13796 PL-I

DECISION

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

FILE: B-194986 DATE: May 21, 1980

MATTER OF: Megapulse, Inc.--Reconsideration DLG03617
[Request for Reconsideration]

DIGEST:

Where decision rendered in response to expressed interest from court is no longer subject of litigation and no court has requested GAO to reconsider decision, GAO declines to reconsider when protester filed timely request for reconsideration but untimely filed required detailed statement concerning factual or legal basis to modify or overturn decision.

Megapulse, Inc., requests reconsideration of our decision in the matter of Megapulse, Inc., B-194986, January 15, 1980, 80-1 CPD 42, which we rendered in response to an expression of interest from the court in connection with Megapulse's complaint filed in Megapulse, Inc. v. Adams, et al., Civil Action No. 79-1414, in the United States District Court for the District of Columbia. The decision held in part that (1) Megapulse had not met the burden of showing that the agency's technical opinion and judgment--that no severable basic technology was developed at private expense--was not reasonable and (2) Megapulse provided no direct evidence that cognizant Government personnel ever made assurances to protect delivered proprietary data and the contracts tended to show that the agency intended to use and disclose delivered data in competitive procurements. Consequently, the January 15, 1980, decision denied Megapulse's protest.

On January 24, 1980, Megapulse filed its request for reconsideration on the ground that "GAO imposed a new standard of proof on Megapulse and Megapulse is in the process of producing the evidence to meet that standard." Megapulse also stated that it would furnish sworn affidavits and other documentation to show that (1) the funds and efforts used to develop the proprietary designs, manufacturing formulation, processes, and other data were solely Megapulse's; (2) such funds were

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expended by Megapulse prior to any involvement with the Coast Guard; (3) the proprietary data was severable from the data in which the Coast Guard obtained unlimited rights; (4) Coast Guard personnel did provide assurances to Megapulse that it would protect Megapulse's proprietary data; and (5) Megapulse provided such data solely for use by the Government in its procurements and not for general public disclosure.

Upon receipt of the reconsideration request, we advised Megapulse that in a similar situation we dismissed a request for reconsideration since the matter was still in court and the court had not requested that we reconsider the matter. Sea-Land Service, Inc., B-192149, October 16, 1978, 78-2 CPD 278, affirmed, December 19, 1978, 78-2 CPD 421. We also advised Megapulse that we needed to know the current status of Megapulse's suit.

In reply, Megapulse advised that prior to our issuance of the earlier decision its court action was dismissed without prejudice "to the same being reopened on application of either party;" the parties then agreed that no release or disclosure of Megapulse's proprietary data would be made until January 15, 1980, which was the date of the earlier decision. Megapulse states that it was prepared to move to reopen this matter and "[t]he Court stated that the parties should agree to a new Stipulation in order for the GAO to reconsider its decision." Megapulse further stated that as a result a new Stipulation was entered into by the parties recognizing the reconsideration and extending the Coast Guard's agreement not to release or disclose Megapulse's data.

On the basis of Megapulse's information, we concluded preliminarily that the court had expressed an interest in having our Office reconsider the earlier decision; so we asked Megapulse to file its new evidence. On February 25, 1980, Megapulse filed its new evidence and supplementary arguments.

In response, the Coast Guard reports that "it appears that you are under some misconception as to the Coast Guard's intent in agreeing to an extension of the Stipulation between the parties." The Coast Guard

states that it was not agreeing that our decision should be reconsidered but it was not prepared to proceed with the procurement at the time. The Coast Guard also states that it is "unaware of any statement by the Court to the effect that the GAO should reconsider its decision and that the parties should enter into a Stipulation to allow that to take place."

The Coast Guard also reports that it has examined the material submitted by Megapulse and, while there is nothing contained therein to which it cannot respond, a response will require a considerable amount of time and effort to compile and those who will bear the primary burden of refuting the rather vague claims are the same people who would otherwise be working on the LORAN-C procurement.

Accordingly, citing U.S. Duracon Corporation--Reconsideration, B-194225.3, B-194673.3, December 27, 1979, 79-2 CPD 436; Otis Elevator Company, B-195831, December 18, 1979, 79-2 CPD 414; Whitaker Supply Company, Incorporated--Reconsideration, B-196072, November 9, 1979, 79-2 CPD 348, the Coast Guard requests that our Office limit reconsideration to Megapulse's letter of January 24, 1980, as that is the only document submitted within the 10-day period prescribed by our Bid Protest Procedures.

In rebuttal, Megapulse does not refute the primary thrust of the Coast Guard report--that the Court is not expecting our Office to reconsider the earlier decision. Instead, Megapulse argues that its reconsideration request is predicated on our Office's need for factual evidence of the protester's allegations. Further, Megapulse argues that the Coast Guard has received copies of all correspondence between Megapulse and our Office so that it knew that the GAO would extend Megapulse a reasonable amount of time to gather and submit its supporting material. Thus, in Megapulse's view, the Coast Guard could have objected in a timely fashion; instead, the Coast Guard sat by silently and allowed Megapulse to go through the expense and effort of preparing and filing its submittal.

Essentially, Megapulse contends that (1) the Coast Guard should not be allowed to utilize the Bid Protest Procedures to avoid a proper disposition of the reconsideration, (2) the Coast Guard was not prejudiced by

the timing of the reconsideration filings, (3) the decisions on which the Coast Guard relies are distinguishable from the present situation since in each of the cases cited the reconsideration request was received after the requisite 10-day period ended, and (4) our Office properly allowed Megapulse a reasonable period of time to assemble the necessary supporting documents.

Section 20.10 of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), provides that our Office may refuse to decide any protest where the matter involved is the subject of litigation before a court of competent jurisdiction unless the court requests, expects, or otherwise expresses interest in receiving our decision. When a court requests our decision, it is our policy whenever necessary and practical to decide all issues on the merits--even those that are untimely raised. In this situation, Megapulse's protest involved a matter which was the subject of litigation before the United States District Court for the District of Columbia. When we received Megapulse's reconsideration request, we could not tell what the status of the litigation was; so we asked Megapulse. Megapulse responded stating that the court expected our Office to reconsider the earlier decision apparently based on new evidence to be submitted by Megapulse. From the current record, it appears that the matter involved in Megapulse's protest is not the subject of pending litigation and no court is expecting or has requested that our Office reconsider the earlier decision. Thus, Megapulse's reconsideration request is not for consideration within the policy applicable to decisions requested by courts. Instead, Megapulse must satisfy the applicable requirements of the Bid Protest Procedures. See CSA Reporting Corporation, B-196545, December 21, 1979, 79-2 CPD 432, affirmed, B-196545.2, February 14, 1980.

Section 20.9 of the Bid Protest Procedures provides that the request for reconsideration shall be filed not later than 10 days after the basis for reconsideration is known or should have been known and it shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. The only document filed by Megapulse within the time limit was the January 24, 1980, letter, which contained promises to furnish additional

material and Megapulse's view that a new standard of proof had been required.

A similar situation was considered in our decision in the matter of Department of Commerce; International Computaprint Corporation, 57 Comp. Gen. 615 (1978), 78-2 CPD 84. There, 9 working days after the basis was known, Commerce requested reconsideration on the ground that the decision was wrong and would inhibit competition and Commerce noted that the details would follow later; the details were received 6 calendar days later. We held that Commerce's timely request did not advance facts or legal arguments which show that our earlier decision was erroneous and that Commerce's proper request for reconsideration including the detailed statement was untimely and would not be considered. Our rationale is that timeliness standards for the filing of requests for reconsideration are purposefully more inflexible than those for filing protests or meeting intermediate case development or processing deadlines and under the Procedures there is no provision for waiving the time requirements applicable to requests for reconsideration.

The requirement for a "detailed statement" of the factual and legal grounds for reversal or modification is the sum and substance of a request for reconsideration. Without the detailed statement, our Office has no basis upon which to reconsider the decision. For example, in Data Pathing Inc.--Reconsideration, B-188234, July 11, 1977, 77-2 CPD 14, the protester believed that our decision "was not supported by a full examination of the facts." We held that such statements do not constitute the submission of facts or legal arguments demonstrating that our earlier decision was erroneous; accordingly, we declined to reconsider our decision.

When a protester, an interested party, or a contracting agency timely files a short note indicating general disagreement with an earlier decision and subsequently provides the required detailed statement after the expiration of the reconsideration period, an attempt to extend the time for filing the reconsideration request is evident. We cannot condone such action because to do so would open the door to potential protracted delays possibly resulting in circumstances

negating recommended remedial action in the earlier decision.

Megapulse's initial timely filing alleged that a new standard of proof had been imposed and essentially expressed disagreement with the earlier Megapulse, Inc., decision. In the Department of Commerce; International Computaprint Corporation decision and in the Data Pathing Inc. decision, we concluded that such statements do not constitute the submission of facts or legal arguments demonstrating that our earlier decision is erroneous. Therefore, we decline to reconsider the earlier decision based on Megapulse's initial timely filing. For Megapulse's information, however, we note that the standards of proof used in the earlier decision were not new.

Moreover, we note that the essence of the facts and arguments in the affidavit filed in connection with the reconsideration request was thoroughly presented and considered in our earlier decision. Finally, even if facts or arguments were contained in the affidavit which were not previously considered, they were in existence prior to issuance of the earlier decision and if they were not presented then we would not consider them now. See Decision Sciences Corporation--Request for Reconsideration, B-188454, December 21, 1977, 77-2 CPD 485 (We found no compelling reason to reconsider our earlier decision on the ground that the protester failed to present the "complete" information during the initial consider of the matter.).

Megapulse's supplemental filing containing the "additional" evidence is untimely filed and will not be considered.

Further, we wish to point out that we would not have permitted Megapulse to file the supplemental filing if at that time we had been aware that the court was not interested in our Office reconsidering the earlier decision.

Milton J. Socolar

For the Comptroller General
of the United States