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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Spire Corporation--Reconsideration

File: B-258267.2

Date: June 13, 1995

DECISION

Spire Corporation requests reconsideration of our decision in Spire Corp., B-258267, Dec. 21, 1994, 94-2 CPD ¶ 257, in which we dismissed its protest against the award of a cooperative research and development agreement (CRADA) to Implant Sciences Corporation by the Department of the Navy, Naval Research Laboratory.

We affirm the dismissal.

Spire's protest centered around the use of an ion implanter owned by the Navy. Under a 1988 cooperative agreement executed under the authority of the Federal Grant and Cooperative Agreement Act (FGCA), 31 U.S.C. § 6301 et seq. (1988), Spire had been granted the use of the ion implanter for a period of 5 years. By letter dated August 12, 1994, the Navy directed Spire to shut down operation of the ion implanter and prepare it for shipment. This letter explained that the Navy had entered into a new cooperative agreement with Implant Sciences, but did not state the statutory basis for execution of the agreement. By letter dated August 23, Spire protested the Navy's actions to our Office. Spire's letter of protest alleged that:

> "Spire Corporation . . . hereby protests the award of a cooperative agreement by the . . . Navy to Implant Sciences . . . for research related to ion implantation technology as a violation of the Competition in Contracting Act and the [FGCA]."

By letter dated August 29, the Navy advised Spire that the CRADA entered into with Implant Sciences was different from the cooperative agreement previously entered into between the Navy and Spire in that it had been executed pursuant to the authority of the Federal Technology Transfer Act (FTTA), 15 U.S.C. § 3710a (1988), rather than the FGCA. Spire did not supplement its initial protest to allege that the Navy had violated the FTTA within 10 working days of its becoming aware of this fact; instead, Spire alleged for the first time in its comments responding to the agency's administrative report that the Navy's actions were in violation of the FTTA.

We dismissed Spire's protest against the alleged violation of the FTTA as untimely, noting that the terms of that statute, rather than the FGCA, would govern whether the Navy's actions were improper. We specifically concluded that Spire's initial general protest--alleging a violation of the FGCA--was inadequate to raise the issue that ultimately would be dispositive of the matter.

In its reconsideration request, Spire first maintains that its allegation that the agency improperly entered into a CRADA under the authority of the FTTA was merely an extension of its earlier argument that the agency's actions were improper under the FGCA. Spire states that, since its subsequent allegation was merely further support for its initial contention, it was immaterial that the subsequent allegation did not independently satisfy our timeliness requirements. In support of its position, Spire directs our attention to our decision in 841 Assocs., L.P.; Curtis Ctr., Ltd. Partnership, B-257863; B-257863.2, Nov. 17, 1994, 94-2 CPD ¶ 193, with which, it claims, our original decision in this case is inconsistent.

As we explained in our original decision, Spire's initial protest allegation--that the Navy violated the FGCA--was distinct from its subsequent allegation that the Navy's actions violated the FTTA. The FGCA sets forth only general parameters for the use of cooperative agreements, whereas the FTTA provides specific requirements for using CRADAs and defines them as different from cooperative agreements as that term is used in the FGCA. See 15 U.S.C. § 3710a(d)(1). Since the Navy's actions were taken under the authority of the FTTA, the only relevant consideration would be whether the award was consistent with the requirements of the FTTA, not the FGCA. It follows that a protest alleging a violation of the FGCA is wholly distinct from one alleging a violation of the FTTA. Accordingly, we do not agree that Spire's complaint regarding compliance with the FTTA was simply an extension of the argument previously presented. As correctly stated in 841 Assocs., L.P.; Curtis Ctr. Ltd. Partnership, supra, "[w]here the later [protest] bases present new and independent grounds for protest, they must independently satisfy our timeliness requirements." Thus, our dismissal was consistent, not inconsistent, with the cited decision.

Spire also maintains that our original decision ignored its allegation that the Navy's actions violated the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304 et seq. (1994). CRADAs executed under the authority of the FTTA, by definition, are not procurements. The FTTA specifically provides that "the term 'cooperative research and

development agreement' [CRADA] . . . does not include procurement contract[s]. . . ." 15 U.S.C. § 3710a(d)(1). The requirements of CICA, on the other hand, relate solely to an agency's actions when engaged in the procurement of property or services through contracting. 10 U.S.C. § 2304. Thus, the allegation that the Navy had violated CICA could have merit only if the Navy should have awarded a procurement contract instead of the CRADA. See generally Sprint Communications Co., L.P., B-256586; B-256586.2, May 9, 1994, 94-1 CPD ¶ 300. This in turn would depend upon whether this particular CRADA award was consistent with the FTTA. As indicated above, that specific basis for protest was not raised in a timely fashion. Accordingly, there was no basis for us to consider the allegation that CICA had been violated.

The dismissal is affirmed.

Ronald Berger

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