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DECISION



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

FILE: B-202287.2

DATE: August 14, 1981

MATTER OF: Paragon Energy Corporation

DIGEST:

Protester was not competitively prejudiced by award under resolicitation of procurement which was subject of court action since: (1) protester--complainant in court action recently dismissed without prejudice--was aware that court-approved stipulation prohibiting award under resolicitation until "10 days after final [court] judgment" might be canceled by court on application of intervening party as happened here; and (2) resolicitation directed all bidders to bid on basis of same 90-day bid acceptance period within which award was made.

The cancellation of United States Army Corps of Engineers invitation for bids No. 81-7 was originally protested to our Office by the Paragon Energy Corporation (Paragon). Paragon maintained that it should receive award of the contract on the basis of its submitted bid. After Paragon advised us that it had filed a complaint regarding the matter in the United States District Court for the Western District of Texas, we dismissed the protest in our decision in Paragon Energy Corporation, B-202287, April 7, 1981, 81-1 CPD 264. We dismissed the protest because it is our policy not to decide matters where the material issues involved are before a court of competent jurisdiction unless the court expects, requests, or otherwise expresses an interest in receiving our decision. 4 C.F.R. § 21.10 (1981). The court has expressed no interest in our views.

[Protest of IFB Cancellation and Resolicitation]

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Paragon has now lodged a protest with our Office against an award to Farrell Construction Co., Inc., on the resolicitation of the procurement in question. Paragon contends that its suit in the district court is still pending and alleges that the invitation for bids on the resolicitation contained a condition providing that an "award could not and would not be made until some point in time in 1982." Paragon demands that the needs of the agency be resolicited again "on a basis where the conditions of the bid will not be changed after bid opening."

We have been advised that on April 2, 1981, the protester and the Government entered into a court-approved stipulation, the substance of which was incorporated into the resolicitation on April 9, 1981, and which reads as follows:

"A lawsuit has been filed in the U.S. District Court in El Paso, Texas, protesting the resolicitation * * *. No award will be made until 10 days after final judgment has been rendered in this lawsuit.

"It is anticipated that bids for this readvertisement will be opened on 5 May 1981. The anticipated date for court hearing will be latter part of May or early June 1981.

"Bids will require a 90-day acceptance period."

After bids were opened, the court, by Order of May 29, 1981, upon "Intervenors' motions," vacated the April 2 stipulation on the theory that continuing the stipulation "would substantially achieve the same result as a preliminary injunction" which the court found "would not be appropriate in this case." Immediately, upon the dissolution of this stipulation, the Army awarded the contract in question.

The Army has further informed us that on July 10, 1981, the court heard "Paragon's Motion to Clarify the [court's May 29] Order * * * and the Government's Motion for Summary Judgment" and that the court stated

"an Order would be issued regarding the motions in the near future." We are further advised that the court recently dismissed Paragon's complaint "without prejudice."

It is apparent that the purpose of the above stipulation was to afford Paragon 10 days within which to contemplate a future course of action in this matter if a final judgment adverse to its interest was issued by the court. Paragon was fully aware that this stipulation might be canceled by the court upon application, for example, of an intervening party as was the case here. Moreover, the above-quoted resolicitation provision specifically directed all bidders to bid on the basis of the same 90-day bid acceptance period; award, in fact, was made during this bid acceptance period. In these circumstances, we conclude that Paragon was not competitively prejudiced by the award.

Protest denied.



Acting Comptroller General
of the United States