Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

APPELLANT'S MOTION FOR PARTIAL
SUMMARY RELIEF DENIED: May 13, 2004

GSBCA 15871

VIACOM, INC. - SUCCESSOR IN INTEREST
TO WESTINGHOUSE FURNITURE SYSTEMS,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Marc F. Efron and J. Catherine Kunz, Crowell & Moring LLP, Washington, DC, counsel for Appellant.

Robert Hoff and Liana D. Henry, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **DeGRAFF**.

BORWICK, Board Judge.

This appeal concerns a claim by respondent, the General Services Administration (GSA or respondent), for damages against appellant, Viacom, Inc., - Successor in Interest to Westinghouse Furniture Systems (Westinghouse), due to alleged defective pricing on a multiple award schedule (MAS) furniture contract. Appellant seeks partial summary relief on three issues: (1) whether GSA's inclusion of sales over the basic order limitation (BOL) in the damage calculation was improper; (2) whether GSA's inclusion of sales under a different contract in the damage calculation was improper; and (3) whether GSA's alleged failure to reduce the damage calculation by appellant's earlier effective 3.8% discount was improper. Because there are in dispute material issues of fact that affect these issues, the Board denies appellant's motion.

Background

For the sole purpose of ruling on this motion, we accept appellant's statement of

undisputed facts that are not challenged by GSA. Where GSA objects to appellant's statement of undisputed facts, we discuss the parties' differing versions of the facts. For completeness, in this section of the opinion we also quote contract terms and conditions that are not mentioned in either of the parties' submissions.

Basic contract terms

Respondent, GSA, awarded MAS contract GS-00F-76574 (hereinafter the contract) to appellant on July 1, 1985, for the provision of systems furniture and associated design, layout, and installation services under the Federal Supply Schedule. The contract was performed by appellant from July 1, 1985, to September 30, 1988. Appellant's Statement of Uncontested Facts ¶ 1; Appeal File, Exhibit 13.[1]

The contract defined systems furniture as "interconnecting panel assemblies and work surfaces, storage units and other major components which are panel supported." Appellant's Statement of Uncontested Facts ¶ 2; Appeal File, Exhibit 10 at 7.

The contract contained a negotiated three-tier discount schedule that applied to Government orders of systems furniture valued at under $75,000. The discount schedule, as set forth in the contract award document, provided as follows:

$50-$24,999	51% off list
$25,000-$50,000	53% off list
$50,000-$75,000	55% off list

In addition to these discounts, the contract had a 2%-20 day prompt payment discount and a quick ship discount. Appellant's Statement of Uncontested Facts ¶ 3; Appeal File, Exhibits 1 at 40; 8 at 1; 13.

The three-tiered discount structure, prompt payment and quick ship discounts, and other negotiated terms of the contract were based on appellant's disclosures prior to contract negotiations of discounts and contract terms given to its commercial customers. Contract negotiations took place in December 1984. Appellant's Statement of Uncontested Facts ¶ 4; Appeal File, Exhibits 1 at 43-51; 5-6; 8 at 1.

The contract also contained a basic order limitation (BOL) of $75,000 whereby agencies could purchase systems furniture valued at up to $75,000 under the contract. For orders that exceeded $75,000, agencies were required to issue a request for quotation. Appellant's Statement of Uncontested Facts ¶ 5; Appeal File, Exhibit 1 at 4, 10 at 5. The issuance of a request for quotation was termed the "requote procedure." Appellant's Statement of Uncontested Facts ¶ 5.

The solicitation for the contract described a maximum ordering limitation (MOL):

Acquisition of systems furniture by Government agencies will continue to be

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[1] For ease of reading, we paraphrase instead of quoting Appellant's Statement of Uncontested Facts, throughout the Background Section of this opinion.

> controlled by Temporary Regulation E-76 and successful offerors will still be prohibited from accepting orders not accompanied by a letter of authorization from the General Services Administration.
>
> The maximum ordering limitation on any contract resulting from the attached solicitation for offers will be $75,000. Any systems projects beyond the $75,000 MOL will be covered by contracts issued under the resulting Federal Supply Schedule through a process of RFQ's (Request for Quotations) where successful offerors will requote their discounts to agencies on a project by project basis.

Appellant's Statement of Uncontested Facts ¶ 6; Appeal File, Exhibit 1 at 4, Summary. The provision also stated:

> These requotes will not trigger the price reductions clause. This will allow vendors to tailor the volume of business to their capacity and provide a more flexible discount structure.

Id. In solicitation amendment three, the MOL was changed to the BOL. Appellant's Statement of Uncontested Facts ¶ 6; Appeal File, Exhibit 10 at 5.

Amendment three to the solicitation also provided: "Delete paragraph 1, page 4, Summary." Appeal File, Exhibit 10. Amendment three further described the requote procedure:

> Resultant contracts include a completely revised procurement methodology. A summary of this methodology and the procedures to be utilized by using activities when [filling] requirements under the schedule follows:
>
> (a) There is basically no change from the previous method of contract usage up to the $75,000 level. The basic order limit established under each resultant contract is $75,000. For requirements up to this level, using activities will evaluate the product of each contractor, selecting the one that best meets their needs at the lowest cost and place an order.
>
> For requirements which exceed $75,000, using activities will be instructed to issue a "Request for Quote" document. This "Request for Quote" will cover all the particulars of the project involved, i.e. quantity of workstations (broken down by category/prototypicals), installation, design/layout requirements, training, post installation support, etc.
>
> Agencies are being provided with a matrix showing the various items in each product line. This matrix will be used by the agencies in the refining of their technical needs into the specification document which will be used in the "Request for Quote."

> The product evaluation scores established during the mock-up evaluation will be used by the using activities to weight their bid prices received under the Request for Quote. Agencies are being instructed not to request mockups on the requote projects since the GSA evaluation scoring is to be used in the evaluation process. This instruction stems from the major expense incurred by vendors when mockups are required.
>
> Agencies are also being advised that Service Evaluation Scoring on a project-by-project basis can be used. If the agencies elect to include Evaluation scoring into the weighted evaluation, the weighting, factors, and rating/evaluation will be the responsibility of the using activity.
>
> (b) In the area of discounts on requotes, agencies are being advised that no discount less than that negotiated by GSA under the basic order limit is to be considered for award.

Appeal File, Exhibit 10 at 5.

The contract contained a standard price reductions clause labeled I-FSS-390 (4/84). The clause provided in pertinent part:

> General
>
> (a). The price reductions clause is intended to ensure that throughout the term of the contract, the Government shall maintain its relative/price discount (and/or term and condition) advantage in relation to the contractor's commercial customer(s) price/discount upon which this contract award was predicated. The customer or category of customers upon which the contract award is predicated will be identified at the conclusion of negotiations.

Appellant's Statement of Uncontested Facts ¶ 7; Appeal File, Exhibit 10 at 3.

Paragraph (b)(1) of the price reductions clause provided that before the award of the contract, the contracting officer and the offeror would reach an agreement as to the price relationship between the Government and the offeror's identified customer or categories of customer on which the contract award was predicated. The clause required the parties to maintain that pricing relationship throughout the contract period. Any change in the contractor's commercial pricing arrangement for the identified customer or classes of customer which disturbed that relationship would constitute a price reduction. Clause (b)(1) required the contractor to report all price reductions during the contract period. Appellant's Statement of Uncontested Facts ¶ 7; Appeal File, Exhibit 10 at 3.

Paragraph (b)(3) of the price reductions clause required a price reduction if the contractor reduced prices contained in commercial pricelists or other pricing documents so as to disturb the pricing relationship of the Government to the identified customer or classes of customer. Appellant's Statement of Uncontested Facts ¶ 7; Appeal File, Exhibit 10 at 3.

The contract contained a clause mandating price reduction for defective pricing data:

> If subsequent to the award of any contract resulting from this solicitation it is found that any price negotiated in connection with this contract was increased by any significant amount because the prices, data, and facts were not as stated in the offerors's "Certificate of Established Catalog and Market Price", the contract price(s) shall be reduced by such amount and the contract shall be modified in writing to reflect such adjustment.

Appeal File, Exhibit 1 at I-FSS-330(d) (3/76).

Other contracts

The contract's negotiated terms differed from the terms and conditions of the preceding systems furniture contract that appellant held with GSA. For example, the predecessor contract had an MOL of $500,000 and no BOL and provided for a single, non-tiered discount of 52.5%, a 3%-30 day prompt payment discount and a 1-4% volume discount per $100,000. Appellant's Statement of Uncontested Facts ¶ 8. Respondent maintains that the differing terms and conditions are irrelevant. Respondent says that the purchases, amounts paid, and relevant terms and conditions in the subject contract remained identical to the earlier contract. Respondent's Statement of Genuine Issues ¶ 4.

Appellant was awarded another Federal Supply Schedule contract for "modular" not "systems" furniture on July 18, 1986. This contract, Contract GS00F-84244, was governed by similar terms and conditions as the subject contract and had the same BOL level of $75,000. Appellant's Statement of Uncontested Facts ¶ 9.

Contract administration personnel

The contracting officer during the contract term was Shirley Wilson. Appellant's Statement of Uncontested Facts ¶ 10; Appeal File, Exhibit 13. Effective November 25, 1987, the contracting officer appointed Ms. Teresa Elmendorf (now Teresa Elbin) as contract administrator for the contract. Appellant's Statement of Uncontested Facts ¶ 10; Appeal File, Exhibit 20. The current contracting officer, M. Helen Zivkoviche, assumed her responsibility for the contract in approximately 2000. Appellant's Statement of Uncontested Facts ¶ 10; Deposition of Helen Zivkoviche (Zivkoviche Deposition) at 11.

Ms. Elemendorf was responsible for administration of the Federal Supply Schedule contract itself; she was not responsible for requote projects, which were the responsibility of the contract specialist designated on the applicable request for quotations. Appellant's Statement of Uncontested Facts ¶ 11; Appeal File, Exhibit 20.

Commercial price increase and Government response

On March 3, 1988, appellant sent a letter to the contract administrator requesting a price increase for sales under the contract because appellant had increased its commercial price list by an average of 3.8% as of February 1, 1988. Appellant's Statement of

Uncontested Facts ¶ 12; Appeal File, Exhibit 50 at 15. The contracting officer requested that appellant submit updated discount schedule and marketing data; certification that the new commercial pricelist was applicable to all relevant customers; and certification of the maximum price increase for any model number then on the GSA schedule contract. Appeal File, Exhibit 50 at 12. On March 24, 1988, appellant submitted the requested information. Id. at 8.

First price reduction determination

GSA determined that appellant had failed to meet the terms of the price reduction clause because appellant had understated discounts at the time of negotiation and because discounts from identified classes of customers had increased during the term of the contract. Respondent concluded that total contract sales below the basic order limitation were $20,398,143. Appellant's Statement of Uncontested Facts ¶ 13; Appeal File, Exhibit 50 at 4-5. The Government concluded that the refund due the Government based upon the maximum change in one customer's discount--5.54%--was $1,109,658.98. The average discount of three other customers whose discounts changed was 2.31%. Appeal File, Exhibit 50 at 4. GSA determined that the mid-point of those percentages was 3.9%, which produced a refund due in the amount of $799,607. Id.

Price reduction settlement

On June 29, 1988, respondent and appellant executed an unnumbered modification to the contract in which appellant, as consideration for the certified discount disclosure and sales data, paid the Government a refund of $795,527.57 and withdrew its request for incorporation of the Westinghouse commercial pricelist of February 1, 1988 into the contract. The modification provided that GSA contract pricing would be governed by the pricelist existing on June 2, 1986. The agreement "constitute[d] full and final resolution of the specific discount disclosures identified on page 1" and provided that the "rebate amount is based on the certified contract sales total of $20,398,143." Appellant's Statement of Uncontested Facts ¶ 14; Appeal File, Exhibit 50 at 2.

Miscellaneous

Appellant maintains as an uncontested fact that in foregoing the 3.8% price increase, Government procurement personnel agree that the Government received an effective 3.8% discount from appellant. Appellant's Statement of Uncontested Facts ¶ 15. The Government disputes "the factual basis behind the 3.8% discount" which "related only to under BOL sales," and "has no relevance to the current violation." Respondent's Statement of Genuine Issues ¶ 5.

Appellant states as an uncontested fact that GSA consistently administered the contract on the understanding that the negotiated discounts applied only to sales below the BOL and its authority to administer the contract extended only to sales below the BOL. Appellant relies on a contracting officer's letter stating that in the area of requotes, "we have no enforcement authority over the using agencies." See Appeal File, Exhibit 61. Appellant states in Appellant's Statement of Uncontested Facts ¶ 17, that in the price reduction

settlement, Government officials focused on sales below the BOL, not sales above the BOL. Appellant states in Appellant's Statement of Uncontested Facts ¶ 18 that GSA procurement personnel admitted in depositions that agencies other than GSA were responsible for administering requote projects and that they could not identify a single instance in which GSA told an agency that it could not accept a certain discount offered by a vendor in the requote procedure. Appellant states in Appellant's Statement of Uncontested Facts ¶ 19 that the contracting officer and the contract administrator admitted in a price analysis for a follow-on contract that price discounts for this contract applied only to orders below the BOL.

Respondent disputes the alleged undisputed "facts" described in the preceding paragraph. While respondent does not challenge the implication drawn by appellant from each document appellant relies upon, respondent points to other documents to rebut the alleged "facts" appellant proffers. For example, the pre-award audit for the follow-on contract issued by the contracting officer states that over-BOL orders were not used in the price analysis because of the difficulty in tracking the orders. Respondent's Statement of Genuine Issues ¶ 8; Appeal File, Exhibit 55 at 6.

In Appellant's Statement of Uncontested Facts ¶¶ 20-22, Westinghouse maintains as undisputed facts that neither the contract nor respondent's contracting personnel could identify contract documents that required the appellant to offer contract discounts for over-BOL orders or record evidence that agencies were given that advice. Respondent says that those alleged facts ignore the terms of solicitation amendment three and contrary deposition testimony. Respondent's Statement of Genuine Issues ¶¶ 10-11.

GSA conducted a post-award audit of the contract and issued a final audit report on September 4, 1998. GSA determined that appellant had not disclosed current, accurate, and complete data before the contract award and during contract performance and that contract pricing was therefore based on defective data. GSA calculated a refund due the Government of $4,292,893, of which $3,804,316 was due to defective pricing. Appellant's Statement of Uncontested Facts ¶ 23; Appeal File, Exhibit 56.

Respondent calculated the damages owed by appellant by applying the discount structure negotiated in 1988 for the follow-on contract to Government purchases of system furniture under the contract. The auditors applied a 61% discount to orders between $128,205.501 and $347,222 list price. The auditors calculated the damages this way because they assumed GSA contract negotiators would have negotiated the same discounts in 1984 as they did in 1988 despite the fact that the contract was estimated to be worth $4.3 million and the follow-on contract had an estimated value of $80.6 million. Appellant's Statement of Uncontested Facts ¶ 24; Appeal File, Exhibit 56. The auditors took the discounts from what they called the list price sales orders. Appeal File, Exhibit 56 at 14.

In Appellant's Statement of Uncontested Facts ¶ 25, appellant states as a fact that the auditors applied the discount structure of the follow-on contract to Government purchases of systems furniture under the contract from July 1, 1984, through September 30, 1988, thereby including sales that occurred before the start of the contract. Appellant also states as a fact that the auditors applied the discount structure to Government purchases over the

BOL even though the Government received an overall discount of 66.8% on such purchases. See Appeal File, Exhibit 56. Respondent does not dispute the first statement of uncontested facts in that paragraph, but disputes the second statement concerning overall discounts. Respondent's Statement of Genuine Issues ¶ 12. Respondent disputes the statement and maintains that the 66.8% figure was an average and that appellant granted unstated discounts of more than 66.8% to some customers. Id.

In Appellant's Statement of Uncontested Facts ¶¶ 26 and 27, appellant states that respondent used over-BOL sales in calculating damages. Appellant maintains that such a methodology does not comply with generally accepted accounting standards. Appellant also states as fact that the auditor never applied the methodology of this audit to other furniture contractors by including sales of predecessor contracts in damage calculations, by including over-BOL sales in the damage calculations, and by ignoring in the damage calculation the 3.8% price concession reflected in the contract modification of June 29, 1988. GSA disputes these alleged facts and states that the audit methodology was correct because appellant was the only contractor who failed to give discounts above the BOL and that the 3.8% price concession was irrelevant.

The contracting officer's decision of February 14, 2002, determined that $3,804,316 was due the Government for defective pricing. Appellant's Statement of Uncontested Facts ¶ 28; Appeal File, Exhibit 58. The contracting officer's decision is based on respondent's final audit, and it incorporates a July 7, 2000, letter from the contracting officer to appellant's counsel. Appeal File, Exhibit 58.

In determining damages, the contracting officer used data from appellant's sales to the Government that occurred prior to the start of the contract to determine defective pricing damages. Appellant's Statement of Uncontested Facts ¶ 29; Appeal File, Exhibit 58. Respondent states that the use of sales data from the previous contract was by agreement between appellant and respondent since the previous contract's sales data was a substitute for missing sales data at the beginning of this contract.

Discussion

Appellant seeks partial summary relief on three issues: (1) whether GSA's inclusion of sales over the BOL in the damage calculation was improper; (2) whether GSA's inclusion of sales under a different contract in the damage calculation was improper; and (3) whether GSA's alleged failure to reduce the damage calculation by appellant's effective 3.8% discount was improper.

We are obliged in ruling on motions for summary relief to draw all inferences in favor of the party opposing the motion; a motion for summary relief is proper only on those facts about which we "need not function as an arbiter among differing versions of every factual reality for which evidentiary support has been presented." Cable Electric Products, Inc. v. Genmark, Inc., 770 F.2d 1015, 1020 (Fed. Cir. 1985). All significant doubt over pertinent factual issues must be resolved in favor of the party opposing summary relief. Summary relief is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149

(Fed. Cir. 1986); Barmag Barmer Maschinenfrabrik AG v. Murata Machinery, Ltd., 732 F.2d 831, 835-36 (Fed. Cir. 1984); Peter Johnson v. General Services Administration, GSBCA 15604, 01-2 BCA ¶ 31,599.

Our duty at the summary relief stage of proceedings is not to weigh the evidence, but to determine the existence of material facts in dispute. Anderson v. Liberty Lobby, 497 U.S. 242, 249 (1986); Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990, 1003 (3d Cir. 1993) (district court's summary judgment reversed in suit challenging set-aside program as violative of Equal Protection Clause where defendant presented evidence of racial discrimination sufficient to defeat motion).

As to the first issue, appellant maintains that over-BOL orders should not be included in the damage calculations. Appellant maintains that orders above the BOL were separately negotiated by ordering agencies and the price reduction clause does not apply to them. Appellant maintains that the provisions of amendment three to the solicitation eliminated the entire provision entitled summary at page four of the original solicitation, including the requirement that the contractor requote discounts to those agencies who place orders above the MOL or BOL.

Respondent argues that amendment three only struck the first paragraph of the summary and did not change the contractor's obligation to requote the discounts for orders above the MOL or BOL mentioned in the contract, and that the provisions of amendment three must be read in conjunction with those portions of the summary provision that were not abrogated by amendment three.

This issue is not appropriate for summary relief because it is not clear whether the parties understood that the discount and sales information, which formed the basis of the contract's discount structure, would apply to orders above the BOL. It is also unclear how the Government treated the contract provision to "requote the discounts" when agencies placed orders above the BOL. The parties must develop the record on these points at the hearing on the merits. There are also disputed issues of fact as to whether any discounts were in fact provided for over-BOL orders, or the amount of the discount if discounts were provided.

There are issues of fact which prevent us from granting summary relief as to the second issue concerning use of non-contract sales to calculate defective pricing damages. On its face, using sales on a predecessor contract to determine defective pricing damage on the contract at issue would seem improper. The defective pricing clause of the contract, after all, requires adjustment of the prices for the contract resulting from the solicitation for which appellant supplied the defective data. Nevertheless, GSA has submitted an affidavit from its Office of Inspector General referencing an alleged agreement between appellant and respondent to use sales data at the end of the predecessor contract as a substitute for missing sales data at the beginning of this contract. Respondent's Supplemental Memorandum, Exhibit 1. Appellant has countered with an affidavit from appellant's office of general counsel denying the existence of such an agreement. Appellant's Reply to Respondent's Supplemental Memorandum, Exhibit 1. At trial, respondent will have to establish the elements of such an agreement--offer, acceptance, and consideration. Russell Corp. v.

United States, 537 F.2d 474, 481 (Ct. Cl. 1976); Robert L. Merwin, GSBCA 6621, 83-2 BCA ¶ 16,745; E.C.C. International Corp. v. United States, 43 Fed. Cl. 359, 369 (1999).

The third issue is whether the damage calculations should have been adjusted for the earlier alleged price reduction of 3.8%. Price reductions which entirely eliminate defective pricing are obviously relevant to a determination of whether there are remaining defective prices to be adjusted. Minnesota Mining and Manufacturing Co., ASBCA 18432, 77-2 BCA ¶ 12,823, at 62,424. Price reduction modifications which do not eliminate defective pricing may be considered in conjunction with the quantum determination of defective pricing. See Lockheed Corp., ASBCA 36420, et. al, 95-2 BCA ¶ 27,722, at 138,190.[2]

Here, GSA maintains that the GSA auditors "deducted this price reduction reimbursement from the defective pricing damages calculated in the audit report." Respondent's Opposition at 13. However, the audit report is singularly unclear on this point. The contracting officer's decision basically adopted the conclusions of the audit report. The parties must develop the record to establish whether (1) the withdrawal of the price increase amounted to a decrease in the contract price and (2) GSA used the 3.8% purported reduction in calculating the defective pricing damages.

Decision

Appellant's motion for partial summary relief is **DENIED**.

ANTHONY S. BORWICK
Board Judge

CATHERINE B. HYATT
Board Judge

MARTHA H. DeGRAFF
Board Judge

[2] The parties do not argue that the 3.8% price reduction completely eliminated the alleged overpricing.