

DECISION



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

7/1/85
PL-II
31478

FILE: B-218640.2 DATE: August 20, 1985
MATTER OF: Prince George's Contractors, Inc.

DIGEST:

1. Footnote in a court order, indicating that the court will not object to a GAO opinion, does not constitute a request for such an opinion where the court has neither granted the protester's motion for an extension of the hearing date nor taken any other action that would enable GAO to issue a timely decision.
2. Protester's decision to bring suit in court after filing a bid protest constitutes an election of remedies that binds the protester, even though the protester believed it was compelled to take such action in an attempt to stop award or performance. Consequently, the protester's offer to withdraw its suit from the court and reopen the protest at GAO, made after the court has refused to grant the protester's motion seeking an extended briefing schedule until GAO issues an advisory opinion, will not be considered.

Prince George's Contractors, Inc. renews its protest against award to Chemung Contracting Corporation under invitation for bids No. DTFA-15-85-B-10010, issued by the Federal Aviation Administration (FAA) for the rehabilitation of ramp taxiways at Washington, D.C. National Airport. For reasons similar to those in our earlier decision on the firm's protest, Prince George's Contractors, B-218640, June 28, 1985, 64 Comp. Gen. ___, 85-2 CPD ¶ ___, we dismiss the protest.

Subsequent to filing the prior protest, Prince George's brought suit in the U.S. District Court for the District of Columbia, Prince George's Contractors, Inc. v. Donald D. Engen, Administrator, et al. (Civil Action No. 85-1783), seeking injunctive relief. In this connection,

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Prince George's asked the court to mandate abbreviated filing deadlines and processing of the bid protest, so that an advisory opinion would be available for the court's consideration when deciding Prince George's motion for a preliminary injunction. Although the court indicated that it would consider an opinion of this Office should one fortuitously be issued, it did not mandate the abbreviated bid protest schedule. This would have permitted full development of the record, with an agency report and comments by the protester and interested parties, so that our Office could have issued a decision within the court's time objectives. Since the parties were unwilling to accelerate their submissions on a voluntary basis, we dismissed the earlier protest.

Subsequently, the court by order of July 12 denied Prince George's motion for a preliminary injunction; set a date of September 20 for a permanent injunction hearing; and set a schedule for filing briefs by the parties. In a footnote, the court also stated:

"Inasmuch as this matter will proceed to a final injunction hearing in late September, the parties may wish to petition the GAO to resume consideration of plaintiff's administrative protest. Should the GAO agree to do so, the Court would have no objection."

On July 31, Prince George's filed the instant protest, again requesting an advisory opinion of this Office for the court; stating its expectation that the court would extend the hearing date to accommodate a bid protest decision; and furnishing a copy of Prince George's motion to enlarge the time for briefing and for an extension of time for the hearing. The court did not grant this motion and, we are advised, does not intend to do so.

Prince George's further argues that the Attorney General's initial refusal to recognize those portions of the Competition in Contracting Act of 1984 (CICA) relating to the suspension of award or performance pending resolution of bid protests, 31 U.S.C.A. §§ 3553(c) and (d) (West Supp. 1985), virtually compelled Prince George's to bring suit in the U.S. District Court. However, should this Office agree to hear its protest, Prince George's states, it would now consider seeking dismissal of its action in the District Court, since the Attorney General has reversed his advice that federal agencies not follow the stay provisions of CICA.

We still decline to consider this protest. Our Bid Protest Regulations require the dismissal of any protest

where the matter involved is the subject of litigation before a court of competent jurisdiction (unless the court requests a decision by the General Accounting Office) or where the matter has been decided by the court. 4 C.F.R. § 21.9 (1985). It has long been our policy not to decide protests that come within these guidelines. See Pitney Bowes, Inc., B-218241, June 18, 1985, 64 Comp. Gen. ___, 85-1 CPD ¶ 696, citing Raycomm Industries, Inc., B-182170, Feb. 3, 1975, 75-1 CPD ¶ 72.

The issues presented in the Prince George's court proceeding encompass the issues presented in this protest. Therefore, the court's determination of the lawsuit will control the resolution of the bid protest issues under the doctrine of res judicata. In this regard, we do not interpret the court's footnote in the order denying the preliminary injunction--stating that the court would take no objection to this Office's continued consideration of the bid protest--to be the equivalent of a request by a court for a decision of this Office. To the contrary, the court's refusal to grant Prince George's motion for an extension of time to accommodate the bid protest process indicates that a decision of this Office is not a matter of concern to the court. Moreover, in the absence of court-established deadlines for the bid protest process, it does not appear likely that this Office could issue a decision within the time dictated by the court's schedule. Consideration of the protest therefore would serve no purpose. See Prince George's Contractors, Inc., supra.

Finally, we recognize the difficulty of the situation created by the Attorney General's earlier advice to agencies concerning CICA. However, the fact remains that Prince George's actively sought relief from the court with knowledge of the possibility that the court might, in its discretion, refrain from specifically requesting this Office's opinion on the matter. In these circumstances, the protester's filing of a suit constituted an election of remedies which bound the protester, even though the consequences of that election may not have been foreseen.

Protest dismissed.

Harry R. Van Cleve
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General Counsel