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
ON MOTIONS FOR RECONSIDERATION

United Technologies Corporation, Pratt & Whitney (Pratt or appellant) and the Air Force (AF) have requested that we reconsider our decision in *United Technologies Corporation*, ASBCA Nos. 51410, 53089, 53349, 04-1 BCA ¶ 32,556. We sustained the appeals, and concluded that the AF had not proven entitlement to an affirmative recovery on its claims under the Truth in Negotiations Act (TINA), 10 U.S.C. § 2306(f). We found entitlement under a number of the AF claims, but also found that appellant was entitled to offsets that exceeded the government's claims. Familiarity with our decision is presumed.

Appellant's Motion for Reconsideration[1]

Appellant does not ascribe error to that aspect of the Board's decision that held that the AF was within its discretion to seek certified cost or pricing data in this competitive negotiated procurement, and that appellant furnished defective cost or pricing data. Rather, appellant takes issue with our conclusions that the government showed reliance on the defective data so as to be entitled to a contract price adjustment, absent a showing of the countervailing offsets. Specifically, appellant contends that the Board erred in its conclusions regarding (1) AF reliance on cost or pricing data to determine the reasonableness of appellant's best and final offer (BAFO) for FY 85/AFE I, and regarding (2) AF reliance on cost or pricing data to determine the reasonableness of appellant's revised offers for FYs 86-90/AFE II through VI.[2] We make additional findings, and discuss each of these issues in turn.

Appellant's motion basically focuses upon whether the record supports the Board's conclusion that appellant's defective cost or pricing data caused an overstated contract price. In our decision, we concluded that the government met its burden of proof. In support of our conclusion, we cited to cost data reviews by the life cycle cost panel, the content of the Record of Acquisition Action (RAA) and attachments, and a memorandum from the directorate of contracting ("the Mannix memo"). *United Technologies, supra*, 04-1 BCA at 161,026.

According to appellant, the Board's reliance on this evidence was misplaced given other findings we made in our decision and other undisputed evidence of record. According to appellant, the evidence cited by the Board primarily talks to the government review of cost data related to appellant's initial price proposal dated 17 August 1983 (finding 8). However, the AF never accepted this proposal, and the AF defective pricing claims were not based upon it. Rather, the AF accepted appellant's proposal dated 5 December 1983—the BAFO—and the AF defective pricing claims are based upon this proposal. Appellant furnished cost or pricing data for this new proposal (finding 16) and it was this data that the Board found to be defective (finding 53; *see* 04-1 at 161,025). According to appellant, our inquiry as to causation should properly focus on whether the AF relied on the defective BAFO cost or pricing data to award the contract and to determine that the offered prices were fair and reasonable.

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[1] Appellant requested that the Chairman of the ASBCA convene a senior deciding group to review its motion and also requested oral argument. The Chairman has denied the request for a senior deciding group. The request for oral argument is also denied.

[2] This procurement was also known as the Alternate Fighter Engine (AFE) procurement. The base year of the contract, FY 85, was known as AFE I and the succeeding years, FYs 1986-90, were known as AFE II through VI respectively.

We agree with appellant. The AF accepted appellant's BAFO for purposes of the FY 85 source selection and award (finding 23)—with certain warranty modifications not pertinent here (finding 29). It was Pratt's failure to make full disclosure of its BAFO cost or pricing data—the BAFO pricing sheets—that underlies the AF's defective pricing claims. The burden is on the AF, as claimant, to show whether appellant's failure to disclose its BAFO cost or pricing data caused an increase in the contract price under TINA.

We reaffirm that the government's *prima facie* case is aided by a rebuttable presumption that the natural and probable consequence of defective cost or pricing data is to cause an overstated price. *United Technologies*, *supra*, 04-1 BCA at 161,025. However, appellant provided evidence—and we so found at findings 17 and 18—that neither the Defense Contract Audit Agency (DCAA), the AF price analyst, the contracting officer (CO) nor the cost panel reviewed the BAFO cost or pricing data prior to award. *Id*. at 161,011- 012. We believe this evidence rebutted the presumption of causation. As the claimant, the AF retained the burden of proof to show that the defective cost or pricing data caused an increase in the contract price. Upon reconsideration of the evidence, we believe that the AF failed to meet this burden.

The language in the RAA and attachments which purport to show reliance on BAFO cost or pricing data was seriously undercut by the concession of the RAA author—the AF price analyst Mr. Wyatt (DCMA tr. 481)—that he did not recall reviewing any of appellant's BAFO cost or pricing data (DCMA tr. 529). Nor did the AF provide any evidence showing that the BAFO data was reviewed by Mr. Wyatt, the CO or by any other government person prior to award.

Moreover, the AF's "Office Instruction" governing this acquisition—OI 70-3, Source Selection Procedure and Documentation—required that the RAA address the following (R4, tab 280):

> e. Record of Acquisition Action (RAA)
>
> . . . .
>
> (2) . . . Discuss the cost/price information relied upon by the analyst and the cost to the Government panel.

The RAA did not discuss any specific BAFO cost or pricing data relied upon by the AF price analyst and the cost panel. The Mannix memo (finding 22) also did not discuss any specific BAFO cost or pricing data relied upon by the AF. Nor did it indicate that Ms. Mannix, the head of the CDG, reviewed the BAFO cost or pricing data. We

are hard pressed to understand how the AF could have relied on BAFO cost or pricing data—defective or otherwise—that no one reviewed.

We are mindful that the AF price analyst (tr. 4352) and the CO (tr. 3843) testified on direct examination that they relied on the fact that the BAFO data furnished by appellant were current, accurate, and complete. We find that this testimony—given roughly 17 years after the fact—was lacking in specificity and was unpersuasive.

Upon reconsideration, we conclude that the AF failed to show that it relied upon Pratt's BAFO cost or pricing data, and that it failed to show that appellant's defective BAFO cost or pricing data caused an increase in contract price for the base year of the contract. For this reason, the AF may not recover on its defective pricing claims for FY 85.

With respect to the awards made, and the options exercised by the AF in the outyears—FY 86 through FY 90—neither party disputes that the AF did not exercise these options at the same terms and conditions offered by appellant in the BAFO for these options. Rather as we found in our decision, the AF sought different and more advantageous offers each year from appellant and GE—described by the AF as the annual call for improvement process—prior to the exercise of each option. Appellant offered improvements in terms and conditions from its BAFO each year—in some years offering more generous improvements than others—with the hope of obtaining a larger share of the work each year. The AF evaluated the improvements offered by both competitors, and those improvements the AF decided to accept were considered by the source selection authority to determine the new allocation decisions each year. (Findings 34, 37; *see also* findings 40, 43, 46—"Both contractors improved the terms and conditions" of their offers.)

For each of the outyears, the CO documented the basis upon which he believed the revised offer from appellant was fair and reasonable. This determination was made after the AF had evaluated appellant's revised offer in response to the annual call for improvement. The CO prepared a memorandum for the record each year to document the decision to exercise and to fund each option. Insofar as pertinent, each memorandum stated as follows (AR4, tabs 197, 208, 222, 243, 258):

> By a market test between the competitors . . . the prices set forth . . . are considered the most fair and reasonable prices available to the Government.

We believe this evidence, properly considered, shows that for the outyears the AF relied upon this "market test between the competitors" arising out of the calls for improvement to determine the reasonableness of appellant's revised offers, not the

defective BAFO cost or pricing data filed by appellant in December, 1983. A letter from the CO to DCAA dated 10 April 1989 also supports this conclusion (AR4, tab 150 at 020895, ¶ 2):

> [T]his contract is very unique in that it is basically a perpetual competition using a split award technique decided by the SECAF annually. In this process, *the Contractor's originally submitted certified Cost or Pricing Data has been subjected to an annual Call for Improvements letter requesting improvements in prices as well as terms and conditions*. Over the years, dramatic improvements have been experienced in almost all areas. [Emphasis added]

This evidence served to rebut the presumption that appellant's defective BAFO cost or pricing data were relied upon by the AF and, as such, caused an increase in the contract price in the outyears. As we stated earlier, the AF has the burden to prove causation. Based upon our reconsideration of all the evidence of record, we believe that the AF failed to carry its burden. The CO in the outyears, Mr. Rhodeback, did not review the December 1983 BAFO cost or pricing data at any time. He relied on the predecessor CO and the RAA for this purpose (DCMA tr. 1047-8). However for reasons stated herein, these latter sources also did not show any review or reliance on the BAFO data, and hence Mr. Rhodeback's reliance upon them was without legal significance.

Mr. Rhodeback's statements of reliance on BAFO cost or pricing data at trial were unsupported by any contemporaneous project records. Those records of the CO that were adduced—and that we discussed above—show that competitive forces, rather than the defective 1983 BAFO cost or pricing data were relied upon to make the awards and to exercise the options for additional purchases for FYs 86-90. In the face of such credible, contemporaneous evidence, we believe that Mr. Rhodeback's unsupported trial statements to the contrary were unpersuasive.

Upon reconsideration, we conclude that the AF failed to show that it relied on Pratt's December 1983 BAFO cost or pricing data for purposes of the outyear awards, and failed to show that appellant's defective data caused an increase in the contract price for these years.

CONCLUSION

Upon reconsideration, we affirm that the AF has failed to prove its entitlement to recover on its TINA claims for FYs 85-90, for reasons stated herein. Appellant's motion for reconsideration is granted, and we modify our findings and conclusions to the extent

indicated herein, and consistent with this decision. The AF motion for reconsideration, which sought additional recovery under TINA, is denied as moot.[3]

As modified herein, the appeals remain sustained.

Dated: 19 January 2005

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

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:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals

[3] Since the AF motion is moot, we need not address any of the arguments and issues raised in the motion.