



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Colleague Consulting, LLC--Reconsideration

File: B-413156.18

Date: September 12, 2016

Lawrence J. Sklute, Esq., Sklute & Associates, for the requester.
Kristen M. Nowadly, Esq., and Christopher Murphy, Esq., General Services Administration, for the agency.
Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of a prior decision dismissing a protest because of a pending judicial proceeding is denied where the requester does not show that the prior decision contained an error of law that warrants reversal or modification of the decision.

DECISION

Colleague Consulting, LLC (CCL), a small business located in Greenbelt, Maryland, requests that we reconsider our dismissal of its protest challenging the elimination of its proposal from the competition by the U.S. General Services Administration (GSA) under request for proposals (RFP) No. GS02Q15CRR0002. See The Airbinger Company et al., B-413156.4 et al., July 19, 2016 (unpublished decision). Our Office dismissed CCL's protest because another unsuccessful offeror filed a complaint in the U.S. Court of Federal Claims (COFC). CCL alleges that our dismissal was inconsistent with the applicable Bid Protest Regulation, 4 C.F.R. § 21.11(b), governing the dismissal of a protest when there is a pending judicial proceeding relating to the same matter.

We deny the request for reconsideration.

On May 25, 2016, CCL filed a protest with our Office challenging the agency's elimination of its proposal as technically unacceptable. On July 8, another

unsuccessful offeror, for the same RFP pool number,¹ withdrew its protest before our Office in order to file a protest with COFC. That offeror's protest challenged the agency's failure to conduct discussions. After receiving notice of the COFC protest, we dismissed CCL's protest since the disposition of the COFC case could render a decision by our Office on CCL's protest academic.

CCL primarily argues that 4 C.F.R. § 21.11(b) only permits dismissal of a protest before our Office where a case pending before a court involves the "same subject matter." Request for Reconsideration at 3. CCL asserts that its protest involved a different subject matter than the protest before COFC, and therefore our Office erred in dismissing CCL's protest.²

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. §§ 21.14(a), (c). Here, we find that CCL has failed to demonstrate any error of law or fact in our decision.

In this regard, 4 C.F.R. § 21.11(b) provides:

GAO will dismiss any case where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction. GAO may, at the request of a court, issue an advisory opinion on a bid protest issue that is before the court.

Our Office's longstanding case law has consistently held that this regulation necessitates the dismissal of a protest regardless of whether the protest issues are identical, so long as the disposition of the case pending before a court could render the protest before our Office academic. See Schuerman Dev. Co., B-238464.3,

¹ The RFP was divided into separate award pools, with each pool corresponding to certain North American Industry Classification System codes. RFP § H.4.1.

² While we do not address in detail all of the arguments raised by CCL in its request for reconsideration, we have reviewed each, and conclude that none provides a basis to grant the request. For instance, CCL argues that our interpretation of 4 C.F.R. § 21.11 violates the Administrative Procedures Act (APA), 5 U.S.C. § 553, by creating a new regulation without adhering to the APA's notice and comment requirements. Request for Reconsideration at 4. Even if our Office was subject to the APA, however, this argument is without merit because our Office's interpretation of 4 C.F.R. § 21.11 is consistent with the language of the regulation. In this regard, we note that the Supreme Court has held that an agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461(1997).

Oct. 3, 1991, 91-2 CPD ¶ 286 at 2-3; Geronimo Serv. Co.--Recon., B-242331.3, Mar. 22, 1991, 91-1 CPD ¶ 321 at 2-3; Harrington, Moran, Barksdale, Inc., B-401934.2, B-401934.3, Sept. 10, 2010, 2010 CPD ¶ 231 at 2 n.2.

Our interpretation is entirely consistent with the language of the regulation. The provision at issue does not specify that the two cases involve identical issues, but instead generally provides that the “matter involved is the subject of litigation before . . . a court of competent jurisdiction.” 4 C.F.R. § 21.11. While the word “matter” is not defined, there is nothing in the language of the regulation, or elsewhere, to suggest that it is meant to apply to the exact narrow issue involved in the protest before our Office. Instead, the matter before the court can properly be characterized as a dispute over which companies should have remained in the competition under the GSA solicitation. While that matter remains before the court, GAO will not also decide the question.

The request for reconsideration is denied.

Susan A. Poling
General Counsel