DECISION

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

40366

FILE: B-178872 DATE: January 22, 1974

MATTER OF: Military Base Management of New Jersey, Incorporated

DIGEST: Stipulation of dismissal with prejudice, signed by both parties and approved by court, of protestant's complaint for injunctive and declaratory relief pending resolution of protest filed with GAO, was according to cited court decisions a final adjudication on the merits precluding GAO's consideration of protest.

On March 22, 1973, request for proposals (RFP) No. N00200-73-R-0017, was issued by the Supply Department, Naval Station, Key West, Florida. The RFP solicited proposals for the furnishing of mess attendant services for the period July 1, 1973 through June 30, 1974, with the Government reserving the right to renew the contract for an additional two years.

On April 25, 1973, eleven firms including Ira Gelber Food Services, Incorporated (Ira Gelber) and Military Base Management of New Jersey (MBM) Incorporated, submitted proposals which were then evaluated in accordance with the terms of the RFP. On the basis of his evaluation, the contracting officer determined that Ira Gelber Food Services, Incorporated, the low offeror, provided adequate man-hours and that its total net price would support the basic labor expenses. As a result thereof, contract N00200-73-C-0034 was awarded to the firm on June 8, 1973. In a telefax dated June 11, 1973, MBM protested the award of the contract to Ira Gelber on the grounds that either the Government's estimated required man-hours were reduced, or the criteria for evaluation of offers was changed by the Government, and this information was not furnished to other offerors in the competitive range as required by Armed Services Procurement Regulation (ASPR) 3-805.4(c). MBM subsequently informed our Office that while it no longer claimed that the criteria were changed, it still alleged that the price per man-hour used in the evaluation did not contain all of the cost elements specified in Section D - "Evaluation Factors For Award," paragraph (b)(2) of the RFP.

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Subsequent to the filing of the instant protest with our Office, MBM filed an action in the United States District Court for the District of Columbia, Civil Action No. 1317-73, on June 29, 1973 requesting, inter alia, that (1) the award of contract N00200-73-C-0034 to Ira Gelber be declared illegal and the contract be declared null and void; and (2) that pending a decision by the Court on the merits of MBM's complaint, the Court temporarily restrain and preliminarily enjoin the Secretary of the Navy from taking any further action pursuant to or in furtherance of the contract awarded to Ira Gelber.

The application for a temporary restraining order was granted on June 29, 1973 and the plaintiff's motion for a preliminary injunction was set for hearing on July 9, 1973. However, on July 9, 1973, MBM filed a stipulation of dismissal, signed by itself and the Department of the Navy through respective counsel and approved by the Court, in which they agreed that the complaint for injunctive and declaratory relief be dismissed with prejudice. (Underscoring supplied.)

The dismissal of an action with prejudice acts as a final judgment on the merits (D.A.C. Uranium Co. v. Benton, 149 F. Supp. 667 (D. Colo. 1956); Cleveland v. Higgins, 148 F. 2d 722 (2d Cir. (1945)), and operates as a complete adjudication of the issues presented by the pleadings and bars further action between the parties. Glick v. Ballentine Produce, Inc., 397 F. 2d 590 (8th Cir. 1968). A dismissal with prejudice which arises out of and is based upon an agreement of the parties is an adjudication of matters contemplated in the agreement, and these matters are as fully settled as if final judgment had affirmatively disposed of them, and such judgment acts as a bar to further proceedings. Traveler's Insurance Co. v. United States, 283 F. Supp. 14 (S.D. Tex. 1968). Similarly, a dismissal with prejudice is as conclusive of the rights of the parties as an adverse judgment after trial, being conclusive not only as to the matters which were decided, but also res judicata as to all questions which might have been litigated in suit. Englehardt v. Bell & Howell Co., 327 F. 2d 30 (8th Cir. 1964); Esquire, Inc. v. Varga Enterprises, 185 F. 2d 14 (7th Cir. 1950).

Thus, the stipulation of the parties dismissing MBM's complaint with prejudice was, in effect, a final adjudication on the merits of its prayer for permanent injunctive and declaratory relief, which would have required the court to decide the material issues involved in the instant protest. 51 Comp. Gen. 37 (1971). In B-171917,

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May 4, 1971, we dismissed a protest without deciding the merits because the material allegations had been considered and rejected on the merits by a court of competent jurisdiction.

In view of the above, we are closing our file on MBM's protest without further action.

R. F. Keller

Deputy Comptroller General
of the United States