ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Grimco Pneumatic Corp. T/A	)	
David Grimaldi Co.	)	ASBCA No. 50977
	)	
Under Contract No. SPO490-94-C-6081	)	

APPEARANCE FOR THE APPELLANT: Mr. David Grimaldi
President

APPEARANCE FOR THE GOVERNMENT: Donald S. Tracy, Esq.
Chief Trial Attorney
Defense Supply Center Richmond
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN

Appellant timely appealed a contracting officer's decision accessing excess reprocurement costs in the amount of $23,196.96, following the Government's termination of the contract for default. Appellant did not contest the Government's termination of the contract for default in its notice of appeal or complaint, but does arguably raise the issue in its brief. However, it disputes the assessment of the excess costs on the grounds that the Government awarded the reprocurement contract at an unreasonable price and accepted supplies that were dissimilar to the supplies procured and terminated under appellant's contract. The parties elected to proceed under Board Rule 11.

FINDINGS OF FACT

1. In May 1994, the Defense Supply Center Richmond (DSCR) issued a Request for Proposals ("RFP") SPO490-94-R-2880 for the manufacture and supply of a 150 ton hydraulic press in accordance with DGSC-STAB-94-28-1016, dated 24 March 1994, and MIL-P-80114D, dated 2 August 1990 (R4, tab 2). Appellant's proposal was one of six proposals received in response to the RFP (R4, tab 3). The proposals ranged from appellant's low proposal of $52,265 to the highest proposal of $128,334. Initially, the Government determined that appellant's proposal was technically unacceptable, and requested that appellant provide additional technical information (R4, tab 6). Following appellant's submission of additional technical information, the Government determined that appellant's proposal was technically acceptable and afforded appellant the opportunity to submit a best and final offer (BAFO) (R4, tabs 7 and 8). Appellant affirmed its original proposed price and, on 5 August 1994, the Government awarded the contract to appellant for the firm, fixed price of $52,265 (R4, tab1).

2. The contract required Grimco to deliver the hydraulic press within 240 days after contract award or by 2 April 1995 which was 240 days after receipt of the contract award. Delivery was to be made F.O.B. to the U.S. Marine Corps Logistics Base, Albany, GA. According to the contract schedule, the Government would install the hydraulic press within 30 days after delivery and appellant was required to complete verification of the Government's installation of the machine within 15 calendar days after notification by the Government that the installation was complete and ready for verification (R4, tab 1).

3. The contract contained the standard clauses for supply contracting, including DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (FAR 52.249-8, APR 1984); and ADMINISTRATIVE COSTS OF REPROCUREMENT AFTER DEFAULT (DLAR 52.249-9000, MAY 1988). (R4, tab 1) The DEFAULT clause provided, in pertinent part:

> (a) (1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part, if the Contractor fails to –
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
>
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).
>
> (2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.
>
> (b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services.

The ADMINISTRATIVE COSTS OF REPROCUREMENT AFTER DEFAULT clause, provided:

> If this contract is terminated in whole or in part for default pursuant to the clause included herein entitled "Default," and the supplies and services covered by the contract so terminated are repurchased by the Government, the Government will incur administrative costs in such repurchases. The contractor and the Government expressly agree that, in addition to any excess costs of repurchase, as provided in Paragraph (b) of the "Default" clause of the contract, or any other damages resulting from such default, the contractor shall pay, and the Government shall accept, the sum of $385 as payment in full for the administrative costs of such repurchase. The assessment of damages for administrative costs shall apply for any termination for default following which the Government repurchases the terminated supplies or services, regardless of whether any other damages are incurred and/or assessed.

4. Following an exchange of facsimile messages between the parties in early April 1995, the parties negotiated a contract modification extending the delivery date by 90 days, to 1 July 1995 (R4, tabs 14, 22-23). Appellant offered a price reduction in the amount of $1,000 in consideration for the extension, which was accepted by the Government and incorporated in the contract modification.

5. During the next 10 months, appellant continued to be delinquent, failing to deliver the required hydraulic press and failing to meet performance schedules (R4, tabs 23, 26-28, 31-33, 35-52). At various times during this period, appellant requested time extensions, proposed scheduling changes, and offered price reductions in consideration for such time extensions. The parties executed a number of bilateral contract modifications extending the delivery schedule and reducing the contract price by a total amount of $3,375 in consideration for the Government's granting of the requested time extensions to 19 December 1995 (R4, tabs 15-17).

6. By letter, dated 20 December 1995, the contracting officer informed appellant that, since appellant had failed to perform the contract within the time required by its terms, the Government was considering terminating the contract for default and directed appellant to show cause why the contract should not be terminated (R4, tab 47). Appellant responded by letter dated 3 January 1996, stating that it was having cash flow problems and that it thought it could deliver the hydraulic press 10 January 1996 (R4, tabs 42, 48). No other reasons for its delinquency were given. However, on 16 January 1996, appellant again informed the Government that it would not be able to complete the contract by 10 January 1996, as previously stated, and that it would complete the contract

22 January 1996 (R4, tab 50). Although this letter contained revised schedule milestones for appellant's asserted progress, appellant did not provide any reasons or excuses for the delays.

7. During the Government's quality assurance representative's visit to appellant's plant on 23 January 1996, he determined that there were a number of areas in which the hydraulic press did not conform to the specification and that with corrective reworking required to satisfy the contract specifications, the hydraulic press was no more than 50 percent complete (R4, tab 53). He also learned from appellant that an additional four to five weeks, as a minimum, would be required to complete the contract work. Except for appellant's assertion in its letter of 3 January 1996 stating that it was having cash flow problems, appellant had not presented any reason for its failures to deliver the hydraulic press in accordance with the schedule as extended.

8. The Government, on 23 January 1996, issued contract Modification No. P00006 as a Stop Work Order pending a final decision to terminate the contract (R4, tab 18). Then, on 20 February 1996, the contracting officer issued contract Modification No. P00007, terminating the contract for default (R4, tab 20). According to both the termination for default, and the supporting Determination and Findings, the QAR reports indicated that there were numerous areas of non-compliance with the contract specifications, appellant's failure to deliver the machine, now 10 months beyond the originally specified delivery date, and the unreliability of appellant's estimates as to when it would be able to deliver the machine, termination for default was justified (R4, tabs 20, 54).

9. On 19 April 1996, DSCR issued SPO490-96-R-2137, requesting proposals for the supply of a 150 ton hydraulic press with a required delivery time of 240 days (supp. R4, tab G-1). The RFP specified that it was a reprocurement due to a termination for default. (Supp. R4, tab G-1) The specifications were identical to those in appellant's defaulted contract requiring that the hydraulic press conform to DGSC-STAB-94-28-1016, dated 24 March 1994 and MIL-P-80114D, dated 2 August 1990. The Government revised its estimate from $48,200 to $70,000 (R4, tab 56). According to the Government's pre-negotiation briefing memorandum, its estimate was revised based on its "previous experience in offers for this item." (R4, tab 57; see also finding 1)

10. DSCR received 2 proposals, $75,076.96 offered by Don G. Jenness Co., Inc. (Jenness), and $94,490 offered by Viereck Co. (Viereck) (R4, tab 56). The contracting officer determined both offers to be within the competitive range and engaged in negotiation discussions with them. According to the pre-negotiation briefing memorandum, as a result of the delay in meeting the requiring activity's need for the hydraulic press due to appellant's default, the negotiation objective was to obtain the hydraulic press on a reduced delivery date (R4, tab 57). Although the reprocurement solicitation specified a required delivery date within 240 days after receipt of contract award, Jenness, proposed to supply a Nugier Press Company, Model CF150-10, brand

name hydraulic press with delivery within 120 calendar days after the receipt of the contract (R4, tabs 57, 60). Viereck proposed a Clearing Niagra HPS150 brand name hydraulic press with delivery within 42 calendar days after receipt of the contract. The Government determined that the Viereck proposal exceeded some of the technical requirements of the specification and did not satisfy other requirements (R4, tab 57; supp. R4, tab G-2). Therefore, the Government determined that the machine proposed by Viereck was not acceptable and that the proposed price significantly exceeded the Government estimate.

11. The requiring activity requested certain changes to the specification for the reprocurement contract, including increasing the stroke from 10 inches to 20 inches (supp. R4, tab G-2). Following negotiations, the Government accepted the Jenness offer and awarded the reprocurement contract to Jenness on 21 August 1996 in the firm, fixed-price amount of $75,076,96, with delivery required within 120 days after receipt of contract award (R4, tab 60). During the negotiations and evaluation of the Jenness proposal, Jenness agreed to the requested changes to the specifications, and offered to modify the machine at an increased price of $4,000 (supp. R4, tab G-3). However, DSCR determined that since the solicitation was for reprocurement and the costs would be charged to the defaulting contractor, DSCR was only authorized to award a contract containing the same specifications, terms, and conditions of the original defaulted contract. Accordingly, the Government awarded the contract to Jenness with the same specification, terms, and conditions set forth in the defaulted contract, except as to the reduced delivery time specified in the reprocurement contract. The changes requested by the requiring activity were to added by contract modification following contract award (supp. R4, tabs G-3, -4).

12. By contract Modification No. P00001, dated 16 September 1996, the Government changed the stroke requirement from 10 inches to 20 inches thereby increasing the contract price by $4,000 to $79,076.96 (supp. R4, tab G-7). Contract Modification No. P00003, dated 18 September 1996, added the requirement for a scrap chute and increased the contract price by $515 from $79,076.96 to $79,591.96 (supp. R4, tab G-6).

13. Jenness completed delivery of the 150 ton hydraulic press and commercial manuals as required by the contract and data requirements on 13 February 1997, and DSCR accepted them on that date (R4, tab 61). Installation verification was completed and accepted on 24 March. The record does not contain invoices and payment vouchers establishing payment to Jenness. However, by facsimile message dated 5 May 1997, the contracting officer informed Jenness that the final payment had been made and requested verification of its receipt as well as Jenness' consent to the Government's close-out procedures (R4, tab 62). Jenness verified that it had received final payment under the contract on 11 April 1997.

14. The contracting officer issued her final decision on 2 June 1997 holding appellant liable to the Government for excess reprocurement costs and administrative costs in the amount of $23,196.96 and demanded payment thereof. The excess costs were based on the difference in price between the original contract awarded at $52,265 and the reprocured contract price of $75,076.96, plus administrative costs of $385.00. Modifications P00001 and P00003 to the Jenness contract were not included in the computation of excess costs. (R4, tab 63) On 28 August 1997, Grimco filed a notice of appeal challenging the assessment of excess reprocurement cost.

DECISION

In its complaint, appellant expressly stated that it was not appealing the termination for default or the assessment of the $385.00 for administrative costs. Indeed, appellant admits that the Government's termination of the contract because appellant was "late on delivery is correct." The thrust of appellant's contention was stated in its complaint, as follows:

> David Grimaldi Co. should not be liable for this amount [$23,196.00] because the government as [sic] changed the estimate or the type of press it will accept, these costs are not excess costs.
>
> Their [sic] estimate was wrong to begin with, the press costs is [sic] more than they anticipated by trying to charge us for the difference is similar to receiving $75,000 worth of goods for $48,000.
>
> Because our bid was low the government does not have the right to charge David Grimaldi Co. for their [sic] and our mistakes. When they [sic] repurchased the press they [sic] are paying fair market value and the difference can not be considered excess costs.
>
> When they [sic] revised their estimated cost David Grimaldi Co. bid can not be considered the value cost of the machine because the government's estimate was not correct.

Despite its statement in its notice of appeal and complaint, appellant appears to question the Government's decision to terminate the contract in its brief. First, appellant questions the Government's QAR's inspection and report concerning the degree to which appellant now asserts the contract work was completed, and asserts that had appellant been permitted to complete the contract, its delivery would have been more cost and time effective than allowed under a reprocurement contract. Second, appellant suggests that the reason for termination of its contract and the award of the reprocurement contract was

to obtain a hydraulic press different than the machine to be supplied by appellant under the defaulted contract. Appellant supports this contention by its assertion that the Government fully intended to purchase a machine with a 20 inch stroke and a scrap chute, as evidenced by the communications by the requiring activity prior to the award of the reprocurement contract and by the Government's intent "to go around the law and try to show that the [sic] were buying the same machine." Appellant's factual allegations in its brief were not supported by the record.

Notwithstanding the foregoing, appellant acknowledges that Grimco's non-delivery of the hydraulic press was not attributable to any excusable cause and the default termination of the contract was warranted pursuant to the DEFAULT clause. However, in denying its liability for $23,196.96 in excessive reprocurement costs, appellant alleges that the Government increased the estimate on the repurchase RFP by approximately 45% to match the original bids which exceeded the requirements for the hydraulic press and changed the specifications of the contract.

Under the DEFAULT clause, paragraph (a)(1)(i), the Government has the right to terminated the contract in whole or in part if the contractor fails to deliver the supplies within the time specified in the contract or any extension thereof. The Government terminated the contract for default due to appellant's failure to deliver the 150 ton hydraulic press within the time specified in the contract, as extended, and because there were numerous areas of non-compliance with the contract specifications. Although appellant requested additional time extensions, it continued to be delinquent and with the time extensions previously granted, the contracting officer questioned the reliability of appellant's projections of delivery. Appellant had not delivered the hydraulic press on the delivery date, as extended, and, as of 23 January 1996, well after the extended delivery date, the partially manufactured hydraulic press did not conform to the contract specifications in a number of respects. Appellant gave no excuse for the delinquency except that it was experiencing cash flow problems. Appellant's inability to perform the contract in accordance with its terms and delivery schedule due to cash flow problems or insufficient funding is not generally regarded as a matter beyond its control. *Frence Manufacturing Co., Inc.*, ASBCA Nos. 46233, 46657, 98-2 BCA ¶ 29,870; *Local Contractors, Inc.*, ASBCA No. 37108, 92-1 BCA ¶ 24,491, *aff'd*, 988 F.2d 131 (Fed. Cir. 1993) (Table).

According to paragraph (b) of the DEFAULT clause, when the Government terminates the contract for default, the Government "may acquire . . . supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services." "The measure of damages is the reasonable reprocurement price less the original contract price." *Cascade Pacific International v. United States*, 773 F.2d 287, 293 (Fed. Cir 1985); *Marley v. United States*, 423 F.2d 324, 333 (Ct. Cl. 1970). In order to recover excess reprocurement costs, the Government must establish that: (1) the reprocured supplies are the same as, or similar to those involved in the terminated contract; (2) the Government actually incurred excess costs; and (3) the

Government acted reasonably to minimize the excess costs resulting from the default. *Cascade Pacific International v. United States*, *supra*.

We found that the reprocurement contract was awarded under the same terms and conditions as that of the defaulted contract, except as to the delivery schedule, which was proposed by Jenness and provided for 120 days delivery rather than the original 240 days required by appellant's contract. Although, Modification P00001 to the reprocurement contract added the requirement for a 20 inch stroke length and Modification P00003 to the reprocurement contract added the requirement for a scrap chute, there was no evidence that these changes to the hydraulic press changed the similarity of the reprocured hydraulic press to the hydraulic press required under appellant's defaulted contract. As we held in *AGH Industries, Inc.*, ASBCA Nos. 27960, 31150, 89-2 BCA ¶ 21,637 at 108,863:

> In order to be *similar*, the reprocured items must be similar to the original items in "physical and mechanical characteristics as well as functional purpose." *Lome Electronics, Inc.*, ASBCA Nos. 8642, 8701, 1963 BCA ¶ 3833. The test to be applied in determining similarity is a comparison of end items delivered under the reprocurement contract with the item specified in the original contract at the time of default. It is well settled that the word "similar" need not be treated as meaning "identical."

There is no evidence here that the Government relaxed the standards in either the terms of the reprocurement contract or the way it was administered. There is no evidence, nor are we persuaded that contract Modification Nos. P00001 and P00003 to the reprocurement contract effected changes that went to the heart of the procurement by affecting function of the product, its physical or mechanical characteristics, or by affecting the repurchase price other than what was granted in the modifications themselves. In any event, the contracting officer did not include the costs associated with these two modifications in the computation of excess reprocurement costs assessed against appellant.

As set forth in our findings, the reprocurement contractor, Jenness completed the delivery of the hydraulic press and data requirement in accordance with its contractually specified delivery schedule. The Government accepted the press on the date of delivery and accepted the verification by Jenness on 24 March 1997. The Government made final payment on or before 11 April 1997.

We further hold that the Government acted reasonably to mitigate the excess costs of reprocurement. The Government acted reasonably in soliciting offers within approximately two months following its termination of appellant's contract, and in awarding the contract to Jenness following evaluation of the two offers received and

negotiation with Jenness. Although the contract price for the reprocurement contract exceeded the original contract price of the defaulted contract by $22,811.96, the award was well-within the range of proposed prices offered in response to the original solicitation which resulted in the award of the contract to appellant and approximately $20,000 less than the price proposed by Viereck Co. *Fancy Industries, Inc.* ASBCA No. 26578 BCA 83-2 ¶16,659. Moreover, that the Government revised its estimate in the reprocurement solicitation consistent with the history of the procurement is of no significance in this case to the computation of the amount of excess reprocurement costs. The DEFAULT clause of the contract grants the contracting officer broad discretion to reprocure upon such terms and conditions as he may deem appropriate. *Cascade Pacific International v. United States, supra*. The denial of appellant's additional 30 day request and the shortened delivery date for the reprocurement contract were reasonable in light of the appellant's repeated delivery failures.

The contract clause, ADMINISTRATIVE COSTS OF REPROCUREMENT AFTER DEFAULT, provided that, in the event that the contract is terminated for default and the supplies covered by the contract are repurchased by the Government, the "contractor shall pay, and the Government shall accept, the sum of $385 as payment in full for the administrative costs of such repurchase." In addition to excess reprocurement costs, the Government is entitled to damages, including reasonable administrative expenses. *Birken Manufacturing Co*, ASBCA No. 32590, 90-2 BCA ¶ 22,845. Appellant does not contest the assessment of administrative costs, and we hold that under the ADMINISTRATIVE COSTS OF REPROCUREMENT AFTER DEFAULT clause, the Government is entitled to recover the contractually stipulated $385.00 administrative costs in addition to its excess reprocurement costs. According, we hold that appellant is liable to the Government in the amount of $23,196.96, the amount of excess reprocurement costs plus administrative costs.

We deny the appeal.

Dated: 6 January 2000

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

PETER D. TING
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50977, Appeal of Grimco Pneumatic Corp. T/A David Grimaldi Co., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals