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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Premiere Credit of North America, LLC; Financial Management Systems Investment Corp.--Reconsideration

File: B-414220.49; B-414220.50

Date: April 6, 2017

Craig A. Holman, Esq., Kara L. Daniels, Esq., Dana E. Koffman, Esq., Sonia Tabriz, Esq., and Michael E. Samuels, Esq., Arnold & Porter Kaye Scholer LLP, for Premiere Credit of North America, LLC; David R. Johnson, Esq., Tyler E. Robinson, Esq., and Caroline E. Colpoys, Esq., Vinson & Elkins LLP, for Financial Management Systems Investment Corp., the requesters.
Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Motion to vacate protest decision will be treated as a request for reconsideration since our Bid Protest Regulations do not provide for the filing of a request to vacate a decision.

2. Our office will not reconsider a decision based on the subsequent filing of related litigation before a court of competent jurisdiction.

DECISION

Premiere Credit of North America, LLC, of Indianapolis, Indiana, and Financial Management Systems Investment Corporation (FMS), of Woodstock, Georgia, request that we reconsider our decision in General Revenue Corp., et al., B-414220.2 et al., Mar. 27, 2017, 2017 CPD ¶ __, in which we sustained in part several protests challenging the award of multiple indefinite-delivery/indefinite-quantity contracts under request for proposals (RFP) No. ED-FSA-16-R-0009, which was issued by the Department of Education (DOE), for student debt collection services. We sustained several of the protests, concluding that the agency unreasonably evaluated proposals under the past performance and management approach factors. Premiere Credit and FMS--both of which received awards here, and were intervenors in the protests decided on March 27--filed "motions to vacate" asking that we reconsider and rescind our decision.

We deny the requests for reconsideration.[1]

BACKGROUND

Between December 19, 2016 and January 9, 2017, our Office received 24 protests relating to the DOE procurement at issue. After dismissing several protests for various procedural or pleading deficiencies, 19 protests were ultimately developed, and they can be separated into two general groups. In the first group, our Office consolidated 17 protests that raised several common challenges to the agency's evaluation of proposals and ultimate award decisions. We resolved those 17 protests in a protected decision issued on Monday, March 27. The remaining protests, including the protest of Continental Service Group, Inc. (ConServe), challenged the agency's evaluation of offerors' small business subcontracting plans, which were evaluated as part of the agency's responsibility determinations.[2]

On Friday, March 24, ConServe, in accordance with Appendix C of the Rules of the United States Court of Federal Claims, apparently served a notice of its intent to file a protest with the court relating to the same DOE procurement at issue in its protest before our Office. See Premiere Credit Request for Recon., exh. No. A. ConServe served its notice on the Clerk of the Court, the United States Department of Justice, DOE, and the awardees that had intervened in ConServe's protest before our Office, including the requesters. Id. Our Office, however, was neither contemporaneously, nor subsequently, provided with a copy of the notice.

As addressed above, we issued our decision resolving the 17 consolidated evaluation-related protests on Monday, March 27. General Revenue Corp., et al., supra. On Tuesday, March 28, ConServe notified our Office that it was withdrawing its protest, and that it was its "intent to pursue the subject matter of this protest at the U.S. Court of Federal Claims." Email from ConServe's Counsel to GAO, Mar. 28, 2017, at 1. On March 29, ConServe filed its sealed complaint with the Court of Federal Claims. See Complaint, Continental Serv. Grp., Inc. v. United States, No. 17-cv-449 (Fed. Cl. Mar. 29, 2017), ECF No. 1. On the same day, our Office acknowledged ConServe's withdrawal and closed our files without further action. These requests for reconsideration followed.

[1] As discussed below, we consider the requesters' submissions as requests for reconsideration seeking the dismissal of the protests on the basis that our Office lacked jurisdiction to consider them.

[2] ConServe and the other remaining protester also challenged the agency's evaluation of proposals under the qualitative evaluation factors and its ultimate award decisions. For reasons not material to the resolution of these requests, we dismissed those aspects of the protests.

DECISION

As an initial matter, although the requesters' styled their submissions as "motions to vacate" our prior decision, our Bid Protest Regulations do not contemplate vacating published decisions, and the requesters have cited no legal authority to support their requests. As we have recognized, published decisions provide valuable information to the procurement community in terms of, for example, analyzing violations of procurement statutes and regulations and explaining why such violations provide a basis for sustaining a protest. Environmental Protection Agency; CGI Fed., Inc.--Recon., B-299504.3, B-299504.4, July 23, 2008, 2008 CPD ¶ 149 at 3-4. Accordingly, we instead consider the requesters' submissions as requests for reconsideration seeking the dismissal of the protests on the basis that our Office lacked jurisdiction to consider them.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). Here, we conclude that the standard for reconsideration has not been satisfied.

In their requests, Premiere Credit and FMS effectively ask us to rescind our March 27 decision resolving the 17 consolidated evaluation-related protests, and issue a decision dismissing the protests in its place. The requesters seek to nullify our decision sustaining the protests based on the contention that ConServe's March 24 pre-filing notice with the court had the immediate and automatic effect of divesting our Office of jurisdiction over any potentially related protests pursuant to 4 C.F.R. § 21.11(b). Under that provision of our Bid Protest Regulations, we "will dismiss any case where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction." Id.[3] For the reasons that follow, ConServe's March 24 pre-filing notice did not immediately and automatically divest our Office of jurisdiction to resolve the 17 consolidated evaluation-related protests.

First, the requesters overlook the fact that, as explained above, ConServe did not provide our Office with the March 24 pre-filing notice until March 28, after we issued our decision on March 27. Second, we reject their premise that, notwithstanding the subsequent filing of the notice with our Office, ConServe's pre-filing notice had the

[3] Even where the issues before the court are not the same as those raised in our Office by a protester, or are brought by a party other than the protester, we will not consider the protest if the court's disposition of the matter would render a decision by our Office academic. Schuerman Dev. Co., B-238464.3, Oct. 3, 1991, 91-2 CPD ¶ 286 at 2-3; Geronimo Serv. Co.--Recon., B-242331.3, Mar. 22, 1991, 91-1 CPD ¶ 321 at 2.

immediate effect of divesting our Office of jurisdiction. In support of this position, the requesters rely on Lockheed Martin Corporation, B-412056 et al., Dec. 15, 2015, 2015 CPD ¶ 395, for the proposition that dismissal is required upon the filing of a pre-filing notice of a party's intent to commence litigation before the Court of Federal Claims. The requesters, however, misconstrue the import of the decision.

In Lockheed Martin Corporation, the protester, prior to the issuance of a decision, notified our Office that it had filed the requisite pre-filing notice to initiate a protest before the Court of Federal Claims, and that the protest would "involve the same subject matter" as the protests filed with our Office. Lockheed Martin Corp., supra, at 2. Based on the notice from the protester, our Office dismissed the protest pursuant to 4 C.F.R. § 21.11(b). Thus, the decision stands for the principle that where a protester notifies our Office prior to the issuance of a decision that it intends to file a complaint with a court of competent jurisdiction involving the same subject matter as raised before our Office, we will dismiss the protest pursuant to 4 C.F.R. § 21.11(b). Here, the notice from ConServe--whose protest was not among the consolidated protests addressed in our March 27 decision--was not provided to us until after the issuance of our decision.

More importantly and contrary to the requesters' arguments, nothing in Lockheed Martin Corporation can reasonably be construed as finding that a pre-filing notice immediately and automatically divests our Office of jurisdiction over other potentially related protests. In this regard, the mere fact that a notice of intent to file a complaint (or even a complaint itself) has been filed by a party does not de facto divest our Office of jurisdiction over a protest pursuant to 4 C.F.R. § 21.11(b). Rather, such a filing triggers the requirement for our Office to consider whether dismissal is required under the prudential considerations reflected in 4 C.F.R. § 21.11(b). Specifically, 4 C.F.R. § 21.11(b) only requires dismissal where our Office determines that the subject matter of the protest is before a court of competent jurisdiction. Schuerman Dev. Co., supra; Geronimo Serv. Co.--Recon., supra. This conclusion is entirely consistent with the prudential considerations underlying 4 C.F.R. § 21.11(b), which is to defer to a court's resolution of similar protest issues in order to obviate the risk of an inconsistent resolution of the issues between the forums. Robinson Enters.--Request for Recon., B-238594.2, Apr. 19, 1990, 90-1 CPD ¶ 402 at 2; Snowblast-Sicard, Inc., B-230983.2, Aug. 30, 1989, 89-2 CPD ¶ 190 at 2. Where there is no pending or notice of imminently pending litigation at the time we issue a decision on a potentially related protest, our Office is precluded from conducting this required analysis, as was the case here.

In essence, the requesters' position would require us to apply 4 C.F.R. § 21.11(b) retroactively to a decision issued by our Office that predates any formal notice of or consideration of the potential impacts of any pending litigation before a court of competent jurisdiction. Following the requesters' argument to its logical end would require our Office to "vacate" any decision where a party subsequently raises the

same subject matter before a court of competent jurisdiction. Such a result is not consistent with the text or purpose of 4 C.F.R. § 21.11(b).

The requests for reconsideration are denied.

Susan A. Poling
General Counsel