

Memorandum

October 15, 1976

TO : Director, LCD

FROM : *M. Fowler*
General Counsel - Paul G. DemblingSUBJECT: Recoupment of Transportation Costs Incurred by the
United States Incident to Foreign Military Sales
B-165731

Allen Sumner, Assistant Director, LCD, requested our advice with regard to the recoupment of transportation costs incurred by the United States incident to Foreign Military Sales (FMS). In the course of an audit, it was determined that substantial transportation costs are being entirely overlooked and not recovered prior to the "closing" of Foreign Military Sales cases by the Department of Defense (DOD) and Mr. Sumner asked whether DOD may be directed to reopen "closed" cases and attempt to recover the deficiencies caused by the omissions up to and including actual costs.

Moreover, it has been determined that the uniform standard DOD percentage rates applied to the billing price of the material shipped to recover the costs of the transportation service do not in all cases recover the actual identifiable costs of the transportation service provided. Accordingly, Mr. Sumner asked whether DOD may reopen a case to recover actual identifiable transportation costs not fully recouped by the use of the uniform standard DOD percentage rate.

We believe that where the final cost of transportation services incident to a foreign military sale are not accurately reflected in billing because of inadvertent omissions, miscalculation or otherwise, the contract, in providing for the recovery of actual costs, provides a sufficient basis to attempt to recover those costs which were clearly contemplated by both parties for inclusion in the contract, provided the attempt is made within a reasonable time. Also, where the final cost of transportation services incident to a Foreign Military Sale are undercharged due to the use of a standard uniform percentage

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rate, the language of the contract provides a sufficient basis to attempt the retroactive recovery of undercharges on either open or closed cases.

Attached is a more detailed analysis.

Attachment

cc: Mr. Barclay, OGC
Mr. Sumner, LCD
Mr. Smith, FGMS
Mr. Melici, Philadelphia R.O.
Mr. Rogers, New York R.O.
Mr. Heller, Cincinnati R.O.
Mr. Newman, ID
Mr. Kepplinger, OGC
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ATTACHMENT

Recoupment of Transportation Costs
Incurred by the United States
Incident to Foreign Military Sales

I. DIGEST:

Cost of transportation services incident to foreign military sales and governed by DOD Form 1513, providing that foreign government agrees to reimburse U.S. Government if final cost exceeds amount estimated in sales agreement, have not always been recovered due to error, miscalculation, or use of uniform percentage rate. Thus, DOD Form 1513 provides sufficient basis to attempt to recover those costs which were contemplated for inclusion in the contract provided attempt made within reasonable time.

II. BACKGROUND:

Pursuant to the Foreign Military Sales Act of 1968, 22 U.S.C. §2751 et seq., the United States carries on a reimbursable military equipment export program to allied and friendly nations. H.R. Rep. No. 1641, 90th Cong., 2d Sess. 3, 5, July 3, 1968; S. Rep. No. 1632, 90th Cong., 2d Sess. 1, October 9, 1968. Pricing guidelines for sales of defense articles and defense services to foreign countries and international organizations are contained in DOD Instruction 2140.1, June 17, 1975. This Instruction states:

"A. Reimbursements to DoD Components pursuant to terms of the agreements for sales of Defense articles and Defense services (including training) will be established on a basis to recoup DoD costs as identified in this Instruction, plus a reasonable contribution to sunk investment cost.

"B. In general terms, this means that pricing policies and procedures provide for

charging for significant identifiable Department of Defense direct and indirect costs, including those costs referred to hereinafter as an 'administrative charge' for use of the DoD logistics system (see IX, below).

"C. Ordinarily, in order to assure that all costs are recovered, prices of Defense articles and Defense services will be identified to the elements of cost provided in DD Form 1513, which will be utilized in all sales pursuant to the Act, unless a waiver of this requirement is obtained from the Assistant Secretary of Defense (International Security Affairs)."

As per DoD Instruction 2140.1, the instrument governing the relationship between the United States Government and the purchasing entity is DoD Form 1513, "Offer and Acceptance." This Form states that the United States Government extends an offer to sell specified defense articles or services at an estimated total cost and contains appropriate space for the acceptance of the offer. On the reverse of the Form, the conditions of sale are enumerated which, insofar as pertinent here, read as follows:

"B. THE PURCHASER:

* * * * *

"5. Shall reimburse the USG if the final cost to the USG exceeds the amounts estimated in this sales agreement."

Regarding the costs in question here, namely, transportation costs, DoD Instruction 2140.1 employs a system of "uniform standard DoD percentage rates" for charging accessorial costs. Thus, for example, a percentage rate of 3.0 will be applied against the billing price of the material shipped to recover the cost of CONUS (Continental United States) transportation; a percentage rate of 4.0 is required for ocean transportation from CONUS to Alaska, Hawaii, Europe, Latin America and Mediterranean ports; a 6 percent rate applies to ocean transportation to Newfoundland, Labrador, Thule, Iceland, South America, etc. However, these rates are not to be:

" * * * * arbitrarily applied to excess items or to single items having a unit billing price of \$10,000 or over. Instead, actual or estimated costs will be used when determination is made by the supplying agency that a more equitable charge will result."
DoD Instruction 2140.1, June 17, 1975,
Section VIII at 11.

Upon the acceptance of the DoD Form 1513, the purchasing entity will return the properly executed original and copies to the Military Department making the offer. The Military Department involved performs all the necessary contracting functions to secure the sale items. Upon acquisition of the sale items, they are delivered to the point of delivery specified as per the condition of sale, paragraph B2, on the reverse of DoD Form 1513. Once delivery is effected, the procuring Military Department notifies its billing office responsible for foreign military sales which then makes any necessary adjustment in the total estimated cost and prepares final accounting statements (DoD Form 645) to be submitted to the purchasing entity. It is at this point that DOD considers the case "closed."

During the course of your work in this area, you have reported numerous examples of undercharges and omissions for transportation services. For example, it has been brought to our attention that the billing system has in at least one case failed to pick up transportation costs for shipments made from one overseas area to another overseas area. In the Jordanian Case ULM, forty M-125 mortar carriers were shipped from Bremerhaven, Germany, to Aqaba, Jordan, on January 6, 1975, aboard the Military Sealift Command (MSC) contracted vessel, the Greenport. Until November 21, 1975, no transportation charges, estimated by our Logcom staff to be in the neighborhood of \$600,000, had been billed, although, upon notification by our Logcom staff of the failure of the billing system to pick-up and bill those costs, the United States Army Tank Command, Warren, Michigan, agreed to take the necessary action to recover the costs. Similarly, transportation charges were missed in the Israeli case VZK as a result of an amendment to the basic contract altering the delivery terms from F.O.B. origin to F.O.B. vessel. Since the amendment was not reflected

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in the billing or supply transaction documents, no CONUS transportation costs or CONUS port handling costs would have been billed to Israel had the discrepancy not been detected by our LogCom staff. Upon notification, TACOM personnel gave assurances that the appropriate charges would be billed to Israel.

In light of the foregoing information, the following two questions have been submitted for our consideration.

Question 1: In the event that transportation charges have been inadvertently omitted during the billing process, may the Department of Defense (DoD), subsequent to a closing, reopen the case and attempt to recover additional payments?

DISCUSSION:

Generally, attempts to recover omitted costs should be made. We have consistently advised that where reimbursement of the costs in question is in accord with the intention of the contracting parties as expressed in the terms of the contract, an attempt should be made to recover unbilled costs for services provided pursuant to the governing contract. In B-168707-O.M., September 28, 1973, we were asked to resolve the following question:

"Does the completion of work and the closing of an individual DoD Form 1513 preclude the billing and collection of additional charges for articles and services listed on that Form 1513 when such additional charges are discovered after the closing?"

In response, we advised that:

" * * * * considering that international agreements are involved, it would appear that when a case has been closed and settlement made in accordance with the agreement, such case could not be reopened to bill additional charges not theretofore contemplated by the parties as 'costs.' In other words if the agreement--of the type

involved here--excluded or did not contemplate a cost factor for any given items, we see no legal basis on which to now bill an additional amount for that item.

"However, when the agreement clearly contemplated the inclusion of such cost factor but through error, miscalculation or otherwise, it was not included in whole or in part in the final billing we see no reason why it could not be included in a revised bill if billed within a reasonable time. We find nothing in the agreements that would specifically preclude such corrected billings." (Emphasis added.)

Similarly, in B-159835, December 1, 1975, a letter report to the Secretary of Defense on whether the Department of Defense obtains full reimbursement from foreign governments for training provided to foreign military students, we stated that where the parties included or contemplated a cost factor in the agreement yet undercharged the purchasing entity in the final billings, an attempt to recover the undercharges subsequent to closing the case may be made. In this regard, the letter report concluded:

"As to those undercharges which may be found subsequent to final billing, we believe that the contract, in providing for the recovery of actual costs, provides a sufficient basis to attempt to recover those costs which were clearly contemplated by both parties for inclusion in the contract, provided the attempt is made within a reasonable time. For example, in those cases where outdated tuition rates were used in billings and where there were errors in computing tuition rates, we believe that an effort should be made to recover costs not previously billed." See also B-165731, June 14, 1976; B-159835, July 13, 1976.

Accordingly, we believe that where the final cost of transportation services incident to a foreign military sale are not accurately reflected in billing because of inadvertent omission, miscalculation or otherwise, the FMS case may be reopened

and adjustment attempted as per the terms of the contract if done within a reasonable time.

Question 2: In the event that it is determined that the uniform standard DoD percentage rates used in charging accessorial charges such as transportation costs do not recoup full costs, may DoD, subsequent to the acceptance of the letter of offer or subsequent to the issuance of final billings to the purchasing entity, retroactively attempt to recover actual costs?

We believe that our answer to the first question applies with equal force here. The fact that the undercharges result from the use of a uniform standard percentage rate rather than from omission or miscalculation does not require the application of a different principle, namely, that where reimbursement of the costs in question is in accord with the intention of the contracting parties as expressed in the terms of the contract, an attempt should be made to recover unbilled costs. Stated conversely, if the agreement excluded or did not contemplate a cost factor for a given item of cost, we see no basis to attempt recovery. However, that is not the case here.

Accordingly, we feel that authority exists to support an attempt to recover undercharges resulting from the use of uniform percentage rates to cost the transportation services provided incident to an FMS sale if billed within a reasonable time. Our conclusion covers both the case where the undercharges are discovered subsequent to the acceptance of the letter of offer but prior to the issuance of final billing to the purchasing entity and where the undercharges are discovered subsequent to the issuance of final billings to the purchasing entity. Particularly with regard to the situation where undercharges are discovered prior to final billings, DoD Instruction 2140.1 provides that "Final billings shall be adjusted as necessary to fully recover the cost elements prescribed in this Instruction, whether more or less than estimated in the cost quotations." DoD Instruction 2140.1, June 17, 1975, at 3.

SPECIAL STUDIES AND ANALYSIS

By: Gary Kepplinger