ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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ARCO Engineering, Inc.	)	ASBCA No. 52450
	)	
Under Contract No. F42630-97-C-0079	)	

APPEARANCE FOR THE APPELLANT: Mr. Steve Watson
President

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
CAPT Christopher J. Aluotto, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from contracting officer's decisions terminating the contract for default and assessing reprocurement costs of $32,361.66. The underlying contract between the United States Air Force, Hill Air Force Base, Utah, and appellant is for bushings for F-16 aircraft. The parties have waived a hearing pursuant to Board Rule 11. We deny the appeal as to the default termination and administrative reprocurement costs. We sustain the appeal with respect to the excess repurchase costs.

FINDINGS OF FACT

1. Contract No. F42630-97-C-0079 was awarded to appellant on 13 February 1997 for a first article and 5259 production units of 3120-01-257-2740LE bushing for F-16 aircraft. The part number was 2007404-23. The firm fixed-price of the negotiated contract was $34,683.50 (5259 bushings at $6.50 and $500 first article costs). Delivery of the first article was to be within 90 days, and the contract stated "Urgent: this is an extremely urgent requirement concerning public exigency." After first article approval delivery was to be FOB origin as follows:

1000 units	60 days
2000 units	90 days
2259 units	120 days

(R4, tab 1; ex. G-1)

2. Appellant was the low offerer. Six of 37 unidentified offerors were in the competitive range, with per unit prices of $6.75, $7.648, $7.879, $8.38, $8.95 and $8.95. (R4, tab 18)

3. The contract contained FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). That clause permits the contract to be terminated for various failures of performance and the Government to acquire the supplies from another vendor, and makes the contractor liable for excess costs incurred as a result. The clause does not specifically address administrative costs. However, the contractor may not be liable if the failure to perform the contract arises from causes "beyond the control and without the fault or negligence of the Contractor." (R4, tab 1)

4. Appellant's first article was conditionally approved by letter of 1 October 1997. Delivery of the first production lot of 1000 was due by 6 December 1997. (R4, tab 12) By letter of 4 November 1997 appellant informed the contracting officer that it could not "produce this product, for the price originally quoted." Appellant admitted underbidding the job and stated that its production process was "incompetent." A price increase to $10.50 per unit was proposed. (R4, tab 15) When appellant missed the 6 December 1997 delivery date, a show cause letter was issued on 16 December 1997 (R4, tab 16).

5. By letter of 31 December 1997 appellant's president, Steve Watson, informed respondent that it could not complete the contract. Mr. Watson offered, however, to provide a quantity sufficient to meet emergency requirements. (R4, tab 17) Mr. Watson subsequently refined his offer and agreed to provide emergency units at $2.00 per unit above the contract price. The contracting officer evaluated the situation pursuant to FAR 49.402 on 2 March 1998. She rejected appellant's offer and concluded, *inter alia*, that the items were still needed and would have to be repurchased. (R4, tab 20) The contract was terminated for default on 6 April 1998 (R4, tab 4). Appellant did not deliver any production units (exs. G-2, -4; Notice of Appeal).

6. Respondent thereafter issued a request for proposals (RFP) to reprocure 5,260 bushings. Bid opening was 30 July 1998. The number of vendors to whom RFPs were issued is not indicated in the record. Three offers were received, of which two were responsive: Mayday Manufacturing Co. (Mayday) at $65,276.60 ($12.41 per unit) and Yeager Mfg. Division at $84,686.00 ($16.10 per unit). (Exs. G-3, -5) A contract was thereafter awarded to Mayday on 3 August 1998 for 5,260 units at $12.41 per unit. Delivery was to be in 13 weeks, FOB origin. Mayday shipped the units ahead of schedule and was paid by respondent. The record contains only the first two pages of the Mayday contract, which do not evidence a first article provision. (R4, tab 25) There is no evidence of cost analysis or negotiation of price by respondent. The record does not disclose whether any of the original offerers was solicited. The record does not disclose why the offers were higher than the original offers (finding 2). Neither does the record disclose when the parts were needed.

7. The contracting officer issued a demand for excess costs of $32,361.66 for repurchase of the bushings ($31,080.69) and related administrative costs ($1,280.97) in a decision dated 12 August 1999 (R4, tab 23). The excess repurchase costs were calculated by subtracting the $6.50 unit price in appellant's contract from the $12.41 unit price in Mayday's contract ($5.91) and multiplying that by 5259 units. The administrative costs were calculated using "Pro Cost 1995," a manual developed at Hill Air Force Base to determine the administrative costs associated with procurement and reprocurement of contract orders. The manual is based on studies of administrative costs. Data for the studies was obtained from an information control system at Hill Air Force Base. In an affidavit, the author of the manual represents that the administrative costs assessed against appellant were consistent with the manual and that the costs assessed would have been higher if the manual were current. (Exs. G-2, -3; R4, tab 23) We find the manual contains reasonable estimates of the administrative costs of reprocurement and that it was reasonably applied by the contracting officer. A timely appeal was filed by letter of 2 November 1999.[1]

DECISION

Appellant does not attempt to excuse its failure to deliver, but asks the Board to do "the fair thing" and deny reprocurement costs. Respondent argues that appellant's letters (findings 4, 5) amount to an anticipatory repudiation and that, in any event, appellant did not deliver any production units (finding 5). We need not address anticipatory repudiation, as respondent has met its burden of proving that appellant defaulted on its obligation to manufacture and deliver bushings under the contract (*id*.). The burden shifts to appellant to prove the default was excusable. *Caskel Forge, Inc.*, ASBCA No. 6205, 61-1 BCA ¶ 2891. Appellant does not even argue that its performance failure was excusable. We thus deny the appeal as to the propriety of the default termination.

The record establishes that the bushings were still needed (finding 5). With respect to the excess costs of reprocuring the bushings, it is respondent's burden to establish: 1) the reprocured bushings are the same as or similar to those in appellant's contract; 2) that excess costs were actually incurred; and 3) that it acted reasonably to minimize the excess costs. *Cascade Pacific International v. United States*, 773 F.2d 287, 294 (Fed. Cir. 1985). The evidence establishes that the same part was reprocured (finding 6) and that the excess costs were actually incurred (*id.).* Respondent has therefore succeeded in establishing that it met the first two conditions.

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[1] Pursuant to the Fulford Doctrine a timely appeal from an assessment of reprocurement cost permits the appellant to challenge the propriety of the default. *Fulford Manufacturing Co*., ASBCA Nos. 2143, 2144, 6 CCF ¶ 61815 (1955).

To meet the third condition - whether respondent acted reasonably to minimize costs - respondent must establish that it acted "within a reasonable time of the default, use[d] the most efficient method of reprocurement, obtain[ed] a reasonable price, and mitigate[d] its losses." *Cascade Pacific International v United States, supra* at 294, footnote omitted. In determining whether this condition was met, the court upheld the refusal to assess excess reprocurement costs because the reprocurement contract was not in the record. *Id*. at 294. Here, we have only the first two pages of the reprocurement contract, enough to identify the contractor, date of award, delivery provisions, method of contracting, part number, price and quantity. However, we cannot determine if the reprocurement contract contained other conditions affecting price, so that we cannot find, under *Cascade Pacific*, that respondent acted reasonably to minimize the excess costs.[2] In this regard, we also note that evidence of cost analysis or negotiation is not in the record, and we do not know if any of the original offerors were solicited. The record does not disclose when the parts were needed, so, notwithstanding the "urgent" status of appellant's contract, we do not know if the accelerated delivery under the reprocurement contract was warranted.

Although the Default clause does not specifically mention administrative costs as part of the excess costs of reprocurement, such costs have been treated as part of the Government's right to common law damages. *Birken Manufacturing Company*, ASBCA No. 32590, 90-2 BCA ¶ 22,845 at 114,718. Appellant has not challenged the administrative costs, which are properly recoverable if supported by reasonable estimates. *Arctic Corner, Inc.*, ASBCA No. 38075, 94-1 BCA ¶ 26,317. The costs are consistent with respondent's 1995 internal manual for determining the administrative costs of procurement and reprocurement in similar contract actions. We have found the manual to contain reasonable estimates of such costs and that the manual was reasonably applied by the contracting officer (finding 7). Accordingly, we conclude respondent is entitled to recover administrative costs of $1,280.97. *Birken Manufacturing Company, supra*.

The appeal is denied with respect to the propriety of the default termination and the administrative reprocurement costs of $1,280.97. It is sustained with respect to the assessment of $31,080.69 for the excess repurchase costs.

Dated: 12 December 2000

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[2] We note that the reprocurement contract's unit price of $12.41 was considerably higher than the $6.50 unit price in appellant's contract or the next six low bids for appellant's contract. There is no explanation for the higher price. (Findings 1, 2, 6) Further, while appellant sought a unit price of $10.50 to complete the contract, it described its own production process as "incompetent" (finding 4).

CARROLL C. DICUS, JR.
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

EUNICE W. THOMAS
Administrative Judge
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. 52450, Appeal of ARCO Engineering, Inc., rendered in conformance with the Board's Charter.

Dated:

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