The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Teknion, Inc.--Claim for Protest Costs 1/

File: B-230171.22 et al. 2/

Date: September 6, 1988

DIGEST

Protesters may not be awarded the costs of filing and pursuing protests, including attorneys' fees, where protests are dismissed as academic and thus no decision on the merits has been issued.

DECISION

Teknion, Inc., and 10 other firms request that we reconsider our decision in Center Core, Inc., B-230171.2 et al., Apr. 19, 1988, 88-1 CPD ¶ 384. In that decision we dismissed as academic the protests of 17 firms against the rejection of their respective offers by the General Services Administration (GSA) under request for proposals (RFP) No. FCN0-87-B701-1-26-88, issued for the acquisition of automatic data processing (ADP) furniture. We dismissed the protests because the agency had taken corrective action which provided the protesters with the relief sought in their respective protests. The firms seeking reconsideration ask that we award to them the costs associated with filing and pursuing their protests, including attorneys' fees.

We deny these claims for protest costs.

On December 10, 1987, GSA issued the solicitation for a federal supply schedule (FSS) contract for furniture

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1/ M.S. Ginn, Inc.; Hon Co.; Krueger, Inc.; Center Core, Inc.; Interact-Acoustical Screens Corp.; American Seating Co.; J.G. Furniture Systems, Inc.; K&B Office Systems, Inc.; Shaw/Walker, Inc.; Datum Filing Systems, Inc.

2/ B-230171.22; B-230171.23; B-230171.24; B-230171.25; B-230171.26; B-230171.27; B-230171.28; B-230171.29; B-230171.30; B-230171.31; B-230171.32; B-230171.33.

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systems, workstation clusters and demountable walls.3/ The RFP contemplated the inclusion of all successful offerors (on a multiple award basis) on the FSS for a 3-year period to supply the federal government with the above-described supplies, as required. By closing, GSA had received 20 offers for workstation clusters, 39 offers for furniture systems and one offer for demountable walls only.

After initial evaluation, GSA rejected 17 of the 20 offers for workstation clusters, 28 of the 39 offers for furniture systems and the one offer for demountable walls. All of the "unacceptable" offers, with the exception of the offer for demountable walls, were rejected on grounds that they contained informational deficiencies. Specifically, GSA rejected the offers because they lacked adequate test data for the products offered as required by the RFP.

Subsequent to the rejection of the offers by GSA, a total of 19 firms protested to our Office and an additional seven firms filed as interested parties. Of the 19 protests filed, our Office dismissed one as untimely (see Douron Inc.--Request for Reconsideration, B-230171.15, Mar. 31, 1988, 88-1 CPD ¶ 325) and one firm withdrew its protest, prior to GSA's filing of a report, after GSA reevaluated its proposal and concluded that the firm should be included in the competitive range for negotiation purposes.

With respect to the remaining 17 protesters, a number of the firms requested bid protest conferences pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.5 (1988). In response thereto, our Office scheduled two conferences. The first conference was scheduled for March 31, 1988, in response to the request of Center Core, Inc., and was held on that date. At that conference representatives of virtually all protesting and interested party firms attended as did representatives of GSA. The firms who attended that conference but had not requested conferences or had been scheduled for the later conference date attended as interested parties. The second conference, scheduled for April 18 in response to the remaining firms' requests, was ultimately canceled because on April 15 GSA submitted a request to our Office asking that the protests be dismissed as academic. This request provided in essence that GSA

3/ The solicitation provided that firms could not offer demountable walls only, but had to offer them in connection with furniture systems. In essence, therefore, the solicitation concerned primarily two products: systems furniture (with or without demountable walls) and work station clusters.

intended to reconsider all offers, to allow all offerors an opportunity to submit revised test data and to hold discussions on the subject of test data adequacy. Although the specific reasons for the rejection of any given offer varied widely, all protesters were in agreement that this had been the remedy sought by all protests. Accordingly, our Office concluded that GSA had specifically satisfied the demands of all protesters and by decision dated April 19, 1988, we dismissed as academic all protests. Center Core, Inc., B-230171.2 et al., supra.

The protesters argue that we should adopt the position of the General Services Administration Board of Contract Appeals (GSBCA) and make award of costs in all cases where a protester has "prevailed," even though our Office has not issued a decision on the merits. For the reasons that follow, we decline to do so.

Under the Competition in Contracting Act (CICA), the Comptroller General is authorized to award the costs of filing and pursuing a protest, including attorneys' fees, where he "determines that a solicitation for a contract or a proposed award or award of a contract does not comply with statute or regulation. . . ." 31 U.S.C. § 3554(c)(1) (Supp. IV 1986). Early decisions of this Office subsequent to the passage of CICA interpreted this language as requiring that a determination of the merits of a protest by our Office was necessary in order for us to make an award of costs. See Pitney Bowes, Inc., 64 Comp. Gen. 623 (1985), 85-1 CPD ¶ 696 (claim for costs denied where protester's filing in district court compelled dismissal of protest without a decision upon the merits from General Accounting Office). We applied this principle to cases in which we did not render a decision on the merits because an agency's corrective measures rendered a protest academic, see e.g., Monarch Painting Corp., B-220666.3, Apr. 23, 1986, 86-1 CPD ¶ 396, and have consistently adhered to this position.

In our view, Congress intended to retain the informal character of our forum when it enacted CICA. The conferees stated that the statute merely ". . . codifies and strengthens the bid protest function currently in operation at the General Accounting Office (GAO)." (Emphasis supplied.) H.R. Rep. No. 98-861, 98th Cong. 2d Sess 1435, reprinted in 1984 U.S. Code Cong. & Ad. News 1445, 2123. To this end, our procedures allow for either party to moot the protest at any time during the proceedings, either through a dismissal when the protest becomes academic or by withdrawal by the protester. Such dispositions do not constitute an adjudication of the merits or a determination by our Office

that the ". . . award does not comply with statute or regulation." 31 U.S.C. § 3554(c)(1) (Supp. IV 1986). The purpose of our bid protest function, as described above, would be impaired by a decision to award protest costs where we need not determine that an agency's actions did not accord with statute or regulation because of agency-level corrective action, which in effect, resolves the protest.

In contrast to the GAO forum, CICA provides that the GSBCA shall review bid protests ". . . under the standard applicable to review of contracting officer final decisions by boards of contract appeals." 40 U.S.C. § 759(f)(1) (Supp. IV 1986). Thus, the rules applicable to the adjudication of claims before the GSBCA are, by virtue of CICA, also applicable to the adjudication of bid protests. These rules are intended to govern the conduct of formal adjudicatory-type proceedings.

The GSBCA proceedings generally do not permit an agency's corrective action alone to moot the protest. Typically, where an agency desires to have a protest at the GSBCA dismissed because it is willing to take corrective action, it would ordinarily enter into a stipulation agreement with the protester, and the parties file a joint motion for dismissal. Rule 28(a)(1), 48 C.F.R. § 6101.28(a)(1) (1987); see, e.g., NCR Comten, Inc., GSBCA No. 8229, Feb. 10, 1986, reprinted in 86-2 BCA ¶ 18,822. The stipulation agreement explicates the terms of the parties' settlement of the case. In acting upon the motion, the GSBCA, in effect, ratifies the terms of the settlement agreement (embodied in the stipulation) and dismisses the protest with prejudice. Such a dismissal in effect constitutes a determination by the GSBCA that ". . . a challenged agency action violates statute or regulation." 40 U.S.C. § 759(f)(5)(B) and (C) (Supp. IV 1986). A dismissal of this nature would then form the basis for the payment of costs. As indicated above, we do not think these procedures are appropriate for disposition of protests filed with GAO.

Accordingly, we continue to adhere to the position which we stated in Monarch Painting Corp., B-220666.3, supra, that our Office will not award the costs of filing and pursuing a protest where that protest is dismissed as academic since we have not made the requisite determination.

The claims for costs are denied.

James F. Hinchman
General Counsel