

Ballagher
Proc F

12370



DECISION

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

FILE: B-196545

DATE: December 21, 1979

MATTER OF: CSA Reporting Corporation *D 3519*

DIGEST:

1. After protest to GAO, protester filed suit seeking preliminary injunction pending GAO decision on merits of protest and declaratory judgment. Motion for preliminary injunction was ~~denied~~ *Suit* is still pending before court, and court has not expressed any interest in receiving GAO decision. Protest is accordingly dismissed.

2. Argument that GAO should consider merits of protest involved in concurrent litigation--notwithstanding lack of any expression of interest by court in GAO decision--is not supported by precedent. *General* policy of GAO is that without expression of interest, protest will be dismissed. *Accordingly, the protest was dismissed.*

2
/ CSA Reporting Corporation (CSA) has protested concerning invitation for bids (IFB) No. 041-80-B-0002, issued by the National Labor Relations Board (NLRB). The protest, filed after bid opening, alleges that the Service Contract Act wage determination in the the IFB is unlawful, that the IFB evaluation criteria are defective, that the successful bid is nonresponsive, and that NLRB conducted negotiations concerning the ultimately successful bid. 114

After protesting w/ GAO
After protesting to our Office, *the protester* CSA filed suit in the United States District Court for the District of Columbia on October 31, 1979 (CSA Reporting Corporation v. John H. Fanning, et al., Civil *Cont'd*)

[Protest Alleging Service Contract Act Wage Determination in IFB Unlawful]

111148

~~008136~~

Action No. 79-2958), on essentially the same grounds as asserted in its protest. ^{As per protest} CSA sought a preliminary injunction pending ~~our~~ ^{GAO's} decision on the merits of the protest and a declaratory judgment. *- see digest* By order dated November 14, 1979, the court denied CSA's motion for a preliminary injunction. The order did not indicate that the court was interested in receiving a decision from our Office. We requested CSA to furnish evidence of an expression of interest by the court in receiving a GAO decision.

In response, CSA has argued, in effect, that no expression of interest by the court is necessary because suit was initiated by the protester "* * * for the express purpose of obtaining an injunction pending a determination by GAO on the merits * * *." (Emphasis in original.) The protester, citing several of our decisions, contends that either this posture or an expression of interest from the court is a sufficient basis for our Office to render a decision.

Initially, the holdings of the decisions relied on by CSA do not support its contention. All of the cases involve either dismissals of protests without consideration of the merits, or instances where we issued decisions on the merits because courts had expressed interest in receiving our decisions.

Moreover, CSA's argument overlooks the fact that its complaint did not merely seek a preliminary injunction; it also sought a declaratory judgment. While the court has ruled to the extent of denying the motion for a preliminary injunction, the issues in the case have not been finally adjudicated. They are still before the court, and the court's decision would take precedence over a decision by our Office. Nartron Corp. et al., 53 Comp. Gen. 730 (1974), 74-1 CPD 154.

In these circumstances, we see no reason why we should issue a decision on the merits solely because it was the protester/plaintiff's intention, at the time it initiated suit, to obtain a decision from our Office regardless of whether it succeeded in obtaining

a preliminary injunction from the court. In this regard, once a suit is initiated what is significant from our perspective is not the protester/plaintiff's intentions, but the court's. It is our policy not to render a decision where the material issues involved in a protest are before a court of competent jurisdiction, unless the court expresses an interest in receiving our decision. Dyneteria, Inc., et al., B-194279, B-194284, August 1, 1979, 79-2 CPD 70; Saddleback Mountain Radiologic Medical Group, B-195271, August 6, 1979, 79-2 CPD 85.

~~The protester~~ requested a conference on its protest. Since the merits of the protest are not for consideration, ~~we believe~~ no useful purpose would be served by holding a conference in this case. See Die Mesh Corporation, 58 Comp. Gen. 111 (1978), 78-2 CPD 374.

Finally, we note as a matter of information that where a suit is dismissed without prejudice our Office will consider the merits of a protest, provided the protest was timely filed. Saddleback Mountain Radiologic Medical Group, supra. In this instance it appears that at least the first two grounds of protest are untimely, because they are based upon apparent improprieties in the solicitation and the protest was not filed prior to bid opening. See section 20.2(a) of our Bid Protest Procedures, 4 C.F.R. part 20 (1979). In this connection, counsel for the protester has submitted for our approval a proposed stipulation of dismissal of the suit. We believe, however, that the dismissal of the suit is a matter to be resolved among the plaintiff, the defendants and the court.

✶The protest is dismissed.


Milton J. Socolar
General Counsel