

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

*Handwritten:*  
Lester  
30826

**FILE:** B-217098**DATE:** March 28, 1985**MATTER OF:** Math Box Inc.**DIGEST:**

Agency need not synopsisize for publication in the Commerce Business Daily its intention to issue an order of \$50,000 or less against a nonmandatory automatic data processing schedule contract. While the agency nevertheless must attempt to secure maximum competition, a protester objecting to the lack of notice of the intended purchase has the burden to show that the agency acted intentionally to preclude the protester from competing.

Math Box Inc. protests the Department of the Army's sole-source purchase of five microcomputers and accessories, at a price slightly exceeding \$25,000, from International Business Machines Corporation (IBM). The Army purchased the equipment by issuing a delivery order, No. DAKF04-84-F-3392, against a nonmandatory automatic data processing (ADP) schedule contract between the General Services Administration (GSA) and IBM. The protester complains that the Army failed to have a notice of the intended purchase published in the Commerce Business Daily (CBD), thus precluding Math Box from an opportunity to express interest in competing to supply the equipment. Math Box explains that it is a dealer in IBM equipment.

We deny the protest.

The Army issued the delivery order on September 30, 1984. The contracting officer reports that on September 12, he had electronically transmitted a synopsis of the proposed order to the CBD, but for some unexplained reason the notice never was published. The contracting officer nonetheless proceeded with issuing the delivery order in reliance on Department of Defense Federal Acquisition Regulation Supplement (DOD FAR Supp.), § 5.203, 48 C.F.R. § 205.203 (1984), which provides that when a synopsis is required, the contracting officer shall not issue a competitive solicitation until at least 15 days after the date of publication

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of a proper notice in the CBD, and that the contracting officer "may presume that notice has been published" 2 days following electronic transmittal to the CBD.

Math Box contends that the Army's issuance of the delivery order without actual publication of a CBD notice was inconsistent with the requirements of Public Law No. 98-72, which amended the Small Business Act to require generally that federal agencies have a notice published in the CBD of all proposed competitive and noncompetitive procurements of property, supplies and services in amounts of \$10,000 or more. 15 U.S.C. § 637(e) (Supp. I 1983).<sup>1/</sup>

The notice requirements of Public Law No. 98-72 do not apply here, however. The statute provides an exception to those requirements where it is determined in writing by the head of the agency, with the concurrence of the Administrator of the Small Business Administration (SBA), that advance notice is not appropriate or reasonable. 15 U.S.C. § 637(e)(1)(H). On September 26, 1984, the Administrator of GSA, with the concurrence of the Administrator of SBA, determined that it is not appropriate or reasonable to apply the statute's requirements to nonmandatory ADP and telecommunications schedule contracts. The notice requirements of the statute therefore do not apply to this case since the delivery order in question was issued (on September 30) after the Administrators' determination.

The requirements that control the disposition of this case are, instead, at section 5.h of Federal Information Resources Management Regulation (FIRMR) Temp. Reg. 6, 50 Fed. Reg. 4411, 4414 (1985) (to be codified at 48 C.F.R.

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<sup>1/</sup> We note that DOD FAR Supp., § 5.203, cited by the contracting officer, apparently derives from the statute's requirement that an agency not issue a solicitation until 15 days after the publication of a CBD notice. 15 U.S.C. § 637(e)(A). This requirement and the cited regulation are not applicable to this case, however, since a delivery order against an ADP schedule contract does not entail the issuance of a competitive solicitation. GSA has determined, and we agree, that ADP schedule contracts are in the nature of basic agreements, basic ordering agreements or similar arrangements for which Public Law No. 98-72 generally requires that a notice be published 30 days in advance of placing the order. 15 U.S.C. § 637(e)(2)(B).

§ 201-32.206). That regulation, promulgated by GSA, imposes a synopsis requirement where an agency intends to place an order against a nonmandatory ADP schedule contract; the regulation requires that the intent to place an order in excess of \$50,000 must be synopsisized in the CBD at least 15 calendar days before placing the order. Applying that provision, we note that the Army's delivery order had a value well below the dollar threshold for requiring a CBD notice (\$50,000). Thus, there was no requirement that a notice be published here.

That does not mean that the Army was free to disregard nonschedule suppliers, since nonmandatory schedule purchases still must comply with the mandate that all purchases be made on a competitive basis to the maximum practicable extent. FIRMR Temp. Reg. 6, § 5.h. Generally, if an agency is aware of suitable nonschedule sources, it must give the sources an opportunity to demonstrate their ability to meet the agency's needs at a price lower than the schedule contractor's and, if an interested source does so, then the agency should conduct a competitive acquisition. See CMI Corporation, B-210154, Sept. 23, 1983, 83-2 C.P.D. ¶ 364. There is no showing, however, that the Army was aware of Math Box's interest in supplying the items and intentionally acted to preclude the firm from competing, which the protester must prove where there either is no requirement for a CBD notice or the failure to meet such a requirement did not prejudice the protester.<sup>2/</sup> Tri-Com, Inc., B-214864, June 19, 1984, 84-1 C.P.D. ¶ 643.

The protest is denied.

*Harry R. Van Cleve*  
Harry R. Van Cleve  
General Counsel

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<sup>2/</sup> The cited case involved an agency's failure to comply with the notice requirement of Public Law No. 98-72 for a nonmandatory schedule order; we found that the protester had not been prejudiced. The District Court for the District of Columbia, however, subsequently disagreed with our finding. Tri-Com, Inc. v. NASA, No. 84-1058, slip op. (D.D.C. Oct. 31, 1984), as amended, slip op. (Jan. 22, 1985). We also note that at that time, there had not yet been a determination by the Administrators of GSA and SBA that the statute's notice requirements were inappropriate.