



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Electronic Systems Associates, Inc.--Request
for Reconsideration

File: B-235323.2; B-235323.3

Date: June 23, 1989

DIGEST

General Accounting Office will not consider a protest where the issue raised could be resolved as the result of a court suit filed by the protester seeking to direct the General Services Administration Board of Contract Appeals to entertain jurisdiction over the matter, and the court has not expressed interest in a decision by our Office.

DECISION

Electronic Systems Associates, Inc. (ESA), requests reconsideration of our dismissal of its protest against the specifications under request for proposals (RFP) No. F30602-89-R-0090, a total small business set-aside issued by the Air Force for the acquisition of a Reduced Instruction Set Computer Ada Environment (RISCAE). ESA has also filed a second protest against its exclusion from the competitive range under the same solicitation. ESA's allegation under its earlier dismissed protest to our Office was that the Air Force was biased in favor of a competitor, TLD Systems Ltd., and had issued the RFP using overly restrictive specifications designed to favor that competitor's system.

Prior to filing either protest in our Office, ESA had filed a protest of related issues concerning the same acquisition before the General Services Administration Board of Contract Appeals (GSCBA), which the GSCBA had dismissed on April 13, 1989, for lack of jurisdiction. GSCBA determined that the RISCAE acquisition fell within the scope of the Warner Amendment, 10 U.S.C. § 2315(a) (1982), which exempts certain categories of automatic data processing procurements from the requirements of the Brooks Act, 40 U.S.C. § 759 (1982), which, in turn, removes the procurement from GSCBA's jurisdiction. ESA appealed this jurisdiction decision to

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the United States Court of Appeals for the Federal Circuit (doeketed on April 21, 1989, as Electronic Systems v. U.S., No. 89-1415), which is considering ESA's appeal. Accordingly, we dismissed ESA's protest because we viewed it as one which was before a court of competent jurisdiction which had not sought our opinion, and whose decision could result in reinstatement of the protest before the GSBCA. See 4 C.F.R § 21.3(m)(6)-(11) (1988).

In its reconsideration request, ESA argues that the protest which it filed before the GSBCA concerned a different procurement action and, therefore, ESA is not foreclosed from coming to our Office by the forum election provision in the Competition in Contracting Act of 1984 (CICA) which provides that an interested party who has filed a protest with the GSBCA under the Brooks Act may not protest to our Office with respect to that procurement. 31 U.S.C. § 3552 (Supp. IV 1986). It is this CICA provision which is implemented in section 21.3(m)(6) of our Bid Protest Regulations. In addition, ESA contends that our Office's action leaves it without any forum in which to challenge the agency's action under the RFP. We disagree and we affirm our prior dismissal.

ESA's protest to GSBCA was that the acquisition should have been made under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982 and Supp. IV 1986), and should not have been solicited as a small business set-aside. ESA, an eligible 8(a) firm, asserted that it had been invited by the Air Force to satisfy the RISCAGE requirements under an 8(a) subcontract, and that the Air Force failed to fairly consider ESA's response and to arrange for award of the subcontract to ESA under the section 8(a) procedures. ESA alleged that the Air Force action was based on its bias in favor of TLD and on its desire to select TLD under a total small business set-aside, rather than purchase the RISCAGE under an 8(a) set-aside, for which TLD is ineligible. As noted above, GSBCA dismissed the protest on jurisdictional grounds, and that decision is currently on appeal before the Circuit Court of Appeals, which has yet to issue a ruling.

ESA's original protest to our Office, filed April 26, contended that the specifications were overly restrictive based on essentially the identical premise, that the Air Force, because of its bias, was attempting to insure award to TLD. Specifically, ESA contended that the specifications included requirements for certain equipment which only TLD, among the eligible small business competitors, possesses. ESA's contention that the GSBCA and the General Accounting Office protests concern different procurements stems from its allegation that the acquisition should have been made as

a section 8(a) subcontract award to ESA, rather than under a solicitation issued as a small business set-aside. ESA posits that, because of the different procedures involved, there are two separate and different procurements. We find this argument without merit. Only one requirement is at issue and only one solicitation has been issued. ESA is protesting the identical Air Force procurement--both before the GSBICA and before our Office. There never has been any other procurement, and even if ESA were successful in its effort to have the requirement subcontracted as an 8(a) set-aside, it would remain the same procurement notwithstanding the utilization of a different purchase procedure. ESA does not dispute that there is only one acquisition which is the subject of both ESA's protest to GSBICA and its protest to our Office.

ESA filed its appeal in the Circuit Court of Appeals in order to obtain a determination that GSBICA should take jurisdiction of its protest. That appeal is pending and if ESA is successful, the protest will be reinstated before the GSBICA. Any decision by the GSBICA would be dispositive of the initial protest which ESA filed in our Office. We have held that even where the issue before a court is not the precise issue which the protester is attempting to raise in our Office, if the Court's disposition of the matter before it would render a decision by our Office academic, we will not consider the protest while the matter is pending in the Court and the Court has not expressed an interest in our opinion. Meisel Rohrbau GmbH & Co. KG--Request for Reconsideration, 67 Comp. Gen. 380 (1988), 88-1 CPD ¶ 371. Since that is the posture of ESA's first protest to our Office, that protest was properly dismissed.

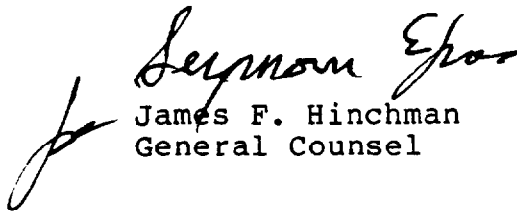
In its second protest to our Office, ESA has asserted that an Air Force employee, who may have been a member of the technical evaluation team, has a personal bias against ESA. This is based on deposition testimony taken under the GSBICA protest, during which the employee in question indicated that he had considered filing a libel suit against ESA and its president. ESA contends that, if this employee was on the evaluation team, the evaluation was tainted and ESA's proposal was improperly eliminated from the competitive range. The above rationale is equally applicable to this second protest to our Office. That is, since there is a court case pending which directly impacts the propriety of RFP No. F30602-89-R-0090, and which could render our decision on the matter academic, it is inappropriate for our Office to consider the protest. Id.

ESA has argued that the effect of our dismissal of its protests is to prevent it from having any forum, which is

not the purpose of the forum election requirement under CICA. This argument ignores the fact that ESA is making precisely the election which CICA mandates. ESA has elected to pursue the matter before the GSBICA by its court action designed to force GSBICA to take jurisdiction. If ESA had elected to pursue the matter before our Office instead, it would have been free to do so as long as it had not simultaneously pursued its efforts to compel GSBICA to also entertain jurisdiction.

It is plain that CICA and our Regulation are designed to prevent protesters from maintaining the same action in separate forums. Telos Field Engineering, B-233285, Mar. 6, 1989, 89-1 CPD ¶ 238. CICA requires a protester to make a final election between the GSBICA and our Office when both forums are available, and a protester may not pursue its protest in both forums in order to insure consideration in our Office in the event that GSBICA does not take jurisdiction. TAB, Inc., 66 Comp. Gen. 113 (1986), 86-2 CPD ¶ 639. By pursuing the matter before the Circuit Court of Appeals, ESA is seeking GSBICA jurisdiction while simultaneously pursuing the protest in our Office.

The dismissal is affirmed.


James F. Hinchman
General Counsel