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B-227084.6, Dec 19, 1988

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APPROPRIATIONS/FINANCIAL MANAGEMENT - Federal Assistance - Grants - Cooperative agreements - Use - Criteria DIGEST: Request for reconsideration by the Maritime Administration of B-227084.5, October 15, 1987, 67 Comp.Gen. 13, which concerned the Maritime Administration's award of a cooperative agreement for the operation of its Computer Aided Operations Research Facility. Upon reconsideration, we reaffirm our view that a procurement contract and not a cooperative agreement should have been used.

Maritime Administration Award-- Cooperative Agreement for Privatization of Computer Aided Operations Research Facility-- Reconsideration:

The Maritime Administration (MARAD), U.S. Department of Transportation, requests that we reconsider our opinion addressed to Chairman Jack Brooks of the Legislation and National Security Subcommittee, House Committee on Government Operations, B-227084.5, dated October 15, 1987, 67 Comp.Gen. 13. That opinion dealt with the award of a cooperative agreement by the Maritime Administration for the privatization of the Computer Aided Operations Research Facility (CAORF), located at the U.S. Merchant Marine Academy, Kings Point, New York. We concluded that a cooperative agreement was an inappropriate funding mechanism for the operation of the CAORF, and that instead a procurement contract should have been used.

The Maritime Administration states that the basic reason for the disagreement is that the "separate, self-contained nature" of the transaction by which the CAORF was transferred to the private operator was not recognized. Instead, it says that we merged that transaction with the "possible, indeed probable," business to be awarded in the future by means of the acquisition process. It states that the primary purpose of the transaction was to remove the federal government as a competitor of the private maritime research industry and to reduce the budgetary demands for the maintenance and improvement of the facility. "At no time was the relationship premised on acquisition of research services for the direct benefit of any Federal agency." According to MARAD:

"Our position remains that the use of a cooperative agreement for the transfer of CAORF into private hand was clearly consistent with the Federal Grant and Cooperative Agreement Act. The principal purpose of the agreement was to transfer a thing of value to carry out a public purpose of support or stimulation authorized by law, not the purchasing of services for the direct benefit of the United States."

Finally, according to MARAD, absent a clear demonstration of a "procurement

context," we should defer to the agency's purpose in choosing to use a cooperative agreement.

The Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. Secs. 6301-6308, established the criteria which agencies must follow in deciding which legal instrument to use when entering into a funding relationship with a recipient for an authorized purpose. The question this Act raises is whether the principal purpose of the transaction is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by law, or whether it is to acquire property or services (including lease or barter) for the direct benefit or use of the United States. If the former, a grant or cooperative agreement is proper. If the latter, then a procurement contract is to be used. U.S.C. Secs. 6304-(1) and 6305(1).

We said in our opinion that the relationship between MARAD and the awardee fundamentally involves operation of the facility for MARAD by the awardee to serve principally the needs of MARAD and other government agencies. We concluded that a contract, rather than a cooperative agreement, was the proper instrument for this type of relationship.

The Maritime Administration argues that we have ignored repeated disavowals of the promise of any business from federal agencies. According to it, "we (MARAD) took pains to clearly inform potential proposers that any potential Federal Government business would have to result from following the normal acquisition processes" and any contract to provide services to a federal agency should be viewed as completely independent of the cooperative agreement.

In our view MARAD's purpose in entering into the agreement must be judged on the basis of all the surrounding circumstances, including the fact that the available information indicated the facility would be operated principally to meet the needs of the federal government. In this connection we note that since our decision MARAD has awarded a sole-source contract to the operator of the facility and has justified that sole- source award on the ground that it was necessary to assure the facility was available to provide required services in the event of a national emergency or for industrial mobilization. See Ship Analytics Inc., The Maritime Training and Research Center, B-230647, July 12, 1988.

In our opinion of October 15, 1987, we recognized that it is often difficult to draw fine lines between the available funding vehicles in a particular factual situation. Nevertheless, we concluded that use of a cooperative agreement was inappropriate. While an agency's choice of an instrument is entitled to deference, we must look to the substance of an agreement to determine if a proper funding mechanism has been used. Our analysis of this matter convinced us that management services were procured by the award in question. The subsequent noncompetitive award to the operator of the government's facility is a related award that assures payment under the terms of the initial procurement. Accordingly, upon reconsideration, we reaffirm our view that a procurement contract and not a cooperative agreement should have been used in the first instance.