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Proc I

DECISION



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

FILE: B-192654

DATE: December 26, 1978

MATTER OF: Frontier Science Associates, Inc.--
Reconsideration

DIGEST:

[Issues Involved in Litigation Will Not Be Considered Under Bid Protest Function]

1. District court denied protester's complaint for injunctive relief and entered summary judgment for defendants. Protester appealed district court's decision. Since district court's decision is conclusive as to all issues decided and all issues which might have been decided, GAO will not consider merits of protest issues allegedly not submitted to court.
2. Propriety of district court's decision denying injunctive relief and granting defendant's motion for summary judgment is now matter for Court of Appeals. Where, as here, matter has been and is subject of litigation and district court did not request GAO opinion prior to rendering decision, there is no basis for GAO to consider merits of protest.

In Frontier Science Associates, Inc., B-192654, November 9, 1978, we dismissed the protest. In that case, the protester not only filed a timely protest with our Office, after its protest to the procuring activity had been denied, but it also sought injunctive relief before the Federal District Court for the Western District of New York (Civil Action No. 78-512). On October 13, 1978, the district court denied the request of Frontier Science Associates, Inc. (FSA), for injunctive relief and granted defendant's motion for summary judgment. FSA appealed the district court's decision to the Second Circuit Court of Appeals.

The documents which the protester submitted to GAO had also been filed with the court. Consequently, it appeared that the issues which were before GAO were also before the court.

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We dismissed the protest since the district court's decision was an adjudication on the merits and because the protester's appeal indicated that it was looking to the courts and not to GAO for a final adjudication on the merits, citing as precedent decisions of our Office to this effect.

The protester has requested reconsideration of our decision. In urging reconsideration, the protester states in substance that:

1. All of the grounds of protest before GAO were not submitted to the court.

2. In its opinion of October 31, 1978, on the protester's application for reconsideration of the earlier dismissal, the district court indicated that GAO should carefully consider the protest.

3. Consideration of the protest on the merits would be in accordance with 4 C.F.R. § 20.10 (1978) of GAO's Bid Protest Procedures, which provides as follows:

"The Comptroller General may refuse to decide any protest where the matter involved is the subject of litigation before a court of competent jurisdiction or has been decided on the merits by such a court. The foregoing shall not apply where the court requests, expects, or otherwise expresses interest in the Comptroller General's decision."

4. If GAO does not consider the protest, most of the issues will never be reviewed on the merits.

While it now appears that some of the issues presented to GAO were not specifically submitted to the court, it is clear that they could have been. In this connection, a district court's denial of a protester's complaint for injunctive relief is conclusive not only as to matters which were decided, but also as to all matters which might have been decided. See Perth Amboy Drydock Company, B-184379, November 14, 1975, 75-2 CPD 307, where we stated:

* * * Federal Rule of Civil Procedures 41(b) provides as follows:

" * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

* * * * *

"Moreover, in decisions interpreting the effect of the above-quoted rule the courts have held that the dismissal of a complaint is conclusive not only as to matters which were decided, but also as to all matters which might have been decided. Glick v. Ballantine Products, Inc., 397 F.2d 590 (1968); Englehardt v. Bell & Howell Co., 327 F.2d 30 (1964). * * *"

Consequently, it is our opinion that the denial of the protester's complaint by the district court operated as a full adjudication on the merits.

Moreover, 4 C.F.R. § 20.10 (1978) is applicable only where a court requests, expects or otherwise expresses an interest in receiving a GAO decision before it renders an opinion. City and County of San Francisco, B-188130, March 30, 1978, 78-1 CPD 246. As stated in that case:

"We find that the matter is inappropriate for consideration on the merits. In Associated General Contractors of Massachusetts, Inc. and Construction Industries of Massachusetts, Inc.; Perini Corporation and King Erectors, Inc., A Joint Venture, B-187359, October 26, 1977, 77-2 CPD 326, we declined to render a decision on the merits where the matter was also the subject of litigation and the court had expressed 'no objection' to consideration of the case by this Office, because we did not regard the court's statement as indicating 'any particular interest by the court in receiving our views.' Although here the court's statement is less clear, it appears that the court may now view its order as one directing us to consider the case on the merits, since the November 27 memorandum of the court contains a footnote stating that 'On June 3, 1977, this Court ordered the GAO to proceed with the bid protest review.' Nevertheless, in view of the court's order of dismissal and subsequent entry of judgment, it is apparent that the court is not interested in our views at this time. Moreover, under Rule 41(b) of the Federal Rules of Civil Procedure, the court's dismissal of the causes of action for 'variously, failure to state a claim upon which relief can be granted, and lack of jurisdiction over the subject matter,' appears to operate as an adjudication on the merits. See Hall v. Tower Land and Development Company, 512 F. 2d 481 (5th Cir. 1975)."

In the instant case, the court did not request a decision by the Comptroller General before denying the protester's request for injunctive relief and granting the defendant's motion for summary judgment.

Accordingly, we conclude that the matter has been and is the subject of litigation, and there is no basis for our further consideration of the issues involved under our bid protest function. Based on the foregoing, our decision of November 9, 1978, dismissing the protest is affirmed.

However, we have determined that the subject matter of this protest is appropriate for consideration under our audit function and it will so be considered.



Acting Comptroller General
of the United States