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DECISION



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

FILE: B-220559.2 **DATE:** November 26, 1985
MATTER OF: Earth Resources Consultants, Inc.--Request
for Reconsideration

DIGEST:

1. Where GAO's bid protest authority over objections to solicitation provisions is limited to matters that concern a proposed contract for the procurement of property or services, GAO is not the proper forum to consider the agency's alleged misuse of the protester's proprietary information since the challenged solicitation has been canceled and, hence, there is no longer a proposed contract in issue.
2. Prior dismissal of a protest as academic due to the agency's cancellation of the challenged solicitation is affirmed since the protester's mere speculation as to the agency's future course of action in satisfying the requirement is not a valid reason for GAO to consider the merits of the protest.

Earth Resources Consultants, Inc. (ERC) requests reconsideration of our October 10, 1985, dismissal of its protest alleging that invitation for bids (IFB) No. DACA45-85-B-0121, issued by the Army Corps of Engineers, improperly contained ERC's proprietary and trade secret information. We dismissed the protest as academic because the solicitation was being canceled due to lack of funding. ERC now requests reconsideration of our prior dismissal on the ground that cancellation of the IFB was not sufficient to render the protest academic. We affirm that dismissal.

In its original protest, ERC asserted that the Corps had utilized the firm's proprietary and trade secret information in preparing the IFB in violation of an agreement not to disclose the information to third parties. ERC requested that this Office direct the Corps to cancel the

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solicitation; refrain from further disseminating the information; ask all parties receiving the IFB to return their copies to the Corps; and notify these parties that ERC regarded the information as proprietary.

However, the Corps shortly thereafter informed this Office that the solicitation was being canceled because funding for the project had expired at the end of fiscal year 1985, and it was not certain when fiscal year 1986 funding would become available. Accordingly, we dismissed ERC's protest as academic pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(f) (1985), which provides for dismissal of a protest when the protest is otherwise not for our consideration. In this regard, it has been our general view that cancellation of a challenged solicitation renders the protest academic. The Wheelabrator Corp., B-219419, July 29, 1985, 85-2 CPD ¶ 107.

In its request for reconsideration, ERC argues that cancellation of the solicitation, although one of the forms of corrective action originally requested, is not sufficient to render the protest academic because copies of the IFB remain in the possession of third parties who have not been advised by the Corps that the IFB contains ERC's proprietary information.

Moreover, ERC asserts that it may be possible for the Corps to award the requirement when funding becomes available without the need to publicize the action. ERC refers to the Federal Acquisition Regulation (FAR), § 5.202(a)(2) (FAC 84-5, Apr. 1, 1985), which provides that a contracting agency need not publicize notice of a proposed contract action in the Commerce Business Daily (CBD) when the contract action is to fulfill a need for supplies or services that is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals and not comply with the specified CBD publication procedures. Therefore, in ERC's view, this provision indicates that the Corps could, without notice, award a contract to a party in possession of ERC's proprietary information without ever formally reissuing the solicitation.

We find nothing in ERC's request for reconsideration to establish that our prior dismissal was legally or factually erroneous. See Department of Labor--Reconsideration, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13.

With regard to the fact that third parties still retain copies of the solicitation and have not been advised that it contains ERC's proprietary information, the fundamental issue as to the Corps' alleged misuse of that information has never been decided on the merits.^{1/} Our bid protest authority over objections to solicitation provisions is limited to matters that concern a proposed contract for the procurement of property or services. 31 U.S.C.A. § 3551(1) (West Supp. 1985). Since the solicitation has been canceled and, hence, there is no longer a proposed contract in issue, we do not have a basis upon which to consider the alleged misuse of ERC's proprietary information. Thus, at this time, this Office is not the proper forum to consider the question.

We also believe that ERC errs in relying on section 5.202(a)(2) of the FAR to support its argument that the protest is not academic. The Corps has advised this Office that there are no immediate plans to reissue the solicitation, but that it will be reissued sometime in fiscal year 1986 when funding becomes available. Accordingly, it is speculative for ERC to assert that, even though the contemplated project involves the removal of toxic wastes, the Corps, on the ground of urgency, will select one of the firms in possession of ERC's information for the award without ever publicizing the proposed action or formally reissuing the solicitation. The mere existence of that possibility is not a valid reason for us to consider the merits of the protest. See Aviation Enterprises, Inc.--Reconsideration, B-215662.4, Dec. 3, 1984, 84-2 CPD ¶ 603.

Our prior dismissal is affirmed.

for Seymour Epos
Harry R. Van Cleve
General Counsel

^{1/}The Corps has expressly denied the allegation.