

DECISION



w/ops PLP D
120162
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-208348

DATE: December 20, 1982

MATTER OF: Midwest Holding Corporation

DIGEST:

Dismissal with prejudice of a complaint filed in a U.S. district court constitutes a final adjudication on the merits, barring further action by GAO on a protest involving the same issues.

Midwest Holding Corporation protests the award of a contract to Hussmann Corporation under invitation for bids (IFB) No. F41689-82-B-1015 issued by the 3303rd Contracting Squadron, Randolph Air Force Base, Texas. The contract was for the purchase of refrigeration equipment to be installed in a new commissary under construction at Ramstein Air Base in Germany. Midwest contends that, for a number of reasons, Hussmann's bid should have been rejected as nonresponsive. Because the issues in this protest were the subject of a judicial decision, the protest is dismissed.

On August 13, 1982, Midwest filed a complaint in the United States District Court for the Eastern District of Kentucky, Midwest Holding Corp. v. United States, No. 82-40, requesting a temporary restraining order and a preliminary injunction prohibiting further performance of the contract until the court acted on Midwest's request for a permanent injunction ending all contract performance and a judgment declaring the contract award invalid. A motion for preliminary injunction also was filed on August 16 requesting that the court stay contract performance while the action before the court was pending. The basis for both the complaint and the motion was that the award to Hussmann was improper because, in Midwest's view, the bid submitted by Hussmann was nonresponsive. The reasons cited for this belief were the same as those cited in Midwest's protest to this Office.

During the evidentiary hearing into the allegations stated in the complaint, the court was advised of the pendency of this protest. At the conclusion of the hearing, the judge took the case under advisement and issued an order advising our Office to expedite our consideration of the protest and to provide the court with a copy of our decision. The Air Force, however, which on July 26 was requested to submit a report on the protest, did not furnish its report until October 8, and the protester's comments on the report were not filed until October 20. Subsequently, and notwithstanding his expressed interest in our decision, the judge issued an order dated November 5 which "overruled" Midwest's motion for a preliminary injunction and dismissed the complaint with prejudice. The order stated that it was a final and appealable order.

The dismissal with prejudice by the district court constitutes a final adjudication on the merits of this matter, Fed. R. Civ. P. 41(b), barring further action by this Office. Indiana Bell Telephone Co., B-205291, May 18, 1982, 82-1 CPD 476. See 4 C.F.R. § 21.10 (1982). In reaching this conclusion, we are aware of Midwest's view that the court's decision is erroneous and of its filing of a motion for a new trial. Neither of these factors changes the legal effect of the court's dismissal of Midwest's complaint. If the court should grant Midwest's request for a new trial and express an interest in a decision from our Office, the matter can be reopened.

The protest is dismissed.

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel