



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bay Tankers, Inc.--Request for Reconsideration

File: B-224480.10

Date: August 19, 1988

DIGEST

1. Prior decision is affirmed where protester fails to show that decision was based on error of fact or law.
2. Where government-provided training is reasonably necessary to assure safe and efficient operation of cable ships, agency determination of the precise amount of training required for that purpose will not be questioned where the record does not show that the determination was made in a manner tantamount to fraud or bad faith.
3. Agency properly excluded from in-house cost estimate the cost of support personnel whose positions would not be eliminated if a contract were awarded; cost comparison procedures require inclusion in estimate only of costs for positions that would be eliminated.

DECISION

Bay Tankers, Inc., requests reconsideration of our decision in Bay Tankers, Inc.; et al., B-224480.6, et al., Mar. 25, 1988, 88-1 CPD ¶ 306, wherein we denied protests by Bay Tankers and Transoceanic Cable Ship Company against the cost comparison conducted by the Military Sealift Command (MSC) under request for proposals No. N00033-86-R-4006. MSC determined pursuant to Office of Management and Budget (OMB) Circular A-76 that MSC can operate and maintain five cable ships at a lower cost than Bay Tankers.

We affirm the decision.

OVERHEAD

In its original protest to our Office, Bay Tankers challenged MSC's estimate of the cost of overhead attributable

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to in-house performance. MSC reported that it included the cost of support positions in its estimate of overhead only if the position would be eliminated by contracting out. Bay Tankers argued, however, that MSC had understated overhead costs by \$2,010,973, on the apparent basis that some share of the costs of MSC shore-based personnel should have been included in the cost of in-house performance. We rejected Bay Tankers' argument, finding that MSC's approach was consistent with Circular A-76, which provides that an agency need not include in the cost of in-house performance any overhead expenses reflecting support from outside the function under study where contracting out would not eliminate at least one position in the outside supporting office.

In its request for reconsideration, Bay Tankers reiterates its claim of a \$2,010,973 understatement of overhead costs, specifically arguing that \$1,558,869 of the understatement is attributable to an alleged failure by MSC to account for the cost of administering contracts for industrial assistance to be provided by shipyards and other entities to the operator of the cable ships. As in its original protest, Bay Tankers is asking our Office to allocate part of the cost of a labor pool to one of the functions performed by that pool. Again, however, Bay Tankers' approach is inconsistent with the provisions of OMB Circular A-76 with respect to calculating overhead costs; the protester fails to identify any positions in outside supporting offices that would be eliminated by contracting out and that MSC has failed to cost. Likewise, nothing in the most efficient organization study identifies positions involved with contract administration that would be eliminated by contracting out and that MSC has failed to cost. This argument thus does not warrant reversing our decision.

COST COMPARISON GUIDELINES

Bay Tankers questions whether MSC's cost comparison was consistent with the provisions of the National Defense Authorization Act for Fiscal Year 1987 (Act), Pub. L. No. 99-661, 100 Stat. 3816, 3977, requiring the Secretary of Defense to ensure that costs considered in cost comparisons are "realistic and fair." Neither the Act nor its legislative history, however, sets forth specific and definite guidelines for calculating costs. On the contrary, the Act itself assigns primary responsibility for assuring costs are fair and reasonable to the Secretary of Defense. See S. Rep. No. 331, 99th Cong., 2d Sess. 278 (1986); H.R. Rep. No. 1001, 99th Cong., 2d Sess. 527 (1986). As we indicated in our prior decision, our review is limited to examining whether the contracting agency followed established cost comparison procedures; we will not question the procedures

themselves, which are matters of policy within the province of the executive branch.

TRAINING

In its original protest, Bay Tankers challenged MSC's decision to require a comprehensive, uniform training program (rather than an amount of training based on each offeror's circumstances), to be provided by MSC for contractor personnel, and to include the cost of that program in the cost comparison as a one-time cost of conversion to contract performance. In order to assure an orderly and efficient transition to contract performance, the solicitation provided for a training program emphasizing essential procedures for the operation and maintenance of cable machinery and of the propulsion electrical distribution systems, and including classroom indoctrination, demonstrations, and ongoing at-sea familiarization programs. We found Bay Tankers' protest against consideration of the training costs to be untimely because it had failed to protest consideration of the training costs prior to the next closing date for receipt of proposals after issuance of the amendment adding the program, as required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988). In addition, commenting on the merits, we noted that there was nothing unreasonable in MSC's determination that its minimum needs encompassed a uniform, comprehensive training and familiarization program so as to assure that all crew members, including experienced crew members, had the knowledge and skills deemed necessary to perform.

In its request for reconsideration, Bay Tankers challenges the amount included in the cost comparison for the government-provided training and familiarization program (approximately \$6,361,550), arguing that it is unreasonable when compared to the agency's estimate of the cable ships' total operating cost (\$64,726,797 including conversion costs).^{1/}


We generally consider the determination of the extent of the government-provided training required to accomplish the performance work statement (PWS) to be a management decision involving subjective judgments that ordinarily are inappropriate for our review. It is our view that where government-provided training is reasonably justified as necessary to accomplish the PWS, the agency should be free

^{1/} The \$6,361,550 cited by Bay Tankers is the cost of acquiring training from commercial contractors. It does not include the cost of MSC Mariners participating in providing the training.

to make its own management decisions on the precise amount of training that is required so long as they are not made in a manner tantamount to fraud or bad faith (and so long as the subsequent cost comparison is performed in accordance with the established procedures). Cf. Bay Tankers, Inc., B-227965.3, Nov. 23, 1987, 87-2 CPD ¶ 500 (agency determination of staffing level required to accomplish PWS is largely a management decision).

In rejecting Bay Tankers' agency-level challenge to the cost comparison, the appeals board cited the complexity of cable-laying operations, the unique character of the cable ships' military mission, and the critical, essential nature of that mission as justification for requiring an extensive training and familiarization program. Bay Tankers neither demonstrates the fallacy of the agency's rationale for the training program nor attempts to detail a more limited program that would adequately satisfy the agency's minimum need to assure an efficient transition. Therefore, given the sophisticated character and importance of the work performed by the cable ships, and our view (expressed in our prior decision) that this type of training is justified here, we find no basis to conclude that it is tantamount to fraud or bad faith to require a certain level of government-provided training merely because the cost of the training amounts to approximately 10 percent of the total contract cost.

Bay Tankers has failed to demonstrate that our prior decision was factually or legally erroneous. Accordingly, our decision is affirmed.


James F. Hinchman
General Counsel