12863 PL-1 Mr. Boyle

DECISION

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

FILE: B-196545.2 DATE: February 14, 1980

MATTER OF: CSA Reporting Corporation-- Reconsideration DL60 35/9

DIGEST:

Prior decision dismissing protest because issues involved were subject to litigation pending in court of competent jurisdiction is affirmed. On reconsideration, protester failed to show errors of fact or law warranting reversal or modification; in fact, matter is still pending in Federal court and court has not expressed interest in receiving GAO decision. In circumstances, longstanding GAO policy is to dismiss protest.

Our decision in the matter of CSA Reporting Corporation, B-196545, December 21, 1979, 79-2 CPD 432, dismissed the protest of CSA Reporting Corporation (CSA) because the issues presented in the protest were pending before a court of competent jurisdiction, a decision by the court would take precedence over a decision by our Office and the court had not expressed an interest in our views.

CSA requests reconsideration on the grounds (1) that the decision was based on a misimpression concerning which parties support a draft dismissal stipulation, and (2) that the copy of the stipulation submitted with CSA's request for reconsideration constitutes new evidence.

First, CSA argues that the matter effectively was not before a court at the time of our decision since a proposed stipulation of dismissal had been submitted to our Office. CSA notes that there was only one contingency in going forward with the stipulation: CSA wanted an assurance from our Office that a dismissal pursuant to the proposed stipulation would not be viewed as an adjudication on the merits by the court and that our Office would take jurisdiction of

~~008686~~ 111577 [Proposed Stipulation of Dismissal]

the CSA protest once it was dismissed. CSA states that the stipulation will be filed promptly with the court upon receipt of written confirmation from our Office that (1) dismissal of the court action pursuant to the stipulation will in no way impair GAO jurisdiction over the CSA protest and that (2) upon receipt of proof of dismissal, our Office will resume jurisdiction over the protest.

Second, CSA contends that, in the alternative, our earlier decision should be reconsidered in light of the new evidence presented, i.e., the signed stipulation. Finally, CSA refers to our decision, B-170989, November 17, 1971, in which Keco Industries had concurrently filed a court action seeking to enjoin the defendants from accepting any deliveries or making any payments and to direct the contractor to stop all work under the contracts until we decided the protest and, if our decision was unfavorable, a decision on the merits by the court was requested. There, the court denied the request for a preliminary injunction. An agreement on dismissal without prejudice could not be reached; however, neither party took any action to bring the case to a hearing on the merits. Expressly noting that a court's findings on a preliminary injunction is not a decision on the merits of the case, CSA notes our Office held that, in view of the status of Keco's court action, it was appropriate for our Office to consider the merits of Keco's protest as requested by counsel.

CSA argues that exactly the same situation exists here since CSA's motion for preliminary injunction was denied, the parties have been unable to agree on a dismissal, and none of the parties have sought to bring the case to a hearing on the merits. CSA requests that the precedent set in B-170989 be followed here.

In opposition to CSA's request for reconsideration, the awardee, Acme Reporting Company, Inc. (Acme), contends that the signed copy of the stipulation is not new evidence because a copy was submitted by CSA and was a part of the record considered in arriving

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at the earlier decision; furthermore, GAO was not under any misapprehension concerning Acme's or the Government's willingness to enter into the stipulation. Acme states that it remains willing to be bound by that stipulation and Acme's willingness is not conditioned on our Office's agreeing in advance to resume jurisdiction over the protest; CSA is the only party that has not been willing to submit the stipulation to the court. Thus, in Acme's view, the issues in this protest remain before the Federal court and should not be considered by GAO.

Section 20.9 of our Bid Protest Procedures warns that decisions will be affirmed on reconsideration unless the protester specifies errors of fact or law made or adds information not previously considered. Here, CSA has added no new information, since our prior dismissal was not based upon the fact that the copy of the stipulation filed with our Office was not signed; the signed stipulation submitted in connection with the reconsideration confirms that the suit is still pending in Federal court, which was the basis for our dismissal.

Regarding the applicability of the 1971 Keco decision, our Bid Protest Procedures, which govern protests received at GAO after June 2, 1975, provide that we will not decide any protest where the matter involved is the subject of litigation before a court of competent jurisdiction unless the court expresses interest in our decision. 4 C.F.R. § 20.10 (1979). Since the publication of the Bid Protest Procedures, we have uniformly followed that policy; examples of decisions dismissing protests for that reason were cited in the prior decision. Thus, the Keco precedent--to the extent it would have been applicable here--was modified by our Procedures and subsequent decisions.

Accordingly, since the situation now has not changed--the issues in the protest are still pending in court--the prior decision is affirmed.

Again, we note that where a suit is dismissed without prejudice, our Office will consider the merits

of a timely protest. In this regard, CSA again requests that we decide in advance whether the proposed stipulation and order would constitute such a dismissal. In the prior decision, we did not offer an opinion because the dismissal of the suit is a matter to be resolved among the plaintiff, the defendants and the court. Here, it is sufficient to refer to sections 20.1(a) and 20.10 of the Bid Protest Procedures, which indicate that we will entertain a timely protest that is not the subject of litigation and has not been decided on the merits by a court.

Deputy Comptroller General
of the United States