ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of –	)	
	)	
Premiere Building Services, Inc.	)	ASBCA No. 51804
	)	
Under Contract No. DAKF04-96-C-0003	)	

APPEARANCE FOR THE APPELLANT: Richard W. Schwartzman, Esq.
McManus, Schor, Asmar & Darden
Washington, D.C.

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ David Newsome, Jr., JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE ROME

Premiere Building Services, Inc. (Premiere) has appealed under the Contract Disputes Act, 41 U.S.C. § 606, from the contracting officer's (CO) final decision charging it with excess reprocurement costs after the termination of its contract for default. Appellant's prior appeal to the U. S. Court of Federal Claims from the default termination was dismissed with prejudice. When appellant again challenged the default termination in conjunction with its current appeal, the Board granted summary judgment to the Government on that issue, leaving the propriety of the reprocurement cost assessment to be resolved. *Premiere Building Services, Inc.*, ASBCA No. 51804, 00-1 BCA ¶ 30,696. The parties are proceeding pursuant to Board Rule 11, based upon the submitted record. We decide entitlement only (order dated 21 December 1998) and, for the reasons given below, we deny the appeal.

FINDINGS OF FACT

In 1995, 22 offerors submitted proposals in response to a solicitation issued by the Department of the Army for custodial services at Fort Irwin, California. On 14 December 1995 the Army awarded the captioned firm fixed-price contract to Premiere, as the lowest responsive, responsible offeror, at its $1,045,508.17 offer price. The contract, which incorporated the FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause by reference, included a base year, from 1 February 1996 to 31 January 1997, and four option years. The base year price was $197,161.90. (R4, tab 2 at award page, B-1, B-9, tab 4 at I-6, tab 9; ex. G-16, ¶¶ 1-3 (uncontroverted declaration of CO Ledinila M. Cate)).

By letter dated 31 January 1996, Premiere notified the CO that it would be unable to perform the contract as priced (R4, tab 15). On 13 February 1996 the CO terminated the contract for default (R4, tab 11). Having an immediate need for custodial services, the Army used the abstract of offers from the original solicitation as a source of potential contractors who were familiar with its requirements and whose offers were the closest in amount to Premiere's offer (ex. G-16, ¶ 4).

On 20 February 1996 the Army awarded firm fixed-price Contract No. DAKF04-96-C-0005 to Cardinal Maintenance Service (CMS), the next lowest responsive, responsible offeror after Premiere on the original solicitation, in the amount of $1,189,352.40, covering a base year, from 1 March 1996 through 28 February 1997, and four option years (ex. G-1). The Army had determined that CMS's price was fair and reasonable based upon adequate competition (ex. G-16 ¶5). CMS had proposed a base year price of $232,740.31 in response to the original solicitation, but prior to the award to CMS, that amount was increased to $237,870.48, the net result of square footage errors discovered after the award to Premiere. The Army did not make any other material alterations to the original solicitation's scope of work prior to its award to CMS (R4, tab 2 at B-2, B-3; ex. G-1 at B-2, B-3, ex. G-16, ¶¶ 4, 5).

Post-award, CMS's contract was modified in various respects, including to add and delete buildings where services were to be performed, resulting in a net increase in square footage; to extend the base year through 29 April 1997; and to increase the contract price due to the modifications (exs. G-9 through G-13). The CO terminated the contract for convenience effective 31 March 1997 (ex. G-14). The Army has made final payment on the contract (ex. G-17, voucher 253863).

On 16 July 1998 the CO issued her final decision seeking $42,678.88 in excess reprocurement costs from appellant. The assessment did not account for the fact that CMS's original price had increased due to the square footage errors discovered after the award to appellant. (R4, tab 1) The Army now seeks only the difference between Premiere's $197,161.90 base year price and CMS's original base year price of $232,740.31, which is $35,578.41,[*] plus $2,000 in administrative costs, for a total of $37,578.41. Therefore, the current claim does not include the cost to the Army of any work beyond that which appellant was to have performed under its contract. (Ex. G-16, ¶¶ 5, 6)

DISCUSSION

Pursuant to the Default clause incorporated into appellant's contract, upon a default termination the Government may acquire "under the terms and in the manner the [CO]

[*] The Government reports the difference as $35,548.7l, an apparent mathematical error.

considers appropriate," supplies or services similar to those terminated, and the contractor will be liable for any excess costs. FAR 52.249-8(b). The regulations further provide that the CO is to repurchase the same or similar supplies or services against the contractor's account as soon, and at as reasonable a price, as practicable, and is to obtain competition to the maximum extent practicable. FAR 49.402-6(a), (b). Although the Default clause does not specify administrative costs as recoverable upon a reprocurement, they are allowed pursuant to the Government's right to common law damages, if reasonably supported, including by reasonable estimates. *ARCO Engineering, Inc.*, ASBCA No. 52450, 01-1 BCA ¶ 31,218 at 154,095; *Arctic Corner, Inc.*, ASBCA No. 38075, 94-1 BCA ¶ 26,317 at 130,905.

The Default clause accords the CO very broad discretion in determining how to effect a reprocurement, *Barrett Refining Corporation*, ASBCA Nos. 36590, 37093, 91-1 BCA ¶ 23,566 at 118,144-45, but that discretion is not absolute. We are to examine whether the CO acted reasonably under the relevant circumstances. *Astro-Space Laboratories, Inc. v. United States*, 470 F.2d 1003, 1017 (Ct. Cl. 1972); *Barrett*, 91-1 BCA at 118,145. The Government bears the burden of persuasion that: (1) the reprocured supplies or services are the same or similar to those involved in the terminated contract; (2) it incurred excess costs; and (3) it acted reasonably to minimize the excess costs resulting from the default. *Cascade Pacific International v. United States*, 773 F.2d 287, 293-94 (Fed. Cir. 1985). The third condition requires the Government to "act within a reasonable time of the default, use the most efficient method of reprocurement, obtain a reasonable price, and mitigate its losses." *Id*. at 294 (footnote omitted). Insubstantial or immaterial changes in the procurement, such as the correction of inadvertent errors, do not relieve the defaulted contractor of its liability for excess reprocurement costs; but any increased costs due to the changes are not to be charged to it. *Double B Enterprises, Inc.*, ASBCA Nos. 52010, 52192, 01-1 BCA ¶ 31,396 at 155,112-13; *Environmental Tectonics Corporation*, ASBCA No. 21204, 78-1 BCA ¶ 12,986 at 63,309.

With the exception of the claimed administrative costs, which it asserts are unsupported, appellant does not contest that the Army incurred the reprocurement costs sought. Rather, appellant contends that the Army did not establish that its contract with CMS was similar to or substantially the same as its contract with appellant or that it mitigated its losses. With regard to mitigation, appellant alleges that the Army failed to prove that its changes to appellant's contract did not affect the cost of reprocurement.

In fact, as we have found, CMS's contract was based upon the same solicitation and list of offerors as those for appellant's contract. The Army reprocured the custodial work only one week after appellant's default and awarded the contract to the next lowest responsive, responsible offeror from among many offerors. But for square footage changes to correct errors, there were no material changes to the contract prior to the award to CMS. In any event, the Army is not seeking its increased costs attributable to those changes. The other contract modifications resulting in a net increase in square footage also

do not bear upon the Army's computation of its excess reprocurement costs, which is based solely upon appellant's base year award price compared to CMS's original base year price, prior to increase.

The Army has thus met its burden of persuasion. We are satisfied that the CO acted reasonably in effecting the reprocurement in the most prompt and efficient method practicable, based upon ample competition, and that the Army is entitled to its excess reprocurement costs. With respect to any administrative costs attendant to the reprocurement, we note that though the Army used the same solicitation in reprocuring the custodial work, some administrative costs are inevitable. The Army is entitled to those administrative costs that it can prove or support by reasonable estimates in the quantum phase of this appeal.

DECISION

The appeal is denied and remanded to the parties to resolve quantum.

Dated: 24 October 2001

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 51804, Appeal of Premiere Building Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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