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Mr. Kratzer  
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**DECISION**



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

*[Protest of Remedial Action Proposed in NIH Procurement]*

FILE: B-197188

DATE: October 21, 1980

MATTER OF: International Business Machines  
Corporation

**DIGEST:**

1. Where agency acknowledges all facts necessary to establish validity of protest and proposes to take corrective action, it is unnecessary for GAO to consider whether protest complied with Bid Protest Procedures.
2. Federal Procurement Regulations require synopsisizing of agency's intent to procure word processing equipment. Where agency failed to synopsisize before entering purchase agreement, proposed remedial action, which includes synopsisizing before renewing purchase agreement, is reasonable and appropriate.

International Business Machines Corporation (IBM) protests the remedial action which the Department of Health and Human Services (HHS) proposes to take with respect to the procurement of word processing equipment by the National Institutes of Health (NIH).

On September 10, 1979, IBM submitted to NIH an unsolicited proposal for the purchase of IBM Mag Card II machines which IBM leased to NIH during fiscal year 1979. The proposal, termed "Alternate Purchase Plan" (APP), provided that title to the already installed equipment would pass to NIH immediately and that payment would be made over a period of 60 months. NIH had an option to renew the APP each fiscal year until payment in full. Failure to renew would retroactively convert the purchase into a lease. In late October 1979, NIH accepted the proposal to convert from lease to purchase and began to order the word processing equipment.

On December 17, 1979, Lexitron Corporation (Lexitron) protested the procedures used in the lease/purchase conversion claiming that NIH violated the Federal Procurement Regulations (FPR) by failing to synopsisize the procurement action in the Commerce

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Business Daily (CBD). HHS, by letter of April 8, 1980, acknowledged that NIH failed to synopsise the procurement. Moreover, HHS concurred with Lexitron that the FPR required that NIH synopsise before entering the conversion agreement. HHS proposed, as remedial action, to instruct NIH to seek a delegation of procurement authority from the General Services Administration and to place a synopsis notice in the CBD in advance of the date upon which the option to renew the APP must be exercised. HHS further agreed that NIH would not renew the APP if synopsizing resulted in a more advantageous offer. IBM protests the proposed remedial action.]

[IBM contends that Lexitron's protest was untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1980); that the Lexitron protest should not have been considered because it failed to comply with the requirements of section 20.1(c) of our Bid Protest Procedures; and that Lexitron failed to present sufficient evidence to affirmatively prove its allegations.] However, the contracting agency acknowledged all the facts necessary to establish the validity of Lexitron's objections and there is no bar to a contracting agency proposing corrective action where it deems the circumstances to be appropriate. Therefore, it is unnecessary for us to consider IBM's procedural objections.]

[IBM further argues that the remedial action proposed by HHS is inappropriate and unfair because NIH was not required to synopsise the procurement in the CBD.] The FPR provides, in relevant part, that:

"In accordance with section 8 of the Small Business Act \* \* \* all proposed civilian agency procurement actions of \$5,000 and above, will be published promptly in the Department of Commerce Synopsis \* \* \* except that the following need not be so publicized:

\* \* \* \* \*

"(5) Procurements which are made by an order placed under an existing contract \* \* \*." 41 C.F.R. § 1-1.1003-2(a) (1979).

IBM claims that NIH ordered the equipment under Federal Supply Service (FSS) contract No. GS-005-92162 and that, therefore, the procurement falls within the existing contract exception of paragraph (5). However, although the orders placed by NIH refer to the FSS contract, it is significant that the APP accepted by NIH provided:

"Notwithstanding the incorporation of or reference to said Schedule, this Plan and any options thereunder, shall be separate and apart from and not transactions under any IBM/GSA FSS Schedule contract."

Additionally, the terms of the APP are different from the terms of the FSS contract. Therefore, notwithstanding the reference to the FSS contract in the orders NIH placed, it does not appear that NIH ordered the machines from the FSS contract. Thus, since the procurement is not within any exception to the synopsisizing requirement, NIH was required to synopsise before procuring the equipment.

IBM alternatively argues that, even if pertinent regulations required synopsisizing, the relief HHS proposes is inappropriate. In support of this contention, IBM points out that we have held that failure to comply with CBD publication requirements is not, in itself, a sufficient basis to require invalidation of an award. See Culligan Incorporated, Cincinnati, Ohio--Reconsideration, B-189307, November 7, 1977, 77-2 CPD 345. IBM additionally notes that GAO will not recommend resolicitation of a contract unless insufficient competition was generated, a reasonable price was not obtained, or failure to synopsise was intended to preclude the protester from competing. See Check Mate Industries, Inc., B-194612, June 12, 1979, 79-1 CPD 413.

The invalidation of award and resolicitation holdings cited by IBM, however, are inapposite here since the proposed remedial action entails neither invalidation of an award nor resolicitation. As noted above, by the terms of the APP, NIH has an option to renew the purchase agreement each fiscal year. HHS merely proposes to require NIH to synopsise its intent to exercise the option before doing so. The proposed synopsisizing is in no way inconsistent with IBM's rights under the APP. Indeed,

synopsizing is arguably necessary for NIH to make an informed, intelligent decision on renewal. We find that the proposed remedial action is reasonable and appropriate.

The protest is denied. ]

*Milton J. Fowler*

For The Comptroller General  
of the United States