

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Aerojet Solid Propulsion Company) ASBCA Nos. 44568 and 46057
)
Under Contract No. DAAA09-89-C-0599)

APPEARANCE FOR THE APPELLANT: William R. Phillips, Esq.
Senior Vice President, Law
and General Counsel
GenCorp, Inc.
Fairlawn, OH

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
MAJ Edward E. Beauchamp, JA
CPT Kenneth G. Wilson, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE TUNKS

ASBCA No. 44568 is a defective pricing appeal that arose from a contractor's failure to disclose competitive supplier quotations in its locked bid box prior to the date of agreement on price. The Government alleges that the contractor's failure to disclose the quotations resulted in an overstatement of the contract price in the amount of \$487,374, entitling it to a refund under the Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a, as amended by Pub. L. 100-180, 4 December 1987. The contractor has paid the Government \$513,841.87, which includes the sum claimed by the Government plus accumulated interest. In ASBCA No. 46057, the contractor seeks return of that payment plus interest, asserting that the quotations were neither cost or pricing data nor reasonably available under TINA. Only entitlement is at issue.

FINDINGS OF FACT

1. On 20 August 1987, the Air Force Plant Representative Office (AFPRO) issued a Contractor Deficiency Report (CDR) to Aerojet Solid Propulsion Company (Aerojet), a subsidiary of GenCorp, for failure to have adequate controls for safeguarding the confidentiality of telefaxed bids (GSR4, tab 3; tr. 1/169-71).

2. The AFPRO was responsible for reviewing and approving Aerojet's purchasing systems. The primary purpose of the AFPRO's surveillance was to prevent fraud in

federal procurement. If the AFPRO withdrew approval of Aerojet's subcontract system, the system at issue here, Aerojet would have to obtain prior approval from the Government before placing any major subcontracts and submit to heightened surveillance by the AFPRO. (Tr. 1/211-13)

3. In response to the CDR, Aerojet moved its telefax machine out of the buyers' area into the procurement services area and rewrote Procurement Operations Procedure (POP) No. 1206, entitled "Quotation Control" (tr. 1/171-73). Under revised POP No. 1206, competitive telefax quotations were treated the same way as competitive mail-in quotations. They were put in a locked bid box until the day after the quotation due date. (GSR4, tab 5) POP No. 1206, dated November 1987 provided, in part, as follows:

2. GENERAL

2.1 [Q]uotations must be safeguarded from unauthorized disclosure. Confidentiality must be insured for all quotes.

....

3. RESPONSIBILITIES

....

3.1.1 Receive self-addressed quotation return envelopes, open, date/time stamp "in" the quotation.

a. If the return is in response to a "competitive" solicitation, retain quote in locked file until the day after the quotation due date. Only the number and identity of bidders shall be available, and then only to procurement employees with a need to know.

....

3.1.2 Bids received after the quotation due date . . . shall be opened, stamped "Late Bid" and delivered to the buyer.

3.1.3 Receive FAX quotations, date/time stamp "in", and retain or release as in 3.1.1 above.

....

3.1.5 Five days prior to quotation due date, buyer may be advised of the number and identity of bids received

4. Revised POP No. 1206 satisfactorily corrected the defects in Aerojet's handling of telefax quotations (tr. 1/174-76).

5. On 6 February 1989, Aerojet solicited quotations from W.R. Grace Company (Grace) and Angus Chemical Company (Angus) for 290,000 pounds of nitroethane (GSR4, tab 11). Nitroethane is the "key" and most expensive material used to produce nitroplasticizer, a chemical used as an energetic propellant and explosive binder in ordnance (GSR4, tab 58 at 8; Complaint and Answer ¶¶ 1).

6. Grace submitted a quotation of \$1.98 per pound and Angus submitted a quotation of \$2.00 per pound (GSR4, tab 11).

7. On 26 May 1989, the Government issued Request for Quotations (RFQ) No. DAAA09-89-R-0311 for a 5 year multiyear contract for nitroplasticizer with delivery to begin in May 1990 (R4, tab 1). Aerojet was the sole supplier of the material (tr. 1/16).

8. The Government awarded letter Contract No. DAAA09-89-C-0599 to Aerojet on 2 August 1989 (R4, tab 1; GSR4, tab 13). The contract incorporated FAR 52.215-22 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (APR 1988), which provided, in part, as follows:

(a) If any price, including profit or fee, negotiated in connection with this contract . . . was increased by any significant amount because (1) the Contractor . . . furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, . . . the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction.

9. The following portions of 10 U.S.C. § 2306a are relevant to these appeals:

(d)(2) In determining for purposes of a contract price adjustment under [TINA] whether, and to what extent, a contract price was increased because the contractor . . . submitted defective cost or pricing data, it shall be a defense that the United States did not rely on the defective data submitted by the contractor

(National Defense Authorization Act for Fiscal Year 1987, P.L. 99-661, § 952, 100 Stat. 3947).

(g) Cost or Pricing Data Defined. In this section, the term “cost or pricing data” means all facts that, as of the date of agreement on the price of a contract . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly.

(National Defense Authorization Act for Fiscal Year 1988 and 1989, P.L. 100-180, § 804, 101 Stat. 1125).

10. The following provisions of the Federal Acquisition Regulation (FAR) in effect on the date of the RFQ are also relevant, in part, to this dispute:

15.801 Definitions.

. . . .

“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 more than historical accounting data; they are all the facts that can be reasonably 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

. . . .

15.804-7 Defective cost or pricing data.

. . . .

(b)(1) If, after award, cost or pricing data are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on price given on the . . . Certificate of Current Cost or Pricing Data, the Government is entitled to a price adjustment . . . of any significant amount by which the price was increased because of the defective data.

(2) In arriving at a price adjustment, the contracting officer shall consider (i) the time by which the cost or pricing data became reasonably available to the contractor and (ii) the extent to which the Government relied upon the defective data.

11. Aerojet submitted its price proposal to the Government on 19 June 1989 (GSR4, tab 18).

12. On 10 August 1989, Mr. Robert T. Estabrook, one of Aerojet's chemical buyers, orally confirmed the Grace quotation of \$1.98 per pound (GSR4, tab 11; tr. 150).

13. On 30 August 1989, Aerojet submitted a revised price proposal. The priced Bill of Materials (BOM) in the proposal reflected a price of \$1,289,472 for 651,472 pounds of nitroethane and indicated that the price was based on the 10 August 1989 Grace quotation (Gov't br. at ¶ 47; app. br. at 1; GSR4, tabs 7, 27). The material overview contained the following information concerning Aerojet's prices:

Chemical prices reflect Price in Effect quotes escalated using DRI Industrial Chemical index WPI06INS. Those items over \$100,000 were bid as follows:

1. Nitroethane-95% Competitively bid

.....

Final chemical quotes will be solicited 8 to 10 weeks prior to required delivery.

(GSR4, tab 7)

14. A "price in effect" quotation is one that will be adjusted in the future. It is not a firm quotation. (Tr. 1/108, 187)

15. In the 1990 time period, the price of chemical materials was subject to violent fluctuations (ASR4, tab 1 at 14).

16. Joint Stipulation of Fact No. 47 provided, and we find, as follows:

Both the Government and Aerojet were aware that Nitroethane would have to be purchased by Aerojet to manufacture the Nitroplasticizer to be delivered under

Contract DAAA09-89-C-0599. The “Material Overview “ page in Aerojet’s price proposal of 30 August 1989 stated that purchase orders for Nitroethane would be solicited eight to ten weeks prior to the time the chemical was required. The Government was aware of the schedule requirements under the Contract for Nitroplasticizer deliveries to the Government.

17. On 13 February 1990, Aerojet submitted another revised price proposal. The proposal included an escalation factor of 16.4567 % for nitroethane (GSR4, tabs 21, 22).

18. The Defense Contract Audit Agency (DCAA) audited the February proposal and recommended that the escalation factor be reduced to 7.2787 %. It did not question Aerojet’s proposed price per pound for nitroethane (GSR4, tabs 21, 22).

19. On 30 April 1990, Aerojet submitted its last revised proposal (R4, tab 5). The unescalated price of nitroethane in this proposal was still \$1.98 per pound (GSR4, tab 44).

20. Negotiations began on 2 May 1990, with material costs being one of the first subjects to be discussed. Although the parties disagreed over the appropriate escalation factor to be applied to nitroethane, they did not disagree over the unescalated \$1.98 price per pound proposed by Aerojet. (GSR4, tabs 33, 37; tr. 1/130-38)

21. On 3 May 1990, Aerojet updated its raw material costs. The update did not change the unescalated price of nitroethane (GSR4, tabs 27, 58 at 8).

22. On 5 June 1990, Mr. W. Dewayne Carr, a parts buyer for Aerojet, solicited quotations for 651,000 pounds of nitroethane from Grace and Angus (ASR4, tabs 11, 12). Mr. Carr was filling in for the principal chemical buyer who was on vacation (ASR4, tab 1 at 7, 11).

23. On 14 June 1990, Grace orally requested and Mr. Carr granted a 2-day extension of the bid due date to 20 June 1990 (ASR4, tab 1 at 6, 17, 28-29, tab 12).

24. On 15 June 1990, Grace confirmed that the bid due date had been extended by 2 days and advised that it could offer a reduced price if Aerojet could accept rail car deliveries of 160-180,000 pounds (GSR4, tab 30).

25. On the same date, 15 June 1990, Mr. Carr issued a confirmation to both Grace and Angus stating that the bid due date had been extended by 2 days and that Aerojet could accommodate rail car deliveries of 160-180,000 pounds (GSR4, tabs 31, 32).

26. Aerojet received Angus' bid on 15 June 1990 and put it in the bid box (GSR4, tab 35). Grace's bid was received on 19 June 1990 (ASR4, tab 12). In the mistaken belief that the bid due date was 18 June 1990, Aerojet's procurement services personnel stamped it "Late Bid" and gave it to Mr. Carr as prescribed by POP No. 1206 (ASR4, tab 1 at 20-21). Mr. Carr marked the bid "Not Late Extended to 6-20-90" and returned it to procurement services, where it was put in Aerojet's bid box (ASR4, tab 1 at 20-21).

27. Mr. Carr testified that he did not see Grace's price and that it would not, in any event, have meant anything to him because he was not involved with the February 1989 solicitation, did not participate in the 21 June 1990 bid opening and did not buy the nitroethane for this contract (ASR4, tab 1 at 21-22, 31, tab 2 at 7).

28. Negotiations continued off and on until 20 June 1990 when the parties reached agreement on a price of \$18,462,235. Aerojet executed its Certificate of Current Cost or Pricing Data on the same date. (R4, tab 5; GSR4, tab 34)

29. Ms. Shelby Yankee, the Government's chief negotiator, testified that "during negotiations we used . . . the \$1.98 unit price that Aerojet had given us. . ." (tr. 1/31). Mr. Owen M. Dean, another member of the negotiating team, testified that "[t]he Government fully relied on the \$1.98 quote" (tr. 1/112-13). Both negotiators testified that they would have negotiated a lower price had they known that Aerojet had lower quotations in-house (tr. 1/31-34, 94-97, 111-13). The Government's post-negotiation business clearance, which was prepared by Ms. Yankee, confirms that the Government relied on the "verbal quotes dated Aug 89" of \$1.98 per pound shown on the BOM in formulating its final objective for raw material and that it ultimately achieved that objective (GSR4, tab 33 at 8, 19). We are satisfied that the team relied on the \$1.98 per pound price disclosed by Aerojet.

30. Aerojet did not disclose that it had unopened competitive supplier quotations in its bid box prior to the agreement on price (tr. 1/32, 111).

31. On 21 June 1990, Aerojet opened the quotations in its bid box. Angus' bid was for \$1.45 per pound and Grace's bid was for \$1.47 per pound. (ASR4, tabs 11, 12)

32. The Government issued Modification No. PZ0002 definitizing Contract No. DAAA09-89-C-0599 on 7 August 1990. Delivery was to commence on 31 January 1991. (R4, tab 1d) As finally negotiated, the contract was for 536,257 pounds of nitroplasticizer with a 1% variance over. For production purposes, the quantity required by the Government was to be combined with quantities ordered by other Aerojet customers and produced as a single production run of 679,800 pounds (GSR4, tabs 19, 33). Aerojet placed an order for 651,000 pounds of nitroethane with a Grace supplier, Solvents and

Chemicals, on 14 August 1990. The price was \$1.36 for the first 160,000 pounds and \$1.38 for the remaining 491,000 pounds (GSR4, tab 42).

33. On 22 October 1991, DCAA issued a post-award review recommending that the contract be reduced by \$483,813 as a result of Aerojet's failure to disclose that it had lower quotations for nitroethane prior to the agreement on price (GSR4, tab 44).

34. On 30 April 1992, the contracting officer issued a final decision demanding payment of \$487,374 plus interest (increasing DCAA's recommendation to include \$3,561 for additional quantities) (R4, tab 5). Aerojet filed a Notice of Appeal dated 22 May 1992. The appeal was docketed as ASBCA No. 44568.

35. On 9 February 1993, Aerojet paid the Government \$513,841.87, which included the sum claimed by the Government plus accumulated interest (GSR4, tab 48). Aerojet subsequently submitted a claim for \$513,841.87 plus interest, which the contracting officer denied. The appeal was docketed as ASBCA No. 46057 and consolidated with ASBCA No. 44568.

DECISION

These appeals raise two questions: (1) whether Aerojet was required to open and disclose competitive supplier quotations in its locked bid box prior to the date of agreement on price; or alternatively (2) whether Aerojet was required to disclose the fact that it had unopened competitive supplier quotations in its bid box prior to the date of agreement on price. We conclude that Aerojet was not required to open the bid box and disclose the bid prices. However, we hold that Aerojet should have disclosed the fact that it had the additional quotations.

Since defective pricing is an affirmative Government claim, the Government bears the burden of proof. This entails proving three elements by a preponderance of the evidence. First, the Government must prove that the disputed data is cost or pricing data under TINA. Second, it must prove that the disputed data was either not disclosed or not meaningfully disclosed to a proper Government representative. Third, it must prove that it relied on defective data to its detriment and show by some reasonable method the amount by which the final negotiated price was overstated. In proving the last element, the Government is aided by a rebuttable presumption that the "natural and probable consequence" of nondisclosure is an increase in the contract price. Once the Government proves these elements, the burden shifts to the contractor to prove that the Government did not rely on defective data or that the undisclosed data would not have been relied on even if it had been disclosed. The Government retains the ultimate burden of proving a causal connection between the undisclosed or defective data and an overstated contract price. *United States v. United Technologies Corporation, Sikorsky Aircraft Division,*

51 F. Supp. 2d 167 (D. Conn. 1999); *Rosemount, Inc.*, ASBCA No. 37520, 95-2 BCA ¶ 27,770.

In our view, Aerojet's failure to open and disclose the quotations in its bid box prior to the agreement on price does not constitute defective pricing. Aerojet's bid box procedure is a reasonable business practice. The primary purpose of the procedure is to prevent fraud in federal procurement, particularly the premature disclosure of bidding information to unauthorized persons. Procurement Procedure (POP) No. 1206 required that procurement services personnel time and date stamp all incoming bids and retain competitive quotations in a bid box until the day after the bid due date. POP No. 1206 prohibited procurement services personnel from disclosing the amount of the quotations in the bid box to anyone prior to bid opening. If Aerojet fails to adhere to POP No. 1206, the Government may withdraw approval of its purchasing system and require it to obtain prior approval of all major subcontracts and submit to heightened surveillance by the AFPRO. The Government has not pointed to any evidence showing that Aerojet manipulated POP No. 1206 to avoid its disclosure obligations under TINA. To the contrary, the record shows that Aerojet established the bid due date for the final nitroethane quotations several weeks before either party knew when they would reach agreement on price.

The Government cites *Grumman Aerospace Corporation*, ASBCA No. 27476, 86-3 BCA ¶ 19,091, for the proposition that a contractor must disclose cost or pricing data even if it violates an internal company policy. In *Grumman*, we held that the contractor was required to disclose a draft Cost Analysis Report, which we held to be cost or pricing data, even though the company had an internal policy prohibiting disclosure of draft documents. In our view, POP No. 1206 is considerably different than an internal policy relating to draft documents. POP No. 1206 sets forth Aerojet's procedure for preventing fraud in its contracts with the Government. The Government has approved POP No. 1206 and regularly monitors Aerojet for compliance. If Aerojet fails to adhere to POP No. 1206, the Government may withdraw approval of its subcontract system. As a result, we conclude that *Grumman* did not require Aerojet to violate POP No. 1206.

The Government secondly argues that "information in a Contractor's purchasing department, relating to the prices of materials, is clearly factual and must be disclosed." (Gov't br. at 43) As indicated *infra*, procurement services personnel were prohibited from disclosing the quotations in the bid box until the day after the bid due date and there is no evidence that they were disclosed prior to that date. As a result, *Sylvania Electric Products, Inc. v. United States*, 479 F.2d 1342 (Ct. Cl. 1973), which was cited by the Government, is inapposite. In *Sylvania*, the Court held that cost or pricing data known to a branch of the company was reasonably available despite evidence that, in the ordinary course of events, it would take 30 to 37 days for the data to reach the negotiators. The

Court reasoned that a “simple telephone call” would have obviated the problem. Since Aerojet’s procurement services personnel were prohibited from disclosing the quotations in the bid box until one day after the bid due date, the amount of the quotations could not be obtained by a “simple telephone call” and were not reasonably available prior to the bid opening date which did not occur prior to the agreement on price.

Citing *Aerojet-General Corporation*, ASBCA No. 12264, 69-1 BCA ¶ 7664, *aff’d on reconsideration*, 70-1 BCA ¶ 8140, the Government thirdly argues that even if Aerojet’s negotiators and the signer of the Certificate of Current Cost or Pricing Data were not aware of the amount of Grace’s 19 June 1990 quotation, Mr. Carr saw the quotation and had actual knowledge of the amount. In *Aerojet-General*, we held that the fact upper management personnel were aware of engineering and cost analyses showing that one of its subcontractor quotations was excessive rendered the data reasonably available. In this case, Aerojet received the Grace bid on 19 June 1990. Procurement services erroneously marked it “Late Bid” because it was received after the 18 June 1990 bid due date shown on the solicitation. In accordance with POP No. 1206, Mr. Carr marked the bid “Not Late Extended to 6-20-90” and returned it to procurement services, where it was retained in a locked bid box until 21 June 1990 in compliance POP No. 1206. Mr. Carr was a parts buyer for Aerojet who was filling in for the vacationing chemical buyer. He did not see the amount of Grace’s 19 June 1990 quotation, did not know the amount of Grace’s February 1989 quotation, was not present at the opening of the quotations on 21 June 1990 and did not purchase nitroethane for this contract. We conclude that Mr. Carr did not have actual knowledge of the price of the 19 June 1990 Grace quotation and that the amount of the quotations in the bid box was not known until after the parties reached agreement on price.

Alternatively, the Government argues that the fact Aerojet had unopened quotations in its bid box on the date of agreement on price was, in and of itself, cost or pricing data that should have been disclosed under TINA. The 1987 amendments to TINA defined cost or pricing data as all facts that, as of the date of the agreement on price, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. In determining what is cost or pricing data, the legislative history “reaffirm[ed] that the term . . . should be broadly construed.” H.R. Rep. No. 100-446, 100th Cong. 1st Sess. 657, *reprinted in* 1987 U.S. Code Cong. & Ad. News 1769. In short, TINA requires the contractor to disclose “all the facts necessary to place the Government in a position equal to that of the contractor with respect to making judgments on pricing.” *Norris Industries, Inc.*, ASBCA No. 15442, 74-1 BCA ¶ 10,482 at 49,574.

We conclude that the existence of unopened bids for nitroethane in Aerojet’s bid box was cost or pricing data that a prudent buyer or seller would reasonably expect to affect negotiations significantly. Nitroethane was the most expensive raw material used to produce nitroplasticizer. Aerojet solicited the quotations on 5 June 1990, shortly after

the parties began negotiations, and the bid opening date was 21 June 1990, one day after the agreement on price. Under POP No. 1206, Aerojet's negotiators could have easily determined the number of bids and the identity of the bidders prior to the agreement on price. Moreover, Aerojet was aware that the price of nitroethane was subject to wide fluctuations during this time period and that it might obtain a price reduction for rail deliveries. Thus, we conclude Aerojet's failure to disclose the fact that it had unopened quotations for nitroethane in its bid box violated TINA.

The Government has proven that the existence of unopened bids for nitroethane in Aerojet's bid box was cost or pricing data within the meaning of TINA and that Aerojet failed to disclose that fact to the Government prior to the agreement on price. With the aid of the presumption that the natural and probable consequence of nondisclosure is an overstated negotiated contract price, the Government has established a *prima facie* case of defective pricing. Since the presumption is rebuttable, the burden of production or going forward now shifts to Aerojet to prove that the Government did not rely on defective data in pricing the contract.

Aerojet argues that the testimony of the Government's chief negotiator, Ms. Shelby Yankee, was so "evasive, vague and enigmatic" that it was impossible to determine what she relied on in pricing the contract (app. br. at 26). Notwithstanding, Ms. Yankee clearly testified that "during negotiations we used . . . the \$1.98 unit price that Aerojet had given us." Our review of the BOM has failed to reveal any other item with a cost of \$1.98 per unit. Mr. Owen M. Dean, a cost/price analyst who was a member of the negotiating team, testified that "[t]he Government fully relied on the \$1.98 quote". Both negotiators testified that they would have negotiated a lower price if they had known that Aerojet had lower quotations. The Government's post-negotiation clearance, which was prepared by Ms. Yankee, confirms that she relied on the "verbal quotes dated Aug 89" in formulating her final objective for raw material and that she ultimately achieved that objective. We conclude that Aerojet has not carried its burden of proving that the Government did not rely on defective data.

The appeals are denied.

Dated: 17 March 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

CAROL C. DICUS, JR.
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. 44568, 46057, Appeals of Aerojet Solid Propulsion Company, rendered in conformance with the Board's Charter.

Dated:

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