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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: PAE GmbH Planning and Construction--Second Reconsideration

File: B-250470.3

Date: May 24, 1995

DECISION

PAE GmbH Planning and Construction requests--for the second time--reconsideration of our decision, PAE GmbH Planning and Construction, B-250470, Jan. 29, 1993, 93-1 CPD ¶ 81, aff'd, B-250470.2, July 22, 1993, 93-2 CPD ¶ 45, 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 our Office should reconsider our earlier decision because the German labor law issues have been resolved in the way PAE predicted and because the Army has modified Ogden's contract to reimburse Ogden for additional direct labor expenses related to this issue.

We deny the request for reconsideration.

Our initial decision and subsequent reconsideration denied PAE's contention that the Army performed a flawed cost realism review of Ogden's proposal by failing to make an upward adjustment to Ogden's proposed labor costs. PAE argued that the Army should have added to Ogden's proposal the cost of complying with section 613a of the German Civil Code, a labor statute. If the statute was applied, as PAE claimed it would be, Ogden would be required to hire much of PAE's (the incumbent's) work force, and pay those employees the higher wages paid by PAE.

After considering the possible impact of section 613a on Ogden's labor costs together with the likelihood that the statute would apply here, we concluded that the contracting officer reasonably decided not to make an upward adjustment to Ogden's proposal. We reached this conclusion because: the applicability of the statute was unclear; the Army's position was based on a reasonable interpretation of the trend of the case law on the issue; and the contracting officer recognized and raised the issue with Ogden during

discussions before deciding not to adjust Ogden's proposed labor costs as if the statute would apply.

By the time our Office issued its decision affirming the initial denial of PAE's protest, a legal challenge by the former PAE employees in the German labor courts had completed two levels of review, the second of which supported the Army's actions; while at the trial court level, the employees prevailed and the statute was held to apply, at the intermediate appeal level, the trial court was reversed and the statute was held to not apply. See PAE GmbH Planning and Constr.--Recon., supra at 4. According to PAE, at the third and final level of review, the German Federal Labor Court reversed the intermediate appeal decision, and on July 14, 1994, held that section 613a was applicable to the contract here. PAE also advises our Office that the Army has recently modified the contract to provide additional funding to cover the amounts now due Ogden's employees under the court order.

PAE argues that our Office should again reconsider our earlier decision on this protest because the Army's decision to modify this contract and reimburse Ogden its additional labor costs is inconsistent with representations to our Office in connection with the earlier protest. PAE claims that the Army "suggested" to our Office that it would not pay the costs associated with the labor claims, and that "[i]t was with these representations that the Agency (and Ogden) convinced [our Office] that it reasonably and properly evaluated the offers of Ogden and PAE. . . ."

The premise of PAE's reconsideration request is simply wrong. Nowhere in the initial decision, or in the reconsideration decision, did our Office state that the protest was denied because the agency would not be obligated to pay the additional costs associated with the labor claims if the German courts resolved the issue by applying section 613a to this contract. Instead, the decision turned on whether the cost realism analysis adequately addressed the possibility that Ogden (and the Army) might be required to pay the higher labor costs "because regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Federal Acquisition Regulation § 15.605(d)."[1] PAE GmbH Planning and Constr., supra at 6.

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[1]If, as PAE contends, the contract here had, in effect, a cap protecting the Army from additional costs associated with the application of the labor statute, our analysis would have differed substantially from the analysis set forth in the initial and reconsidered PAE decisions. Generally, when a contractor agrees to a cap or ceiling on

(continued...)

Since PAE is unable to show that our prior decision contains errors of fact or law, or to present information not previously considered that warrants reversal or modification of the decision, see 4 C.F.R. § 21.12(a) (1995), we conclude that neither the ultimate outcome of the litigation surrounding the application of the German labor law, nor the Army's decision to reimburse Ogden for the increased labor costs associated with this effort, leads to a conclusion that our prior decision was factually or legally incorrect.

The request for reconsideration is denied.

Michael R. Golden
for Robert P. Murphy
General Counsel

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[1](...continued)
its reimbursement for a particular category or type of work, the maxim that the government bears the risk of cost overruns in the administration of a cost reimbursement contract is reversed. Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202; Advanced Tech. Sys., Inc., 64 Comp. Gen. 344 (1985), 85-1 CPD ¶ 315. In PAE, if there had been no risk of passing the higher labor costs to the government, there would have been no serious debate about the adequacy of the cost realism review. See Halifax Technical Servs., Inc., B-246236.6 et al., Jan. 24, 1994, 94-1 CPD ¶ 30 at 11.