

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Alliant Techsystems, Inc.) ASBCA Nos. 47626 and 51280
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Under Contract No. F42650-88-C-3607)

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

These appeals involve alleged defective pricing arising out of a supply contract for 50,920 BLU-97 A/B Bomblets awarded to appellant Alliant Techsystems, Inc. We sustain the appeals.

FINDINGS OF FACT

In 1985, the Department of the Air Force, Eglin Air Force Base (AFB), FL awarded appellant a contract to develop and deliver a small quantity of Combined Effects Munitions (CEM) Systems (the FY 85 contract) (tr. 1/18-19). Each CEM System contains 202 BLU-97 A/B Fragmentation Bomblets (BLUs) (ex. G-1).

On 1 July 1986, a head-to-head competition between appellant and Aerojet Ordnance Company resulted in an award to appellant of Contract No. F08635-86-C-0026 for 14,500 CEM Systems, which represented the major portion of the requirements for Fiscal Year (FY) 1986 (the FY 86 contract) (ex. A-127; tr. 1/19-20). Deliveries for the FY 86 CEM Systems contract were scheduled to begin in December 1987, and to be completed in September 1988 (ex. A-127).

The FY 87 Contract

The competition with Aerojet for the FY 1987 CEM Systems contract resulted in an award to appellant, on 19 June 1987, of Contract No. F08635-87-C-0029 for 6,500 CEM Systems, which included 1,313,000 bomblets, the smaller portion of the requirements for that year (the FY 87 contract). The unit price of the bomblets was \$42.40. Deliveries were scheduled to begin in October 1988, and to be completed in September 1989. (Ex. A-127) Because of the competition, appellant's FY 87 Best and Final Offer (BAFO) reflected a six percent discount, or "decrement," on the prices of all the component parts, except the bomb body and the Aid cup assembly (tr. 3/198-99). The hearing testimony established that the estimated labor, burden and material (LBM) costs per bomblet in the FY 87 BAFO were \$16.23 (R4, tab 3 at 16; ex. A-134; tr. 3/127-30, 132, 134, 139).

The FY 87 contract included four option years and, in Section H, provided the formula for evaluating and apportioning the award of the FY 88 CEM Systems option between appellant and Aerojet based upon their respective BAFOs (ex. G-7; tr. 1/133-34).

Effective 24 July 1987, administrative responsibility for the CEM Systems contracts was transferred from Eglin AFB to the U.S. Army Rock Island Arsenal, IL. Mr. James Prather was assigned contract administration responsibilities for the contracts. (Ex. G-6, tr. 1/99-102) At the same time, technical and program management responsibilities for the contracts were transferred to Hill AFB, UT (tr. 1/102-03, 136, 3/202-03).

The individual responsible for the CEM System contracts for appellant was Mr. Bruce Johnson, appellant's Director of Air-Delivered Systems. Messrs. Gene Jacobson and David Tappe served as appellant's program manager and deputy program manager, respectively. Mr. Jacobson also served as Production Engineering Supervisor and was appellant's contact with LT Jessie Rowe and Mr. Steve Rives, the Hill AFB program managers. (Tr. 2/171-72, 3/6-8, 171)

Appellant decided it would be more cost effective to combine the purchase of materials for the 6,500 CEM Systems for the FY 87 contract with an advance purchase of materials for an additional 9,000 CEM Systems in anticipation of the FY 88 option award and began placing material orders in September 1987 (ex. A-10; tr. 3/23-26). The options appellant negotiated with its vendors to purchase additional materials beyond those needed for these 15,500 CEM Systems expired on 31 May 1988, and the vast majority of the combined parts purchase orders were confirmed before that date (R4, tab 10 at 2; G-48; tr. 1/72, 3/138).

The FY 88 Award

Following notice of its intention to exercise the first option for the FY 87 contract, the Army, on 19 April 1988, awarded appellant the larger share of the CEM Systems requirements for FY 88, a total of 15,683 CEM Systems, which included 3,167,966 bomblets, with deliveries beginning in October 1989, and concluding in September 1990 (the FY 88 contract) (exs. A-127, G-14; tr. 1/132-33).

Appellant provided its resident Defense Contract Audit Agency (DCAA) auditor with a copy of the cost volume for its FY 88 BAFO (tr. 2/37-38, 87). Section 3 of the FY 88 BAFO, which was entitled "Methodology - Cost Build Up," explained appellant's combined purchasing strategy for the FY 87 and FY 88 contracts (ex. A-5, tab 3 at 34-35). LT Rowe was aware of the plan to combine purchases and considered the risk to be appellant's (tr. 1/200-01). Appellant heavily "decremented" the component materials by ten percent (ex. A-5; tr. 2/144, 3/127, 157). The unit price of the BLUs for the FY 88 contract was \$31.45 (ex. A-127).

The FY 88 contract contained three additional purchase options for bomblets in quantities of 500, 2,000 and 4,000 (a total of 6,500) at the same \$31.45 unit price (ex. A-5, tab 10 at 295).

The Hill AFB Special Purchase

In May 1988 appellant learned that the Air Force intended to procure an additional quantity of approximately 50,000 BLU-97 A/B bomblets (2/181-82, 3/172). On 22 July 1988, the Special Activities Office at Hill AFB issued a sole-source solicitation for a special procurement of 50,400 BLU-97 A/B Combined Effect Bomblets (CEBs) with an optional additional quantity of 520 bomblets for delivery by 31 July 1989 (the Hill contract) (R4, tab 1). The requirement was for a classified "black operations" program (tr. 1/153-54, 256). The only difference between the BLUs that were already under contract with appellant and those solicited by Hill AFB was the shipping container (ex. G-27; tr. 1/184, 257).

The contract had a "short notice delivery schedule or requirement" (tr. 1/184-85), and the original proposal response date was 11 August 1988, although this date was subsequently changed to 22 August 1988 (R4, tab 1). Appellant responded to the solicitation with a letter dated 4 August 1988, addressed to Mr. Kenneth U. Pierce, the Hill AFB contracting officer, who was aware that the Army was administering CEM contracts at the Rock Island Arsenal, but had no personal experience with the program (tr. 2/196-99). Appellant's letter suggested that the Government's interests would be

served best by exercising an option on the existing FY 88 contract, and offered to provide a quote for increased option quantities (R4, tab 2; tr. 3/110-11, 174-75). The Army, however, determined that the requirement was out-of-scope for the existing contract (tr. 1/184-85). The Air Force considered the solicitation to be an “urgent requirement” which could not be purchased through the existing Army contract because of “unique circumstances relative to security and urgency” (ex. G-27).

Appellant submitted its proposal on 22 August 1988 (R4, tab 3). At the time of the proposal, appellant had internal cost or pricing policy procedures in place to ensure compliance with the Truth in Negotiations Act (TINA) (10 U.S.C. § 2306a) (ex. A-12).

Appellant’s usual estimating procedures require preparation of a “bottoms-up” estimate, which involves contacting all suppliers for quotes and verifying all costs (tr. 2/11-12, 3/118-19). The usual estimating procedures were not followed for the Hill contract because of the time constraints (tr. 2/187). Instead, appellant used cost data from its FY 87 CEM Systems BAFO which it adjusted for the substantial difference in quantities. It considered the FY 87 BAFO to be the most realistic basis for negotiation because it predicted the lowest costs and because the Hill contract BLUs would be produced concurrently with the FY 87 BLUs. (R4, tab 3; tr. 3/139-40)

Although it did not do a full “bottoms-up” estimate, appellant did obtain a quotation from its subcontractor, Day & Zimmermann, Inc. (D&Z), which proposed providing load and pack (LAP) service on two Fridays in February 1989. The quotation was consistent with appellant’s March 1989 target delivery date for the Hill contract BLUs. (Ex. A-27 at 104-06; tr. 3/75, 101-02, 176-77) There is bomblet attrition in the LAP operation; however, the attrition rate had dropped from the need for 213 bomblets per CEM System in FY 85, to 205 bomblets in FY 86, to 204 in FY 87 and 203 in FY 88 (R4, tab 25; tr. 3/91-92).

Appellant disclosed its anticipated pricing approach to the Air Force (R4, tabs 3 through 6; tr. 3/60-62). Appellant also advised Mr. Charles L. Eggerichs, the DCAA supervisory auditor in appellant’s resident office, that a full estimate would not be prepared, and followed his suggestion that the proposal for the Hill contract include an explanation of the methodology to avoid any problem with inadequate estimating (ex. A-22; tr. 2/6-12, 3/117-20). The proposal stated: “In order to provide hardware at the lowest possible cost to the government and an expeditious delivery, our proposal is based upon supplying production hardware the same as we build for the FY 87 requirement on Air Force contract F08635-87-C-0029.” The cost and pricing documentation attached to the proposal was clearly identified as having been taken from the FY 87 BAFO. (R4, tab 3)

Mr. Cedric Bonner, appellant's cost estimator for all of its CEM System program bids, prepared the proposal for the Hill contract (tr. 3/106-09, 113). It proposed a unit price for the BLU of \$44.83 for both the 50,400 base quantity and the option, up to a maximum of 25,000 bomblets, assuming both quantities were ordered at the same time. The estimated LBM costs were \$22.84. (R4, tab 3)

As part of his preparation, Mr. Bonner obtained appellant's bomblet LBM costs for the FY 86 CEM System contract, the only contract then in production. Including an actual cost of \$6.85 for the bomblet body, the FY 86 LBM cost per unit was \$27.21. (Ex. A-27 at 102-03, ex. A-134; tr. 3/123-26, 133-35, 139) Additionally, he obtained from appellant's procurement department a computer list dated 18 August 1988 of appellant's current actual material costs, identified as a "Total Value" list, which was based upon outstanding purchase orders for the FY 87/88 combined buy (tr. 3/120-21). Using this list, Mr. Bonner calculated the actual LBM costs per BLU for the FY 87/88 combined buy to be \$16.45, including the \$5.19 figure contained on the Total Value list for the bomblet body. (Ex. A-27 at 190-92, ex. A-134; tr. 3/131-33)

The Total Value list also contained a cost of \$4.74 for the Aid cup assembly, which was the same as the actual cost of the part for the FY 87 CEM Systems contract. For the Hill contract, the Aid cup assembly was replaced by a less expensive part called a Ram Air Decelerator (RAD). (R4, tab 4; ex. A-27 at 191, ex. A-113B; tr. 1/242, 3/163, 165-67, 188-90)

Mr. Pierce discussed appellant's proposal for the Hill contract with Mr. Eggerichs, who reported that appellant had previously contacted him and advised that appellant's approach appeared to be a satisfactory method. He requested that Mr. Eggerichs review the proposal and Mr. Eggerichs assigned the review to Mr. Michael Walker, another resident DCAA auditor. (Ex. G-27; tr. 2/202-03)

Although appellant had previously provided him with a copy of the FY 88 BAFO, Mr. Walker had not performed an audit of the award. He reviewed the cost runs contained in the FY 88 BAFO, but not the narrative in Section 3 which explained that appellant had implemented a combined buy for the FY 87 and FY 88 contracts. (Tr. 2/37-39, 90-91, 94-96) Mr. Walker then called Mr. Pierce and advised him that the proposal for the FY 88 contract was about 21 percent lower than the proposal for the Hill contract, which he described as "the most important point," and recommended that a "bottoms-up" estimate be prepared (ex. A-28; tr. 2/99-101). The memo for record Mr. Pierce prepared supporting his decision to waive an audit of the proposal establishes that he decided to use the information provided by Mr. Walker in the negotiations and had concluded that there was an adequate production and cost history to negotiate a reasonable price (ex. G-27).

Contract Negotiations

Contract negotiations took place on 25 August 1988 at Hill AFB. Appellant's negotiators were Messrs. Bonner, Jacobson and Floyd J. Ordemann, Director of Negotiations and Contracts Counsel (tr. 3/142). The Air Force negotiators included the contracting officer, Mr. Rives, who had just replaced LT Rowe as the CEM Systems project manager, and Messrs. Fred Parry and Paul Vanderkooi, both of whom were price analysts from the Hill AFB Special Activities Office (R4, tab 4; tr. 1/206). LT Rowe was not involved with the Hill contract except for obtaining a Rough Order of Magnitude (ROM) pricing estimate from Rock Island Arsenal which he had requested in March 1988 and which reflected BLU unit prices ranging from \$37.89 to \$42.00 for FY 1990 (ex. G-16; tr. 1/177-81).

Mr. Bonner explained the methodology used in appellant's proposal and advised the Government that appellant's current actual LBM unit cost of \$27.21 for the BLU for the FY 86 CEM Systems contract was higher than the FY 87 BAFO estimates (R4, tab 10; tr. 2/212-13, 3/143-44). Appellant did not provide a comparison of the FY 86, FY 87 and FY 88 part costs to the Air Force price analysts (tr. 3/149), and did not inform the Air Force that it was making combined purchases of materials for the FY 87 and FY 88 CEM Systems contracts (tr. 2/191). It also did not provide copies of either its LBM costs for the FY 86 contract or the Total Value list (tr. 3/150).

The Government negotiators relied upon the cost data provided by appellant (R4, tab 5; ex. G-29; tr. 2/208-11). When they inquired about the FY 88 contract costs, they were advised that, even if the FY 88 pricing information was available, it would reflect higher costs to the Government (tr. 1/236, 2/212).

The Government's Price Negotiation Memorandum states the following in a paragraph identified as "UNIQUE FEATURES:"

The time constraints of this procurement did not permit the use of a "bottoms-up" estimate for the purchase of the items. As an alternative, the [Government] used a comparison to the FY 87 CEM BAFO. Current actuals were projecting costs higher than could be negotiated due to the timing of the contract. It was the [Government's] opinion that a "bottoms-up" estimate for our stand-alone purchase would result in a higher cost and longer lead-time than as presently negotiated.

(Ex. G-29 at 5). The memorandum also reflects the Government's understanding of the risk associated with appellant's plan to maintain material costs at the same level for this "add-on" effort to the existing FY 87 contract (*id.* at 8).

In a 29 August 1988 letter addressed to Mr. Pierce, Mr. Ordemann documented the negotiations and agreements reached on 25 August 1988. His letter recorded appellant's explanation of the methodology underlying its proposal and the Government's decision to use the FY 87 BAFO prices for the negotiations and observed: "We stated that we were very concerned about any future defective pricing action wherein someone might 'second guess' our mutual actions and you agreed that you did not want to and did not rely on any other data." The letter acknowledged the agreement on a unit price of \$39.68 for 50,920 units, which recognized a price reduction of 67 cents each for the inclusion of a RAD in lieu of the Aid cup assembly. (R4, tab 4; ex. A-31; tr. 1/242) The letter was incorporated into the contract by reference (R4, tab 1 at 6). Attached to the letter was a Certificate of Current Cost or Pricing Data signed by Mr. Ordemann and dated 29 August 1988 (R4, tab 4).

Mr. Pierce responded on 7 September 1988 in a letter which tracked the Government's Price Negotiation Memorandum and stated in pertinent part:

It is understood that time did not permit a "bottoms-up" estimate and as an alternative we used the FY 87 CEM BAFO. We elected to use the cost data presented in the BAFO because the current actuals were projecting costs higher than we were negotiating due to the timing of the contract, the quantity required, and the required delivery. In addition it was our opinion a "bottoms-up" estimate for our quantity "stand alone" would also be higher. In short, we feel there should be no basis for any future defective pricing action.

(R4, tab 5)

In yet another letter dated 22 September 1988 on the subject, Mr. Ordemann further clarified that the Hill contract price had been extrapolated from two "bottoms-up" estimates prepared for the FY 87 BAFO, that a stand-alone estimate would have been higher than the price proposed, and that current actual costs also would have resulted in a higher estimate. The letter explained that the proposed prices factored in prior learning and assumed that materials could be added to the FY 87 Contract to obtain the benefit of quantity material buys. (R4, tab 6)

On 23 September 1988, Hill AFB awarded appellant Contract No. F42650-88-C-3607 in the total amount of \$2,098,370.60 to furnish and deliver 50,920 BLU-97 A/B Bomblets at a unit price of \$39.68 on or before 31 July 1989, and to provide packing qualification testing (R4, tab 1). Clause I-133 incorporated

FAR 52.215-22 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (APR 1988), into the contract (R4, tab 1). Appellant successfully performed the contract and was paid in full (R4, tab 7).

The DCAA Audit Reports

The DCAA issued an audit report and two follow-up review reports for the Hill contract (R4, tabs 8, 13, 15). On 1 August 1990, DCAA issued Audit Report No. 3751-OB420108 following an audit of the Hill contract performed by Mr. Walker (tr. 2/41-42). The report stated that:

Documentation found during our purchase order review shows that [appellant] planned on purchasing CEM material on combined 1987 and 1988 purchase orders over 12 months prior to [the Hill contract] certification at significant unit cost savings over the amounts awarded on the 1987 CEM contract. In addition, [appellant] received the FY 1988 CEM contract award on 30 March 1988 reflecting a 25 percent reduction over the FY 1987 CEM system price.

DCAA asserted that appellant should have used the FY 88 CEM Systems contract to estimate the BLU unit price for the Hill contract. It computed an adjusted FY 88 BAFO LBM cost of \$17.19 per BLU and compared it to the \$22.84 LBM cost contained in the Hill contract proposal. The comparison is similar to the earlier comparison made by Mr. Walker before the Hill contract negotiations which led him to advise Mr. Pierce that FY 88 BAFO was about 21 percent lower than the Hill contract proposal. The report concluded that the cost or pricing data submitted by appellant were not accurate, complete or current as of the date of the agreement on price and recommended a contract price adjustment of \$355,179, based upon a \$5.405 reduction to the bomblet LBM unit cost, and associated mark-ups (R4, tab 8).

Mr. Pierce forwarded a copy of the report to appellant for reply (R4, tab 9). Appellant did so in a letter dated 5 September 1990 which argued that it used the FY 87 BAFO because: (1) it did not have time to prepare a “bottoms-up” proposal; (2) the units were to be delivered concurrently with the FY 87 deliveries; (3) the quantity of units was much lower than either FY 87 or FY 88 contracts; (4) it did not know whether it would be able to obtain the lower FY 88 contract prices resulting from combined FY 87/88 material purchases; (5) stand alone prices would have been considerably higher; and (6) the actual cost data from the FY 86 contract showed anticipated LBM costs of \$27.21, whereas the proposed LBM costs for the Hill contract were \$22.84. Appellant asserted that the Government was aware of the FY 87 and FY 88 CEM Systems awards and concluded

that, in its view, the auditor merely disagreed with the method the contracting officer agreed to use to negotiate the Hill Contract. (R4, tab 10)

Two follow-up reviews of the audit report were performed by DCAA (R4, tabs 12, 13, 25). The first follow-up report, dated 15 October 1990, responded to questions raised by Mr. Pierce regarding a comparison of appellant's proposed and actual costs (tr. 2/136-37). It commented that "the recommended price adjustment was not based on a bottoms-up approach," but rather simply used the FY 88 contract price and that it would have taken appellant the same amount of time to prepare a proposal using the FY 88 BAFO as it had taken to prepare it using the FY 87 BAFO (R4, tab 13 at 1). It then attempted to compare appellant's proposed and actual costs for the Hill contract. It noted that the Hill contract BLUs were assembled with parts transferred mostly from the FY 87 CEM Systems contract, but also from the FY 88 CEM Systems contract. This was confirmed by other evidence which established that appellant increased the quantities ordered on existing purchase orders or borrowed parts from other contracts (except the bomb bodies and the RADs) to meet the Hill contract materials requirements. (R4, tab 15; exs. A-18, -36A, G-15; tr. 1/94-97, 3/85, 204) Because of the parts transfers, the auditor could not identify all actual material costs; nevertheless, the follow-up report purported to show that the actual cost of materials for ten of the BLU components was lower for the FY 87 contract than the costs proposed in either the FY 87 or FY 88 BAFOs and that the costs proposed in the FY 88 BAFO for these ten parts were less than the FY 87 BAFO. The follow-up report concluded:

We believe [appellant] was obligated to disclose to the government that use of the FY 1987 CEM BAFO to price this buy of BLU-97A/Bs substantially overstated the cost of material when compared to actual FY 1987 and FY 1988 combined material purchases. These reduced material prices were reflected in the FY 1988 CEM BAFO and, therefore, [appellant] should have used the FY 1988 CEM BAFO to price this buy.

(R4, tab 13)

The list of ten parts included in the DCAA follow-up report represented only about 30 or 32 percent of the total BLU material costs for the FY 87 contract (tr. 3/185-86). The actual costs of each of these ten parts were lower than the costs estimated in the Hill contract proposal (tr. 3/197). The two most expensive parts, the bomb body and the RAD, were not included in the list (ex. A-137; tr. 2/64-65, 145-47). The follow-up report did not include any actual materials costs for the FY 88 contract.

Only five of the ten parts identified in the DCAA follow-up report were in the top ten parts list prepared by Mr. Tappe, appellant's deputy program manager. His top ten parts list ranked parts by value based upon the FY 87/88 Total Value list and represented approximately 83 percent of the BLU material costs. Mr. Tappe cross-referenced the Total Value list against appellant's purchase orders to assure the accuracy of the costs for the ten parts he had included. He listed the bomb body at the \$5.19 cost. We find that his top ten parts list accurately reflects agreed-upon or actual costs for the BLUs manufactured in conjunction with the FY 87 CEM Systems contract, including an AID cup assembly at \$4.74. The actual prices of six of these parts were higher than the FY 87 BAFO prices. (Ex. A-27 at 190-92, exs. A-113b, -137; tr. 3/186-98) A similar analysis performed for all of the BLU parts with appropriate decrements produced an aggregate actual FY 87 BLU materials price that was higher than the FY 87 BAFO estimate (tr. 3/198-99).

Appellant responded to the follow-up report on 30 November 1990, acknowledging that it probably could have prepared its proposal just as quickly using the FY 88 BAFO, but again pointing out that the Government was aware of both the FY 87 and the FY 88 BAFO prices, and reiterating that that it did not know whether it would be able to purchase materials for the Hill Contract at the reduced FY 87/88 combined prices. (R4, tab 15)

The second follow-up to the audit report was issued on 14 February 1991. It focused upon the BLU attrition associated with LAP and estimated that, as of August 1988, appellant had an excess of 48,475 BLUs from the FY 85 and FY 86 contracts. It asserted that appellant could have estimated excess quantities of BLUs totaling 23,137 for the FY 87 and FY 88 contracts. Although the auditor conceded that the second follow-up report was an "educated guess" as to why there were no separate purchase orders placed for the Hill contract (tr. 2/68), the report nevertheless summarily concluded that appellant "had knowledge that no additional material would have to be purchased for the subject contract and therefore the combined FY 87/88 purchase order prices should have been used" (R4, tab 25) In fact, appellant typically "rolled over" any excess material on a fixed-price contract to the next contract and if there was no contract, it absorbed the cost of the unused materials (tr. 3/11-14). The evidence established only that there probably were some excess, but unquantified and unidentified, BLU component parts in August 1988 (tr. 3/92-94).

On 16 March 1994, the contracting officer issued a final decision finding that appellant certified the FY 87 CEM BAFO as current cost or pricing data under TINA when the FY 88 CEM BAFO was more current, but had not been disclosed to the Government during negotiations. He concluded that \$355,179 was the defective pricing portion of the contract, and demanded payment of that amount plus interest under 26 U.S.C. § 6621(a)(2). He issued Modification No. P00003 to the Hill contract,

reducing the unit price of the BLUs from \$39.68 to \$32.70, which he computed to be a total contract price reduction of \$355,179. His computation was in error: the reduction should have been \$355,421.60. (R4, tab 29) The date upon which interest began to accrue was corrected in subsequent correspondence to the date of final payment, 9 August 1989 (R4, tab 38). A timely appeal was docketed as ASBCA No. 47626.

Shortly before the hearing was scheduled to begin, appellant filed a motion in limine seeking to exclude all evidence regarding the excess material theory raised in the second follow-up to the DCAA audit report on grounds no contracting officer's decision had been issued asserting this theory as basis for recovery. The matter was resolved when the contracting officer issued a final decision dated 23 December 1997, claiming that the Government's excess materials theory constituted an additional basis for the Government's claim of defective pricing. A timely appeal was docketed as ASBCA No. 51280 and the two appeals were consolidated.

Preliminary Matters

The Board did not close the record at the conclusion of the hearing in order to give the parties an opportunity to stipulate to specific and limited documents relating to purchase orders for the ten parts about which Mr. Tappe testified and to receive appellant's exhibits A-134 and A-137, all of which were to be provided to the Board not later than 13 February 1998 (tr. 3/207-08, 210-11).

The parties went beyond the Board's direction and agreed that the record should be supplemented with additional exhibits. Based upon the stipulations of the parties, we supplement the hearing record with the following documents. As to appellant's exhibits, tab 13 is added to exhibit A-3, so that exhibit A-3 now consists of tabs 9, 10 and 13. Tabs 9 and 10 are added to exhibit A-5, so that exhibit A-5 now consists of page 8 of tab 1 and tabs 3, 9, 10, and 13. Additionally, exhibits A-46B, -50A, -52C, -69A, -71B, -91A, -105C, -106B, -113B, and -115B are included in the record. As to the Government's exhibits, the record has been supplemented with G-1, -2, -41, -42, -43, -44, -45, and -46.

Thereafter, appellant filed its post-hearing brief with an addendum consisting of exhibits A through E and a three-volume appendix. The Government moved to exclude the addendum and appendix from the record, asserting that the record was to have been closed with the stipulations reached following the hearing. It contends that appellant's addendum and appendix violate Board Rule 13. As to the appendix, the Government also complains that the documents contain hand written notes which had not previously been made available to it and that the pricing and purchase order documentation contained therein is incomplete.

Appellant responds that exhibits A and D to its brief are charts compiled after the trial from trial exhibits and that exhibits B, C, and E are either trial exhibits, or combinations of trial exhibits. The Government's motion is granted as to the addendum exhibits A through E attached to appellant's brief. There is no need to include additional copies of documents already in the record and the presentation of new exhibits after the hearing is improper, irrespective of whether they are prepared from documents already in evidence.

Appellant's attempt to explain its three-volume appendix is not of much help. Moreover, it incorrectly implies that the documents contained in the appendix are simply excerpts from exhibits already in evidence. And, while the handwritten notes may well have been intended to be a guide to the attached pricing and purchase order documents, neither the notes nor the documents which follow them as attachments appear to be part of the hearing record. That some of these documents support contentions raised by appellant in its post-hearing brief merely underscores why we cannot consider them if they are not already part of the record. The Government's motion to strike the three-volume appendix submitted by appellant with its post-hearing brief is likewise granted.

Appellant notes that the Government included two attachments to its reply brief and asks us to exclude them if the Government's motion to exclude its addendum and appendix is granted. The Government's attachments suffer from the same kind of evidentiary infirmities associated with appellant's appendix and addendum. Therefore, the Government's attachments are likewise stricken from the record.

DISCUSSION

The Government has the burden of proving that appellant violated TINA by failing to disclose accurate, complete and current pricing data that was relevant to the price negotiation for the Hill contract and that it relied upon defective data to its detriment. *See McDonnell Douglas Helicopter Systems*, ASBCA No. 50341, 99-2 BCA ¶ 30,546. The objective is to place the Government in a position equal to the contractor with respect to making judgments on pricing. *Litton Systems, Inc., Amecom Division*, ASBCA No. 36509, 92-2 BCA ¶ 24,842 at 123,944.

The Government's first argument is that appellant did not disclose that it made combined materials purchases for the FY 87 and FY 88 CEM Systems contracts which reduced the costs of the BLU component parts for the FY 88 CEM Systems Contract to prices that were less than those quoted in the FY 87 CEM Systems BAFO. It asserts that appellant misrepresented the component prices contained in the FY 87 BAFO as being accurate, complete and current, when the pricing actually had been superseded and nullified by the combined purchasing strategy used in the FY 88 BAFO. According to the

Government, the result was that the actual FY 87 prices and the FY 88 BAFO prices were the same. It relies upon *M-R-S Manufacturing Company v. United States*, 492 F.2d 835, 843 (Ct. Cl. 1974), in asserting that appellant did not fulfill its duty under TINA because it did not furnish information to the Government concerning its combined purchasing strategy.

Appellant does not dispute that the FY 87/88 combined materials purchasing strategy used for the FY 88 BAFO reduced the cost of the BLU component materials. It also acknowledges that it had actual cost data relating to the FY 86 contract and additional cost information, consisting of the Total Value list, relating to the FY87/88 combined purchases, which it did not disclose.

It asserts, however, that the urgent nature of the Hill contract precluded it from performing its usual “bottoms-up” estimate and compelled the parties to focus upon the FY 87 BAFO. We have excused a contractor’s failure to submit accurate, complete and current cost or pricing data when the information was not reasonably available due to extenuating circumstances. Appellant relies upon two of these cases: *LTV Electrosystems, Inc., Memcor Division*, ASBCA No. 16802, 73-1 BCA ¶ 9957, *aff’d on reconsid.*, 74-1 BCA ¶ 10,380 and *Central Navigation & Trading Co., S.A.*, ASBCA No. 23946, 82-2 BCA ¶ 16,074. Neither is applicable. Here, the Government is not contending that appellant should have performed a “bottoms-up” estimate; rather, it is simply asserting that appellant should have disclosed the combined FY 87/88 purchasing strategy which was reflected in the FY 88 CEM Systems BAFO and contract prices. The record not only reflects that this FY 88 information was reasonably available to appellant, but also that appellant had additional related information in the form of the True Value list in its possession. Moreover, appellant acknowledged that it would not have taken any more time to prepare its proposal for the Hill contract using the FY 88 BAFO than it took to prepare it using the FY 87 BAFO.

Appellant further asserts that there was no defective pricing because the FY 87 CEM Systems BAFO cost data it used for the Hill contract proposal reflected LBM costs that were lower than the more current cost data it possessed at the time of the negotiations. Stated otherwise, in appellant’s view, use of the FY 88 BAFO cost data would not have had a significant impact upon the price negotiations. *See* 10 U.S.C. § 2306a. The evidence supports its contention.

Appellant evaluated the pricing information available to it, including the material actuals for the FY 86 contract and the Total Value list for the FY 87/88 combined purchases and concluded that the FY 87 BAFO predicted the lowest costs for the Government. It decided to base its proposal for the Hill contract upon the FY 87 BAFO, presented its approach to DCAA before preparing its proposal and then followed the DCAA’s recommendation that the proposal include an explanation of the methodology

utilized. It also informed the Government negotiators that its current production costs were projected to be higher than the FY 87 BAFO estimates. The Government's Price Negotiation Memorandum and the correspondence between appellant and the contracting officer preceding execution of the contract confirm that the contracting officer agreed to use the FY 87 BAFO estimates because current actuals were projecting costs higher than could be negotiated using the FY 87 BAFO and because a stand-alone purchase would have resulted in a higher cost and longer lead time.

The evidence established that, at the time of negotiations, the estimated LBM cost per unit in the FY 87 BAFO was \$16.23. The actual cost data for the FY 86 contract indicated that the LBM unit price per BLU was running \$27.21 and the Total Value list based upon outstanding purchase orders for the combined FY 87/88 purchases reflected LBM costs of \$16.45 per BLU. The adjusted FY 88 LBM unit price computed by DCAA was \$17.19. Thus, although appellant may have possessed more accurate and current cost and pricing data, the FY 87 BAFO still estimated the lowest LBM costs, just as had been represented by appellant.

In a related argument that has its genesis in the first follow-up to the DCAA audit report, appellant asserts that the FY 87 BAFO data used to negotiate the Hill contract was lower than its actual material costs for the FY 87 contract and further that these actual costs were comparable to its FY 88 BAFO estimates. Appellant effectively demonstrated that the first follow-up to the DCAA audit report was based upon a flawed analysis of its FY 87 actual costs and otherwise presented credible evidence to support its contention. We note, however, that, to the extent these actual costs differ from the costs contained on the Total Value list, they are irrelevant inasmuch as this information was not available at the time of the negotiations.

In sum, appellant's FY 86 actual cost data, the Total Value list and the FY 88 BAFO, the latter two of which reflected appellant's combined purchasing strategy, all show higher LBM costs than those contained in the FY 87 BAFO used to negotiate the Hill contract. As is readily apparent, any failure by appellant to disclose this information did not result in an overstated contract price. *See Grumman Aerospace Corp.*, ASBCA No. 27476, 86-3 BCA ¶ 19,091 at 96,494-95.

Appellant also contends that, even if it was obligated to disclose this information, it did offer the FY 88 contract price to the Government in its 4 August 1988 letter and it did disclose the FY 88 BAFO pricing information. Appellant's first contention is not supported by the record. The FY 88 contract did not provide for additional BLU quantities as large as 50,400. Moreover, although it did offer to do so, appellant never provided a quote for the Hill contract as an option to the FY 88 contract, apparently because the Government had determined that the "unique circumstances relative to

security and urgency” precluded additional purchases on the existing contract being administered by the Army.

However, as to its second contention, the evidence established that appellant had previously provided a copy of the FY 88 BAFO to the resident DCAA auditor who evaluated the Hill contract proposal. The FY 88 BAFO cost and pricing information was in a “usable, understandable format.” *Litton Systems, Inc.*, *supra*, 92-2 BCA at 123,944. Indeed, the auditor used it to compare the BLU pricing and advised the contracting officer that the FY 88 unit prices were 21% lower than the Hill contract proposal which was based upon the FY 87 prices and recommended that a “bottoms-up” estimate be prepared.

Thus, both the auditor who reviewed the Hill contract proposal and the contracting officer who negotiated the contract had actual knowledge of the differences in the BLU unit prices. We have no doubt that both were aware of the significance of this difference which Mr. Walker considered to be “the most important point.” And, although neither apparently knew the specific reason for the 21 percent difference in the pricing, they did have actual knowledge of the difference, information which placed the Government on equal footing with appellant to negotiate price. *See The Boeing Company*, ASBCA No. 32753, 90-1 BCA ¶ 22,270 at 111,879, *aff’d on reconsid.*, 90-1 BCA ¶ 22,426. Moreover, the contracting officer expressly determined that he would use the information the auditor had provided to him in the negotiations, that an audit was not required and that he had adequate production and cost information to negotiate a reasonable price. *See Kaiser Aerospace & Electronics Corp.*, ASBCA No. 32098, 90-1 BCA ¶ 22,489, *aff’d on reconsid.*, 90-2 BCA ¶ 22,695 (Government negotiator ignored historical data he possessed regarding differences between proposed and actual direct labor hours because he was concerned only with the total number of hours and a bottom line price).

“Disclosure is not confined to a formal, written submission. Instead the contractor’s disclosure obligation is fulfilled if the Government obtains the data in question in some other manner or had knowledge. . . . [It] must be meaningful, regardless of the form it takes.” *Aerojet Ordnance Tennessee*, ASBCA No. 36089, 95-2 BCA ¶ 27,922 at 139,437. Whether there has been meaningful disclosure depends upon application of a “rule of reason” to the particular circumstances of the each case. *Plessey Industries*, ASBCA No. 16720, 74-1 BCA ¶ 10,603. On the facts of this case, we are satisfied that appellant fulfilled its disclosure obligation with respect to the FY 88 pricing. *See Motorola, Inc.*, ASBCA No. 41528, 94-2 BCA ¶ 26,596.

The Government’s only other contention is that appellant failed to disclose the extent of the materials on hand which would be used for the Hill contract. The contention is based upon the second follow-up review to the DCAA audit report which estimated that appellant had an excess of 48,475 BLUs in inventory from its FY 85 and FY 86 contracts and could have estimated an additional surplus of 23,137 BLUs from the FY 87 and FY

88 contracts. Appellant responds, and we agree, that there was no evidentiary support for the auditor's hypothetical estimate of appellant's inventory. Instead, the evidence established that appellant typically "rolled over" any excess material to its next contract and that, while there probably was some material on hand in August 1988, the quantity was unknown. The Government's contention fails for lack of proof.

CONCLUSION

The appeals are sustained.

Dated: 25 July 2000

CAROL N. PARK-CONROY
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

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. 47626 and 51280, Appeals of Alliant Techsystems, Inc., rendered in conformance with the Board's Charter.

Dated:

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