11952 FL-1 mr. Cunningham

DECISION

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

FILE: B-194734 DATE: November 6, 1979 CNG00803

MATTER OF: Informatics, Inc. -- Reconsideration [Request for Reversal of Prior Decision]

DIGEST:

Involuntary dismissal of complaint under Federal Rules of Civil Procedure (FRCP) 41(b) constitutes adjudication on merits not only as to issues which were decided but also as to issues which might have been decided. Since issues presented in request for reversal of prior decision were adjudicated by court under FRCP 41(b), GAO must honor adjudication and dismiss request.

Informatics, Inc., has requested that we reverse our decision in Informatics, Inc., B-194734, August 22, 1979, 79-2 CPD 144, which concerned Informatics' protest of a contract awarded to Computer Data Systems, Inc. (CDSI), by the Department of Health, Education, and Welfare (HEW). We issued the decision because the United States District Court for the District of Columbia in Civil Action No. 79-1192 expressed interest in obtaining our views on the protest. CNG01225 AGC00025 AGC000748

For the reasons set forth below, we dismiss the request.

Informatics specifically argues that our decision ignored deficiencies relating to CDSI's proposed contract facilities as shown in HEW "site visit" reports. Moreover, Informatics argues that we should decide a "new issue" concerning the evaluation of Informatics' final proposal for the contract by HEW's "Evaluator C" notwithstanding that the court has recently dismissed the action and Informatics' complaint with prejudice.

We will not consider these arguments because the involuntary dismissal of Informatics' pending complaint in the civil action operated as an adjudication on the merits of these arguments under Federal Rules of Civil Procedure 41(b). The rule reads:

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> "(b) Involuntary Dismissal: Effect thereof. * * * unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision * * * operates as an adjudication upon the merits."

"Issues" adjudicated under this Rule are not only ones which were decided, but also ones which might have been decided. Perth Amboy Drydock Company, B-184379, November 14, 1975, 75-2 CPD 307; Glick v. Ballantine Products, Inc., 397 F.2d 590 (1968). Contrary to Informatics' view, the issues relating to its above arguments were either decided, or could have been decided, by the court. Thus, we must honor the court's decision on the issues.

"Site Visit Reports"

All of Informatics' "site visit" arguments could have been raised in the civil action for the court's possible decision even if they were not expressly raised. Under this view, we must respect the court's adjudication of these issues which mainly dealt with HEW's alleged failure to properly evaluate reports questioning the adequacy of CDSI's proposed facilities and the adoption of these reports by HEW's proposal evaluation committee chairman.

"Evaluator C"

Informatics' "new issue" regarding "Evaluator C's" scoring of its final proposal was expressly raised in the civil action; therefore, it must be considered to have been adjudicated under rule 41(b) because the issue could have been decided even if it was not decided.

The presence of the "new issue" in the civil action may be demonstrated by reference to Informatics' September 6 affidavit filed in the civil action. The affidavit apparently responded to the court's need to "clarify the scoring procedure involved in the award of the CDSI contract"; so the affidavit must be considered part of the pleadings for the

purpose of rule 41(b). (That the affidavit was considered by the court to be part of the pleadings for practical purposes is shown in the statement quoted below, from the court's "Memorandum Opinion" which addresses the contents of the affidavit.) In the affidavit, Informatics effectively argued: (1) the higher of the two "Evaluator C" scores (97 and 85) should have applied to its final proposal; and (2) in the event 85 was the correct score for its final proposal, "Evaluator C" must have "overlooked" the contents of Informatics' final proposal in the areas of "modern data entry" and "analytic capability assigned to the project."

Moreover, in dismissing Informatics' complaint, the court's "Memorandum Opinion" suggests that this issue was decided. As stated by the court at page 4 of its opinion: "[W]e find * * * that the lower score * * * was properly and intentionally attributed to plaintiff's revised technical proposal. The court finds no error in attribution of numerical scores to plaintiff's initial or revised proposals."

Informatics argues that the statement merely means the court found the scores were not accidentally transposed. We doubt whether the statement should be read so narrowly; the statement also suggests the court considered the lower score to be "proper" notwithstanding plaintiff's belief that to so hold would mean the evaluator overlooked merit in Informatics' final proposal.

Conclusion

We must consider the issues raised by Informatics' request as decided under rule 41(b). Thus, the company's request will not be considered despite Informatics' plea that we review the issue in the interest of preserving the "integrity of the competitive system." See 4 C.F.R. § 20.10 (1979).

Request dismissed.

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General Counsel