

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

B-182576

FEB 20 1976

The Honorable Paul A. Stone
Acting Deputy Assistant Secretary
for Grants and Procurement Management
Department of Health, Education, and Welfare

Dear Mr. Stone:

We are in receipt of your letter of December 31, 1975, referencing the actions taken by the National Institutes of Health (NIH) in connection with a contract awarded to Delta Data Systems Corp. under request for proposals No. NIH-74-P(62)-132-CC. The award of this contract was the subject of our decision in the matter of Computek Incorporated, B-182576, June 25, 1975 (54 Comp. Gen. 10807(1975), 75-1 CPD 384).

The solicitation in question contemplated the possibility of lease, purchase, and lease with option to purchase arrangements for the computer terminals in question. The contract awarded to Delta Data on September 19, 1974, provided for the acquisition of an indefinite number of customized terminals. The terminals were to be ordered as required over the period of the contract and its extensions with a minimum of 100 terminals to be ordered. The contract also contained two 1-year options to renew the contract beyond its initial 12-month base period. However, the contract also contained the provision increasing the guaranteed rental period from 1 year to a minimum of 2 years and also a penalty clause that provided if the Government terminated the lease any time before the end of 2 years the Government would have to pay the items' purchase price less any rental paid up to that point.

Your letter of December 31 advised us of a number of significant details with regard to NIH's acquisition process. We now understand that on March 28, 1975, or approximately 3 months before the issuance of the decision and, in fact, a few days prior to our holding a conference on the matter, your agency placed an order with Delta Data for the purchase of five terminals. Moreover, you advised that on June 18, 1975, your agency placed an additional order for 20 units. The placing of these orders, you note, resulted in NIH's becoming liable for the outright purchase of the guaranteed minimum of 100 terminals.

After the issuance of our decision, which was critical of the manner in which NIH had awarded the contract, Computek made inquiries

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to NIH regarding the manner in which it intended to implement the Comptroller General's recommendation. Our recommendation was contained in the following paragraph of the decision:

"We thus feel that the award made to Delta Data was improper for the reasons that the agency (1) initially failed to amend the RFP with regard to the requirement for type II terminals; and (2) did not reopen negotiations upon the significant revisions of the Government's requirements. In view of the referenced discontinuance charge, we do not believe that termination of this contract for convenience would be in the Government's best interest. However, we do recommend that HEW not exercise either the purchase option or the rental option for the third year of the subject contract."

By memorandum of November 6, 1975, of the Chief, Procurement Branch, at NIH, it appears that as of that date 70 terminals had been ordered and delivered. The reason stated by NIH for its continued purchase of terminals after our June 25 decision was that our decision only recommended that continuation of contract performance, either by purchase or lease, must cease after the second year of the contract, that is, after September 19, 1976. You relate that thereafter a meeting was held on December 11, 1975, at which time the question was discussed regarding what should be done as to the purchase of the additional 30 units which constituted the balance of the 100-unit minimum. In advising NIH to complete the purchase of the minimum quantity, you state that the decision was predicated upon (1) the contract giving the Government the right to purchase or lease; (2) the fact that NIH did purchase units well in advance of the Comptroller General's decision; (3) allowing NIH to complete the purchase of the minimum appeared to be the most economical alternative available to the Government; and (4) competition would be introduced at the earliest feasible time, that is, resolicitation will occur prior to September of 1976.

The NIH actions which you have referenced in your letter raise a number of very serious questions as to the propriety of the actions taken both prior and subsequent to our June 25 decision. First, we express serious concern with the failure to inform us during the protest process that the purchase option had in fact been exercised in the Delta Data contract. That is, during the protest process the question of exercise of the purchase option had come up and yet at no time during the conference held on the matter at which the contracting officer and numerous representatives of NIH were present, or in the 2 months thereafter, was this Office informed of the fact

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that the purchase option had been exercised. As you know, section 1-2.407-8(2) of the Federal Procurement Regulations (1964 ed. amend. 139) provides that "Where a protest, before or after award, has been lodged with the General Accounting Office (GAO) and the contracting agency is requested to submit a report, such report should include * * * (v) Any other documents which are relevant to the protest * * *." In failing to provide us with any information regarding exercise of the purchase option we believe that NIH has violated not only the letter but also the spirit of this regulation and by doing so has done serious harm to the viability of the GAO protest process. Indeed, GAO cannot perform its function adequately if one party, especially a Government agency, keeps certain relevant information to itself.

As your letter states, by the date of our decision 25 terminals were ordered. While we note that the contract did state a minimum requirement of 100 units, had we been aware of the fact that the purchase option had been exercised and that only 25 of those units had been ordered, with substantially fewer of them having been delivered, our Office might very well have concluded that the portion of the Delta Data contract regarding purchase be terminated for convenience. However, with no knowledge of the fact that the purchase option had been exercised, we saw no reason to discuss this matter any further than to state that "* * * we do recommend that HEW not exercise * * * the purchase option * * *."

With regard to HEW's actions taken after our decision, we first note with interest that the procurement personnel at NIH apparently were not made aware of our decision until late in July (and then only by the fact that they happened to read a synopsis of the decision in the Government Contract Reports), even though our decision was transmitted to the Secretary by letter of June 25, 1975, and even though you had sent a memorandum of July 18 to the Director, Division of Grants and Contracts at NIH, to which he responded on August 8, 1975.

However, more significantly, we feel that the interpretation placed upon our recommendation in the June 23 decision by NIH is unreasonable. When viewed in the context of the paragraph in which it is set, stating that the reason that we did not recommend termination of the entire contract for convenience was the referenced lease discontinuance charge, and since GAO was unaware that the purchase option had been exercised, NIH's interpretation that we were only precluding it from taking action in the third year of a contract was patently erroneous. Our decision clearly conveys the

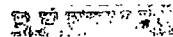
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impression that had it not been for the lease discontinuance charge we would have recommended that the contract be terminated for the convenience of the Government immediately.

Therefore, we believe that NIH precluded the possibility of effective relief to the protesters, by its unannounced action taken in March 1975 in exercising the purchase option and by its continued purchases after our June 25 decision on the basis of an unreasonable reading of our decision. While we do not criticize your decision to allow NIH to purchase the last 30 units of the minimum stated in the contract, since at that point such a decision may have been in the Government's best interest, the actions taken in making purchases up to the 70-unit level do give us substantial concern.

In sum, we believe that from the very outset your agency has acted in a manner which paid mere lip service to the rights of competing offerors during the procurement process, as well as during and subsequent to the protest process in our Office. We therefore request that you furnish us with the reasons why your agency failed to inform this Office of the fact that the purchase option had been exercised prior to our issuance of a decision. We also would appreciate your advising us of the steps which you propose to avoid a repetition of the serious errors outlined in this letter.

Sincerely yours.



Deputy

Comptroller General
of the United States