ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Double B Enterprises, Inc.	)	ASBCA Nos. 52010, 52192
	)	
Under Contract No. DAAE20-98-C-0118	)	

APPEARANCE FOR THE APPELLANT: Zane E. Finkelstein, Esq.
Carlisle, PA.

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Ryan M. Zipf, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS

These appeals arise from the termination for cause of a commercial items contract. ASBCA No. 52010 is the appeal from the termination for cause. ASBCA No. 52192 is the appeal from the assessment of excess reprocurement costs. Entitlement only is at issue.

FINDINGS OF FACT

Termination for Cause

1. On 1 May 1998, the Government issued a solicitation for a commercial items contract for 60 heavy tank target lifters. Contract Line Item (CLIN) 0001 required that the lifters be delivered to Ft. Riley, Kansas, within 60 days of award. CLIN 0002 was for installation and related items. No delivery date was set for CLIN 0002. The acquisition was a 100 percent small business set-aside. (R4, tab 1)

2. The solicitation incorporated the following clauses which are relevant, in part, to these appeals:

> FAR 52.212-4 CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (MAY 1997)
>
> . . . .
>
> (c) *Changes*. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

. . . .

(f) *Excusable delays*. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence . . . .

. . . .

(m) *Termination for cause*. The Government may terminate this contract . . . for cause in the event of any default by the Contractor . . . .

. . . .

(s) *Order of precedence*. Any inconsistencies . . . shall be resolved by giving precedence in the following order:

(1) The schedule of supplies/services.
(2) [Enumerated contract clauses not relevant here].
(3) The clause at 52.212-5.

. . . .

FAR 52.212-5 CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS–COMMERCIAL ITEMS (AUG 1996)

(a) The Contractor agrees to comply with . . . [FAR] 52.233-3, Protest after Award . . . .

FAR 52.233-3 PROTEST AFTER AWARD (AUG 1996)

(a) . . . Upon receipt of the final decision in the protest, the Contracting Officer shall either—
(1) Cancel the stop-work order; or
(2) Terminate the work covered by the order . . . .
(b) If a stop-work . . . is canceled . . . [t]he Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both . . . if—
(1) The stop work order results in an increase in the time. . . or . . . costs properly allocable to . . . this contract;

> (2) The Contractor asserts its right to an adjustment within 30 days [of the lifting of the stop work order] . . . .
>
> . . . .

(R4, tab 1)

3. FAR 12.403 TERMINATION provided, in part, as follows;

> (a) *General*. . . . [T]he requirements of Part 49 do not apply when terminating contracts for commercial items . . . .
>
> (b) *Policy*. The contracting officer should exercise the Government's right to terminate a contract for commercial items . . . for cause only when such a termination would be in the best interests of the Government. The contracting officer should consult with counsel prior to terminating for cause.
>
> (c) *Termination for cause.*
>
> . . . .
>
> (2) The Government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess reprocurement costs together with any incidental or consequential damages . . . .

4. Installation was to be performed as follows:

> 10. The contractor shall provide complete installation of all lifters . . . on both ranges at Ft. Riley . . . . 14. Delivery is required 60 Days after award. Installation windows shall be coordinated upon receipt of award with Ft. Riley . . . . 15. . . . Inspection/Acceptance shall be accomplished by Ft. Riley's designated Range Officer for verification that the requirements of this performance description have been met. Delivery is required 60 [days] after award.

5. The solicitation was formally advertised. The Government's bidders' mailing list identified six potential offerors: ATA Defense Industries, Inc. (ATA), Caswell International Corp. (Caswell), Marvin Land System, Inc., Centra Industries, Inc., Advance Manufacturing Co., Inc., and Arcata Associates, Inc. Of those companies, one was debarred and another had an invalid telephone number. (R4, tab 133; tr. 13)

6. On 21 May 1998, the installation provisions were amended as follows:

> The equipment is required to be shipped to Ft Riley within 60 days after award. The successful offeror will be given a three weeks notice as to the actual installation window when it is determined. . . . Installation shall be completed within 15 days from the start of installation . . . .

(R4, tab 1, Amendment A0001)

7. On 16 June 1998, Mr. Joseph J. Borbeck, Jr., appellant's president, owner and only employee, submitted his proposal. Although he had assembled and installed lifters as a subcontractor on other Government contracts, this was his first prime contract (tr. 183-84).

8. Bid opening was 19 June 1998. The Government received the following bids:

Double B Enterprises	$347,040.00
SES	$447,480.00
ATA Defense Industries	$469,291.68
Caswell Internation Corp.	$539,100.00

(R4, tab 54)

9. The Government awarded the subject contract to appellant on 29 July 1998 at a price of $347,040. The delivery date for CLIN 0001AA was "30-SEP-1998" and the delivery date for CLIN 0002AA was "30-SEP-1998 ESTIMATED." (R4, tab 1)

10. On 30 July 1998, Caswell filed a protest, alleging that appellant was the same entity as, or an agent of, another firm in violation of FAR 52.219-6(a) NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE (JUL 1996). Caswell also alleged that appellant planned to supply items made by Theissen Training Systems (Theissen), a German company, in violation of FAR 52.219-6(c), which requires a small business to use "only end items manufactured or produced by small business concerns in the United States." (R4, tab 8)

11. On 4 August 1998, ATA protested the award to the General Accounting Office (GAO), alleging as follows: (1) appellant could not perform 50 percent of the cost of manufacturing as required by FAR 52.219-14 LIMITATIONS ON SUBCONTRACTING (DEC 1996); (2) the Government disclosed the outcome of the competition to appellant six weeks before award; and (3) appellant's price was unachievable (R4, tab 10).

12. On 5 August 1998, the contracting officer issued a stop work order (R4, tab 11).

13. The GAO dismissed the ATA protest on 6 August 1998 (R4, tab 13).

14. On 24 August 1998, the SBA found that appellant was a small business and that it was independently owned and operated. The SBA did not make any findings as to appellant's capability to comply with FAR 52.219-14. (R4, tab 15)

15. On 26 August 1998, the contracting officer lifted the stop work order and, without consulting appellant, established a delivery date of 26 October 1998 (R4, tab 16; tr. 52-53). He did not lift the stop work order earlier because the Caswell protest was still pending (tr. 19-20).

16. Appellant did not submit an equitable adjustment claim after the stop work order was lifted (tr. 22, 214).

17. In September 1998, Mr. Joseph J. Borbeck, Sr., Mr. Borbeck's father and consultant, advised Mr. Vincent J. Runco, the Government's equipment specialist, that appellant planned to transport the lifters to Ft. Riley on a semi-trailer and asked if there was a place where the trailer could be stored until installation could begin. Mr. Runco indicated that the trailer could be stored behind a chain link fence outside the range maintenance office (tr. 114-15, 125-27, 140-41). Mr. Borbeck, Sr., denied the conversation (tr. 270). Based on our assessment of the demeanor and credibility of the witnesses, we find that the conversation took place (R4, tabs 46, 47, 48).

18. On 14 September 1998, Caswell advised the contracting officer that it did not believe appellant could comply with FAR 52.219-14 LIMITATIONS ON SUBCONTRACTING because it did not have a facility or adequate personnel (R4, tab 17).

19. On 22 September 1998, the contracting officer sent a letter to appellant proposing to extend the delivery date until 17 November 1998 to compensate for vendor delays caused by the stop work order. He asked appellant to sign the letter as "acknowledgement [sic] and agreement" of the change. (R4, tab 3; tr. 23)

20. Mr. Borbeck, Sr., and the contracting officer discussed the proposed extension over the telephone. According to Mr. Borbeck, Sr., the contracting officer told him "that unless Double B executed this document . . . [the Government] would have no choice other than . . . to exercise their right to terminate the contract." Mr. Borbeck, Sr., allegedly interpreted the statement as a "threat." (Tr. 264) The contracting officer denied threatening Mr. Borbeck, Sr. (tr. 23-24). We find the contracting officer's testimony credible.

21. Mr. Borbeck signed the letter on 29 September 1998, allegedly because the contracting officer had threatened his father with termination (R4, tab 3; tr. 219-20, 255-56). The cover letter to the agreement stated as follows:

> . . . I would like to suggest, that if, as informed during [several] telcons, the government should decide to terminate our contract, we are prepared to react accordingly. It is hard to understand the intent of these threats since we are not the cause of the delays.
>
> This is to advise that . . . the protest filed against the government, which Double B defended and provided the necessary input, has resulted in a claim in the amount of $6,000. To defend against the protest, we employed outside legal counsel to prepare the necessary documentation . . . .
>
> . . . .
>
> . . . Since there is no progress payments [clause], our concern is over the period of time from when the hardware is delivered and the date of installation. Based on previous experience, installations have been delayed which directly causes financial impact. Therefore we request that the contract be modified . . . to [permit] payment for the hardware . . . on condition and count only, when received at the destination, with final acceptance based on installation and performance . . . .
>
> Attached, please find the executed . . . revised delivery schedule . . . [which] is being executed solely for agreeing to the revised delivery schedule and for no other reason.

(R4, tab 19)

22. On 13 October 1998, the contracting officer and members of his staff conducted a post award visit. In particular, the contracting officer wanted to see if appellant had a facility and planned to perform 50 percent of the cost of the manufacturing. The visit lasted three or four hours and was conducted at the home of Mr. Borbeck, Sr. The inspection team reviewed purchase orders for about 25 to 35 percent of the parts. Appellant advised that it planned to use its Tipton, Iowa, office or a facility in the Kansas City area, that it would use its own employees to do the work and that none of the parts would be obtained from Theissen. (R4, tabs 18, 20, 21, 121, 122; tr. 26-28, 32-33, 92-96)

23. On 14 October 1998, the contracting officer extended the delivery dates for CLIN 0001AA from "30-SEP-1998" to "17-NOV-1998" and CLIN 0002AA from "30-SEP-1998 ESTIMATED" to "17-NOV-1998 (E)" (R4, tab 3 at Mod. P00002).

24. On 15 October 1998, the contracting officer advised that range 18 would be available 1 through 15 November 1998, 21 through 30 November 1998 and 1 through 13 December 1998, and that the MPRC range would be available 5 through 31 December 1998. The letter also stated that he wanted to "accommodate your request for a site visit" and requested appellant to propose dates. The letter concluded by asking appellant for its "anticipated timeframes for installation so that these dates can . . . be reserved with Ft. Riley." (R4, tab 23)

25. Appellant replied that it did "not have an interest in a site visit" and that it would advise as soon as possible of its anticipated timeframe for installation (R4, tab 24).

26. On 21 October 1998, the contracting officer issued a cure notice, giving appellant 10 days in which to advise of the steps it was taking to obtain a facility (R4, tab 25).

27. On 22 October 1998, the contracting officer advised appellant that range 18 had to be completed by 13 December 1998 due to Ft. Riley's training schedule, and that work on the MPRC range could not begin until range 18 was completed (R4, tab 26).

28. In reply to the cure notice, appellant provided the address of a facility in Riverside, Kansas (R4, tabs 27, 28, 29).

29. On 4 November 1998, the contracting officer shortened the 1 through 13 December 1998 window for range 18 by four days. The new window was 4 through 13 December 1998. (R4, tab 30)

30. On 4 November 1998, Mr. Borbeck asked the contracting officer to issue a "use certificate" so that a British vendor could obtain a license to export arms-related material. The contracting officer rejected appellant's certificate because it referred to "Tank Target Mechanisms" instead of "Heavy Lifters" and issued a corrected version on 6 November 1998 (R4, tabs 33, 144, 145; tr. 33-35). Although appellant did not send the certificate to the vendor, the vendor was able to ship the parts (tr. 257-60, 281-285).

31. On 5 November 1998, the contract specialist requested the Defense Contract Management Center (DCMC) to verify that appellant had made arrangements for the Riverside facility (R4, tabs 31, 32, 123). The DCMC representative advised that appellant had not arrived as of 12 November 1998 and that he had the following conversation with Mr. Borbeck, Sr.:

> Mr. Borbeck stated, "I have some issues with the Contracting Officer . . . and have prepared a letter to be sent November 13th . . . . I asked what the issues were? [He]stated, "If I deliver on time . . . there will not be anyone to sign off so that I can be

> paid until after the first of the year when the testing is complete. I have no way to protect my $347,000 investment during the 6 week delay from delivery until the testing begins.

(R4, tab 130; tr. 42)

32. On 13 November 1998, appellant telefaxed a letter to the contracting officer requesting that the delivery date be extended to "on or after 4 December 1998" (tr. 227-28). The letter was transmitted to a proper number, but the contract files do not contain a copy of the letter and neither the contracting officer nor the contract specialist saw the letter prior to termination (tr. 35-36, 75-77, 164-66, 173-74, 178-81). Among other things, the letter stated as follows:

> We have independently verified that should we move components of these lifters to the instillation [sic] point on or before 17 November 1998, they could not be finally assembled and installed until or after 4 December 1998. The title to these goods and the risk of loss remains with us until acceptance, which will not take place until after installation. Thus, not only would the technology be at risk during the hiatus, but the operating machinery and electronics as well. This is a risk we need not take and you can not unilateral [sic] impose it upon us.

(Ex. A-2; R4, tab 131)

33. On 13 November 1998, the contracting officer denied appellant's claim for legal fees (R4, tab 37). The propriety of that denial is not before us.

34. On the same date, Theissen shipped a 40-foot container from Germany containing 60 "Tank target lifer, cpl." to appellant. The price of the components was $184,934. (R4, tab 60)

35. Appellant failed to deliver the lifters on 17 November 1998. Mr. Borbeck explained the reasons for the failure to deliver as follows:

> I did not have the components in my facility because we had delayed the shipments. If I take possession of them, I now start running the clock on when I have to pay for the components. As long as I keep it from being delivered, if I delay them, . . . I have a longer period of time not to pay for them . . . . As a matter of fact . . . most of the components sat in the railroad yard in the Davenport area for about five to seven days . . . . We did not take possession or come down because we had to pay

> Customs and everything to take it out of [the yard]. So, the longer we could – but we ended up using up the time period for how long we could leave it down there, and that's why we finally ended up accepting the parts.

(Tr. 248-49)

36. Based on Mr. Borbeck's testimony, we find that the following events did not cause or contribute to the default: (1) the designation of separate windows for range 18 and the MPRC range; (2) the failure to provide a window of 15 days in all cases; (3) the requirement that range 18 be completed before the MPRC range; (4) revision of the installation windows; (5) the failure to provide three-weeks notice of windows in all cases; (6) the failure to lift the stop work order when GAO dismissed the ATA protest; (7) the post award visit of 15 October 1998; and (8) the issuance of a revised use certificate (tr. 248-49).

37. After consulting with counsel, the contracting officer terminated the contract for cause on 18 November 1998 (tr. 37-40 91; R4, tabs 39, 40, 41). In reaching his decision, he did not specifically consider the factors at FAR Part 49 (tr. 78).

38. On 24 November 1998, Mr. Borbeck, Sr., contacted the contract specialist by telephone and requested that the contract be reinstated. The contract specialist told him that requests for reinstatement had to be in writing. Appellant did not submit a written request. (R4, tab 42; tr. 38-39, 170-71, 224-25, 268-69, 286)

39. On or about 25 November 1998, the container arrived in Montreal, Canada, where it was shipped by rail to Davenport, Iowa (tr. 290).

40. The container arrived in Davenport, Iowa, on 7 December 1998, where it sat in the rail yard for approximately a week (tr. 248-49, 290-91; R4, tab 67).

41. On 21 January 1999, appellant appealed the final decision terminating the contract. The appeal was docketed as ASBCA No. 52010.

The Reprocurement

42. The resolicitation was not formally advertised. With the exception of appellant, all the original bidders were solicited by letter dated 4 December 1998. (R4, tabs 43, 44, 45).

43. The contracting officer did not solicit a bid from appellant for the following reasons:

> The primary issue . . . with . . . Double B is that they failed to . . . deliver . . . the original 60 lifters, but I was also at the point where I really had lost a lot of confidence in their ability to . . . build the product or deliver it, based on not even showing . . . customary progress to getting to where they can deliver.
>
> It would have been different if they had . . . a variety of equipment . . . in various stages of assembly or had some product there, but . . . I really had lost confidence in their ability to go ahead and do that.

(Tr. 41)

44. The contracting officer did not open the reprocurement to other bidders for the following reasons:

> A I didn't . . . think that I would gain anything by going back and reopening the procurement . . . to anyone else . . . . I think the four . . . companies that were originally there were the ones that were probably going to be the most interested, even six months, seven months later, [and] that they were the primary target companies I would end up getting . . . .
>
> Q [B]ased on your experience as a contracting officer [in] targeting systems, would you have expected many other offerors to submit proposals?
>
> A At that time, I don't think so. I mean, maybe one, but I would anticipate probably not, and again the primary companies that I had that were involved in this were the ones that would normally be supplying targetry equipment to the Government.
>
> Q And this was a small business set-aside?
>
> A This was a small business set-aside. There are other large businesses out there, but obviously they'd be excluded entirely. So, it narrows the field of acceptable companies.

(Tr. 43-44)

45. The performance requirements and the testing and inspection requirements of the resolicitation were identical to those of the original contract and the reprocured items

had similar physical and mechanical characteristics and served the same functional purpose as the original items (tr. 44-47, 108 149; R4, tabs 1, 43, 44, 45, 50).

46. The resolicitation included the following changes in the terms and conditions:

> 1. Award would be made on the basis of performance risk and price instead of price alone.
>
> 2. The resolicitation explicitly stated that the delivery date would remain constant regardless of range availability.
>
> 3. The delivery date was extended from 60 days to 120 days.
>
> 4. The resolicitation added a requirement for a "post award conference/product demonstration."
>
> 5. If installation was delayed, the resolicitation provided that the lifters could be stored at Ft. Riley.
>
> 6. The resolicitation provided for progress payments if installation was delayed more than 60 days.

(R4, tabs 1, 50)

47. Appellant did not offer any evidence indicating that the foregoing changes increased excess reprocurement costs.

48. Although the acquisition was not of such urgency that it would support sole source treatment, the contracting officer indicated that the equipment in use at Ft. Riley was out-dated and that the activity had been trying to get new equipment for about 2 1/2 years (tr. 44).

49. The Government received three bids:

Caswell	$541,600
ATA	$545,900
SES	$580,680

(R4, tab 49)

50. On 18 February 1999, the contracting officer awarded the reprocurement contract to Caswell. The price of the contract was $541,600. The contracting officer

selected Caswell because it offered the lowest risk and the lowest price. (R4, tab 50; tr. 155-56)

51. The reprocurement contract was mistakenly issued on a Standard Form (SF) 26, which is used for noncommercial contracts, instead of a SF 1449, which is the appropriate form for commercial items contracts. Since the contract contained the standard FAR clauses for commercial items contracts, it was still a commercial items contract. (Tr. 48; R4, tabs 1, 50)

52. Caswell completed the contract in June or July of 1999 and the Government paid Caswell $541,600 (tr. 49-51; R4, tab 71).

53. On 5 May 1999, the contracting officer issued a final decision assessing appellant $194,560 in excess reprocurement costs (R4, tab 53).

54. Appellant appealed the decision and it was docketed as ASBCA No. 52192 and consolidated with ASBCA No. 52010.

Motion for Summary Judgment

55. Shortly before the hearing, which was held on 3 and 4 October 2000, appellant filed a motion for summary judgment. We deferred ruling on the motion until after the hearing on the merits.

DECISION

These appeals raise three issues. First, was the contracting officer justified in terminating appellant's contract for cause? Second, if the termination was justified, was appellant's failure to deliver excusable? Third, if the failure to deliver was not excusable, is the Government entitled to recover excess reprocurement costs?

The Government bears the burden of proving that a termination for cause is justified. *Cf. Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). The facts surrounding appellant's failure to deliver are undisputed. The components required to assemble the lifters did not leave Germany until 17 November 1998, the date specified for delivery, and did not arrive at appellant's facility in Davenport, Iowa, until 7 December 1998. Accordingly, we conclude that the Government has established a *prima facie* case that the termination for cause was proper. Once the Government has established its *prima facie* case, the burden of going forward shifts to appellant to prove that the default was excusable. *Cf. FDL Technologies, Inc.*, ASBCA No. 41515, 93-1 BCA ¶ 25,518 at 127,098.

FAR 52.212-4(f) *Termination* sets forth the standard for excusable delay for commercial items contracts:

> The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence . . . .

Thus, in order to establish excusable delay under a commercial items contract, the contractor must prove two elements: (1) that the delay was beyond its reasonable control and without its fault or negligence; and (2) that there was a causal connection between the delay and the failure to perform.

Appellant alleges numerous excuses: (1) no installation window was available on 17 November 1998; (2) the contracting officer issued unilateral changes in violation of FAR 52.212-4(c); (3) appellant's consent to extend the delivery date until 17 November 1998 was obtained by duress; (4) the contracting officer failed to consider appellant's 13 November 1998 request for an extension; (5) the contracting officer failed to comply with FAR 12.403(b); (6) the contracting officer failed to consider the factors at FAR Part 49; (7) the contracting officer failed to consider appellant's request for reinstatement; (8) the contracting officer required appellant to install the lifters on more than one range; (9) the contracting officer failed to provide installation windows of 15 days in all cases; (10) the contracting officer required appellant to complete installation on range 18 before starting the MPRC range; (11) the contracting officer revised the designated installation windows; (12) the contracting officer failed to provide a full three-weeks notice of installation windows in all cases; (13) the contracting officer did not lift the stop work order immediately following GAO's dismissal of the ATA protest; (14) the contracting officer failed to equitably adjust the contract after the stop work order was lifted; (15) the contracting officer required appellant to submit to a post award inspection on 15 October 1998; and (16) the contracting officer substituted a different use certificate for the one submitted by appellant. We consider appellant's excuses *seratim.*

First, appellant argues that it was not in default because there was no installation window available on 17 November 1998, the required delivery date. This argument is based on the premise that the contract required simultaneous delivery and installation. Thus, if no installation window was available on 17 November 1998, appellant asserts that the delivery date automatically migrated to the next available window, which was 4 December 1998. As a result, appellant concludes that it was not in default.

In interpreting a contract, we are guided by the following principles:

> [T]he intention of the parties must be gathered from the whole instrument. (Citations omitted) Also, an interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible.

Hol-Gar Manufacturing Corp. v. United States, 351 F.2d 972, 978 (1965).

Applying the foregoing principles to this contract, we conclude that appellant was required to deliver the lifters by 17 November 1998 whether or not an installation window was available. The contract schedule established a delivery date of "30-SEP-1998" for the lifters and a delivery date of "30-SEP-1998 ESTIMATED" for installation. The only reasonable interpretation of these provisions is that delivery of the lifters was required by 30 September 1998 and that installation would begin on an unspecified date thereafter. Those dates were later extended to "17-NOV-1998" and "17-NOV-1998 (E)" respectively. The contract neither implied nor stated that an installation window would be available when the lifters were delivered. Moreover, the contract specifically stated that installation was to be completed within 15 days of starting installation, not within 15 days of delivery, meaning that delivery and installation would not necessarily take place simultaneously.

Second, appellant argues that its default should be excused because the contracting officer unilaterally extended the delivery date from 30 September to 26 October 1998. Relying on FAR 52.212-4(c), appellant argues that changes to a commercial items contract may "be made only by written agreement of the parties." This argument overlooks FAR 52.212-4(s), the order of precedence clause in the contract. The order of precedence clause states that the clauses at FAR 52.212-5 take precedence over the clauses at FAR 52.212-4 in the event of inconsistency. FAR 52.212-5 includes FAR 52.233-3 PROTEST AFTER AWARD, which authorizes the contracting officer to unilaterally issue and lift stop work orders and reestablish a delivery date in conjunction with a bid protest. To the extent there was an inconsistency between FAR 52.212-4(c), which required bilateral changes, and FAR 52.233-3, which permitted unilateral changes, FAR 52.233-3 took precedence. Accordingly, we conclude that the contracting officer's unilateral reestablishment of a delivery date after lifting the stop work order did not violate FAR 52.212-4(c).

Third, appellant argues that the contracting officer obtained its signature on a bilateral agreement extending the delivery date from 26 October to 17 November 1998 under duress. In order to establish duress, appellant must prove that: (1) it did not voluntarily sign the bilateral agreement extending the delivery date; (2) it had no other reasonable alternative but to sign the agreement; and (3) that the Government's behavior

violated "notions of fair dealing." *Systems Technology Associates, Inc. v. United States*, 699 F.2d 1383, 1388 (Fed. Cir. 1983).

We are not persuaded that appellant's consent to the extension was obtained through duress. The contracting officer denied threatening appellant with termination. Assuming *arguendo*, that the contracting officer did threaten appellant with termination, that does not *ipso facto* violate "notions of fair dealing." It is only when the contracting officer uses wrongful conduct to obtain agreement that pressure becomes duress. *Systems Technology*, 699 F.2d at 1387. Under the circumstances of this case, the contracting officer's threat, if any, did not cross that line.

Fourth, appellant argues that the default should be excused because the contracting officer did not consider its request to extend the delivery date until 4 December 1998. Appellant telefaxed its request to the Government on 13 November 1998, but neither the contracting officer nor the contract specialist saw the request until after the termination. This argument must be rejected because appellant could not have delivered the lifters on 4 December 1998 any more than it could have delivered them on 17 November 1998. The components did not arrive from Germany until 7 December 1998 and appellant did not take delivery of them for another week for financial reasons. Assuming that appellant could have taken delivery on 7 December 1998, the lifters still had to be assembled and transported from Davenport, Iowa, to Ft. Riley, Kansas. Since appellant could not have delivered the lifters on 4 December 1998, we conclude that the contracting officer's failure to consider appellant's request for an extension does not invalidate the termination for cause.

Fifth, appellant argues that the termination is invalid because the contracting officer did not consider the factors at FAR Part 49. FAR 12.403(a) states that the "requirements of FAR Part 49 do not apply when terminating contracts for commercial items." This argument is without merit.

Sixth, appellant argues that the termination is invalid because the contracting officer failed to comply with FAR 12.403(b), which sets forth Government policies for terminating a commercial items contract. Paragraph (b) states that the contracting officer "should" exercise the right to terminate only when it is in the best interests of the Government and consult with counsel prior to terminating for cause. The record indicates that the contracting officer did consult counsel prior to terminating the contract. Moreover, under the facts and circumstances of this case, the contracting officer did not abuse his discretion by terminating the contract for cause.

Seventh, appellant argues that the contracting officer's failure to act on its request for a reinstatement, rendering the termination ineffectual. On 24 November 1998, Mr. Borbeck, Sr., telephoned the contract specialist and requested that the contract be reinstated. The contract specialist told Mr. Borbeck, Sr., that requests for reinstatement had to be in writing and addressed to the contracting officer. She prepared a memorandum

of the call and put it in the file. Appellant did not submit a written request. As a result, the contracting officer did not take any action on appellant's request.

Appellant's remaining excuses fail because there is no proof that they caused or contributed to the failure to deliver. The evidence establishes that appellant failed to deliver because the components were not shipped until 17 November 1998 and did not arrive at its Davenport, Iowa, facility until 7 December 1998. Accordingly, arguments (8) through (12) which relate to the installation windows, arguments (13) and (14) which relate to the Government's stop work order, argument (15) which relates to the post award inspection, and argument (16) which relates to appellant's request for a use certificate, do not excuse appellant's failure to deliver.

After completion of the reprocurement contract, the Government assessed appellant $194,560.00 in excess costs, the difference between the price of the original contract and the reprocurement contract. To recover excess costs, the Government must prove three things: (1) that the reprocured supplies are the same as or similar to those involved in the termination; (2) that the Government actually incurred excess costs; and (3) that the Government acted reasonably to minimize excess costs. *Cascade Pacific International v. United States*, 773 F.2d 287, 294 (Fed. Cir. 1985). Although appellant does not dispute that the Government incurred excess costs, it argues that it is not liable for those costs because the two contracts were not similar and the Government failed to properly mitigate its damages.

While the Government does not have to prove that the reprocured items and the original items are identical in order to satisfy the requirement for similarity, it must show that the items have similar physical and mechanical characteristics and that they serve the same functional purpose. If the Government fails to prove that the items are similar, it loses its right to excess costs. In contrast, changes that do not go to "the heart of the procurement," such as the correction of inadvertent errors and omissions, updating of specifications or changes in terms and condition such as progress payment and first article pricing provisions, do not vitiate the Government's right to excess costs. Increased costs caused by such changes may not be charged to appellant, however, and will be used to reduce the amount of the Government's recovery. *Meyer Labs, Inc.*, ASBCA No. 19525, 87-2 BCA ¶ 19,810 at 100,219-20; *Guenther Systems, Inc.*, ASBCA Nos. 18343, 20363, 77-1 BCA ¶ 12,501 at 60,591.

There is no dispute that the performance requirements and the inspection and testing requirements of the original contract were identical to those of the reprocurement contract and that the reprocured items had similar physical and mechanical characteristics and served the same functional purpose as the original items. Thus, the Government has met its burden of proving similarity. The burden of going forward now shifts to appellant to show that the changes which the Government made to the reprocurement contract increased its price and the amount of the increase. *Puroflow Corp.*, ASBCA No. 36058, 93-3 BCA ¶ 26,191 at

130,392 and cases cited therein. To the extent appellant can show that the changes increased the Government's excess costs, it is entitled to a reduction of its liability.

When it issued the resolicitation, the Government made the following changes: (1) award was to be made on the basis of performance risk and price rather than price alone; (2) the resolicitation explicitly stated that the delivery date would remain constant regardless of range availability; (3) the delivery date was extended from 60 days to 120 days; (4) the resolicitation added requirement for a "post award conference/product demonstration;" (5) if installation was delayed, the resolicitation indicated that the lifters could be stored at Ft. Riley; and (6) the resolicitation provided for progress payments if installation was delayed more than 60 days. Appellant did not present any evidence regarding how these changes affected the price of the reprocurement contract. Absent such evidence, appellant is not entitled to a reduction of its excess cost liability.

Appellant next argues that the Government failed to mitigate damages because there was inadequate competition. This duty has been described as follows:

> The Government is not obligated, in reprocuring services after a default termination, to solicit every known source of supply or to contact all bidders in the original procurement. The test for determining the adequacy of a reprocurement is rather one of reasonableness, and the principal criterion is that a sufficient number of potential contractors are solicited to assure competitive prices and thereby mitigate the excess cost liability of the defaulted contractor.

Advance Building Maintenance Co., ASBCA Nos. 27183, 28219, 85-2 BCA ¶ 18,076 at 90,750; *see also Barrett Refining Corp.*, ASBCA Nos. 36590, 37093, 91-1 BCA ¶ 23,566 at 118,145, *aff'd.*, 937 F.2d 623 (Fed. Cir. 1991) (table).

We are satisfied that there was adequate competition for the reprocurement contract. The Government solicited bids from the original bidders except appellant, which we discuss *infra*. The contracting officer did not formally advertise the reprocurement because, in his opinion, he would not obtain any additional bids. He testified that Caswell, ATA and SES "were the ones that were probably going to be the most interested, even six months, seven months later [because] they were the . . . ones that would normally be supplying targetry equipment to the Government." Appellant has not offered any evidence to the contrary. In addition, the contracting officer testified that, although the requirement for the lifters was not such that it would justify a sole source procurement, the Government had been trying to obtain new lifters for Ft. Riley for at least 2 1/2 years.

Appellant next argues that in order to mitigate its damages, the Government must allow the defaulted contractor an opportunity to bid on the reprocurement. Contrary to

appellant's assertion, this is not the law. *See Z.A.N. Company*, ASBCA Nos. 23860, *et al*., 86-1 BCA ¶ 18,700 at 94,003, *Tyco Air Spec Division*, ASBCA No. 16534, 73-1 BCA ¶ 9951 at 46,681. The case cited by appellant, *World-Wide Development Co., Inc*., ASBCA No. 16717, 74-1 BCA ¶ 10,474, is inapposite. In that case, we held that the Government failed to mitigate damages after it terminated a contract for rental of a tugboat and reprocured the incumbent's services because the defaulting contractor could have provided a boat at a lower price within thirty days and the incumbent might have agreed to a short extension. Given appellant's demonstrated lack of responsibility—its inability to manage the contract, its lack of a facility and employees with which to assemble, deliver and install the lifters and its apparent financial distress--we conclude that the contracting officer's decision to exclude appellant from bidding on the reprocurement contract was reasonable.

We have considered all the other arguments advanced by appellant in its briefs and its motion for summary judgment and find them to be without merit.

The appeals are denied. Appellant's motion for summary judgment is moot. ASBCA No. 52192 is remanded to the parties to finalize quantum.

Dated: 24 April 2001

ELIZABETH A. TUNKS
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 Nos. 52010 and 52192, Appeals of Double B Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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