

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Tropicana Product Sales, Inc.) ASBCA No. 52515
)
Under Contract Nos. DLA13H-93-P-0595)
DLA13H-93-P-1141)

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This timely appeal by Tropicana Product Sales, Inc. (appellant or Tropicana) involves a Government claim asserting that appellant failed to offer prompt payment discounts to the Government that were offered to Tropicana's commercial customers. As a result, the Government alleges that appellant breached the price warranty provisions of contracts to provide goods for resale at commissaries. The claim involves delivery orders issued to Tropicana pursuant to such contracts during Government fiscal years 1993, 1994 and 1995. This appeal is a test case for addressing issues common to 25 related appeals by other contractors. Appellant has filed a motion, and the Government a cross-motion, for summary judgment. The related appeals have been stayed pending our resolution of these motions. For the reasons detailed below, we grant appellant's motion and deny the Government's cross-motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS¹

1. The Defense Personnel Support Center (DPSC, DSCP or the Government²) purchases brand name products (groceries, health and beauty products, toiletries, household

supplies, etc.) from manufacturers and distributors for resale by commissaries inside and outside the United States. The purchases are made through the issuance of delivery orders which, in turn, are subject to the terms and conditions of DPSC ordering agreements denominated Brand Name Supply Bulletins (BNSB). The BNSBs in dispute in this appeal were entered into by DPSC and Tropicana during Government fiscal years 1993 through 1995. (Agreements 1-2)

2. The BNSB is a two-part instrument consisting of (1) the Brand Name General Requirements, DPSC Form 3846 (JAN 92) (DPSC General Requirements Form), and (2) the contractor's Individual Supply Bulletin (ISB) (agreement 3). The BNSB is itself not a contract, but rather a continuing offer by the contractor to sell its brand name items to the Government on the terms and conditions specified in the DPSC General Requirements Form and the ISB. Designated commissaries or activities were authorized to purchase these items by the issuance of delivery orders to the contractor. (Agreement 7) Under the terms of the BNSB, when a delivery order was issued to the contractor, it was deemed to be an acceptance of the contractor's continuing offer, and the delivery order became a binding contract without further action by either party (agreement 8).

3. The contractor's ISB consists of a listing of the brand name items for sale to the Government, including a description of the product, product code, size and type of container, method of packing, minimum quantity per order, prices, and other ordering information (agreement 5). The contractor's ISB also offered payment terms. (R4, tabs 1-2).

4. Changes to the BNSB terms and conditions were sometimes incorporated by "Notice" to the industry (AR4, tabs 6-7). In January 1992, DPSC issued Headquarters Notice No. 1, subject: "Brand Name General Requirements, DPSC Form 3846," which replaced an earlier form. The January 1992 version of the DPSC General Requirements Form is the version applicable to this appeal. (Agreements 10-11)

5. The DPSC General Requirements Form consists of commonly used provisions and clauses from the Federal Acquisition Regulation (FAR), Defense FAR Supplement (DFARS), Defense Logistics Acquisition Regulation (DLAR), as well as local DPSC provisions and clauses (agreement 4).

6. The Prompt Payment Act of 1982, Pub. L. No. 97-177, as amended by the Prompt Payment Act Amendments of 1988, Pub. L. No. 100-496, is codified at Chapter 39, Title 31, U.S. Code. The Office of Management and Budget (OMB) Circular A-125, "Prompt Payment," dated 25 August 1982, revised 21 December 1989, provided policy guidance to Federal agencies on the implementation of the Prompt Payment Act. (AR4, tabs 15-16) FAR subpart 32.9 PROMPT PAYMENT, prescribes policies, procedures, and clauses for implementing OMB Circular A-125. FAR 32.902, Definitions, defined a "discount for prompt payment" as "an invoice payment reduction voluntarily offered by the

Contractor, in conjunction with the clause at FAR 52.232-8, Discounts For Prompt Payment, if payment is made by the Government prior to the due date. The due date is calculated from the date of the Contractor's invoice." (Agreement 15)

7. FAR 52.232-8, DISCOUNTS FOR PROMPT PAYMENT (APR 1989), was incorporated by reference and made applicable to all delivery orders issued under a BNSB (agreement 14). The clause states as follows:

(a) Discounts for prompt payment will not be considered in the evaluation of offers. However, any offered discount will form a part of the award, and will be taken if payment is made within the discount period indicated in the offer by the offeror. As an alternative to offering a prompt payment discount in conjunction with the offer, offerors awarded contracts may include prompt payment discounts on individual invoices.

(b) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. . . .

(AR4, tab 9)

8. NET payment terms specify when payment must be made if an offered discount is not taken. Under the contract, the NET payment terms to the contractor were addressed in FAR 52.232-25, PROMPT PAYMENT (APR 1989), which was incorporated by reference and made applicable to all delivery orders issued under a BNSB (agreement 16). This clause stated in pertinent part:

Notwithstanding any other payment clause in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. . . .

(a) *Invoice Payments*

(1)

(2) . . . the due date for making invoice payments by the designated payment office shall be the later of the following two events:

(i) The 30th day after the designated billing office has received a proper invoice from the Contractor.

(ii) The 30th day after Government acceptance of supplies delivered or services performed by the Contractor. . . .

(AR4, tabs 8, 10)

9. DoD Financial Management Regulations, DoD 7000.14-R, Volume 10, Contract Pay, ¶ 020102 - Computation of Discount Period mandates:

. . . the discount time starts from date of the invoice. If no date has been placed on the invoice by the contractor, the discount period will begin on the date a proper invoice is actually received by the designated billing office . . .

(AR4, tab 19)

10. In October 1992, DPSC issued Headquarters Notice No. 20, subject: “General Instructions For Brand Name Supply Bulletins,” which enclosed an updated “General Instructions For Brand Name and Limited Coverage Supply Bulletins . . . October 1992” (DPSC General Instructions). The update provided general guidelines for supply bulletin contractors and authorized military ordering activities. (Agreement 12) The DPSC General Instructions, provided in pertinent part:

5. CONTRACTOR’S REQUIREMENTS (Supply Bulletin Offer)

DPSC is the authorizing Agency for the issuance of Supply Bulletins. However, prior to the publication of a Brand Name Contract Supply Bulletin, there are certain general conditions established which must be met by the CONTRACTOR.

. . . .

(b)(2) Payment Terms (NET and DISCOUNT)

(a) NET Payment Terms shall always be 30 days, in accordance with the Prompt Payment Clause 52.232-25 with . . . exceptions . . . [not relevant to this appeal] (emphasis added)

(AR4, tab 7)

DPSC Price Warranty Clause

11. DPSC Clause 52.216-9P08, GENERAL CONDITIONS (JAN 1992), which was included in the DPSC General Requirements Form, was applicable to supply bulletin contractors only, and detailed the specific terms of the price warranty applicable to delivery orders issued against ISBs. The clause (hereinafter the Price Warranty clause) provided in pertinent part:

(f) Prices.

....

(3) Warranty:

(i) The offeror warrants that all prices offered the Government are as advantageous as the price offered the most favorable customer. Such warranty includes base price, freight and transportation charges, *billing advantage*, quantity discounts, allowances, rebates and special promotions[.] . . .

....

(ii) When an allowance, rebate or other special promotion is offered to any commercial customer in a particular area, the same or equivalent offer available in a clearly defined area for an equivalent period of time will be made to all affected government activities. . . .

(iii) To assure compliance with the above warranty, the offeror agrees that the contracting officer shall have the right to examine books, documents, records, and any other evidence necessary to determine the basis for the prices offered. *The examination will compare the average price paid by the Government versus commercial customers for the same item during the offeror's latest fiscal year.* Should such an examination reveal any instances of overpricing, the offeror further agrees to reimburse the Government for that amount. (emphasis added)

(Agreement 17; AR4, tab 8 at 24)

12. With regard to the warranty requirement in subparagraph (f)(3)(i) and (iii) of the Price Warranty clause, the Government claim which is the subject of this appeal is not based on a comparison of the “average price paid by the Government versus commercial customers for the same item” Nor is the claim based on data from appellant’s “latest fiscal year.” The claim also does not consider all of the enumerated elements. Instead, the Government claim, in its final form, is based solely on a comparison of alleged “billing advantages” offered commercial customers not the Government. (AR4, tabs 1, 8; admis. 44-45, 69)

13. The term “billing advantage” in subparagraph (f)(3)(i) of the DPSC Price Warranty clause was not defined in the DPSC General Requirements Form, the ISB, or the DPSC General Instructions. Nor was the term “billing advantage” defined in any DPSC regulation, the DLAR, the DFARS, the FAR, OMB Circular A-125, the DoD Financial Management Regulation, DoD 7000.14R, or any other Government regulation, supplement, directive, circular, bulletin, notice or memorandum pre-dating the Government’s claim. (Agreements 19-20)

14. With minor variations, the typical commercial discount payment terms (commercial terms) offered by contractors to commercial customers consist of three elements: (1) the discount term (*e.g.*, 2% 10 days), (2) the NET term (*e.g.*, NET 11 days), and (3) the triggering event for determining timeliness of payment (*e.g.*, “from the date of the invoice”) for both the discount term and the NET term. These three elements are usually stated as “2% 10 days, NET 11 days from the date of the invoice,” or “2% 10, NET 11 from date of invoice,” or simply “2% 10 days, NET 11.” Tropicana offered commercial terms during the three-year period in dispute of 2% 10 NET 11 from date of invoice. (AR4, tabs 2, 11, 46; admis. 93, 97)

Demonstration Program

15. The FY 1996 National Defense Authorization Act required the DoD to conduct a demonstration program to evaluate the feasibility of using private contractors to identify overpayments made to vendors by DoD. The demonstration program began in September 1996 with DPSC’s award of an audit contract to Profit Recovery Group International, Inc. (PRGI) to identify and document overpayments. A primary claim strategy developed by DPSC was to review contract provisions and recover overpayments associated with failure to comply with contract terms and conditions (*i.e.*, commercial terms made available to the contractor’s other customers but not the Government). (AR4, tabs 22, 30, 52)

16. Pertinent terms of PRGI’s contract with the Government were as follows:

SECTION B - SUPPLIES/SERVICES AND CONTRACT
COSTS

....

B-2 Costs

....

2. Costs to be paid under this contract will be in the form of a fixed incentive bonus payment on amounts recovered by the Government.

SECTION C - DESCRIPTION/SCOPE OF WORK

C-1. General

....

PRGI will initiate a claims process for identified overpayments made to vendors, with supporting documentation. Claims will be forwarded to the Contracting Officer Technical Representative at the Defense Finance & Accounting Services Columbus (DFAS-CO) in the form of a Demand Letter. The validity of claims will rest with PRGI based on all supporting documentation.

(AR4, tab 52)

17. In July 1997, the Government, through DFAS-CO, began sending “Bill of Collection” letters to certain DPSC contractors, stating that the contractor was indebted to the United States. The reason for indebtedness was given as: “[c]ash discount not deducted at time of invoice payment.” The letter added, “If payment is not received within 30 days, interest will be charged on the unpaid portion In addition to charging interest, administrative offset action will be initiated against any unpaid invoice sufficient to recover this debt.” Numerous contractors challenged the debt assessment. (AR4, tabs 24-26)

18. In June 1998, DSCP’s contracting officer began sending letters to various contractors advising of their possible indebtedness to the Government. The letters stated in pertinent part:

As a result of the provisions set forth within Section 354 of the Defense Authorization Act of Fiscal Year 1996, accounting and procurement records applicable to your contract(s) . . . have been audited.

Review of contract payment activity . . . for the 1st quarter of fiscal year 1993 indicate you may be indebted to the United States This amount represents review and comparison of price warranty terms and provisions as offered to your other customer(s) and the Government during the same time period. Price warranty provisions as set forth within these brand name supply bulletin contracts, specifically Clause 52.216-9P08, require the vendor to warrant that all prices offered to the Government are as advantageous as the prices offered their most favorable customer. Such warranty shall also include factors that are not an element of unit price to include billing advantages, transportation and freight charges, discounts, allowances and promotions. Specific finding relative to these price warranty provisions show that the Government was not afforded the same cash discount terms for all contracts as specified on the enclosed supporting schedule with those terms offered to your most favorable customers during the same time period.

(AR4, tab 29)

19. On 26 June 1998, Tropicana received twelve separate letters from DSCP, like that cited above, concerning its possible indebtedness for failure to offer the Government the same commercial terms (2% 10, NET 11 from date of invoice) it had offered to its commercial customers for each of the four quarters of FY 1993, 1994, and 1995, respectively. Attached to the letters, among other things, was a document entitled “DSCP Policy & Procedures for 354 Audit Demonstration Program (1998 DSCP Policy & Procedures).” (AR4, tab 29)

20. The 1998 DSCP Policy & Procedures for the 354 Audit Demonstration Program summarized the methodology used to demonstrate the alleged indebtedness. With regard to claims related to commercial payment terms, it distinguished between “Unit Price” claims and “Billing Advantage/Cash Discount” claims. Unit price claims were “[A]udit findings specific to unit price comparisons . . . intended to identify differences in unit pricing offered and invoiced to the Government with those offered and invoiced to a vendor’s other customers.” Billing advantage/cash discount claims were “[i]dentification of apparent claims specific to billing advantages . . . [such as] cash discount terms a vendor made available to other customers and not the Government during the same/similar period of time.” (AR4, tab 30)

21. The ALA is the principal trade association for companies that sell or provide products and services to the military (commissaries and exchanges). Over the years, ALA

and the commissary/exchange systems have worked to promote an open dialogue between industry and Government by meeting together several times throughout the year. (AR4, tabs 44, 54-57)

22. In conjunction with a February 1999 meeting between DSCP and the ALA, DSCP provided ALA with a copy of DSCP's Addendum to DSCP Policy & Procedures for the 354 Audit Demonstration Program (Addendum). It was intended to clarify DSCP's earlier Policy & Procedures. In the Addendum, DSCP provided its definition of a "billing advantage," along with definitions for such terms as "base price," "invoice price," and "unit price." The Government defined a "billing advantage" as follows:

Billing advantage is applicable to a contractor's invoicing (or billing) terms and conditions. It is often associated with seasonal items and/or related to specific time periods as offered or not offered by a vendor. As such, it is not a direct component of unit price, but rather a component associated with "time value of money." Types of billing advantages may include cash/prompt payment discounts, or extended terms of payment (e.g., payment due in 90 days) where it is more advantageous to accelerate shipments on seasonal items.

(AR4, tabs 33, 34 at 5) The Addendum pronounced that:

Unit pricing elements will not include prompt payment discounts and/or cash discount terms. Cash discounts and prompt payment discounts are considered a billing advantage and as such will be evaluated as a "time value of money" component associated with a Contractor's payment terms, and in accordance with the provisions set forth within the aforementioned FAR and local DPSC clauses.

(AR4, tab 34 at 5-6)

Government Billing Advantage/Cash Discount Claims

23. In March 2000, DSCP elected not to pursue any of the Unit Price claims it had developed (AR4, tab 35-36). However, it continued to pursue the billing advantage/cash discount issue. By letters dated 20 April 1999, signed by the CO, DSCP asserted that appellant was indebted to the Government in the amount \$137,556 based upon an audit of FY 1993, 1994, and 1995 accounting records:

. . . we have reviewed these apparent claims and determined they are valid under the terms and conditions of our contract.

In addition to the base price of an item, paragraph (3) of the contract clause titled General Conditions (52.216-9PO8) specifically cites “billing advantage” among the terms the contractor warrants to be as advantageous as those offered to the contractor’s most favored customer. The term billing advantage includes cash discount terms for prompt payment. This clause affords us the right to recover overpayments resulting from the more advantageous discount terms you offered your commercial customers than you offered to DSCP.
[Emphasis in original]

(R4, tabs 152-63)

24. The CO further stated that unless payment was received in 30 days, a contracting officer’s final decision would be issued. Attached to the Government’s 20 April 1999 letter were various documents, including a PRGI-generated claim summary. Also attached was the evidence relied upon by the Government in asserting that appellant had offered terms of 2% 10, NET 11 from the date of invoice to its commercial customers including a Tropicana invoice in the July 1995 time period which stated in part: “TERMS: 2% 10 days, NET 11 DAYS ALLOWABLE DISCOUNT.”³ This format, was recreated for each of 12 letters sent to Tropicana, one letter for each quarter of FY 1993, 1994, and 1995. (R4, tabs 152-63)

25. The parties were unsuccessful in attempts, during the summer of 1999, to resolve their differences associated with the billing advantage/cash discount claims (R4, tabs 165-66).

26. By letter dated 3 November 1999, the CO issued a final decision asserting that Tropicana was indebted to the Government in the amount of \$137,556. The claim was based upon the same assertion that the Government had made in its earlier letters to appellant: during all or part of the 3-year audit period, appellant failed to offer its more favorable payment discount terms of 2% 10 days, NET 11 from the date of invoice to the Government, and that payment discount terms were considered to be a billing advantage and, therefore, covered by the Price Warranty clause applicable to all delivery orders issued to appellant during the audit time period. (Agreement 42)

DECISION

Summary judgment may be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). Although the parties differ concerning the conclusions to be drawn from the above statement of facts, there are no genuine disputes concerning them and we have been cited to no relevant evidentiary conflict

in the record. See *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir. 1984). Instead the parties dispute the proper interpretation to be accorded the contract's Price Warranty clause, a legal issue that generally, as in this case, may properly be resolved by summary judgment. *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984); *Motorola, Inc.*, ASBCA No. 51789, 01-1 BCA ¶ 31,223 at 154,152.

The Government argues that appellant offered its commercial customers a cash discount but not the Government. Consequently, DSCP maintains that appellant breached the Price Warranty clause of the contract and seeks a refund of the resulting overpayment. The basic premise for the Government's conclusion is that appellant's commercial discount terms constituted a "billing advantage," one of the elements enumerated in the Price Warranty clause. We assume *arguendo*, without deciding, that this basic premise is correct. Nevertheless, the Government claim is without merit because it fails to adhere to the contract's price warranty enforcement procedures, improperly bifurcates appellant's unitary commercial terms, and assumes that appellant should have offered terms that would both restrict the Government's contractual rights and be contrary to the agency's own instructions related to the NET payment period.

Enforcement Of The Price Warranty Clause

The Government misconstrues the warranty clause and fails to comply with its enforcement mechanism. That enforcement mechanism requires the Government to "compare the average price paid by the Government versus commercial customers for the same item during the offeror's latest fiscal year" in assessing whether overpricing occurred. The Government agrees that the average price comparison should consider all elements listed in ¶ 3(i), except "billing advantage." Specifically, the Government would compare "base price, freight and transportation charges, quantity discounts, allowances, rebates, and special promotions." But, it carves out "billing advantage" for distinctive, unique treatment. According to the Government, as to that element it can assert a separate, stand-alone warranty claim without consideration of any other aspect of "average price." Because the commercial discount terms (*i.e.*, the alleged "billing advantages") were not offered to the Government, the Government concludes that the goods were overpriced to the extent of the 2% discount.

There is nothing in the clause that permits the Government to base a separate overpricing claim solely on a comparison of the discount terms offered the Government versus those offered commercially. Any overpricing claim should consider all warranted factors listed in ¶ 3(i) *in the aggregate*. It cannot single out one of the factors for special scrutiny and treatment. There could be numerous legitimate reasons why the Government has not been extended the best possible terms for each and every factor and still been given the best "average price" and accorded "most favored" customer status. For example, here there is no evidence that the "base price" (for computation of discounts) for its most

avored commercial customers was as low as that offered the Government. It is patently unfair to focus solely on one factor that *may* represent more favorable treatment to a commercial customer while ignoring other factors where the Government *may* have been afforded more favorable treatment. There is no separate and distinct “warranty” for prompt payment discounts or “billing advantage.”

The Government attempts to justify its disparate treatment of “billing advantage” by contending that cash or prompt payment discounts are payment or “time value of money” terms not an element of price. This position is premised on 1999 post-dispute definitions in the Addendum to DSCP Policy and Procedures (finding 22). Not only does the definition of “billing advantage” therein post-date the contracts and disputes here, it also does not override the contractual enforcement mechanism of the warranty clause. There was no Government regulation, supplement, directive, circular, bulletin notice or memorandum predating the claims generated by PRGI for DSCP that defined “billing advantage.” The price warranty provision itself does not distinguish among the enumerated elements. Special treatment or emphasis is not evident. The “average price” comparison does not focus on any one of the components of price.

In short, the basis for the Government’s overpricing claim is fatally flawed. It failed to make the examination and comparison unambiguously required by the Price Warranty clause and otherwise adhere to the enforcement procedure established therein.

Bifurcation of Appellant’s Commercial Terms

The Government’s claim is premised on the assumption that it may unilaterally bifurcate appellant’s commercial terms. Appellant’s commercial terms are comprised of three elements, *i.e.*, the discount term, the NET term and the triggering event. The Government claim emphasizes one element, the discount term, while ignoring the NET term and the triggering event. In essence, the Government argues that it should have been granted the option of taking the discount within ten days without having the obligation of making NET payment within 11 days.

Unless otherwise stated, each element and condition of appellant’s commercial terms is presumed to be in consideration of all of the others. *See Stone Forest Industries, Inc. v. United States*, 973 F.2d 1548, 1552 (Fed. Cir. 1992); *Aerojet-General Corp.*, ASBCA No. 47206, 97-1 BCA ¶ 28,887 at 144,044; *United Technologies Corp., Pratt & Whitney*, ASBCA Nos. 47416 *et al.*, 01-2 BCA ¶ 31,592 at 156,132, *appeal docketed*, No. 02-1071 (Fed. Cir. Dec. 3, 2001). The commercial terms offered by appellant (*e.g.*, 2% 10 days, NET 11 days from the date of invoice) are, by their very nature, indivisible and not proffered as separate, severable or bifurcated terms. The Government cites no authority in the contract or otherwise for its unilateral bifurcation of appellant’s commercial terms. The Government may not “pick and choose” one element of the commercial terms that it will accept while rejecting the others. It has no right to do what appellant’s commercial

customers cannot do. It cannot take the rights without the accompanying obligations. Here an integral part of appellant's commercial bargain with its customers is that NET payment must be made within 11 days. Appellant can compel compliance with the 11 day NET payment condition of sale. The commercial buyer has no right to withhold payment for 30 days, as does the Government buyer.

Statutory and Contractual Prompt Payment Requirements

As noted, appellant's commercial terms consist of three elements: (1) the discount term (*e.g.*, 2% 10 days), (2) the NET term (*e.g.*, NET 11 days), and (3) the triggering event for determining timeliness of payment (*e.g.*, "from the date of invoice") for *both* the discount term and NET term. The NET payment and related triggering event components of appellant's commercial terms are inconsistent with the corresponding terms prescribed in the contract. Because of this inconsistency, we do not consider that appellant was obliged to offer its commercial terms to the Government.

The Prompt Payment Act, as implemented by OMB Circular A-125, Prompt Payment, by ¶ 020102, "Computation of Discount Period," of DOD 7000.14-R, DOD Financial Management Regulation, by FAR 52.232-25, PROMPT PAYMENT, and by FAR 52.232-8, DISCOUNTS FOR PROMPT PAYMENT, prescribes different triggering events for determining cash discounts and NET payments. In the case of voluntary cash discounts, the triggering event for calculating the due date is the invoice date. For NET payments, the due date under the FAR Prompt Payment clause is 30 days from the Government's *receipt* of a proper invoice or the date of acceptance of the supplies or service, whichever is later.

Significantly, the FAR Discounts for Prompt Payment clause does not address what happens if payment is not made within the discount period. The clause does not establish when the NET payment is due, nor does it establish the triggering event for that NET payment. Rather, both of those elements are governed by the FAR Prompt Payment clause. The latter clause establishes mandatory terms by which the Government must pay the contractor.

It is well established that in sealed bid procurements, the Government cannot "accept" commercial terms containing elements that differ from the above noted statutory and contractual requirements relative to the net payment and triggering event. Bids containing terms deviating from the requirements will be rejected as nonresponsive. *RAD Oil Co.*, B-209047, Oct. 20, 1982, 82-2 CPD ¶ 352; *Buckeye Pacific Corp.*, B-212183, Aug. 30, 1983, 83-2 CPD ¶ 282; *see also*, *Atco Surgical Supports Co.*, B-215076, Sept. 4, 1984, 84-2 CPD ¶ 247; *Parsons Precision Prods., Inc.*, B-249940, Dec. 22, 1992, 92-2 CPD ¶ 431.

For each of the delivery orders in question here, the due date for NET payments for contractors is governed by FAR clause 52.232-25, Prompt Payment. In general that clause

establishes a 30 day due date (except for certain enumerated products and perishables not relevant here) from the later of the invoice receipt date or the acceptance date. The FAR's NET term is a statutorily mandated promise by the Government to pay within the designated time period. In other words, the contract written by the Government itself establishes nonnegotiable NET payment and triggering event terms. In comparison, Tropicana's commercial terms are imposed as a condition of sale of its product to its non-Government customers.

Not only does the contract pursuant to statute dictate the NET payment and triggering event terms, DPSC in its General Instructions (finding 10), contemporaneously admonished offerors not to propose alternative terms by specifically cautioning contractors that the Government's "NET Payment Terms shall *always* be 30 days" (emphasis added). Although the contract here was not sealed bid, the structure of the DPSC contracting system did not contemplate or permit the proposal of terms that would deprive the Government of, or vary rights contained in, the contract's general provisions. Nothing in the Brand Name Supply Bulletin expressly or impliedly indicated that appellant had that option. Indeed the Government's brief insists that appellant could not offer alternative NET payment terms. (See Gov't Mem. and Cross Mot. at 15-16) Instead, DSCP maintains that appellant should have bifurcated the commercial terms, giving the Government the benefit of the discount without the corresponding obligation to make NET payment within 11 days, an argument that we have rejected above.

CONCLUSION

We conclude that there are no material facts in dispute and appellant is entitled to judgment as a matter of law. Appellant's motion is granted and the appeal is sustained.

Dated: 29 October 2002

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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

NOTES

- 1 The record consists of the pleadings, the Rule 4 File (R4), appellant's supplement to the Rule 4 File (AR4), appellant's motion for summary judgment, the Government's opposition and cross-motion for summary judgment and exhibits, and appellant's reply. Along with its motion, appellant provided 48 Proposed Findings of Uncontroverted Fact (PFF). The Government's opposition and cross-motion, includes a "Statement of Genuine Issues" in which the Government concurs with a significant number of appellant's PFFs. Accordingly, we have based many of our stated facts on the undisputed PFFs. We cite the PFFs using the same paragraph numbers used by appellant. For example, undisputed "PFF 1" is cited as "Agreement 1."
- 2 The Defense Personnel Support Center (DPSC) changed its name to the Defense Supply Center Philadelphia (DSCP) on 13 January 1998. Here, the acronym DPSC is used for events prior to January 1998 and DSCP for all events thereafter.
- 3 Solely for the purposes of appellant's proposed findings of uncontroverted facts and its motion for summary judgment, and not by way of admission, appellant does not challenge the Government's assertion that this commercial discount term was in effect during the time periods corresponding to the claim, or that the Government applied the correct commercial terms to the delivery orders in question (app. mot. at 14, n.9).

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52515, Appeal of Tropicana Product Sales, Inc., rendered in conformance with the Board's Charter.

Dated:

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