

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

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FILE: B-210423.2**DATE:** March 9, 1984**MATTER OF:** Decision Planning Corporation**DIGEST:**

After denying plaintiff's request for temporary restraining order, preliminary injunction and permanent injunction without requesting opinion from GAO on plaintiff's protest concerning same issues, court dismissed suit on condition that plaintiff not bring same issues to another court. GAO will not consider the protest, even though court indicated in dismissal that plaintiff could pursue GAO decision, since court already adjudicated the matter and it would be inappropriate to provide a second forum.

Decision Planning Corporation (DPC) protests the award of a contract by the Department of Energy (DOE) to Systematic Management Services, Inc. (SMS) under request for proposals (RFP) No. DE-RP02-83-CH10128 for consulting services. DPC contends that the award is unlawful and in violation of the terms of the RFP and DOE regulations. DPC further contends that DOE's failure to follow the specified evaluation criteria and procedures in selecting SMS for award was arbitrary, capricious and an abuse of discretion.

We dismiss the protest.

The solicitation was issued in October 1982. After negotiations and best and final offers, the Source Evaluation Board (SEB) determined that DPC's technical proposal was so much better than that of SMS that acceptance of DPC's higher-priced proposal was justified. DOE therefore selected DPC for negotiations with the intent to award to the firm. SMS then protested to our Office, objecting to the selection on many different grounds.

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Before we could resolve the matter, however, DOE decided to reinstate SMS, and to reopen negotiations with both firms. DPC then filed a protest with our Office against the agency's decision, contending that DOE furnished SMS information that resulted in improper technical transfusion from DPC's proposal.

DOE was then in the midst of the reopened negotiations, and was reluctant to submit a report on either protest because it felt that it was impossible to do so before the new selection without compromising the ongoing negotiations. The agency suggested that as soon as the new selection was made, a report could be made without its affecting the competition.

After best and final offers were received in July 1983, DOE determined that the level of effort should be reduced from 20 man years of effort per year to 14 man years of effort. New best and final offers were received on August 5, and this time the SEB determined that SMS's price was sufficiently lower than DPC's to overcome the benefits to be derived from the superior technical proposal submitted by DPC.

DPC subsequently renewed its original protest, and also protested the new selection of SMS as, among other things, in violation of the regulations, contrary to the specified evaluation criteria, based on erroneous calculations of probable costs, and resulting from technical transfusion and leveling. DOE then started preparation of its report on the DPC protest.

Before this report was complete, DPC filed suit in the United States Claims Court seeking declaratory and injunctive relief (Civil Action No. 637-83C) and presenting the same issues presented to our Office in the protest. In accordance with our usual policy, we set the protest aside until the desires of the court with respect to obtaining our view could be clarified. See Norfolk Dredging Company, B-209099, December 22, 1982, 82-2 CPD 567. DPC did not, however, ask the court to request an advisory opinion from our Office, and the court did not express its desire for such an opinion.

After a full day of oral argument, the court, on October 28, issued a 7-page order in which it concluded that the probability of DPC ultimately prevailing on the merits was lacking. The court also concluded that the materials presented to it by the parties showed that DOE had followed the specified proposal evaluation criteria, that SMS had at least minimally complied with all requirements, and that the source selection official had not abused his discretion in selecting SMS for award. The order then denied DPC's motion for a temporary restraining order (TRO) and its requests for a preliminary injunction and a permanent injunction.

Promptly after the court's order, DOE awarded the contract to SMS. DPC did not appeal from the court's order of October 28, but on November 3, filed a Notice of Dismissal Without Prejudice under Rule 41(a)(1) of the Federal Rules of Civil Procedure (FRCP). After a hearing at which DOE and SMS opposed this dismissal, the court, on November 10, dismissed DPC's complaint, stating that the dismissal was under Rule 41(a)(2) rather than Rule 41(a)(1) "in order to avoid carping about dismissal under Rule 41(a)(1)." The order further stated that the court's dismissal was motivated in large part by DPC's assertion that it did not want to relitigate the issues involved in any court of competent jurisdiction, and noted DPC's stated desire to dismiss voluntarily "that part of its claim remaining" in order to permit our Office to decide the protest. Rule 41(a)(1) provides for voluntary dismissals by the plaintiff without order of the court and for dismissals by stipulation signed by all parties who have appeared in the action. Rule 41(a)(2) provides for dismissals by court order, and states that unless otherwise specified in the court, such a dismissal is without prejudice.

DOE contends that we should dismiss DPC's protest because the issues it involves were presented to the court and the court, after full consideration, found that there was no likelihood of DPC prevailing on the merits of its complaint. DOE argues that DPC's decision to pursue a dismissal without prejudice rather than appeal the court's action is simply an effort to induce this

Office to consider and resolve the same issues the court found to have no substance. To permit DPC to accomplish this would, DOE submits, be tantamount to giving DPC an undeserved second hearing.

DPC opposes the dismissal of its protest, contending that the court did express a desire to have a ruling from our Office, and that therefore this matter comes within the exception to our general policy of not deciding matters which have been before a court of competent jurisdiction. DPC argues that the dismissal of its court action was without prejudice, and contends that the court did not rule on any issues other than those brought before it for purposes of obtaining a TRO.

We find no indication in the record that the court ever expressed a desire for a decision from our Office. DPC's complaint and oral brief gave no indication that DPC requested anything other than that the court resolve all issues without advice from the General Accounting Office. Although the court at the hearing asked about the status of the protest, it at no time asked for our views on the issues, and none of the parties, including DPC, asked the court to withhold its decision until our Office issued a decision. Indeed, the transcript indicates that the court considered the advisability of requesting this Office to expedite its decision, but rejected that course of action after stating that as the parties did not seem to be concerned about a decision from our Office, neither was the court. It was only after the court issued its order indicating its belief that DPC's position had no merit that DPC decided that its best course of action would be to return to this Office.

As a general rule, our Office will not decide matters where the issues involved are before a court of competent jurisdiction or have been decided on the merits by such a court. 4 C.F.R. § 21.10 (1983). We will, however, review a complaint if the court action has been dismissed without prejudice. See Optimum Systems Inc., 56 Comp. Gen. 934 (1977), 77-2 CPD 165; Planning Research Corporation Public Management Services, Inc., 55 Comp. Gen. 911 (1976), 76-1 CPD 202. The reason is that a dismissal without prejudice generally leaves the parties in the same position they

would have been if no court action had been brought.
Moore v. St. Louis Music Supply Co., Inc., 539 F.2d 1191
(8th Cir. 1976).

A dismissal under Rule 41(a) is, according to the rule itself, without prejudice unless otherwise specified in the order. The qualification in the court order dismissing DPC's suit that the dismissal was founded on the plaintiff's assertion that it would not bring the same issues to another court seems to us to constitute a dismissal with prejudice to the plaintiff's right to attempt to have the matter relitigated. Certainly, the court, having denied the plaintiff's request for a permanent injunction as well as for temporary relief, did not intend by the 41(a)(2) dismissal to place the parties in the same situation they were in before the lawsuit was initiated. In effect then, the judicial branch has finally adjudicated the parties' rights in connection with DOE's procurement.

As stated above, the court considered and rejected the advisability of requesting a GAO decision before reviewing the merits of DPC's complaint. In our view, the fact that the court nevertheless left DPC the opportunity to seek a second forum--this Office--to hear the complaint, does not mandate that we accede to DPC's request. Rather, we believe that our appropriate course is to honor the court's judgment on the merits of the issues that were (or could have been) raised, and decline to give DPC a second opinion.

The court ruled not only that DPC was not likely to prevail on the merits if it pursued the litigation in court, but also denied a TRO and preliminary and permanent injunctions--the permanent injunction decision included over DPC's objection--on the basis that DOE properly followed the RFP format in evaluating the competing proposals, and that the selection of SMS was within the source selection official's discretion. Under the circumstances, we will not reconsider the same matters.

The protest is dismissed.

for 
Comptroller General
of the United States