M. Burkard

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Military Sealift Command--Reconsideration

File: B-236834.6; B-236834.7

Date: October 30, 1990

Robert T. Basseches, Esq., I. Michael Greenberger, Esq., and Elise J. Rabekoff, Esq., Shea and Gardner, for American President Lines, and Christopher K. Tankersley, Esq., Nemirow, Hu, Kurt & Tankersley, for Lykes Bros. Steamship Co., Inc., the protesters.
Peter M. Klein, Esq., for Sea-Land Service, Inc., an interested party.
Richard S. Haynes, Esq., and Charna J. Swedarsky, Esq., Military Sealift Command, for the agency.
Richard P. Burkard, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office will not consider new arguments raised by agency in a request for reconsideration where those arguments are derived from information available during initial consideration of the protest but not argued, or from information available but not submitted during initial protest, since parties that withhold or fail to submit all relevant evidence, information, or analyses do so at their own peril.

2. Repetition of arguments previously made and mere disagreement with prior decision do not provide bases for reconsideration of a decision.

DECISION

Military Sealift Command (MSC) requests that we reconsider our decisions in American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53 and Lykes Bros. Steamship Co., Inc., B-236834.4, July 23, 1990, 90-2 CPD ¶ 62. These decisions concerned the propriety of the rejection of rates submitted by American President Lines, Ltd. (APL) and Lykes Bros. Steamship Co., Inc. (Lykes) under request for proposals (RFP) No. N00033-89-R-2300, issued by MSC.

We deny the request for reconsideration.

The RFP provided that container and shipping agreements would be awarded to all technically acceptable, responsible carriers who submitted offers which were fair and reasonable. Cargo would actually be "booked" in accordance with a "Cargo Booking Provision" contained in the RFP. This provision stated that in the event the low-cost carrier could not provide acceptable space, then cargo would be booked to the next low carrier with available space. We reviewed the rate rejections and, with the exception of certain specified rates, were unable to conclude that MSC's rejection of APL's and Lykes's rates was reasonable and supported by the record.

In its requests for reconsideration, MSC advances new reasons in support for its rejection of various rates. For example, it argues now that certain determinations that rates were fair and reasonable were based on cargo capacity of carriers serving the route. It asserts that "on a route where one carrier can carry all the cargo, another carrier's rate which is only slightly higher would nevertheless not be considered fair and reasonable. . . ." In addition, for the first time, the agency now states, with respect to drayage rates, that "any rate which was over 50 percent higher than the low offered rate was rejected."

Under our Bid Protest Regulations, a party requesting reconsideration must show that our decision was founded on errors of either fact or law, or specify information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1990). Our regulations do not permit a piecemeal presentation of evidence, information, or analysis, since a piecemeal presentation would disrupt the procurement process indefinitely; accordingly, where a party raises in its reconsideration request an argument that it could have, but did not, raise at the time of the protest, the argument does not provide a basis for reconsideration. The Dep't of Labor--Recon., B-237434.2, May 22, 1990, 90-1 CPD ¶ 491. We therefore will not consider MSC's new explanations.1/

1/ With respect to MSC's statement that it factored other carriers' cargo capacities into the price reasonableness determination, we also think that this explanation is an admission by MSC that it deviated from the stated evaluation criteria in making its price reasonableness determinations. We find no basis in the RFP for using cargo capacities of the carriers to justify rejection of rates as unreasonable. In fact, the RFP contemplated multiple awards and provided for booking procedures where one offeror's ships were booked to capacity or unavailable. MSC's new position would appear to

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In addition, MSC repeats arguments about its use of market conditions and evaluation factors in determining whether a rate was fair and reasonable. While MSC continues to maintain that its actions were reasonable, its mere disagreement with our decision does not serve as a basis for us to reconsider the decision.2/ FAA Seattle Venture, Ltd.--Recon., B-234998.4, Oct. 12, 1989, 89-2 CPD ¶ 342.

MSC also asserts that we improperly overstated the significance of evaluation factor No. 3, which provides that the agency, in making the determination that a rate is fair and reasonable, will consider prior rates which have been accepted.

As MSC acknowledges, our review is limited to an examination of whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria. Seville Management Corp., B-225845, Mar. 18, 1987, 87-1 CPD ¶ 308. Our decisions in these protests were based on our review of the record to determine whether the agency's determinations were supported and whether evaluation criteria were applied reasonably and consistently. We held that it was unreasonable for the agency to disregard a favorable comparison of the protesters' currently offered rates with previously accepted rates, in view of the inclusion of such a comparison as a specific evaluation factor for determining whether a rate was fair and reasonable. Where MSC provided no evidence that a rate was unreasonably priced, and a similar rate was accepted

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be inconsistent with these RFP provisions; under the RFP, an offeror's cargo capacity was not, and could not be, an evaluation factor, since cargo capacity and ship availability is determined at the time cargo needs to be shipped.

2/ After receipt of the agency report, in a letter to MSC, we requested that MSC submit a document to explain how the work papers in the agency protest file supported the rate rejections. We did this notwithstanding APL's objections. APL argued MSC was being given an additional, unwarranted opportunity to explain its position. MSC furnished explanations for 6 rate rejections. We found 3 of these rate rejections reasonable. We did so based on the entire record. It was neither our intent, nor the agreement of the parties, that the additional submission which provided explanations concerning rates which MSC selected and which offered, in part, new rationalizations for the rate rejections would bind our Office concerning the rejection of the other rates, if those other rejections were unsupported by the record.

under the previous procurement cycle, we found it unreasonable for the agency to disregard that evaluation factor and reject the rate, absent some valid reason based on another evaluation criteria. Thus, as we concluded in our prior decisions, the rate rejections were not consistent with the stated evaluation criteria and the evaluation was unreasonable.

Finally, MSC argues that our Office does not have the authority to recommend that MSC include APL's and Lykes's rates in MSC container and shipping agreements for the remainder of the procurement cycle. It argues that we have substituted our judgment for the contracting officer's in determining whether rates are fair and reasonable and that we should have remanded to the contracting officer for a new price reasonableness determination. As discussed above, we found that MSC's evaluation of certain rates did not have a reasonable basis and was not consistent with the stated evaluation criteria. Since the record failed to establish any rational basis for rejection of the rates, we recommended that the rejected rates be included in the container and breakbulk agreements.

The Competition in Contracting Act of 1984 provides that if the Comptroller General determines that an award does not comply with a statute or regulation, the Comptroller General shall recommend that the contracting agency implement any one of several enumerated remedies including awarding a contract consistent with such statute and regulation or such other recommendations as the Comptroller General determines necessary to promote compliance with procurement statutes and regulations. 31 U.S.C. §§ 3554(3)(b)(1) (1988). The statute grants us flexibility in fashioning a remedy to promote compliance with procurement statutes and regulations. We think this discretion reasonably includes recommending that an agency award a contract to a protester even where an agency's price reasonableness decision is the issue and does not require that we give the agency another opportunity to justify its determinations. See United Power Corp., B-239330, May 22, 1990, 90-1 CPD ¶ 494.

We deny the request for reconsideration. Where an agency liable for protest costs asks us to reconsider its liability, the costs attendant to the protester's response also are reimbursable. Consequently, we find that the protesters are entitled to their protest costs incurred in responding to MSC's reconsideration request, including reasonable

attorneys' fees. See Pacific Northwest Bell Telephone Co.; Mountain States Bell Telephone Co.--Claim for Bid Protest Costs, 67 Comp. Gen. 441 (1988), 88-1 CPD ¶ 527.

James F. Hinchman
General Counsel