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DECISION



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

FILE: B-202287.3

DATE: January 6, 1982

MATTER OF: Paragon Energy Corporation--
Reconsideration

DIGEST:

1. issue concerning propriety of cancellation will not be considered since, under circumstances, protester must be viewed as having finally elected a judicial, rather than a GAO, remedy for this issue.
2. GAO has no authority to decide whether an intervenor may properly petition court for relief in pending litigation.
3. GAO affirms prior decision holding that protester had not been competitively prejudiced by award under resolicitation of procurement which was subject of court action.

In our decision in Paragon Energy Corporation, B-202287.2, August 14, 1981, 81-2 CPD 142, we denied the company's June 4, 1981, protest against an award made by the United States Army Corps of Engineers under the Corps' resolicitation of canceled invitation for bids (IFB) No. 81-7. Paragon had previously filed a complaint with the United States District Court for the Western District of Texas to contest the cancellation of the IFB and the resolicitation of the procurement on the grounds that it should have received an award under the canceled invitation. With the filing of Paragon's court complaint, we dismissed the company's earlier protest which raised these same issues. Paragon Energy Corporation, B-202287, April 7, 1981, 81-1 CPD 264.

While contesting the resolicitation, Paragon had also entered into a court-approved stipulation, the substance of which was incorporated into the resolicited invitation on April 9, 1981, and which read:

"A lawsuit has been filed in the U.S. District Court in El Paso, Texas, protesting the resolicitation * * *. No award will be made until 10 days after final judgment has been rendered in this lawsuit.

"It is anticipated that bids for this readvertisement will be opened on 5 May 1981. The anticipated date for court hearing will be latter part of May or early June 1981.

' bids will require a 90-day acceptance period."

After bids were opened, the court, by Order of May 29, 1981, upon "Intervenors' motions," vacated this stipulation on the theory that continuing the stipulation "would substantially achieve the same result as a preliminary injunction" which the court found "would not be appropriate in this case." Immediately upon the dissolution of the stipulation, the procuring agency awarded the contract. Paragon then requested that the court reconsider its Order. In its Order of Dismissal, dated July 30, 1981, the court affirmed its decision to set the stipulation aside and dismissed the Paragon complaint "without prejudice."

In responding to Paragon's June 4 protest, which alleged that the award contravened the above stipulation our August 14 decision held:

"* * * Paragon was fully aware that this stipulation might be canceled by the court upon application, for example, of an intervening party as was the case here. Moreover, the above-quoted resolicitation provision specifically directed all bidders to bid on the basis of the same 90-day bid acceptance period; award, in fact, was made during this bid acceptance period. In these circumstances, we conclude that Paragon was not competitively prejudiced by the award."

By letter of August 21, 1981, Paragon requested reconsideration of that decision on the basis that we did not consider all the issues raised by it. Specifically, Paragon argued that we did not consider the "full protest [a 25 page brief with enclosures] even though it was sent Federal Express on August 7, 1981."

Our records show that on August 10, 1981, we did receive an August 3, 1981, letter from the attorney representing Paragon. This letter stated that a legal brief was "attached"; however, the GAO attorney who prepared the draft of the decision noted that a brief was not attached to the August 3 letter. Further, the GAO attorney noted that the only document attached to the August 3 letter was a copy of the court's July 30 Order. Moreover, the brief was not contained in our case file when Paragon's attorney asked us to check the file for the presence of the brief on August 21, 1981. Subsequent to that date, the original of Paragon's legal brief (dated August 7, 1981) has been located in our Office. The original brief does not contain a time/date stamp of our Office.

Under the circumstances, it is our view that Paragon's August 7 brief was received by our Office on August 10 with the August 3 letter but was thereafter detached from the letter. Because of this circumstance, the brief was not considered prior to the release of our August decision.

We will now examine the issues presented in Paragon's August 7 brief.

The first issue addressed in that brief is a detailed argument as to why the IFB cancellation--which was done, the agency states, in order for the Government to achieve monetary savings involving a change in concrete requirements--was improper. Paragon argued that the monetary savings were, allegedly, not substantial in relation to the total bids submitted and that there was, therefore, no basis for cancellation.

This argument, in general terms, formed the subject of Paragon's initial protest which our April decision dismissed because the issue was pending in court. Paragon, however, did not immediately attempt to obtain

a dismissal, without prejudice, of its court complaint after receiving our decision so that this issue might be considered on the merits by our Office.

In these circumstances, it is our view that it would frustrate the orderly process contemplated by our Bid Protest Procedures to now consider this issue. Paragon had obviously decided that it preferred the court, rather than our Office, to consider this issue from the date of Paragon's receipt of our April decision until its complaint was involuntarily dismissed by the court without prejudice on July 30. In this situation, Paragon must be seen as having finally elected a judicial, rather than a GAO remedy.

Paragon's August 7 brief also argued that the reissued IFB under which bids were received on May 5 did not, in fact, contain changed concrete specifications so as to permit the expected savings. Although this issue was not specifically brought before the court, we think it is part of Paragon's basic argument that the IFB cancellation was improper. As such, we see no reason to consider the issue at this time. However, even if we regard the issue as a separate protest, it is untimely in any event.

It was Paragon's obligation to file a timely protest with us or the agency prior to the May 5 bid opening concerning this issue. See 4 C.F.R. § 21.2 (1981). Paragon's brief does contain an April 30 letter addressed to the procuring agency protesting the resolicitation's concrete specifications. Nevertheless, the procuring agency proceeded with the May 5 bid opening; therefore, this bid opening constituted initial adverse agency action on the protest.

Under these facts, Paragon had 10 working days after May 5 to file a protest with our Office if the company wanted to contest the concrete specifications. Paragon did not file a protest concerning this issue until it submitted its August brief. Consequently, this issue is untimely and will not be considered.

Next, Paragon's August 7 brief advances reasons why the award under the resolicitation was allegedly improper in light of the court-approved stipulation,

noted above. Since this argument was not before the court, it was appropriate for our Office to have considered this issue in our August decision and at present in the context of Paragon's request for reconsideration.

Paragon requests that we find the award under the resolicitation to have been improperly made since bidders--except for the awardee--allegedly bid on the basis that an award would be made only in 1982--or when Paragon says it believed it would obtain a final judgment on its lawsuit. The rescinding of the stipulation after bid opening and the subsequent award, Paragon continues, meant, allegedly, that all bidders had not competed on an equal basis. Paragon states that it, and at least one other bidder, would have submitted substantially lower prices had it been known that an award would, instead, be made within the 90-day bid acceptance period. And Paragon also cites a number of our decisions which stress that significant changes to the Government's requirements arising after bid opening ordinarily require resolicitation rather than permitting award under the original solicitation. Therefore, Paragon argues that the procuring agency's decision to disregard the IFB provision regarding the court-approved stipulation and award a contract was improper.

As noted in our August decision, the resolicitation procurement expressly directed bidders to bid on the basis of a "90-day acceptance period" from May 5, 1981. Under this circumstance, we consider it unreasonable for any bidder to have assumed that award would not be made in this period and that, on the contrary, award would not be made until 1982, or months after the expiration of the 90-day bid acceptance period. Paragon's assertion that it and another bidder computed bids on the basis of a 1982 award date effectively means that it preferred to speculate on the date of the court's "final judgment" in this matter when, on the contrary, the bid acceptance period was obviously based on the assumption that the court action would be concluded during this 90-day period. Consequently, and since Paragon was otherwise on notice that the stipulation might be dissolved, Paragon should not reasonably have interpreted the IFB's award provision as it says it did.

Finally, Paragon argues that the intervenors should not have been permitted to request the court to set aside the stipulation because the motion effectively questioned Paragon's alleged interpretation of the award provision. Obviously, however, it is not our function to rule on whether a party may properly raise a matter before a court; moreover, as noted above, the court held that the propriety of the resolicitation was not before it.

Accordingly, we affirm our decision of August 14.

Paragon has also requested a conference to discuss its request for reconsideration. Since our Bid Protest Procedures do not explicitly provide for a conference on a reconsideration and since the matter can be resolved without a conference, the request is denied. KET, Inc.--Request for Reconsideration, B-190983, January 12, 1981, 81-1 CPD 17.

Larry R. Van Cleave
For Comptroller General
of the United States