



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Superior Engineering and Electronics
Co., Inc.--Reconsideration
File: B-224023.2
Date: March 20, 1987

DIGEST

The General Accounting Office (GAO) will not reconsider a prior decision where the material issues are before a court of competent jurisdiction and the court has not expressed an interest in a reconsideration decision by the GAO of the prior decision.

DECISION

Superior Engineering and Electronics Co., Inc. requests reconsideration of our decision, Superior Engineering and Electronics Co., Inc., B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698, denying a protest against the award of a contract to Jonathan Corporation under request for proposals (RFP) No. N00189-85-R-0378, issued by the Naval Supply Center, Norfolk, Virginia. This matter is also the subject of a suit filed by Superior in the United States District Court (Civil Action No. 86-860-N). Superior argues that we should not dismiss its reconsideration request even though the matter is before a court of competent jurisdiction because we wrongfully issued our initial decision without the court's having requested that decision.

For the reasons stated below, we dismiss the request for reconsideration.

Superior filed its initial protest with our Office on August 28, 1986. The Navy filed an agency report on October 3, 1986 and Superior filed its comments on the agency report on October 15, 1986. Approximately 6 weeks later, on November 24, Superior filed suit in the United States District Court for the Eastern District of Virginia, seeking injunctive relief. We became aware of the litigation shortly thereafter.

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On three occasions after filing suit, counsel for the protester sent us letters about the pending protest at our Office, including a letter dated December 10, 1986, in which counsel for Superior filed "additional or, alternatively, a supplemental protest to the [pending] protest." The letters included additional arguments and documents in support of Superior's protest. In another letter, also dated December 10, counsel for the protester complained that we had given a more precise estimate of when our decision would be issued to Jonathan's counsel who presented that estimate to the court. Counsel for Jonathan, the interested party, also called our Office several times after the suit was filed inquiring as to when our decision would be issued. Further, we received a call from the United States Attorney requesting an immediate decision. Based on these communications from the parties, we assumed that all parties were indeed interested in our decision.

Additionally, in his December 10, 1986 letter to our Office, counsel for the protester included a partial transcript of a December 4, 1986 hearing before the court in which counsel for Jonathan stated the following to the court:

"Mr. Shillito [Counsel for Jonathan]: . . . We anticipate that that decision, that GAO decision, -- will deny Superior's protest, and we reasonably anticipate that the General Accounting Office will find, determine and conclude the contracting officer acted in accordance with the Federal Acquisition Regulations in awarding a contract in this instance to the Jonathan Corporation."

"The Court: Well, now, suppose they rule or suppose the Court should find that he did not act arbitrarily and capriciously in awarding the contract"

Based on the interest expressed by all parties, together with the fact that the court was apprised of the pending protest and was apparently expecting our decision, we proceeded to issue our ruling.

Superior now states that it informed the District Court during the December 4, 1986 hearing that our Bid Protest Regulations "suggested" that Superior's protest would be dismissed because of the pending court action. Superior also contends that the District Court specifically declined to request a decision from our Office. Under these

circumstances, according to Superior, we should not dismiss its request for reconsideration unless we withdraw the prior decision.

We now have in our record the full transcripts of the proceedings before the court. Based on our review of the transcripts, we conclude that the court was indeed expecting our decision. First, there are many references to GAO and our expected decision in the transcripts. For example, the contracting officer testified:

"Well, I would look at hopefully having a GAO decision and the recommendations from the GAO relating to what actions to take in the procurement."

Further, counsel for Jonathan had the following exchange with the court:

"The Court: So then really if it is found finally that the contracting officer did not act arbitrarily and capriciously that ends the situation. Is that what you're saying?"

"Mr. Shillito: That is correct, Your Honor. That is correct. And that decision is for the General Accounting Office."

"The Court: I understand that."

"Mr. Shillito: The General Accounting Office will make the decision relative to the contracting officer's decision for purposes of proceeding with award of this contract having made that urgency determination."

"The Court: Now, would that end the suit, or does the Court have a right to review that?"

"Mr. Shillito: Your Honor, the Court does indeed have a right to review the General Accounting Office's decision; however, I would assume the Court has recognized the unique expertise of the GAO and will give that a great amount of weight, in fact."

"The Court: Of course it would be entitled to some weight, but that still doesn't end the litigation, necessarily."

Moreover, the transcript suggests that the court did not specifically decline to request a decision in the sense that the court did not want or expect our Office to issue a decision. The portion of the transcript relied upon by Superior for the proposition that the court did not request a decision is as follows:

"The Court . . . Secondly, I'm not going to make the request of GAO. I just don't like to do that. I don't like to do it of any other judge or any other court, and I'm not going to do it of an agency. There isn't any question about it [our decision] would have some effect on the Court in its decision one way or the other. I hope I never get to the point that I won't be willing to at least understand or reason with what an agency that deals in similar matters all the time has to say, and their reason for it would be very on point. I think we all agree that their decision is not going to end my ruling on the motion for an injunction. I would hope it would. Whatever they decide that's for them to decide. If it could be done tomorrow and I wouldn't have to rule on it that would be fine, but I don't think that would excuse me regardless of what they rule."

We conclude that the court and the parties were expecting our decision on the protest. Indeed, if the protester did not want a decision by our Office, it could have withdrawn its protest at any time but did not do so. Based on the facts above, we conclude that we properly issued our initial decision.

Thus, since the matter is still before a court of competent jurisdiction and because there has been no indication from the court that it is expecting us to reconsider the matter, the request for reconsideration is dismissed. 4 C.F.R. § 21.3(f)(11) (1986).

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