



Comptroller General  
of the United States

100051

Washington, D.C. 20548

## Decision

**Matter of:** CyberResources Corporation

**File:** B-259561

**Date:** January 5, 1995

### DECISION

CyberResources Corporation protests the terms of request for proposals (RFP) No. N00123-94-R-0325, issued by the Department of the Navy for mainframe computer maintenance services. The protester contends that the RFP's requirement for the successful offeror to provide maintenance diagnostic software is unreasonable and unduly restrictive of competition because the Navy allegedly owns rights in the software which permit the agency to provide the software to the successful offeror.

We dismiss the protest.

### BACKGROUND

The agency obtained the computers to be maintained under the RFP, including associated software and maintenance services, under a contract the Navy awarded to Control Data Corporation<sup>1</sup> in 1984 (the CDC contract); that contract was due to expire in December 1994. The RFP contemplates the award of a follow-on contract for the maintenance services currently provided under the CDC contract.

The agency published a synopsis of the procurement in the Commerce Business Daily (CBD) on May 4, 1994, announcing its intention to obtain maintenance services for government-owned CDC equipment.<sup>2</sup> The Navy issued the RFP on August 17, as an unrestricted solicitation, seeking proposals to provide the maintenance services for CYBER

<sup>1</sup>Control Data Corporation has been succeeded by Control Data Systems, Inc. We refer to this entity as CDC in this decision.

<sup>2</sup>The CBD announcement contained a partial listing of the equipment to be maintained including: "Central Processor P/N 170-855, Computer P/N 180-860, PPU/Channel Increment P/N 18352-1, Central Processor P/N 180-860A."

mainframe computers and associated automatic data processing equipment. Proposals were due by September 16.

Section C.1 of the RFP contains the following requirement: "[t]he [c]ontractor shall furnish, as required, material, maintenance diagnostic software, and support services in conformance with the terms and conditions of this contract" (emphasis added). Section C.5.1 of the RFP, entitled "ON LINE DIAGNOSTICS," states that:

"The [c]ontractor shall provide on-line maintenance diagnostic software to detect CYBER computer systems and problems for the equipment supported under this contract . . . The diagnostic software binary code provided by the [c]ontractor shall be integrated into the CYBER NOS/BE operating system to assure security requirements are satisfied. The [c]ontractor shall provide full implementation support for the diagnostic software."

Section C.6 of the RFP, entitled "OFF-LINE DIAGNOSTIC SOFTWARE," further states in relevant part that "[t]he [c]ontractor shall supply off-line diagnostic software to test and verify all supported CYBER [m]ainframe equipment per [the RFP]." The protester concedes that the RFP expressly requires the contractor to supply the diagnostic software, adding that the RFP is not ambiguous in this regard. Notwithstanding the clear language of the RFP regarding the diagnostic software, CyberResources states that it submitted an alternate proposal based on its "speculation" that the Navy owns rights in, and would provide the firm access to, the diagnostic software called for in the RFP.

CyberResources states that it subsequently obtained a complete copy of the CDC contract including all 58 amendments. Based on its evaluation of those documents, CyberResources concluded that the Navy owns rights in the CDC diagnostic software which would permit the Navy to provide the software to any qualified, responsible firm under the contemplated contract. The Navy has maintained throughout the procurement, however, that the government would not provide the successful offeror under the RFP access to the diagnostic software.

Shortly before submitting its initial proposal, CyberResources filed an agency-level protest challenging the RFP's diagnostic software requirement as unduly restrictive of competition. CyberResources based that protest on the premise that since the agency maintained that it did not own any rights in the software, and since CDC would not license

the diagnostic software to a third party,<sup>3</sup> the Navy should delete the requirement from the RFP and acquire the diagnostic software separately. The agency responded in a letter dated October 19, essentially denying that protest. CyberResources then filed a second agency-level protest on November 9, based on the theory that the agency does own rights in the maintenance diagnostic software. Before the agency responded, CyberResources filed this protest with our Office on December 1.

#### PROTESTER'S CONTENTIONS

CyberResources argues that the RFP's requirement for the contractor to provide the maintenance diagnostic software renders the RFP unduly restrictive of competition because only CDC, the original equipment manufacturer, could meet that requirement. CyberResources further argues that since in its opinion the Navy owns rights in the software which permit the Navy to provide the diagnostic software to the contractor, and since there are at least two small business firms that could be expected to submit reasonable offers, the RFP should be set aside exclusively for small business participation.<sup>4</sup>

#### DISCUSSION

The Navy states that under the basic CDC contract the Navy had agreed to purchase from CDC at least three computer systems identified as model number 170-855; this is the same model number as two of the computers to be maintained under the RFP. In addition, it is undisputed that contract line item number (CLIN) 0007, entitled "Diagnostic Software," obligated CDC to furnish the government with "On-Line Diagnostic Software" (CLIN 0007AA) and "Off-Line Diagnostic Software" (CLIN 0007BB) under the CDC basic contract. Paragraph 8.4 of the basic CDC contract, entitled "Government Rights to Licensed Software," and paragraph 8.5, entitled "Software Rights," defined the government's rights

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<sup>3</sup>In a letter to the Navy dated August 9, which the agency forwarded to CyberResources the next day, CDC stated that the firm "does not license, sell, or lease its proprietary diagnostics [software] to any third party. . . We have addressed this issue with numerous third-party vendors and our policy remains as stated."

<sup>4</sup>In its protest, CyberResources also argued that the agency had unreasonably denied its request for an extension of time in which to submit a best and final offer, which was due by December 2. The protester subsequently informed us that the agency granted its request and withdrew this aspect of its protest.

in the software provided under the CDC contract.<sup>5</sup> CyberResources states that it received a copy of the basic CDC contract, which included these software rights provisions, on or about August 1, 1994.

Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to closing to be timely, 4 C.F.R. § 21.2(a)(1) (1994); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. As explained more fully below, since CyberResources did not file its protest until after closing, the protest is untimely and will not be considered.

The protester received a copy of the CDC basic contract prior to the September 16 closing date. CyberResources thus knew or should have known from examining that document that the Navy had acquired under the CDC contract at least two of the computers (model number 170-855) to be maintained under the RFP. Further, CyberResources also had in its possession prior to closing the CDC basic contract provisions that defined the government's rights in the maintenance diagnostic software for those computers. In our view, the protester had sufficient information prior to the September 16 closing date to allow the firm to file a timely protest challenging the RFP's diagnostic software requirement, premised on its theory that the Navy owns rights in the diagnostic software at least for the computers identified in the basic CDC contract, and that, as a result, the government should provide the software to the successful offeror under the RFP. Since CyberResources did not file its agency-level protest on that basis until November 9, well after the September 16 closing date, its protest is untimely.

CyberResources argues that its protest is timely because it is based on information that it learned from examining the complete CDC contract, including all of its 58 amendments, which CyberResources received on October 27. Specifically, the protester argues that prior to that time, it could only "speculate," on the basis of language in the CDC contract, whether the Navy in fact owns rights to the diagnostic software for the four computers to be maintained under the RFP. In this connection, the protester points out that two of the computers to be maintained under the RFP (model number 180-860 and 180-860A) are different from those identified in the basic CDC contract, and that those computers may have been acquired under different terms and

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<sup>5</sup>The contract incorporated by reference Defense Acquisition Regulation § 7-104.9(a), entitled "Rights in Technical Data and Computer Software."

conditions than the 170-855 model, which could affect the government's rights in the diagnostic software.<sup>6</sup> We find these arguments unpersuasive.

CyberResources had sufficient information prior to the September 16 closing date to allow the firm to formulate the theory upon which it bases this protest--i.e., that the Navy acquired rights to the diagnostic software for at least two computers under the CDC contract which permit the agency to provide the software to the successful offeror under the RFP. The contract provisions regarding the government's rights in the diagnostic software upon which CyberResources relies in support of its position in this protest appeared in the basic contract. Specifically, subparagraphs 8.5a through 8.5k of the basic CDC contract set out in great detail the government's rights in the software at issue here. Further, the RFP specifically identified, by model number, two computers (model number 170-855) with the same model number as three computers covered by the CDC basic contract. Thus, even assuming that the Navy subsequently obtained additional equipment with different model numbers (180-860 and 180-860A) and under different terms and conditions of software rights, CyberResources either knew or should have known prior to closing that at least two computers (model number 170-855) to be maintained under the RFP<sup>7</sup> were also the subject of the CDC basic contract's software rights provisions.

Our conclusion that the protester had sufficient information to form the basis for this protest prior to closing finds further support in the protester's alternate proposal, in which CyberResources stated in pertinent part that:

"CyberResources will fulfill the requirements of Section C.5 (On-Line Diagnostics) and C.6 (Off-Line Diagnostics) (collectively the "Diagnostics") by using the [original equipment manufacturer] diagnostic maintenance software currently in use at the site ('OEM Diagnostics'). CyberResources has reviewed the

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<sup>6</sup>We understand the protester's argument in this regard to be premised on the theory that any rights in the maintenance software the Navy obtained under the CDC basic contract attached to the equipment obtained under that contract for the life of that equipment. Thus, according to the protester, it is conceivable that the agency subsequently acquired additional computers with different model numbers and with different rights in software.

<sup>7</sup>We note that the CBD announcement's partial listing of equipment to be maintained under the RFP also listed these two computers.

purchase agreement between the [g]overnment and [CDC] (Contract No. N66032-85-C-0001 and subsequent) with regard to these issues. This agreement provides the [g]overnment with significant rights to use the CDC Diagnostics and Source Code as well as the ability to grant third parties the right to use the CDC Diagnostics on the computer hardware indicated in the [g]overnment's solicitation. CyberResources therefore formally requests any required certifications and approvals from the [g]overnment to use CDC Diagnostics if its awarded this contract." (Emphasis added.)

CyberResources further indicated that its alternate solution would use the diagnostics software that the government had already "paid for" under the CDC contract.

Thus, contrary to the protester's suggestions throughout these proceedings, the statements in its alternate proposal which were explicitly based on the firm's interpretation of the software rights provision of the basic CDC contract, reflect more than mere "speculation" on its part regarding the government's rights in the software. CyberResources expressed a firm belief, based on its interpretation of the pertinent provisions of the CDC basic contract, that the Navy owns rights in the software and that in its opinion, the agency could provide the software to the successful offeror under the RFP. Rather than acting on a "hunch," as it now contends, CyberResources clearly demonstrated in its proposal that it had sufficient information prior to the September 16 closing date upon which to base this protest.

Accordingly, to be timely, CyberResources should have filed this protest prior to the September 16 closing date. The protester could not make assumptions in its proposal which were contrary to what it concedes were clear provisions of the RFP regarding the diagnostic software, and then expect relief from our Office when it learns that the agency, in fact, does not intend to act in accordance with its theory. See, e.g., PEC Constr. Inc., B-245462, Oct. 1, 1991, 91-2 CPD ¶ 277.

The protest is dismissed.

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