

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR RECONSIDERATION DENIED: April 28, 2005

GSBCA 16374-TD-R

BENMOL CORPORATION,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Terrence M. O'Connor, Alexandria, VA, counsel for Appellant.

Marvin Kent Gibbs, Office of Chief Counsel, Bureau of Engraving and Printing,
Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **NEILL**.

DANIELS, Board Judge.

BENMOL Corporation (BENMOL) moves the Board to reconsider its decision in this case, or alternatively to grant a new hearing or otherwise reopen the record. We deny the motion.

The case involves a claim for material handling costs incurred in performing contracts for the operation and maintenance of the Bureau of Engraving and Printing's (BEP's) wastewater pre-treatment facility in Fort Worth, Texas. We held that the contractor is entitled to recover such costs. *BENMOL Corp. v. Department of the Treasury*, GSBCA 16374-TD, 04-2 BCA ¶ 32,669 [*BENMOL I*]. In evaluating the proof of quantum, however, we held that the estimates and accounting techniques on which BENMOL relied were insufficient to prove any amount of recovery. *BENMOL Corp. v. Department of the Treasury*, GSBCA 16374-TD (Feb. 15, 2005) [*BENMOL II*]. Quoting from *Sternberger v. United States*, 401 F.2d 1012, 1016 (Ct. Cl. 1968), we concluded that the "[e]xaggeration, inherent improbability, self-contradiction, omissions in a purportedly complete account, imprecision and errors' in BENMOL's evidence and explanations have '[bred] disbelief and therefore the disregard of even uncontradicted non-opinion testimony.' They have 'carrie[d] [their] own death wound.'" *BENMOL II*, slip op. at 10.

In asking us to reconsider the second of these decisions, BENMOL in part reargues points it previously made. For example, it takes issue with the Board's conclusion that by removing some of the costs of the time of a key employee (Dora Wu) from the field portion of overhead, the proportion of overhead allocated to field activities decreases relative to the proportion of overhead allocated to non-field activities, so the two overhead rates need to be adjusted. As BENMOL notes in its motion, it addressed this matter thoroughly in its posthearing brief, and the Board did not accept its contentions. Motion for Reconsideration at 4-5. Our rules of procedure provide that "[a]rguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration." Board Rule 132(a) (48 CFR 6101.32(a) (2003)). To the extent that, as in this example, BENMOL's motion simply reargues points previously made, the motion does not contain sufficient grounds for granting it.

BENMOL also contends that portions of the Board's findings are erroneous. BENMOL apparently believes that reopening the record, perhaps by granting a new hearing, would result in correcting these putative mistakes. Six items in particular are brought to our attention. In these areas, too, we find the motion wanting.

First, BENMOL complains that the Board should not have divided the total number of hours alleged by the contractor to have been spent by employees other than Ms. Wu on material handling by the total number of purchase orders for materials. BENMOL evidently believes that establishing in this way an average number of hours per purchase order is misleading because these employees spent less time on material handling in each successive contract year (or six-month period) than they had in the previous contract year (or six-month period). Even if BENMOL is correct as to the progression of work, this does not mean that the calculation is erroneous or that using an average as an analytical tool is impermissible. We note that the contractor has itself used an average as to the major part of its claim – the percentage of her time that Ms. Wu, its principal employee involved in ordering and paying for materials, devoted to that activity.

Second, BENMOL suggests that our characterization of the work involved in ordering and paying for materials as "simple, routine, [and] repetitive [in] nature" is incorrect. The contractor maintains that the characterization is inapt because chemicals were bought from several vendors and each order was recorded on more than one piece of paper. The steps required to perform the work were described by BENMOL's Ms. Wu in testimony, and the contractor does not contend that our decision misstates that testimony. Our characterization of the activity was simply commentary on the testimony. The facts noted by the contractor in its motion are not inconsistent with that characterization. These facts do not alter our view.

Third, BENMOL objects to our finding that Ms. Wu had not been engaged in material handling activity before the company was awarded the contracts at issue in this case. BENMOL says that "the record testimony is that Ms. Wu had the same amount of material to handle under the instant BEP contracts as under the previous BEP contract." Motion for Reconsideration at 2. The record testimony cited in support of this assertion actually says that *BENMOL*, not Ms. Wu, "had close to the same amount of purchasing" under the previous contract as under the ones at issue in this case. Transcript at 32. We do not have any evidence as to Ms. Wu's prior efforts. But even if BENMOL's assertion were to be

proved in a subsequent hearing, it would change merely in degree our conclusion that the contractor has presented Ms. Wu as a woman capable of performing other duties far more speedily than performing the duties of ordering and paying for materials. If Ms. Wu really spent eighty percent of her time on ordering and paying for materials under both the prior contract and the ones at issue here, she would have devoted more time to material handling under the contracts at issue (3.2 of her four workdays per week), than she devoted under the prior contract to material handling *plus* all of her many other duties (all three of her workdays per week). Nor would proof of BENMOL's assertion alter our belief that the "material handling" duties Ms. Wu described cannot reasonably be thought to have consumed nearly two full workdays of this accounting supervisor's time per purchase order.

Fourth, BENMOL finds fault with our conclusion that employee time noted as having been spent on "ultrasonic tests," "respirator program," and "acid test" was not devoted to material handling. The contractor maintains, based on an affidavit of its president, Benjamin Molayem, that this time did involve material handling. Mr. Molayem effectively defines "material handling" in a far broader way than do the contracts in question, however. The contracts provide for recovery, under the materials sub-line items, of indirect costs associated with the purchase of five specified chemicals – calcium chloride, sulfuric acid, sulfonated castor oil, caustic soda, and pellet salt. *BENMOL II*, slip op. at 4; *BENMOL I*, 04-2 BCA at 161,696. Mr. Molayem includes as "material handling" activities "projecting . . . the condition of pipes, equipment, and vessels at the facility to determine the specific life expectancy of these items," so that a contractor would know when to replace them; "identifying . . . a specific piece of safety equipment . . . that could be purchased"; and "identif[ying] . . . test equipment to be purchased." These activities have little if anything to do with ordering and paying for the five specified chemicals. The affidavit confirms that our conclusion was correct.

Fifth, BENMOL disagrees with our conclusion that no evidence was presented to show that the claimed 443 hours worked by a secretary, Rebecca Yule, were not actually devoted to activities that should have been allocated to the firm, fixed-price line items. The contractor calls to our attention documents in the appeal file – pages 6 through 9 of exhibit 52 and page 245 (incorrectly cited as 249) of exhibit 49, which show that on one particular day, Ms. Yule signed four identical letters asking vendors for quotations of prices for sulfuric acid and charged two hours of her time to the BEP Fort Worth project. If testimony were to confirm that Ms. Yule actually did write the letters, and that she spent two hours doing so, this might cause us to amend our statement to say that two of the claimed 443 hours of Ms. Yule's time were devoted to material handling. But it does not address the remaining 441 questioned hours. More important, it does not speak to the issue of whether the time of Ms. Yule, a secretary, was included in the four hundred secretarial hours per year which BENMOL included in the fixed-price line items of the contracts. The contractor has given us no reason to reconsider this point.

Sixth, BENMOL objects to our discrediting the assertion that employees Rogali and Baerwald spent concentrated hours "helping out" Ms. Wu with material purchasing while the latter was working her full four-day-per-week schedule. Mr. Molayem's affidavit insists that these employees did indeed spend time on material handling. The affidavit does not persuade us to reconsider our conclusion on this matter, however. As to Mr. Rogali, a member of the technical support staff, Mr. Molayem's improperly broad definition of "material handling"

taints his conclusive statement. Reviewing and revising material specifications, which the affidavit may generously be read as saying was one of the activities in which Mr. Rogali was engaged, is not “material handling,” as that term is defined in the contract. As to Ms. Baerwald, a secretary, our comments regarding the time of her fellow-secretary, Ms. Yule, apply.

BENMOL’s quarrels with our decision, even if well taken, would merely nibble around the edges of our findings and analysis. After hearing and briefing, the contractor’s presentation left us with the firm and unmistakable sense that BENMOL’s claim is exaggerated, inherently improbable, self-contradictory, and full of omissions, imprecision, and errors. The contractor’s presentation bred disbelief and carried its own death wound. There is no proof that the contractor incurred any particular amount of costs in handling the five specified chemicals under the contracts in question. The motion for reconsideration does not persuade us otherwise.

Decision

BENMOL’s motion for reconsideration, or in the alternative to grant a new hearing or otherwise reopen the record, is **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

EDWIN B. NEILL
Board Judge