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

**FILE:** B-211489  **DATE:** July 28, 1983

**MATTER OF:** Onyx, Inc.

**DIGEST:**

1. Contention that a contracting agency should have furnished benchmark materials written in a particular character set is untimely. Protester knew from the solicitation, including benchmark materials released before the closing date for receipt of initial proposals, that another character set had been used, but did not file the protest until after the closing date.

2. GAO will not consider a protest complaining of a specific benchmark coding defect where the protest was filed more than 10 working days after the protester was advised of initial adverse action on the protest it filed with the contracting agency.

   Onyx, Inc. protests the use of a benchmark developed by the Navy's Automatic Data Processing Selection Office to evaluate teleprocessing services proposals received in response to request for proposals (RFP) N66032-83-R-0001. The procurement is being conducted under the General Services Administration's Teleprocessing Services Program to support requirements of the Navy Recruiting Command. We dismiss the protest as untimely.

   Onyx asserts that the benchmark is defective because it contains software written for machines designed to process EBCDIC rather than ASCII-coded software. EBCDIC and ASCII are coded character sets that define the pattern in which data is stored by a computer. Data is stored in a binary representation, which can be thought of as numbers consisting only of ones and zeros. EBCDIC (based on an eight digit representation) was developed by the IBM Corporation, and the capability of handling EBCDIC coded

characters is largely limited to IBM machines. ASCII, which uses a seven digit representation, can be utilized by most computers, including those manufactured by IBM.

The protester claims that the EBCDIC coding as furnished with the solicitation can only be run on machines manufactured by IBM. Onyx says this is improper for two reasons. First, Onyx contends that Federal Information Processing Standards Publication (FIPS Pub.) 1-1 adopts ASCII as a Government standard so the Government is required to use ASCII-coded software, and thus to provide ASCII-coded benchmark materials. Moreover, Onyx complains that the particular EBCDIC code used in this instance is written in such a way as to prevent ready machine conversion to ASCII, which usually is possible. Onyx says that although it could convert the software itself so it would operate on its system, Onyx would have to do so manually, one line at a time, and should be allowed additional time to convert the benchmark. Onyx estimates that this would require several months.

Although the Navy has conceded that the specific problem Onyx has identified in the source code exists, requiring manual conversion, it contends in a preliminary report to our Office that Onyx's protest should be dismissed as untimely. According to the Navy, Onyx failed to comply with the requirement in section 21.2(a) of our Bid Protest Procedures, 4 C.F.R. part 21 (1983), that if a protest initially is filed with the contracting activity, a subsequent protest to the General Accounting Office must be filed within 10 working days of the date the protester knows or should know of initial adverse agency action regarding its protest at that level. The Navy says Onyx protested to its office by letter dated March 23, 1983, and that Onyx was advised of initial adverse agency action concerning the protest in a March 29 telephone discussion. In that discussion, the Navy says, Onyx was told that the Navy considered its protest to be without merit and that the closing date for receipt of pre-benchmark proposals (identified in the RFP as volume III of each offeror's proposal) would be April 1, as scheduled. The protest to our Office was filed on April 15.

We agree that the protest is untimely.

We first point out that, with respect to Onyx's argument that FIPS Pub. 1-1 requires the Navy to provide materials coded in ASCII, the benchmark documentation was released long before the closing date for receipt of initial proposals and states specifically that the benchmark code was prepared from existing system software using the EBCDIC character set. Section 21.2 (b)(1) of our Bid Protest Procedures requires that protests based on alleged improprieties in any type of solicitation that are apparent before the closing date for receipt of proposals must be filed prior to that date. Protests against RFP improprieties concerning benchmark instructions and materials are subject to this rule. See Federal Data Corporation, B-208237, April 19, 1983, 83-1 CPD 422. Since this portion of Onyx's protest was apparent prior to the closing date for receipt of initial proposals, it is untimely under section 21.2(b)(1). Sperry Univac Division of Sperry Corporation, B-209379, May 27, 1983, 83-1 CPD 571.

We agree with the Navy that the remainder of Onyx's protest is untimely because it was not filed with our Office within 10 working days after the March 29 telephone call. Notice that an agency intends to go ahead with a scheduled closing, or the fact that it does so without correcting a defect that was protested to the agency, is initial adverse agency action from which a protester is allowed 10 working days to protest to our Office under section 21.2(a) of our Procedures. Stewart- Warner Electronics Division of Stewart-Warner Corporation, B-208671, March 15, 1983, 83-1 CPD 256. Instead of filing its protest with our Office upon learning of the Navy's intention, Onyx wrote to the Navy restating its protest; pursuit of a protest within the contracting agency after initial adverse action, however, does not toll the running of the 10-day period in section 21.2(a). Photica Inc., B-210677, March 16, 1983, 83-1 CPD 269. (Onyx's letter to the Navy resulted in the April 5 issuance of an amendment to the RFP alerting other offerors to the problem Onyx had discovered, and stating the Navy's position that it would not correct the code or provide the amount of additional time Onyx claimed was needed to permit vendors to do so.) Thus, Onyx clearly knew the Navy's position on its protest on March 29. Since the April 15 filing with our Office was more than 10 working days after this initial adverse action on Onyx's protest to the Navy, the protest to our Office is dismissed as untimely.

Although we dismiss this portion of Onyx's protest as untimely, we note that upon receipt of the protest, we asked the Navy to transmit to our Office various procurement materials relating to the protest, including the magnetic tapes containing the benchmark source code and data. We reviewed these materials, and found that what is known as a source code editor could be used to identify readily where in the code problems of the type protested are encountered. In fact, only a handful of the 11,799 lines of source code examined were affected, so that the burden placed on offerors in requiring that they correct the code does not appear to be as onerous as Onyx suggests.

*Harry R Van Cleve*

Harry R. Van Cleve
Acting General Counsel