

HHS's proposed procurement, announced in the January 25, 1980, edition of the Commerce Business Daily, stated that certain software capabilities were required, including: an operating system capable of operating in a network, and which supports COBOL; a printer formatter which generates COBOL; and an interactive debug facility which will interface with COBOL programs. The announcement also stated that the hardware's cost was less than \$142,000. Potential suppliers were advised to submit data to demonstrate their ability to satisfy the requirement not later than February 4, 1980, and if no affirmative responses were received, award would be made to IBM.

Data General interpreted the announcement as requiring a COBOL compiler and, on January 31, 1980, called an official at the using activity of HHS to advise that the COBOL compiler for the IBM 8100 system did not meet Government standards as required by General Services Administration regulations. On February 4, 1980, the HHS official advised Data General that there was no intention of buying a COBOL compiler and the procurement would proceed without change.

On February 14, 1980, Data General protested here in essence because it believes that HHS's procurement of the IBM 8100 for use in a network will preclude Data General from competing in future HHS's system upgrades because the IBM 8100 system offers networking capability in terms of an IBM proprietary approach. Data General explains that its system uses the international standard X.25 as its base, and allows for the connection of other vendors' equipment. In Data General's view, HHS appears to be locking into IBM when expansion is necessary. Further, Data General argues that the entire IBM 8100 system is unacceptable for Government use because of the compiler.

HHS argues that the protest is untimely under our Bid Protest Procedures since the Commerce Business Daily synopsis was, constructively, the "solicitation" for the requirement; consequently, the instant protest must be characterized as a protest against an irregularity or impropriety in the solicitation and to be considered

timely, such protests must be filed before the closing date for receipt of proposals. HHS reports that no protest was filed with the agency.

HHS also argues that there is no merit to the protest because nowhere in the synopsis does it indicate that it was the Government's intention to purchase or lease a COBOL compiler and the order subsequently written indicates that no COBOL compiler was purchased. HHS explains that the synopsis only stated the device should support high-level languages, such as COBOL. HHS also explains that the using activity, Parklawn Computer Center, has been involved in networking for more than 6 years and currently supports several vendors' remote job entry equipment. HHS contends that it will not be locked into IBM equipment because other vendors can emulate IBM's approach and HHS will continue to support other approaches without excluding any vendor.

In response, Data General contends that its protest is timely because it does not involve an impropriety apparent from the synopsis; instead, the issues here are (1) whether HHS, upon discovering that the IBM 8100 COBOL compiler was not approved, changed the requirements subsequent to the closing date in order to favor the IBM 8100, even though that system without COBOL did not meet HHS's needs; and (2) whether HHS intends to set up a computer networking scheme which has a potential of becoming IBM dependent without investigating either its needs or more flexible, vendor-independent alternatives.

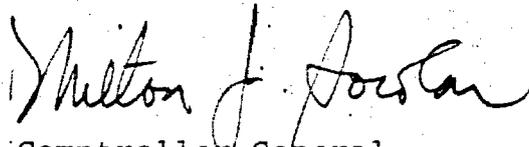
Data General also responds that COBOL was a listed requirement and the hardware purchased supports COBOL, so that the COBOL compiler could be procured now or in the future, and it appears that HHS is willing to permit IBM to define the communications approach which will be linked to IBM equipment. Data General concludes that HHS should cancel its order, develop a functional specification, and conduct a competitive procurement which accurately reflects its needs.

First, Data General's argument--that HHS changed its requirements when informed that the compiler was

not approved--is supported by the record. However, upon review by HHS, the compiler was deleted from the software requisition because HHS determined that its needs could be satisfied without the compiler. HHS also reports that its cognizant personnel were aware of the unapproved status of the compiler prior to procurement action and one was not acquired. In view of HHS's position that the IBM 8100 system will satisfy its needs without the COBOL compiler, we must conclude that Data General's argument is without merit. In the event that HHS's needs change in the future, HHS officials are, however, reminded of the necessity to comply with the applicable regulation restricting acquisition of unapproved COBOL compilers.

Second, in our view the synopsis expressly contained HHS's requirement for network capability using the IBM proprietary approach. Our Bid Protest Procedures provide that protests against alleged solicitation improprieties must be filed prior to the closing date for receipt of initial proposals, here February 4. 4 C.F.R. § 20.2(b)(1) (1980). Since Data General did not protest until February 14, this aspect of its protest is untimely and will not be considered on the merits.

The protest is denied in part and dismissed in part.



For The Comptroller General  
of the United States