ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
McDonnell Douglas Helicopter Systems	)	ASBCA Nos. 50447 50448 50449
	)	
Under Contract No. DAAJ09-90-G-0025	)	

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MAJ Sandra J. Fortson, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS

These appeals arise from contracting officer's decisions seeking recovery under the Truth in Negotiations Act (TINA) for alleged defective pricing. The underlying Basic Ordering Agreement is for spare parts and related materials for the AH-64 ("Apache") Helicopter. Only entitlement is before us. We sustain ASBCA No. 50447. ASBCA Nos. 50448 and 50449 are sustained in part.

FINDINGS OF FACT

General

1. On 28 September 1990 the U.S. Army Aviation Command (Army or respondent) and McDonnell Douglas Helicopter Systems (McDonnell or appellant) entered into Basic Ordering Agreement ("BOA") No. DAAJ09-90-G-0025. The BOA established terms and conditions under which respondent would purchase through individual delivery orders (DOs) "spare and repair parts, assemblies, support equipment, kits and initial support packages and supporting data" for the AH-64 Helicopter. The BOA incorporated the clause at FAR 52.215-22 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (APR 1988). These appeals concern DOs 2, 55 and 93. (50447 R4, tab 2)[1]

2. In part, the disputes here involve McDonnell's alleged failure to disclose cost or pricing data on parts it had decided to manufacture ("make") rather than purchase ("buy"). The Government does not challenge McDonnell's make-or-buy decision (tr.

1a/64, 2/30).[2] In early filings the Government raised the possibility of contractor manipulation of cost or pricing data involving McDonnell's make-or-buy decision and argued it was entitled to look behind the make or buy decision to determine if appellant's decision to "make" was in good faith or camouflaged an intent to buy for less than the proposed price of manufacture. The Government subsequently advised the Board that "it does not intend to dispute the make-or-buy decision." (4 December 1998 Gov't submission) Indeed, counsel was afforded a further opportunity to challenge the make/buy decision and did not do so (tr. 1a/164-65, 2/30).

3. Personnel from two Government entities other than the Army were present at the McDonnell plant - Defense Contract Audit Agency (DCAA) and the Defense Plant Representative Office (DPRO) of the Defense Logistics Agency (DLA). DCAA provided pre- and post-award audit support and DPRO provided technical support in the form of a technical analysis of cost proposal ("TACP") as well as cost/price analysis during the evaluation of proposals. Army negotiators relied heavily on the DCAA and DPRO analyses. (Tr. 1b/19-21, 132-34, 176-77, 243-44) Gordon Eeten of DCAA prepared the pre-award audit reports on DOs 2 and 55 and the post-award audit reports on all three of the DOs at issue (tr. 1b/19). In performing the post-award audits, Mr. Eeten found defective pricing based on undisclosed purchase order history (tr. 1b/92). Regarding the "make" parts, he testified that if purchase history on those parts had been identified a comparison of "make" versus "buy" cost could have been made "or even we could have asked them to get a quote for the cost if we didn't like the purchase history." (Tr. 1b/52)

4. McDonnell had several in-house systems for obtaining information on the purchase history of the parts at issue in these appeals. Current purchase histories sorted by part number were maintained in a computer system called the Procurement Data System Inquiry ("PDSI"). PDSI contained all the purchase orders for which deliveries were not complete or final payment had not been made. (Tr. 1a/138, 1b/59) New purchase orders were placed online the day after issuance (tr. 2/38). Mr. Eeten found PDSI a "pain," but he did not find it difficult to use (tr. 1b/62). DCAA and DPRO personnel had "read only" access to PDSI (tr. 2/38). We interpret this to mean that Government personnel could only look at information in the computer in its essential form and that the capability to generate the data in other formats or combinations was not available. Information on purchases was available from the day after an order was placed until 60 to 90 days after the last activity. PDSI was updated and a hard-copy printout provided on a weekly basis to McDonnell employees. (Tr. 1a/31-32) During the period relevant to these appeals, purchase history information was always provided to DCAA and DPRO personnel on request (tr. 1b/100). Hard-copy printouts or catalogs, which were voluminous and included all purchase history sorted by part number, were routinely provided to Government personnel at least once a year (tr. 1a/138, 1b/64, 2/64-65). The catalogs were relatively easy to work with (tr. 1b/202). Prior to the end of 1990, monthly updates were routinely provided to Ronald Pellum of DPRO through Linda Hubert of

McDonnell (tr. 1b/198, 2/79, 92). Thereafter, the updates were received less regularly (tr. 1b/204-05). Catalogs were kept in Government offices at McDonnell's plant and DCAA and DPRO could also use McDonnell's copy (tr. 1b/89). Purchase history which is no longer stored on PDSI is retained on magnetic tape. The information on magnetic tape was available on request and used by DCAA and DPRO personnel. (Tr. 2/38-39, 65)

5. Government personnel received no formal training on PDSI (tr. 1b/60). They had, however, learned to use it (tr. 1b/61, 142, 207). DCAA used PDSI for pre-award audits on all three of the delivery orders at issue (50447 R4, tab 149 at 22-23; tr. 1b/59). At that time, Mr. Eeten preferred using the computer to using the catalogs (tr. 1b/65). There is no evidence that any Government personnel other than the DCAA and DPRO personnel at the McDonnell plant had access to either the catalogs or PDSI.

6. Through the dates of certification, McDonnell intended to manufacture the "make/buy" parts at issue (tr. 2/105). McDonnell's proposals disclosed which parts it intended to manufacture and it did manufacture those parts (tr. 1a/146). McDonnell did not prepare an estimate of what it cost to manufacture individual parts, nor did it do a comparison of the cost to "make" a part to the previous cost of purchasing that part (tr. 1a/45-46, 146-48).

7. The proposals submitted by McDonnell for DOs 2, 55 and 93 contained manufacturing engineering plans ("MEPLANS"), indentured bills of materials ("IBOMS") and consolidated bills of materials ("CBOMS") (tr. 1a/23, 54, 65-66). The MEPLANS included pricing support for the parts which McDonnell proposed to manufacture. Materials and labor for "make" parts would be found there (tr. 1b/135-36). IBOMS may have contained purchase history for "make" parts and listed parts in a logical sequence based upon the level at which the part fit into the finished product. The finished product was level 1, and the sub-assemblies comprising level 2 were listed as components. The subassemblies comprising level 3 were listed as components for level 2, and so forth. (Tr. 1a/65-67, 1b/136). IBOMS contained "make" and "buy" parts (*e.g.*, 50447 R4, tab 106). CBOMS contained the parts and materials purchased by McDonnell with support for the price proposed for the parts or materials, which may have included purchase history (tr. 1b/35-42). MEPLANS and IBOMS were principally reviewed by DPRO, while DCAA focused on the CBOMS (tr.1b/33-34, 136). In some instances purchase history was provided in support of the purchase order identified in the CBOM as the source of estimate (*see*, *e.g.*, 50449 R4, tab 105 at 7B-1.35). Part numbers were underlined in the purchase history to draw the attention of Government reviewers to that part (tr. 1a/49-51).

8. IBOMS contained a column for material codes, abbreviated as "MC." Under MC there appeared codes, which included "DS," the abbreviation for dual source, and "MP," the abbreviation for parts manufactured by McDonnell. Another column on the

IBOMS was designated MB, the code for make-or-buy. Under that column the number 1, for make, or 2, for buy, appeared. McDonnell proposals for DOs 2 and 55 identified the "make" parts at issue as "DS" and contained appendices with definition pages which explained DS as follows: "DUAL SOURCE PART - Hardware that is simultaneously manufactured by MDHC and subcontractors for either cost or schedule reasons." (Tr. 1a/67-69; *see, e.g.*, 50448 R4, tab 103) DPRO personnel understood the meaning of dual source prior to award of the delivery orders that are in dispute but did not see the dual source notation and did not raise the fact that dual source parts were being manufactured (tr. 1b/139-40). Prior to award DCAA personnel did not understand the meaning of dual source (tr. 1b/30-31). The record does not establish that McDonnell's proposals contained definitions or explanations for the MB abbreviation and its numerical codes.

9. In addition to the cost and scheduling reasons given in the "dual source" definition, McDonnell also manufactured parts to maintain quality and to maintain manufacturing capability within the company. The specific reason or reasons for McDonnell's decision to manufacture the parts at issue is not disclosed in the record. (Tr. 1a/142-44) Make/buy decisions are typically made by a team of McDonnell's personnel familiar with the manufacturing processes and materials involved (tr. 1b/137). In addition to not challenging the make/buy decisions in these appeals, during the relevant period DPRO, the responsible agency for review of make-or-buy decisions, became satisfied that McDonnell's make-or-buy decisions were reasonable and no longer required specific review (tr. 1b/163-64, 166-68).

10. DLA, DCAA and an internal McDonnell audit team reviewed McDonnell's estimating system. In Appendices 4 and 5 of a 28 September 1990 report, deficiencies in McDonnell's make/buy plans were noted. These included the need to categorize items as "must make," "must buy" or "can either make or buy." Appendix 5 concluded that McDonnell had corrected all concerns except timeliness. (50447 R4, tab 137)

11. Although she did not participate in the negotiations for the DOs at issue, Linda Hubert had negotiated other Apache spares contracts for McDonnell (tr. 2/77-78, 80). She testified as follows:

> A. When we are arriving at an agreement on a price of a part, if it's a make part, and what we're proposing is a make part, we would go over the realization factors we're applying to come up with the total hours we're estimating to price out for the price of the part.
>
> If it's a part that's a buy part, we're looking at past procurement history for the part. If it's a part that we've estimated as a dual source or indicated as a dual source, and

we're proposing it as a make part, we would discuss prior history on that part if they asked us.

Q. Prior purchase history.

A. Yes. That could be contention [sic] at the table in arriving at a price of that part.

(Tr. 2/81) There is no evidence that Government personnel asked about purchase history on the dual source parts at issue.

ASBCA NO. 50447

12. This appeal involves DO 93 and whether appellant provided defective cost or pricing data with respect to part Nos. 7-211411035 ("035"), 7-211411037-5 ("037-5"), 7-211411125 ("125") and 7-211411160-5 ("160-5"), all of which are "make" parts (complaint and answer, ¶ 16).

13. On 3 October 1991 the Government issued a request for quotations ("RFQ") under the BOA for acquisition of 1,024 strap assemblies for the AH-64 Helicopter. Appellant submitted a proposal dated 25 September 1991 with a cover letter dated 14 October 1991 in the amount of $6,301,541.01. (Answer, ¶¶ 22, 23; app. reply br. at 86; R4, tab 106)

14. The proposal included a CBOM listing a total of 25 parts and an IBOM listing a total of 36 parts, none of which were designated as dual source. However, two of the parts at issue are shown on the CBOM as having been purchased in June 1991 at $5.45 for part no. 035 and $4.20 for part no. 160-5 (*id.* at 6B1.1). Although certain purchase histories were included for the purpose of showing outside processing costs, they coincidentally included part nos. 035 and 160-5 (tr. 1a/56-58). The most recent purchases shown are: part no. 035 - 26 August 1991 at a unit price of $5.45; part no. 160-5 - 30 August 1991 at a unit price of $3.58[3] (50447 R4, tab 106 at 7-1.28, 7-1.33).

15. DCAA issued a 20 November 1991 pre-award audit report questioning costs of $509,617 and, although referring to minor inadequacies in cost or pricing data, stating the proposal was adequate for cost negotiations. David Patterson, who prepared the report, had not previously reviewed purchase history. He used a printout dated 20 October 1991 and the PDSI. The report does not mention the purchase history for "make" parts 035 and 160-5. (50447 R4, tabs 133, 149, at 15, 17-18, 21-22) Appellant provided an updated proposal dated 18 December 1991 (50447 R4, tab 111). Additional data was provided on 10 January 1992 (50447 R4, tab 112).

16. On 23 January 1992 the parties agreed to a total price of $5,585,070.08 (unit price of $5,454.17). A Certificate of Current Cost or Pricing Data was executed on 24 January 1992. (50447 R4, tab 115) DO 93 was issued on 31 January 1992, calling for 1,024 strap assemblies for a firm fixed-price of $5,585,070.08 (50447 R4, tab 1).

17. On 7 October 1993 DCAA issued a post-award audit report which asserted that appellant had not disclosed complete, accurate and current cost and pricing data during price negotiations. The audit report recommended a price reduction of $325,938. According to the report, appellant had failed to disclose purchase histories for parts which could be bought for less than appellant's manufacturing cost. (50447 R4, tab 4) The contracting officer followed with a letter to DCAA which stated that review of the contract file indicated that appellant had not disclosed that the parts "could have been or would be procured from outside vendors at a lower cost." (50447 R4, tab 5)

18. The final audit report on DO 93 was issued on 23 March 1994. The report asserted that appellant had failed to provide current, accurate and complete cost and pricing data for part nos. 035, 037-5, 125 and 160-5. Specifically the audit report asserted that appellant failed to disclose it had purchased the parts for less under other contracts than the cost of manufacture under DO 93, that the cost of manufacture was used during price negotiations with the Government, and the price should be reduced by $840,022 as a result. The specific purchase orders, prices and dates are as follows:

Part No.	Purchase Order	Date	Unit Cost
035	477551	24 May 1991	$14.85
037-5	471518	13 Mar 1991	14.80
125	436366	31 May 1990	7.10
160-5	468738	30 Jan 1991	79.00

(50447 R4, tab 6) The 25 September 1991 proposal listed a 24 May 1991 purchase order for part no. 035 at a price of $14.85 in the purchase order history included for support for that part (50447 R4, tab 106 at 7-1.27, 28).

19. Linda Diedrich was the primary negotiator for the Army on DO 93. It was her practice to look at the proposal, but she relied heavily on DCAA and DPRO reports (tr. 1b/241-44, 254-55). Ms. Diedrich would have adjusted her starting negotiation position downward based on the post-award audit had she been provided with the information beforehand. When asked how specifically she would have used the data for "make" parts, she repeated that her starting position would have been lower and added "[t]hat's not to say that during negotiations we wouldn't have adjusted upwards again based on different reasons, again, you know, lead times or different things like that . . . ." (Tr. 1b/255, 270-71)

20. A final decision was issued on 13 November 1996 seeking $840,022 plus interest from appellant for defective pricing in the negotiation of DO 93 (50447 R4, tab 11). An appeal was filed on 20 December 1996.

ASBCA NO. 50448

21. This appeal arises under DO 2 and involves whether appellant provided defective cost or pricing data with respect to part nos. 7-211411035 ("035"), 7-211411037-5 ("037-5"), 7-211411125 ("125"), 7-211411034-7 ("034-7") and 7-211411161-9 ("161-9") (complaint and answer, ¶¶ 16, 20). Part Nos. 125, 035 and 037-5 are "make" parts and part nos. 034-7 and 161-9 are "buy" parts. (Complaint and answer at ¶¶ 16, 20; app. reply br. at 54)

22. The Government issued an RFQ for acquisition of 1,174 strap assemblies for the AH-64 Helicopter. Appellant submitted a proposal dated 4 June 1990 in response thereto. Appellant proposed a firm fixed price of $7,781,008.55. (50448 R4, tab 103) A second proposal was submitted on 24 July 1990 for the firm fixed-price of $6,843,209.63 (50448 R4, tab 106). An amended proposal dated 9 August 1990 was also submitted with a fixed-price of $6,915,872.39 (50448 R4, tab 109).

23. The June and August proposals listed 20 part numbers on the CBOMs. The IBOMs listed 38 parts. Among the 10 parts listed as dual source on the IBOMs were part nos. 035, 037-5 and 125. Part nos. 034-7 and 161-9 are both included on a CBOM as "FM" parts (made by subcontractors with materials supplied by McDonnell). The latter parts are supported with purchase history for lots of 1,174 as follows: 034-7 - $1.98 on 5 June 1990; 161-9 - $54.25 on 8 June 1990 (50448 R4, tabs 103, 109).

24. In August 1990, Gordon Eeten of DCAA conducted a pre-award review of appellant's proposal (50448 R4, tabs 107, 108). DCAA held an exit conference with McDonnell on 17 August 1990 and issued a 23 August 1990 pre-award audit report based on review of the 24 July 1990 proposal. The report questioned costs of $752,150 and found costs of $20,651 unsupported. Although questioning minor aspects of McDonnell's cost or pricing data, the report considered the proposal adequate for negotiation purposes. (50448 R4, tab 125) There is no evidence DCAA or DPRO were provided copies of the 9 August 1990 proposal.

25. The parties conducted negotiations for DO 2 from 20 September 1990 through 27 September 1990. On 27 September 1990, appellant confirmed the parties' negotiation of DO 2 and submitted its Certificate of Current Cost or Pricing Data. On 15 October 1990, the Army awarded DO 2 to appellant for the production and delivery of 1,174 main rotor strap assemblies spares at a total firm fixed-price of $6,445,260.00. (50448 R4, tabs 1, 113)

26. On 30 November 1990, the Army issued Modification No. 000201 to DO 2, increasing the order quantity to a total of 1,313 units, at the same per unit price, and increasing the contract price by $763,110.00 (50448 R4, tab 1).

27. On 17 December 1993, the resident DCAA office issued a post-award preliminary audit report. In the report, DCAA recommended a downward price adjustment of $21,813.00 based on appellant's alleged failure to disclose current, accurate and complete cost or pricing data during negotiations for the award of DO 2. (50448 R4, tab 116)

28. On 27 September 1994, DCAA issued a final post-award audit report which recommended a downward price adjustment of $522,463.00, plus interest. The alleged basis for the recommended adjustment was, in part, that appellant failed to disclose more current purchase history information which had become available before the date of certification. The specific purchase history which DCAA cites is as follows:

Part No.	Purchase Order	Date	Unit Cost
035	431778	3 April 1990	$18.80
037-5	437973	30 May 1990	10.68
125	428858	19 Feb 1990	13.98
034-7	440006	6 September 1990	1.48
161-9	438446	6 August 1990	42.10

(50448 R4, tab 6)

29. Ms. Lorine Anderson-Boyd was a procurement technician for the Army who assisted the contract specialist and contracting officer in the negotiations for DO 2 (tr. 1b/210-12, 214). She did not have a contracting officer's warrant and did not deal directly with McDonnell (tr. 1b/225-26). According to Ms. Anderson-Boyd, the Army would have negotiated a lower price if it had been in possession of the information in the audit report during negotiations (tr. 1b/224-25).

30. On 13 November 1996, the contracting officer issued a final decision asserting a Government claim under the BOA's Price Reduction for Defective Cost or Pricing Data clause for alleged defective pricing in connection with DO 2 for $522,463.00, and for $217,563.00 in interest (50448 R4, tab 121).

ASBCA No. 50449

31. This appeal involves whether appellant provided defective cost or pricing data with respect to 21 parts. Part nos. 7-114111137-3 ("137-3"), 7-211411035 ("035"),

7-211411037-5 (“037-5”), 7-211411074 (“074”), 7-211411125 (“125”), 7-211411138 (“138”), 7-211411159 (“159”), 7-211411160-5 (“160-5”), 7-211411198-11 (“198-11”), 7-211411198-7 (“198-7”), 7-211411198-9 (“198-9”), 7-211411200 (“200”), 7-311411045 (“045”), 7-211411153 (“153”) and 7-311411164 (“164”) are “make” parts. Part nos. HS4924-14D48 (“D48”), 7-311411202 (“202”), 7-114111121-5 (“121-5”), 7-311411165-5 (“165-5”), 7-211411177-5 (“177-5”) and 7-311411187 (“187”) are “buy” parts. (Complaint and answer, ¶¶ 16, 20, 23)

32. On 29 August 1990, appellant submitted an initial firm fixed-price proposal dated 21 August 1990 to the Army for 61 main rotor head assemblies in the amount of $10,222,694.16 in response to RFQ No. DAAJ09-90-Q-0798. The proposal contained an IBOM listing 159 part numbers, 59 of which were listed as dual source. The IBOM showed all of the “make” parts at issue as dual source parts. It contained a CBOM listing 81 part numbers, with the following unit price information and purchase order dates for five of the “buy” parts at issue: D48 - $106.40 on 20 June 1990; 202 - $2,810 on 30 April 1990; 121-5 - $40.36 on 18 July 1990; 177-5 - $1,011.46 on 14 May 1990; and 187 - $115 on 2 May 1990. (50449 R4, tab 105)

33. The proposal also contained purchase histories which included part nos. 121-5, 177-5 and 202. Pages from purchase histories on which part no. 121-5 appears show purchase orders in the amount of $34.58 dated 14 March 1989 and $37.90 dated 8 December 1989 and 19 March 1990. The pages follow the printout for part no. 7-11411014, and that part number is underlined. Part no. 121-5 is not underlined. (50449 R4, tab 105 at 7B-1.34-35) Purchase history for part no. 177-5 is included and underlined. It showed a price of $895 for two purchase orders from 1989 (i*d.* at 7B-1.37-38). Purchase history for part no. 202 is included and underlined. In addition to the 30 April 1990 purchase of 120 units at $2,810, it shows prices of $1,830 for 3 purchase orders from 1988, the last of which is dated 12 October 1988 (*id*. at 7b-1.93-94).

34. The DCAA office resident at appellant’s facility conducted a pre-award audit of the August proposal. An exit conference was held with a McDonnell pricing analyst on 18 September 1990 and the pre-award audit report was issued on 20 September 1990. The pre-award audit found that the cost or pricing data submitted by appellant was inadequate in some respects, but was acceptable as a basis for negotiating a contract price. (50449 R4, tab 127) There is no evidence that, after the pre-award audit, additional cost or pricing data related to the disputed purchases of part Nos. D48, 121-5 or 177-5 was provided to Government personnel except through PDSI.

35. On 20 November 1990, appellant submitted a revised proposal and on 31 January 1991, appellant submitted its final proposal, dated 21 January 1991, for the 61 main rotor head assemblies in the firm fixed-price amount of $10,776,746.86. In the November proposal appellant included a 21 September 1990 purchase of part no. 202 at

$2,979 per unit. The January proposal included part no. 165-5 for the first time, with purchase history showing a price of $110. Under cover of a 12 February 1991 letter, appellant provided the Government with a revised MEPLAN to correct the labor hours related to its January proposal. Under a 19 February 1991 letter, appellant provided "pricing backup" to the Government. There is no indication of a copy of either revision being sent to DCAA or DPRO, and we conclude the revisions were not provided to DCAA or DPRO. (50449 R4, tabs 109, 112, 113, 114)

36. The parties conducted negotiations for DO 55 on 21 February 1991. Linda Diedrich was the primary negotiator for the Army. It was her practice to look at the proposal, but she relied heavily on DCAA and DPRO reports. (Tr. 1b/241-44, 254-55) Ms. Diedrich would have adjusted her starting negotiation position downward based on the post-award audit had she been provided with the cost or pricing data at issue beforehand. When asked how specifically she would have used the data for "make" parts, she repeated that her starting position would have been lower and added "[t]hat's not to say that during negotiations we wouldn't have adjusted upwards again based on different reasons, again, you know, lead times or different things like that . . . ." (Tr. 1b/255, 270-71) On 21 February 1991, appellant confirmed the parties' negotiation of DO 55 and submitted its Certificate of Current Cost or Pricing Data. (Complaint and answer, ¶ 8) DO 55 was awarded for the firm fixed-price of $9,900,710.53 on 28 February 1991 (ASBCA No. 50449 R4, tab 2).

37. On 20 June 1994, the resident DCAA office issued a post-award preliminary audit report, recommending a downward price adjustment of $839,882.00 based on appellant's alleged failure to disclose current, accurate and complete cost or pricing data during negotiations for the award of DO 55 (ASBCA No. 50449 R4, tab 117).

38. On 27 September 1994, DCAA issued a final post-award audit report which recommended a downward price adjustment of $839,882.00, plus interest. The basis for the recommended adjustment was, in part, that appellant failed to disclose more current purchase history information which had become available before certification. The specific purchase order history cited by DCAA is as follows:

"Make" Parts

Part No.	Purchase Order	Date	Unit Cost
137-3	431763	18 April 1990	$ 7.83
074	368519	14 Nov 1988	78.01
138	427525	7 Feb 1990	11.12
159	434080	24 April 1990	63.72
200	431126	14 March 1990	3.88
045	429575	26 Feb 1990	36.56
035	431778	3 April 1990	20.30

037-5	437973	30 May 1990	11.53
125	436366	31 May 1990	7.67
153	429351	26 Feb 1990	78.35
160-5	450952	20 Sep 1990	85.32
198-11	428973	23 Feb 1990	9.61
198-7	428972	23 Feb 1990	9.34
198-9	428971	26 Feb 1990	10.75
164	426605	6 Apr 1990	96.12[4]

"Buy" Parts

D48	457487	2 Jan 1991	$113.65
121-5	450237	16 Nov 1990	35.79
165-5	453455	19 Nov 1990	99.50
177-5	396602	21 Dec 1990	968.00

In addition, the audit report found that McDonnell had not disclosed a price/cost analysis dated 4 January 1991 which recommended a price of $2,963 for part no. 202. It noted that McDonnell had issued a 27 March 1991 purchase order for that part at a unit price of $3,022. It further found that McDonnell had not disclosed an April 1990 quote of $107 from BFM Transport Dynamics (BFM) for part no. 187, which expired without a purchase being made, and noted a 21 March 1991 quote of $107.73 from BFM for part no. 187. That quotation, which was in response to a 1 February 1991 solicitation, resulted in a 28 March 1991 purchase order to BFM. McDonnell had made previous purchases of part no. 187 from BFM. (50449 R4, tab 119; tr. 1b/93)[5]

39. The 4 January 1991 price/cost analysis states it is "predicated on the requirements of FAR 15.802-2 and 15.805-3" and notes that the supplier, Kaydon Corporation (Kaydon), is the sole source for the part. Only a two-page synopsis is in the record. Although a detailed cost analysis is referenced, it is not included. The synopsis contains the following with respect to Kaydon's 31 July 1990 proposal for part no. 202, and McDonnell's recommendations arising from its analysis. The bracketed numbers are added to show unit cost:

QTY.	PROPOSED	RECOMMENDED
18	$ 56,700 [$3,150]	$ 53,334 [$2,963]
38	$116,622 [$3,069]	$112,594 [$2,963]
149	$469,350 [$3,150]	$441,487 [$2,963]

(50449 R4, tab 5) McDonnell's November 1990 proposal shows a unit price of $2,979 for a quantity of 61 parts based on a 21 September 1990 quote. Its final proposal shows a

price of $3,169 based on a 4 January 1991 quote from Kaydon also for a quantity of 61 (50449 R4, tab 112).

40. On 13 November 1996, the contracting officer issued a final decision asserting a Government claim under the BOA's Price Reduction for Defective Cost or Pricing Data clause for alleged defective pricing in connection with DO 55 for $839,882.00 and for $277,026.00 in interest (50449 R4, tab 124).

DECISION

In all three appeals, the Army asserts that McDonnell violated TINA when it failed to disclose purchase history with respect to various parts manufactured by McDonnell. In ASBCA Nos. 50448 and 50449 there are also parts purchased by McDonnell at issue. The cost or pricing data allegedly not disclosed were purchase history, a vendor quote and a price/cost analysis. McDonnell argues that the Army has not met its burden of proof on all of the parts in dispute.

General Principles and the Burden of Proof

Under TINA and FAR 15.801 cost or pricing data is defined as "all facts . . . prudent buyers and sellers would reasonably expect to affect price negotiations significantly." Under FAR 15.801, vendor quotes, information on management decisions having a significant bearing on costs, and make-or-buy decisions are specifically identified as cost or pricing data. In defective pricing cases the Government bears the burden of proof on three elements - 1) that the information in dispute is "cost or pricing data" under the Truth in Negotiations Act, 10 U.S.C.A. § 2306a; 2) that cost or pricing data was not meaningfully disclosed; and 3) that it relied to its detriment on the inaccurate, noncurrent or incomplete data presented by the contractor. As to the third element, once nondisclosure is established a rebuttable presumption arises that a contract price increase was a natural and probable consequence of that nondisclosure. *Sylvania Electric Products, Inc. v. United States*, 479 F.2d 1342 (Ct. Cl. 1973). However, "[t]he ultimate burden of showing the causal connection between the incomplete or inaccurate data and an overstated contract price remains with the Government." *Grumman Aerospace Corporation*, ASBCA No. 27476, 86-3 BCA ¶ 19,091 at 96,494.

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Assuming, *arguendo*, that the Army has met its burden of proof on the other issues, we conclude it has failed to do so with regard to the causal connection between the allegedly undisclosed data and an overstated contract price. In our view, the Army's failure to challenge the make/buy decision and other facts established regarding the Army's "hands off" treatment of McDonnell's make/buy decision generally persuade us

that disclosure of the disputed data on "make" parts would not have resulted in a change in the decision to manufacture rather than purchase. Unless the decision to manufacture was changed, we are persuaded that the nondisclosure was without effect on the price. *Cf. Universal Restoration, Inc. v. United States*, 798 F.2d 1400, 1406 (Fed. Cir. 1986).

The only evidence of record that can be reasonably construed to support a finding that disclosure would have led to an attempt to change the decision from "make" to "buy" during negotiations is Mr. Eeten's testimony that DCAA might "even [ask] them to get a quote for the cost if we didn't like the purchase history." (Finding 3) However, the Army has expressly waived the make/buy decision as an issue in this appeal (finding 2). We consider the Army's action in so doing to constitute a judicial admission that the make/buy decision was not subject to question. *John McShain, Inc. v. United States*, 375 F.2d 829, 831 (Ct. Cl. 1967); Defoe *Shipbuilding Company*, ASBCA No. 17095, 74-1 BCA ¶ 10,537. As such, Mr. Eeten's testimony cannot contravene the admission and will not be considered as evidence that the make/buy decision violated TINA and was subject to being set aside. *Id.* The Army's concession is similar to the stipulation in *Plessey Industries, Inc.*, ASBCA No. 16720, 74-1 BCA ¶ 10,603, where the parties had agreed that even if the vendor quotation had been disclosed, the Government would not have insisted that appellant reverse its decision to manufacture (*Plessey*, finding 22 at 50,275). In that case they also stipulated that the Government would have insisted that appellant credit the difference between the make and buy costs (*id.*). Here, we are only provided with conclusory testimony that the Army negotiators would have started at a lower price or negotiated a lower price with no specifics as to how (findings 19, 29, 36). In ASBCA No. 50448 the Army presented the testimony of a procurement technician who assisted in negotiations. She did not have a contracting officer's warrant and did not deal directly with McDonnell personnel (finding 29). In ASBCA Nos. 50447 and 50449 Ms. Diedrich, when asked to provide specifics as to how the undisclosed data would affect price, stated only that she would have started at a lower figure, but volunteered that various factors may have required her to raise the starting figure. In ASBCA No. 50448, the witness's position in the process as well as the non-specific nature of her testimony made her testimony on price unpersuasive. In the other two appeals, the testimony itself was unpersuasive regarding a causal connection between the data and price. While the Army argues that speculation is unavoidable in defective pricing cases, *citing Hardie-Tynes Mfg. Co.*, ASBCA No. 20717, 76-2 BCA ¶ 12,121, we are not provided any basis for such speculation. The Army needed to provide some factual support for how the data would have been used and it did not do so. Finally, insofar as TINA is concerned with contractor "windfalls," we note that McDonnell followed through on its intention to manufacture the parts. In summary, we have no basis to conclude that disclosure of the relevant purchase history would have resulted in a change in the make/buy decision. We hold, therefore, that disclosure would not have changed the make/buy decision. Lacking an explanation as to how a lower price would have been negotiated without reversing the

make/buy decision, we are not persuaded there was a causal connection to price that resulted from the nondisclosure.

Moreover, even if we believed that the Army's concession did not foreclose consideration of Mr. Eeten's testimony as evidence that the make/buy decision might have been changed, it would not suffice to establish the necessary causal connection between nondisclosure and the overstated price. Weighed against it would still be the Army's stipulation that it does not dispute the make/buy decision; the fact that DPRO, not DCAA, was responsible for make/buy issues; DPRO's evolved position of not only not seeking to question McDonnell's make/buy decisions but not even reviewing them; and the negotiators' failure to testify that they would have sought to change the make/buy decision. (Findings 2, 9, 19, 29, 36) The circumstances preceding the Army's concession on the make/buy decision are such that the Army relinquished its right to raise the issues of contractor price manipulation, lack of good faith or an intent to buy for less than the proposed cost of manufacture (finding 2). The Army's yielding on the make/buy decision is tantamount to proof adduced by McDonnell that there was no price manipulation, lack of good faith or intent to buy for less attached to the decision. Combined with the other facts listed above, it establishes *prima facie* that the Army did not intend to challenge the make/buy decision during contract negotiations with or without the undisclosed data. This, and the fact that McDonnell intended to and did, in fact, manufacture the parts, persuades us that a price increase was *not* a natural and probable consequence of nondisclosure of purchase history. Our rejection of the Army's argument that price would have been affected is not changed by the testimony of Army negotiators, who failed to explain with some degree of specificity how they would have attempted to use the data in price negotiations. *See Rosemount, Inc.*, ASBCA No. 37520, 95-2 BCA ¶ 27,770 (summary judgment granted where Government buyer's affidavit stated only that the data would have been used in an effort to negotiate a lower price). Indeed, without some explanation, we cannot discern how price could have been affected without changing the "make" parts to "buy" parts.

The Army's burden of proof is not carried by the testimony of McDonnell's negotiator, Ms. Hubert (finding 11). As McDonnell points out, her testimony that purchase history would be discussed "if they asked us" (*id.*) established only that discussions of purchase history arose at the Government's request, and here there was no request. Her testimony may support the argument that the undisclosed purchase history meets the definition of cost or pricing data generally, but it does not establish a causal connection to price in these appeals, where the make/buy decision would not have been changed by the undisclosed data. In this context, it is well to bear in mind that DPRO personnel ultimately became sufficiently satisfied with McDonnell's make/buy decisions that they no longer reviewed them (findings 8, 9). Thus, in addition to the Army's concession as to the make/buy decision in these appeals, there evolved a general acceptance of McDonnell's practice and policy with regard to make/buy decisions by

DPRO, the responsible agency for make/buy reviews (finding 8). Moreover, although the Army negotiators relied on DPRO and DCAA, DPRO personnel, who understood the meaning of dual source, did not see the dual source notation and DCAA, in spite of the definitions appendices in two of the proposals, did not know what dual source meant. Indeed, in DO 93 where the proposal showed prior purchases of "make" part Nos. 035 and 160-5, it also escaped notice by DCAA and DPRO. Thus, the existence of "make" parts that had been purchased previously was not brought to the Army negotiators' attention. If, as Ms. Hubert testified, dual source parts could be a source of contention, they were not a source of contention here in spite of the fact that ample information had been presented by McDonnell as to the dual source status of all but two of the parts at issue. This must have been contributed to by the review process, which was such that DCAA reviewed one part of the proposal and DPRO reviewed another (finding 7). DPRO knew what dual source meant prior to award but DCAA did not (*id.*). On this crucial point they did not communicate. As a result neither entity made adequate use of the information available with respect to the "make" parts. In other circumstances involving multiple Government participants, disclosure to one active participant was adequate. *Singer Company, Librascope Division*, 576 F.2d 905 (Ct. Cl. 1978). We find that principle applicable here through the period of the pre-award reviews.

The Army has not alleged that McDonnell knew about the division of review responsibilities and used it to its advantage in developing its proposals. Moreover, we are not disposed to place on the contractor responsibility to anticipate how its data is reviewed and coordinated so long as the appropriate data is disclosed adequately. We find nothing obfuscatory in, for example, a "definitions" section in an appendix to identify codes on a bill of materials. We are unwilling to place responsibility for DCAA's failure to find the definitions and review the IBOMs on McDonnell. Given these facts, it is difficult to see how the pre-award review process, upon which great reliance was placed, would have made use of purchase history for the "make" parts, which would have been on the IBOM reviewed by DPRO, and resulted in the provision of useful information to the Army negotiators. We are thus unpersuaded by the evidence and arguments of record that there was a causal connection between the nondisclosure of purchase history and an overstated price with respect to any of the "make" parts. Because of our holding on this issue, we do not address the parties' other arguments.

The "Buy" Parts - ASBCA Nos. 50448 and 50449

Purchase History Availability

The purchase history involved here, including the vendor quote and price/cost analysis, is for recent purchases of the same parts as those at issue. As such, it falls within the definition of cost or pricing data at FAR 15.801. We are not persuaded otherwise by McDonnell's argument that, because different contracts may have been

involved, the data was not cost or pricing data. *Hardie-Tynes, supra.* The Army must establish next that the data was not meaningfully disclosed. *Sylvania Electric Products, Inc., supra.*

Making cost or pricing data available does not, *ipso facto*, constitute disclosure. Effective and adequate disclosure of cost or pricing data occurs when a contractor clearly advises appropriate Government personnel of the relevant data. *Sylvania Electric Products, Inc., supra*. In these appeals, DCAA and DPRO personnel participated in the pre-negotiation evaluation of the proposals and their input was relied on by the contract negotiators. Accordingly, at least through the pre-award reviews, disclosure to DCAA and DPRO personnel, if otherwise adequate, satisfied McDonnell's disclosure obligation. *Whitaker Corporation (Straightline Manufacturing Division),* ASBCA No. 17267, 74-2 BCA ¶ 10,938 at 52,077, 52,079.

There is no "bright line" test as to what constitutes adequate disclosure. In *M-R-S Manufacturing Co. v. United States*, 492 F.2d 835 (Ct. Cl. 1974), the court said:

> Situations wherein accurate, complete, and current information is known to the contractor and not known to the Government can certainly be avoided if such information is physically delivered to the Government and the information's significance to the negotiation process is made known to the Government by the contractor. We do not hold that both of these conditions must always be met before a contractor can be said to have submitted the required information to the Government. We conclude, however, that if a contractor possesses accurate, complete, and current information that is relevant to negotiations with the Government, and he neither physically delivers the data to the Government, nor makes the Government aware of the information's significance to the negotiation process, then he has not fulfilled his duty under the Act to furnish such information to the Government.

492 F.2d at 842-43.

McDonnell argues that the data at issue was adequately disclosed prior to issuance of the Certificates of Current Cost or Pricing Data. It is argued that access to all relevant data was provided by computer, on magnetic tape and in binders or catalogs. The Army argues that the data was not adequately disclosed by such access.

The record establishes that the sources for the data were located in reasonably close proximity to DCAA and DPRO personnel; they had ready access to the computer

data base for parts (PDSI) and the catalogs, which were automatically received once a year; that PDSI contained all active purchase orders and the catalogs, updates of which were received monthly through 1990 and less frequently thereafter, contained complete purchase histories; that PDSI was updated daily; that DCAA and DPRO personnel knew how to use those sources; and that McDonnell personnel were always responsive when data was requested. While PDSI dropped purchase orders 60 to 90 days after they became inactive, the allegedly undisclosed purchase order for part no. 161-9 cited in the post-award audit report in ASBCA No. 50448 was issued within 60 days of the pre-award audit report. The purchase order for part no. 034-7 was issued after the audit and before certification. (Findings 24, 28). In ASBCA No. 50449, the disputed purchase orders were also issued after the pre-award audit report but before certification (findings 34, 36, 38). In any event, we conclude that through the PDSI, DPRO and DCAA personnel had ready access to relevant purchase history in performing their reviews. McDonnell thus satisfied the "physical delivery" requirement at least as to the pre-award audits.

The Army argues that ready access to data by computer and in the form of multi-volume catalogs was not in compliance with FAR 15.804-6(d), which states that "merely making available books, records, and other documents without identification . . . does not constitute 'submission' of cost or pricing data." In essence, this argument asserts that the significance of the data was not made known to the Government. However, these were straight-forward acquisitions. The "buy" parts were listed on both the IBOMs (which also included "make" parts) and the CBOMs. The Army does not argue that, during the pre-award review, DCAA and DPRO did not understand the significance of the part numbers and the purchase histories or that further explanation was necessary. Indeed, the significance of the parts and the purchase histories should have been obvious to anyone reviewing the proposal. While the Army does argue that no formal training was provided to Government personnel by McDonnell, we have found that DCAA and DPRO personnel understood how to use PDSI and the catalogs. In ASBCA No. 50448, the IBOM listed 38 part numbers and the CBOM listed 20 part numbers. The proposal did not involve part numbers in quantities so large that review using PDSI was unacceptably onerous and amounted to unloading an unmanageable quantity of data on the reviewer. As to the PDSI, Mr. Eeten objected only on the basis that it was a "pain" to use, not because it was difficult (finding 4). Moreover, we have held that, with identification of significance no more specific than the facts in these appeals, data submitted in multiple formats more complex than the PDSI and bills of materials here was adequately disclosed. *Texas Instruments, Inc.*, ASBCA No 23678, 87-3 BCA ¶ 20,195 (a combination of microfiche cost reports, account summaries, run costs and learning curve summaries). Taking all of the above into consideration, we hold that the purchase history of part no. 161-9 in ASBCA No. 50448, which was in PDSI at the time of the pre-award audit, was adequately disclosed.

With respect to part no. 034-7 in ASBCA No. 50448 and "buy" parts D48, 121-5, 177-5 and 165-5 in ASBCA No. 50449, the facts differ in that the purchases were made after the pre-award audit but before certification. The purchase history was not, therefore, in PDSI at the time of the pre-award audit. Indeed, part no. 165-5 was only included in the last proposal. In the case of part no. D48, appellant disclosed a purchase order for $106.40, less than the $113.65 purchase cited in the audit. Given the disclosure of the purchase for $106.40, we are not persuaded there was a causal nexus between the price and the failure to disclose the $113.65 purchase.

Since there were exit conferences with McDonnell analysts following the pre-award audits, McDonnell was aware that the audits of its original proposals had been completed. For DOs 2 and 55 it submitted amended proposals which were neither provided to DCAA and DPRO by McDonnell nor audited. Except through PDSI, McDonnell made no attempt to apprise DCAA or DPRO that additional purchases relevant to DOs 2 and 55 had been made. On the facts of this appeal, DCAA and DPRO personnel were no longer part of the evaluation process after the pre-award audit and the availability of the data to them through PDSI ceased to be adequate disclosure. To hold otherwise would impose on the DCAA and DPRO personnel at the McDonnell plant the responsibility to continuously survey the part numbers on the bills of materials of previously audited proposals until apprised of certification. We think the imposition of such a responsibility would be unreasonable. As there is no evidence that the contract negotiators had access to or knew how to use PDSI and the catalogs, the fact that the purchase history was available in PDSI does not constitute disclosure to them. McDonnell did not, therefore, specifically identify the purchase history in question or its significance to any Government personnel. We think it did not meet its obligation to update the data with respect to part nos. 034-7, 121-5, 165-5 and 177-5. *Singer Company, Librascope Division, supra.* Accordingly, the rebuttable presumption of a price increase arises. *Sylvania Electric Products, supra.* McDonnell has not rebutted the presumption. The Army's burden on the causal connection is met by the fact that orders for the parts at lower prices were placed less than six months before certification in DO 55 (finding 38), and within weeks of certification in DO 2 (finding 28).

The Vendor Quote and the Price/Cost Analysis

The post-award audit report on DO 55 cited part nos. 202 and 187 as parts for which relevant cost or pricing data had not been disclosed. For part no. 202 it reported that a price/cost analysis had not been disclosed. For part no. 187, it reported that a vendor quote had not been disclosed. There being no evidence to the contrary, we conclude that the vendor quote and the price/cost analysis were not disclosed. (Finding 38) It is thus rebuttably presumed that price was affected by the nondisclosure.

McDonnell argues that the quote from BFM was not cost or pricing data because it was for a procurement other than DO 55 and because it had expired without a purchase order being awarded prior to submission of the proposal for DO 55. Vendor quotations are specifically listed as cost or pricing data under FAR 15.801. We do not think the factors argued by McDonnell establish that prudent buyers and sellers would not reasonably consider the vendor quotation to affect price negotiations significantly. To the contrary, we think the quote would reasonably be expected to have a significant effect on price negotiations. *Aerojet-General Corporation*, ASBCA No. 12873, 69-1 BCA ¶ 7585 (expired, non-responsive quote for a different quantity held to constitute cost or pricing data). It was not so distant in time as to be unreliable and prior purchases from BFM of part no. 187 establish that BFM was an acceptable supplier. Moreover, McDonnell solicited a quote from BFM shortly before certification. We hold that the April 1990 BFM quote was cost or pricing data, that McDonnell has not rebutted the presumption that an increase in price was a natural and probable consequence of nondisclosure and that the Army has established a causal connection to the price increase. *Sylvania Electric Products, supra.*

Regarding the price/cost analysis, McDonnell argues that the analysis is not cost or pricing data because the analyst's recommendation is a judgment. The Army asserts that the analysis contains facts, particularly the quotation, from Kaydon which is lower than the price in McDonnell's proposal. We agree with the Army that the analysis is cost or pricing data. *See Grumman Aerospace Corporation*, ASBCA No. 27476, 86-3 BCA ¶ 19,091 at 96,494-95. However, the presumption of a price increase as a consequence of the failure to disclose the report, in which McDonnell sets the price of $2,963 as a target for part no. 202, is overcome by McDonnell's disclosure of purchases for $2,979 in September 1990, $2,810 on 30 April 1990 and $1,830 in 1988 in its November and August 1990 proposals (findings 32, 33, 35). At least with respect to the 30 April 1990 purchase, the Army had information of a lower price sufficiently close in time that we would expect it to facilitate negotiation of a lower price than that agreed to by the Army. Moreover, the September 1990 price was not significantly higher than that in the report. We are, therefore, not persuaded there was a causal nexus between the nondisclosure of the analysis and an overstated contract price for part no. 202. We sustain the appeal as to part no. 202.

SUMMARY

ASBCA No. 50447 is sustained. ASBCA Nos. 50448 and 50449 are sustained with respect to the parts manufactured by McDonnell. ASBCA No. 50448 is sustained with respect to "buy" part no. 161-9 and denied with respect to "buy" part no. 034-7. ASBCA No. 50449 is sustained with respect to "buy" part nos. D48 and 202 and denied with respect to "buy" part nos. 121-5, 165-5, 177-5 and 187. The matter is remanded to the parties for negotiation of quantum.

Dated: 29 August 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
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] Citations to Rule 4 files and other documentary evidence will include the appropriate appeal number as a prefix.

[2] A one-day hearing for the purpose of taking the testimony of George W. Littlefield was held on 20 April 1999. The transcript of that hearing is designated "tr. 1a." The transcript of the first day of the hearing that commenced on 13 July 1999 is designated "tr. 1b."

[3] Because the prices are significantly lower than those cited in the audit report and, for 035, the purchase history (*see* finding 18, *infra*) it appears that these references are to materials used in manufacture of the parts (*see* finding 7, *supra*), and not the completed parts. Neither party has addressed this question. Our conclusion that

the Army has failed to establish a causal connection between the alleged price increase and the undisclosed data makes resolution of whether the prices are for completed parts or materials unnecessary.

[4] DCAA added an 8 percent escalation factor to 14 of the "make" parts, and added an 18.2 percent escalation factor to part no. 074.

[5] The 21 March 1991 quote is, of course, irrelevant to the issue before us.

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. 50447, 50448 and 50449, Appeals of McDonnell Douglas Helicopter Systems, rendered in conformance with the Board's Charter.

Dated:

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