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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: PAE GmbH Planning and Construction--Reconsideration

File: B-250470.2

Date: July 22, 1993

Richard B. Oliver, Esq., McKenna & Cuneo, for the protester. William A. Roberts, III, Esq., and Brian A. Darst, Esq., Howrey & Simon, for Ogden Allied Services GmbH, an interested party.
Major Bobby G. Henry, Captain Gerald P. Kohns, and Cynthia Wilke, Esq., Department of the Army, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Prior decision concluding that contracting officer reasonably chose not to upwardly adjust awardee's proposed labor costs by calculating the effect of a German labor statute is affirmed where the issue was considered in great detail, and the contracting officer's position was supported by the record and by the Army's reasonable interpretation of developing case law on the application of the statute.

DECISION

PAE GmbH Planning and Construction (PAE) requests reconsideration of our decision, PAE GmbH Planning and Constr., B-250470, Jan. 29, 1993, 93-1 CPD ¶ 81, in which we denied its protest challenging award to Ogden Allied Services GmbH under request for proposals (RFP) No. DAJA37-92-R-0092, issued by the Department of the Army for the operation and management of the Army's European Redistribution Facilities at Nahbollenbach and Hanau-Grossauheim, Germany. PAE argues that we erred in our prior decision in concluding that the Army's cost realism analysis of Ogden's proposal was reasonable, and erred in other ways that PAE contends affected the outcome of our decision.

We affirm our prior decision.

In our prior decision we denied PAE's contention that the Army conducted a flawed cost realism review of Ogden's proposal by failing to make an upward adjustment to Ogden's proposed labor costs. According to PAE, the Army should

have added to Ogden's proposal the cost of complying with section 613a of the German Civil Code, a German labor statute. Rather than conclude that the statute applied--and thus that Ogden would be required to hire much of PAE's (the incumbent's) workforce and to pay those employees the higher wages paid by PAE--the Army accepted Ogden's position that the statute did not apply. As a result, Ogden was selected for award as the offeror with the lowest evaluated cost, even though Ogden proposed a higher number of employees than PAE.

Our review of PAE's contentions led us to consider the possible impact of section 613a on the labor costs included in a proposal for a cost-reimbursement contract to be performed in Germany with local workers. Even though it was clear that the contracting officer was aware of the German statute, and aware of its past application to some Army contracts, we found reasonable his decision not to adjust Ogden's proposal upward to account for the application of the statute. We concluded that the applicability of the statute to this contract at the time of the contracting officer's decision was unclear, even to legal experts; that the Army position that the German statute did not apply was based on a reasonable interpretation of the trend of developing case law; and that the contracting officer recognized and raised the issue of the impact of German labor laws during discussions with the awardee.

In its request that our Office reconsider the prior decision, PAE contends that the record did not support accepting the Army's justification of its decision not to adjust Ogden's proposed labor costs. PAE argues that despite the Army's claims, there was no agency policy on the inapplicability of section 613a to contracts such as this one, and asserts that the Army misled our Office when it claimed there was such a policy. In support of this argument, PAE cites the Army's failure to provide any written evidence of such a policy, and its failure to argue that there was such a policy in the agency report provided in response to the protest. In addition, PAE asserts that the Army's claimed policy--referred to during a transcribed telephone conference among all parties, including agency officials in Frankfurt and Heidelberg--is inconsistent with the position taken by the agency during at least three other procurements.

To obtain reversal or modification of a decision on reconsideration, the requesting party must convincingly show that our prior decision contains either errors of fact or law, or information not previously considered that warrants its reversal or modification. 4 C.F.R. § 21.12(a) (1993); Gracon Corp.--Recon., B-236603.2, May 24, 1990, 90-1 CPD ¶ 496. For the reasons set forth below, we affirm our

earlier conclusion that the contracting officer had a reasonable basis for choosing not to make an upward adjustment to Ogden's proposed costs. With respect to PAE's contention that no Army policy exists on the application of section 613a, and that Army officials misled our Office on this matter, we conclude that PAE mischaracterizes both the Army's arguments and our prior decision.

PAE's request for reconsideration focuses mainly on information provided by the Army during a transcribed telephone conference among all the parties. During this call, the Army's expert on German labor law explained in detail his view that section 613a was inapplicable to the transfer of service contracts due to a trend in German case law in the direction of a more narrow application of the statute. Specifically, the Army's expert explained his understanding of the initial intent of the statute, and explained ways in which the application of the statute was extended during the 1980s. He also explained that the highest German labor court issued a decision in 1988, followed by a decision in 1990, restricting the application of section 613a. The 1990 case involved the transition of a guard services contract at a German military installation, a services contract similar to the contract here. After the 1990 decision, the Army's expert met with representatives of the agency's Frankfurt contracting center to reevaluate the Army's position about the applicability of section 613a to the agency's service contracts. He stated that it was his understanding that since 1990, agency officials in Europe "have been more or less familiar with the current status of [section] 613a and its scope of applicability, and probably have advised the [c]ontracting [o]fficers accordingly." Transcript (Tr.) at 36 (Howoldt).

In analyzing this procurement, our prior decision in several instances refers to the contracting officer's action here--i.e., his decision not to adjust Ogden's proposed labor costs upward as if section 613a applied--as consistent with the Army's position on the applicability of section 613a. Only in our conclusion does the decision state that "the Army's official position--based on a reasonable interpretation of the trend of the case law--is that the statute does not apply." [Emphasis added.] According to PAE, our decision erred in accepting the Army's posture as "official U.S. Army policy," since there is no evidence in the record of any official policy on this matter by the Army.

The protester's claim here hinges on the wording of the concluding paragraph of our prior decision in which we refer to the Army's "official" position. As quoted above, the Army's position on the likely applicability of section 613a to transfers of its service contracts has been evolving with

recent developments in German law. These developments have been discussed in meetings with contracting representatives since 1990. Nowhere did the Army claim the contracting officer was following an official policy, and nothing in the comments of the Army's German labor law expert suggests that the Army had developed a written policy stating with precision the agency's views on the applicability of section 613a to transfers of service contracts. Nor is it clear that the Army could have succinctly stated a precise policy on the matter.

Our decision was not based on an assumption that such a policy had been developed. Rather, in the face of PAE's request that our Office find improper a contracting officer's selection decision for failing to insist that the awardee propose costs as if section 613a applies--when the trend appears to be that the statute does not apply--we denied the protest. Our decision was based on the recognition that the decision not to make the adjustment urged by PAE was a position more consistent with the Army's views as reflected in the advice of its experts on this matter than PAE's position. As a result, we did not view the contracting officer's actions as unreasonable.[1] Also, since the issuance of our decision, the German intermediate court with jurisdiction over these lawsuits has ruled that section 613a does not apply to this contract.

Finally, PAE claims that our prior decision contained three errors of fact that it maintains contributed to the conclu-

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[1]PAE errs in its claims that three other recent contracts issued by the same Army contracting facility took a different position about the applicability of section 613a. In the Army's response to the request for reconsideration, it provided information about the three contracts. In two of the three contracts, the solicitation as issued stated that section 613a would apply to the successful offeror, but an amendment to the solicitation removed the statement. In the third solicitation, the successful contractor took the position that section 613a would not apply, and the Army decided to accept the contractor's position on the matter. In a final reply, PAE does not dispute that the two solicitations were amended to remove the reference to section 613a but states that the actions "demonstrate the Army's uncertainty on this issue." On the third solicitation, PAE claims that the Army did not have to contest the contractor's assertion that section 613a does not apply because the contractor proposed to pay the workforce at the existing tariff. While we need not resolve every issue surrounding the application of section 613a to these contracts, these examples fall short of convincing evidence of inconsistent practices by the Army.

sion that the cost realism review here was reasonable. In its first contention, PAE argues that the Defense Contract Audit Agency report did not support the cost realism decision. PAE raised this argument during our initial consideration of the protest, and it simply repeats its earlier argument now. The mere repetition of arguments made during the initial protest, or disagreement with our decision, does not warrant reversal or modification of the prior decision. Logics, Inc.--Recon., B-237411.2, Apr. 25, 1990, 90-1 CPD ¶ 420.

In its second contention--PAE's claim that our Office erred in viewing the contracting officer's decision to raise the subject of compliance with German labor laws during discussions with Ogden as a substitute for a valid cost realism review--PAE simply disagrees with our conclusion. In our view, the Army's decision to explore Ogden's understanding of German labor laws during discussions, and Ogden's resulting decision to retain an expert in the matter to assist it during discussions (and prior to submitting its best and final offer), was, indeed, cause for increased comfort regarding Ogden's proposed labor rates and the Army's decision not to make an upward adjustment to those rates.

Third, PAE points out that our decision contained an error in describing the precise posture of the lawsuits filed by German workers against Ogden. The prior decision explained that the transfer of this contract from PAE to Ogden triggered more than 100 lawsuits by German workers seeking application of section 613a to Ogden. During the transcribed telephone conference, the parties attempted at great length to explain the status of the lawsuits filed against Ogden. Tr. at 11-33. Although we noted that the lower court had ruled that section 613a applied to this contract, we erroneously stated that Ogden would not be required to comply with the lower court ruling until the issue had been decided by the intermediate court. This statement was included as part of an acknowledgement that the only ruling to date was contrary to the approach of the contracting officer and did not contribute to our conclusion that the cost realism review was reasonable. Rather, the acknowledgment highlighted the consistency between the protester's position and the lower court ruling. As noted above, the German intermediate court has since reversed the lower court ruling and has held in favor of Ogden.

In conclusion, nothing in PAE's reconsideration request has caused us to conclude that our prior determination was unreasonable, or should be reversed.

The prior decision is affirmed.

James F. Hinchman
General Counsel