However, when Sprint then says that the change by NSF in the application of acceptable use policy to the backbone is critical to its case, it takes quite a chance. For it apparently is unaware of a public statement by Wolff that will allow him to claim that he not only is following AUP but is doing so with Congressional intent behind his policy. However, we reveal here for the first time that when Wolff was asked by FOIA for documents that would show NSF or explicit Congressional backing of his interpretation, he responded that he had none.

The third area is Sprint's conviction that the solicitation had been marred by conflict of interest. Having been "burned" with its first formulation of this approach it is somewhat more cautious. Submitting some materials from the *COOK Report* as an attachment it says in effect that this is an area that it has under continued developement.

The NSF in its March 16 rebuttal says that it finds Sprint's arguments in the first two areas "spurious". In the third area it somewhat derisively dismisses Sprint for bringing up the "report" of a private individual, Gordon Cook. In only two pages it does not attempt to refute Sprint's basic legal argument. whether it doesn't because it can't or it feels that it doesn't need to is not clear.

Sprint may loose within GAO - hung by its thumbs on the weaknesses of its first filing. We hope not. Why? Because it seems to be prepared to seek adjudication, we hope in Federal Court if need be, of some of the most significant policy issues on which we have been focusing for more than two years.

We are puzzled by the NSF's insistance on once again granting its intended awardee commercial resale of a government paid-for backbone. We wonder why granting this favor seems so important to NSF, OSTP and the Administration for we suspect that the viability of Sprint's protest hinges on it. Sprints next decision date with GAO is April 8.

PROTESTER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

The Complete Text of Sprint's March 15 Submssion to GAO, pp.14-19.

We publish the complete 7,000 word text of Sprints submission.

Controversy Over NSF Network Access Points UUNET and PSI Question NSF Motives - Say They See No Reason To Connect, pp. 20-21.

In comments from two network mail lists, UUNET CEO Rick Adams says that connecting to the NSF sponsored NAPs would cost his company $100,000 per year with no appreciable return on the investment. He does not forsee MAE East being transformed into the Washington NAP saying that under NSF procedures the cost of operation would increase by 75%. He remarks that the only thing standing in

Con't on next page

the way of a MAE West is PAC Bell's SMDS pricing. PSI's CTO Marty Schoffstall called the cost benefit ratio of the NAPs "infinite" and asked whether, in view of continued NSF wiretapping of network connect points, since only about 10% of commercial traffic went to the NSF/ANS backbone, it would be worthwhile to connect to the NAPs?

The vBNS: What MCI Offered that AT&T & Sprint Did Not A Source Recollects Content of Merit Review Panel Findings, p. 21.

A source who has been permitted to read the Merit Review Panel Report says that while there was some significant disagreement both about the NAPs and vBNS, that AT&T and Sprint both appear to have suffered in making what turned out to be an unwarranted assumption that the NSF wanted an off- the-shelf high speed ATM network The source shows how MCI seems to have used its almost seven year old relationship with NSF to ensure its customers continued comfort by having a better idea than anyone else what continued "leadership in high speed networking" meant.

CoREN Test Network in Operation, p. 23.

A source reports that CoREN members have installed a network to test routing using their commercial connectins to the NSF/ANS backbone.

Late News: NSF on Auto -Pilot?

We report that our FOIA request for documents detailing discussios on NSFnet privatization, commercialization, ANS, MERIT, IBM etc between NSF Directors (Lane, Massey, Bernthal, and Brownstein.) came up empty We are headed in a new direction (Lindberg at NLM).

UUNET Initiates FOIA Lawsuit Against NSF

When we were alerted to UUNET's action as the result of NSF asking if we minded their release of our May 1993 solicitation questions to UUNET as result of a UUNET Foia Lawsuit, we said that since we had already published them of course UUNET was welcome to them. At that point we put in our own request and in only 18 days NSF responded with a fat package of all or nearly all questions asked about thge solicitation last May and June. Examination show that the NSF was asked many questions on its intentions for commercial use of the vBNS and in other areas - questions that it declined to answer.

A Note to Our Readers:

Coming in May- June: Part 2 of Intrernet Plans for Princeton Regional Schools. (We had no room this month.) Feature article on the CIX and its growing pains. In depth interview with Bill Washburn, Executive Director of the CIX. In May we are spending more than 3 weeks in Russia. Before leaving we shall published a combined May June issue of the *COOK Report.*

CoREN Test Network in Operation

CoREN issues RFP Despite Not Yet Having Received an Interregional Connectivity Grant

In early March we saw a Network Service Report posting of a backbone outage in Boston. Among the networks listed as unreachable was COREN-THREE. Having reported on CoREN since May of 1991 our curiousity was perked because we were unaware that CoREN was in any kind of test phase. We asked on com-priv what COREN-THREE was all about.

From a source in the Boston area we were told: actually it is one of the nodes of the CoREN test network.

What test network? we replied.

Source: the nodes of the test network are co-located at the CoREN member sites and are a function of these sites, no fee required.

What are they doing? we asked.

Source: They are importing routing information from logical sources including the regional networks, the NSFnet, the GIX, the CIX .

They are using the NSFnet (ANSnet) backbone to do this?

Source: They are using the regional's CO+RE (i.e. paid for by the regional) connections via ANSnet to link the routers for the very low amount of traffic between the routers.

Tell us more. What does ANS think of all this?

Source: This is a virtual network to test the ability of routers to deal with the routing load of running the backbone of the Internet. It could have been built with physical links or not, this was simple and since we were already paying for the connections it seemed like a reasonable way to go. There is no ANS involvement in any way with this virtual network, they did not even know we were doing this - it is just IP traffic.

ANS did not have a clue that CoREN was doing the routing testing and, I expect would have shat if they did know. ANS found out about the CoREN tests at the regional techs meeting.

CoREN Members Apparently Assured of NSF Support Issue Network RFP

Meanwhile the CoREN group apparently grew tired of waiting for MCI to make a deal and on March 14 in Network World Ellen Messmer announced: "In an abrupt about-face, eight regional Internet networks last week issued a request for proposal aimed at selecting a TCP/IP service provider to supply the T-3 Internet backbone that will interconnect them.

The Internet purchasing consortium, called the Corporation for Regional

Con't next page

(CoREN cont'd) and Enterprise Networking (CoReN) , last year announced plans to build and operate its own network because federal subsidies that pay for the current Internet backbone are scheduled to taper off. But this month, the group switched gears and opted to buy routed Transmission Control Protocol/Internet Protocol service instead, convinced that high-speed TCP/IP service is becoming a commodity. The move will help CoREN support an influx of new commercial Internet users and may spur corporate users to consider the TCP/IP service provider option for their own networks.

CoREN's members CICNet, NEARNet, BARRNet, NorthWestNet, NYSERNet, SURANet, WestNet and MIDNet want to find a TCP/IP and Connectionless Network Protocol (CLNP) service provider ready to offer T-3 access and backbone service for a maximum of 12 cities by October, with speeds rising to 155M bit/sec within four years." We are still mystified about WESTnet's inclusion in CoREN. A querry to the network produced a private response claiming that WESTnet has not joined CoREN.

Con't from p. 13.

Competition.

3. The MCI Award Appears to Replicate the Prior NSFNet Situation Where the National Science Foundation Provided Funds and A Competitive Commercial Advantage to A For-Profit Enterprise Thereby Effectively Foreclosing the Market To Non Subsidized Commercial Entities.

4. Sprint, As An Offeror on the vBNS Portion of the Subject Solicitation, Was Not Given a Fair Opportunity to Compete for a vBNS Award Which Was Free of the Acceptable Use Restrictions Contained in the Solicitation.

III. THERE IS AMPLE EVIDENCE AT THIS EARLY STAGE TO JUSTIFY THE GAO'S INVESTIGATION INTO SPRINT'S ALLEGATION THAT THERE MAY HAVE BEEN CONFLICT OF INTEREST

IV. CONCLUSION

Subscription Information Prices for Volume III

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