



FEDERAL CONTRACTS



REPORT

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Defective Pricing

GSA Loses \$4M Defective Pricing Claim Under Westinghouse Furniture Contract

The General Services Board of Contract Appeals Sept. 21 emphatically rejected GSA's claim that Westinghouse Furniture Systems owed the government more than \$3.8 million in refunds for defective pricing under a multiple award schedule systems furniture workstation contract that ended 13 years ago (*Viacom Inc., Successor in Interest to Westinghouse Furniture Systems v. General Services Administration*, GSBCA, No. 15871, 9/21/05).

In largely sustaining an appeal by Westinghouse successor Viacom Inc., the GSBCA said the agency failed for "numerous and disparate" reasons to meet its burden of proof to establish defective pricing.

According to the board, GSA improperly relied on Westinghouse commercial invoices after the date of price agreement and for furniture not covered under the MAS contract.

"Instead of making a substantive analysis of Westinghouse's commercial selling practices, and from that analysis extracting timely commercial invoices for products available under [the contract], the claim appears to rely on somewhat robotic automated audit techniques," Board Judge Anthony S. Borwick said.

Further, the agency based much of its defective pricing claim on orders above the contract's \$75,000 basic order limitation (BOL) of the contract. However, the board said GSA failed to show that it had negotiated for discounts for orders above the BOL, which did not even exist at the time of price negotiations but was added subsequently.

Finally, the GSBCA said, GSA's calculation of the defective pricing amount was based upon the assumption that had the agency's contract negotiator known of the alleged defective pricing, he would have negotiated identical discounts for the follow-on contract. However,

GSA did not show that use of the discount percentages in the follow-on contract was reasonable in calculating any damages.

As a result, the GSBCA concluded that Westinghouse did not engage in defective pricing, and that successor-interest Viacom owed the government nothing.

Wrong Invoices Formed Basis of Claim. GSA awarded Westinghouse the three-year contract in July 1985. More than 10 years after the contract ended, the contracting officer determined that Westinghouse owed the agency about \$3.8 million for failing to disclose the full range of discounts provided to its commercial customers for the same or similar systems furniture.

However, for several reasons the Board found that the agency failed to establish its defective pricing claim.

First, the GSBCA said, the government's claim was based partially on the assumption that the relevant ending transaction date for Westinghouse's required cost or pricing data, including commercial invoices for systems furniture, was July 1, 1985, the date of contract award.

However, the board said, because Westinghouse was required to certify only that its invoices and other pricing data were accurate as of the date price negotiations were concluded, Dec. 19, 1984, GSA should not have based its defective pricing claim on any invoices after that date.

The board also found it irrelevant that Westinghouse failed to disclose commercial invoices showing discounts for individual workstation components, because the MAS contract only required complete workstations.

"In short, [GSA] did not present to the Board invoices which showed that before Dec. 19, 1984, Westinghouse gave undisclosed commercial discounts for complete systems furniture workstations ... available under the contract," Borwick concluded.

Agency Did Not Rely on Orders Above BOL. The agency's claim of defective pricing was substantially based on government orders above the contract's \$75,000 BOL. According to GSA, these orders did not reflect larger

and unstated discounts Westinghouse allegedly granted to its commercial customers.

However, the GSBCA found that the agency's contract negotiator had not bargained for discounts for orders above the BOL.

In fact, the board said that when the price negotiations took place, the solicitation contained only a maximum order limitation, not a BOL. The BOL and a "re-quote" procedure to allow agencies to place above-BOL orders were added in a major solicitation amendment, apparently without price re-negotiation with Westinghouse.

The GSBCA also found that the agency's actions after award and during performance belied the notion that the negotiated discounts applied to orders above the BOL. For example, GSA neglected to instruct ordering agencies not to accept orders from Westinghouse above the BOL if Westinghouse did not provide discounts for those orders equal to those for orders below the BOL.

Refund Was Calculated Improperly. The board also said that it was unreasonable for GSA to use percentage discounts negotiated in the successor contract for systems furniture to calculate defective pricing damages, because the successor contract had different estimated quantities, price breaks for operation of discounts, and ordering limitations.

In addition, according to the board, the agency's alternative damages calculations were based on the erroneous premise that the highest non-volume dependent discount disclosed was 52.5 percent, where the actual figure was 66 percent.

Ultimately, the GSBCA awarded GSA only \$4,191—on its unchallenged claim that Westinghouse failed to provide a two percent prompt payment discount.

Marc F. Efron and J. Catherine Kunz of Crowell & Moring LLP, Washington, D.C. represented Viacom. Robert T. Hoff and Liana D. Henry of GSA represented the agency.