



Comptroller General  
of the United States

Washington, D.C. 20548

1041142

## Decision

**Matter of:** CyberResources Corporation

**File:** B-259561.2; B-259561.3

**Date:** February 14, 1995

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### DECISION

CyberResources Corporation protests certain actions by the Department of the Navy under request for proposals (RFP) No. N00123-94-R-0325, issued by the Navy for mainframe computer maintenance services. The protester contends that the Navy improperly failed to notify CyberResources of another bid protest filed in our Office concerning the RFP and that the Navy improperly failed to provide CyberResources with questions and answers and other information which it distributed to other offerors.

We dismiss the protests.

### 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

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<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]."

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 a bid protest with our Office (B-259561) on December 1.

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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."

CyberResources argued that the RFP's requirement for the contractor to provide the maintenance diagnostic software rendered the RFP unduly restrictive of competition because only CDC, the original equipment manufacturer, could meet that requirement. In its protest, the protester conceded 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 stated 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 also stated 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.

We dismissed CyberResources's December 1 protest as untimely filed. In so doing, we concluded that 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 to our Office was untimely filed. See 4 C.F.R. § 21.2(a)(1) (1994); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. We dismissed CyberResources's protest on January 5, 1995.<sup>4</sup>

#### SUPPLEMENTAL PROTESTS

On December 12, 1994, and on January 27, 1995, CyberResources filed supplemental protests (B-259561.2 and B-259561.3) in our Office. In these protests, CyberResources alleges that the agency improperly failed to inform the firm of a protest filed in our Office by Control Corporation, another disappointed offeror, challenging the RFP's diagnostic software requirement. The protester also alleges that the contracting officer had improperly failed to provide CyberResources with questions and answers

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<sup>4</sup>CyberResources has not requested that we reconsider our decision to dismiss that protest.

concerning the RFP which the Navy had allegedly distributed to other offerors.<sup>5</sup>

#### DISCUSSION

Prejudice is an essential element of a viable protest, and where no prejudice is shown or is otherwise evident, our Office will not sustain a protest, even if some technical deficiency in the award process arguably may have occurred. Merrick Eng'g, Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130, aff'd, B-238706.4, Dec. 3, 1990, 90-2 CPD ¶ 444. Here, even assuming that the Navy failed to inform CyberResources of Control Corporation's protest and that the contracting officer failed to distribute questions and answers about the RFP to CyberResources, as the protester alleges, the record does not show that CyberResources was prejudiced as a result.

CyberResources first must show that it was prejudiced by the agency's failure to inform the firm of Control Corporation's protest. Even assuming that the firm was precluded from participating as an interested party in that protest, since we dismissed Control's protest as untimely without reaching the merits, Control Corporation, B-259553, Jan. 20, 1995, 95-1 CPD ¶ \_\_\_, we fail to see how CyberResources was prejudiced as a result of the agency's action.

CyberResources must further show that it was prejudiced by the agency's failure to provide the firm with the questions and answers. In this connection, CyberResources asserts that it would have structured its proposal differently had the agency provided the firm with the questions and answers allegedly distributed to other offerors. The protester also argues that the Navy's responses would have provided a "red flag" to CyberResources on the diagnostic software ownership issue, thus permitting CyberResources to file timely (*i.e.*, pre-closing) protests challenging the terms of the RFP.

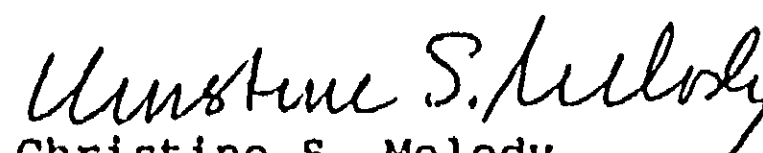
We find these arguments unpersuasive. As we explained in our earlier decision, the protester had sufficient information prior to the September 16 closing date to allow the firm to file a timely protest challenging the RFP's diagnostic software requirement. Thus, the correspondence

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<sup>5</sup>In response, by letter dated January 12, the Navy provided CyberResources with copies of correspondence containing questions submitted to the Navy concerning the RFP and the contracting officer's responses thereto. We note that one of the letters the Navy provided CyberResources in its response is a request under the Freedom of Information Act by another potential offeror for a copy of the CDC contract, and is not a question or answer concerning the RFP.

containing the questions and answers would not have provided CyberResources with any additional information it did not already have in its possession before closing which allowed the firm to formulate the basis for its protest. Moreover, the protester's statement that it would have structured its proposal differently overlooks what CyberResources considered the main obstacle to the firm's ability to compete under the RFP--that unless the diagnostic software is provided by the Navy, or the requirement for diagnostic software is removed from the RFP, only the original equipment manufacturer could compete for the procurement. Since CyberResources did not timely protest the agency's failure to state in the solicitation that the diagnostic software would be provided to the successful offeror, and since CyberResources concedes that it does not have the capability to compete for the requirement without such a provision, CyberResources clearly could not have submitted the successful proposal even if the firm had been provided with the questions and answers prior to closing. Accordingly, we find that there was no reasonable possibility of prejudice to CyberResources as a result of the agency's actions. See Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401.

The protests are dismissed.

  
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