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DECISION



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

FILE: B-204524.4

DATE: February 1, 1982

MATTER OF: Roarda, Inc. - Request for Reconsideration

DIGEST:

Where protester does not advance any additional facts or legal arguments which indicate that earlier decision was erroneous, prior decision, dismissing protest because material issues involved are pending before court of competent jurisdiction, is affirmed.

Roarda, Inc. requests reconsideration of our decision in Green Fuel Oil, Inc.; Roarda, Inc.; Atlantic Petroleum Corp., B-204524, B-204524.2; B-204524.3, October 27, 1981, 81-2 CPD 348. In that decision, we dismissed the protests filed by all three parties because Atlantic had filed Civil Action No. 12534-81 in the Superior Court of the District of Columbia raising the same material issues as those raised in the protests before this Office.

Roarda objects to our dismissal of its protest since it has not joined in the court action and it is not "similarly situated" to Atlantic with respect to this procurement. Roarda points out that Atlantic, unlike the protester, is a minority business enterprise and argues that the principal claim advanced by Atlantic is that the removal of the petroleum products being solicited from the "sheltered market program" violates the District of Columbia Minority Contracting Act. Roarda also contends that the dismissal of its protest is founded on a wrongful application of GAO policy, that it deprives Roarda of due process and otherwise works a substantial hardship on Roarda, and that dismissal of the protest is contrary to the public interest.

At the outset, we note that Roarda does not deny the fact that the very issues raised in its protest to this Office are also raised by Atlantic in its suit for judicial relief. These allegations are that the responsibility criteria set forth in the invitation for bids (IFB), as well as the clause which permits bidders to restrict their bids to consideration in the aggregate, are unduly restrictive of competition, and that the equitable price adjustment clause in the IFB is unlawful. While Roarda argues that these are not the principal issues raised by Atlantic, nothing in Atlantic's complaint so indicates. Indeed it appears that both Roarda and Atlantic have the same primary concern regarding the challenged aspects of the IFB -- that they unduly restrict competition.

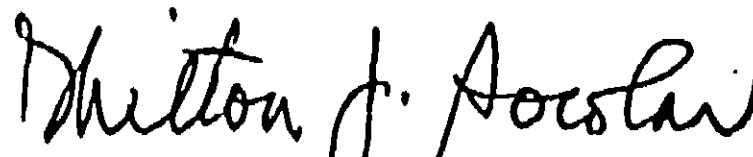
Further, we have held that our policy of refusing to decide a matter where the material issues involved are before a court of competent jurisdiction also applies to a protesting party not involved in the pending litigation, since the court's action would take precedence over any action of this Office. Nartron Corporation and DC Electronics, Incorporated, 53 Comp. Gen. 730 (1974), 74-1 CPD 154; Gary Aircraft Corporation; National Fleet Supply, Inc., B-193793, August 9, 1979, 79-2 CPD 104; Seafarers International Union of North America; Cove Shipping, Inc.; Hudson Waterways Corporation; Zapata Tankships, Inc.; B-194574.2; B-194574.3; B-194574.4; B-194574.5, June 21, 1979, 79-1 CPD 443, aff'd Seafarers, et al. -- Reconsideration, B-194574.6, July 23, 1979, 79-2 CPD 48, E-Systems Inc., B-185724, December 8, 1976, 76-2 CPD 466. As indicated in our initial decision, the only exception to this policy is when the court requests or otherwise expresses an interest in our decision, which is not the case here.

We find no merit to the contention that our dismissal of Roarda's protest deprives it of due process since Roarda is free to join in Atlantic's suit, or seek judicial relief on its own. While it is true that this may be viewed as working a hardship on Roarda, the fact remains that we consider our review of Roarda's protest to be precluded by the pending court action involving the same issues. Since we would be bound by the court's disposition of this matter, no useful purpose would be served by considering it further.

Since Roarda has not presented any evidence demonstrating any error of fact or law in our original decision, nor provided any substantial information not previously considered, we find no basis for reversing our prior decision that the protest is not for consideration. 4 C.F.R. § 21.9 (1981).

We do note that subsequent to the dismissal of its initial protest, Roarda filed a second protest with this Office involving the same solicitation. In that protest, Roarda objects to the rejection of its bid due to a finding of nonresponsibility by the contracting officer. Since it appears that the finding of nonresponsibility is based on criteria other than those originally protested by Roarda and Atlantic, which are now the subject of Atlantic's civil action, we have requested a report from the agency involved and the matter is currently pending before this Office.

Our prior decision dismissing the protest is affirmed.



Acting Comptroller General
of the United States