

tpiahptwARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
GKS, Inc.) ASBCA Nos. 47692 and 49296
)
Under Contract No. F34601-90-G-6714)

APPEARANCE FOR THE APPELLANT: Dale A. Thompson, Esq.
Mansfield, OH

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE TUNKS

In ASBCA No. 47692, the Government asserts that it is entitled to a refund of \$134,561 plus interest under the Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a, as amended, on the grounds that the contractor's proposal included a quotation for a part that was not specified and that the contractor failed to disclose 17 lower quotations in its possession prior to the agreement on price. ASBCA No. 49296 is the contractor's claim for an equitable adjustment in the amount of \$49,897.95. The contractor alleges that the contract price negotiated by the parties understated its general and administrative rate by \$44,434.32 and its material costs by \$5,463.63. The contractor also contends that it incurred additional costs resulting from the Government's acceleration of the delivery schedule. A hearing was held in ASBCA No. 47692. ASBCA No. 49296 was submitted on the record. The appeals were consolidated for decision. Only entitlement is before us.

FINDINGS OF FACT

1. The Government and GKS, Inc. (GKS) entered into Basic Ordering Agreement (BOA) No. F34601-90-G-6714 on 6 March 1990. The BOA incorporated FAR 52.215-22 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (APR 1988) and FAR 52.243-1 CHANGES—FIXED PRICE (AUG 1987) by reference. (SR4, tab 25)

2. The applicable version of TINA contained the following provisions which are relevant, in part, to these appeals:

(d)(4)(A) A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision . . . if—

(i) the contractor certifies . . . that, to the best of [its] knowledge and belief, [it] is entitled to the offset; and

(ii) [it] proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and . . . were not submitted

(b) A contractor shall not be allowed to offset . . . if—

(i) certification . . . with respect to the cost or pricing data involved was known to be false when signed

. . . .

(g) . . . “[C]ost or pricing data” means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification) . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

3. The Federal Acquisition Regulation (FAR) contained the following provisions which are relevant, in part, to this dispute:

FAR 15.801 (FAC 84-35 eff. April 4, 1988)

“Cost or pricing data” means all facts as of the date of price agreement that prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental, and are therefore verifiable. While they do not indicate the accuracy of the prospective contractor’s judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably be expected to contribute to the soundness of estimates of future costs and to the validity of determinations

of costs already incurred. They also include such factors as
(a) vendor quotations

. . . .

FAR 15.804-7 (FAC 84-51, eff. September 20, 1989)

(b)(5) An offset shall be allowed only in an amount supported by the facts and if the contractor (i) certifies . . . that to the best of [its] knowledge and belief, [it] is entitled to the offset in the amount requested, and (ii) proves that the cost or pricing data were available before the date of agreement on price but were not submitted. . . .

(6) An offset shall not be allowed if (i) the understated data was known by the contractor to be understated when the Certificate of Current Cost or Pricing Data was signed. . . .

4. On 29 June 1990, the Government issued Request for Quotations (RFQ) No. FD2030-89-6851 for 87 KD 9 kits to four sources: Kit-Pack, Kit-Co, Hamilton Standard Division of United Technologies (Hamilton Standard) and GKS. KD 9 kits are used to repair and overhaul E-3A aircraft (tr. 30-31). Bid opening was 5 September 1990. (R4, tabs 1, 14; tr. 24)

5. The RFQ was issued as a result of Desert Shield under the authority of 10 U.S.C. § 2304(c)(2), which allows other than open and full competition when the agency's need for the property or services is of "an unusual and compelling urgency."

6. The kit list was telefaxed to GKS on 29 August 1990 (tr. 42, 51, 61). It listed each of the 128 parts in the kit by part number and indicated the quantity of each required. The kit list indicated that two units of Part Number (P/N) 748906-1 were required and that P/Ns 726611-3, 740021-3 and 746456-1 were proprietary to Hamilton Standard (R4, tab 1; tr. 38, 42-43).

7. Neither Kit-Pack nor Kit-Co submitted a bid (tr. 24). Hamilton Standard submitted its bid in November 1990 and was not considered for the award (tr. 24, 51).

8. In accordance with its normal practice, GKS prepared a Solicitation Detail Report (SDR) which it used as the basis for its bid. The SDR was a computer-generated report that listed the part description, the quantity, the unit price, the vendors solicited, the quotations received and the prices quoted for each part number. Based on the data in the

computer as of 5 September 1990, the SDR reflected a unit cost of \$5,358.51 and a total cost of \$466,190.37 (SR4, tab 41).

9. By 30 August 1990, GKS had entered all the part numbers into the computer (tr. 61). GKS priced the majority of the parts using the Hamilton Standard list, a price list provided to GKS annually by the manufacturer of the equipment (tr. 63; SR4, tab 29). Eight parts were priced based on quotations from vendors other than Hamilton Standard. Proposed costs for several of the lower cost items were based on estimates or standard cost. (Bishop pre-filed testimony at 40)

10. On 5 September 1990, GKS submitted a bid in the amount of \$466,190.37 for 87 units at \$5,358.51 per unit (R4, tab 2).

11. By 6 September 1990, GKS had received lower quotations for 17 parts from Parco O Ring Incorporated (Parco), A. J. Kay Company (AJK) and New Hampshire Ball Bearings (NH Ball Bearings) (tr. 66-73; SR4, tabs 30, 34, 39).

12. On 10 September 1990, Ms. Peggy Oster, the Procuring Contracting Officer (PCO), advised GKS that it was the only offeror and requested it to submit a Standard Form (SF) 1411 Contract Pricing Proposal Cover Sheet, and a cost breakdown as required by FAR 15.804-2. GKS did not advise the PCO that it could not prepare a proposal in the time allotted or request additional time to complete the task (tr. 33). GKS submitted its proposal by telefax the same day (tr. 40-41; R4, tab 5). Other than the SF 1411 and the cost breakdown, GKS did not submit any cost or pricing data.

13. GKS' cost breakdown provided as follows:

<u>COST BREAKDOWN</u>	<u>TOTAL</u>	<u>UNIT PRICE</u>
MATERIAL	\$366,557.10	\$4,213.30
PACKAGING	780.39	8.97
FREIGHT IN/	3,665.31	42.13
* SG&A	74,200.56	852.88
[20%]		
** Profit	<u>20,987.01</u>	<u>241.23</u>
TOTAL	\$466,190.37	\$5,358.51

* SG & A IS DCAA AUDITED 20% RATE

** PROFIT IS STATED AT 4.714%

(R4, tab 5)

14. Prior to negotiations, the PCO checked the procurement history of KD 9 kits and consulted her cost/price analyst. She found that Tinker Air Force Base, the procuring activity, had awarded only one other contract for KD 9 kits. In 1982, Hamilton Standard was awarded a contract for 60 KD 9 kits at a price of \$1,623.60 per kit (tr. 21, 49-50; SR4, tab 26). The PCO considered this information too old to be reliable (tr. 35). The cost/price analyst indicated that GKS' audited G&A rates as of June 1990 was 12 percent and that it had had prior audited G&A rates of 20, 24 and 36 percent. He recommended that the PCO use the most current G&A rate, which was 12 percent (tr. 34; R4, tab 7 at 3). Using the streamlined weighted guidelines, the PCO calculated a profit rate of 8.81 percent (tr. 33-34).

15. Based on the foregoing, the PCO prepared the following prenegotiation objectives:

<u>OBJECTIVES</u>		
Material		\$4,213.30
Material Handling		42.13
Packaging		8.97
Subtotal		\$4,264.40
G&A	12.00%	511.73
Total Cost		4,776.13
Profit	8.81%	420.64
Unit Price		\$5,196.77

(R4, tab 7)

16. Telephone negotiations began and were concluded on 10 September 1990. The PCO represented the Government and Mr. Robert R. Rankin, GKS' vice president, represented the contractor (R4, tab 7 at 2). Mr. Rankin prepared GKS' proposal (tr. 61). Most of the discussion focused on material; there were no detailed discussions of G&A or profit (tr. 34). The PCO requested GKS to submit cost or pricing data for the most expensive part in the kit, which she later learned was P/N 748906-1 (tr. 37). Mr. Rankin did not provide the requested cost or pricing data (tr. 34). In addition, Mr. Rankin did not disclose that he used the Hamilton Standard list to price the majority of the parts, including the part singled out by the PCO, or that he had lower quotations from Parco, AJK and NH Ball Bearings for 17 parts. He also failed to disclose GKS' SDR for 5 September 1990. (R4, tabs 4, 5, 7 at 3; tr. 30, 34, 37, 38-39)

17. The PCO accepted GKS' proposal on 10 September 1990. Material costs were accepted as proposed. She increased the G&A rate to 15.49 percent in view of the historical G&A rates pointed out by the cost/price analyst and retained the profit rate

of 8.81 percent in accordance with the weighted guidelines. The negotiated delivery date was 26 June 1991 and the negotiated unit price was \$5,358.51, broken down as follows:

<u>NEGOTIATED</u>		
Material		\$4,213.30
Material Handling	1.00%	42.13
Packaging		8.97
Subtotal		4,264.40
G&A	15.49%	660.37
Total Cost		4,924.78
Profit	8.81%	433.73
Unit Price		<u>\$5,358.51</u>

(R4, tab 7 at 6; tr. 33-34)

18. The PCO accepted GKS' proposal "[b]ecause the proposed material was as accurate as possible under the circumstances" (R4, tab 7 at 3).

19. The Government issued firm-fixed price delivery order (DO) 0012 in the amount of \$466,190.37 under BOA No. F34601-90-G-6714 on 14 September 1990 (R4, tab 14).

20. The Government requested GKS to submit its Certificate of Current Cost or Pricing Data on 27 November 1990 (tr. 28-29). GKS submitted its certificate on 21 December 1990, certifying that the data submitted in support of the proposal were current, accurate and complete as of 10 September 1990 (R4, tab 6).

21. At the request of the Government, GKS made partial shipments beginning in February 1991 (R4, tab 7 at 2, tab 15; ASBCA 49296, complaint & answer ¶¶ 6). GKS did not file a claim for any additional costs resulting from the expedited delivery schedule.

22. DCAA audited the cost or pricing data related to DO 0012 and issued Audit Report No. 1671-91S42040005 on 19 July 1991. DCAA concluded that GKS failed to disclose three lower vendor quotations in its possession prior to the agreement on price and that that it included the wrong part in its proposal, resulting in an overstatement of the contract price in the amount of \$134,561. (R4, tab 16 at 5, 7-8)

23. GKS admits that it mistakenly included P/N 746908-1 instead of P/N 748906-1 in its proposal (tr. 13; ASBCA 47692, app. br. at 13). P/N 746908-1, which was not part of the KD 9 kit, was \$611 per unit, while P/N 748906-1, the required

part, was \$54.80 per unit. At two units per kit times 87 kits, this error resulted in an overstatement of \$96,779 (R4, tab 16). GKS became aware of its error in October 1990, but did not disclose it to the Government because:

[W]e were putting in almost a full time person expediting almost on a daily basis with every single vendor that we had in that bid. . . . And we had mistakes that were going in our favor and some that going in the Government's favor [sic]. And so we figured there was a mistake on that item, but there were also things that we were not being compensated for. And so we looked at it . . . as being, this was [the price] that we had agreed to and there's going to be some pluses and minuses, as there are on many jobs.

(Tr. 79-80)

24. With respect to the vendor quotations, DCAA found that GKS received a quotation from Parco for 14 parts on 5 September 1990. GKS did not disclose the Parco quotation because it thought the parts might be proprietary to Hamilton Standard and was unsure if Parco was an approved supplier (SR4, tab 34; tr. 72-74). None of the part numbers quoted by Parco were listed as proprietary on the kit list. On 13 November 1990, GKS placed an order with Parco for all 14 parts (SR4, tab 35).

25. DCAA also found that GKS received a lower quotation for P/N 746435-2 from NH Ball Bearings on 5 September 1990 (SR4, tabs 39, 40; tr. 70-72). GKS failed to disclose this quotation because NH Ball Bearings quoted its own part numbers, rather than Hamilton Standard part numbers, and it was uncertain if the quotation was responsive. GKS thought it would take 30 to 90 days to verify the quotation, so it did not disclose the quotation to the Government. (Tr. 70-72) GKS subsequently ordered the part from NH Ball Bearings (R4, tab 16 at 8-9; SR4, tab 46 at 6).

26. With respect to P/Ns 740433-1 and 727591-5, DCAA found that GKS received a lower quotation from AJK on 6 September 1990 (SR4, tab 30; tr. 66). GKS did not disclose the quotation because it contained the following note: "This price subject to clarification of material type. Quote is based on using normal, standard spring material, commonly found in stock (*i.e.*, M.W. - stainless)" (SR4, tab 30). In GKS' opinion, the quotation was unreliable and GKS believed it would need 30 days to verify that the quoted parts were compliant. (Tr. 66-68, 91-92) GKS placed an order for the parts with AJK on 12 November 1990 (SR4, tabs 31, 32).

27. On 8 April 1994, the PCO issued a final decision demanding payment of \$134,561 plus interest and a contract modification reducing the price by \$134,561 (SR4,

tab 23). GKS timely appealed the decision and the appeal was docketed as ASBCA No. 47692 (SR4, tab 24).

28. On 14 August 1995, GKS submitted a claim to the PCO for an equitable adjustment. As amended, the claim sought payment of \$49,897.95 on the basis that GKS understated the price of its material costs by \$5,463.63 and its G&A rate by \$44,434.32 (Claim dated 14 Aug. 95; Rankin Affidavit). The claim contained a Contract Disputes Act (CDA) certification executed by GKS' trustee. GKS submitted a portion of Audit Report No. 1671-92B16990003 dated 5 August 1992 indicating that GKS had an audited G&A rate of 27.47 percent for its fiscal year 1991. On 27 March 1996, Mr. Rankin submitted an affidavit detailing the amended amount claimed for material as follows:

ITEM	PART NUMBER	DESCRIPTION	QTY	EST. PRICE	TOTAL EST	QTY PURCH.	ACTUAL PRICE	ACTUAL TOTAL	DIFF
83	750467-3	PLATE	87	36	3132	87	88.89	7733.43	4601.43
86	AN814-4DL	PLUG	87	0.65	56.55	100	1	100	43.45
87	AN814-5DL	PLUG	87	0.85	73.95	100	1.05	105	31.05
97	MS21043-3	NUT	435	0.225	97.875	435	0.32	139.2	41.33
98	MS21043-4	NUT	87	0.2	17.4	206	0.243	50.058	32.66
100	MS21908D6	ELBOW	87	3.75	326.25	100	4.42	442	115.75
101	MS35338-135	WASHER	87	0.001	0.087	100	0.2	20	19.91
....									
104	MS9461-07	BEARING	87	0.65	56.55	300	0.215	64.5	7.95
....									
112	NAS5902-12	SCREW	87	0.4	34.8	95	1.71	162.45	127.65
118	NAS5903-13	SCREW	174	0.35	60.9	185	0.94	173.9	113.00
119	NAS6002-9	SCREW	174	1.5	261	185	2.45	453.25	192.25
120	NAS6002U6	SCREW	87	1	87	95	2.36	224.2	137.20
									5463.63

29. The SDR for 5 September 1990 indicates that the prices for items 83, 86, 87, 100, 104, 112, 118, 119 and 120 of GKS' claim were "ESTIMATES," that the quotation for item 97 expired on 5 November 1990 and that the prices for items 98 and 101 were based on "STD COST" (SR4, tab 41).

30. The Government made final payment under DO 0012 on 2 August 1991 (SR4, tab 70).

31. GKS appealed the failure of the contracting officer to timely issue a final decision and the appeal was docketed as ASBCA No. 49296.

32. Based on GKS' financial statements and financial data, Ms. Shirleen Bishop, the DCAA auditor, concluded that GKS' G&A rate for the two years prior to this proposal was as follows:

[T]he G&A rate for GKS, Inc. was consistently in excess of 25 percent for more than two years prior to the proposal for the subject . . . contract. [N]o evidence was found to indicate the situation was in the process of any significant change at the time the proposal on this contract was prepared, and the contract negotiated.

(Bishop affidavit at 5; SR4, tab 89)

33. Ms. Bishop also reviewed other DCAA audit reports and 28 related workpaper files to determine the company's G&A rate immediately before and after the negotiation of this contract:

(a) Audit Report No. 1671-90S17700006 dated 26 April 1990 was performed as a result of a proposed change to GKS accounting system. With respect to the G&A rate, the workpapers stated that "Kr set rate at 20% even though rate is much higher (Kr calculated between 27.69% and 34.24%)" (SR4, tabs 76, 77; Bishop affidavit at 2).

(b) Audit Report No. 1671-90S17500022 dated 2 May 1990 was performed in connection with a March 1990 progress payment request. The workpapers for that audit stated that "Kr wants to change SGA rate to 20%. Kr calculated the 'real rate' to be between 27.69% & 34.24%" (SR4, tabs 75, 78; Bishop affidavit).

(c) In September 1990, GKS proposed a G&A rate of 10 percent in connection with a Navy contract when it was aware that its actual G&A rate was between 20 and 36 percent. *GKS, Inc.*, ASBCA No. 45913, 94-3 BCA ¶ 27,232 at 135,701.

34. Based on the foregoing, Ms. Bishop concluded as follows:

[M]anagement of GKS appears to have intentionally understated the G&A rate in its proposal on this contract. It is not uncommon for contractors to intentionally underbid specific cost elements, or entire contracts to "buy-in" on a contract, or for other reasons known only to contractor management.

(Bishop affidavit at 5)

DECISION

In ASBCA No. 47692, the Government argues that GKS failed to submit current, accurate and complete cost or pricing data as required by TINA and that it is entitled to a refund of \$134,561 plus interest. ASBCA No. 49296 is GKS' claim for an equitable adjustment and/or an offset in the amount of \$49,897.95.

GKS admits that it failed to submit current, accurate and complete cost or pricing data and does not dispute that its failure to make full disclosure resulted in an overstatement of the contract price (app. br. at 6, 13). Notwithstanding, GKS asserts that its failure to disclose should be excused for the following reasons:

- (1) It did not have an adequate amount of time in which to prepare its bid/proposal;
- (2) It was not prudent for GKS to use the 17 lower quotations in its bid/proposal because they were unreliable and could not be confirmed by the date of agreement on price;
- (3) The Government had historical data indicating that GKS' price was significantly higher than that of another contractor;
- (4) The Government did not timely request GKS to submit its Certificate of Cost or Pricing Data.

As a general rule, inadequate proposal preparation time is not a defense to a defective pricing claim. In *Baldwin Electronics, Inc.*, ASBCA No. 19683, 76-2 BCA ¶ 12,199 at 58,737, we explained the rationale for this rule as follows:

The receipt of a solicitation does not obligate a response. If the return time is considered inadequate for the proper preparation of a proposal, a contractor may and undoubtedly should decline to respond [citation omitted]. The onus imposed by [TINA] may not be avoided by a plea of haste. Once a contractor prepares and submits a proposal in response to a Government solicitation, the contractor becomes responsible for insuring that the pricing and costing thereof are accurate, current and complete.

We have, however, excused the contractor's failure to submit current, accurate and complete cost or pricing data where the contractor was required to process and assemble a large quantity of raw data in an unreasonably short period of time. In *Litton Systems, Inc., Amecom Division*, ASBCA Nos. 34435, 37615, 37616, 93-2 BCA ¶ 25,707 at 127,910, for example, we excused the contractor's failure to convert labor hours accumulated by work order number into hours per unit because the contractor's accounting system did not accumulate labor hours by unit, the conversion had to be done manually and it would have required an "inordinate" amount of time to perform. In *Central Navigation and Trading Company, S.A.*, ASBCA No. 23946, 82-2 BCA ¶ 16,074 at 79,746, we excused the contractor's failure to submit a more current cost breakdown because it had only days over a weekend in a war zone to retrieve the data to prepare it. We excused another contractor's failure to update a bill of materials involving about 650 parts and 200 vendors due to the magnitude of the task relative to the time available to perform the update. *LTV Electrosystems, Inc., Memcor Division*, ASBCA No. 16802, 73-1 BCA ¶ 9957 at 46,708-09, *aff'd on reconsid.* 74-1 BCA ¶ 10,380.

The facts of this case do not bring it within *Litton*, *Central Navigation* and *LTV*. In those cases, the contractor did not have enough time to prepare its cost or pricing data. The Government failed to prove that the data were reasonably available (see FAR 15.804-6(d)). In this case, GKS had current, accurate and complete cost or pricing data in its possession prior to the agreement on price — the Hamilton Standard list, the SDR and the quotations from Parco, AJK and NH Ball Bearings — it simply failed to submit them to the Government. Thus, GKS' failure to submit current, complete or accurate cost or pricing data is not excused on the basis of inadequate proposal time.

GKS secondly argues that it would not have been prudent to use the quotations from Parco, AJK and NH Ball Bearings in its bid/proposal because they were unreliable and could not be verified prior to the date of agreement on price. Although none of the parts quoted by Parco was identified as proprietary on the kit list, GKS did not disclose the quotation because the parts might have been proprietary to Hamilton Standard. GKS did not disclose the AJK quotation because it contained a material exception which GKS thought would take 30 days to resolve. GKS did not disclose the NH Ball Bearings quotation because the parts were identified by NH Ball Bearings part numbers instead of Hamilton Standard part numbers. GKS estimated that it would take 30 to 90 days to verify that these parts were compliant.

TINA requires the contractor to disclose all cost or pricing data "which *may* or will make up part of the total cost of a contract." *Cutler-Hammer, Inc. v. United States*, 416 F.2d 1306 at 1314-15 (Ct. Cl. 1969) (emphasis in original). GKS' judgmental decision not to use the Parco, AJK and NH Ball Bearings quotations in its bid/proposal was not cost or pricing data. However, the quotations themselves were clearly cost or pricing data because they might, and in this case did, become part of the cost of the contract. We

considered similar facts in *Bell & Howell Company*, ASBCA No. 11999, 68-1 BCA ¶ 6993. In that case, the contractor chose not to use six lower quotations because it deemed the vendors “too risky.” As in this case, the contractor ultimately ordered the parts from the six vendors with the lowest quotations. Under the circumstances, we stated that it would be “unrealistic” to say that disclosure of the lower quotations could not reasonably be expected to affect price negotiations. *Id.* at 32,348. Accordingly, we conclude that the Parco, AJK and NH Ball Bearings quotations were cost or pricing data that had to be disclosed. *See also Hughes Aircraft Company*, ASBCA No. 46321, 97-1 BCA ¶ 28,972 at 144,287 (contractor should have disclosed data even though it deemed the data unreliable); *Sperry Corporation Computer Systems, Defense Systems Division*, ASBCA No. 29525, 88-3 BCA ¶ 20,975 at 105,988-89, *aff’d on reconsider.*, 89-2 BCA ¶ 21,624, *aff’d. sub. nom. Unisys Corporation v. United States*, 888 F.2d 841 (Fed. Cir. 1989) (contractor should have disclosed estimated test hour costs despite its opinion that they were not comparable); *Aerojet-General Corporation*, ASBCA No. 12873, 69-1 BCA ¶ 7585 at 35,219 (argument that undisclosed quotation was nonresponsive was insufficient to excuse nondisclosure).

GKS thirdly argues that its submission of defective cost or pricing data should be excused because the PCO was aware that Tinker Air Force Base awarded a contract to Hamilton Standard in 1982 for the same kit at price of \$1,623.60 per kit. GKS’ proposed price was \$5,358.51 per unit. We have sustained defective pricing appeals where the Government had actual knowledge of undisclosed cost or pricing data. *The Boeing Company*, ASBCA No. 32753, 90-1 BCA ¶ 22,270 at 111,879, *aff’d on reconsider.*, 90-1 BCA ¶ 22,426; *Texas Instruments, Inc.*, ASBCA No. 23678, 87-3 BCA ¶ 20,195 at 102,266. However, what is being alleged in this case, is that the Government had actual knowledge of *another contractor’s contract price*. We are not aware of any authority, nor has GKS cited any authority, which excuses the contractor’s failure to submit current, accurate and complete cost or pricing data for this reason.

GKS finally argues that its failure to submit current, accurate and complete cost or pricing data should be excused because the Government failed to timely request it to submit a Certificate of Current, Cost or Pricing Data. The parties reached agreement on price on 10 September 1990, but the Government did not request GKS to submit its certificate until 27 November 1990. GKS ultimately submitted the certificate on 21 December 1990. The requirement to submit current, accurate and complete cost or pricing data is a statutory requirement that cannot be waived by the Government. *See Numax Electronics, Inc.*, ASBCA No. 29186, 85-3 BCA ¶ 18,396 at 92,273; *M-R-S Manufacturing Company v. United States*, 492 F.2d 835, 841 (Ct. Cl. 1974). Thus, the Government’s delay in requesting GKS to submit its certificate does not excuse GKS’ failure to submit current, accurate and complete cost or pricing data.

In the companion appeal, ASBCA No. 49296, GKS asserts that it is entitled to an equitable adjustment of the contract price for alleged understatements in its G&A rate and material costs and for alleged additional costs resulting from the Government's acceleration of the delivery schedule.

The Government argues that GKS' equitable adjustment claim is barred because it did not file its claim until after the Government made final payment. The record reflects that the Government made final payment under DO 00012 on 2 August 1991. In order to preclude an equitable adjustment claim, however, final payment must be made under the BOA, not just the delivery order. *Sedona Contracting, Inc.*, ASBCA No. 52093, 99-2 BCA ¶ 30,466, *aff'd on reconsideration*, 99-2 BCA ¶ 30,552. Thus the Government has not established that GKS' claim is barred.

In order to establish entitlement to an equitable adjustment, it is well established that the contractor must establish three elements: liability, causation and resultant injury. *Servidone Construction Corporation v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991); *Wunderlich Contracting Company v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965); *JGB Enterprises, Inc.*, ASBCA No. 49493, 96-2 BCA ¶ 28,498. GKS' claim for payment of its actual G&A rate and actual material costs founders on the element of causation. GKS has not demonstrated that any action or inaction on the part of the Government caused the incurrence of these costs. These costs were incurred because GKS understated its G&A rate in preparing its proposal and failed to accurately estimate its material costs. Accordingly, this aspect of GKS' equitable adjustment claim is denied.

Other than unsubstantiated assertions, GKS failed to offer any evidence that it incurred increased costs in connection with the Government's acceleration of the delivery schedule. This aspect of GKS' claim fails for lack of proof.

Even if GKS's equitable adjustment claim was construed as an offset claim, it would still fail.

Assuming that GKS' CDA certification under ASBCA No. 49296 would have satisfied its obligation to certify the offset under TINA, the evidence provided by Ms. Shirleen Bishop, the DCAA auditor, establishes that GKS intentionally understated its G&A rate. Using GKS' financial reports and other financial data, she concluded that its G&A rate "was consistently in excess of 25 percent for more than two years prior to the proposal" for this contract and that there was "no evidence . . . to indicate the situation was in the process of any significant change at the time . . . this contract was . . . negotiated." The auditor's review of audit workpapers for other DCAA audits revealed intentional understatements on at least three occasions during this time period. The audit workpapers for DCAA Audit Report No. 1671-90S17700006 dated 26 April 1990, conducted in connection with a proposed change to GKS' accounting system, stated that

“Kr set rate at 20% even though rate is much higher (Kr calculated between 27.69% and 34.24%).” The audit workpapers for DCAA Audit Report No. 1671-90S1750022 dated 2 May 1990, performed in connection with a March 1990 progress payment request, stated that “Kr wants to change SGA rate to 20%. Kr calculated the ‘real rate’ to be between 27.69% & 34.24%.” In *GKS, Inc.*, ASBCA No. 45913, 94-3 BCA ¶ 27,232 at 135,701, GKS proposed a G&A rate of 10 percent when its actual G&A rate was between 20 and 36 percent. We conclude that GKS’ decision to use a 20 percent G&A in its proposal rather than its actual G&A was a judgment which may not be used to offset overstating errors in cost or pricing data. *AM General Corporation*, ASBCA Nos. 48476, 51107, 99-1 BCA 30,130 at 149,049-50.

With respect to the material costs, the SDR for 5 September 1990 indicated that the prices of nine of the thirteen parts were based on estimates. Since estimates are judgments, they are not cost or pricing data and may not be used as an offset under TINA. *Litton Systems, Inc., Amecom Division*, ASBCA No. 36509, 92-2 BCA ¶ 24,842 at 123,944. The quotation for item 97 (MS21043-3) expired on 5 November 1990. When the part was ordered, the price had increased from 0.225 per unit to 0.32 per unit. This is not cost or pricing data that was in existence at the time of the agreement on price and does not qualify as an offset. The basis for the price of items 98 (MS21043-4) and 101 (MA35338-135) was listed as “STD COST” on the SDR. In the absence of any evidence explaining the meaning of this term, these understatements would not qualify as offsets under TINA. GKS’ alleged acceleration costs were neither cost or pricing data in existence at the time of the agreement on price and could not have been used to offset the overstatements in its cost or pricing data.

Accordingly, the appeals are denied. ASBCA No. 47692 is remanded to the parties to negotiate quantum.

Dated: 27 April 2000

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 47692, 49296, Appeals of GKS, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals