



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Solon Automated Services, Inc.--Reconsideration

File: B-224776.2

Date: December 8, 1986

DIGEST

A protester has the affirmative duty to notify the General Accounting Office promptly of its failure to receive the agency's administrative report on the protest. Where the protester's counsel was informed that GAO had timely received the report, and advised GAO at that time that he had not yet received the report, this circumstance nevertheless did not mitigate counsel's failure to notify GAO no later than 7 working days after the specified agency report due date of his continued nonreceipt of the report. Prior action dismissing the protest for failure to furnish comments on the report is affirmed.

DECISION

Solon Automated Services, Inc. requests reconsideration of our prior dismissal of the firm's protest against the award of a contract to another firm under solicitation No. N00189-86-R-0406, issued by the Department of the Navy. We dismissed the protest because Solon had failed to respond to the agency's administrative report within the 7-day comment period prescribed by our Bid Protest Regulations. Solon now urges that the dismissal action was improper because it has never received a copy of the agency's report.

We will not reopen the file.

Solon's protest was filed on September 24, 1986, and, by notice of September 25, we acknowledged our receipt of the submission and advised Solon that the Navy was required to file an administrative report in response to the protest. In addition, the acknowledgment notice informed Solon that the due date for receipt of the report was October 31, and, pursuant to our Regulations, 4 C.F.R. § 21.3(e) (1986), expressly cautioned the protester that:

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". . . you are required within 7 working days of receipt of the report to submit written comments or to advise our Office that you wish to have the protest decided on the existing record. . . . Please notify our Office at that time [i.e., October 31] if you do not receive the report since, unless we hear from you within seven working days of our receipt of the report, we will close our file without action."

This Office received the Navy's report as due on October 31. The report clearly indicated that a copy had been sent to Solon's counsel at the correct address. On the following workday, November 3, the General Accounting Office (GAO) attorney handling the case contacted Solon's counsel by telephone regarding certain procedural matters that had become apparent from the report, potentially affecting GAO's continued consideration of the case. Among other things, the Navy's report revealed that, on October 6, Solon had filed suit in federal district court seeking a temporary restraining order (TRO) and a preliminary injunction against further contract performance. The Navy stated that although the TRO had been denied, the court had yet to rule on the preliminary injunction. These facts were material to the case in the procedural sense because our Regulations, 4 C.F.R. § 21.3(f)(11), specifically provide that we will not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction, unless the court requests our decision.

We had received no such request from the court, and Solon's counsel was advised of this provision of our Regulations during the November 3 conversation. Solon's counsel responded at that time that he had not yet received the Navy's report, and asserted that, during the oral hearing, the court had indicated an interest in obtaining an opinion from this Office. Although we believed that the protest was properly dismissable under 4 C.F.R. § 21.3(f)(11), supra, we decided to allow Solon the opportunity to submit its comments on the agency report in the event the court now requested our view.^{1/} In this regard, we assumed that since Solon's counsel was located as well in Washington, D.C., his receipt of the agency's report reasonably should not be delayed more than a day beyond our own. Accordingly, we calculated that the due date for receipt of Solon's comments should be no later than November 13, 7 working days from November 3.

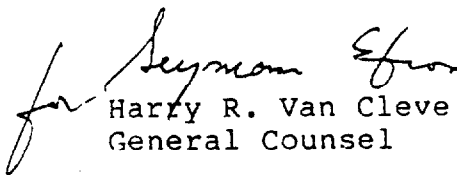
^{1/} Our Office in fact has never received an expression of interest from the court. Therefore, this reason alone precludes our review of the protest. 4 C.F.R. § 21.3(f)(11) (1986).

The GAO attorney attempted to contact Solon's counsel by telephone later on November 3 with this determination and left a message, but Solon's counsel did not return the call. Nothing further was heard from Solon, and, since no comments on the report were filed by November 14, the protest was dismissed. 4 C.F.R. § 21.3(e), supra.

We see no basis to reconsider our dismissal and to reopen the file even though Solon now urges that it has never received the Navy's report. Our notice acknowledging a protest clearly advises the protester of the appropriate due date for submission of the agency's report, the requirement to respond to that report within 7 working days of the protester's receipt, and, significantly, the protester's affirmative duty to notify us promptly if the report is not received on the specified date. Harrell-Patterson Contracting, Inc.--Request for Reconsideration, 65 Comp. Gen. 330 (1986), 86-1 CPD ¶ 180; see also Trans World Communications Inc.--Reconsideration, B-220754.2, Jan. 6, 1986, 86-1 CPD ¶ 12.

Thus, even though Solon stated on November 3 that it had yet to receive the Navy's report, we believe that its affirmative duty extended beyond that time to require further notification to us no later than 7 working days after October 31, the specified due date, that the Navy's report had still not been furnished. See Harrell-Patterson Contracting, Inc.--Request for Reconsideration, supra, 65 Comp. Gen. at 331, 86-1 CPD ¶ 180 at 2. If the firm had done so, we would have taken steps to assure that a copy of the report was furnished, and, accordingly, entertained a request for an extension of the comment period. See Rail Co., B-218623, Aug. 7, 1985, 85-2 CPD ¶ 141 at 2. However, we find no circumstance present here mitigating Solon's failure to contact this Office subsequent to November 3 regarding its continued nonreceipt of the Navy's report.

Our prior dismissal is affirmed.


for Harry R. Van Cleve
General Counsel