ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
McDonnell Aircraft Company	)	ASBCA No. 44504
	)	
Under Contract No. N00019-85-C-0250	)	

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OPINION BY ADMINISTRATIVE JUDGE HARTMAN

This is an appeal from a contracting officer's final decision seeking $4,543,410 for "defective pricing" based upon failure to disclose a prospective subcontractor's cost analysis of a prospective second-tier subcontractor's proposal to furnish laser subsystems. Pursuant to Rule 11 and a stipulation, the parties to this appeal (the prime contractor and Department of the Navy) are submitting for judgment on the record solely the issue of "whether a prospective subcontractor's preliminary cost analysis was reasonably available to . . . [the prime contractor] within the meaning of . . . [Federal Acquisition Regulation (FAR)] 15.804-7(b)(2)," appellant having "waived all other defenses to the Navy's claim" (app br. at 1).

FINDINGS OF FACT

During April of 1986, the Department of the Navy and appellant, McDonnell Douglas Aircraft Company (McAir), subsequently McDonnell Aircraft Company, entered into an advance acquisition contract, No. N00019-85-C-0250, for the supply of F/A-18 aircraft and related equipment (R4, tab 1). The contract provided that the parties "shall promptly and in good faith negotiate the pricing terms of a definitive contract that will be based on the terms and conditions contained in this contract," and that the "Contractor agrees to submit a price proposal and cost or pricing data supporting that proposal" (*id*. at 7-2). The contract incorporated by reference various standard clauses, including FAR 52.215-22 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (APR 1984) and

52.215-24 SUBCONTRACTOR COST OR PRICING DATA (APR 1985) (*id*. at 8-5). The former provided in pertinent part (emphasis added):

> (a) If any price . . . negotiated in connection with this contract . . . was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or *prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate* . . . , or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction.
>
> (b) Any reduction in the contract price under paragraph (a) above due to defective data from a *prospective subcontractor that was not subsequently awarded the subcontract* shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor . . . .

The latter stated in pertinent part:

> (a) Before awarding any subcontract expected to exceed $100,000 when entered into, or before pricing any subcontract modification involving a pricing adjustment expected to exceed $100,000, the Contractor shall require the subcontractor to submit cost or pricing data (actually or by specific identification in writing), unless the price is –
>
> (1) Based on adequate price competition;
>
> (2) Based on established catalog or market prices . . .; or
>
> (3) Set by law or regulation.
>
> (b) The Contractor shall require the subcontractor to certify in substantially the form prescribed in Subsection 15.804-4 . . . that, to the best of its knowledge and belief, the data submitted

> under paragraph (a) above were accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract modification.

In October of 1987, Ferranti Defence Systems, Ltd. (Ferranti) of Scotland sent Ford Aerospace and Communications Corporation (Ford) a not-to-exceed quotation in pounds sterling (£) for a laser target designator/ranger (laser subsystem) to be used in the Forward Looking Infrared Radar (FLIR) pod of F/A-18 aircraft. About two months later, in December of 1987, Ford submitted to McAir a cost proposal, No. P-30909, for the F/A-18 FLIR fiscal year (FY) 1987 "Baseline Production Program And Option 3 Laser Production," which relied upon and included a copy of the October 1987 Ferranti quote. (R4, tab 2; app. supp. R4, tabs 2, 21; app. br. ex. B)

On 3 February 1988, Ferranti furnished Ford a firm fixed-price proposal for the FY 1987 production of the laser subsystem. From 14 through 25 March 1988, Ford personnel conducted "fact finding" at Ferranti's facilities regarding Ferranti's February 1988 proposal. (App. supp. R4, tab 21) While Ford personnel were performing their fact finding, on 23 March 1988, McAir disclosed to the Navy the December 1987 FLIR FY 1987 proposal from Ford, which included Ferranti's October 1987 quote, as part of McAir's preliminary analysis of the December 1987 Ford proposal. (App. supp. R4, tab 11 at 2, 3, attach. 1 at 84, and attach. 2's addendum (8) at 5; SJM ex. 1; app. br. ex. B)

On 28 April 1988, Ford completed an initial analysis of the 3 February 1988 Ferranti proposal. In a 13-page memorandum, a senior Ford procurement analyst advised other Ford personnel that "factfinding" and "an in-depth analysis has been performed on [Ferranti's] proposal, with many Ford . . . engineers and technical personnel assisting in the evaluation of the many categories of estimated labor hours," and "it is recommended to the subcontract administrator that he negotiate with Ferranti . . . using . . . [specified cost] parameters." At the bottom of the first page of this memorandum, someone stamped the word "PRELIMINARY." (App. supp. R4, tab 21)

On 3 May 1988, the Defense Contract Audit Agency (DCAA) issued an audit report, No. 4741-8A210030, regarding Ford's December 1987 proposal in the amount of $172,756,390. At page 19 of that report (schedule B-1, page 3), DCAA stated that it was reporting as unsupported the total costs proposed for the Ferranti subcontract. DCAA explained that "[a]s of the date of this report a cost analysis [of Ferranti's proposal] has not been completed by Ford," "negotiations are still continuing" between Ferranti and Ford, and a "supplemental report will be issued after the results of the subcontractor's price and cost analysis has been reviewed." (SJM ex. 2; app. br. ex. C)

On 16 June 1988, McAir and the Navy agreed on a price of $165,600,000 for the FY 1987 FLIRs. They also agreed to select 24 June as the date for McAir's certification of cost and pricing data. Two months later, on 16 August 1988, a McAir official signed

a certificate certifying that the cost and pricing data submitted to the Navy's contracting officer (CO) were "accurate, complete, and current as of 24 June 1988." (App. supp. R4, tab 11)

As of 24 June 1988, Ford had not furnished a certification to McAir regarding its cost or pricing data. Moreover, as of 24 June, both the Navy and McAir were not aware of the existence of Ford's 28 April 1988 analysis of the February 1988 proposal from Ferranti. McAir had requested several times that Ford supply it cost and pricing data, but was not provided a copy of that analysis. (Stip. ¶ 1(b), (c), and (d))

During late August 1988, McAir issued to Ford a purchase order for FY 1987 FLIRs at a not-to-exceed price (app. supp. R4, tab 12; stip. ¶ 1(a)). In September 1988, McAir and the Navy executed contract Modification No. P00087, which, among other things, definitized the unpriced recurring costs for FY 1987 FLIRs, including the laser subsystems (app. supp. R4, tab 10).

On 13 January 1989, Ford's senior procurement analyst issued a "revised" version of his 28 April 1988 memorandum analyzing Ferranti's proposal for the laser subsystem. The 13-page revised memorandum incorporated a "second factfinding effort [which] was performed at Ferranti during the period of October 31 to November 6, 1988," and "all of the various changes which resulted in Ferranti submitting a revised [fixed-price] proposal on 18 May 1988," and "recommended to the subcontract administrator that he negotiate with Ferranti . . . using . . . parameters" of $19,196,462 (£ 11,674,550) and $17,022,055 (£ 10,352,159), which were less than the parameters previously specified. (App. supp. R4, tab 9)

Three days after the date the Ford memorandum was revised, on 16 January 1989, Ford and McAir completed their subcontract negotiations and agreed upon a fixed-price of $159,815,000 for the FY 1987 FLIRs (app. supp. R4, tab 5). On 2 August 1989, Ford certified its cost or pricing data for FY 1987 FLIRs as accurate, complete and current as of 16 January 1989 (app. supp. R4, tab 3).

DCAA subsequently audited the costs associated with McAir's Navy contract and concluded defective pricing had occurred. On 2 March 1992, based on the DCAA audit, the Navy's CO issued a final decision asserting that there was a failure to disclose cost or pricing data which caused the negotiated price of the FY 1987 FLIR modification to be overstated by $4,543,410. According to the CO, McAir's "final price" for the laser subsystem presented on 14 June 1988 was based on "costs taken verbatim from [Ford's December 1987] proposal P-30909," but Ford's 28 April 1988 cost analysis, which was not disclosed to the Navy during negotiation of the modification, "contained estimating techniques (for example, learning curve) that indicated fewer hours were required for Ferranti to perform the [laser subsystem] work than were proposed in P-30909." (R4, tab 2)

McAir filed a timely appeal of the CO's decision with this Board (R4, tab 4). After several years of conducting discovery, McAir filed a motion for entry of summary judgment. McAir asserted that, absent a specific written finding that the data is necessary under 10 U.S.C. § 2306a(c), the Navy cannot reduce the price of its prime contract based upon non-disclosure of data by a prospective subcontractor because a subcontractor must submit cost or pricing data under the Truth In Negotiations Act (TINA) *only* when the prime and subcontractor have agreed upon their subcontract price. In the alternative, McAir asserted that Ford's April 1988 cost analysis with respect to Ferranti's proposal, which was not disclosed to McAir prior to the date of its prime contract certification, was not "reasonably available" and thus not "cost or pricing data." *McDonnell Aircraft Co.*, ASBCA No. 44504, 97-1 BCA ¶ 28,977 at 144,312.

With respect to McAir's initial assertion, we held that, under TINA and the contract clause utilized pursuant to that statute, if a cost, such as subcontractor costs, "'is known when the contract price is being negotiated, it must be furnished accurately, completely and on a current-price basis.'" *Id*. at 144,315, *quoting Cutler & Hammer, Inc. v. United States*, 416 F.2d 1306, 1311 (Ct. Cl. 1969). We stated that McAir confuses its own duty to certify under TINA with a subcontractor's duty to certify. We explained that TINA requires the submission of subcontractor cost or pricing data and the certification of such data as accurate, complete and current upon two occasions – (1) as of the date of final price agreement between the prime contractor and the Government, 10 U.S.C. § 2306a(a)(1), (2) (1988), and (2) when the subcontractor and prime contractor agree on a negotiated subcontract price, which can occur months after agreement on the Government's and prime contractor's contract price, 10 U.S.C. § 2306a(a)(1)(C), (2) (1988). *McDonnell Aircraft Co.*, ASBCA No. 44504, 97-1 BCA ¶ 28,977 at 144,314-15; *see* FAR 15.806(a), (c) (prime contractor and higher-tier subcontractors receiving cost or pricing data from subcontractors are to perform price or cost analysis of that data and furnish such analysis as part of their own cost or pricing data submission).

With respect to McAir's alternative assertion, we held that McAir was not entitled to entry of summary judgment because it had not demonstrated that the Ford analysis was not "reasonably available" to it. We stated that the prime contractor's obligation to obtain and submit accurate, complete, and current cost or pricing data from subcontractors and prospective subcontractors, and update such data when necessary, cannot be reduced by lack of administrative effort to see that all significant data are gathered and furnished the Government, or by subjective lack of knowledge of such data upon the part of negotiators or the person who signed the certificate. We explained that it is well-established that a prime contractor's liability for subcontractor data is fixed even if it had no knowledge of the defective data. *McDonnell Aircraft Co.*, ASBCA No. 44504, 97-1 BCA ¶ 28,977 at 144,316-17. We added that, because the record reflected that Ford's initial or preliminary cost analysis was prepared more than six weeks before McAir and the Navy agreed upon a price for McAir's contract and that a senior Ford procurement analyst had furnished a copy

of that analysis to Ford's subcontract administrator, who was Ford's negotiator, the April 1988 cost analysis of Ferranti's proposal appears to have been "reasonably available to Ford." *Id*. at 144,316.

After issuance of our decision denying McAir's motion for summary judgment, the parties attempted to amicably resolve this appeal. During 2001, the parties notified us they had been unable to resolve the appeal amicably, had entered into a three-page stipulation of facts, and would submit "moving briefs" for "judgment on the record" and optional reply briefs with respect to "the sole remaining issue" whether "the Preliminary Analysis was 'reasonably available' to McAir within the meaning of FAR 15.804-7(b)(2)" since "[a]ppellant waives all other defenses to Respondent's claim in this matter, including . . . : (a) whether the Preliminary Analysis constitutes 'cost or pricing data' for purposes of . . . [TINA] and implementing regulations; (b) whether the Navy possessed knowledge of the Preliminary Analysis prior to June 24, 1988; and (c) whether the Navy or McAir relied on the February 1988 Ferranti proposal." Subsequently, McAir and the Navy both submitted "moving briefs" for judgment on the record and the Navy filed a reply. The parties also submitted their stipulation of facts, which provided, "in the event of a finding of liability adverse to Appellant in this matter, the amount of the Navy's recovery is deemed to be $1,214,500, plus statutory interest from January 31, 1991." (App. br. at ex. A, ¶ 2)

DECISION

McAir waives all defenses to the Navy's "defective pricing" claim arising from McAir's failure to disclose to the Navy the April 1988 cost analysis of Ferranti's proposal to furnish laser subsystems prepared by Ford, a prospective first-tier subcontractor, except that Ford's cost analysis was not "reasonably available" to it within the meaning of FAR 15.804-7(b)(2) on the date it certified its cost and pricing data. According to McAir, the cost analysis was not reasonably available to it at the time of its certification because: (A) it did not have actual knowledge of Ford's cost analysis; (B) it could not demand that Ford furnish the cost analysis because Ford had not yet entered into a contract with it and thus had no legal obligation to disclose such data; and (C) it had no legal duty to obtain the cost analysis from Ford because Ford was only a "prospective subcontractor."

A. No Actual Knowledge of Data

McAir asserts that it is undisputed that it provided the Navy with all information in its possession and that it had no reason to believe that any additional information existed. McAir argues that, under FAR 15.804-6(d) and 15.804-7(b)(2), information which is not reasonably available to a prime contractor prior to its date of prime contract certification does not constitute "cost or pricing data," is not required to be disclosed and certified by the prime contractor, and cannot serve as a basis for a defective pricing claim by the Navy against the prime contractor under TINA. According to McAir, the April 1988 Ford cost analysis of Ferrante's proposal, which was not in McAir's possession or known to McAir in

June 1988, was not required to be disclosed and certified in June of 1988 under TINA and it is entitled to judgment on the record. (App. br. at 2, 5, 7, 9)[1]

In our prior decision denying McAir's summary judgment motion, we explained that it is well-established that a prime contractor's liability for subcontractor data is fixed even if it had no knowledge of the defective data. *McDonnell Aircraft Co.*, ASBCA No. 44504, 97-1 BCA ¶ 28,977 at 144,316. A prime contractor's obligation to obtain and submit accurate, complete, and current cost or pricing data from its subcontractors and prospective subcontractors, and update such data when necessary, cannot be reduced by lack of administrative effort to see that all significant data are gathered and furnished the Government, or by subjective lack of knowledge of such data on the part of its negotiators or the person who signed its certificate. *E.g.*, *Aerojet-General Corp*., ASBCA No. 12264, 69-1 BCA ¶ 7664 at 35,583. Thus, McAir's simple lack of knowledge of or possession of the Ford cost analysis cannot excuse its failure to disclose the analysis to the Navy. *See Lockheed Aircraft Corp. v. United States*, 432 F.2d 801, 805-06 (Ct. Cl. 1970) (prospective subcontractor's failure to disclose to prime and Government that it obtained firm prices on a substantial amount of material was basis for prime contract price reduction under defective pricing clause because, while prime contractor was "not at fault," it must bear responsibility as far as Government is concerned for inaccurate material cost estimates); *General Dynamics Corp.*, ASBCA No. 39866, 94-1 BCA ¶ 26,339 at 131,009; *Norris Indus., Inc.*, ASBCA No. 15442, 74-1 BCA ¶ 10,482 at 49,576.

While McAir asserts that the Navy's interpretation here of what constitutes data "reasonably available" to a prime contractor would impose "strict liability" on a prime contractor for prospective subcontractor data that the prime contractor was not aware existed (app. br. at 9), the Price Reduction for Defective Cost or Pricing Data clause contained in McAir's contract (FAR 52.215-22) makes no distinction between data "known" and "not known" to the prime contractor. It provides, in relevant part, that a prime contractor is liable to the Government for defective cost or pricing data "[i]f any price . . . negotiated in connection with this contract . . . was increased by any significant amount because . . . a subcontractor or prospective subcontractor furnished the [prime] Contractor

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[1] FAR 15.804-6(d), 48 C.F.R. § 15.804-6(d) (1987), states that "[t]he requirement for submission of cost or pricing data is met if all cost or pricing data reasonably available to the offeror are either submitted or identified in writing by the time of agreement on price." Similarly, FAR 15.804-7(b), 53 Fed. Reg. 10829 (April 1, 1988), states that, "[i]f after award, cost or pricing data are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on price given on the contractor's or subcontractor's Certificate of Current Cost or Pricing Data, the Government is entitled to a price adjustment . . . of any significant amount by which the price was increased because of the defective data" and, "[i]n arriving at a price adjustment, the contracting officer shall consider (i) the time by which the cost or pricing data became reasonably available to the contractor . . . ."

cost or pricing data that were not complete, accurate, and current as certified in the [prime] Contractor's Certificate." *Id*.; *see Martin Marietta Corp*., ASBCA No. 43223, 96-2 BCA ¶ 28,270 at 141,160; *General Dynamics Corp*., ASBCA No. 39866, 94-1 BCA ¶ 26,339 at 131,009 (even where it appears prime contractor not at fault, prime contractor is responsible for impact upon prime contract of defective subcontractor data); FAR 15.804-6(h), 48 C.F.R. § 15.804-6(h) (1988) ("prospective contractor shall be responsible for updating a prospective subcontractor's data").

In sum, in executing a contract containing the Price Reduction for Defective Cost or Pricing Data clause (FAR 52.215-22), a prime contractor assumes the risk of having failed to furnish the Government accurate, complete or current cost or pricing data, as certified in its certificate. The contractor's liability to the Government is predicated on the express language of the clause. *Norris Indus., Inc.*, ASBCA No. 15442, 74-1 BCA ¶ 10,482 at 49,570. We, therefore, cannot hold that the April 1988 Ford cost analysis was data not "reasonably available" to McAir based simply on McAir's lack of possession of or knowledge of the cost analysis.

B. No Legal Right to Demand Data

McAir additionally asserts that TINA does not require a prospective subcontractor to submit cost or pricing data to the prime contractor before award of the prime contract or to certify that the prospective subcontractor's cost and pricing data is complete as of the time of prime contract price agreement. McAir argues that, because FAR 52.215-24 mandates only that a subcontractor submit cost or pricing data before the award to it of a subcontract or a contract modification, and certify its data as of the date of agreement on the negotiated subcontract, Ford was not a subcontractor required to make cost or pricing data available as of 24 June 1988, McAir's prime contract certification date. According to McAir, Ford's failure to turn over its April 1988 cost analysis of the Ferrante proposal cannot be imputed to McAir because "Ford was not under contract to McAir and had no obligation to disclose such data." (App. br. at 1, 2, 3, 5-6, 7)

In our prior decision denying McAir's summary judgment motion, we explained that TINA requires submission of subcontractor cost or pricing data and certification that the cost or pricing data submitted is accurate, complete and current upon two occasions – (1) as of the date of final price agreement between the prime contractor and the Government, 10 U.S.C. § 2306a(a)(1), (2) (1988), and (2) when a subcontractor and prime contractor agree upon a negotiated subcontract price, which can occur months after agreement upon the Government's and prime contractor's contract price, 10 U.S.C. § 2306a(a)(1)(C), (2) (1988). *McDonnell Aircraft Co*., ASBCA No. 44504, 97-1 BCA ¶ 28,977 at 144,314-15; *accord Martin Marietta Corp*., ASBCA No. 43223, 96-2 BCA ¶ 28,270 at 141,160; FAR 15.806(a), (c), 48 C.F.R. § 15.806(a), (c) (1987) (prime contractor and higher-tier subcontractors receiving cost or pricing data from subcontractors are to perform price or cost analysis of that data and furnish such analysis as part of their own cost or pricing data

submission). In asserting a subcontractor need not furnish cost or pricing data before award of a subcontract, which can occur months after the prime has entered into its contract with the Government, McAir confuses a "subcontractor's duty" to supply cost or pricing data and certify under TINA with its own duty – that of a prime contractor to furnish cost or pricing data and certify that data when entering into a contract with the Government. The FAR implementing TINA does not restrict the submission of subcontractor data to the entry into a subcontract agreement. Rather, it expressly provides for a prime contractor to furnish cost or pricing data from prospective subcontractors before agreement upon a prime contract price with the Government and submission of a certification with respect to that prime price agreement. For example, FAR 15.804-6(g)(2), (3), 48 C.F.R. § 15.804-6(g)(2), (3) (1988), states that a CO "shall require a contractor that is required to submit certified cost or pricing data also to submit to the Government (or cause the submission of) accurate, complete, and current cost or pricing data from prospective subcontractors in support of each subcontract cost estimate" which satisfies specified criteria met here and, "[i]f the subcontract estimate is based upon the cost or pricing data of the prospective subcontractor most likely to be awarded the subcontract, the contracting officer shall not require submission to the Government of data from more than one proposed subcontractor for that subcontract." Further, FAR 15.806(a), 48 C.F.R. § 15.806(a) (1988), provides that "[s]ubcontractors must submit to the contractor or higher tier subcontractor cost or pricing data or claims for exemption from the requirement to submit them," and the "contractor and the higher tier subcontractor are responsible for (1) conducting price analysis and . . . (2) including the results of subcontract reviews and evaluations as part of their own cost or pricing data submission." The FAR is consistent with the purpose of TINA. As the United States Court of Claims stated in *Lockheed Aircraft*, 432 F.2d at 805:

> The purpose of the statute is not to give the Government one chance to request information as to what costs were incurred by the contractor or subcontractor; rather, the purpose is to have the contractor furnish costs which are complete, accurate, and on a current-price basis. If the contractor, or subcontractor, knows the actual costs, and the government does not, then the only way to further the purpose of the statute, and to implement the clause, is to require complete disclosure.

McAir's contention that a subcontract must exist for subcontractor data to be required to be furnished to the Government was rejected by the Court of Claims in *Cutler-Hammer, Inc. v. United States*, 416 F.2d 1306 (Ct. Cl. 1969). The Court of Claims held there that a prospective supplier's proposal constituted cost or pricing data the prime was required to furnish the Government "[a]lthough no firm agreement had been reached [by the prime] with [the supplier] until after the [prime's] certificate was filed." *Id*. at 1314.

McAir contends that the Navy's interpretation of what is "reasonably available" to a prime contractor imposes "strict liability" upon a prime contractor for prospective

subcontractor data the prime has no legal means of obtaining at the time it is required to certify its costs. According to McAir, TINA provides no coercive tools for a prime contractor to use to obtain current, accurate and complete cost or pricing data from a prospective subcontractor when a prime is in the process of certifying its own cost or pricing data. (App. br. at 6, 9) A prime contractor, such as McAir, however, may insert a defective pricing clause into its subcontracts and proceed against its subcontractors pursuant to that clause if the Government reduces the prime contract price based on subcontractor defective cost or pricing data. *See Lockheed Aircraft Corp. v. United States*, 432 F.2d at 806. We thus cannot hold that the April 1988 Ford cost analysis was data not "reasonably available" to McAir based simply upon McAir's lack of entry into a subcontract with Ford prior to its June 1988 certification.

C. No Legal Duty To Obtain Data

Finally, McAir asserts that a "prime contractor is not automatically liable for prospective subcontractor data, the existence of which is not yet known to the prime contractor." McAir argues that, if it did not have actual knowledge of the information prior to or on the date it certified its costs to the Navy and did not have a contractual right to demand such information from Ford at the time, the information "was not required to be disclosed and certified under TINA." (App. br. at 2, emphasis in original) According to McAir, there is no precedent for the Navy's interpretation of TINA here "as requiring a prime contractor to gather and disclose information from prospective subcontractors of which it does not have possession or a contractual right to obtain." (App. br. at 7)

As discussed above, a prime contractor does have a legal duty to obtain cost or pricing data from prospective subcontractors. The Price Reduction for Defective Cost or Pricing Data clause (FAR 52.215-22) states a prime contractor is liable for defective cost or pricing data "[i]f any price . . . negotiated in connection with th[e] contract . . . was increased by any significant amount because" a "prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate." *Accord* FAR 15.804-6(g)(2), 48 C.F.R. § 15.804-6(g)(2) (1988); FAR 15.806(a), 48 C.F.R. § 15.806(a) (1988). Further, contrary to McAir's assertion, there is precedent requiring a prime contractor to disclose data from prospective subcontractors "of which it does not have possession or a contractual right to obtain." *E.g*., *Martin Marietta Corp*., ASBCA No. 48223, 98-1 BCA ¶ 29,592 at 146,713-14 (prospective subcontractor's failure to disclose to prime and Government that its G&A contained unallowable facilities capital charge was basis for prime contract price reduction under defective pricing clause).

Citing *Aerojet Solid Propulsion Co*., ASBCA No. 44568, 00-1 BCA ¶ 30,855, *aff'd*, 291 F.3d 1328 (Fed. Cir. 2002), McAir attempts to create an exception to its duty to disclose prospective subcontractor data by asserting that a prime contractor "is not *automatically* liable" for prospective subcontractor data, "the existence of which is not yet

known to the prime contractor." McAir states this Board consistently has held that TINA simply requires a contractor to disclose all facts necessary to place the Government in a position equal to that of the contractor with respect to making judgments on pricing and the Board should grant it judgment on the record because it "was in the same position as the government" here. (App. br. at 2, 8, 9) (emphasis added) Our decision in *Aerojet Solid Propulsion Co*., like our decisions in other TINA appeals concluding that cost or pricing information was not "reasonably available," however, concerned information that could not reasonably be processed or assembled by the prime contractor within the time required for disclosure to the Government. In *Aerojet Solid Propulsion Co*., the prime contractor personnel were barred by a Government-approved purchasing system which was designed to deter fraud from disclosing prospective supplier quotes they possessed in a locked "bid box" until the day after the bid due date, which was subsequent to the prime's date of agreement upon contract price with the Government. The failure of the prime to disclose the "contents" of the supplier quotes to the Government, by itself, was thus not deemed to be defective pricing.[2] *Compare Aerojet Solid Propulsion Co*., ASBCA No. 44568, 00-1 BCA ¶ 30,855 at 152,324-26, *with Litton Sys., Inc.*, ASBCA Nos. 34435, *et al*., 93-2 BCA ¶ 25,707 at 127,910 (record shows time to perform analysis would be inordinate so not required*); Central Navigation & Trading Co., S.A.*, ASBCA No. 23946, 82-2 BCA ¶ 16,074 at 79,746 (weekend in war zone was insufficient amount of time for contractor to update materials bill); *LTV Electrosystems, Inc.*, ASBCA No. 16802, 73-1 BCA ¶ 9957 at 46,708-09 (contractor under no duty to update combat radio materials bill involving about 650 parts and 200 vendors because of limited time available and urgency of procurement). Here, the information not furnished to the Government – Ford's April 1988 cost analysis of Ferrante's proposal – was available to Ford personnel more than six weeks before McAir and the Navy agreed on a price for McAir's contract. *See, e.g., Grumman Aerospace Corp*., ASBCA No. 27476, 86-3 BCA ¶ 19,091 at 96,495. We, therefore, cannot hold that the cost analysis was not "reasonably available" within the meaning of FAR 15.804-7(b)(2) because it was data the contractor could not reasonably process or assemble within the time required for disclosure to the Government. Rather, we hold that, pursuant to the defective pricing clause of its contract (FAR 52.215-22) and TINA, McAir was responsible for disclosing to the Government the April 1988 Ford cost analysis, which was reasonably available to it within the meaning of FAR 15.804-7(b)(2), 48 C.F.R. § 15.804-7(b)(2) (1988).

CONCLUSION

The appeal is denied. Pursuant to our decision and the parties' stipulation, the Navy is entitled to $1,214,500, plus interest from 31 January 1991, based on defective pricing.

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[2] We note, however, that this Board held, and the Federal Circuit affirmed, that the contractor's failure to disclose the "existence" of subcontractor bids in the locked bid box was deemed to be "defective pricing." *Aerojet*, 00-1 BCA at 152,326, *aff'd*, 291 F.3d at 1331-32.

Dated: 27 January 2003

TERRENCE S. HARTMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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 No. 44504, Appeal of McDonnell Aircraft Company, rendered in conformance with the Board's Charter.

Dated:

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