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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Office of the Civilian Health and Medical Program of the Uniformed Services; Aetna Government Health Plans, Inc.--Request for Modification of Decision

File: B-254397.11; B-254397.12

Date: May 23, 1994

Thomas P. Humphrey, Esq., Frederick W. Claybrook, Jr., Esq., Robert M. Halperin, Esq., Paul Shnitzer, Esq., and Stephanie B. Renzi, Esq., Crowell & Moring, for Foundation Health Federal Services, Inc.; and James A. Dobkin, Esq., Richard S. Ewing, Esq., and J. Robert Humphries, Esq., Arnold & Porter, for QualMed, Inc., the protesters.
Roger S. Goldman, Esq., David R. Hazelton, Esq., Penelope A. Kilburn, Esq., and Katherine A. Lauer, Esq., Latham & Watkins, for Aetna Government Health Plans, Inc., an interested party.
Kenneth S. Lieb, Esq., Ellen C. Callaway, Esq., and Karl E. Hansen, Esq., Office of the Civilian Health and Medical Program of the Uniformed Services, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that General Accounting Office (GAO) withdraw a finding of entitlement to costs is denied, where the basis for the request, a district court's granting of a motion for voluntary dismissal of a complaint, was not inconsistent with prior GAO decision.

DECISION

The Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) and Aetna Government Health Plans, Inc. request that our Office modify its decision in Foundation Health Fed. Servs., Inc.; QualMed, Inc., B-254397.4 et al., Dec. 20, 1993, 94-1 CPD ¶ 3, in which we sustained the protesters' challenge to the award of a contract to Aetna under request for proposals (RFP) No. MDA906-91-R-0002. In particular, OCHAMPUS and Aetna request that we withdraw our finding that the protesters are entitled to recover the reasonable costs of filing and pursuing their protests.

We sustained the protests because we found that, in evaluating proposals and selecting Aetna for award, OCHAMPUS had failed to follow the RFP evaluation scheme. We recommended that OCHAMPUS revise the RFP to inform offerors of the actual bases for evaluating technical and cost proposals.[1] We did not recommend that the agency terminate Aetna's contract unless, as a result of the evaluation of revised proposals, the agency concluded that it did not represent the best value to the government.

Shortly after our decision was issued, OCHAMPUS exercised the first 1-year option under Aetna's contract. Foundation and QualMed then filed suit in United States District Court for injunctive and declaratory relief to prevent OCHAMPUS from having Aetna perform under the contract. After their motions for a temporary restraining order (TRO) and a preliminary injunction were denied, Foundation and QualMed moved for voluntary dismissal, which the court granted, dismissing the complaint with prejudice on February 25, 1994.

OCHAMPUS and Aetna now contend that the court's dismissal with prejudice constitutes an adjudication on the merits which was inconsistent with our decision. Relying primarily on our decision in SWD Assocs.--Claim for Costs, 68 Comp. Gen. 655 (1989), 89-2 CPD ¶ 206, they argue that we should withdraw the finding that Foundation and QualMed are entitled to the cost of filing and pursuing their protests.[2]

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[1]In the alternative, we recommended that, if the agency elected to proceed with the evaluation as described in the RFP, it should reopen discussions with all competitive range offerors, request revised proposals, and proceed with the source selection process based on appropriate evaluations. The agency decided to revise the RFP rather than opt for this alternative recommendation.

[2]Aetna also requests that we dismiss Foundation's and QualMed's protests and withdraw our decision in its entirety, a request we deny for the same reason we deny the request regarding the award of costs.

Both OCHAMPUS and Aetna also make reference to the regulation under which our Office will dismiss a protest where the matter involved is the subject of court litigation unless the court requests a decision by our Office. 4 C.F.R. § 21.9(a) (1994). That regulation, also refers to dismissal (rather than the withdrawal of a decision), applies only to protests (or requests for reconsideration) that are pending, and generally bars further consideration

(continued...)

Our Office treats a decision by a court of competent jurisdiction as taking precedence over an inconsistent decision of our Office. See Lear Siegler, Inc.--Recon., B-218188.2, June 27, 1985, 85-1 CPD ¶ 733. In SWD Assocs.--Claim for Costs, supra, we determined that our prior decision to award costs to the protester should be withdrawn, because it was based on our conclusion that a violation of procurement regulations had occurred, and the district court in which the protester subsequently filed suit had explicitly rejected that conclusion.

Here, in contrast, the district court merely granted the motion by Foundation and QualMed for voluntary dismissal; the court never made findings of fact or reached conclusions of law regarding the propriety of the agency's evaluation of proposals. The court's only findings were the determinations that there was "little likelihood of success on appeal" and that the absence of a TRO would not cause the plaintiffs irreparable harm. Neither those determinations nor any other statement by the district court suggested that the court disagreed with any aspect of our decision--the substantive determination that OCHAMPUS had failed to follow the solicitation evaluation scheme, the recommendation, or the declaration of entitlement to costs. Because there is no inconsistency between the district court's action in the civil case (including its dismissal of the complaint) and our decision sustaining the protests, we have no basis to modify that decision or withdraw our award of costs.[3]

The request that we modify our decision is denied.

Robert P. Murphy
Acting General Counsel

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[2](...continued)
of those cases by our Office; it is inapplicable to protests, such as Foundation's and QualMed's, where our Office has already issued a decision and no request for reconsideration is pending. See Techniarts Eng'g--Recon., B-238520.7, June 10, 1992, 92-1 CPD ¶ 504.

[3]Cf. Wright & Miller, Federal Practice and Procedure: Civil § 2373 ("Even though [a] dismissal is with prejudice, if no facts have been adjudicated, as when the dismissal is for want of prosecution, the judgment, though a bar to a second suit on the same claim, does not establish any facts to which the doctrine of collateral estoppel can be applied in later litigation on a different claim.").