ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
United Technologies Corporation	)	ASBCA Nos. 51410, 53089,
	)	53349
Under Contract No. F33657-84-C-2014	)	

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OPINION BY ADMINISTRATIVE JUDGE DELMAN

The Department of Air Force (AF or government)[1] seeks a contract price reduction in the amount of roughly $299,000,000 under a multi-billion dollar contract with United Technologies Corp., Pratt & Whitney (Pratt or appellant), contending that Pratt furnished

[1] The DCMA also sought contract price reductions from Pratt related to pension cost issues and cost accounting changes that were appealed under ASBCA Nos. 50465, 50518, and 51445. These appeals shared a number of common witnesses with the above-captioned appeals and were consolidated with these appeals for discovery purposes, but the Board determined that two separate trials were necessary. The DCMA appeals were tried first in one hearing and the Board ordered that evidence admitted in that proceeding would also be considered part of the evidentiary record in the subject appeals. References in this opinion to the "DCMA Rule 4 file," or to the "DCMA transcript" relate to that first proceeding. The DCMA appeals have been settled and were dismissed by the Board.

defective cost or pricing data in violation of the Truth in Negotiations Act (TINA), 10 U.S.C. § 2306(f).[2] We have jurisdiction under the CDA, 41 U.S.C. §§ 601 *et seq*. Entitlement and quantum are before us.

FINDINGS OF FACT[3]

Background

1. In 1983, the AF sought to implement a competitively negotiated procurement for engines to be used in F-15 and F-16 jet fighter aircraft. A Request for Proposals (RFP) was issued on 18 May 1983. The RFP cover letter stated the purpose of the program as follows (R4, tab 48):

> 1. Program Background and Objectives
>
> The purpose of the Fighter Engine Competition program is the implementation of a competition for out-year F-15 and F-16 production engine requirements for versions of the F100 and F110 engines. This competition is to provide engines with improved operability, safety, durability and support-ability at reduced life cycle costs when compared to currently available engines.

The cover letter also stated that the AF reserved the right to award its engine requirements to a single contractor or to issue a dual or split award. It also provided that engines from different contractors would not be mixed within an F-15 or F-16 wing (R4, tab 48 at 2245). At this time, it was generally anticipated that two contractors would participate in the competition – Pratt and General Electric Corporation (GE).

2. A draft RFP was issued to the prospective competitors on or about 14 December 1982. The draft RFP incorporated by reference DAR 7-104.29(a), PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (1970 JAN). At the time the draft document was sent out for comment, Pratt objected to this clause and objected to furnishing certified cost or pricing data on the grounds that there would be "adequate price competition" for the procurement so as to exempt the procurement from the cost or pricing data requirements of TINA (AR4, tab 63). The contracting officer replied that certified cost or pricing data would be required, and retained the subject clause in the RFP, citing DAR 3-807.7 (R4, tab 34 at 3242; finding 74).

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[2] TINA has undergone revision and recodification since 1984. We rely on the statute and the regulations as they existed under this contract.

[3] The following findings of fact were made after due consideration of all the relevant evidence, including the testimony of appellant's expert.

3. The RFP sought three alternative proposals for engine requirements for FYs 85-90: (1) A three year multi-year proposal with three follow-on yearly NTE options; (2) A five-year multi-year proposal, with one NTE annual option; and (3) An annual proposal covering six years, with firm fixed-priced options for the second and third years, and NTE priced options for years four, five and six (R4, tab 48 at 2311).

4. Insofar as pertinent, the RFP at SECTION M, Evaluation Factors for Award, provided as follows (R4, tab 48 at 2435):

> The Air Force will assess the effect of selecting either a single source or dual sources to produce alternate fighter engines for incorporation in production models of the F-15 and F-16 aircraft scheduled for delivery beginning in mid-1986. Consideration will be given to the effect of dual awards on acquisition and ownership costs, system readiness and availability, and the industrial mobilization base.

The evaluation factors for award, in descending order of importance, were as follows (*id*.):

> (a) Overall Capability
>
> (b) Readiness and Support
>
> (c) Life Cycle Cost
>
> (d) Program Adequacy and Competition

Life Cycle Cost was defined as follows (R4, tab 48 at 2437):

> (3) Life Cycle Cost – The Government will estimate the most probable cost to acquire and support these engines over a 20 year period. This estimate of most probable cost to the Government will be considered in the assessment. The Operating and Support (O&S) costs will be based on the engines initially acquired under this acquisition and the remaining engine requirements to satisfy the total F-15 and F-16 planned force when used according to the identified mission profiles. Due to the nature of this production engine competition, Life Cycle Costs will include the production and operating costs for a 20 year period. Prior sunk costs will not be included. Anticipated savings for competitive procurement of follow-on spare parts will be considered in determining probable Government life cycle costs. The Life Cycle Cost assessment will consider the following items:

(a) Acquisition Cost

(b) Operations and Support Cost

Source Selection Procedures

5. In accordance with AF procedure, the AF approved a Source Selection Plan (SSP) for this procurement. The SSP identified source selection procedures and the overall source selection organization. The source selection was to be conducted in accordance with Air Force Regulation (AFR) 70-15, Source Selection Policy & Procedures. The organization included a source selection authority (SSA), a source selection advisory council (SSAC), and a source selection evaluation board (SSEB). (DCMA R4, tab 11)

6. The SSEB was responsible to evaluate contractor proposals and provide its findings in a consolidated report to the SSAC. The SSEB consisted of four panels, each corresponding to the four evaluation areas in the RFP: an overall capability panel, readiness and support panel, life cycle cost panel, and a program adequacy and competition panel, each of which prepared a summary report for its subject area which was incorporated into the consolidated report. The SSEB also contained a Contract Definition Group (CDG). Mr. Hansman, the PCO, was assigned to this group along with Mr. Richard Wyatt, the AF price analyst for the Pratt proposal (DCMA tr. 51-52; DCMA R4, tab 11).

7. The SSAC's responsibilities included preparing a report for the SSA based upon the findings of the SSEB, and briefing the SSA. The Secretary of the Air Force was identified as the SSA. He was responsible to make and document the final source selection decision based upon the input of the SSAC.

8. Pratt submitted its technical proposal on 10 August 1983 and its price proposal on 17 August 1983 (DCMA R4, tabs 3A, 3B to 3N, 3P). Pratt offered the AF its new F-100-PW-220 engine (the -220 engine). In accordance with the RFP, appellant furnished cost or pricing data related to its proposal. GE also provided a proposal and related data, offering its new F-110-GE-100 engine. These were the only contractors that submitted proposals.

9. The contracting officer requested a review of Pratt's proposal from the AFPRO (R4, tab 285), which in turn requested assistance from DCAA (R4, tab 288; tr. 4306-07). DCAA prepared two pre-award audits of Pratt's 17 August 1983 price proposal. The audit report dated 14 October 1983 was prepared by the resident office in East Hartford, Connecticut and was a review of the manufacturing division portion of the proposal (R4, tab 66). The audit report dated 17 October 1983 was prepared by the West Palm Beach, Florida office of the DCAA and related to appellant's government products division (R4, tab 67). A number of technical reviews were also requested and obtained. Similar reviews were also performed on GE's proposal.

10. The SSEB life cycle cost panel reviewed appellant's cost records at its West Palm Beach, Florida facility to evaluate the cost proposal and to prepare a "most probable cost" (MPC) assessment (see finding 4). By memorandum dated 22 September 1983 to the AFPRO Pratt office (DCMA R4, tab 115), Mr. Guy Jette, the chief of the cost panel, stated that the panel's visit should last "approximately four days to review, collect, analyze and understand available cost data which supports the cost proposal." The memorandum further stated, in pertinent part, as follows (*id*.):

> 3. During the visit the team will be reviewing the rationale, methodology, and applicable data bases which support the cost proposal. . . .
>
> 4. An important aspect of the review will be to further supplement the rationale, estimating methodology, and supporting data which was provided with the proposal. This additional "information" will assist in establishing the reasonableness of the proposal costs.

11. The life cycle cost panel developed the MPC - sometimes referred to in the record as the "independent estimate," the "unconstrained" MPC or the "raw" MPC - using Pratt engine cost data from previous AF engine buys. The AF also developed a "constrained" MPC using Pratt's BAFO price to which was added certain government support costs. (DCMA tr. 293, 303-06; tr. 4086)

12. In the Fall of 1983, government personnel, including DCAA auditors, held separate meetings with Pratt and GE at Wright-Patterson AFB to discuss the results of the DCAA and AFPRO reports (R4, tabs 79, 322, 323). These meetings were the discussions incident to competitive negotiations identified in DAR 3-805.3 (*see* finding 13 below). The contracting officer provided a copy of the DCAA audit reports and the technical AFPRO reviews to the AF price analyst, Mr. Wyatt (tr. 4300-01, 4303, 4326). Mr. Wyatt reviewed the audit and technical reports in order to be able to participate in the discussions with Pratt (DCMA tr. 466, 4301, 4304, 4326).

13. The purpose of the discussions was to convey the findings made by DCAA and the AFPRO so that the contractors could consider this information when preparing final offers (DCMA tr. 474). Paragraph (a) of DAR 3-805.3, Discussions With Offerors, provided:

> (a) All offerors selected to participate in discussions shall be advised of deficiencies in their proposals and shall be offered a reasonable opportunity to correct or resolve the deficiencies and to submit such price or cost, technical or other revisions to their proposals that may result from the

> discussions. A deficiency is defined as that part of an offeror's proposal, which would not satisfy the Government requirements.

14. At the discussions, DCAA went through the East Hartford audit report with Pratt representatives item by item, advising of the costs questioned by DCAA (DCMA tr. 592). The AF also provided Pratt with an audit report excerpt from Schedule A-2, Standard Material, several days before the beginning of the discussions (R4, tab 315), which included the review of the "Digital Electronic Engine Control" (DEEC) parts and the DEEC configuration. The DEEC was one of the featured improvements in appellant's -220 engine. DCAA questioned $550.2 million in proposed standard material costs under appellant's 3-year multi-year proposal. (Tr. 2463-64)

15. By letter to Pratt dated 19 November 1983 (R4, tab 71), the AF requested appellant's best and final offer (BAFO). Pratt was directed to address the cost issues raised during the parties' discussions, which were summarized in a Contractor Inquiry dated 11 November 1983 (R4, tab 71A). More specifically, appellant was to address, as a minimum, the following (R4, tab 71 at 711407):

a. Was the exception incorporated into the BAFO?

b. To what extent was each area incorporated?

c. What was the price impact of that incorporation?

d. How was each cost element impacted by that incorporation?

e. Written rationale for the treatment given each area.

As this was a competition, the AF could seek price reductions for the BAFO but could not compel them.

16. Appellant submitted its BAFO to the AF on 5 December 1983 (AR4, tab 157 at 021077). Under separate cover letter, cost or pricing data were also provided. This cover letter identified Category I Disclosure Data - Items 1 through 18 - as data considered in the BAFO (AR4, tab 158 at 2296-7). BAFO exhibit 3.8.1 was a narrative summary description addressing the changes made in appellant's proposed costs from the initial proposal to the BAFO. GE also timely provided a BAFO to the AF.

17. Mr. Wyatt compared the initial Pratt proposal with the BAFO. He reviewed the major cost elements questioned by the DCAA to the BAFO in order to see what Pratt had done with each element of cost that had been addressed in discussions. This was a macro-level rather than a parts-level review. (DCMA tr. 481; tr. 4346, 4365-66) Mr. Wyatt did not review the cost or pricing data at this time, nor did the contracting officer or the DCAA.

Appellant's BAFO price was considerably lower than initially proposed. For the annual proposal, appellant reduced its standard material transfer costs for the engines by over $531 million (AR4, tab 175 at 3-29).

18. The life cycle cost panel also evaluated the contractors' BAFOs. However, it did not review the relevant cost or pricing data at this time. (DCMA tr. 529, 4004, 4285) The cost panel determined that Pratt's BAFO was significantly *lower* than the government's unconstrained MPC (AR4, tab 117C at 004383-4). The panel resolved this concern by considering the impact of the competition (*id*):

> However, in the case of the Alternate Fighter Engine, the raw or unconstrained MPC does not inherently consider the impact of competition. Given a competition decrement to the MPC of only 9%, the MPC is within the contractual 10% threshold of reasonableness.

The Record of Acquisition Action (RAA)

19. In accordance with AF procedure, the AF prepared an RAA to document the eventual source selection award by the SSA. The RAA took the place of the price negotiation memorandum that was typically used in non-source selection negotiated procurements. Among other things, the RAA was to address whether the prospective award was to be issued to a responsible source at fair and reasonable prices. (R4, tab 280) The RAA, Paragraph No. 4, entitled "Evaluation Summary," identified the DCAA inputs, the field analysis results, and AF pricing review efforts. The RAA identified the proposals, described the work of the Air Force Evaluation Team (AFET); the fact-finding discussions between the parties in the Fall of 1983, the government-issued Contractor Inquiry; the BAFO response; and the development of the MPC by the cost panel. (R4, tab 79)

20. Attachment 6 to the RAA addressed a number of DCAA areas of concern. Insofar as pertinent, Attachment 6 at Paragraph II(h) addressed the DCAA concern that appellant's cost or pricing data for the initial proposal were not current, accurate and complete. Paragraph II(h) noted that additional cost data had been presented, that the BAFO reflected significant cost reductions in material and labor, and stated (R4, tab 79 at 004355): "[I]t is the opinion of the AFET that cost and pricing data submitted in support of the BAFO is adequate." The RAA concluded as follows (*id*., at 004345):

> Based on the discussions herein, the competitive nature of source selection along with the MPC developed by the cost to the Government panel, the contract prices are considered to be fair and reasonable.

The AF approved and signed the RAA in late December 1983.

21. On 3 January 1984, appellant certified that the cost or pricing data supporting its proposal were accurate, complete and current as of 5 December 1983 (R4, tab 88).

22. By memorandum dated 6 January 1984, Ms. Patricia Mannix, Directorate of Contracting, documented the reasonableness of the BAFO prices offered by the contractors. We find the following statement from her memorandum pertinent (R4, tab 87):

> In view of the above action taken by the AF team to ensure that field and audit concerns were adequately addressed (i.e. in-depth audit reports in lieu of summary reports, AFPRO/auditor participation in discussions with contractors and tracking of cost discussion to BAFO), it is believed that (i) both audit and field reports have been adequately addressed and (ii) prices are considered fair and reasonable. As a corollary verification, the most probable cost numbers, developed by the Air Force Source Selection Team, also substantiate the reasonableness of the contract price.

23. By memorandum dated 3 February 1984, the SSA decided to issue a dual award to GE and Pratt for FY 85, stating that a dual award "provides the best overall value to satisfy Air Force needs" (R4, tab 349). The SSA stated, and we find that a dual award resulted in higher costs than if award were made to a single offeror, but the SSA determined that "this increase in total life cycle cost is more than offset by the enhanced industrial mobilization base for higher performance fighter engines and the increased ability to maintain competition in the acquisition of not only these engines but future engine requirements as well which result from dual awards" (*id*.). With respect to the option years the SSA decision provided as follows (*id*): "The quantities of engines to be acquired from each contractor in future years will be determined annually on the basis of estimated life cycle costs and the other considerations set forth above as they exist at that time."

24. The SSA decision did not identify the split award quantities for each contractor, although it did state that only GE engines would power the new production F-16 aircraft for FY 85. By separate memorandum dated 3 February 1984, the SSA stated that the source selection decision resulted in an award of approximately 120 GE engines and 40 Pratt engines. This memorandum also authorized the AF to accept appellant's offer which provided for variable quantity annual options over the contract term of six years. (R4, tab 93)

25. The award/contract form was signed by appellant on 5 December 1983, and the contract was signed by the contracting officer with an effective date of 3 February 1984 (R4, tab 1). The appropriations to fully fund the first year of the contract – FY 85 – were to be provided in the following fiscal year (tr. 6623). At the time of award the contracting officer signed Modification No. P00001, which authorized payment for long lead items,

defined as items that required early effort in order to protect the delivery schedule (R4, tab 95). Of the several alternative proposals offered by appellant, the AF accepted appellant's annual proposal, as revised, for three years at firm-fixed prices and three years at fixed prices with EPA adjustment. Engine quantities for each year were to be ordered and funded through the AF's exercise of options on an annual basis.

26. Appellant was surprised and disappointed with the FY 85 source selection decision, which gave most of the engine work to GE. Appellant's engines had been removed from the new production F-16s for FY 85, which heretofore had been exclusively fielded with Pratt engines. Pratt believed that this AF decision would profoundly affect its domestic and foreign business. Pratt sought to regain market share and to become more competitive. (DCMA tr. 2096-98)

27. After source selection, Pratt requested and obtained a debriefing (R4, tabs 97, 102). The AF stated at the debriefing that the warranty offered by Pratt for a split award was not cost effective (R4, tab 102 at 004445). The AF also pointed to other perceived weaknesses in appellant's BAFO, including limits placed upon the full award discount factor, co-production offsets and economic price adjustments based on price rather than cost (*id*. at 004450-51).

28. The AF also briefed Congress regarding the source selection decision. The AF stated, *inter alia*, that Pratt's warranty price for a split award was excessive. (AR4, tab 19 at 235) By letter to the contracting officer dated 17 May 1984 Pratt offered to revise its warranty offer for the already announced FY 85 split award (R4, tab 109 at 004472). The contracting officer replied that the AF would not address this matter until Congress completed its investigation and consideration of the warranty issue (R4, tab 360; DCMA tr. 805).

29. The Defense Department Authorization Act for FY 85, Pub. L. No. 98-525, § 103(b), 98 Stat. 2502, stated in pertinent part as follows (R4, tab 362 at 1095):

> The Secretary of the Air Force may not make a contract for the procurement of aircraft engines unless the amount under the contract for any warranty required by section 797 of the Department of Defense Appropriation Act, 1983 . . . does not exceed 10 percent of the total contract price.

Given this statute and appellant's BAFO warranty price for the dual award the parties do not dispute, and we find that the AF was not authorized to order and to fully fund any engines for appellant for FY 85. Mindful of this problem, appellant offered to reduce its warranty price for FY 85, and also capped its warranty liability to 300% of the warranty price. These revisions were accepted by the AF and were incorporated into P00007, effective 3 December 1984, which was the AF's unilateral exercise of its option for the FY 85

quantities. (R4, tab 116) Appellant did not contemporaneously dispute the issuance of this option.

30. In response to a DCAA request for the record of the negotiations between the parties that led to the contract award, the AF advised DCAA by letter dated 10 October 1984 that: "The contracts were awarded solely on a competitive basis consistent with the decision made by the Source Selection Authority in accordance with the criteria set forth in Section M of the AFE Request for proposal." (AR4, tab 130)

The Air Force Seeks Improved Terms and Conditions for Out-Year Options, FYs 86-90

31. Prior to exercising its options for the out-years, the AF explored whether Pratt and GE were willing to improve upon the out-year option offers reflected in their BAFOs. The CO understood that the AF could not exercise the original BAFO option prices if they were not the most advantageous method of fulfilling the Government's need, price and other factors considered. DAR 1-1505(c)(iii). (Tr. 3876-77)

32. By letter to Pratt dated 17 September 1984, the contracting officer sought improvements in appellant's BAFO option prices prior to the exercise of the FY 86 option, stating in pertinent part as follows (R4, tab 111):

> Considering that the FY85 awards to both you and General Electric were the result of a lengthy and comprehensive competition, the Air Force does not intend to and will not conduct an additional formal competition for the FY86 (annual or multi-year) options. In this regard, this letter must not be construed as a request for proposal. . . . Any offered improvements . . . must be within the constraints of [the RFP] and the amendments thereto, must address the F100-PW-220 engine exclusively, and must be provided on an individual stand alone basis such that any single improvement can be selected for contractual implementation.

The AF made similar inquiries prior to its exercise of the options for each of the out-years. Appellant voluntarily offered improvements each year with the hope that it would gain a greater share of the engine work as a result of the exercise of these options.

33. As for the FY 86 call for improvement, most of appellant's proposed revisions applied to FYs 87-90. One of the most significant of these improvements was appellant's offer to use its full-award unit price "discount factor" on future split awards, which in the BAFO was only applicable if Pratt had obtained 100% or full award. As for FY 86, appellant offered a number of improvements, including: (1) allowing the Air Force to add Foreign Military Sales (FMS) engines, in excess of contract limits, to the units purchased by the Air Force in order to provide the Air Force with quantity savings under the contract

pricing matrix, retroactive to FY 85; (2) reduced warranty prices; and (3) revisions in terms and conditions affecting data rights, co-production requirements, and spare-parts requirements. (AR4, tabs 187, 188) GE was also contacted for improvements, but revalidated its BAFO prices insofar as FY 86 was concerned (AR4, tab 192 at 007957).

34. By memorandum dated 8 January 1985, the Secretary of the Air Force as SSA advised of his option exercise decision for FY 86, stating in part as follows (R4, tab 369):

> [I] have completed my assessment of the FY 86 option updates. . . and have decided to exercise the options in both contracts. . . .
>
> The [GE and Pratt engines] both continue to be excellent engines and are fully acceptable for both the F-15 and F-16 aircraft. . . . Life cycle costs are essentially equal in the various dual award situations, although it is recognized that life cycle costs do increase slightly as Pratt & Whitney's share of the dual award increases. Since Pratt & Whitney has revised its warranty to comply with the Congressional direction in Section 103(c), DoD Authorization Act, 1985, Pub. L. 98-525, the cost of Pratt & Whitney's warranty is no longer considered excessive. . . .
>
> . . . Based on estimated life cycle costs (including acquisition costs, operation, and support costs as well as warranty costs), considerations of readiness and supportability, current deployment plans, the quality of engines to be procured, the Air Force's desire to acquire engines and related items for the F-15 and F-16 in a competitive environment, performance under the contracts to date, and the high performance fighter engine industrial base, I have determined that the best alternative at this time is to place the F100-PW-220 in new production F-15 aircraft and to place both the F110-GE-100 and the F100-PW-220 in new production F-16 aircraft. The engine quantities for FY 86 is determined to be approximately 159 F100-PW-220 engines (114 engines in F-15 aircraft; 45 engines in F-16 aircraft) and approximately 184 F110-GE-100 engines. . . .
>
> You may direct the exercise of the option in each contract which provides for variable quantity annual options over the remaining contract term of five years. This will enable us to annually assess the optimum quantities to be awarded the two contractors. . . .

The AF exercised the option for its FY 86 engine requirements by the execution of P00015. Appellant signed this contract modification and offered no objection to the manner or method of the option exercise. (R4, tab 121)

35. By letter to Pratt dated 15 August 1985, the AF issued a call for the improvement of the terms and conditions in appellant's option prior to the exercise of the option for FY 87. A number of areas of improvement were suggested, but the AF encouraged all offers that could be "of further benefit to the Air Force." (R4, tab 122)

36. Pratt's reply, dated 30 September 1985, offered a number of improvements in addition to those offered in the prior year that would become effective in FY 87, including allowing the AF to add Pratt's direct foreign and commercial sales to the annual AF buy to obtain quantity savings under the contract pricing matrix, reduced warranty prices for FYs 87-90 and increased warranty duration retroactive to FY 85, and reduced cost of proprietary data rights (R4, tab 125). GE was also contacted by the AF and offered improvements in terms and conditions.

37. By memorandum dated 20 February 1986, the Secretary of the AF as SSA advised of his decision regarding the FY 87 option exercise, stating in part as follows (R4, tab 397):

> [I] have completed my assessment of the FY 87 option updates . . . and have decided to exercise the options in both contracts. . . .
>
> . . . General Electric's life cycle costs in the previous years were slightly lower in the various dual award situations by virtue of its lower operating and support cost. For the first time this year, however, both its acquisition cost and operating and support cost are lower, thus continuing its edge in the area of life cycle costs. As in previous years, life cycle costs increase slightly as Pratt & Whitney's share of the dual award increases.
>
> . . . [I] have determined that the best alternative at this time is to continue to place the [Pratt engine] in new production F-15 and F-16 aircraft and to continue to place the [GE engine] in new production F-16 aircraft. The engine quantities for FY 87 are determined to be approximately 160 [Pratt engines] . . . and approximately 205 [GE] engines. . . .

38. The AF exercised its option for FY 87 requirements by the execution of P00061. Appellant signed this contract modification and offered no objection to the manner or method of the option exercise. (R4, tab 135) In the execution of this contract

modification, the contracting officer relied upon appellant's BAFO cost or pricing data (tr. 2957).

39. By letter to Pratt dated 17 July 1986, the AF issued a call for improvement in the terms and conditions of appellant's option prior to the decision to exercise the option for FY 88 (R4, tab 129). Appellant's reply, dated 29 August 1986, offered a number of additional improvements, including reducing its BAFO engine unit prices for FYs 88-90, which prices would be subject to adjustment under the EPA clause of the contract after engine delivery (R4, tab 130). Appellant's proposed unit price reductions took into account its projection of escalation under the EPA clause (R4, tab 467 at 2009432). These reductions, however, allowed the AF greater budgetary flexibility in the order and funding of the engines, which it would not have possessed using appellant's higher BAFO unit prices (tr. 2993, 3291). Pratt also offered technical-modification savings, reduced warranty prices for FYs 88-90 and increased warranty protection retroactive to FY 85, and reductions in charges for certain technical order (TO/TCTO) work. (R4, tab 130). GE was also contacted by the AF, and it also provided improved terms and conditions for FY 88.

40. By memorandum dated 30 January 1987, the Secretary of the AF as SSA advised of his decision regarding the FY 88 option exercise. Insofar as pertinent, the SSA determined as follows (R4, tab 409):

> . . . [I] have completed my assessment of the FY 88 engine option updates . . . and have decided to exercise the options in both contracts. . . .
>
> . . . Both contractors improved the terms and conditions in their FY 88 option update offers; however, Pratt & Whitney was judged to be more favorable overall. This year Pratt & Whitney significantly reduced the acquisition cost of its engine which narrows the slight difference in life cycle costs between both engines. In addition, Pratt & Whitney expanded its product support, increased the benefit/cost ratio of its warranty and offered greater guaranteed savings in the technology modernization program. Pratt & Whitney also has an edge with regard to rights in technical data, in terms of a reduced number of parts with limited rights and a reduced price for those parts. . . .
>
> . . . [I] have determined that the best alternative at this time is to continue to place the [Pratt engine] in new production F-15 and F-16 aircraft and to place the [GE engine] in new production F-16 aircraft. The engine quantities for FY 88 have been determined to be approximately 181 [Pratt] engines and

> approximately 147 [GE] engines (a 55/45 percent split favoring Pratt & Whitney). . . .

41. The AF exercised its option under FY 88 by the unilateral execution of Modification No. P00120, effective 30 March 1988 (R4, tab 144). Appellant offered no contemporaneous objection to the manner or method of this option exercise. The AF relied upon appellant's BAFO cost or pricing data for the execution of this contract modification (tr. 2975).

42. By letter to Pratt dated 24 June 1987, the AF issued a call for improvement in the terms and conditions of appellant's option prior to the decision to exercise the option for FY 89 (R4, tab 137). Appellant's reply, dated 21 August 1987, offered the AF a number of additional improvements in terms and conditions beyond those already offered, including further reduced engine unit prices for FYs 88-90 that were subject to adjustment under the EPA clause, guaranteed technical-modification savings, reduced warranty prices, expanded warranty coverage, and volume discounts for support equipment. (R4, tab 138) GE was also contacted by the AF, and provided revised terms and conditions.

43. By memorandum dated 29 January 1988, the SSA advised of the AF decision regarding the option exercise for FY 89. Insofar as pertinent, the SSA determined as follows (R4, tab 431):

> . . . [I] have completed my assessment of the FY 89 engine option updates . . . for the fifth yearly increment of the Alternate Fighter Engine Competition, and have decided to exercise the options in both contracts. . . .
>
> . . . Both contractors improved the terms and conditions in their FY 89 option update offers; however, Pratt & Whitney was judged to be more favorable overall. This year Pratt & Whitney significantly improved their warranty, particularly with respect to analytical conditions inspections, as well as teardown and reassembly. Pratt & Whitney also demonstrated their improved product support this past year.
>
> . . . I have determined that the best alternative at this time is to continue to place the F100-PW-220 in new production F-15s and a portion of new production F-16s; . . . The engine quantities for FY 89 have been determined to be approximately 159 F100-PW-220 engines and approximately 130 F110-GE-100 engines (a 55/45 percent split favoring Pratt & Whitney). . . .

44. The AF exercised its option for FY 89 requirements by the unilateral execution of P00170, effective 31 March 1989. Appellant offered no contemporaneous objection to the manner or method of this option exercise. (R4, tab 150) The AF relied upon appellant's BAFO cost or pricing data for the exercise of this contract modification (tr. 2985).

45. By letter to Pratt dated 19 July 1988, the AF issued a call for improvement in the terms and conditions of appellant's option prior to the decision to exercise the option for FY 90, which was the final year of the contract (R4, tab 434). Appellant's reply, dated 19 August 1988, offered the AF a number of additional improvements beyond those already offered, including a ½ percent reduction in engine prices, reduced warranty prices, reduced support equipment prices and guaranteed technical-modification savings. (R4, tab 435) GE was also contacted by the AF, and provided improved terms and conditions.

46. By memorandum dated 24 February 1989, the Secretary of the AF as SSA announced the AF decision regarding the option exercise for FY 90. Insofar as pertinent, the SSA determined as follows (R4, tab 440):

> 1. I have completed my assessment of the FY 90 engine option updates . . . for the sixth and last yearly increment of the Alternate Fighter Engine competition, and have decided to exercise the options in both contracts. . . .
>
> 2. . . . Both contractors improved the terms and conditions in their FY 90 option update offers, primarily by reducing engine acquisition costs. Pratt & Whitney continued to demonstrate improved product support this past year.
>
> . . . .
>
> 4. I have determined that the best alternative at this time is to continue to place the F100-PW-220 in eight (8) new production F-15s and in 54 new production F-16s; and to place the F110-GE-100 in 39 new F-16s. The engine quantities for FY 90 have been determined to be approximately 70 F100-PW-220 engines and approximately 39 F110-GE-100 engines (a 64/36 percent split favoring Pratt & Whitney). . . . This completes the award of options under the Alternate Fighter Engine competition.

47. The AF exercised its option for FY 90 requirements by the execution of P00215, effective 30 March 1990, and by the execution of P00278, effective 28 June 1991. Appellant signed these modifications. Appellant offered no contemporaneous objection to the manner or method of these option exercises. (R4, tabs 153, 160)

Appellant offered no contemporaneous objection to any of the AF calls for improvement prior to the exercise of the contract options.

48. The contracting officer did not seek, and appellant did not provide any additional cost or pricing data in support of appellant's revised options for FYs 86-90 (tr. 3634). The CO deemed this unnecessary because he relied upon appellant's BAFO cost or pricing data submission to execute the full funding options (findings 38, 41, 44; DCMA tr. 1048-49).

49. Mr. Richard Rhodeback was the contracting officer or the supervisor of the CO for the option buys starting in 1986 (DCMA tr. 933; tr. 2976-77). He relied upon the RAA, executed by his predecessor, and the findings and conclusions therein to the effect that the BAFO prices were fair and reasonable based upon the information reviewed (DCMA tr. 1048). Given that original determination, he was of the view that the revisions offered by Pratt relating to the calls for improvement were also fair and reasonable (DCMA tr. 1048-49, 3640-41).

50. On 27 August 1985, AF representatives, including the AF pricing analyst and contracting officer, met with DCAA auditors who were exploring the appropriateness of doing a post-award defective pricing audit on the contract (AR4, tab 150 at 020894-95). These AF representatives took the position that a defective pricing audit was inappropriate (DCMA tr. 743-44, 1295-96).

51. On 1 December 1987, DCAA sent the AF a letter requesting a determination regarding whether "adequate price competition" existed in the procurement so as to obviate the need for a TINA defective pricing audit (AR4, tab 150 at 020896). By letter to DCAA dated 10 April 1989, the contracting officer stated that adequate price competition did not exist, but he limited that determination to the initial award, *i.e*., the FY 85 quantities (AR4, tab 150). The DCAA sought clarification by memorandum dated 25 April 1989 (R4, tab 443). By memorandum to DCAA dated on or about 8 May 1989, the contracting officer stated that his determination regarding lack of adequate price competition should apply to all the out-years, *i.e*., the annual option exercises from FYs 86-90, also known as FEC II through FEC VI (R4, tab 445).

52. In 1989, DCAA began the defective pricing audit of the contract.

The Claimed Defective Cost or Pricing Data

The BAFO Pricing Sheets

53. At or about the time it was putting together its BAFO, appellant created a sheet entitled "Material Standards for FEC BAFO," known as the "Bible Sheet," and a document entitled "Summary of ECP's" (tr. 3114-15). These documents showed, *inter alia*, the costs that flowed into appellant's BAFO price (tr. 5227). Appellant did not disclose these

documents as part of its BAFO cost or pricing data when the BAFO was submitted (tr. 4939-40), or at any time prior to award.

Failure to Use More Current Quotes in BAFO (Schedule A)[4]

54. Appellant's BAFO stated at pages 3-56 that it had used its "most current quotes" and "most current data available" to price engineering changes (AR4, tab 157). Upon audit, the DCAA found that appellant did not use its most current quotes for certain parts related to engineering changes. According to the DCAA, this BAFO statement was inaccurate and constituted defective cost or pricing data. (Tr. 4974, 4992) DCAA recommended contract price reductions on a per part basis reflecting the more current data that should have been used per appellant's representations. (R4, tab 512 at 18-19). For a number of parts, the more current data would have resulted in a *higher* BAFO price, and the DCAA recommended offsets against the price reductions (R4, tab 512 at 23-24).

55. The AF does not assert that the most current data were not disclosed to the Government. It contends that the data were not *used* by Pratt to develop its BAFO price. For reasons stated in the Decision section of this opinion, we find that appellant's cost or pricing data were not defective in this respect and that no contract price reductions or offsets can be recognized under Schedule A.

Defective Data re ECP Deleted Material (Schedule B)

56. Generally, appellant derived its BAFO price for its new -220 engine by modifying the pricing for its then current -200 engine configuration. The DEEC and Improved Life Core (ILC) engineering changes were two major technical changes that converted the -200 engine to the -220 engine (tr. 3080). These engineering changes required, *inter alia*, that certain parts be deleted from, and added to the current engine configuration.

57. Upon audit, the DCAA discovered that appellant's data showed that certain parts were not deleted at the same cost values at which they were originally entered. For example, appellant's 10/6/83 bill of material – which we find was cost or pricing data – showed a cost of $229 for a certain part in the build up of cost for the –200 engine, but other data showed that it was deleted from the new engine at $220. The auditors compared appellant's bills of material and other cost or pricing data to uncover similar discrepancies amongst the data with respect to a number of deleted parts. (Tr. 5275-79) The auditors determined, and we find that since these parts were not shown as deleted at the same values as entered, there remained value in the contract price for deleted parts that were never

[4] The references to Schedules A through H herein refer to the schedules in DCAA's most recent audit report dated 22 February 2001 (R4, tab 512), which was adopted by the contracting officer by decision dated 20 March 2001 (R4, tab 518), and which was appealed under ASBCA No. 53349.

bought by the government (R4, tab 512 at 27; tr. 5270). According to DCAA, this resulted in the overstatement of the contract price over the six-year contract term, and the DCAA recommended a contract price adjustment in the amount of $122,750,594, revised at the hearing to $124,114,495 (R4, tab 831).

58. A DCAA pre-award audit report identified this problem in appellant's initial proposal. However, appellant's BAFO price was considerably lower than that initially proposed (finding 17). Without the data entitled "Material Standards for FEC BAFO" and "Summary of ECP's" – which appellant did not disclose prior to award (finding 53) –the government had no reason to know the significance of the above material values as they related to the BAFO (tr. 5302). We find that appellant failed to make full and meaningful disclosure of its cost or pricing data. We find that appellant's cost or pricing data were defective in this respect.

Defective Data regarding Deleted ECP Labor--Offset (Schedule C)
Failure to Use Labor-Reduction Factors per BAFO (Schedule C)

59. Upon audit, the DCAA discovered that appellant's labor data showed a type of defect similar to that found with respect to the ECP deleted material above, that is, that certain ECP parts were shown as deleted at different labor values in the new engine from those entered in the build up of cost. In this instance, however, the data showed that these parts were deleted at *higher* labor values than previously entered. According to the DCAA, this resulted in an *understatement* of contract price, and DCAA recommended an offset that it projected over the six-year contract term, in the amount of $117,171,121 (R4, tab 512 at 30). We find that appellant's cost or pricing data were defective in this respect.

60. Appellant's BAFO stated at 3-59 that "labor standards from 1985 forward were reduced by increased factors from the initial proposals . . ." to reflect historical standard labor reductions (AR4, tab 157). Upon audit, the DCAA determined that the BAFO did not use these "factors," also known as out-year reductions or taskings, to reduce DEEC & ILC labor (tr. 5331-33, 5353-54, 5371). According to the DCAA, appellant's failure to use these factors per its purported BAFO representation constituted defective pricing, caused an overstatement in the contract price and was a basis for contract price adjustment. For reasons stated in the Decision section of this opinion, we find that appellant's cost or pricing data were not defective in this respect.

Math Error (Schedule D)

61. After audit, the DCAA determined that certain cost or pricing data – the Summary of ECP's sheet – erroneously carried a DEEC engineering change labor adjustment as an add-on, that is, a (+) $697.00, when it should have been carried as a minus (-) $697.00. Appellant did not disclose this piece of data to the AF prior to award. According to DCAA, this data showed that the error flowed into, and overstated the contract price, and a contract price adjustment was recommended, in the amount of $26,914,167.

(R4, tab 512 at 3, 5; tr. 4996-98). While appellant disclosed to the government, pre-award, a document which contained the correct value, it failed to disclose the above Summary of ECP's sheet which explained the significance of the labor adjustment as it related to the BAFO. We find that appellant's cost or pricing data were not fully disclosed, were inaccurate and were defective in this respect.

Errors in 1993 Calculations (Schedule E)

62. In February 1993, roughly ten years after the BAFO and cost or pricing data were submitted to the AF, the DCAA asked appellant to explain and to support the BAFO amount of $277,060 for unquoted material parts for 1985, and the 1984 value for these parts of $263,867. By letter to DCAA dated 5 April 1993, appellant attempted to support these figures, and provided calculations and a reconciliation based upon the data available in 1993. (R4, tab 522 at 2107300)

63. DCAA discovered errors in appellant's 1993 calculations: (1) Appellant erroneously included a resource adjustment twice on certain parts; and (2) Appellant's calculations erroneously removed a given part value only once, but should have removed it three times because there were three such parts in each engine (R4, tab 512 at 35-6). According to the DCAA, these errors made by appellant in 1993 were defective cost or pricing data, and a contract price adjustment was recommended (tr. 5385). We find that these 1993 reconciliation errors were not shown to be associated with the cost or pricing data furnished by appellant and certified as accurate, current and complete as of 5 December 1983. We find that appellant's data were not defective in this respect.

Defective Data regarding Material Overhead (Schedule F)

64. The auditors determined that with respect to the BAFO proposed costs for Task 331 ECP, appellant's data showed an 8% material overhead charge in the material standard but also showed this charge in the final mark-up, which was a duplication (R4, tab 512 at 3). Appellant's letter to DCAA dated 13 March 1990 stated in pertinent part as follows (R4, tab 802 at 2019392; tr. 5637-38):

> Please note that the 1984 $ [dollars] standard material unit engine cost adjustment for CIP Task #331 has been erroneously overstated by $1,332. *The proper 1984 $ [dollar] CIP Task #331 adjustment is $16,664 not $17,976* (difference of $1,332). The 1983 $ [dollar] delta used of $18,725 included 8% [eight percent] material overhead costs. *The delta without material overhead costs* should have been used. . . . [Emphasis added]

The defective figure of $17,976 referenced by appellant above was found on the Summary of ECP's sheet, which was not furnished to the government prior to award. According to

the DCAA, this duplication of material overhead overstated the contract price and a contract price adjustment was recommended, in the amount of $2,425,903 (R4, tab 512 at 3), revised at trial to $2,452,968 (R4, tab 831). While appellant disclosed documentation, pre-award, that contained an accurate value for Task 331 ECP, appellant failed to disclose the subject data sheet which showed the significance of appellant's proposed values as related to the BAFO price. We find that appellant's cost or pricing data were not fully disclosed and were inaccurate and defective in this respect. (Tr. 5642)

Appellant's Failure to Consistently Use Same Material Escalation Factor in BAFO (Schedule G)

65. The DCAA determined that appellant priced DEEC add parts in the BAFO using estimated 1983 standard material costs escalated by a material escalation factor of .9815 (also stated in the record as -1.85%) for 1984, but elsewhere in the BAFO used a more current escalation factor of .9600 (R4, tab 512 at 41). According to the DCAA, appellant's failure to use the more current rate consistently in the BAFO constituted defective cost or pricing data, for which a contract price adjustment was recommended. (Tr. 5003-09) The AF does not assert that appellant failed to disclose these rates to the Government, but only that it failed to use the more recent rate consistently in the BAFO.

66. During a briefing on 9 May 1995, the AF advised the DCAA that material escalation is "traditionally more judgmental, rather than factual, in nature" (tr. 5166; AR4, tab 389 at 2119508). We find that this material escalation factor was in essence a judgment as to the future movement of material costs.

67. Insofar as pertinent, DAR 3-807.6 states as follows:

> 3-807.6 Certificate of Current Cost or Pricing Data
>
> . . . .
>
> (b) Because the certificate pertains to "cost or pricing data," it does not make representations as to the accuracy of the contractor's judgment on the estimated portion of future costs or projections. It does, however, apply to the data upon which the contractor's judgment is based. This distinction between fact and judgment should be clearly understood.

We find that the subject escalation factor was not cost or pricing data. If it was, we find that appellant's cost or pricing data were not defective in this respect.

Defective Data Regarding ECP 416350H (Schedule H)

68. DCAA determined that Part 4058553 was dropped from the new engine configuration, and hence was properly deleted in the build up of cost for the new engine. With respect to the cost build up for ECP 416350H, which was part of the new engine, DCAA determined that Pratt's cost or pricing data erroneously deleted the cost for Part 4058553 when it should have deleted the cost for Part 4061829 (tr. 5159). This caused the former part to be deleted twice, and the latter part to be included in the BAFO price although it was not part of the new engine configuration. According to the DCAA, the presence of the latter part in the BAFO price caused an overstatement in contract price for which the AF was entitled to a contract price reduction, and the double deletion caused an understatement in contract price for which appellant was entitled to an offset. Since the latter figure was larger then the former, DCAA recommended a net offset in its S5 audit report. (R4, tab 510 at 3) This recommendation was adopted by the CO in his decision dated 23 August 2000 (R4, tab 511). The parties agree, and we find that the understatement in the contract price due to the double deletion was in the amount of $55,532,649 (Pratt br. at 195; govt. reply br. at 128) which, when applied against the contract price overstatement of $18,777,251, provided appellant with a net offset of $36,755,398 (R4, tab 510 at 45). We find that appellant's cost or pricing data were defective in this respect. The contract price overstatement was revised at trial to $18,987,953 (R4, tab 831), which would make for a net offset of $36,544,696.

69. After issuance of the S5 audit report and the CO decision, DCAA changed its recommendation. Based upon a pre-award audit and a review of appellant's cost or pricing data thereunder, the Government became aware of the double deletion error, and made Pratt aware of the matter during the pre-award discussions in the Fall of 1983. According to DCAA, appellant's failure to correct this error precluded consideration of the understatement in contract price. In its S6 audit report, DCAA modified its S5 audit report and recommended that the subject adjustment include only that portion of the data error that reflected the overstatement of the contract price, in the amount of $18,777,251 (R4, tab 512 at 3-4), which was revised at trial to $18,987,953 (R4, tab 831). The CO adopted DCAA's new recommendation by decision dated 20 March 2001 (R4, tab 518).

Contracting Officer Decisions and Appeals

70. A number of post-award audit reports were issued by DCAA covering the aforementioned issues throughout the 1990s. After these audit reports were issued, the parties met and exchanged writings over a number of years, discussing the propriety of the AF defective pricing claim. The DCAA recommendations for contract price adjustment under three of the later audit reports, known as the S4, S5 and S6 audit reports, were adopted by the contracting officer in separate decisions dated 16 January 1998, 23 August 2000, and 20 March 2001 respectively (R4, tabs 202, 511, 518) and were appealed to this board and were consolidated under the above-captioned appeals.

71. With respect to the most recent contracting officer decision dated 20 March 2001 (R4, tab 518), the contracting officer adopted the DCAA's recommendations for contract price adjustment under the S6 audit report dated 22 February 2001 in the amount of $184,532,420, based upon the proposed price adjustments and offsets identified in Schedules A through H above. The contracting officer issued a demand for contract price adjustment in the amount of $184,945,199, which included the recommended price adjustment under the S6 audit report and a recommended price adjustment of $412,779 pursuant to Audit Report 1481-OA420002 dated 28 June 1990.[5] This contracting officer decision was appealed to this board under ASBCA No. 53349. The S6 audit component of the AF claim was reduced to $171,398,012 at trial (*see* R4, tab 831).

72. At trial and in its brief (br. at 252-53), the AF sought to disallow all offsets recognized by the DCAA and the contracting officer as part of the AF claim under ASBCA No. 53349, in the amount of $127,876,680, based upon Pratt's failure to retain its ILC material records in accordance with the record-retention requirements of the contract (finding 75). This increased the government defective pricing claim to roughly $299,000,000.

73. Insofar as pertinent, TINA provided as follows, 10 U.S.C. § 2306(f):

> (f)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current –
>
> (A) prior to the award of any negotiated prime contract under this title where the price is expected to exceed $500,000;
>
> . . . .
>
> (2) Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor

[5] The AF failed to offer into evidence Audit Report 1481-0A420002 and failed to offer any evidence in support of its recommended price adjustment, nor did it brief the matter. It appears that the AF has abandoned this element of its claim, but if not abandoned we must deny it for lack of proof.

required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent: *Provided*, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.

(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the negotiation, pricing, or performance of the contract or subcontract.

74. We find the following DAR provisions pertinent:

3-807 Pricing of Negotiated Contracts.

3-807.1 *General. . . .*

(a) *Definitions.*

(1) *Cost or pricing data* consists of all facts existing up to the time of agreement on price which prudent buyers and sellers would reasonably expect to have a significant effect on price negotiations. . . . [C]ost or pricing data consist of all facts which reasonably can be expected to contribute to sound estimates of future costs as well as to the validity of costs already incurred. Cost or pricing data, being factual, are that type of information which can be verified.

. . . .

3-807.3 *Requirement for Cost or Pricing Data*.

(a) When appropriate, the contracting officer shall require the contractor to submit, either actually or by specific identification in writing, cost or pricing data in support of his proposal. The contracting officer also shall require the contractor, in circumstances specified in (b) below, to certify, using the certificate set forth in 3-807.6, that the cost or pricing data submitted are accurate, complete, and current. Cost or pricing data shall not be required merely in anticipation of post-award review of the contract.

(b) Cost or pricing data are required as part of a proposal leading to, and certification is required prior to:

(i) the award of any negotiated contract (except for unpriced actions such as letter contracts) expected to exceed $500,000 in amount;

. . . .

unless the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. . . .

. . . .

(e) When it is anticipated from the outset that there will be adequate price competition, cost or pricing data shall not be requested regardless of the dollar amount involved. If, after cost or pricing data were initially requested and received, it is determined that adequate price competition does exist, the data need not be certified. . . .

. . . .

3-807.6 *Certificate of Current Cost or Pricing Data.*

. . . .

(d) Although Cost or Pricing Data were requested in the solicitation, a Certificate of Current Cost or Pricing Data shall not be requested in connection with the award of any contract

of any dollar value where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(e) The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used, does not require re-certification.

. . . .

3-807.7 *Adequate Price Competition, Catalog or Market Prices and Prices Set by Law or Regulation*. For the purpose of paragraphs 3-807 and 15-205.22(e), the terms "adequate price competition", "established catalog or market prices of commercial items sold in substantial quantities to the general public", and "prices set by law or regulations" shall be construed in accordance with the following general guidelines.

(a) *Adequate Price Competition*.

(1) Price competition exists if offers are solicited and (i) at least two responsible offerors, (ii) who can satisfy the requirements, (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price, (iv) by submitting priced offers responsive to the expressed requirements of the solicitation. Whether there is price competition for a given procurement is a matter of judgment to be based on evaluation of whether each of the foregoing conditions is satisfied. Generally, in making this judgment, the smaller the number of offerors, the greater the need for close evaluation.

(2) If the foregoing conditions (i) through (iv) are met, price competition shall be presumed to be "adequate" unless it is determined that:

(i) the solicitation was made under conditions that unreasonably deny to one or more known and qualified offerors an opportunity to compete;

(ii) the low competitor has such a determinative advantage over the other competitors that he is practically immune to the stimulus of competition in proposing a price

(*e.g.*, a determinative advantage because substantial costs, such as start up or other nonrecurring expenses, have already been absorbed in connection with previous sales, thus placing the competitor in a preferential position); or

(iii) the lowest final price is not reasonable and this finding is supported by an enumeration of the facts upon which it is based; *provided*, that such finding is approved at a level above the contracting officer.

(3) A price is "based on" adequate price competition if it results directly from such competition or, if price analysis (not cost analysis) shows clearly that the price is reasonable in comparison with current or recent prices for the same or substantially the same items procured in comparable quantities under contracts awarded as a result of adequate price competition (*e.g.*, (i) exercise of an option in a contract for which there was adequate price competition if the option price has been determined to be reasonable in accordance with 1-1505(d) and (ii) an item normally is procured competitively but in a particular situation only one offer is solicited or received, and the price clearly is reasonable in comparison with recent purchases of comparable quantities for which there was adequate price competition).

(4) Prices based on adequate competition exempt offerors from the requirements for submission and certification of cost or pricing data. (*But see 3-1200 for CAS requirements*.)

75. We also find the following contract provision pertinent (DAR 7-104.41; R4, tab 1 at 707; ex. G-827):

Audit by Department of Defense (1982 DEC)

. . . .

(c) *Cost or Pricing Data*. If the Contractor submitted cost or pricing data in connection with the pricing of this contract or any change or modification thereto, unless such pricing was based on adequate price competition . . . the Contracting Officer or his representatives . . . shall have the right to examine all books, records, documents and other data of the Contractor related to the negotiation, pricing or performance

> of such contract, change or modification for purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted. . . .
>
> . . . .
>
> (e) *Availability*. The materials described in (b), (c) and (d) above shall be made available . . . until the expiration of three (3) years from the date of final payment under this contract . . . .

There is no dispute, and we find that appellant failed to retain all of its records, specifically its ILC add material data, in accordance with the requirements of this clause.

DECISION

Appellant has pleaded laches as a complete defense to the AF defective pricing claim. Laches is available as a defense to a government contract claim in appropriate circumstances. *See JANA, Inc. v. United States*, 936 F.2d 1265 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992); *S.E.R., Jobs for Progress, Inc. v. United States*, 759 F.2d 1 (Fed. Cir 1985); *Eurasia Heavy Industries, Inc.*, ASBCA No. 52878, 01-2 BCA ¶ 31,574. We believe that appellant has failed to make out a case of laches under the circumstances here.

In order to prove laches, Pratt must show that the AF was responsible for unreasonable and inexcusable delay in asserting its claim as result of which Pratt was prejudiced. *JANA, Inc. v. United States*, *supra*. The AF initiated post-award audits during the performance period of this contract, and during the time in which appellant was required to retain its records. After these audit reports were issued the parties met, exchanged writings and debated the propriety of an AF defective pricing claim over a number of years. The AF manifested no intent to abandon its claim. The first contracting officer decision asserting a defective pricing claim was issued in January 1998, and was timely appealed to this board. The record does not show that the AF was responsible for any unreasonable and inexcusable delay which prejudiced appellant. See *McDonnell Douglas Helicopter Systems*, ASBCA No. 50341, 99-2 BCA ¶ 30,546 at 150,828-29.

Appellant also seeks to bar the AF defective pricing claim by generally challenging the manner and method in which the AF exercised its options for engine quantities in FYs 85-90. We reject this contention for a number of reasons. First, appellant has not shown any material violation of any procurement regulations that were promulgated for the benefit of contractors so as to bar the AF claim. In addition, Pratt voiced no contemporaneous objection to the exercise of any of the options by the AF. Appellant knowingly and voluntarily agreed to allow the AF the time necessary to exercise the options, and knowingly and voluntarily agreed to improve the terms and conditions of its option offer each year at the AF's request, which it was under no legal obligation to do. Clearly, this was not done

magnanimously but with the expectation that the AF's exercise of options would result in additional engine work for appellant, which is what in fact occurred. As we stated in *Arthur E . Lees*, ASBCA Nos. 52040, 52207, 01-1 BCA ¶ 31,360 at 154,888, *aff'd*, 31 Fed. Appx. 680 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 884 (2002):

> [W]e must conclude that appellant participated in, and benefited from the acquisition process to which it now objects and must be considered as having unclean hands so as to be precluded from obtaining the equitable remedy. *Promac, Inc. v. West*, 203 F.3d 786, 789 (Fed. Cir. 2000).

Although in *Lees* the appellant's participation and benefit precluded equitable relief, we believe the underlying principle has application to the facts here as well.

We conclude that appellant has not proven any affirmative defense that would preclude this AF claim. We proceed to address the claim on the merits.

A claim for contract price reduction under TINA is a government claim. As such, the government has the burden of proof and assumes the risk of non-persuasion on all elements of the claim. As a threshold issue, the government must show that it lawfully exercised its discretion under the statute and related regulations to seek certified cost or pricing data from the offerors in this competitive procurement. The government must then show that the data in dispute are cost or pricing data; that the data disclosed prior to award were not accurate, current or complete; and that the defective data caused an increase in contract price. See *McDonnell Douglas Helicopter Systems*, ASBCA Nos. 50447 *et al*., 00-2 BCA ¶ 31,082.

I. WHETHER THE CONTRACTING OFFICER LAWFULLY EXERCISED HIS DISCRETION TO OBTAIN CERTIFIED COST OR PRICING DATA

TINA requires a contractor to submit and to certify cost or pricing data prior to the award of any negotiated contract where the contract price is expected to exceed $500,000, and requires that the contract contain a provision providing for contract price adjustment in the event the contract price is increased due to the submission of data that was inaccurate, incomplete or noncurrent. The Act also provides for certain exemptions, *i.e*., "adequate price competition," whereby the government may exercise its discretion not to obtain certified cost or pricing data.

The procurement regulations provide guidance as to how this discretion is to be exercised, explaining how the contracting officer is to determine the existence of price competition and whether the price competition is "adequate" under the circumstances so as to exempt the procurement from cost or pricing data requirements. *United Technologies Corp., Pratt & Whitney*, ASBCA No. 51410, 99-2 BCA ¶ 30,444. It is well settled that the application of this regulatory guidance to the facts of each case is committed to the sound

discretion of the contracting officer. See *Fraass Surgical Mfg. Co., Inc. v. United States*, 571 F.2d 34, 39 (Ct. Cl. 1978); *Cubic Defense Systems*, B-229884, 88-1 CPD ¶ 395 at 8; *see also Sperry Flight Systems Division of Sperry Rand Corp. v. United States*, 548 F.2d 915 (Ct. Cl. 1977) (application of TINA exemptions committed to the sound discretion of the contracting officer); *Honeywell Federal Systems, Inc.*, ASBCA No. 39974, 92-2 BCA ¶ 24,966 (whether to grant commerciality exemption is within the discretion of the contracting officer).

When a contracting officer is afforded discretion under the regulations, it is incumbent that said discretion not be abused. On the other hand, it is not our province to substitute our judgment for that of the contracting officer.

It is undisputed that this was a negotiated competitive procurement. The question is whether prior to award, the CO had reason to expect that price competition was "adequate" – as defined by the regulations – so as to exempt the offerors from furnishing certified cost or pricing data. Prior to award, the contracting officer was of the view that adequate price competition did not exist and that certified cost or pricing data were required. Based upon the governing factors in DAR 3-807.7(a)(1), Adequate Price Competition (finding 74), we believe that appellant has not shown any abuse of discretion.

First, the competition consisted of only two offerors, Pratt and GE. The regulations caution that "in making this [exemption] judgment, the smaller the number of offerors, the greater the need for close evaluation." DAR 3-807.7(a)(1). Moreover, the regulation at DAR 3-807.7(a)(1)(iii) contemplates that a procurement with adequate price competition is one awarded to a "responsive and responsible offeror" (singular, not plural). In this procurement however, the AF reserved the right to award to all offerors, that is, to make a dual award, which in fact occurred under every option exercise of the contract. Subsection (iii) of the regulation also contemplated that a procurement with adequate price competition would be one awarded to the responsive and responsible offeror who submitted "the lowest evaluated price." However, in this procurement the AF was not constrained to award at the lowest evaluated price, and in fact it did not do so (finding 23).[6]

For reasons stated, we conclude that the contracting officer did not abuse his discretion under the regulations or the statute by concluding, prior to award, that "adequate price competition" did not exist, thereby requiring the offerors to submit certified cost or pricing data under TINA.

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[6] We are mindful that the GAO has interpreted this regulatory language – "lowest evaluated price" – which clearly on its face is limited to price, to include not only price but all the factors in the award evaluation, and has thereby recognized adequate price competition where price was merely a substantial, though not determinative factor in the prescribed evaluation criteria, *Serv-Air, Inc*, 78-2 CPD ¶ 223. The plain language of the regulation does not support this interpretation, and we do not find this holding persuasive.

II. WHETHER TINA REQUIRES USE OF COST OR PRICING DATA

Under the claims related to Schedules A, C and G, the government contends that appellant violated its obligations under TINA by failing to *use* certain cost or pricing data in its BAFO. We reject this contention for a number of reasons.

The plain language of the Act does not obligate a contractor to use any particular cost or pricing data to put together its proposal. Indeed, TINA does not instruct a contractor in any manner regarding the manner or method of proposal preparation.

TINA is a disclosure statute. It requires a contractor under certain circumstances to disclose and to furnish cost or pricing data to the government and to certify that the data are accurate, current and complete. This disclosure and certification obligation is not limited to that data actually used or relied upon by the contractor to prepare its proposal. Under the regulatory definition, the data to be provided consists of "all facts existing up to the time of agreement on price which prudent buyers and sellers would reasonably expect to have a significant effect on price negotiations. . . " (finding 74). On the other hand, once a contractor has furnished accurate, current and complete data, it has fulfilled its TINA obligations. The statute does not require that all or any of that data be used to prepare the proposal. One would think that any contractor with the desire to obtain a contract award would use credible, historical cost data so as to demonstrate to the government that its proposed price is consistent therewith. However this is a matter for the contractor to decide, and for the Government to evaluate as part of the proposal review process, and is not a mandate under TINA.

For reasons stated, we deny those AF defective pricing claims – Schedules A, C, and G – predicated upon appellant's failure to use certain cost or pricing data in its BAFO.

III. WHETHER APPELLANT'S BAFO IS COST OR PRICING DATA

Under claims related to Schedules A and C, the government also contends that appellant's BAFO is cost or pricing data, and hence misstatements, inaccuracies or "defects" in the BAFO constitute defective cost or pricing data for purposes of TINA. We also find this contention without merit.

First and foremost, the AF position is unsupported by the Act and the implementing regulations. The Truth in Negotiations Act and regulations provide for exemptions from the cost or pricing data submission requirement, that is, they identify circumstances where a contractor's BAFO would *not* be subject to the submission and certification of cost or pricing data. If the contractor's BAFO were itself a cost or pricing data submission, it would render nugatory these statutory exemptions.

The government's position is also inconsistent with the certification requirements of the Act. Generally, cost or pricing data disclosed by a contractor must be certified as current, accurate, and complete. If a contractor's BAFO were cost or pricing data, the BAFO would have to be certified as current, accurate, and complete. We are aware of no statute, regulation or contract provision that obliges a contractor to certify its BAFO proposal under TINA. Nor did the government insist upon such a BAFO certification in this case.

In addition, we believe that a BAFO does not fall under the definition of cost or pricing data as prescribed by the regulations. Under DAR 3-807.1(a)(1), cost or pricing data "consist of all facts which reasonably can be expected to contribute to sound estimates of future costs as well as to the validity of costs already incurred" (finding 74). A contractor's offer or BAFO is not a set of facts consistent with this definition. Rather, a contractor's offer is a mix of judgments as to how best to accomplish contract work at a price that is developed to cover anticipated cost and a satisfactory profit. That a verifiable "fact" may be included in such a document does not detract from its overall judgmental nature.

We conclude that the government's claims under Schedules A and C for contract price reduction based upon BAFO misstatements or inaccuracies are not cognizable under TINA since a BAFO is not cost or pricing data. Whether any such purported BAFO "defect" may be remediable under other contract clauses, procurement regulations or statutes we express no opinion.

IV. WHETHER APPELLANT FURNISHED DEFECTIVE COST OR PRICING DATA

At the time it was putting together its BAFO, appellant created documents entitled "Material Standards for FEC BAFO" (the Bible Sheet), and "Summary of ECP's." These documents showed the costs that flowed into appellant's BAFO price. Appellant did not disclose these documents to the AF as part of its cost or pricing data prior to award. (Finding 53) Clearly, these documents related to the cost and pricing of the BAFO. We conclude that they were cost or pricing data under TINA and should have been timely disclosed to the government prior to award. These nondisclosed pieces of data provided the government with an understanding of the significance of appellant's data as it related to appellant's BAFO – which became the contract price – and which understanding it did not have prior to award without the benefit of these documents. The cost or pricing data provided by appellant were not fully and meaningfully disclosed, were inaccurate and were defective under TINA.

V. WHETHER THE GOVERNMENT HAS SHOWN THAT DEFECTIVE COST OR PRICING DATA CAUSED AN INCREASE IN CONTRACT PRICE

The plain language of TINA underscores that proof of causation is an essential ingredient of the government's *prima facie* case for defective pricing. In accordance with

10 U.S.C. § 2306(f)(2), "[T]he price to the Government . . . shall be adjusted to exclude any significant sums by which it may be determined . . . that such price was increased **because** the contractor . . . furnished cost or pricing data which . . . was inaccurate, incomplete, or noncurrent" (emphasis added). The importance of the causative element has also been underscored in the case law. *Universal Restoration, Inc. v. United States*, 798 F.2d 1400 (Fed. Cir. 1986); *McDonnell Douglas Helicopter Systems*, ASBCA Nos. 50447 *et al.*, *supra*.

As one TINA authority has noted:

> When we take up the subject of causation we enter the world of the "would have been." The "reliance" or "causal nexus" inquiry must always be, Would the price finally negotiated have been different from that actually negotiated had the contractor provided the Government with current, accurate and complete cost or pricing data?

WILLIAM P. RUDLAND, DEFECTIVE PRICING, V-6 (Update No. 7, 1999). This speculative exercise is eased due to the presumption that the natural and probable consequence of defective cost or pricing data is to cause an overstated contract price. DAR 3-807.10(a)(2). *Sylvania Electric Products, Inc. v. United States*, 479 F.2d 1342 (Ct. Cl. 1973).

However, once the contractor provides evidence of lack of causation, the burden of proving causation remains with the government. *McDonnell Douglas Helicopter Systems*, ASBCA Nos. 50447 *et al.*, *supra*. If the government can prove that it generally relied on appellant's cost or pricing data during the process leading up to the final agreement on price, it is deemed likely that the defective data would have affected the contract price, and the government has made its case on causation. *Sylvania Electric Products, Inc.*, *supra*. *See generally, Universal Restoration, Inc.*, *supra*.

Competitively negotiated procurements, for which cost or pricing data have been furnished, present difficult questions with respect to reliance and causation issues. As a general rule, competition serves to promote fair and reasonable prices. Did the government rely solely on the competition, *i.e.*, the prices of the competitors, to determine the fairness and reasonableness of the contract price, or did it rely solely upon the cost or pricing data they furnished? Or did the government rely upon both the competition and the data, or neither?

Presumably, a contracting officer who seeks certified cost or pricing data in a competitive negotiated procurement on the grounds that the price competition was not "adequate" per the statute and regulations, does so in order that the data will be reviewed and relied upon to assist in the determination of the fairness and reasonableness of price. Notwithstanding, we must decide whether the record shows that the AF relied, in whole or in part, upon the cost or pricing data furnished by the appellant in 1983 to determine the

fairness and reasonableness of the contract prices for FYs 85-90. We believe the answer is in the affirmative.

We believe that the preponderance of the evidence, including but not limited to the data reviews by the life cycle cost panel (finding 10), the RAA and its attachments (findings 19, 20) and the 6 January 1984 memorandum from the directorate of contracting (finding 22), shows that the government relied in significant measure upon the review of Pratt's cost data to determine that appellant's BAFO prices were fair and reasonable. The RAA, Attachment 6, made an affirmative finding that appellant's cost or pricing data were adequate, which we believe was tantamount to a statement of reliance.

Appellant contends that the AF relied upon the competition and its MPC calculation to determine the reasonableness of price *without regard* to appellant's cost or pricing data. The evidence of record simply does not support this broad assertion. The AF considered competition and the MPC for sure, but the record persuades us that appellant's cost or pricing data were also an integral factor in the Government's determination.

Given that the AF relied upon appellant's cost or pricing data to determine that the BAFO prices were fair and reasonable for the contract, we do not believe that it was incumbent upon the AF to review the data again or to make an affirmative statement of "re-reliance" prior to the exercise of each of the out-year options under the contract. All options were exercised as part of one contract. We are mindful that during the out-years the AF sought and obtained a number of different terms and conditions applicable to the option years, and that the competition helped to drive these concessions to some extent. However, the record does not show that these revised options severed the AF's reliance on the certified cost and pricing data originally furnished by Pratt, which established the baseline from which these improvements were offered. Indeed, the CO responsible for the exercise of the options testified that he relied on the BAFO data (findings 48, 49). It may have been appropriate for the AF to seek "re-certification" of the cost or pricing data prior to the execution of each option, DAR 3-807.6(e) (finding 74), but we believe that the government's failure to do so did not sever its earlier reliance on the data and did not serve to bar this claim as a matter of law.

We conclude that the AF's reliance on appellant's BAFO cost or pricing data lasted throughout the entire contract. The amount of contract price adjustment, if any, caused by the defective data will be addressed herein.

VI. WHETHER PRATT IS ENTITLED TO A CREDIT FOR VOLUNTARY PRICE REBATES OR REFUNDS

Appellant contends that it is entitled to a credit against the AF defective pricing claim based upon the value of all the revised terms and conditions it offered – and that the AF accepted – prior to the exercise of each option. This contention is without merit.

Appellant cites *Minnesota Mining and Manufacturing Company*, ASBCA No. 20266, 77-2 BCA ¶ 12,823, in support of its position. In this case the contractor, 3M, was awarded three contracts in succession between 29 November 1971 and 21 January 1972 for the delivery of a fire-extinguishing agent. Contract 2 was awarded at $6.50 per gallon and Contract 3, awarded shortly thereafter, was awarded at $6.15 per gallon. The contractor voluntarily agreed to reduce the unit price on Contract 2 to meet the unit price on Contract 3, a 35 cents per gallon price reduction that was reflected in a bilateral contract modification during contract performance.

The Board held that 3M's voluntary refund or rebate served to mitigate a defective pricing claim later filed by the Government on Contract 2 (77-2 BCA at 62,424): "[A]ny assessment under 35 cents for defective pricing is covered by the 35 cent *voluntary* reduction, *i.e.*, a reduction not in 'consideration' of any relaxation in specifications or other matter requiring a downward adjustment in price." (Emphasis in original)

We believe that the 3M price rebate is wholly dissimilar to the revised option terms and conditions offered by Pratt here. Appellant's revisions, even if we accept appellant's proposition that they achieved significant savings for the AF, were not gratuitous or otherwise lacking for consideration as was the case in *3M*. Appellant tendered improved terms and conditions prior to the exercise of each option with the express hope that its revised offers would obtain additional profitable engine work, that is, a larger share of the option quantities to be awarded by the AF each year. Indeed, Pratt was largely successful in this endeavor. There is nothing of record to suggest that this additional engine work was performed at a loss. The additional engine work received by Pratt on a yearly basis was ample consideration for its revised option terms. We see no basis in fact or law to use appellant's option revisions to mitigate or eliminate an otherwise legitimate government defective pricing claim. *Kisco Company, Inc.*, ASBCA No. 18432, 76-2 BCA ¶ 12,147, also cited by appellant, is factually distinguishable and does not compel a contrary conclusion.

VII. WHETHER THE AF MAY DISALLOW OFFSETS ADOPTED BY THE DCAA AND CO BASED UPON NEWLY ASSERTED EQUITABLE CONSIDERATIONS

By contracting officer decision dated 20 March 2001, the AF adopted DCAA recommendations under the S6 audit report which recommended a contract price reduction after netting contract price overstatements and contract price understatements/offsets due to claimed defective cost or pricing data. The AF argues on brief that these CO-sanctioned offsets should now be disallowed in their entirety, in the amount of over $127,000,000 – not based upon the lack of merit of the offsets – but based on the grounds that appellant failed to preserve its ILC material add records for DCAA review in accordance with the contract (finding 75).

We reject the AF position for a number of reasons. First, the factual predicate upon which the AF now seeks to increase its defective pricing claim by over $127,000,000 was

not addressed by the contracting officer in a written decision pursuant to the CDA. We question whether we have jurisdiction over this new and greatly expanded claim, 41 U.S.C. § 605(a) ("All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer.")

Assuming *arguendo*, that we have jurisdiction, we believe that the AF position is unsupportable on the merits. First, we fail to see any material connection between a lack of compliance with the record-retention clause (finding 75) and the remedy sought by the AF. Clearly, the clause does not provide for this remedy, nor do any other pertinent contract clauses, regulations or statutes.

The AF contends that appellant is seeking "equity" when it seeks to apply contract price understatements against contract price overstatements to reduce the AF claim, and its failure to preserve its records shows that it has "unclean hands" which must preclude the equitable remedy. We do not agree. The DCAA recommendation to apply understatements against overstatements to mitigate or offset the AF claim – and the CO's adoption thereof – was a well-settled practice sanctioned by law. *Cutler-Hammer, Inc. v. United States*, 416 F.2d 1306 (Ct. Cl. 1969). This type of offset was not an "equitable setoff" or "recoupment" as those terms are recognized in the law. In general, a recoupment allows a defendant to mitigate a plaintiff's contract claim, up to the amount of the claim, by asserting the defendant's own claim or cause of action under the contract. *See* 80 C.J.S, *Set-Off and Counterclaim* § 2 at 7 (2000). Here, the evidence of contract price understatement does not rise to the level of a stand-alone claim or cause of action that could be asserted by appellant. Rather, this type of evidence addresses the AF's *prima facie* case, that is, whether defective cost or pricing data actually caused an increase in the contract price, and the extent of that price increase. For us to strike or to ignore such evidence – which is memorialized in DCAA audit reports and CO decisions as part of the AF's evidence before this Board – would constitute a Board-ordered sanction or penalty that we believe is unsupported by the Board's rules, the contract or the law.

For reasons stated, we believe that previously acknowledged offsets may not be disallowed for appellant's failure to preserve certain portions of its contract records.

VIII. WHETHER THE AF MAY DISALLOW PREVIOUSLY CONCEDED CONTRACT PRICE UNDERSTATEMENTS AS OFFSETS OF WHICH APPELLANT HAD REASON TO KNOW PRIOR TO BAFO

With respect to the Schedule H claim, appellant's data was erroneous insofar as it mistakenly deleted Part 4058553 a second time rather than deleting Part 4061829, with the result that the latter part erroneously remained in the contract price while the former part was erroneously deleted twice. The net result of this error was a major *understatement* of the contract price, and the CO recognized this understatement as an offset in an earlier CO decision. However in his March 2001 decision, the CO disallowed this understatement and offset in accordance with DCAA recommendations – not on the lack of merit of the offset –

but because the AF subsequently learned that DCAA had made appellant aware of the defective data during pre-award discussions.

We believe that the AF current position is without merit for a number of reasons. First, we believe that the Government's disparate treatment of overstatements and understatements arising from this single error was unjustified and inappropriate. The effect of appellant's error on the contract price should be viewed in its totality, that is, the part that was improperly part of the engine price and caused a contract price overstatement should be the subject of a contract price reduction, but the part that was improperly deleted twice – and which caused an understatement in contract price – should be the subject of an offset. The government relies only upon that aspect of the data error that is to its advantage. It seeks a contract price reduction related to the part that was improperly included in the BAFO price, but refuses to consider the countervailing effect of the double-deletion and its effect on the understatement of the contract price. The AF suggests no audit or accounting principle that supports such treatment, nor does it cite to any precedent in support of its position. We find no basis in fact or in law for the government's inconsistent treatment of appellant's defective cost or pricing data.

The AF contends that appellant's failure to correct the double deletion problem after being advised of the matter by the DCAA during discussions made this error a deliberate or intentional understatement. The AF adduces no persuasive evidence in support of this argument. It is just as plausible that Pratt's failure to correct this problem – even if it was generally aware of it pre-award – was due to mistake, inadvertence or neglect. The AF also contends that it was deceived by the BAFO into believing that the matter had been corrected. However, the BAFO does not reasonably support such a belief. The BAFO does not represent that this double-deletion had been addressed and resolved.

Even if we accept for purposes of argument that the double-deletion was intentional, this still would not sustain the AF position. Under the law as it existed at the time of this contract, intentional understatements of cost could still be used to offset contract price overstatements. *United States v. Rogerson Aircraft Controls*, 785 F.2d 296 (Fed. Cir. 1986). See also DCAA Contract Audit Manual, 14-118 Treatment of Offsets, which provided in pertinent part as follows (AR4, tab 403):

> 14-118 Treatment of offsets
>
> . . . .
>
> (1) For contracts entered into before 15 February 1987, offsets are usually appropriate against defective cost or pricing data and should be considered during the normal course of audit. This includes inadvertent understatements in the contractor's cost or pricing data and *intentional*

> underproposed/negotiated prices where full disclosure of the cost or pricing data relating to the underproposed price has been made. An example of this offset is mathematical errors in the cost or pricing data. . . .

The AF cites *United Technologies Corporation/Pratt & Whitney*, ASBCA No. 43645, 98-1 BCA ¶ 29,577, *aff'd in part, reversed in part*, 215 F.3d 1343 (Fed. Cir. 1999) (table), for the proposition that an intentional offset could be disallowed under the law as it existed in 1984. Assuming, for argument's sake, that the understatement here was intentional, the facts of *UTC* are clearly distinguishable, the offset being disallowed there because it stemmed from an intentional withholding of cost or pricing data. Here, the DCAA's knowledge of the matter pre-award makes clear that appellant made all material disclosures to the Government regarding the erroneous double-deletion.

For reasons stated, we conclude that under the Schedule H claim Pratt is entitled to the offset in question for the defective data that erroneously deleted a part twice from the engine and that resulted in a significant understatement in the contract price. The contract price understatement due to the double deletion, in the amount of $55,532,649, when netted against the contract price overstatement of $18,987,953 as revised at trial, makes for an offset of $36,544,696 (finding 68).

CONCLUSION

The record does not provide any credible evidence disputing the calculations of any of the contract price reductions and offsets to which we have found the parties entitled. Absent such evidence, we conclude that these price reductions and offsets are as calculated by DCAA and as adopted by the contracting officer.

In summary, we reach the following conclusion with respect to the AF's entitlement on its defective pricing claim (the figures in parentheses are offsets):

AF Defective Pricing Claim	Price Reduction (as revised at trial)	
Schedule A	0	(finding 55)
Schedule B	124,114,495	(findings 57, 58)
Schedule C	(117,171,121)	(finding 59)
Schedule D	26,914,167	(finding 61)
Schedule E	0	(finding 63)
Schedule F	2,452,968	(finding 64)
Schedule G	0	(finding 67)
Schedule H	(36,544,696)	(finding 68)

Based upon the foregoing, the offsets to which appellant is entitled ($153,715,817) exceed the contract price reductions to which the AF is entitled ($153,481,630). The AF

has not proven that it is entitled to an affirmative recovery due to appellant's defective cost or pricing data. In view of the foregoing, we need not address appellant's other contentions that seek to reduce or eliminate the AF claim.

The appeals are sustained.

Dated: 27 February 2004

JACK DELMAN
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 Nos. 51410, 53089, 53349, Appeals of United Technologies Corporation, rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals