

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Lockheed Martin Aeronautics Company) ASBCA No. 56547
)
Under Contract No. F33657-98-C-0035)

APPEARANCES FOR THE APPELLANT: W. Jay DeVecchio, Esq.
Kathy C. Weinberg, Esq.
Shaun M. Van Horn, Esq.
James C. Cox, Esq.
Jenner & Block LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Alan R. Caramella, Esq.
Acting Air Force Chief Trial Attorney
Jeffrey P. Hildebrant, Esq.
Alexis Bernstein, Esq.
Jeffrey M. Lowry, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PEACOCK

This appeal involves a government defective pricing claim under the Truth in Negotiation Act (TINA).¹ We conclude that any nondisclosure of the subcontractor data in question did not cause an overstatement of the contract price. We sustain the appeal.

FINDINGS OF FACT

A. The CCIP Contracts and Raytheon Subcontracts

1. The Common Configuration Implementation Program ("CCIP") involved changes to the hardware and software used in the F-16 aircraft. Lockheed Martin Aeronautics Company ("LM Aero" or appellant) provided retrofit kits used by the Air Force (AF or government) to install the new hardware and software. One of the hardware items appellant supplied through the CCIP contracts was the Modular Mission Computer ("MMC"), the computer system used to run the F-16's cockpit interface. The MMC was supplied to LM Aero by Raytheon Systems Company (Raytheon). Prior to 1999, most production F-16s used an early version of the MMC, the MMC 3000. The

¹ Pub. L. No. 87-653, 76 Stat. at 528 (codified as amended) at 10 U.S.C. § 2306a and 41 U.S.C. §§ 3501-3509.

two CCIP contracts relevant to this case, however, involved a “new and upcoming” version of the MMC, the MMC 5000. (Tr. 4/131-32; R4, tab 305 at 4)

2. The first relevant CCIP contract was an Engineering and Manufacturing Development contract (the “CCIP EMD contract”) for the development of the MMC 5000 and other elements used in the CCIP retrofit kits. The modules produced under the CCIP EMD contract were not production units and were not required to meet the same specifications as production units. (Tr. 1/191, 3/63-64, 4/72-73) This dispute concerns solely alleged defective pricing related to the negotiation of the subsequent production contract (R4, tabs 43, 47).

3. Raytheon began supplying MMC 3000 systems in the mid-1990s for use by appellant under a variety of prime contracts, including foreign military sales contracts. In 1999, around the same time that the MMC 3000 was going out of production, the purchase order under which Raytheon had been supplying the MMC 3000’s system, called 4XT PO, was expiring. (Tr. 3/14)

4. On 25 June 1998, appellant issued what the parties refer to as the Bridge Purchase Order (or Bridge PO) to Raytheon to satisfy its short-term needs for MMC system components that could not be met under the expiring 4XT PO. The Bridge PO was intended to result in a stop-gap fixed-quantity subcontract to fulfill appellant’s needs for the final MMC 3000 components and a few EMD components for the next-generation MMC 5000 systems. The MMC 5000 replaced three older processing components accounting for five modules in the MMC 3000 with faster processing components that accounted for six modules in the MMC 5000. However, the Bridge PO was not intended to cover components for production of MMC 5000 systems that were to be supplied under the subsequent CCIP contract solicitation. The MMC 5000 systems for the CCIP production contract were intended to be procured later by LM Aero from Raytheon under what the parties refer to as the Material Requirements Contract (MRC or MRC subcontract). (R4, tabs 1, 76, 77; tr. 1/198) The Bridge PO and resultant Bridge subcontract with Raytheon are both sometimes referred to herein interchangeably as Bridge.

5. On 9 July 1998, LM Aero issued a solicitation to Raytheon for the MRC subcontract to procure the MMC 5000 units to be used in performance of the CCIP prime contracts with the AF. The solicitation requested that Raytheon propose a set of prices contingent on the Average Monthly Delivery Rate (AMDR), with the actual price to be determined later once appellant’s quantity requirements were set. Raytheon was required to “submit pricing breaks/ranges associated with your product” that are “sensitive to increased rates of production, i.e., savings associated with increased Lot sizes.” (R4, tab 1 at 1, 17-18) The proposed unit prices, based upon the AMDR, could vary each delivery period (*id.* at 17-18). AMDR is calculated based on a LM Aero methodology set forth in full in the MRC solicitation to Raytheon but generally applicable to all of

appellant's solicitations including the Bridge PO (tr. 1/46, 2/53; R4, tab 1 at 16, 29). All requirements, (and manufacturing effort) including full systems and components, are totaled to determine the number of equivalent "shipsets" for a six month period with the total number generally divided by six, the number of months in the period. However, this method is modified for any delivery period of less than six months as was the case with the four month Bridge PO delivery period (as detailed below). Where the delivery period is less than six months, the equivalent shipsets are divided by the actual months in the delivery period. (R4, tab 1 at 29; tr. 1/44, 2/46-47, 53-54, 3/45, 47)

6. Despite its name, the Bridge PO was not a "bridge" either to the CCIP production contract with the AF or to the follow-on MRC between LM Aero and Raytheon. The Bridge PO was planned to meet appellant's other MMC needs. The Bridge PO supplied mostly MMC 3000 components, but also included some developmental MMC 5000 components approximating eight equivalent shipsets worth of MMC 5000 components, noting that the latter were still in the development phase. The MMC 5000 components under the Bridge PO were intended to supply the CCIP EMD contract (not the CCIP production contract) and a related contract called the USAF 98 contract. (Tr. 1/90, 169-70, 3/14; R4, tabs 76, 83, 185)

7. The Bridge PO thus involved the purchase of components equivalent to a "handful" of MMC 5000 systems. The MRC estimated an MMC 5000 purchase quantity "in the 620 [systems] range." (Tr. 3/39-40) As discussed in detail below, Bridge envisioned a four-month delivery period as awarded by appellant, while the MRC covered a five-year delivery period. The Bridge MMC 3000 systems had been in steady production for years and were essentially "off the shelf." (Tr. 3/40; R4, tab 16 at 5) Related to the period-of-performance difference, the Bridge PO priced MMC components in Real Then Year ("RTY") dollars, while the MRC priced MMC systems in constant year economics accounting for inflation/escalation factors. Escalation was a significant MRC risk factor considered in negotiations between LM Aero and Raytheon. (Tr. 3/51-54; R4, tab 15 at 15, tab 26 at 2) The labor rate calculation for the MRC contained a "quantity adjustment factor" that took into account the "set up time associated with...lower quantities.... [T]he lower quantities that are built, the more [fixed cost] set up hours that have to [be] amortized into those quantities." The Bridge PO did not contain this quantity adjustment factor. (Tr. 3/127-28) The Bridge subcontract did not contain variable pricing based on specific AMDR ranges because, unlike the MRC, the Bridge subcontract required delivery of a fixed quantity of MMC components (tr. 3/40).

8. Raytheon responded to the Bridge PO on 29 July 1998, quoting a proposed price of \$13,397,268 for delivery in accordance with its "[m]ost [e]conomical [d]elivery [s]chedule" with an additional cost of \$2,018,891 if LM Aero opted for a delayed delivery schedule (R4, tab 77).

9. The AF issued its Request for Proposal (RFP) for the CCIP production contract to LM Aero on 1 September 1998. The RFP requested firm-fixed prices for the base period and Option 1 (FY 2000) MMC 5000 systems, spare components and services and Not-To-Exceed (“NTE”) prices for Option Years 2001, 2002, and 2003. (R4, tab 42 at 22-23, tab 301)

10. Raytheon submitted its proposal in response to LM Aero’s MRC solicitation on 15 October 1998. Raytheon proposed the following unit prices for MMC 5000 systems in each of the AMDR ranges indicated (R4, tab 2 at 6):

	UNIT PRICE per MMC 5000 SHIPSET (DOD/FMS)					
AMDR	YR 00	YR 01	YR 02	YR 03	YR 04	YR 05
16-20	\$327,066	\$291,649	\$286,572	\$285,977	\$285,407	\$284,859
10-15	\$369,333	\$316,853	\$309,306	\$305,388	\$303,684	\$302,122
4-9	\$515,446	\$386,001	\$360,104	\$349,948	\$343,651	\$340,952
1-3	\$1,088,537	\$632,812	\$583,912	\$548,899	\$521,667	\$521,667

As evident from the table above, the proposed unit price in every AMDR range was less for each successive time period (except AMDR 1-3, which has the same unit price in the last two years). The proposal identified the number of each component used on an MMC 5000 system. (R4, tab 2 at 7)

11. On 5 February 1999, Raytheon submitted a revised MRC quote to LM Aero (R4, tab 26 at 2). And on 17 February 1999, Raytheon updated its Bridge PO proposal again basing its lowest price on early delivery and its “most economical manufacturing plan” as opposed to delayed or extended delivery (R4, tab 79).

12. On 11 and 15 March 1999, LM Aero prepared a Supplier Price Analysis (SPA) that resulted in a total estimated MRC MMC 5000 price for each system of \$464,362. There is no evidence or contention that Defense Contract Audit Agency (DCAA) or the AF relied on this SPA MMC 5000 system price. The SPA also set forth certain estimated decrement factors, including a 3.2% decrement applied by LM Aero to the MMC 5000 price based on a specific previous negotiation with Raytheon. Other higher subcontractor decrements were disclosed by appellant but also were not relied on by DCAA or the AF. (R4, tabs 14, 15 at 12, 16-23)

13. Raytheon submitted an updated MRC proposal to LM Aero on 1 April 1999. The proposed MRC prices were highly sensitive to delivery rate, dropping significantly as the delivery rate increased. For an AMDR of 4-9, the proposed price was \$538,784 for the first delivery period and \$397,177 for the second delivery period; for an AMDR of 10-15, the proposed price was \$380,220 for the first delivery period and \$322,785 for the second delivery period. In full, the proposed MRC prices were:

	UNIT PRICE per MMC 5000 SHIPSET (DOD/FMS)					
AMDR	Jan 01-Jun 01	Jul 01-Jun 02	Jul 02-Jun 03	Jul 03-Jun 04	Jul 04-Jun 05	Jul 05-Jun 06
16-20	\$334,163	\$295,324	\$289,483	\$288,817	\$288,177	\$287,562
10-15	\$380,220	\$322,785	\$314,110	\$309,718	\$307,808	\$306,058
4-9	\$538,784	\$397,177	\$367,919	\$356,553	\$349,507	\$346,487
1-3	\$1,168,021	\$678,230	\$618,169	\$579,195	\$548,882	\$548,882

(R4, tab 16 at 5) Again, the proposed unit price in every AMDR range was less for each successive time period (except AMDR 1-3, which has the same unit price in the last two years). Under AMDR 4-9, Raytheon proposed a unit price in the second year that was 26.3% lower than the first six-month period ($\$397,177/\$538,784=73.7\%$, or a reduction of 26.3%).

14. On 5 May 1999, LM Aero submitted a Material Update (MU) to the AF with respect to its CCIP proposal (R4, tab 17). The MU included the 3.2% decrement developed in its 15 March 1999 SPA and applied this decrement to the prices set forth in Raytheon's 1 April 1999 proposal in the 4-9 AMDR range (*id.* at 12, 45).

15. On 12 May 1999, Raytheon submitted its proposal in response to the Bridge PO to appellant (R4, tab 185). Section 1.4, "PROGRAM SCHEDULE," stated "[t]he period of performance is June 1999 through December 2002. The most economical manufacturing plan is based upon completion in December 2000. It should be noted that this proposal assumes first hardware delivery in September 2000." (*Id.* at 7) Section 2.4 of the Raytheon proposal, "LINE ITEM PRICE AND COMPLETION SCHEDULE," set forth CLINs 0001 through 0005 in pertinent part as follows:

2.4 LINE ITEM PRICE LIST AND COMPLETION SCHEDULE

ITEM	DESCRIPTION	EXTD \$	COMPLETION DATE
0001	EARLY DELIVERY	\$ 16,014,293	Dec-00
0002	PHYSICAL CONFIGURATION AUDIT	\$ 18,614	Sep-00
0003	EXTENDED DELIVERY	\$ 1,102,267	Dec-02
0004	REFURB PHASE	\$ 141,121	Sep-99
0005	DEVELOP ALTERNATE SUPPLIER	\$ 1,213,969	Sep-00
TOTAL TOTAL F-16 MMC BRIDGE PROPOSAL		\$ 18,490,264	

(*Id.* at 21)

16. Section 2.4 of the Raytheon Bridge proposal indicated the price per “equivalent shipset” was \$345,082 (R4, tab 185 at 21) and provided a table allocating component parts for the MMC shipsets as follows (*id.*):

RSC Part Number	Description	Bridge Quantity	Allocation Percentage	Equivalent Shipsets	Unit Price	Extended Price
---	Chassis Assy	50	11.88%	5.9	\$ 40,996	\$ 2,049,789
---	Tray Assy	57	1.19%	0.7	\$ 4,106	\$ 234,069
---	MMCPS Module	96	7.83%	7.5	\$ 27,020	\$ 2,593,915
---	HLVPS Module	50	2.78%	1.4	\$ 9,593	\$ 479,664
---	PCA Module	98	3.49%	3.4	\$ 12,043	\$ 1,180,251
---	DC-DC Converter	52	1.48%	0.8	\$ 5,107	\$ 265,575
---	AIO 1 Module	64	6.89%	4.4	\$ 23,776	\$ 1,521,675
---	AIO 2 Module	33	6.96%	2.3	\$ 24,018	\$ 792,585
---	AIO 3 Module	32	6.90%	2.2	\$ 23,811	\$ 761,942
---	MB32 Module	81	6.33%	5.1	\$ 21,844	\$ 1,769,341
---	WM32 Module	86	5.95%	5.1	\$ 20,532	\$ 1,765,786
---	ADS Module	41	7.81%	3.2	\$ 26,951	\$ 1,104,988
---	WM64 Module	16	7.47%	1.2	\$ 25,770	\$ 412,313
---	AD64 Module	8	9.01%	0.7	\$ 31,095	\$ 248,761
---	MB64 Module	30	8.05%	2.4	\$ 27,788	\$ 833,637
Totals				46.4		\$16,014,293

17. Raytheon’s Bridge proposal section 2.5 also provided cost element breakdowns associated with the CLIN 0001 “EARLY DELIVERY” to be completed in 2000 (R4, tab 185 at 23) along with the additional costs associated with “EXTENDED DELIVERY” in 2001 and 2002 (*id.* at 25).

18. Pertinent portions of Raytheon’s “COST CONTENT SUMMARY” described the costs associated with “Extended/Delayed Delivery” as resulting from “holding the [MMC shipsets] inventory at [Raytheon], and extending the deliveries over the period of time required to meet [appellant’s] schedule. This time period begins in January 2001 and expires in December 2002, thus extending for 24 months.” (R4, tab 185 at 151) A detailed description of those delay-related costs of holding the MMC units in inventory pending delivery in the extended period followed (*id.* at 152-57).

19. On 7 June 1999, the AF decided to price only the first delivery period and Option 1 (FY 2000) quantities of the CCIP contract. The contract line items corresponding to the three additional option years remained in the CCIP contract, but included not-to-exceed prices only rather than fixed prices. (R4, tab 43 at 1, 21-24, 26)

20. On 16 July 1999, Raytheon revised its offer to LM Aero on the Bridge PO as follows:

Recurring	\$15,135,743
<u>Non-recurring</u>	
Physical Configuration Audit (PCA)	8,422
Test Equipment	141,121
Backplane Development (Encl. C)	198,701
Alt. Source	<u>192,993</u>
Total Non-Recurring	541,237
Total	\$ 15,676,980

(R4, tab 70 at 8-9)

21. Raytheon's above reduction from its 12 May 1999 proposal was based primarily on Raytheon's decision not to replace Danish Aerotech as a source for the power supply in the Bridge subcontract and Raytheon's consequent elimination of the non-recurring cost of establishment of an alternative source (R4, tab 70 at 6; tr. 3/17-18). The above quote did not contain the extended delivery option because appellant had earlier rejected it (tr. 2/25; R4, tab 47 at 33).

22. LM Aero made a Bridge PO counter-offer to Raytheon on 23 July 1999 of \$15,450,000 (R4, tab 70 at 3). LM Aero and Raytheon reached agreement on a total, bottom-line price for the Bridge PO on that date, one week prior to the date of the LM Aero and AF price agreement on the CCIP contract. The total agreed Bridge PO amount was \$15,450,015 in "real then year economics." However Raytheon and LM Aero did not break out and allocate the Bridge PO total and reach price agreement on the individual MMC components. The component and "shipset" prices for the complete MMC 3000 and 5000 systems were not definitized by Raytheon and appellant until 6 August 1999. (R4, tab 47 at 46, tab 87; tr. 2/37, 60, 3/31) There were various potential ways of allocating the total Bridge price to MMC components prior to their agreement on 6 August 1999 (tr. 2/23, 59-61; R4, tabs 70 at 10, 409 at 4).

23. Raytheon's 12 May 1999 proposal (finding 15) was used as the base for Bridge negotiations between it and appellant. Between the submission of that proposal for the Bridge PO on 12 May 1999 and the final, bottom-line, price agreement on 23 July 1999, LM Aero negotiated a total subcontract decrement amounting to a percentage reduction of approximately 4%. (Tr. 3/19, 33-34, 38, 149, 4/123; R4, tab 47 at 32, 38, tab 70 at 3) Although the 12 May proposal from Raytheon totaled \$18,490,264 and the final Bridge price was \$15,450,015 (or a 16.4% reduction), \$1,373,704 of the reduction involved non-recurring costs of which \$1,213,969 represented a Raytheon charge for developing an alternate supplier that was *withdrawn* by Raytheon. An additional \$1,102,367 of the reduction related to an extended delivery option that was *not exercised*

by LM Aero. Neither of the latter two major reductions were negotiated nor do they pertain to the recurring costs of the MMC units. (Tr. 3/37-38; R4, tab 58 at 2, tab 136 at 12) If the non-recurring costs are eliminated, the resulting decrement is approximately the same, 4.2% (R4, tab 50 at 2, tab 58 at 2; tr. 3/31, 37-38).

24. LM Aero and the Air Force reached final agreement on the CCIP production contract price on 30 July 1999, following a one-week period of negotiations. The government decided, *inter alia*, to negotiate and price only the FY 1999 quantities and FY 2000 first option year quantities in the 4-9 AMDR range, along with two additional retrofit kits for FY 1999. (See finding 19; R4, tab 43 at 1, 3-4) LM Aero submitted a signed Certificate of Current Cost or Pricing Data on the same day (R4, tab 43 at 25, tab 47 at 24). The total negotiated firm fixed-price for FY 1999 and FY 2000 was \$108,039,864. The negotiated price included a profit rate of 13.49%. (R4, tab 43 at 1) According to the AF's Price Negotiation Memorandum (PNM), of the \$108,039,864 negotiated price, \$46,744,564 or 43% consisted of proposed costs associated with procuring MMC 5000 computer systems from Raytheon (R4, tab 43 at 8). Because appellant had not completed negotiations with Raytheon regarding the MRC which was to be used to supply the MMC systems for the CCIP contract, this element of the negotiated price was based on Raytheon's proposals (in particular, the 1 April 1999 proposal) and the cost data Raytheon had submitted to support those proposals (R4, tab 43 at 9). The AF negotiators accepted the use of escalation factors for the Raytheon MMC subcontract costs for the second period (or option year), as well as a general subcontractor decrement based on LM Aero's historical negotiation of decreases in subcontractor-proposed amounts (*id.*).

25. On 4 August 1999, LM Aero proposed to Raytheon an allocation of the total negotiated recurring price to the components purchased pursuant to the Bridge PO. The percentage allocations were based on Raytheon's previously proposed distributions. Raytheon agreed to the proposed allocation on 6 August 1999. (R4, tab 70 at 10-12; tr. 2/36, 59)

26. Beginning in September 1999 and after final price agreement on both the Bridge subcontract and CCIP contracts, Raytheon disclosed that it was considering ways of reducing MRC costs and prices in part as a consequence of potential "overlap" and "concurrencies" in the Bridge and MRC work. There is no data or other evidence indicating that appellant knew of such possible reductions prior to September 1999. (R4, tab 176 at 2, 4, tab 177 at 1-2, tab 261 at 2, tab 285 at 1; tr. 1/44, 88-93)

27. LM Aero and Raytheon reached agreement on the MRC on 28 January 2000, approximately six months after conclusion of the CCIP contract negotiations (R4, tab 44 at 18).

28. As noted previously, Raytheon and appellant contemplated on 30 July 1999 that Bridge deliveries would be made over the four-month period "commencing in September of

2000 and concluding in December of 2000” (R4, tab 44 at 165, tab 83 at 3; tr. 2/57-58, 69; *see also* findings 15, 17, 18). After execution of both the Bridge subcontract and CCIP contract, the Bridge delivery schedule slipped as a result of delays by Raytheon. Because the delays did not adversely impact it, LM Aero did not oppose extension of that schedule to accommodate Raytheon. Because the Bridge MMC 5000 components were in EMD “design mode” and subject to different specifications and not subject, *inter alia*, to the same strict liability requirements (tr. 3/14, 24-25; R4, tabs 180, 267), appellant did not plan to use any Bridge subcontract component to fulfill CCIP requirements when both the Bridge subcontract and CCIP contract were executed (tr. 3/11-12). Approximately nine months after their execution and as a result of the Raytheon delays in MRC deliveries, it was determined that a few Bridge components could be used “for CCIP operational test and evaluation” but not in production units because of the differences in specification and reliability requirements (R4, tab 55 at 4; tr. 2/226-27). This use was not planned when either the Bridge or CCIP contracts were executed. The earliest suggestion that some Bridge subcontract components might be used for the CCIP contract was approximately nine months after execution of those contracts. The slippages had no impact on the pricing of the fixed-price Bridge subcontract and the causes of the Raytheon delays were not known prior to commencement of performance of that subcontract. (Tr. 2/58-59, 67-69, 3/11-12; R4, tab 47 at 49, tab 55 at 4)

B. Post-Award Audit and Final Decision

29. In September 2002, DCAA issued a post-award audit report that alleged that LM Aero defectively priced the CCIP contract by failing to disclose “significantly lower prices” for MMC computer components under the Bridge subcontract and that these prices were available to LM Aero on 23 July 1999 before the 30 July 1999 final agreement on price for the CCIP contract. The CCIP post-award audit recommended a contract price adjustment of \$14,582,978 (including markups). This amount was calculated mainly by comparing the price of an MMC 5000 in the CCIP contract of 1 September 1999 (alleged to be \$545,008 in FY 1999 and \$404,905 in FY 2000) to a Bridge PO MMC shipset computed by the auditor to be \$307,358 for FY 1999 and \$323,770 for FY 2000. In addition, the audit amount claimed reflects differences between MMC component prices in the Bridge PO and the MRC. (R4, tabs 43, 47 at 2, 8, 9)

30. The audit derived the FY 1999 price by dividing the alleged total recurring price of the Bridge PO (\$14,264,481)² by the total number of equivalent units or “equivalent shipsets” of MMC 5000 *and* 3000 systems purchased under Bridge (46.41) for comparison with the MMC systems purchased under the CCIP contract. The audit then *increased* the resulting \$307,358 MMC Bridge price for FY 1999 by an *escalation* rate of approximately 5.3% to obtain the FY 2000 Bridge price. The audit did not attribute a delivery rate to the alleged Bridge PO “average MMC price.” (R4, tab 47 at 9)

² The derivation of the audit determined recurring cost amount is unclear and inconsistent with other evidence. This inconsistency is further addressed in Finding 32 below.

31. Because the Bridge subcontract involved the purchase of components of primarily the MMC 3000 systems, DCAA used an "equivalent shipset" concept as a basis for comparing the manufacturing effort required by the Bridge subcontract and CCIP contracts. In this regard, the audit made no distinction between the older MMC 3000 and the new MMC 5000 systems. The CCIP contract involved solely the purchase of complete MMC 5000 systems and not components. DCAA derived the 46.41 "equivalent shipset" number from a section of Raytheon's Bridge 12 May 1999 proposal, in which Raytheon used it as part of an effort to estimate its base shop labor. (R4, tab 47 at 9, tab 70 at 14-16) Appellant has accepted the 46.41 "equivalent shipsets" determined by the audit report. Throughout this decision, the term "shipset" has been used in referencing deliverables under the Bridge and MRC subcontracts and CCIP contract.

32. The \$14,264,481 total recurring Bridge price of the 46.41 shipsets used in the audit computation (*see* R4, tab 47 at 43) was not the most current breakdown of the recurring costs of the units, which Raytheon broke out and identified in its 16 July 1999 offer to be \$15,135,743 (*see* finding 20). The more persuasive evidence in the record establishes that \$15,135,743 represents the most accurate figure for the recurring costs (*id.*; *see also* R4, tab 47 at 46, tab 55 at 11). Using the auditor's methodology, and correcting solely for this recurring cost error, results in increased Bridge shipset prices, for comparison with CCIP prices, to approximately \$326,131 and \$343,416 for FY 1999 and FY 2000 quantities respectively.

33. Prices for deliveries of MMC shipsets at different delivery rates are not easily compared (tr. 2/76, 213, 216-17, 3/127-29). In comparing the delivery rates between the Bridge PO and MRC, the auditor concluded that the delivery schedule for the 46.41 Bridge PO shipsets had to be "assumed" because no express delivery schedule as such was present in the Bridge PO in his opinion. Therefore, the auditor considered that the shipsets could be delivered over the entire performance period of the contract from June 1999 to September 2002. Thus, he concluded that for purposes of comparison with the MRC, the price comparison properly could be made using MRC AMDR 4-9 prices. (Tr. 1/41, 43-46, 125-26) DCAA's post-award auditor agreed that use of the 6 August 1999 unit prices in the Bridge subcontract was the "only method" available to perform a reasonable price comparison (tr. 1/139-40).

34. In making the comparison used to determine the recommended price adjustment, the CCIP post-award audit used the MRC prices of \$545,008 for FY 1999 and \$404,905 for FY 2000 for the MMC 5000 systems. These roughly approximated the MRC prices Raytheon had proposed on 1 April 1999 for the 4-9 AMDR range. (R4, tab 16 at 5, tab 47 at 8; finding 13)

35. For purposes of comparison with MRC, the Bridge PO's "most economical manufacturing plan" and "Program Schedule" contemplated a four-month period delivery

period from September to December 2000. Thus, an average monthly delivery rate of 11.6 MMC 3000 and 5000 shipsets (46.4 equivalent units divided by 4 months) was contemplated by the Bridge subcontract, or shipset deliveries in the 10-15 AMDR range for comparative purposes. (Tr. 1/125-26, 130, 143-46, 2/46-47, 53-54, 57-58, 3/45, 47, 4/45; R4, tab 1 at 10-30, tab 44 at 165, tab 47 at 1, tab 83 at 3) Consequently, the proposed MRC prices for an AMDR of 4-9 used in the CCIP post-award Audit were not appropriate for comparison with the Bridge PO prices. (R4, tab 44 at 165, tab 47 at 1; tr. 2/46-47).

36. DCAA also concluded in a subsequent analysis, dated 27 February 2003, that LM Aero had failed to disclose that it had negotiated a 16.4% decrement in the Bridge PO (R4, tab 50). The actual decrement was approximately 4% with the difference attributable to non-recurring cost items and other changes to Raytheon's proposal unrelated to the negotiation decrement (tr. 3/33-34; *see* finding 23).

37. The audit-calculated shipset price of \$307,358 for FY 1999 quantities represents the average cost of all equivalent shipsets purchased under the Bridge PO. Because the components covered by the Bridge PO were primarily for the MMC 3000 version, with only a handful of MMC 5000 components, this audit-calculated average closely tracked the price of the older, less advanced MMC 3000 system. (R4, tab 55 at 8)

38. The parties conducted discussions and exchanged communications over the period from issuance of the post-award audit report through 2008 (R4, tabs 46-48, 50-72; tr. 2/228-34). Among other things, appellant maintained that the post-award audit had used the incorrect recurring price for the shipsets, had not segregated the price of the few MMC 5000 shipsets from the MMC 3000 shipsets, and had erroneously compared the Bridge PO shipset prices offered by Raytheon to Raytheon's MRC shipset prices (for the CCIP contract) in the AMDR 4-9 range rather than the AMDR 10-15 range. Appellant also contended that the Bridge price did not constitute cost or pricing data, that the government was adequately apprised of the Bridge negotiations, and even if there had been defective pricing the Bridge prices were higher than comparable MRC prices and thus did not cause any overstatement of the CCIP production contract prices. (R4, tabs 52, 54, 55, 62, 70).

39. On 8 May 2008, the Contracting Officer (CO) issued a final decision finding that the CCIP production contract was defectively priced as a result of the alleged nondisclosure of the Bridge PO data, that the government had relied on the defective data in pricing the MMC 5000 systems, and consequently the price of the CCIP contract was overstated in the amount of \$14,582,978 including "loads" based on the audit recommendations and calculation (R4, tab 73).

40. The audit and final decision used the incorrect Bridge recurring price for the MMC 5000 systems. That price was based on outdated MMC 3000 components. (R4, tab 73) The government subsequently agreed with appellant's calculation of the

component prices of Bridge PO MMC 5000 shipsets totaling \$382,868 for FY 1999 (R4, tabs 73, 314; gov't opp'n at 5).

41. The final decision (and audit) computation of damages for comparative purposes used Raytheon's proposed MRC prices at the AMDR 4-9 range (R4, tab 73).

42. On 1 August 2008, LM Aero timely appealed the CO's final decision.

C. The Pre-Hearing Motions and Government Revised Recommended Price Adjustment

43. Shortly prior to the hearing of this appeal, the parties filed cross-motions for summary judgment. In a teleconference on 1 August 2011, the Board, among other things, discussed the motions and reserved its ruling thereon for the multiple reasons summarized in the Board's Memorandum of Telephone Conference and Order dated 2 August 2011.³

44. Although the Board reserved its ruling, the motions, *inter alia*, served to clarify and narrow certain issues in dispute and also set forth revised government theories regarding computing the amount of its alleged damages. In its motion papers, LM Aero aggregated the prices of all of the undisputed components for both the MMC 3000 and MMC 5000 systems. Appellant noted that the correct Bridge price for the MMC 3000 system was \$330,811 and the accurate Bridge price for all components comprising an MMC 5000 shipset system was \$382,868 for first period deliverables in contrast to the audit/CO position that had been erroneously based on an alleged composite price for both the older MMC 3000 and new MMC 5000. (App. mot. at 16-17) Although the breakout of component prices was unavailable before the date of final agreement on the CCIP price, they had been definitized approximately one week following that agreement. Prior to appellant's motion, the components and prices for each system had not been computed by either party. The government's revised theories discussed below assume that the \$382,868 (or \$382,872) per shipset price of the components for the MMC 5000 system is accurate. (See, e.g., APF ¶¶ 152, 155, 168⁴)

³ These motions are rendered moot by virtue of this decision.

⁴ Following the hearing, the Board issued a detailed Briefing Order. Among other requirements, that Order directed each party to address with specificity in their reply briefs any objections to the substance and accuracy of each factual assertion and accompanying record citations proposed in the opposing party's initial briefs. To the extent that no such objections were made, the Board indicated that it may adopt in whole or in part a party's proposed factual findings. Where the Board has adopted an unopposed factual assertion in this Opinion, the abbreviation APF or GPF are used to designate appellant's proposed finding and the government's proposed finding respectively.

45. If the original price adjustment set forth in the post-award audit and final decision were recalculated by changing only the MMC 5000 system price (\$382,868), the government's recommended price adjustment would have been \$3,603,962 rather than the initially claimed total of approximately \$14,982,578 (tr. 4/83-84).

46. The government's auditor conceded at the hearing that the price of MMC systems is very sensitive to, and significantly impacted by, the AMDR and a valid comparison of prices between the Bridge and MRC subcontracts requires that the AMDR be considered (tr. 4/40-41; *see also* tr. 2/171-172, 3/140). If the price adjustment calculations in the post-award audit and final decision were revised using the Bridge price for an MMC 5000 system shipset (\$382,868) at a 10-15 AMDR and comparing it to the proposed and lower MRC price of an MMC 5000 system shipset in the 10-15 AMDR range (\$380,220) (finding 13) the entire recommended price adjustment would be eliminated for both years (tr. 4/64-65, R4, tab 409 at 12-21).

47. As part of its cross-motion, the government developed a Revised Recommended Price Adjustment (RRPA). The RRPA replaced DCAA's adoption of LM Aero's 5.3% *escalation* rate for Bridge between FY 1999 and FY 2000 (finding 30), with a 26.3% *decrement*. (APF ¶ 156; R4, tab 314) The AF rationale for the decrement is that the price for shipsets in the AMDR 4-9 range decreased by 26.3% in Raytheon's MRC proposal (\$538,784 to \$397,177) from the first period to the second period. (Finding 13) Consequently, had the Bridge MMC 5000 price of \$382,868 been disclosed, the government would have negotiated a corresponding 26.3% reduction for second period shipsets according to the AF. (*See* gov't reply to APF ¶ 157) The RRPA asserts that the cost for the MMC 5000 systems was overstated by \$17,475,054 (with markups) because the increase in the unit price (to \$382,868) was more than offset by the 26.3% decrement (APF ¶¶ 158-60; R4, tabs 314, 315).

48. There is no evidence in the record that the Air Force's RRPA and/or proposed decrement were reviewed, analyzed, or approved by, negotiators or the CO prior to its presentation in the AF cross-motion, and its assumed decrement is based solely on the above-described price reduction between the first and second period of the MRC in AMDR 4-9 range. It is otherwise unsupported by documents or testimony in the record (APF ¶ 161). The post-award auditor (the only auditor who examined the RRPA after the motion was filed) disclaimed any theoretical justification for the calculation, admitting at trial that his calculations were for the purpose of "trying to prepare something for the trial attorney" and not based on new information or his own independent judgment. The auditor did not discuss the RRPA with his supervisors and no supplemental audit report was issued. (Tr. 1/151-52, 156, 158, 162-63; APF ¶ 161)

49. If the government's RRPA was adjusted using the Bridge price for an MMC 5000 system shipset (\$382,868) at a 10-15 AMDR and comparing it to the proposed and lower MRC price of an MMC 5000 system shipset in the 10-15 AMDR range (\$380,220),

the proposed price adjustment for first period units would also be eliminated. Adjusting also for the second period (FY 2000), the total RRPA would be reduced to \$331,302 for both years, assuming that the government's claimed 26.3% decrement remained appropriate for FY 2000. Eliminating the claimed decrement for FY 2000, would eliminate the latter total residual (\$331,302) amount and result in zero government damages. (Tr. 4/49-52, 58-59; R4, tab 409 at 12-21)

50. The most persuasive evidence in the record supports the post-award auditor's conclusion that an escalation factor was appropriate for comparing Bridge and MRC prices for FY 2000. Appellant's expert, Mr. John T. Loving and other witnesses for appellant extensively analyzed labor learning curve data and concluded that the decrease in labor hours for production of MMC 5000 systems was relatively minimal providing no support for any significant decrement of hypothetical Bridge prices in a second year. Moreover, Mr. Loving considered that any minor decrease in labor costs was far less significant than first year front loading by Raytheon of substantial overhead and extensive non-recurring costs necessitated by ramping up production for the extended five-year MRC program for the new MMC 5000 systems, a risk that Raytheon did not incur in the short-term Bridge contract that focused primarily on final production of older MMC 3000 systems. (Tr. 3/7, 117, 122-23, 129-30, 132-33, 4/53-56) Mr. Loving noted that Raytheon would logically seek to recover its front-end costs on earlier units consistent with its expenditure of non-recurring front-end costs for the extended delivery periods contemplated by the MRC and CCIP. In contrast, Bridge was primarily intended to procure final MMC 3000 system components over a very short-four month period. In addition, Mr. Loving concurred with the auditor's conclusions that costs would increase in future years as a consequence of escalating labor and material costs. (R4, tab 409 at 2-4; tr. 4/113-14) The government offered no contrary rebuttal evidence or testimony.

51. If the RRPA applied no decrement or escalation and compared the Bridge prices to the MRC prices for AMDR range 10-15 instead of AMDR range 4-9, then the RRPA would drop to less than zero (tr. 4/59-60).

52. Neither the price adjustment recommended in the post-award audit (and final decision) or the RRPA made adjustments for differences in contractual and technical requirements between the Bridge PO and MRC (APF ¶¶ 164-67).

53. In its post-trial brief, the government first proposed two new alternative methodologies for computing its damages. The first post-trial theory asserts that the government's total damages are \$9,929,357 and the second \$9,319,401. There is no reasonable basis or good cause offered for the government's failure to timely present the quantum calculations. There is nothing in the evidentiary record, or even the government post-hearing briefs that adequately explains the assumptions underlying the calculations. The computations and assumptions inherent in the theories are far from clear, obvious and logical without testimony or record support. They are not reconcilable with the original

damages computation prepared by the auditor and adopted by the CO. As noted above, the DCAA auditor declined to endorse fundamental assumptions associated with the pre-trial RRPAs (finding 50). There is nothing in the record that post-trial RRPAs were endorsed by government auditors, negotiators and/or the CO. To the limited extent the calculations and assumptions underlying the post-trial revisions can be understood and analyzed without explanatory and supporting testimony, they appear to suffer from the same or similar conceptual problems and deficiencies discussed above. For example, the government's first revised post-trial theory makes the same flawed 4-9 AMDR assumption. In addition, it is based on a variant of the government's arguments regarding a "decrement" between the first and second periods of delivery. The second post-trial RRPAs introduces a new, equally-deficient and unsupported "decrement" analysis based on the difference between Raytheon's total February 1999 (\$18,214,195) and 12 May 1999 (\$15,135,743) Bridge proposals to LM Aero. The government assumes and alleges that the 16.9% "decrement" between these proposals was a "negotiated" reduction but there is no evidentiary support for this position. (Gov't br., attachs. 1-2)

DECISION

The government claims that appellant's failure to disclose data related to the Bridge PO negotiations with its MMC subcontractor Raytheon constituted defective pricing resulting in the overstatement of the prices of MMC 5000 units purchased by the AF pursuant to the CCIP contract. As emphasized by the government, it is entitled to a presumption that the non-disclosure of data resulted in an overstatement of the price of the CCIP contract. *E.g., Sylvania Electric Products, Inc. v. United States*, 479 F.2d 1342, 1348 (Ct. Cl. 1973); *American Machine & Foundry Co.*, ASBCA No. 15037, 74-1 BCA ¶ 10,409 at 49,178. We analyze the evidentiary record bearing in mind and applying the presumption. However, the presumption is rebuttable and is not a substitute for specific proof establishing the amount of such damages. As we stated in *Grumman Aerospace Corp.*, ASBCA No. 27476, 86-3 BCA ¶ 19,091 at 96,494, "[t]he ultimate burden of showing the causal connection between incomplete or inaccurate data and an overstated contract price remains with the Government." *See also Martin Marietta Corp.*, ASBCA No. 48223, 96-2 BCA ¶ 28,270 at 141,159. In this case, the government not only has failed to prove the amount of any increase, appellant has rebutted the presumption that an overstated CCIP contract price resulted from the alleged nondisclosure of the data in question. *Cf. Wynne v. United Technologies Corp.*, 463 F.3d 1261 (Fed. Cir. 2006). Therefore, we need not address the numerous other issues raised by appellant regarding the defective pricing claim, in particular whether the Bridge PO data in question was timely disclosed to the government.

The government has developed four separate theories regarding the computation of its damages: the original Recommended Price Adjustment (RPA); the Pre-Trial RRPAs and, two Post-Trial Revised Recommended Price Adjustments (Post-Trial RRPAs). All are deficient and logically or factually flawed for the reasons detailed below. *Cf.*

American Machine & Foundry, 74-1 BCA ¶ 10,409 at 49,172-73 (multiple, inconsistent, contradictory quantum calculations).

A. The Original RPA

The RPA was developed in the 2002 audit and adopted by the CO in the 2008 final decision. The following generally summarizes the DCAA/CO's RPA theory regarding the damages the Board should presume resulted from the nondisclosure of Bridge data:

1. Appellant failed to disclose the amount of the Bridge subcontract calling for the delivery of 46.1 shipsets.
2. The price per Bridge shipset (total Bridge price/46.41 shipsets) was less than the MRC price per shipset.
3. Therefore, the government's damages were the difference in the shipset prices multiplied by the number of first and second period deliverable shipsets under the CCIP production contract, with the Bridge price slightly *increased* for the second period deliverables to compensate for escalation.

For the first nine years after this dispute arose with the 2002 DCAA audit, the government adhered to the above analysis for computation of its damages. That government methodology is based on several assumptions, including:

1. The audit use of \$14,264,481 as the total recurring price of the 46.41 Bridge shipsets was appropriate for comparison with the MRC prices.
2. The Bridge shipsets were technically comparable to the MRC shipsets.
3. The audit-derived price for the Bridge shipsets was based on the equivalent AMDR for comparison with the AMDR MRC price for the shipsets.

Each of these underlying assumptions is flawed as discussed below.

The Recurring Price Flaw

The recurring price used by the auditor and CO (finding 30), was inaccurate. The most accurate recurring price for the Bridge shipsets was \$15,135,743 (finding 20), not \$14,264,481. The government's resulting division of the total costs by 46.41 shipsets thus significantly understated the price of those shipsets and incorrectly compared that price with the recurring price of the MRC subcontract shipsets. Although this flaw in the audit computation likely had the least monetary impact of the three defective

assumptions, its influence in calculating the Bridge shipset prices was nonetheless material.

The Composite Rate Flaw

The audit and CO's damages computation used a blended or composite single shipset price without differentiating between the old MMC 3000 systems and the new MMC 5000 shipsets. Over 80% of the Bridge shipsets were the old MMC 3000 version. Thus the AF substantially distorted the Bridge shipset price used in its computation disproportionately emphasizing the less expensive model as compared with the more expensive MMC 5000 procured pursuant to the CCIP.

The AMDR Flaw

We have found that Raytheon's Bridge proposal and the Bridge subcontract were based upon a four-month delivery period beginning September through December, 2000. Raytheon's early delivery Bridge price was based on that schedule termed by Raytheon as its "most economical manufacturing plan." Had LM Aero contracted for the Raytheon proposed Extended Delivery option, Raytheon's Bridge price would have increased by \$1,102,267 according to its 12 May 1999 proposal, reflecting the delay costs Raytheon would incur if it was required to hold the shipsets in inventory during the period January 2001 to December 2002. (Findings 16, 17) The proposal and contract provided for delivery of the units before January 2001. Meaningful comparisons of the two contracts required analysis using equivalent delivery rates. (Findings 34, 46) DCAA's auditor conceded and we have found that Raytheon's proposed prices for MMC units were heavily dependent on the AMDR. The AF conflates the terms "delivery schedule" and "period of performance" treating them as synonymous for purposes of its damages computation. In fact distinguishing between the terms is essential to computing the pertinent AMDR which is properly based on the actually agreed delivery schedule of four months, not the entire period of performance.

In contrast, LM Aero's MRC purchase order requested that Raytheon propose a range of delivery rates and associated prices that would vary depending on the AMDR actually ordered. Although the negotiations between appellant and the government eventually focused on the 4-9 AMDR (finding 24), Raytheon's MRC proposals to appellant contained quotes for other ranges including 10-15 AMDR (e.g., finding 13). Apparently as a consequence of its focus on the 4-9 range in its CCIP negotiations with LM Aero, the government's RPA erroneously compared the lower quantity/higher priced MRC prices at the 4-9 AMDR range to the higher quantity/lower priced Bridge prices. This faulty comparison flowed from the government's misanalysis of the required four-month Bridge delivery schedule and in the process grossly overstated the impact of any nondisclosure.

Without persuasive evidentiary support, the government offered a number of counter-intuitive, illogical reasons for not using the MRC prices proposed at the comparable 10-15 AMDR for the Bridge PO. None of these reasons has merit. In some instances, the contentions contradict the approach of the government auditors and the damages computation reflected in the CO final decision. We have considered all of the government's contentions, but need not address each of them. *Cf. American Machine & Foundry*, 74-1 BCA at 49,172, 49,178.

The Bridge required delivery of the components for 46.41 "shipsets," (sometimes called "equivalent shipsets" by Raytheon and DCAA) over a four-month period commencing in September 2000 yielding an equivalent AMDR of between 10-15 MMC 5000 units. The reasonable unit price acknowledged by the government for an MMC 5000 equivalent system under the Bridge PO was \$382,868. That unit price *exceeded* the unit price for the MMC 5000 offered by Raytheon in its MRC proposal for an AMDR of 10-15. Nevertheless, the government erroneously constructed proposed price adjustments by comparing the Bridge price to the proposed MRC prices for an AMDR of 4-9: \$538,784 for the first six-month delivery period and \$397,177 for the second one-year delivery period. There was no 4-9 unit delivery rate on the Bridge PO.

Although the total manufacturing effort required was equivalent to production of 46.41 systems, the government now contends that the components ordered by LM Aero could have been used to build only 32 full systems (with numerous additional "left-over" components). Therefore, the government contends that the Bridge AMDR was eight (32 full systems/four-month delivery period) and, accordingly, the 4-9 AMDR was the appropriate range for comparison. However, we have found that component deliveries as well as full system deliveries are to be considered in determining AMDR. LM Aero's and Raytheon's AMDR calculation contemplated the use of an equivalent shipset number that encompassed all manufacturing effort, rather than counting solely full systems. (Finding 5) There is no evidence to the contrary. The government's auditor focused on equivalent shipsets and never calculated the number of full systems that could be assembled from the Bridge components. (*See Findings 31, 37*) Raytheon's component break out in its 12 May 1999 proposal also computed and priced its offer in "equivalent shipsets."

The government also argues that the Bridge price cannot be compared to the MRC on the basis of the AMDR because the Bridge PO had no express AMDR pricing. While this is true, the AMDR was determinable by simple arithmetic as demonstrated by the post-award audit. The total shipsets (46.41) and delivery period (four months) were specified. The general gravamen of the government's case is that the Bridge unit prices were comparable for computation of damages. The government's further conclusion that, because there was no express Bridge AMDR price the price was not sensitive to the delivery schedule, is contrary to all of the persuasive evidence in the record. In addition, merely because appellant and the Air Force may have ultimately focused their CCIP

negotiations on the 4-9 AMDR range, has no relevance to the fact that Bridge shipsets were priced for the 10-15 AMDR range (46.41 units divided by 4 months).

The government's misreliance on an AMDR of 4-9 for comparison may have found its inception in the assumption that because AMDRs are generally calculated on a six-month basis by appellant, the 46.41 shipsets should be divided by six months to derive an AMDR of 7.73. However, the six-month delivery rate assumption is in error. The Bridge PO irrefutably contemplated deliveries over a four-month period at the time of price agreement. LM Aero's practice and both Raytheon and appellant's understanding of the Bridge PO were that for delivery periods shorter than six months, the actual number of months should be used as the denominator in calculating the AMDR (finding 5).

The government contends that appellant did not challenge the AMDR assumptions inherent in the audit conclusions until approximately 30 October 2003 (gov't br. at 83). The government asserts that this is a legal position first developed by LM Aero's counsel after an earlier settlement offer from LM Aero. Although for purposes of settlement, appellant's offer did not address the government's AMDR assumptions, those assumptions were plainly incorrect as a factual matter for the reasons that we have detailed. Appellant did not construct a legal theory unsupported by the facts. On the other hand, the government crafted and advanced pre and post-trial damages theories unsupported by any testimony and based primarily on misanalysis and misapplication of the facts as discussed herein.

The government also emphasizes the actual performance period of the Bridge contract rather than what was contemplated by appellant and Raytheon at the time of their agreement on the Bridge price. The government suggests that, because actual deliveries stretched out through May 2001, it was reasonable to compare prices in the 4-9 AMDR range. There are several problems with this analysis. There is no question that LM Aero and Raytheon contemplated a four-month delivery period on the critical date of agreement on price. Changes made after that date could be attributable to numerous factors and are generally irrelevant for comparison. *Rosemount, Inc.*, ASBCA No. 37520, 95-2 BCA ¶ 27,770 at 138,455 ("Care must be taken to tie the assessment [of whether defective pricing occurred] to a consideration of the parties' actions at the time and to avoid imposing an after-the-fact perspective on how the negotiations could have been conducted to produce improved results from the Government's perspective."). Here, the delays were entirely caused by Raytheon, first became known after execution of the Bridge subcontract and had no impact on or relation to the negotiated production rate of the components. Regardless of actual deliveries, the Bridge PO components were intended to be delivered by Raytheon at a rate of 10-15 per month.

B. The Pre-Trial RRPA

On the eve of trial, the government formulated an RRPA in its cross-motion for summary judgment. It also developed additional post-trial theories of damages. Although the AF did not expressly abandon the original RPA and indeed adopted some of the assumptions inherent in that original calculation (while discarding others), the RRPA (and post-trial RRPAs) introduced fundamental changes in the government's theory of damages. Before addressing more specific defects in the government's proof, it bears emphasis that the government essentially retreated from the damages calculation in the post-award audit report and that developed by the CO. (*See, e.g.*, gov't reply br. at 45 alleging DCAA computations to be irrelevant) Instead, it has offered several alternative damages theories all of which were developed approximately ten years after issuance of the audit report on which the final decision is based. The government's pre- and post-trial revisions regarding damages are allegedly based on contemporaneous data available to the auditors and CO. As stated in the government's post-trial brief, counsel:

[D]isputes any suggestion that review by the contracting officer or auditor of the legal basis for the AF's price adjustment is necessary or has any relevance to this appeal. The AF's claim is based on the facts cited in the AF's post-hearing brief and the law to be applied by the Board. The amount of the price adjustment under [TINA], based on the facts proven by the AF, is a question of law that is not based on the opinion testimony of the CO or auditor.

(Gov't reply br. at 48)

The most fundamental problem with this assertion here is that the pre-trial RRPA and the post-trial RRPAs are not based on the facts. They are based on a selective, out-of-context reading and/or unreasonable interpretation of the facts. They also ignore significant evidence as well as diametrically opposed interpretations by the CO and auditors of the same "facts" that provided the original foundation for the AF's defective pricing claim. Contemporaneously, the auditors and CO viewed the facts differently. Even at the trial twelve years after the negotiation of the CCIP contract in dispute, the auditor declined to support the revised damage theories.

To the extent that these alternative theories resemble the CO's damages computations, they suffer from the same defects as those computations. To the extent that they depart from the CO's calculations, they are based almost exclusively on theories and assumptions developed shortly before or after trial without any persuasive evidentiary support. At times, the multiple government damages theories are inconsistent and contradictory. It is a challenge to determine precisely what damages the government considers logically flowed from the alleged nondisclosure of specific Bridge PO data in

these circumstances. We recognize that proof of damages involves some degree of imprecision. Nevertheless, the presence of multiple damages theories, particularly where unsupported by evidence, detailed logic regarding causation and how the data specifically would have been used by actual government negotiators, makes it unfeasible to conclude that the government suffered any damages.

First we address the elements of the RRPA. So as best to understand the elements, the RRPA's rationale is again summarized as follows:

1. The agreed price of the Bridge MMC 5000 shipset was \$382,868.
2. The relevant MRC/CCIP price for the MMC 5000 shipsets was \$538,784 for the 4-9 AMDR range.
3. The excess of the MRC/CCIP price over the Bridge price per shipset multiplied by the number of first period shipsets represents the government's first period damages.
4. Because the MRC/CCIP second period shipset price declined by 26.3% from the first period price, the government would have negotiated the identical 26.3% percent reduction (termed a "decrement" by the government) from the \$382,868 Bridge shipset price for the second period.
5. Accordingly, the AF computed its damages for the second period as the excess of the second year MRC/CCIP shipset price over the "decremented" Bridge shipset price multiplied by the number of second period shipset deliverables.

The government RRPA is grounded in the following questionable and/or flawed assumptions:

- a. It was possible to develop the Bridge shipset price of \$382,868 as of the date of price agreement on the CCIP;
- b. The AMDR rate of 4-9 shipsets was appropriate for comparison; and,
- c. The second period MRC/CCIP percentage reduction (26.3%) reflects the "decrement" that could have been achieved by government negotiators for the second period shipsets.

For all the reasons discussed in connection with the original RPA, the second assumption above regarding the propriety of using prices in the 4-9 AMDR is equally deficient. Therefore, we focus our discussion of the errors in the RRPA on assumptions (a) and (c) above.

The MMC 5000 Price Assumption: Availability of Bridge Component Price Data

TINA defines "cost or pricing data" as data that exists "as of the date of agreement on the price of a contract." 10 U.S.C. § 2306a (h)(1). Here, the individual Bridge PO shipset prices were not available on the date of price agreement on the CCIP contract. LM Aero and Raytheon had only agreed to an unallocated, bottom line Bridge PO total amount as of 23 July 1999. As of 30 July 1999, the date of price agreement on the CCIP contract, there was no agreement between LM Aero and Raytheon on Bridge PO component prices necessary to calculate an imputed shipset price for the MMC 5000. LM Aero and Raytheon had not finally agreed on the proper allocation of MMC component prices on the Bridge PO prior to 6 August 1999. Prior to that date, a Bridge PO unit price for the MMC 5000 system was not established.

In any event, we need not further discuss any unavailability of the component allocation amounts nor rely on this ground to sustain this appeal. We assume that the government reasonably could have approximated the respective prices for Bridge MMC 3000 and 5000 systems using component allocation percentages reflected in Raytheon's 12 May 1999 proposal, even though there had been no attempt to do so prior to the briefing of the summary judgment motion shortly prior to trial. Those allocation percentages are reflected in Raytheon's proposed prices and were not necessarily the agreed component allocations as of the critical date. However, as detailed below, the record demonstrates that, even assuming that unit prices for the MMC 5000 systems could reasonably have been extrapolated from Bridge PO data that was available on the CCIP price agreement date, the nondisclosure of the Bridge data in question would not have caused an increase in the negotiated CCIP prices for the systems.

The Decrement Assumption

The government claims that the amount of its damages should factor in the reduction in price for the MMC 5000 units during the second period of deliveries under the CCIP contract. Essentially, it contends that since the proposed price for the units in the CCIP's 4-9 AMDR declined by 26.3% in the second period (FY 2000), the Bridge second period price would also have been used to reduce the CCIP price for the second CCIP period by 26.3%. Of course, no actual second period for comparison was contemplated by Bridge which provided for delivery of the shipsets over one abbreviated four month period as discussed above. The government's RRPAs claim that the second period "decrement" increases the amount of its damages. The government also now maintains that the "decrement," rather than escalation, was appropriate because Raytheon's actual proposed reduction in the second period reflected, among other things, the offsetting effects of any escalation costs that might have otherwise been incurred.

The AF's RRPAs claim that its damages were increased by the amount of the "decrement" is without merit for several reasons. First, the government's "decrement"

theories were developed without evidentiary support.⁵ That the government characterizes this matter as a “legal issue” does not relieve the government of its responsibility to support its request for damages with substantive, persuasive evidence. We base our decisions on facts established by the record, not allegations that are unsupported by, misanalyze, and/or contradict, that record.

Second, the RRPA’s “decrement” theory contradicts DCAA’s contemporaneous conclusions in its 2002 audit which provided the foundation for the RPA and CO’s decision. Before the RRPA, the government’s position was that the Bridge prices should be *increased* by a 5.3% *escalation rate* for the second CCIP contract delivery period not reduced by 26.3%. The RPA in the audit report made no reduction for the second period MRC/CCIP units.

Third, the RRPA was unsupported by the government’s own auditor at trial. The only government witness addressing the claimed “decrement” was DCAA’s post-award auditor. His testimony essentially refuted any entitlement to the “decrement” noting its inconsistency with the original RPA methodology. The auditor conceded that he was not exercising his independent professional judgment in performing the calculations underlying the RRPA but was “trying to prepare something for” the AF trial counsel. The auditor denied that he had learned any new facts since performing the audit and developing the original RPA that might have caused him to change his original position regarding the appropriateness of the “decrement.” In his view “maintaining comparability” between the Bridge price and the MRC prices required application of an escalation factor to second period shipsets. (Findings 30, 31, 48)

Finally, the record persuasively suggests that the differences between the first and second period CCIP prices were reasonably and most likely attributable to other factors. Mr. Loving agreed with the DCAA auditor’s escalation conclusions and considered that the Bridge prices likely would have increased rather than decreased in a hypothetical second year. According to Mr. Loving, the decrease in proposed MRC prices for the second year was most likely the result of front-loading costs on the early units of a multi-year contract not by production efficiencies in later years. He noted that Raytheon’s back-up data demonstrated that the subcontractor’s costs in the first year were much higher than in later years. Consequently, he considered that the first period pricing was intended to recover those initial costs as early as possible through higher prices on the early units. (Finding 50) The Bridge PO, in contrast, called for deliveries primarily of the older, final MMC 3000 units over a four-month delivery period.

⁵ For purposes of this discussion, we need not reiterate the rationale for our conclusion that it was improper for the government to base its damages claim on the 4-9 unit AMDR assumption.

C. The Post-Trial RRPAs

Appellant asserts that it had no opportunity at trial to rebut these new damage calculation theories and the revised theories could and should have been timely raised at or before the hearing. Consequently, appellant argues that they were waived. We need not address appellant's waiver contention in view of our determination that the government's post-trial RRPAs are without merit. Apart from their obvious unfairness due to untimeliness, the post-trial revisions are based on assumptions that are devoid of record support. They are also not reconcilable with the damages computation by the auditor and CO.⁶

We further note that to the limited extent the calculations and assumptions underlying the post-trial revisions can be understood and analyzed without explanatory and supporting testimony, they appear to suffer from the same or similar conceptual problems and deficiencies discussed above. For example, the government's first revised post-trial theory makes the same flawed 4-9 AMDR assumption. In addition, it is based on a variant of the government's arguments regarding a "decrement" between the first and second periods of delivery. For substantially the same reasons stated in our discussion above, we also reject the AMDR and/or "decrement" foundational assumptions for the post-trial RRPAs.

The second post-trial RRPAs introduces a new, equally-deficient and unsupported "decrement" analysis based on the difference between Raytheon's total 17 February 1999 (\$18,214,195) and 12 May 1999 (\$15,135,743) Bridge proposals to LM Aero. The government alleges that the 16.9% "decrement" between these proposals was a "negotiated" reduction. No record testimony supports the latter conclusion. Appellant argues that it would have presented evidence at trial showing that these reductions are attributable to revised requirements and eliminations that occurred outside the ambit of "negotiations." The logic of the second post-trial RRPAs leads to the question of whether Raytheon's initial 29 July 1999 Bridge proposal (\$13,397,268) should be used as basis for comparison. Because of the delayed assertion of this government theory and the lack of any explanatory testimony, we have no means of determining the precise reasons for the differences. Bridge negotiations in the sense and context of the record documents did not transpire between Raytheon and appellant until Raytheon's final 12 May 1999 proposal was submitted. That proposal was used as the basis for negotiation not the earlier, "superseded" February

⁶ We also observe that the government's post-trial RRPAs made certain adjustments (again unsubstantiated in the record) in the prices of the MRC MMC 5000 production units to account for specification and other material differences with the Bridge MMC 5000 developmental units impacting valid comparison of the cost of the Bridge and MRC systems. We need not address the adequacy of the government's adjustments or make a detailed analysis of other deficiencies because the post-trial RRPAs are flawed for more basic reasons.

proposal. Both the government and appellant contemporaneously used the 12 May 1999 proposal in assessing the extent of negotiated reduction in the Bridge subcontract price. In 2003, the government originally derived a similar 16.4% decrement based on the difference between the total 12 May 1999 price (*including non-recurring costs*) and the final negotiated Bridge price. As discussed above, the failure to eliminate the non-recurring costs resulted in a faulty comparison that materially overstated the actual extent of the negotiated decrement of slightly more than 4%.

Finally, the government asserts that if the Bridge prices were disclosed it “could have performed fact finding to identify areas of commonality” between the Bridge PO and CCIP. During the over four-year period of litigation the government has yet to develop what additional areas of “commonality” might be germane to the issues in this case even in hindsight. The government primarily relies on the presumption that nondisclosure resulted in damages without persuasive supporting proof. For reasons stated herein, we consider appellant has successfully rebutted that presumption.

CONCLUSION

To establish defective pricing, it is axiomatic that the allegedly undisclosed data lead to a higher negotiated price. Here, the evidence establishes that any nondisclosure of the Bridge prices did not contribute to an overstatement of the CCIP contract prices. Consequently, resolution of this appeal does not require us to examine in detail, *inter alia*, the extent of the government’s knowledge of the Bridge negotiations or the differences between the Bridge and MRC subcontracts to further assess their comparability. Even if all other elements of the government’s claim were established, its damages are zero. In particular, we have emphasized the two most critical deficiencies present in the government computations of its damages.⁷ First, the analyses fail to account and adjust properly for the materially different delivery rates for the Bridge and CCIP contracts. Second, the government improperly applies a “decrement” when comparing hypothetical second period Bridge prices to CCIP prices. Correction of these errors eliminates the damages claimed by the government. Because the government suffered no damages from

⁷ Appellant has argued that there are numerous other differences that preclude valid comparisons between the Bridge PO and MRC, particularly with respect to their respective work statements and warranty requirements among others. The government has made some adjustments to its damages computations to account for some of these differences but not for others deeming them irrelevant, insubstantial or otherwise without cost impacts. Because of our conclusions herein regarding the government’s delivery rate and decrement assumptions, it is unnecessary to make detailed findings or further discuss the materiality of the additional differences alleged by appellant. The government has failed to prove that the nondisclosure of the Bridge data caused an increase in the CCIP contract price based on the unreasonableness of those assumptions alone.

nondisclosure of the Bridge data in question, discussion of numerous other factual and legal issues raised by appellant is unnecessary.

For all of the foregoing reasons, the appeal is sustained.

Dated: 22 January 2013



ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



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



JACK DELMAN
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56547, Appeal of Lockheed Martin Aeronautics Company, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals