

DECISION



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

60164

FILE: B-184379

DATE: November 14, 1975

MATTER OF: Perth Amboy Drydock Company

97734

DIGEST:

Upon request for reconsideration, prior decision declining to consider protest is affirmed since dismissal by District Court of complaint requesting both preliminary injunction pending resolution of protest filed with General Accounting Office and permanent injunctive relief that would compel Military Sealift Command, Atlantic (Department of the Navy), to award contract to protester was, according to Federal Rule of Civil Procedures 41(b), final adjudication on the merits on permanent injunctive relief sought and all issues in controversy.

Reconsideration of our decision, Perth Amboy Drydock Company, B-184379, August 18, 1975, has been requested by the protester.

The decision involved the contention that the Military Sealift Command, Atlantic (Department of the Navy), improperly canceled invitation for bids (IFB) No. N62381-75-B-0037 (under which Perth Amboy allegedly submitted the lowest bid) and resolicited the work called for under the canceled IFB. We held that since Perth Amboy requested relief before the United States District Court for the Eastern District of New York, in the form of a permanent injunction compelling the Department of the Navy to enter into the contract at issue and a preliminary injunction pending a ruling by this Office on its protest filed July 2, 1975, the Court's dismissal of the entire complaint had the effect of a final adjudication on the merits on the permanent injunctive relief sought and on all issues in controversy, citing 51 Comp. Gen. 37 (1971).

In requesting reconsideration, Perth Amboy argues that since the issues in its suit before the Court for injunctive relief and those in a bid protest to the Comptroller General are not the same, our decision is erroneous. In this connection, it is argued that in a suit for injunctive relief, while the Court must consider whether the contracting officer acted in consonance with the Armed Services Procurement Regulation, the standard of proof the plaintiff must meet

is much more stringent than that necessary to sustain a protest. Thus, it is argued that a ruling on the merits of a request for injunctive relief does not foreclose the Comptroller General from ruling on the propriety of bidding procedures followed by the contracting officer. Furthermore, it is contended that the reference to "merits" in section 41(b) of the Federal Rule of Civil Procedures, cited in our decision, is merely procedural to permit the plaintiff to immediately appeal an adverse decision.

As stated in our prior decision, Federal Rule of Civil Procedures 41(b), provides as follows:

"* * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

By order dated July 29, 1975, the court denied Perth Amboy's request for injunctive relief, specifying only that it was without prejudice to any right or claim the plaintiff may have for damages. Furthermore, it is clear from the transcript of the court proceedings that the court considered the merits of the protester's complaint and concluded that it was "unable to say that there was no rational basis for the contracting officer's decision to reject all bids and readvertise" or that the "procurement procedure involved a clear and prejudicial violation of applicable statutes or regulations * * *."

Moreover, in decisions interpreting the effect of the above-quoted rule the courts have held that the dismissal of a complaint is conclusive not only as to matters which were decided, but also as to all matters which might have been decided. Glick v. Ballantine Products, Inc., 397 F.2d 590 (1968); Englehardt v. Bell & Howell Co., 327 F.2d 30 (1964). Consequently, it is our view that the dismissal of the complaint operated as a full adjudication upon the merits. This Office must therefore honor the court's decision. 51 Comp. Gen. 37 (1971).

Decisions of the Comptroller General are subject to review when errors of law or fact are alleged and demonstrated. GAO Bid Protest Procedures § 20.9, 40 Fed. Reg. 17979 (1975). Since it has not been

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demonstrated that our prior decision was erroneous as to fact or law, it is affirmed.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States