

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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GRANTED IN PART: September 21, 2005

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GSBCA 15871

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

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

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

Robert T. 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.

## Background

This appeal involves a government claim arising under multiple award schedule (MAS) contract number GS-00F-76574 (contract 76574) for systems furniture workstations, awarded and administered by respondent, General Services Administration (GSA). Respondent awarded the contract to Westinghouse Furniture Systems (Westinghouse) on July 1, 1985; the contract lasted until June 30, 1988, a term of three years. On September 4,

1998, over ten years after the end of the contract, GSA's Office of Inspector General (OIG) issued an audit report concluding that Westinghouse had engaged in defective pricing. The audit report calculated a defective pricing refund of \$3,804,316, an end of contract discount refund of \$484,386, and a prompt payment discount of \$4191 for a total of \$4,292,893. On February 22, 2002, more than thirteen years after the end of the contract, the contracting officer issued her decision based on the audit report, concluding that there was due a defective pricing refund of \$3,804,316 and a refund due to incorrect payment terms of \$4191 for a total due of \$3,808,507.<sup>1</sup> Respondent's defective pricing claim is based upon the assumption that Westinghouse did not disclose the full range of discounts it had given to its non-governmental (commercial) customers as shown on numerous invoices to those customers.

Viacom, Inc., the successor in interest to Westinghouse Furniture Systems, filed a timely appeal at this Board from the contracting officer's decision.<sup>2</sup> We denied appellant's motion for summary relief because of the presence of disputed issues of fact. *Viacom, Inc. v. General Services Administration*, GSBCA 15871, 04-2 BCA ¶ 32,639. We conducted a five-day hearing between September 14 and October 5, 2004. The parties have submitted briefs, reply briefs and sur-reply briefs.

The Board grants this appeal in substantial part. We conclude that respondent has failed to meet the burden of proof the law requires to establish a defective pricing claim. The reasons for respondent's failure--and our conclusion that follows from that failure--are disparate and numerous. In arriving at its determination that appellant had defectively priced the contract, respondent partially relied upon appellant's discounts shown on Westinghouse's commercial invoices for systems furniture created after December 19, 1984--the date of the parties' agreement on price--when the relevant invoices were those in existence on or before December 19, 1984.

Additionally, respondent failed to establish that the commercial invoices it did rely upon, whether timely or not, were for complete systems furniture workstations, as opposed

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<sup>1</sup> The contracting officer did not assess the end of contract discount refund for \$484,386, crediting Westinghouse's argument that Westinghouse had not offered such a discount.

<sup>2</sup> Westinghouse, through its Knoll Division, had been in the furniture business. In 1994 or 1995, Viacom acquired Westinghouse and thus became the successor in interest to Westinghouse's furniture division. At the beginning of 1996, Viacom sold the furniture division to Warburg-Pincus. Transcript at 663. Since Westinghouse Furniture Systems was the contractor, we refer to either appellant or "Westinghouse" interchangeably.

to invoices for workstation components. Only complete workstations were available under contract 76574. Furthermore, many of the commercial invoices the Government relied upon for its allegations of undisclosed discounts were not for the line of systems furniture available under the contract, but were for separate lines not offered under the contract. In short, commercial invoices dated on or before December 19, 1984 for complete workstations of the proper line of systems furniture which showed discounts greater than those negotiated for contract 76574 would have been relevant to establish defective pricing. The Government did not establish to our satisfaction that the invoices upon which it relied for its claim of defective pricing so qualified.

Respondent's claim of defective pricing is substantially based upon government orders above the \$75,000 basic order limitation (BOL) of the contract. According to respondent, those orders did not reflect the alleged larger and unstated discounts Westinghouse supposedly granted to its commercial customers. However, respondent did not establish that in November or December of 1984, when contract price negotiations took place, respondent's contract negotiator negotiated for discounts for above BOL orders. In fact, when the price negotiations took place, the solicitation contained only a maximum order limitation (MOL), not a BOL. The BOL and an elaborate "requote" procedure to allow using agencies to place above-BOL orders were added in a major solicitation amendment, apparently without price re-negotiation with the vendor. Respondent has not established the essential element of reliance by the Government on the allegedly defective data for above-BOL orders.

Finally, respondent's calculation of the defective pricing refund is based upon the assumption that if the contract negotiator had known of the alleged defective pricing, he would have negotiated identical discounts for the follow-on contract for systems furniture. The follow-on contract had different estimated quantities, different price breaks for operation of discounts, and different ordering limitations. The Government has not convinced us that use of the discount percentages in the follow-on contract was reasonable in calculating any damages.

Based upon the combination of those reasons, we cannot conclude that the Government has established its defective pricing claim either in whole or in part. We thus grant the appeal in substantial part and deny the defective pricing claim. However, we grant the Government's claim of \$4191 for improper payment terms.

Findings of Fact

The solicitation

1. Respondent issued solicitation no. FNP-C7-1483-N (“solicitation”) on March 23, 1984, for FSC Group 7110 - Systems Furniture - Part II-Section E. Appeal File, Exhibit 1 at 1.

2. The solicitation contained a “Summary,” which stated, in pertinent part,

Acquisition of systems furniture by Government agencies will continue to be 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 order 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. 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.

.....

(THE ABOVE SUMMARY IS INCORPORATED AND MADE A PART OF THIS SOLICITATION FOR OFFERS)

Appeal File, Exhibit 1 at 4.

3. The solicitation originally contained a MOL clause 124A (3/76) that provided:

(All dollar amounts are exclusive of any discount for prompt payment.) The total dollar value of any order placed under this contract shall not exceed \$75,000. The contractor agrees not to accept or fulfill any orders in violation of this clause. Violation may result in termination of the contract pursuant to the clause of the General Provisions entitled “Default”.

Appeal File, Exhibit 1 at 14.

4. The solicitation contained a Multiple Awards clause that stated, in pertinent part:

The Government may make multiple awards for articles or services listed herein to those responsible offerors whose offers, conforming to the request for proposal, will be most advantageous to the Government, taking into consideration the multiplicity and complexity of equipment of various manufacturers and the differences in performance required to accomplish or produce required end results, production and distribution facilities, price, compliance with delivery requirements and other pertinent factors. Offerors are advised that ordering agencies will be subject to the following instructions:

“Where orders are placed at other than the lowest delivered price available for the type of article or service required, the ordering agencies shall justify such orders as provided in FPMR [Federal Property Management Regulation] 101-26.408.”

Appeal File, Exhibit 1 at 17.

5. The signed offer on the solicitation contained a Basis for Price Negotiation clause that stated in pertinent part:

(a) General. Prices for items to be awarded under this solicitation normally will be negotiated on the basis of discounts from the offeror’s established catalog or market prices. Pricing data for the purpose of such negotiation shall be submitted and certified as hereinafter provided.

(b) Established catalog or market prices. If the prices offered under this solicitation are based on established catalog or market prices, a certification is required that such prices are established catalog or market prices for commercial items as defined in FPR [Federal Procurement Regulation] 1-3.807-1(b)(2).

(c) Certification of established catalog or market prices. Offeror certifies that to the best of his knowledge and belief:

(1) The price(s) quoted in this proposal is based on established catalog or market prices of the commercial items as defined in FPR 1-3.807-1(b)(2), in effect on the date of the offer or on the dates of any revisions during the course of negotiations.

(2) Substantial quantities of the items have been sold to the general public at such prices.

(3) All of the data (including sales data) submitted with this offer are accurate, complete, and current representations of actual transactions to the date when price negotiations are concluded.

NAME AND TITLE OF PERSON AUTHORIZED TO SIGN OFFER

(Type or print)

M. C. Sardi, Business Unit Manager \_\_\_\_\_

SIGNATURE \_\_\_\_\_ [SIGNED] \_\_\_\_\_

FIRM \_\_\_\_\_ Westinghouse Furniture Systems \_\_\_\_\_

DATE OF EXECUTION \_\_\_\_\_ 5-21-84 \_\_\_\_\_

CAUTION: False statements may subject the offeror to penalties provided by statute and regulations.

(d) Price reduction for defective pricing data. If subsequent to 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 offeror's "Certificate of Established Catalog or Market Price", the contract shall be modified in writing to reflect such adjustment. Failure to agree on such a reduction, subsequent to a "final decision" by the contracting officer in this matter, shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause of the contract.

(e) Access to records. By submission of this proposal, the offeror grants to the contracting officer, or his authorized representative, the right to examine, for the purpose of verifying the (1) statements made in the above "Certificate of Established Catalog or Market Price" or (2) cost or pricing data (including computations and projections) submitted in connection with the "Certificate of Current Cost or Pricing Data" (see f, below), those books, records, documents, papers, and other supporting data which involve transactions related to this proposal which will permit adequate evaluation and verification thereof.

(f) Cost or pricing data.

(1) If it is determined by the Government that the price(s) quoted under this solicitation is not based on established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulations, the offeror shall submit in writing cost or pricing data in support of the proposed price. (For definition of "cost or pricing data", see FPR 1-3.807-3.)

(2) The offeror shall certify, by use of the certificate in FPR 1-3.807-4, that to the best of his knowledge and belief the cost or pricing data submitted in accordance with the above is accurate, complete, and current. The applicable clauses in FPR 1-3.814 are incorporated by reference in this contract.

Appeal File, Exhibit 1 at 18.

6. The solicitation further contained, in the Basis for Price Negotiation clause, an incorporation by reference of clauses in FPR 1-3.814 which state, in pertinent part,

**PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA**

If any price, including profit or fee, negotiated in connection with this contract or any cost reimbursable under this contract was increased by any significant sums because:

(a) The Contractor furnished cost or pricing data which was not accurate, complete and current as certified in the Contractor's Certificate of Current Cost or Pricing Data;

....

(d) The Contractor or a subcontractor or prospective subcontractor furnished any data not within (a), (b), or (c) above, which was not accurate as submitted; the price or cost shall be reduced accordingly and the contract shall be modified in writing as may be necessary to reflect such reduction. However, any reduction in the contract price due to defective subcontract data of a prospective subcontractor when the subcontract was not awarded to such subcontractor, will be limited to the amount (plus applicable overhead and profit markup) by which the actual subcontract, or actual cost to the Contractor if there was no subcontract, was less than the prospective subcontract cost

estimate submitted by the Contractor: Provided, the actual subcontract price was not affected by the defective cost or pricing data.

Appeal File, Exhibit 1 at 18.

7. The solicitation contained an Economic Price Adjustment clause, stating, in pertinent part:

This clause is applicable to commercial products or items sold in substantial quantities to the general public contained in multiple award Federal Supply Schedule contracts for which contract prices were negotiated on the basis of an established commercial pricelist.

Price adjustments include price increases and price decreases. Adjustments will be considered as follows:

(a) Price decreases. Contractors shall submit price decreases anytime during the contract period in which they occur. Price decreases will be handled in accordance with the provisions of the price reduction clause.

(b) Price increases. Contractors may request price increases under the following conditions:

(1) Increases resulting from a reissue or other modification of the contractor's commercial catalog/pricelist that was used as a basis for the contract award.

(2) Only three increases will be considered during the contract period.

(3) Increases are requested after the first 30 days of the contract period and prior to the last 60 days of the contract period.

(4) At least 30 days elapse between requested increases.

(c) The aggregate of increases in any contract unit price under this clause shall not exceed 10 percent of the original unit price. The Government reserves the right to raise this ceiling where changes in the market conditions during the contract period support an increase.

(d) The following material shall be submitted with the request for a price increase:

(1) A copy of the commercial catalog/pricelist showing the price increase and the effective date for commercial customers.

(2) Discount Schedule and Marketing Data regarding the contractor's commercial pricing practice relating to the reissued or modified catalog/pricelist, or a certification that no change has occurred in the data since the initial negotiation or subsequent submission.

(3) Documentation supporting the reasonableness of the price increase.

(e) The Government reserves the right to exercise one of the following options:

(1) Accept the contractor's price increase as requested when all conditions of (b), (c), and (d), above, are satisfied;

(2) Negotiate more favorable discounts from the new commercial prices when the total increase requested is not supported; or,

(3) Remove the product(s) from contract involved pursuant to the Cancellation clause of the contract, when the increase requested is not supported.

(f) The contract modification reflecting the price adjustment shall be effective 10 calendar days after receipt of notification from the contractor that the new catalogs/pricelists have been mailed to the addresses previously furnished by the contracting officer; Provided, that in no event shall such price adjustment be effective prior to the effective date of the commercial price increases. The increased contract prices shall apply to delivery orders issued to the contractor on or after the effective date of the contract modification.

Appeal File, Exhibit 1 at 20-21.

8. The solicitation contained a "Catalogs and/or Pricelists" clause, stating, in pertinent part,

(a) Submission with offer.

.....

(4) The offeror is required to show in detail on the attached "Discount Schedule and Marketing Data" sheets the discounts being offered the Government and all other classes of customers.

(5) If the terms of sale appearing on the commercial catalogs or pricelists on which an offer is based are in conflict with the terms of this solicitation, the latter shall govern.

(b) Approval by the Contracting Officer: Upon award of contract, the Contracting Officer will return to the contractor a copy of the contract and one copy of the catalog or pricelist as accepted by the Government. The contractor will also be furnished a list of addressees who are to receive catalogs or pricelists in accordance with (e), below, and information for a cover sheet or insert to be reproduced and distributed as outlined in (c), below.

....

(d) Certification by Contractor.

(1) The contractor s[h]all furnish the contracting officer 10 copies of the published catalogs or pricelists within 15 calendar days prior to the beginning of the contract period or within 30 calendar days after receipt of award or notice.

(2) The catalogs or pricelists furnished the Contracting Officer shall be accompanied by a certification signed by the contractor essentially as follows:

I HEREBY CERTIFY THAT THE ITEMS, DISCOUNTS, PRICES, TERMS, AND CONDITIONS IN THE CATALOGS OR PRICELISTS FURNISHED TO THE CONTRACTING OFFICER AND DISTRIBUTED TO ORDERING OFFICERS ARE IDENTICAL TO THOSE ACCEPTED BY THE GOVERNMENT AND THAT ONLY THOSE PRODUCTS ACCEPTED BY THE GOVERNMENT ARE INCLUDED IN THOSE CATALOGS OR PRICELISTS.

Appeal File, Exhibit 1 at 23.

9. The solicitation identified the supplies to be delivered as special item number (SIN) 512-1, as follows, in pertinent part:

## SYSTEMS FURNITURE

512-1 - System of integrated components, characterized by the utilization of vertical space which creates a comprehensive office furniture environment by providing the ability to create a variety of workstation configurations. Systems include work surfaces, storage units, partitions (powered and/or nonpowered), files, and task lights. Other items which may be included are ambient lights, blackboards, tackboards, machine stands, and other items necessary for the integration of the systems product line.

The solicitation also described design and layout services to be supplied, after placement of the order for systems furniture:

Services below are to be utilized only after placement of an order.

512-2 - Design/Layout Services.

....

512-1 \_\_\_\_\_\* \_\_\_\_\_ % Discount from List Price

512-2 \_\_\_\_\_per Hour

Appeal File, Exhibit 1 at 40 (items specific to Westinghouse's offer omitted).

10. The solicitation contained a sheet entitled "Discount Schedule and Marketing Data For Commercial Items" (DSMD), which stated, in pertinent part,

INSTRUCTIONS TO OFFERORS:

Part A. General Information applies to GSA Special Item Number (SIN) 512-1.

Part B. Separate discount and sales information for SIN 512-1.

Information required by each space must be furnished. If not available, indicate by "N/A". Information furnished in Part B relating discounts, allowances, and sales information will be treated as "CONFIDENTIAL" by

the Government except for final prices and discounts awarded by the Government. Failure to provide current, accurate, and complete information under Parts A and B may subject the offeror to liability for refunds pursuant to the price reductions of Defective Pricing Clauses.

Appeal File, Exhibit 1 at 42.

11. The DSMD sheet also requested:

PART B - DISCOUNT AND SALES INFORMATION

....

II. DISCOUNTS. The following concessions are offered to GSA for delivery FOB destination.

(a) Discount offered on the above GSA Special Item Number is \*        % from the pricelist dated \_\_\_\_\_, plus prompt payment discount, as stated on the first page of this solicitation (additional details may be entered below or attached). If discounts vary, show discounts on pricelist.

....

III.a. List below the best discount and/or concessions resulting in the lowest net price (regardless of quantity and terms and conditions) to other than authorized GSA contract users from the pricelist for the same or similar products or services offered to the Government under this solicitation. For any category of customer, on a separate sheet, outline the criteria, i.e., volume of purchase, etc., governing the discount shown. If bill-back is one of the criteria, give percentage/\$ volume where the bill-back provision has actually been exercised.

Appeal File, Exhibit 1 at 42-44. The solicitation then presented a seven row and seven column table. In the table, offerors were to state in percentages: (1) regular discounts; (2) quantity discounts; (3) aggregate discounts (not stated as a percent); (4) commissions to other than employees; (5) prompt payment; (6) free on board (FOB) point of origin; and (7) "other" for the following customers: (1) dealers/retailers, (2) distributors/wholesalers, (3) educational institutions, (4) state, county, city and local governments, (5) original equipment manufacturers, (6) other (e.g., national accounts, and sales agreements), and (7) if a dealer, a discount from the manufacturer's pricelist. Appeal File, Exhibit 1 at 45.

12. The solicitation required offerors to provide a letter from the applicable manufacturer outlining the discount arrangements for the offer and those that apply for the items offered with commercial dealers. Appeal File, Exhibit 1 at 44.

13. In the next part, the solicitation asked:

III. b. Do you have in effect for any customer, other discounts and/or concessions including, but not limited to, the following, which result in lower net prices than those offered the Government in this offer?

Yes\_\_No\_\_ rebates of any kind, including year-end of contract discounts?

Yes\_\_No\_\_ multiple quantity unit pricing plan?

Yes\_\_No\_\_ cumulative discounts of any type which cover items being offered?

Yes\_\_No\_\_ products(models)/services that may be combined for maximum discounts?

Yes\_\_No\_\_ others (specify)

If answer to any of the above is “Yes”, provide detailed explanation, including the value expressed as a percentage of the list price.

IV. (a) Are any of the models/products offered herein sold by the offeror under a different trade name(s)?

Yes\_\_\_No\_\_\_. If “yes”, explain and provide applicable pricelists.

(b) To your knowledge, are there identical products offered herein contained in any other GSA Federal Supply Schedule contract? Yes\_\_\_, No\_\_\_. If “Yes”, identify the product.

Appeal File, Exhibit 1 at 45.

14. Section V of the solicitation asked if offerors provided allowances for trade-ins, return/exchange goods, reduced prices on samples, demonstrator models, reconditioned items, or floor models. Appeal File, Exhibit 1 at 47.

15. Section VII of the solicitation asked offerors for total annual sales to the Government for the contract item and total annual sales to all entities for the contract item. Appeal File, Exhibit 1 at 48. Section VII also presented offerors with an eight-column, one row table, in which offerors were to state: (1) the contract item number, (2) total annual sales to the Federal Government, (3) the total annual sales to non-government customers, (4) the

total annual sales to non-government customers at other than catalog prices, (5) the total annual sales of columns 2 through 4, (6) the largest discount granted to any non-government customer, and (7) the largest discount at which the item was sold for comparable sales and quantities in column 2 (sales to the Federal Government) to any non-government customer. *Id.* Offerors were to state whether the discounts in column 6 or 7 were greater than the current offer under the solicitation. *Id.*

#### Westinghouse's discount schedule and marketing data

16. On May 21, 1984, Westinghouse, responding to the solicitation, submitted its offer, including a completed DSMD sheet in which Westinghouse disclosed discount and sales information about its commercial customers. Appeal File, Exhibit 1 at 1. From its commercial pricelist of July 8, 1983, Westinghouse disclosed 50% discounts to dealers and retailers and 52.5% quantity discounts to that class of customers. From that same pricelist, Westinghouse disclosed 63% quantity discounts to educational institutions and 50% regular discounts, between 51% and 66% quantity discounts to state and local governments, and 61% quantity discounts to original equipment manufacturers (OEM). Westinghouse also disclosed regular discounts of 40% and quantity discounts averaging 57% to others including national accounts and customers with special sales agreements. *Id.* at 44-45.

17. On its DSMD sheet, Westinghouse reported no rebates, no cumulative discounts, no products or services that were combined for maximum discounts, and no other discounts. Appeal File, Exhibit 1 at 45-46. Westinghouse did disclose that it gave reduced prices on samples, demonstrator models, reconditioned items, and floor models. *Id.* at 47.

18. Westinghouse stated on its DSMD sheet, in block 2, that its total annual sales for systems furniture, SIN 512-1, to the Federal Government was \$2,375,387, and in block three, that total annual sales to non-governmental customers at catalog prices less published discounts was \$80,624,613. Appeal File, Exhibit 1 at 49. In block 4, Westinghouse stated that total annual sales to non-governmental customers at less than catalog price was reported to be \$806.24. Westinghouse reported in block 5 total annual sales of \$83,000,000 for the contract item. In block six, Westinghouse reported that excluding contracts exceeding one million dollars in amount, the largest discount Westinghouse had granted to any non-government customer was 57.29%. In block seven, Westinghouse reported that the largest discount at which the item was sold for sales and quantities comparable to the total annual sales to the Government was a quantity of \$500,000 at a discount from 50% to 52.5%. *Id.* at 49.

19. In explanatory notes to its DSMD information, Westinghouse explained stated that its greatest discount of 66% from the July 8, 1983, pricelist for state and local government

customers was based upon a two-year sole source contract with the State of Michigan. Appeal File, Exhibit 1 at 51. Westinghouse did not mention volume requirements in connection with that discount. *Id.* Westinghouse stated it did business with one customer--American Sterilizer--in the OEM category. For the "other" category, Westinghouse stated that it offered discounts between 40% and 63% from its July 8, 1983, pricelist. Westinghouse explained that the discount for each customer in the other category was established on a case by case basis. The discount level depended on whether Westinghouse was a sole or preferred supplier, and customer loyalty as demonstrated by past sales. *Id.* at 52.

20. On May 21, 1984, Westinghouse's representative signed the certification specified in FPMR 3.807-4 (1984) that "all of the data (including sales data) submitted with this offer [were] accurate, complete and current representations of actual transactions to the date when price negotiations [were] concluded." Appeal File, Exhibit 1 at 18.

#### Negotiations regarding the DSMD sheet

21. The Government's contract negotiator, Mr. Mark Oakey, requested clarifications of pricing items in Westinghouse's offer. On November 19, 1984, Westinghouse's contract negotiator submitted a letter of clarification. The letter explained in pertinent part:

The following are the answers to questions raised concerning our offer, referenced as above.

.....

Price breaks for educational institutions are based on volume as follows: \$0-40,000-50%; \$40,001-200,000-\$52.5%; \$200,001-400,000-54%; \$400,001-800,000-55%; \$800,001-1million-57%; \$1 million-1.5million-60%; \$2 million and above-63%. The pricing is also based on exclusivity, which these contracts are.

Our OEM contract with American Sterilizer (AMSCO) is also tied to volume, and represents products not sold by Westinghouse other than through the agreement. The product is for hospital use only. Price to volume is as follows: \$0-10,000-50%; \$10,001-500,000-56%; \$500,001 and above-61%.

Appeal File, Exhibit 5.

22. At the hearing on the merits, the respondent's auditor, Mr. Richard L. Myer, confirmed that Westinghouse disclosed that it gave up to a 63% discount to national accounts and that Westinghouse's disclosure of 66% discounts to state and local governments was clear and was not associated with any volume requirements. Transcript at 246-47, 276-79, 282-83.

23. In a letter dated November 29, 1984, addressed to GSA, appellant's representative, Douglas B. Parker, responded, in pertinent part, to questions raised in a telephone conversation with Mr. Oakey, as follows:

The following should satisfy the questions raised in our telephone conversation of November 26, 1984, referenced above.

.....

Volume discounts offered by Westinghouse Furniture Systems to educational institutions, our OEM agreement, and all other contractual obligations are based on single orders only.

The Westinghouse Furniture System OEM contract with American Sterilizer involve[s] repackaging and/or modification of product which is sold under AMSCO trademark.

The largest discount granted any non-government customer of Westinghouse Furniture Systems (Block 6, Page 49): Quantity - \$6,000,000.00; Discount - 63%

The largest discount granted for comparable quantity (Block 7, Page 49) to the figure in Block 2, Page 49: Quantity -\$2,375,387; Discount - Not Applicable. Westinghouse has never had one single order of that quantity.

Appeal File, Exhibit 6. This last information eliminated the discount information stated on the DSMD sheet at block seven page 49. Transcript at 928-30.

24. During and after the exchange of correspondence, Mr. Oakey analyzed Westinghouse's prices, memorialized areas of Westinghouse's offer that needed clarification, and expressed his satisfaction with Westinghouse's response of November 29. Appeal File, Exhibit 4.

25. Mr. Oakey's analysis of Westinghouse's offer stated in pertinent part:

Areas Requiring Clarification

....

(3) Westinghouse states they offer some Design and Layout services free of charge and assist in the E-76 process. Letter dated 11-19-84 contains Westinghouse response.

(4) Under "allowances" (p. 47) Westinghouse indicates they do give reductions on samples and demonstrators, but it is such a small amount (\$806) it will be considered negligible. Since the Government only buys new supplies under this contract this will not be considered in negotiations.

....

Offer Analysis

Under Westinghouse's current contract with an MOL of \$500,000 they offer 52.5% basic discount; 3%-30 ppt [prompt payment]; and 1-4% volume discounts per \$100,000; aggregate 1/4% at \$250,000 of projected aggregate of \$500,0000 per year.

Current offer under consideration: SIN 512-1 (MOL = \$75,000 as basic negotiating level):

0-\$24,999 - 51% off list  
 25,000-50,000 - 52% off list  
 50,001-75,000 - 53% off list

Quick Ship: 0-\$10,000 - 50% off list  
 \$10,001 & over - 52.5% off list

PPT: 1% 20 days; FOB Destination

SIN 512-2: \$35-\$75 per hour

Aggregate 1/4% 250,001 - 500,000  
 1/2% 500,001 - 550,000

1% 500,000 +

Areas for clarification in the offer:

(1) Clarify what is being offered at what price under design and layout, SIN 512-2, and determine to what extent these services have been offered free.

(2) Determine what commercial pricing practice is on quick ship program.

(3) On pages 44-45, dealers receive 52.5 at \$150,000 level. Clarification will be requested on:

a. What level does 63% take effect for educational institutions?

b. What level does the 51-66% take effect for local Governments?

c. What level does 61% take effect on OEM's?

d. Obtain largest discount, not average on national accounts and explanation of what level they take effect.

(4) On page 49, information provided in columns 6 and 7 conflicts with the data on pages 44-45. Obtain clarification and revised figures.

See letter dated November 29, 1984 for Westinghouse response to the above questions. When answers to the above have been obtained the information and data contained in the offer will be used to develop negotiation goals.

[Handwritten] Westinghouse reports \$29,200 worth of sales under 512-2 Design and Layout.

Appeal File, Exhibit 4. There is a dispute of fact as to the highest discount Westinghouse revealed on its DSMD sheet and in the explanatory notes. GSA says the highest discount revealed was 52.5%, while Westinghouse says the highest discount was 66%. *Compare Respondent's Brief at 81 with Appellant's Reply Brief at 60.* We find as fact, based upon the DSMD sheet and explanatory notes, that Westinghouse disclosed discounts as high as 66% to the State of Michigan and 63% to national account customers. *See Findings 16, 19, 22.*

Government's pre-negotiation memorandum

26. On December 12, 1984, Mr. Oakey wrote a pre-negotiation memorandum which stated, in pertinent part:

Solicitation: FNP-C7-1483-5-24-84

Offeror: Westinghouse Furniture Systems

Represented by: Douglas Parker, Manager, Government Sales

GSA Contract Negotiator: Mark Oakey [telephone number]

Marketing Category: Manufacturer selling direct to the Government even though he has dealers

Estimated Value: \$4,300,000 (3 year contract)

.....

**GOALS AND OBJECTIVES:**

High Objectives: For the purpose of this negotiation, due to the established basic order discount level (\$75,000) the Government is receiving equal or better discounts than all categories of customers identified by Westinghouse at the \$75,000 level, except the discount granted their OEM which is 56%. While the Government is negotiating a single contract for a three year period that is worth over an estimated \$4.3 million, the established basic order discount level of \$75,000 mitigates [sic] against seeking [discounts] equal to the largest discount granted (63-66%). The discounts granted to customers in excess of 53% offered the Government are all for single orders in excess of \$75,000. Therefore, the high objective will be to negotiate a 56% basic discount at the \$75,000 level, which will ensure that the Government is equal to any category of customer at the basic order volume level.

The requotation procedure above the \$75,000 will add some expenses to Westinghouse in performing successfully under this contract, which will be offset by the larger volume that can be expected to be brought in under this schedule (buys that previously would have been over the MOL). Obtaining a 56% basic discount will allow Westinghouse a certain amount of maneuverability above the \$75,000 level, which is the intent of the requotation procedure.

The purpose of the method of purchase change under this schedule was to allow vendors the flexibility to quote their “best” discount on a job specific basis. The added expense of the requotes on a job-by-job basis will be offset by the workstation mock-up evaluation being performed up front by GSA rather than the offeror being required, at the agency’s discretion, to submit workstations for evaluation on a job-by-job basis.

1. In view of the foregoing, negotiations will attempt to achieve a basic 56% discount. If this is not possible, attempt to get a 54-55-56% based on the categories of volume breakouts contained in the Westinghouse offer.

2. Additionally,

a. Get additional 2% PPT [prompt payment] to match current contract terms.

b. Negotiate in Clause 390 and establish the relationship required by that clause.

....

#### Fall Back Position

The fall back position will be to accept the offer as it stands on 512-1 should additional information come to light on the Westinghouse relationship with their OEM.

The concession on the warranty will not be removed as part of the fall back. If the concession is not forthcoming, Westinghouse will not receive credit for additional warranty.

Appeal File, Exhibit 7. Mr. Oakey noted in his memorandum that the solicitation closed on May 24, 1984, and that two amendments were issued. *Id.*

27. On December 19, 1984, the Government held price negotiations with Westinghouse. Appeal File, Exhibit 8.<sup>3</sup> Westinghouse proposed a 51% discount for orders less than \$24,499, a 53% discount for orders between \$25,000 and \$50,000, and a 55%

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<sup>3</sup> On August 30, 2004, the parties submitted stipulations, one of which stated that “Contract Negotiations took place in December 1984.” Stipulations ¶ 5.

discount for orders between \$50,001 and \$75,000 list. *Id.* Mr. Oakey stated in his price negotiation memorandum (PNM) of January 23, 1985:

Given that the basic ordering level for this contract is \$75,000, Westinghouse's offer makes the Government their most favored customer when considered with their additional warranty coverage at the \$50,000 + level. All other categories of customers that exceed [the] 55% discount are for commitments [sic] considerably larger than the anticipated contract.

The 56% discount offered to the OEM is not attainable because the discount typically applies to much larger volume orders than the \$75,000 BOL. The OEM also repackages/alters the material.

....

Acceptance of the Westinghouse offer partially meets the stated objectives . . . and results in the Government receiving advantageous pricing, while leaving Westinghouse a margin in which to offer additional concessions above the \$75,000 BOL.

*Id.* There is a dispute of fact as to when price negotiations were concluded. Based upon the record of negotiations, we find as fact that price negotiations were concluded on December 19, 1984, and that the price discounts agreed upon during the negotiation session were reflected in Mr. Oakey's memorandum of January 23, 1985.

28. At the hearing on the merits of this appeal, the contracting officer, Ms. Helen Zivkovic, and the contract specialist, Ms. Theresa Elbin,<sup>4</sup> acknowledged that the record did not indicate that the parties negotiated discounts for sales over the \$75,000 MOL. Appeal File, Exhibit 8; Transcript at 286-87, 332-33, 548-49, 1072-73.

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<sup>4</sup> Ms. Elbin's last name at the time was Elmendorf, which frequently appears in the contract records.

Solicitation amendment three

29. On June 26, 1985, Westinghouse acknowledged receipt of Government-issued amendment three to the solicitation. Appeal File, Exhibit 3.<sup>5</sup> The first page of the amendment provided in pertinent part:

The above numbered solicitation is hereby amended:

1. Delete paragraph 1, page 4, "Summary".
2. Delete clause 124A, "Maximum Order Limitation," page 14; Delete clause 694, "End of Contract Additional Discounts Applicable to Aggregate Sales," page 28; Delete Clause 694, "Open Season for Consideration of New Offers," page 29.
3. The following clauses are hereby incorporated: I-FSS-684 and I-FSS-694, and I-FSS-390 copies attached.
4. The contract period is hereby amended to be July 1, 1985, or date of award if later, to June 30, 1988.
5. The attached provisions are hereby incorporated.

Appeal File, Exhibit 10 at 1. As noted above, the first paragraph of the summary that was deleted provided that successful offerors could not accept orders not accompanied by a letter of authorization from GSA. Finding 2.

30. The third and fourth pages of amendment three contained a Price Reductions clause that provided, in pertinent part:

General. This 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 is predicated will be identified at the conclusion of negotiations.

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<sup>5</sup> GSA's contract specialist could not provide the issue date of the amendment. Transcript at 1039.

b. Pricing Reductions to Customers Other Than the Federal Agencies.

(1) Prior to the award of contract, the contracting officer and the offeror shall reach an agreement as to the price relationship between the Government and the offeror's identified customer or category of customers upon which the contract award is predicated. This relationship shall be maintained throughout the contract period. Any change in the contractor's commercial pricing arrangement for the identified customer or category of customers which disturbs this relationship will constitute a price reduction.

(2) The contractor shall report all price reductions made during the contract period to the contracting officer along with an explanation of the conditions under which the reductions were made. Those reductions which do not disturb the Government's price position relative to the contractor's identified customer or category of customers will not be subject to the provisions of this clause. However, the information will be used in conjunction with the negotiations for the following contract period.

(3) If, after the conclusion of negotiations, the contractor (i) reduces the prices contained in the commercial catalog, pricelist, schedule, or other documents (or grants any more favorable terms and conditions) offered by the contractor and used by the Government to establish the prices with the contract; or (ii) reduces the prices through special discounts to the identified customer or category of customers upon which the award was predicated so as to disturb the relationship of the Government to that identified customer or category of customers, a price reduction shall apply to this contract for the remainder of the contract period, or until further reduced, or, in the case of temporary price reductions, for the duration of any price reduction period.

(4) This clause will not apply to contractor's firm fixed price Definite Quantity contracts with specified delivery in excess of the Maximum Order Limitation specified in the contract.

(5) The contracting officer may exempt from the application of this clause any sale at a price below the contract price if caused by error in quotation or billing provided adequate documentation is furnished by the contractor immediately following the discovery of the error.

c. Price Reductions to Federal Agencies. (This paragraph does not apply to NonSchedule ADP [automatic data processing] /Communications/Teleprocessing Services contracts entered into with Federal agencies.)

Except for temporary “Government-only” price reductions described below, if, after the effective date of this contract, the contractor reduces the price of any contract item to any Federal agency and the sale falls within the contract maximum order limitation, an equivalent price reduction shall apply to all subsequent sales of the contract time to Federal agencies for the duration of the contract period or until the price is further reduced. The contractor may offer to the contracting officer a temporary “Government-only” price reduction which has a duration of 30 calendar days or more, except during the last month of the contract period when any such offer must be for the remainder of the contract period.

d. Effective Dates and Notifications. (This paragraph does not apply to NonSchedule ADP/Communications/Teleprocessing Contracts entered into with Federal Agencies.)

(1) Any price reduction pursuant to b. above shall be effective for the Government at the same time as the price reduction for the other customer. Any price reduction pursuant to c. above shall be effective at the time of initial purchase in the Federal agency (Government) at the reduced price, except in the case of a temporary “Government-only” price reduction which shall be effective at the time of acceptance by the contracting officer. The contractor shall invoice at such reduced price and indicate thereon that the price reduction is pursuant to this Price Reduction Clause until such time as this contract is modified.

(2) The contractor shall notify the contracting officer in writing of any price reduction as soon as possible but not later than 10 calendar days after the effective date. Failure to give timely notice shall require that such price reduction (including temporary price reductions) apply to the contract for the duration of the contract period, or until the price is further reduced, and may constitute a basis for termination of the contract as provided in the Default clause of the contract.

e. Contractor’s Statement of Price Reductions. (This paragraph does not apply to NonSchedule ADP/Communications/Teleprocessing Services contracts entered into with Federal agencies.)

The contractor shall furnish within 10 calendar days after the end of the contract period a statement certifying either (1) that there was no applicable price reduction; or (2) that any price reduction was reported to the contracting officer. For each reported price reduction, the contractor shall show the date when the contracting officer was so notified.

Appeal File, Exhibit 10 at 3-4.

31. The fifth page of the amendment contained a section entitled "Procurement Methodology," which stated in pertinent part:

Resultant contracts include a completely revised procurement methodology. A summary of this methodology and the procedures to be utilized by using activities when filing 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 the bid prices received under the ["Request for Quotes." Agencies are being instructed not to request mockups on the requote projects since the GSA evaluation scoring is to be used int [sic] 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 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.

A copy of FPMR E-81 is attached and incorporated into this solicitation. All other terms and conditions remain the same.

Appeal File, Exhibit 10 at 5. Mr. Myer admitted that after the publication of amendment three, re-opening negotiations on discounts might have been a good idea. Transcript at 336.

32. FPMR E-81 was a temporary regulation which was intended to “set forth basic policy concerning the acquisition of systems furniture” by federal executive agencies. Appeal File, Exhibit 10 at 7 ¶ 1. The temporary regulation did not mention pricing discounts above the \$75,000 BOL. The regulation required GSA’s Federal Supply Service (FSS) to issue guidance to agencies concerning the acquisition of systems furniture, *id.* at 7 ¶ 8, and provided various approval authorities within the Department of Defense depending on whether the orders were \$500,000 or below, or above that amount, *id.* at 7 ¶ 8(b).

#### Contract award

33. On May 17, 1985, Westinghouse submitted a new pricelist dated May 1, 1985. Appeal File, Exhibit 9. The Government awarded Westinghouse contract 76574 on July 1, 1985, for the period July 1, 1985, through June 30, 1988. The contract was signed by the contracting officer, Ms. Shirley Wilson. Upon contract award, a Westinghouse representative signed block 22 of the award document. Block 22 provided in pertinent part:

Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and any continuation sheets for the consideration stated herein.

*Id.*, Exhibit 13. Block 22 refers to consideration for delivered items and does not mention price negotiations or discounts. *Id.*

34. The contract provided for the supply of systems furniture; design and layout services at \$45 per hour; installation, to be negotiated by the order; and post-installation

support, to be negotiated by the order. Appeal File, Exhibit 13. The award incorporated Westinghouse's letters of November 19 and 29, 1984, and May 17, 1985. *Id.* The award document stated that "[f]or the purposes of price reductions, this award is predicated on all classes of customers. If discounts/concessions are offered and the order falls within the BOL (\$75,000) of this contract, the Government will be due an equivalent discount."<sup>6</sup> *Id.* No discounts had been negotiated for orders above the basic order limitation (BOL), and the discounts that had been negotiated only applied to orders within the BOL. Transcript at 332, 1072-73. The estimated value of the contract was \$4.3 million dollars. Appeal File, Exhibit 13.

35. Mr. Myer acknowledged that under contract 76574, "systems furniture" consisted of all of the components needed to build a workstation, including panels, components, desktops, cabinets, and filing drawers. Transcript at 212-13. Appellant's witness, Mr. Steven Robinson, who was Westinghouse's federal sales manager during the last eight months of the contract, defined systems furniture under the contract as combinations of components which are hung on panels. Systems furniture did not involve free-standing furniture. *Id.* at 588. Mr. Robinson testified that a workstation of systems furniture required four panels, three work surfaces, a couple of pedestal drawers, brackets to connect the panels and components, and perhaps storage units above and below the work areas. *Id.* at 603. Mr. Myer agreed with Mr. Robinson that a workstation needed panels on which to hang components, but did not agree with Mr. Robinson as to the number of panels needed to make up a workstation. *Id.* at 753-55.

36. As indicated in Westinghouse's published Federal Supply Schedule catalog, under contract 76574 Westinghouse supplied systems furniture of the Wes-Group brand. Appeal File, Exhibit 96; Transcript at 608. Under contract 76574, Westinghouse offered six types of prepackaged workstations: the NQS 100 series for secretarial/clerical work, the NQS 200 series and 300 series for professionals, the NQS 400 series for technical applications, the NQS 500 series for mid-management applications, and the NQS 500 series for high

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<sup>6</sup> On September 8, 1988, FSS issued an amendment to I-FSS-130, which provided that Multiple Award Schedule solicitations and resulting contracts that included requote procedures were required to have a clause giving contractors responding to requests for quotations three options: (a) quote new lower prices for the requirement, (b) quote the lowest price available under the contract, or (c) decline to participate on the requote. The amendment also provided that prices offered under the requote procedure that were higher than the lowest price already available under the contractor's current contract would not be considered. Appeal File, Exhibit 128 ¶ b(4). The instant contract did not have that clause. Transcript at 626-27.

management applications. Appeal File, Exhibit 96 at 5. Each series was catalogued with a list of components. For example, the NQS 300 thirty-inch series professional workstation consisted of the following components:

Quantity	Catalog Number	Description
1	WC630 S/L	Non-cantilevered work surface
1	DC22QS	Box drawer
1	DD22QS	File drawer
1	CFF36 or CFM 36	Pencil tray
1	CFF72 or CFM72	Flipper cabinet top & front assembly
1	NCFFD36 or NCFRD36	Flipper cabinet top & front assembly
1	CS36	Full front shelf assembly
1	CS72	Full front shelf assembly
1	NCFD 36 or NCFMD36	Lateral file
1	OLTL36	Task light
1	OLTA60	Task light
1	PWR10K	Paper management kit
2 pair	ASD6	Shelf dividers

*Id.*, Exhibit 96 at 12. Each workstation came with the support panels necessary to hang the workstation. *Id.* The price list specified a unit list price for each workstation configuration. For example, the unit list price for one NQS 300 series professional station was \$6355 for “one station,” \$10,630 for a “two station cluster,” and \$18,901 for a “four station cluster.” *Id.*

37. Westinghouse made three different and distinct lines of systems furniture, called Wes-Group, ASD, and Wes-Tech, respectively, which appealed to different customers, much like the differentiation between a Honda Accord and a Honda Civic. Transcript at 592-93. Westinghouse’s federal sales manager testified that only Westinghouse’s Wes-Group brand

of systems furniture was covered under the contract. *Id.* at 597, 609. Mr. Myer stated that Westinghouse's ASD line of systems furniture was not covered under the contract and testified that any commercial sales of ASD furniture would not be relevant for pricing purposes of this contract. Transcript at 231-32.

38. On October 19, 1987, the contracting officer prepared a memorandum to all Federal agencies and furniture schedule contractors which reminded using agencies of the intent and purpose of the FSS FSC Group 71, Part II, Sections E & systems and modular furniture contracts. The contracting officer stated that the systems furniture contract:

[i]s designed to respond to the needs of Federal agencies for the purchase of systems and modular furniture workstations and related design and installation services.

....

With the exception of Special Item Number (SIN) 512-9 (Lateral Files), the schedule is not and has never been intended as a source for the purchase of individual component items (e.g. panels, task tables, mobile pedestals, etc.) Agencies with a need for specific component items, as opposed to workstations have been instructed to utilize one of the following Federal Supply Schedules: [Other schedule contracts then listed].

....

All contractors under Federal Supply Schedule FSC Group 71, Part II, Sections E & G are hereby reminded that acceptance of purchase orders under their contracts shall be limited to requirements for complete workstations, as well as related design and installation services. Acceptance of orders for other than workstations could result in cancellation of the subject contract.

Appeal File, Exhibit 108. Based on guidance to federal agencies and other memoranda, Westinghouse understood that contract 76574 covered only complete workstations. Transcript at 609.<sup>7</sup>

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<sup>7</sup> In the price analysis to the successor contract to contract 76574, the contract analyst stated that purchase of individual components of systems furniture was prohibited since, under the schedule, systems furniture had to be purchased as complete workstations. Appeal File, Exhibit 54 at 8-9.

Government guidance to agencies on ordering under the systems furniture schedule contracts and requote procedure

39. In accordance with FPMR E-81, GSA issued a Systems Furniture Acquisition Guide for federal agencies explaining ordering procedures under systems furniture schedule contracts. Appeal File, Exhibit 91. The guide explained that for requotes above the \$75,000 BOL, agencies were to use a competitive procedure for determining which vendor was to receive an order. *Id.*

40. To order under the requote procedure, agencies were to send a quotation package containing, among other items, the GSA Standard Form 18, the prototypical workstation package, floor plans, delivery and installation schedule, installation conditions, design time and hourly design rate, and specifications including the base specification within the schedule contract and any other specification over and above the base specification. Appeal File, Exhibit 91 § III. The Standard Form 18 asked for unit prices, a description of the supplies and services to be provided, quantity, and the amount. *Id.*, Exhibit 142. Westinghouse's Mr. Robinson, who responded to requests for quotations in his capacity as a federal sales manager for Westinghouse, testified that the Standard Form 18 did not include any notice of what level of prices or discounts the vendors were expected to quote. Transcript at 615-16.

41. Agencies were to conduct a technical review of contractors' responses to the requote package and to perform a cost technical trade-off to determine the successful vendor for a quote. Agencies were to multiply the technical score--stated in decimal format--by the price, derive the product of that calculation, and then add the quoted price to the resulting product. The vendor having the lowest number would be deemed the evaluated low vendor and would receive the order. Appeal File, Exhibit 91, § IV. Westinghouse's Mr. Robinson explained that the technical score was assigned by GSA at the beginning of the contract based upon a standard mock-up of systems furniture. Transcript at 623-24. Westinghouse earned what was considered a good technical score. *Id.* at 624. Nothing in the guide prohibited ordering agencies from awarding an order to a vendor who gave a price discount less than the largest discount available for orders below the \$75,000 BOL. Appeal File, Exhibit 91. Ms. Zivkoviche agreed that the guide did not require any minimum discount to be quoted by vendors to be obtained by procuring agencies. Transcript at 328-29, 550. Mr. Myer testified that it was up to the individual ordering agency to decide what level of discounts to accept on requotes. *Id.* at 478.

42. Ms. Elbin, the GSA contract specialist, testified that GSA knew that agencies were ordering above the BOL on contract 76574 but did not monitor their pricing practices unless GSA was conducting the procurement for them. She testified that "it was partly a problem of resources," but that unless a specific problem was brought to GSA's attention by an

ordering agency or a contractor, GSA did not become involved in the ordering against the contracts. Transcript at 978-79.

#### Pricing adjustments to contract 76574

43. In accordance with the discounts that were negotiated, Finding 27, the initial discount structure was 51%, 53%, and 55% from the commercial list price of May 1985, for orders between \$50 and \$24,999; \$25,000 and \$50,000, and \$50,001 and \$75,000, respectively. Appeal File, Exhibit 13. On June 16, 1986, Westinghouse requested a price increase of 3.2% for contract 76574. *Id.*, Exhibit 15. Westinghouse also had a contract to supply modular furniture, GS-00F-84244 (the 84244 contract), and in connection with that contract disclosed increased discounts of 53%, 55%, and 57%. *Id.* Westinghouse stated that “since these discounts cover products that are also offered under the subject contract for systems furniture . . . [Westinghouse] must offer them in its systems furniture Federal Supply Schedule Contract.” *Id.*

44. On August 28, 1986, the contract discounts increased by 2% when appellant’s request for a price increase of 3.2% was approved. Appeal File, Exhibits 15-16; Transcript at 116-17. Now the discounts were 53%, 55%, and 57% off of the commercial list price for orders between \$50 and \$24,999, \$25,000 and \$50,000, and \$50,0001 and \$75,000, respectively, but the price breaks, controlling which level of discount was applicable, were based on net prices, not list prices. Appeal File, Exhibit 16; Transcript at 116-17. A price increase was also requested for Westinghouse’s modular furniture contract.

45. On March 3, 1988, appellant requested a price increase of 3.8% for contract 76574 to reflect new prices to Westinghouse’s commercial customers as of February 1, 1988. Appeal File, Exhibit 50 at 15; Transcript at 631. GSA, thinking that the requested price increase applied to both contract 76574 for systems furniture and contract 84244 for modular furniture, requested an updated DSMD sheet for both contracts or certification that there had been no change in the data presented. Appeal File, Exhibit 50 at 12.

46. On March 24, Westinghouse responded with a DSMD sheet which, according to its terms, “applied to both [the systems furniture and modular furniture] contracts.” Appeal File, Exhibit 64. Westinghouse disclosed that it gave to educational institutions regular discounts of 63%, quantity discounts of 66% for orders above \$135,000, and 2%/20 quick ship discounts; to OEMs it gave 58% regular discounts; to “others” it gave 70% regular discounts; and to dealers and retailers it gave 50% regular discounts and up to 55% quantity discounts. *Id.* at 4.

Westinghouse's most favored customer identification was as follows:

Customer	Category	Discount	New Price Increase Effective Date
Intel	National Acct	59.0%	5/1/88
Michigan	State Gov't	66.5%	2/20/88
Idaho	State Gov't	58.5%	5/1/88
Univ. of California	Educational	63.0% or 66.0 <sup>8</sup>	5/1/88
Marriott Corp.	National Acc't	70.0% 50.0% <sup>9</sup>	2/1/88
Arlington County, VA	Local Gov't	69.0%	3/1/89

Appeal File, Exhibit 64 at 5.

47. On April 15, 1988, in response to Westinghouse's DSMD disclosure, GSA charged Westinghouse with violations of the modular furniture (not the systems furniture) contract's Price Reduction clause for "failure to provide accurate and timely disclosures of most-favored customer discounts." Appeal File, Exhibit 65; Transcript at 1009-10, 1012-13.<sup>10</sup> GSA said that consideration of the price increase was dependent upon renegotiation of the discount structure for both the systems furniture and the modular furniture contracts. Appeal File, Exhibit 65.

48. On May 3, 1998, Westinghouse proposed improved pricing for contract 76574 and modular furniture contract 84245 by withdrawing the requested 3.8% price increase and selling to the Government under the previous pricelist. Appeal File, Exhibit 27.

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<sup>8</sup> Discount level depended on volume of sales.

<sup>9</sup> The 70% discount was for panels or components and the 50% discount was for Wes-Tech products.

<sup>10</sup> Although the letter did not identify either the systems furniture or modular contract on which the Government alleged defective pricing, at the hearing on the merits, Ms. Elbin explicitly identified the modular furniture contract as the defectively-priced one.

49. Westinghouse and the Government negotiated to settle the alleged price reduction violation. Appeal File, Exhibits 28, 31, 34-36, 43-47, 50. The Government presented its proposed modification to Westinghouse and threatened a post-award audit if it did not accept the Government's terms. Appeal File, Exhibit 50; Transcript at 657-58. Ms. Elbin denied that the Government coerced Westinghouse with a post-award audit if it did not agree to the modification. Transcript at 1013-14. However, Ms. Elbin's contemporaneous notes indicate that audit avoidance was used as an incentive to convince Westinghouse to agree to the modification. Appeal File, Exhibits 21 at 5, 38.

50. On June 29, 1988, the parties signed a contract modification for both contract 76574 and modular furniture contract 84244 prepared by the then-contracting officer, Shirley Wilson and the contract specialist, Ms. Elbin, which required Westinghouse to pay a rebate of \$795,527.57 and withdraw its request for a price increase for the systems furniture and modular furniture contracts. Appeal File, Exhibit at 50. The contract modification recited the new discounts, listed above, for the University of California, Intel, and Michigan. The modification provided:

This agreement is applicable to the contracts referenced in Block 10A. This agreement constitutes full and final resolution of the specific discount disclosures identified on page 1 and the rebate amount is based on the certified contract sales total of \$20,398,143.

*Id.*

51. By the end of the contract term, agencies had placed orders totaling a net sales value of \$53,161,266 under contract 76574, Appeal File, Exhibit 56 at 3, more than twelve times the \$4,300,000 estimated in the solicitation, *see* Finding 26.

#### Follow-on contract for systems furniture

52. In July 1998, Ms. Elbin conducted a price analysis for the follow-on contract to contract 76574. Appeal File, Exhibit 54. There, in reference to contract 76574, Ms. Elbin noted that negotiated contract discounts did not apply to orders above the \$75,000 BOL because "those orders are purchased in accordance with the schedule's requote provisions." *Id.* at 2.

53. The BOL for the follow-on contract was \$125,000. Appeal File, Exhibit 76. The follow-on contract contained the following language that was not in contract 76574:

In responding to an RFQ (requote), contractors may either quote lower prices or quote the lowest price available under their Federal Supply Schedule Contract. Prices offered in response to an RFQ (requote) which are higher than the lowest price already available under the contractor's current Schedule contract will not be considered.

*Id.* at 3; Transcript at 623.

54. For the follow-on contract, respondent negotiated discounts of 61% and 64% from Westinghouse's commercial pricelist. Appeal File, Exhibit 109. The estimated value of the contract was \$80.6 million, which was almost twenty times greater than the estimated sales volume of \$4.3 million under contract 76574. *Compare* Appeal File, Exhibit 13, *with id.*, Exhibit 109. Additionally, the follow-on contract had two price breaks for the discounts, while contract 76574 had three price breaks. *Compare* Appeal File, Exhibit 13, *with id.* Exhibit 109. The basis for negotiating the 61% and 64% discounts for the follow-on contract was the 70% discount to the Marriott Corporation, which was not implemented until February 1988. *Id.*, Exhibits 63, 109 at 3; Transcript at 417.

#### Respondent's audit

55. On January 31, 1989, GSA's OIG notified Westinghouse that respondent would conduct a post-award audit of contract 76574. GSA advised Westinghouse that the primary purpose of the examination was to determine if the information offered and certified to "prior to the award" of contract 76574 was current, accurate, and complete and to determine if Westinghouse had adhered to the price reduction and end of discount clauses. Appeal File, Exhibit 84. Mr. Myer was assigned as the auditor in charge. *Id.* at 83.

56. GSA's OIG made its standard, generic request for information, which, aside from the insertion of the number for contract 76574 at appropriate points, was not specific to Westinghouse. Appeal File, Exhibit 84; Transcript at 757-60. The OIG requested sales records covered by the entire period for contract 76574, and sales records for the year prior to the contract award of contract 76574. Appeal File, Exhibit 84. The request for information was not limited to sales records for the item covered by the contract. Transcript at 757-60.

57. On or about April 21, 1989, after Mr. Myer had examined documents, but before preparation of a draft audit report, he held an exit interview with Westinghouse officials. According to the exit interview notes prepared by those officials, Mr. Myer focused on single order discounts which the auditor thought were significantly deeper than the Government discount but which were not disclosed prior to July 1, 1985. Appeal File, Exhibit 85. Mr.

Myer also believed that the discount disclosure in 1986 for the modular contract did not apply to the systems furniture contract. *Id.* Westinghouse officials disagreed with that view, and, if that was indeed Mr. Myer's impression, he was wrong. *See* Finding 46. We find as fact that the 1986 discount disclosure for the modular contract also applied to the systems furniture contract. According to the exit interview notes, Mr. Myer also focused on the disclosure of the 70% Marriott discount, which was disclosed in March 1988, and was effective in February 1988. *Id.*; Appeal File, Exhibit 85.

58. GSA's OIG issued the draft audit report on February 1, 1989. Appeal File, Exhibit 87. The draft audit report found defective pricing in contract 76574 because Westinghouse had granted single order discounts that were greater than the 63% discount it had disclosed and which was relied upon by GSA contracting personnel in awarding the contract. *Id.* at 8, 10. The body of the draft audit report focused on allegedly undisclosed discounts in orders to AMSCO and the State of Michigan, although other vendors were also identified as having received undisclosed discounts. *Id.* at 9. The audit report also concluded that based upon the negotiations for the follow-on systems furniture contract, the procuring contracting officer, Ms. Wilson, and the contract negotiator, Mr. Oakey, would have negotiated discounts of 61% and 64%. *Id.* at 13-14.

59. The draft audit report concluded that Westinghouse owed a defective pricing refund of \$3,804,316, end of contract discount of \$484,386, and prompt payment discount of \$4191, for a total of \$4,292,893. Appeal File, Exhibit 87 at 17. The draft audit calculated the defective pricing refund as follows. For Government orders between \$0 and \$128,205, the audit derived the commercial list price--\$26,944,271--and the list price at net, i.e., what the Government actually paid--\$13,321,129. The Government then calculated the price the Government would have paid had it been given a 61% discount (\$17,656,005) from the commercial list price of \$26,944,271. That price was \$11,288,266, which the audit called "net sales based on increased discount." The Government then subtracted \$11,288,266 from \$13,321,129 to obtain \$1,942,863 for the alleged defective pricing for orders between \$0 and \$128,205. *Id.* at 18.

60. The Government engaged in a similar calculation for Government orders above \$128,205 and, based upon the application of a 64% discount from the commercial list price applicable to Government orders, calculated an alleged defective pricing refund of \$2,315,333. The Government calculated an unstated discount of \$1967 for quick ship orders. The total defective pricing refund was \$4,260,153. Appeal File, Exhibit 87 at 18. The Government then gave Westinghouse a credit of \$455,837, which represented 57.3% of the sales during the period July 18, 1986, through April 30, 1988, that were allocable to contract 76574. *Id.* at 19. According to the Government, the total defective price refund that Westinghouse owed was \$3,804,316. *Id.* at 18.

61. Appendix V of the draft audit listed fourteen examples of orders, allegedly differing from Westinghouse's disclosures, from the State of Michigan, Commonwealth of Virginia, New Jersey Manufacturers Insurance Company, Burroughs, Rapaport Technology, Intel, Intel Electronics, Inc., Tektronic, and Digital Equipment Corp. Appeal File, Exhibit 87 at 22.

62. Mr. Myer did not review any of the conclusions in the audit report with Mr. Oakey, respondent's contract negotiator, or with Ms. Wilson, the contracting officer, and he did not know if anyone else from his office had done so. Transcript at 256-67, 260.

63. GSA's reviews of the draft audit continued as of June 18, 1993. On that date, noting the delay in the issuance of the final audit, Westinghouse provided GSA with an analysis of the draft report. Appeal File, Exhibit 88. Westinghouse noted that in its DSMD it disclosed discounts as high as 66%. *Id.* at 3. Westinghouse argued that the Government would not have obtained discounts of 61% and 64% with full disclosure by Westinghouse, as it did in the 1988 follow-on contract, because the basis for negotiation of the 1988 follow-on contract was the disclosure that year of a 70% discount to the Marriott Corporation, which was not effective until February 1988. *Id.* at 7. Westinghouse stated that the basis for negotiation of contract 76574 was the disclosure of the 63% national account discount, and that to re-price the contract on any other basis would be unfair. *Id.*

64. Westinghouse argued that since the basis for the negotiation of contract 76574 was the 63% discount for national accounts, the State of Michigan 66.5% discount was irrelevant, and, in any event, was "taken into full account" in negotiating the March 1988 price reduction settlement. Appeal File, Exhibit 88 at 9. Westinghouse maintained that since the Burroughs and Rapaport discounts were dated in late December 1984, they would not have affected discounts negotiated by GSA, because price negotiations had come to an end. *Id.* Westinghouse described other discounts listed in the draft audit as exceeding 70% as de minimis, or for mock-up or sample units that were disclosed as special discounts in its DSMD sheet, or for fabric or chairs not covered by the contract. *Id.* at 12-14.

65. On May 4, 1994, the GSA OIG issued a rebuttal report to Westinghouse's analysis. Appeal File, Exhibit 90. The GSA OIG issued its final audit report on September 4, 1998. *Id.*, Exhibit 56 at 3. In the final audit report, the auditors reviewed sixty-three national account agreements, two agreements with state and local governments, one agreement with an educational institution, and two agreements with government agencies. *Id.* The audit analyzed "the entire universe of sales data utilizing automated audit techniques." *Id.* The agreements, said the audit, originated before the July 1, 1985, contract award date, as well as during the life of the contract. *Id.*

66. The audit determined that the pricing information disclosed by appellant prior to the contract award was not current, accurate, or complete and that, as a result, the pricing for contract 76574 was based on defective data. Appeal File, Exhibit 56 at 5. The audit found that “Westinghouse granted greater discounts than disclosed during the period from May 21, 1984, the date of the offer through July 1, 1985, the contract award date.” *Id.*

67. The audit concluded:

Westinghouse’s offer allegedly made the Government [its] most favored customer. Government contracting personnel after negotiations concluded that all other categories of customers that exceeded the negotiated 55 percent discount were for commitments considerably larger than the anticipated GSA contract. Government personnel concluded that the 55 percent discount based on volume ranges of \$10,001 to \$500,000 granted to the OEM was not attainable by the Government. They believed the discount typically applied to much larger volume orders than the \$75,000 Basic Order Limit (BOL). Westinghouse’s disclosure was not current, accurate, or complete. Westinghouse failed to disclose [it] granted single order discounts to customers which were greater than 63 percent. They also failed to disclose that the discounts greater than 63 percent were based on sales volumes significantly less than the \$6 million volume [it] disclosed.

Appeal File, Exhibit 56 at 7. The audit further concluded that “Westinghouse granted single order discounts in excess of the maximum 63 percent discount disclosed and relied upon by GSA contracting personnel.” *Id.* at 8.

#### Alleged undisclosed discounts

68. The audit at appendix E provided examples the Government believed were orders that differed from Westinghouse’s disclosures:

Alleged Instance	Customer Number/Name	Order Date	Order Number	Invoice Number	Discount
1	State of Michigan	7/26/84	83782	VAR	81.4%
2	State of Michigan	7/20/84	83589	VAR	70.0%
3	State of Michigan	9/19/84	85325	VAR	67.5%
4	State of Michigan	10/22/84	86515	EM307137	66.5%
5	Commonwealth of Virginia	7/11/84	83969	EM302775	58.0%

6	Commonwealth of Virginia	9/7/84	84980	EM304276	63.8%
7	Commonwealth of Virginia	7/11/84	83968	EM302774	63.8%
8	Commonwealth of Virginia	11/15/84	87224	EM308756	63.7%
9	Commonwealth of Virginia	7/19/84	31552	EM302685	65.1%
10	C567	6/26/85	15501	EM320823	62.5%
11	American Sterilizer (AMSCO)	5/10/85	92650	EM319707	61.0%
12	American Sterilizer (AMSCO)	1/31/85	89294	VAR	61.0%
13	American Sterilizer (AMSCO)	4/15/85	91844	EM318004	61.0%
14	Burroughs Corp. (Unisys)	10/17/84	86298	EM307655	69.0%
15	Burroughs Corp. (Unisys)			EM307022	69.0%
16	Burroughs Corp. (Unisys)	12/4/84	13346	VAR	69.0%
17	C702	6/26/85	94209	EM323923	67.0%
18	C702	5/31/85	Q3888	EM323924	67.0%
19	C702		93423	EM323922	67.0%
20	Intel Corporation	7/16/84	84367	VAR	61.0%
21	Intel Corporation	7/26/84	84366	EM303990	61.0%
22	Intel Corporation	8/13/84	84455	VAR	61.0%
23	Intel Corporation	2/19/85	89833	EM312601	61.0%
24	Intel Corporation	3/19/85	91624	EM316333	61.0%
25	Intel Corporation	3/3/85	90742	EM314272	61.0%
26	Intel Electronic Ltd.	2/22/85	89918	EM314636	61.0%
27	Intel Electronic Ltd.	5/30/85	93286	EM318541	61.0%
28	Tektronic	8/26/84	84597	EM302896	61.0%
29	Tektronic	2/4/85	89534	EM311845	61.0%
30	Digital Equipment	8/31/84	84920	EM304682	60.0%

31	Digital Equipment	8/31/84	84921	EM308246	60.0%
32	Digital Equipment	6/21/85	33383 & 95830	VAR	60.0%

Appeal File, Exhibit 56 at 18-19.<sup>11</sup>

69. The text of the final audit report identified two additional instances of defective pricing that are not listed in appendix E:

Alleged Instance	Customer Number/Name	Order Date	Westinghouse Order Number	Westinghouse Invoice Number	Discount
33	American Sterilizer (AMSCO)	3/20/85	90877	Not provided in audit report	61.0%
34	American Sterilizer (AMSCO)	5/1/85	92383	Not provided in audit report	61.0%

Appeal File, Exhibit 56 at 7.

70. The final audit report also lists instances of national account customers receiving 70% or better discounts, although no transactional detail, including the date of when the alleged discounts were given, was provided:

Alleged Instance	Customer Number/Name	Type	Discount
35	Chase Manhattan	National Account	80.0%
36	Hewlett Packard	National Account	76.0%
37	Intel	National Account	75.0%

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<sup>11</sup> Customer number C702, for alleged instances seventeen through nineteen, is Rapaport. Appeal File, Exhibit 88 at 10; Transcript at 162.

38	Nello Systems Co.	National Account	75.0%
39	Kajima Associates	National Account	74.9%
40	Hercules Aero	National Account	70.0%
41	Davidson	National Account	70.0%
42	Morgan Guaranty Trust	National Account	70.0%

Appeal File, Exhibit 56 at 9.

At the hearing on the merits, other examples were also provided:

Alleged Instance	Customer Number/Name	Order Date	Westinghouse Order Number	Westinghouse Invoice Number	Discount
43	Burroughs (Unisys)	10/17/84	86296	EM307321	69.0%
44	Burroughs (Unisys)	10/15/84	86297	EM307465	69.0%
45	Burroughs (Unisys)	9/26/84	12956	EM302966	67.0%
46	Burroughs (Unisys)	9/10/84	31716	EM304355	69.0%
47	Western Michigan University	8/28/84	84648	EM302809	68.5%
48	Hercules	12/7/84	13386	EM306995	70.0%
49	Hercules	9/25/84	85639	EM307529	70.0%
50	Hercules	6/26/85	94282	EM320773	70.0%
51	Hercules	4/29/85	92285	EM318232	70.0%
52	Hercules	4/29/85	92277	EM318025	70.0%
53	Hercules	3/1/85	90259	EM313454	70.0%
54	Hercules	4/29/85	92284	EM318419	70.0%
55	Hercules	2/22/85	89916	EM312775	70.0%

56	Hercules	3/7/85	32366	EM314393	70.0%
57	Hercules	5/6/85	14701	EM316469	70.0%

Respondent's Hearing Exhibit 3; Appellant's Hearing Exhibits 11, 12; Appeal File, Exhibits 99, 126, 143.

71. These fifty-seven invoices were taken from a sample of 125 commercial invoices valued at \$781,954 that Mr. Myer had reviewed. Appeal File, Exhibit 56 at 3-4. He analyzed sales data "by sorting the commercial sales by discount using a laptop computer." *Id.* Some of these computer runs were introduced into the record. *See id.*, Exhibits 124, 133-37. Mr. Myer did not review invoices or purchase orders associated with the sales transactions to determine if the invoices involved sales of a systems furniture workstation covered by contract 76574, and without reviewing the invoices or purchase orders, he could not determine what products were sold in the transactions or whether the transactions were required to be disclosed. Transcript at 321-23, 756. Mr. Myer stated at the hearing on the merits of this appeal, that even though he may not have reviewed invoices to determine what products were being sold, "with respect to the invoices, I know the invoices are on the contract." *Id.* at 762.

72. Upon review of the invoices, Mr. Myer admitted that examples one through four (State of Michigan) were originally invoiced at a 66.5% discount and that in 1985, after the date of negotiation for contract 76574, the discounts were changed for an unknown reason. Transcript at 921-27. Mr. Myer did not know if the sales were for systems furniture workstations that were offered under contract 76574. He assumed that to be the case, because Westinghouse had included the invoices in documents produced in response to the GSA OIG's pre-audit data request. *Id.* at 197-99.

73. For items five through nine (Commonwealth of Virginia), Mr. Myer acknowledged that the highest discount Westinghouse had disclosed on the DSMD sheet and explanatory notes--66%, for the category "state and local Government" -- was higher than the alleged undisclosed discounts for the State of Virginia. Transcript at 307-08. The same was true for item ten. *Id.* at 308. Item ten was dated after December 19, 1984, i.e., on June 26, 1985. Appeal File, Exhibit 56 at 18.

74. The alleged defective pricing for American Sterilizer Company (AMSCO) (items eleven through thirteen and thirty-three and thirty-four) was based on prices after December 19, 1984. Appeal File, Exhibit 56 at 18-19. As for those items, Mr. Myer stated that as these sales were after the period of contract price negotiations, they might not be examples of defective pricing, but of violations of the price reduction clause in the contract. Transcript at 299. He also did not know whether the sales were for complete workstations of Wes-

Group systems furniture. *Id.* at 308-10. Furthermore, AMSCO was identified as an original equipment manufacturer (OEM) by Mr. Oakey because AMSCO repackaged and altered the material. Appeal File, Exhibit 8. Mr. Myer agreed that discounts to OEMs did not matter because OEMs were not a category of customer on which the contract negotiator would have based price negotiations. Transcript at 295-96.

75. All but two of the transactions for Hercules took place after December 1984, and those that were before December were for chairs or component parts of systems furniture, not for workstations. Appeal File, Exhibit 56 at 3-5; Transcript at 687-88, 873-84.

#### Burroughs invoices

76. The audit cited Westinghouse's sales to Burroughs Corporation, items fourteen through sixteen, as examples of undisclosed discounts. For item fourteen, the Government submitted Westinghouse invoice 11286K, dated October 17, 1984, as an example of an undisclosed discount. Appeal File, Exhibit 126. That invoice, however, is for components for Westinghouse's ASD line of systems furniture, not the Wes-Group systems furniture offered under contract 76574. *Id.* at 8; Transcript at 366. For item fifteen, the Government cited purchase order 79180, which has a purchase order date of September 10, 1984, Appeal File, Exhibit 126 at 2, not December 4, 1984, as stated in the audit. *Cf.* Appeal File, Exhibit 56 at 18. That invoice showed an order for nine table components, two table surfaces, thirty-two connectors, fifty-five leg base sets, one hundred vertical wire managers, and four table leg assemblies. *Id.*, Exhibit 126 at 2-3. Nothing in the invoice shows that Burroughs had ordered complete workstation systems offered in the catalog issued under contract 76574, or that the separate components would form a workstation offered in the catalog under contract 76574. Mr. Myer conceded that the invoice could not be for a workstation because panels were not included. Transcript at 369.

77. Example sixteen was an invoice dated December 4, 1984, which showed an order to Burroughs for twenty-seven separate items of varying quantities at an invoiced price of \$34,860.86. Appeal File, Exhibit 99 at 1-6 (circled numbers). The items were:

Item number	Item	Quantity
001	Tackboard—Fabric covered	8
002	Tackboard—Fabric covered	4
003	Tackboard—Fabric covered	1
004	Type A cabinet, top & front	1

005	Auxiliary shelf unit 36"	1
006	Type A cabinet, full fabric front	1
007	Type A cabinet, full fabric front	10
008	Type A cabinet, full fabric front	5
009	Half high shelf	6
010	Type D cabinet, full fabric front	6
011	Type D cabinet, full fabric front	3
011	Type A EDEP cabinet, full fabric front	2
012	Type D cabinet, full fabric front	3
013	Type A cabinet, full fabric front	2
014	Marker boards	20
015	Marker boards	3
016	Drawer assembly	6
017	Drawer	5
018	Drawer assembly	5
019	Desk W/2 Edn PL&A Fron	1
020	Vert wire manager	300
020	Task light 36"	5
021	Task light 48"	2
023	Task light 24"	2
024	Canteliver work surface	2
025	Cantilever work surface	2
025	Canteliver work surface	2

026	Table leg assembly	4
027	Panel frame assembly	1

*Id.* The Government did not demonstrate how those components could combine to form an available workstation offered under the contract 76574 or a similar workstation.

Example forty-three was an order by Burroughs for Westinghouse's ASD line of systems furniture, not the Wes-Group line. *Id.*, Exhibit 126; Transcript at 369-70. The remaining Burroughs orders were for components of Wes-Group workstations and not for complete workstations that were offered under contract 76574. Appeal File, Exhibit 126 at 1, 2, 10 (examples forty-four, forty-five and forty-six).<sup>12</sup>

#### Other invoices

78. Respondent did not introduce invoices for the remaining examples shown in the audit. The examples (seventeen through nineteen) of "customer C702" (Rapaport) were dated in 1985, after the end of contract negotiations on December 19, 1984. Appeal File, Exhibit 56 at 19. Three of the six examples (twenty through twenty-six) for Intel Corporation were dated after December 19, 1984. *Id.* The Government did not support the remaining Intel examples with evidence showing that the orders listed were for the items covered by contract 76574. In addition, the overall discount to Intel--61%--was less than the highest discount Westinghouse had disclosed on the DSMD sheet. *Id.*; Transcript at 390. The invoices to Intel Electronic (twenty-six and twenty-seven) were dated after December 19, 1984. Appeal File, Exhibit 56 at 18.

79. The remaining examples listed in the audit suffered from the same defects as the examples explained in detail above. The examples were either invoices dated after the close of price negotiations, or were unsupported by evidence that the invoices were for systems furniture workstations covered by contract 76574, or were for components, not complete workstations, or were for Westinghouse's ASD line of systems furniture. Appeal File, Exhibits 56 at 199; 100; 102-06; 122 at 3; 125; 126 at 1, 2, 10; 143 at 5; Respondent's Hearing Exhibits 2 at 4, 3 at 1.

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<sup>12</sup> The invoice at page 10 of Appeal File, Exhibit 126 is for fifteen paper rails of thirty-six inches each, invoiced at \$217.90.

### Refund calculations

80. The refund calculation in the final audit was the same as the calculation in the draft. *Compare* Appeal File, Exhibit 56 at 14, *with Id.* Exhibit 87 at 18. In calculating the refund in the final report, as in the draft report, Mr. Myer used agency orders, placed under the contract's requote procedure exceeding the contract's \$75,000 basic order limitation. *Id.*, Exhibit 56 at 14. Mr. Myer also used pre-contract 76574 sales that were recorded by Westinghouse during the contract period as a base for the calculation. *Id.*, Exhibit 57 at 2.

81. In calculating the refund, Mr. Myer based his assumption that the contracting officer for contract 76574 would have negotiated discounts of 61% and 64% on the disclosure of the 70% discount to Marriott that was effective in 1988. *See* Finding 46.

### Incorrect payment terms

82. The \$4191 for incorrect payment terms was based on the auditor's conclusion that for ten invoices, Westinghouse did not give the Government the benefit of the contractually required two percent discount for prompt payment. Appeal File, Exhibit 56 at 5, 13, 17.

### Contracting officer's decision and associated correspondence

83. On or about December 1998, counsel for appellant (then Knoll/Westinghouse) met to discuss the audit and Knoll/Westinghouse's position on the Government's conclusions. Knoll/Westinghouse objected to the Government's inclusion of pre-contract sales and Government orders over the contract's \$75,000 BOL in the damage calculation. Knoll/Westinghouse argued that defective pricing damages were cut off as of March 24, 1988, the date Westinghouse disclosed the 70% discount to the Marriott Corporation. Appeal File, Exhibit 57. Westinghouse argued if there were to be a defective pricing calculation, it should not be based upon the methodology used by the auditors, but on a three percent difference, presumably the difference between the 69% discount in the Burroughs order and the 66% discount disclosed in the DSMD. *Id.*

84. In a letter of July 7, 2000, which was not issued as a contracting officer's final decision, the contracting officer, Ms. Helen Zivkovic, rejected those positions. As for Westinghouse's suggested three percent delta, the Government stated that while the Burroughs order represented an undisclosed discount of 69% that should have been disclosed, had that discount been known at the time of negotiations, the contracting officer would have obtained discounts of 61% and 64%. Appeal File, Exhibit 57. Ms. Zivkovic wrote:

It was subsequently discovered that Unisys/Burroughs received a 69% discount on single orders at a much lower dollar order level (in the \$25,000 range). Based on this information, it was determined by the auditor, and agreed to by [the] GSA National Furniture Center representatives, that had the Contracting Officer known about the 69% discount at the lower order dollar level, GSA could have negotiated higher discounts.

*Id.* at 3. The letter stated that the total owed the Government based on the post-award audit was \$4,292,893, consisting of \$3,804,316 for defective pricing, \$484,386 for an end of the contract aggregate discount, and \$4191 for alleged incorrect payment terms, for a total of \$4,292,893. *Id.* at 1. Respondent withdrew its demand for the end of the contract aggregate discount, which left \$3,808,507 as the total allegedly owed to the Government. *Id.* at 3.<sup>13</sup>

85. On February 14, 2002, more than thirteen years after the end of the contract, Ms. Zivkoviche issued her decision, which referenced and attached the Government's final audit report. Appeal File, Exhibit 58. The decision demanded as "the refund due from Westinghouse as a result of the post-award audit" the amounts of \$3,804,316 for alleged defective pricing and \$4191 for alleged incorrect payment terms, for a total of \$3,808,507. *Id.* Ms. Zivkoviche testified that in writing her decision she did not consult with Ms. Wilson or Mr. Oakey; her statements in the final decision were based upon her review of the contract file, the audit, and her assumptions as to what the contract negotiators would have negotiated had the alleged undisclosed discount been fully disclosed. Transcript at 565-66. In her testimony before the Board, however, Ms. Zivkoviche stated that her decision was based only on Westinghouse's alleged undisclosed discount to Unisys/Burroughs, and that it did not reference alleged discounts to any other customer. *Id.* at 563-64. Nevertheless, her decision explicitly references the post-award audit, which is based on more than just the Burroughs invoices.

#### Amended Government claims since contracting officer's decision

86. On July 13, 2004, respondent recalculated the alleged defective pricing damages and reduced that claim to \$3,016,199. Stipulations ¶ 20. Respondent relinquished any claim to damages based upon sales during the time period of the predecessor contract and relinquished any claim that there was an agreement or mutual accommodation between appellant and respondent to use sales from the predecessor contract in the damage calculation for contract 76574. *Id.* ¶ 21.

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<sup>13</sup> The actual figure in the letter was \$3,808,307; the Government corrected that clerical error in its subsequently issued contracting officer's decision discussed below.

87. In its post-hearing brief, respondent amended its claimed damages again. It now maintains that it is owed \$8,847,384.50 as defective pricing damages and sixteen years of interest since contract completion, amounting to \$6,370,116.60, for total damages of \$15,217,501. Respondent's Brief at 134. Respondent calculates the \$8,847,384.50 as follows. Respondent assumes that the highest discount Westinghouse revealed to the contracting officer during contract negotiations was 52.5%. Respondent assumes that the discount that should have been revealed was 70.5%, the discount allegedly given to Hercules and "numerous other customers." *Id.* at 133. Respondent then takes the difference between 70% and 52.5%--17.5%--and multiplies that percentage by alleged total contract sales of \$53,161,266. This results in alleged defective pricing damages of \$9,303,221.50, from which appellant subtracts \$455,837, which appellant says is the 3.8% price reduction apportioned to contract 76574. *Id.* at 133-34.

### Discussion

This is a defective pricing case. Statute in effect at the time of contract award provided that for prime contracts expected to exceed \$100,000 not awarded through sealed bid, with certain exceptions, the prime contractor was required to submit cost or pricing data and a certification of the data's completeness and accuracy. 41 U.S.C. § 254(d)(1)(A) (1984). An exception to the requirement for submission of cost or pricing data applied when the contract price was based upon adequate price competition and established catalog or market prices of commercial items sold in substantial quantities to the general public. 41 U.S.C. § 254(d)(5)(i), (ii).

Despite this statutory exception, the solicitation resulting in contract 76574 required, in accordance with FSS Regulation 330 (1976), that offerors submit cost or pricing data and certify that the pricing data submitted with the offer were accurate, complete, and current representations of actual transactions to the date when price negotiations were concluded. Finding 5. The contract also contained the Defective Pricing clause usually found in contracts subject to the Truth in Negotiations Act (TINA), 10 U.S.C. § 2606(f). Finding 6; *cf. Millipore Corp.*, GSBCA 9453, 91-1 BCA ¶ 23,345 (1990). Therefore, in analyzing the Government's claim, we shall rely on defective pricing cases arising under TINA.

### Whether respondent has established that the contract was defectively priced

To establish defective pricing, respondent has the burden of proving by a preponderance of the evidence that information was required to be disclosed as cost or pricing data, that the data were not meaningfully disclosed, and that the Government relied to its detriment on appellant's disclosure of defective data. *Sylvania Electric Products v. United States*, 479 F.2d 1342, 1349 (Ct. Cl. 1973); *United States v. United Technologies Corp.*, 51 F. Supp. 2d

167, 189 (D. Conn. 1999); *Gelco Space*, GSBCA 7916, 91-1 BCA ¶ 23,387 (1990); *Lockheed Martin Corp.*, ASBCA 50464, 02-1 BCA ¶ 31,784, at 156,943. Upon proof of nondisclosure, or the use of inaccurate cost or pricing data, the Government is aided in meeting its burden of establishing that there was a significant overstatement in the contract price by a rebuttable presumption that the natural and probable consequence of the non-disclosure or use of noncurrent or inaccurate cost or pricing data is an increase in the contract price. *United Technologies Corp.*, 51 F. Supp. 2d at 189. The contractor must then show that the defective data was not relied upon or that the undisclosed data would not have been relied upon even if there were complete disclosure. *Id.*

#### Relevant transaction date for cost and pricing data

Respondent's claim of defective pricing is based partially upon the assumption that the relevant ending transaction date for cost or pricing data was July 1, 1985, the date of contract award. Findings 55, 65. Respondent also vigorously argues for this proposition in its brief, maintaining that block 22 of the award document, signed by appellant, represents a certificate of completion of price negotiations. Respondent's Brief at 76. This assumption is wrong.

The Defective Pricing clause in the contract is keyed to lack of current, accurate, and complete cost and pricing data as certified in the contractor's Certificate of Current Cost or Pricing Data. Finding 6. Westinghouse was required to certify that the data were "accurate, complete, and current representations of actual transactions" to the date "*when price negotiations were concluded*"; i.e., as of December 19, 1984 (emphasis supplied). *See also* Findings 5, 27.<sup>14</sup>

The relevant cost or pricing data is that data in existence at the time of price negotiations. *McDonnell Aircraft Co.*, ASBCA 44504, 97-1 BCA ¶ 28,977, at 144,315 (contractor has no duty to supply accurate and complete subcontractor cost data created after prime and subcontractor have reached agreement on price); *Aydin Monitor Systems*, NASA BCA 381-1, 83-1 BCA ¶ 16,500 at 81,997 (1983), *reconsideration granted on other grounds*, 84-2 BCA ¶ 17,297; *see United States v. Davis*, 803 F. Supp. 830, 863 (N.D.N.Y. 1992); *aff'd in part, rev'd in part sub nom. United States v. General Dynamics Corp.*, 19 F.3d 770 (2nd Cir. 1994); *Plessey Industries, Inc.*, ASBCA 16720, 74-1 BCA ¶ 10,603, at 50,277 (citing

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<sup>14</sup> *See* FPMR 1-3.807-4 (1984), providing that the contractor was required to "submit only one certificate which shall be submitted *as soon as practicable after agreement is reached on the contract price*" (emphasis supplied). This certificate is not Block 22 of the award letter, as respondent maintains in its brief at page 76.

*Paceco, Inc.*, ASBCA 16458, 73-2 BCA ¶ 10,119 (data created between cost and pricing data certification and award date not cost or pricing data that was required to be submitted) (in TINA context, duty to disclose complete, accurate and current data extends only to the date of price negotiations). We have found as fact that price negotiations were concluded on December 19, 1984. Finding 27. Thus the relevant ending date for transactions which were to be submitted as cost or pricing data was December 19, 1984, not July 1, 1985. Therefore, any Westinghouse discount data that existed only after December 19, 1984, was not cost or pricing data that Westinghouse was required to submit to the Government.

Whether discounts for system furniture workstation components were relevant to consideration of defective pricing

The Government argues that allegedly undisclosed discounts for individual components of workstations should have been disclosed by Westinghouse because those discounts were for the same or similar products as the complete workstations offered to the Government under the solicitation. Respondent's Brief at 80. Appellant, in contrast, maintains that since the Government could not purchase individual components under contract 76574, "discounts for individual components can not reasonably be expected to have a significant effect on the price negotiations for the contract." Appellant's Brief at 77.

As a preliminary matter, it is evident that respondent discovered during its pre-audit document review many Westinghouse invoices for workstation components showing discounts greater than those stated on the DSMD sheet. We acknowledge that respondent might thus well have suspected that Westinghouse was not completely forthcoming in disclosing its level of discounts on the DSMD sheet.<sup>15</sup> Nevertheless, in analyzing the positions of the parties, we must hold the respondent to its burden of proof, applying the applicable regulations and contract clauses in a reasonable manner.

Cost or pricing data "consist[s] of all data, *existing up to the time of agreement on price*, which prudent buyers and sellers would *reasonably expect* to have a significant effect on price." 41 CFR 1.307-3(h)(1)(1984) (emphasis supplied). The solicitation required vendors to supply discount data "for the same or similar products or services offered to the Government under this solicitation." Finding 11. The supplies to be provided were an integrated system of components resulting in workstations. Finding 9. The Government's price list contained specific unit prices for the six series of workstations offered under the

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<sup>15</sup> It is evident that Mr. Myer considered discount data for workstation components, as opposed to complete workstations offered under the contract, as relevant discount data that Westinghouse was required to disclose. Finding 70.

contract. Finding 36. The issue in this case is whether Westinghouse was required to disclose discount data for workstation components, which were not available for order under the contract, as well as for complete workstations that were available for order under the contract.

We conclude that commercial discounts shown for individual components or groups of components, not proven to have constituted a systems furniture workstation identical or similar to a workstation offered under contract 76574, are not pricing data that Westinghouse was required to disclose. In this regard, we agree with Westinghouse that it could not reasonably expect to produce pricing data on systems furniture components it was forbidden to offer under contract 76574. *See Plessey*, 74-1 BCA at 50,278 (unsolicited subcontractor quotation of parts for grenade launcher not cost or pricing data, because contractor had no intention of using quotation); *Paceco, Inc.*, 73-2 BCA at 47,559 (prices of item not included in bid not cost and pricing data that contractor had to disclose).

Westinghouse sold \$80,624,613 worth of systems furniture to non-governmental customers. Finding 19. It would have been unreasonable to expect Westinghouse to scour invoices for its systems furniture line of business to ascertain whether invoiced components happened to carry a larger discount than those disclosed on the DSMD sheet, particularly since vendors were forbidden to offer individual workstation components under contract 76574. Findings 10, 35, 37.

Were the invoices for components--at least those before December 19, 1984--"similar items" so as to require disclosure of the discounts on those invoices? Cases which have examined the issue of undisclosed cost data for so-called similar items involved data for items that benefited contract performance in some way, although the item was not directly connected to contract performance, or situations in which the cost of the allegedly dissimilar item was the best evidence of future contract costs. *Lockheed Martin Corp.*, ASBCA 50566, 02-2 BCA ¶ 31,907, at 157,633 (cost data for a factory tester relevant although not part of contract because use of factory tester lessened engineering costs on Navy countermeasures system); *Hardie-Tynes Mfg.*, ASBCA 20717, 76-2 BCA ¶ 12,121, at 58,228 (cost of the allegedly dissimilar item--a bushing--was the best evidence to project material costs of the contract bushing because the contract item had never been designed before).

In contrast to those cases, this case involves standard commercial off-the-shelf items for which there was ample pricing data. In the context of this contract, we conclude that "similar items" would be complete workstations for the Wes-Group brand of systems furniture, either identical to or similar to the workstations covered by contract 76574.

According to the contracting officer, the respondent places principal reliance on Westinghouse's alleged non-disclosure of the Burroughs invoices. Finding 85. However, respondent did not meet its burden of establishing that the Burroughs invoices were for either Wes-Group brand of systems furniture workstations available under the contract or for workstations similar to those available under the contract. Findings 76-77. The other invoices upon which respondent relied cannot trigger the Defective Pricing clause because they were created either after the close of price negotiations or were for system furniture components not available under the contract.<sup>16</sup> Findings 71-75, 78-79.

The AMSCO invoices, in addition to having the defects of other invoices noted above, were from an OEM manufacturer. GSA policy was to exempt vendors from supplying cost or pricing data for OEMs if the vendors could demonstrate there was considerable difference in performance or physical characteristics of the item sold to the OEMs. Appeal File, Exhibit 147 at 6 ¶ IV (47 Fed. Reg. 50,242 (Nov. 5, 1982)). Under GSA's policy, OEMs were not considered by GSA to be relevant in securing equal to better discounts than vendors gave their most favored commercial customers. *Id.* at 5 ¶ II.

In short, respondent did not present to the Board invoices which showed that before December 19, 1984, Westinghouse gave undisclosed commercial discounts for complete systems furniture workstations for the Wes-Group brand of systems furniture available under the contract. Respondent simply did not conduct a meticulous examination of the invoices containing the alleged undisclosed data in order to prove its claim. Instead of making a substantive analysis of Westinghouse's commercial selling practices, and from that analysis extracting timely commercial invoices for products available under contract 76574, the claim appears to rely on somewhat robotic "automated audit techniques." Findings 65, 71, 72. In one case, we rejected the Government's claim for defective pricing of a multiple award schedule contract because, although the appellant had admitted defective pricing, the Government was unable to establish which of the multiple item numbers the undisclosed data

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<sup>16</sup> Appellant, relying upon *Motorola Inc.*, ASBCA 46785, 95-2 BCA ¶ 27,645, suggests that the Burroughs invoices are the only relevant instances of alleged defective pricing because the contracting officer relied only upon the Burroughs invoices in finding defective pricing. In *Motorola*, the board granted a motion to exclude evidence in a defective pricing case when the contracting officer's final decision expressly stated a single basis for the claim. *Motorola*, 95-2 BCA at 137,807. Because the contracting officer's decision was based on the audit report as a whole, Finding 85, we view that decision as broader than stating a single claim based on the Burroughs invoices.

actually affected. *Baker School Specialty Co. v. General Services Administration*, GSBCA 13101, 95-2 BCA ¶ 27,866. Respondent has failed to meet its initial burden of establishing that the discounts were required to be disclosed as cost or pricing data.

Whether the record demonstrates that the contracting officer detrimentally relied on allegedly defective data

Respondent's claim is based not only on alleged defective pricing for orders below the \$75,000 BOL, but also on alleged defective pricing for orders above the BOL. The record, however, does not establish that the contracting officer detrimentally relied on disclosure of allegedly defective data for orders above the \$75,000 MOL then in the solicitation. It must be understood that Mr. Oakey negotiated the contract discounts before respondent issued amendment three to the solicitation, which added the requote procedure, changed the MOL to a BOL, and provided authority for government agencies to order systems furniture workstations in excess of the \$75,000 BOL. Findings 29-30. Mr. Oakey's pre-negotiation memorandum focused repeatedly on orders within the \$75,000 MOL:

For the purpose of this negotiation, due to the established basic order discount level (\$75,000) the Government is receiving equal or better discounts than all categories of customers identified by Westinghouse at the \$75,000 level, except the discount granted their OEM which is 56%.

Finding 26. When Mr. Oakey mentioned discounts on requotes, briefly referenced in the summary section of the pre-amendment three solicitation, it was only to emphasize that orders above the MOL would be on a job-by-job basis, allowing vendors "flexibility" to quote their best discounts on that basis. *Id.* Mr. Oakey's price negotiation memorandum also demonstrates that he did not rely on the allegedly defective data to negotiate discounts for orders above the \$75,000 MOL then in the solicitation. In the price negotiation memorandum, Mr. Oakey refers repeatedly to the discounts as applying to orders within the MOL:

Given that the basic ordering level for this contract is \$75,000, Westinghouse's offer makes the Government their most favored customer when considered with their additional warranty coverage at the \$50,000 + level. All other categories of customers that exceed [the] 55% discount are for commitments [sic] considerably larger than the anticipated contract.

Finding 27.

In its brief, respondent maintains that the parties intended to negotiate discounts above the MOL because the pre-amendment three solicitation contemplated a requote

procedure wherein successful offerors would “requote their discounts on a project by project basis.” Finding 2; see Respondent’s Brief at 121. In the context of a protest brought, ironically, by Westinghouse on similar requote provisions on the companion modular furniture solicitation, the Comptroller General concluded that the requote procedure was placed in the solicitation “for informational and administrative purposes only,” and that the provision did not require Westinghouse to quote any minimum discount if it responded to an RFQ issued under the requote procedure. *Westinghouse Electric Corp.*, B-224,449, 86-2 CPD ¶ 479 (Oct. 27, 1986). Additionally, in an analogous case involving the Price Reductions clause, this Board, based on the testimony of Federal Supply Service officials, concluded that a vendor’s definite quantity commercial contracts over the MOL were not relevant data in considering the application of the Price Reductions clause because the over-MOL contracts were not within the quantity scope of the contract. *3M Business Products Sales*, GSBCA 4722, et al., 78-2 BCA ¶ 13,362, at 65,307, *reconsideration denied*, 79-1 BCA ¶ 13,567.

The actions of the respondent after award of the contract and during performance belie the notion that the negotiated discounts applied to orders above the BOL established by amendment three to the solicitation. Respondent established a best value procurement-type system for orders above the BOL. Findings 39-41. Respondent neglected to instruct ordering agencies not to accept orders from Westinghouse above the BOL if Westinghouse did not provide discounts equal to the discounts for orders below the BOL. Findings 40-41. Respondent did not monitor ordering agencies’ procurements of orders above the BOL to ensure that agencies were demanding from Westinghouse the same discounts for orders above the BOL as the discounts provided below the BOL. Finding 42. In negotiating the successor contract to contract 76574, respondent’s contract specialist acknowledged in her price analysis that contract 76574 discount provisions did not apply to orders above the BOL placed under the requote provisions. Finding 52. Finally, respondent inserted a clause in the successor contract that applied the negotiated discounts to requotes, a clause that was not present in contract 76574. Finding 53.

Whether the use of 61% and 64% to calculate defective pricing refund was reasonable

The impossibility of knowing precisely what the parties would have done in price negotiations if certain information had been disclosed signals the need for careful examination of the circumstances surrounding the conduct of the negotiations. *McDonnell Douglas Helicopter Co.*, ASBCA 41378, 92-1 BCA ¶ 24,655, at 123,000. The Government must show by some reasonable method the amounts by which the final negotiated contract price was overstated. *Boeing Co.*, ASBCA 33881, 92-1 BCA ¶ 24,414, at 121,873, *reconsideration denied*, 1991 WL 165710. Here, to determine the amount of damages due to defective pricing, the Government used percentages negotiated on the successor contract

even though that contract contained estimated quantities and price terms and conditions considerably different than those involved in contract 76574. Findings 53, 54. The Government's use of the 61% and 64% figures was not reasonable. Respondent's alternative damage calculations, Finding 87, are based upon an erroneous factual premise that the highest non-volume dependent discount disclosed was 52.5%. We have found as fact that the highest non-volume dependent discount disclosed was 66%. Findings 16, 19, 22, 25.<sup>17</sup>

We have every respect for respondent's officials who are diligent in protecting the public fisc. In this case, however, respondent, by basing its claim of defective pricing on: (1) an erroneous date for submission of cost and pricing data, (2) commercial invoices for items not available under the contract, (3) orders above the BOL when above-BOL orders were not subject to the discounts negotiated for orders below the then-MOL, and (4) the use of unreasonable percentages to determine what discounts the contracting officer would have negotiated, has failed in its proof. The Government's claim of defective pricing is simply not salvageable by correction of error.

#### Improper payment terms

Appellant did not challenge, at the hearing on the merits or in its brief, the Government's claim of \$4191 for failing to provide a two percent prompt payment discount. We award the Government \$4191.

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<sup>17</sup> During the second to last day of the hearing, respondent sought to introduce spreadsheet calculations as respondent's hearing exhibits seven through nine. Transcript at 945. These exhibits, by respondent's counsel's admission, represented a last minute change in one part of the theory upon which the audit and the contracting officer's decision was based, i.e., that the procurement contracting officer would have negotiated discounts of sixty-one and sixty-four percent had she known about the alleged defective pricing. Transcript at 944. Appellant objected to the introduction of these exhibits, convincingly arguing that their introduction amounted to unfair surprise. Transcript at 937-40. We agreed with appellant that respondent's last-minute invocation of new theories through newly created evidence was impermissible. *J.V. Bailey Co.*, ENGBCA 5348, 90-3 BCA ¶ 23,179, at 116,342 n.3. We therefore rejected introduction of the exhibits. Rule 122; *Adelaide Blomfield Management Co. v. General Services Administration*, GSBCA 13125, 96-1 BCA ¶ 28,267.

Decision

The appeal is **GRANTED IN PART**. Appellant owes respondent nothing for the alleged defective pricing. Appellant owes respondent \$4191 on the Government claim for improper payment terms.

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ANTHONY S. BORWICK  
Board Judge

We concur:

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MARTHA H. DeGRAFF  
Board Judge

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CATHERINE B. HYATT  
Board Judge