

DECISION**COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE: B-209351****DATE: May 27, 1983****MATTER OF: Eagle Construction Corporation****DIGEST:**

A protest based on allegedly restrictive solicitation provisions is dismissed as academic where the agency has withdrawn the authority for the restriction and has canceled the solicitation.

Eagle Construction Corporation has protested the inclusion of certain provisions in solicitation No. DACW21-82-R-0040 which limit the ability of offerors to include foreign components and engineering in their proposals. The solicitation, issued by the U.S. Army Corps of Engineers, was the first step of a two-step formally advertised procurement for the manufacture of four 104,000 horsepower Francis-type hydraulic pump-turbines, and their installation at the Richard B. Russell Dam and Lake Project, Elberton, Georgia. The challenged provisions require that the turbines furnished be 100 percent domestically (or Canadian) produced. The provisions were added to the solicitation in response to a policy established by the Department of Defense (DOD) in an August 5, 1982 memorandum.

Eagle protested to our Office on October 4, principally alleging that the challenged provisions were unauthorized by law and rendered the solicitation unduly restrictive of competition. The restriction would have prevented Eagle from offering to supply and install hydro turbines manufactured under a licensing agreement with a foreign firm; foreign licensing costs would prevent the hydro turbines from qualifying as 100 percent domestic. On January 26, 1983, while we were developing the protest record, Eagle filed suit against the Corps in the United States Claims Court, Eagle Construction Corporation v. United States, Civil Action No. 39-83C, requesting injunctive and declaratory relief on the same grounds raised in its protest. In an order dated January 28, the court expressed interest in our decision on the matter and ordered the Corps to delay further action on the procurement pending issuance of our decision.

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On April 7, prior to issuance of our decision, the Corps advised us that DOD had withdrawn the authority to require 100 percent domestic content on this and other hydro turbine procurements pending the outcome of a study by the Corps of the need for the restriction. It further advised that due to this withdrawal of authority, the solicitation would be either canceled or amended to remove the restriction. The Corps advised us by telephone on April 25, that it had canceled the solicitation on April 22 after informing the court that it intended to do so.

Eagle maintains that, notwithstanding the cancellation, we should rule on the issues raised in its original protest. Further, the protester argues that we should consider a new argument (earlier raised before the court) concerning an alleged conflict of interest involving the DOD official responsible for having the restrictive clauses included in the solicitation. We dismiss the protest.

We believe the Corps' actions have rendered Eagle's protest academic, and any decision by our Office inappropriate for two reasons. First, the cancellation of the solicitation has eliminated the possibility that an improper award under that solicitation could be made. Eagle has not challenged the propriety of the cancellation in its protest submissions. As a general rule, our Office will consider protests only when they are based on alleged improprieties in an ongoing or completed procurement action. Decisions on protests concerning canceled solicitations would answer purely academic questions and thus serve no practical purpose. See Consolidated Services, Inc., B-206413.4, July 12, 1982, 82-2 CPD 39; Young Engineering Systems, B-189322, July 11, 1977, 77-2 CPD 15; Dr. Helmut Weiss, B-185435, February 12, 1976, 76-1 CPD 97. We therefore consider a decision on this matter no longer necessary.

Second, a decision by our Office on Eagle's protest would be inappropriate because DOD's withdrawal of authority to require 100 percent domestic content has eliminated the restriction upon which the protest is principally founded. The question of the propriety of this restriction therefore is purely hypothetical and again, a decision on this point by our Office would serve no practical purpose. Although the Corps plans to resolicit this requirement and now is studying whether

some kind of domestic content restriction is necessary for the resolicitation and other future hydro turbine procurements, we have no reason at this time to anticipate that the Corps will adopt the same restriction Eagle objects to here. In any case, even if the Corps ultimately does determine that the same type of restriction is necessary and includes it in the resolicitation, Eagle will be free to protest that solicitation based on the facts relevant at that time.

In view of the foregoing and the absence of any indication from the court that it remains interested in our decision, we dismiss the protest.

Harry R. Van Cleve
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Acting General Counsel