ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Walsh Construction Company of Illinois	)	ASBCA No. 52952
	)	
Under Contract No. DACW45-89-C-0538	)	

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OPINION BY ADMINISTRATIVE JUDGE REED

This appeal concerns a claim by the Government under a construction contract for alleged excess costs of reprocurement and liquidated damages (LDs) following the termination of the contract for default. The Government's claim as adjusted in its complaint amounts to $813,396.94, plus interest under the contract, comprised of the difference between the award amounts of the defaulted and the re-awarded contracts, LDs for delay caused by the default, and administrative costs attributable to reprocurement efforts by the Government.

Appellant challenges the award of the original contract as ineffective and not the product of a meeting of the minds. If a contract came into being, appellant contests the termination for default and alleges that the Government failed to mitigate its excess costs.

The appeal originally was docketed before the Corps of Engineers Board of Contract Appeals (ENG BCA). In a previous interlocutory decision, the Board denied appellant's motion for summary judgment or to dismiss and denied the Government's cross-motion for summary judgment. *Walsh Constr. Co. of Ill.*, ENG BCA No. 6325, 98-1 BCA ¶ 29,683.

About two months before the hearing on the merits that followed the Board's interlocutory decision, appellant submitted a second motion to dismiss (app. mot.). The Government filed a response in opposition and appellant replied three weeks before the hearing commenced. Following the hearing, the ENG BCA was merged into the Armed Services Board of Contract Appeals and the appeal was redocketed as ASBCA No. 52952. In this decision, the Board will resolve appellant's second motion to dismiss in conjunction with the merits of entitlement and quantum.

FINDINGS OF FACT

The Solicitation

1. The principal feature of work under the envisioned contract was remediation of hazardous and/or toxic materials at the Baird & McGuire Superfund Site, Holbrook, Massachusetts. The contracting officer (CO), the commanding officer of the U.S. Army Engineer District, Omaha, a senior U.S. Army colonel experienced in federal construction procurement, considered the work a high priority because the site was listed as the No. 14 Superfund site in the United States and because it was among the first sites to be remediated by the U.S. Army Corps of Engineers (the Corps or the Government) for the U.S. Environmental Protection Agency (the EPA). (Tr. 22-26, 192-93; ex. G-4[1])

2. The invitation for bids (IFB) was issued on 5 July 1989. Pertinent provisions of the IFB, including clauses to be incorporated in the contract upon award, follow:

> BIDDING SCHEDULE
>
> . . . .
>
> NOTES:
>
> . . . .
>
> 3. . . . Extensions [of unit prices multiplied by estimated quantities] will be subject to verification by the Government. In case of variation between the unit price and the extensions, the unit price will be considered the bid. In case of variation between the individual bid item prices and the Total Amount, the individual bid prices will be considered the bid.
>
> . . . .
>
> BIDDING INFORMATION

. . . .

8. BID GUARANTEE (APRIL 1984)

. . . .

8.3. If the successful bidder, upon acceptance of its bid by the Government . . . fails to . . . give performance and payment bonds as required by the solicitation within the time specified, the [CO] may terminate the contract for default.

. . . .

8.5. In the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid. . . . (DFAR[S] 252.228-7007)

. . . .

9. PERFORMANCE AND PAYMENT BONDS. . . . Within 10 days after the prescribed forms are presented to the bidder to whom award is made . . . two bonds, each with good and sufficient surety . . . will be furnished by the Contractor to the Government prior to commencement of the contract performance. . . .

. . . .

15. ARITHMETIC DISCREPANCIES. (EFARS [Engineer FAR Supplement] 14.201/90)

15.1. For the purpose of initial evaluation of bids, the following will be utilized in resolving arithmetic discrepancies found on the face of the bidding schedule as submitted by bidders:

. . . .

(2) In case of discrepancy between unit price and extended price, the unit price will govern;

(3) Apparent errors in extension of unit prices will be corrected; and

(4) Apparent errors in addition of lump sum and extended prices will be corrected.

15.2. For the purpose of bid evaluation, the Government will proceed on the assumption that the bidder intends his bid to be evaluated on the basis of the unit prices, extensions, and totals arrived at by resolution of arithmetic discrepancies as provided above . . . .

. . . .

CONTRACT CLAUSES

. . . .

49. FAR 52.232-17 INTEREST (APR 1984)

. . . .

52. FAR 52.233-1 DISPUTES (APR 1984)

. . . .

79. FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984)

. . . .

SPECIAL CLAUSES

. . . .

1. COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK. The Contractor shall . . . complete the entire work ready for operations . . . not later than 550 calendar days after receipt of Notice to Proceed. . . . [T]he Contractor shall immediately commence operations of the facilities and shall continuously operate the facilities for 365 calendar days.

2. [LDs]-CONSTRUCTION.

2.1. FAILURE TO COMPLY. If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as [LDs], the sum of [$]300 for each day of delay.

2.2. CONTRACT TERMINATED. If the Government terminates the Contractor's right to proceed, the resulting damage will consist of [LDs] until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

. . . .

13. INSURANCE - LIABILITY TO THIRD PERSONS - COMMERCIAL ORGANIZATIONS.

13.1. The parties agree that this Clause will be modified within 180 days of the [EPA's] promulgation of final guidelines for carrying out the provisions of Section 119 of the . . . CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act of 1980 a/k/a Superfund Act] . . .

. . . .

13.3. The Contractor will obtain adequate pollution liability insurance in accordance with EPA guidelines.

. . . .

13.5. . . . the Government shall upon request reimburse the Contractor the reasonable and allocable cost of insurance . . . as required or approved under this provision.

13.5.1. Pursuant to Section 119 of CERCLA, the Government will hold harmless and indemnify the Contractor against any liability . . . for negligence arising out of the Contractor's performance under this contract in carrying out response action activities. Such indemnification shall apply only to liability not compensated by insurance or otherwise and

> shall apply only to liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of the response action activities of this contract. Further, any liability within the deductible amounts of the Contractor's insurance will not be covered under this provision.
>
> 13.5.2. For purposes of this provision 13.5, if the [CO] has determined that the insurance identified in paragraph 13.3 is not available at a reasonable cost, the Government will hold harmless and indemnify the Contractor for liability to the extent such liability exceeds $100,000.00.

(Gov't compl. and app. answer (C&A), ¶¶ 1-3; exs. G-4 to -6)

The Apparent Low Bid

3. The bid submitted by Walsh Construction Company of Illinois (Walsh, appellant, or contractor) was formulated and compiled by appellant's experienced vice president (VP) and his professional and support staff. The bid included an unspecified amount for pollution liability insurance. That amount was supplied to Walsh's VP by appellant's home office, the typical method by which amounts for insurance were included in Walsh's proposed bids. The insurance quote was obtained from Walsh's insurance carrier, which had no question about the pollution liability insurance provisions of the contract. No clarification from the Government was requested by Walsh concerning pollution liability insurance at any time even though Walsh's president testified at the hearing that he was somewhat concerned about the risk-sharing aspects of the pertinent contract provision, that the potential liability made bidding difficult, that he was uncertain of the coverage needed, and that he thought the provision was patently ambiguous. (Tr. 209-21, 236-40, 251-52, 268-98) No record evidence indicates that the CO was asked by Walsh to determine that the insurance identified in paragraph 13.3. was not available at a reasonable cost. No evidence in the record indicates that any potential offeror made any inquiry concerning pollution liability insurance. We give little credibility to the above-described testimony about Walsh's concern regarding risk given the lack of any evidence of concern expressed prior to the hearing.

4. Walsh was changing bid preparation systems when it prepared the bid at issue here. It was deploying a new computerized spreadsheet for bids. Overhead and other portions of the bid related to technical requirements of the solicitation were being finalized and entered on the proposed bid spreadsheet by appellant's VP and his staff the day before bid opening. Subcontractor bids were also being added that day. Refinement of and changes to the proposed bid continued up to the time of bid submission. Prior to bid submission by Walsh, concurrently with other changes being made to the proposed bid, the VP discovered that the proposed bid did not include amounts for the projected salaries of some of Walsh's

job site employees. The VP hand-wrote a change to the proposed bid for some personnel, salaries, and projected time periods on the job. The change was assigned to a support person for input into the proposed bid spreadsheet; however, that person entered only salary amounts but not multipliers (the projected time period on the job for each added employee or employee type). Therefore, extended amounts with proposed attendant changes to various unspecified bid line items and the unknown revised overall bid amount in the bid spreadsheet were not fully entered. The oversight was not detected at that time because numerous changes to the proposed bid were being made simultaneously and because the particular changes at issue were embedded in the bid such that it was not readily obvious to Walsh's VP. (Tr. 211-32, 244-45; exs. G-7, -8) There is no contemporaneous corroboration of the VP's testimony, other than a single computer sheet, described below, and no corroboration, then or later, of all the entries allegedly intended to be added.

5. The bid schedule was comprised of 26 separate bid items, a combination of lump sum, fixed-priced and estimated quantity, unit-priced items. A Government estimate (GE) was prepared and five bids were submitted. Bids were opened on 23 August 1989. Walsh was the apparent low bidder. The total of its bid, according to Walsh's bid documents, was $10,488,000. Walsh's VP was notified, by a Walsh employee attending the bid opening, of the other bid amounts and the GE total. Walsh's VP was comfortable with Walsh's bid and thought the second low bid was close enough. (Tr. 138-39, 222-26, 243-44; exs. A-3, G-1, -4, -5, -68)

6. A Corps contract specialist (CS) checked the arithmetic on Walsh's bid. She noted two discrepancies. The first was the bid grand total. Appellant had entered $10,488,000, on the bid documents; however, the correct grand total of all bid line item totals, as entered by appellant, equaled $10,487,790, a difference of $210. The second discrepancy was at bid item No. 3.2i. The estimated quantity provided by the Government for that bid item was 100 cubic yards (CY). Appellant entered a bid of $450 per CY and a bid line item extended total amount of $4,500. The CS correctly determined that 100 CY multiplied by a bid of $450 per CY equals $45,000, not $4,500. She struck through Walsh's line item extended total entry of $4,500 and entered $45,000, on Walsh's bid document and on the abstract of bids. She then struck through appellant's grand total bid amount of $10,488,000, and entered $10,528,290, on Walsh's bid document and on the abstract of bids. No bid line item amount was changed; therefore, the bid was not changed. Instead, a bid line item extended total amount and the grand total amount were corrected in accordance with the solicitation provisions. (Findings 2 (¶¶ 3., 15.-15.2.), 5-6; tr. 28-29, 87-98, 122-26, 135-49; exs. A-3, G-1, -4, -5, -68)

7. The GE, without pollution liability insurance and profit, totaled $9,404,748.[2] The grand total prices for all bidders, following correction of Walsh's bid, were (1) $10,528,290 (Walsh), (2) $10,780,000,[3] (3) $11,737,825 (Barletta Engineering Corporation (Barletta)), (4) $12,545,140, and (5) $18,330,021. Individual bid item prices

varied by percentage much more than the grand total bid prices. An extract of pertinent bid item amounts, after correction for arithmetic errors, reveals the following:

Bid Item No.	GE	Walsh	2d low bid	Barletta	4th low bid	5th low bid
1.	$1,271,670	$500,000	$500,000	$140,000	$400,000	$4,744,000
2.	4,797,636	6,419,210	8,346,870	7,570,000	8,800,000	8,595,000
3.1	1,520,636	2,250,000	840,000	2,600,000	1,700,000	2,710,000
3.2h	391,800	270,000	120,000	258,000	276,000	342,000
3.2i unit extended	1,458 145,800	450 45,000	200 20,000	430 43,000	2,600 260,000	570 57,000
7.2	89,025	175,000	150,000	165,000	150,000	128,000
8.	259,670	402,500	345,000	393,300	345,000	374,900
Grand total of all 26 bid item amounts	$9,404,748	$10,528,290	$10,780,000	$11,737,825	$12,545,140	$18,330,021

a. In the GE and in four of the five bids, the prices for bid item Nos. 1., 2., and 3.1 were the three largest price components of the grand totals. However, in one bid, the amount in bid item No. 1 was lower than the prices in bid item Nos. 2., 3.1, 3.2h, 7.2, and 8.

b. The amount in the GE for bid item No. 1. was more than double the same bid item prices in the four lowest bids.

c. The amounts in the GE and the bids for bid item Nos. 1., 2., and 3.1 varied significantly.

d. Walsh, the low bidder, was not lowest for bid item Nos. 1. or 3.1. The lowest bidder for bid item No. 1. was Barletta, the third low bidder. The lowest bidder for bid item No. 3.1 was the second low bidder. The lowest bidder for bid item Nos. 1. and 3.1 and for bid item Nos. 1., 2., and 3.1 was the second low bidder; however, the second low bidder was third low on bid item No. 2.

e. The GE for bid item No. 1., increased by an estimate for profit, is much more than double Walsh's bid for that item. The GE for bid item Nos. 1. and 2., increased by an estimate for profit, is more than 92% of Walsh's bid for those items. The GE for bid item Nos. 1., 2., and 3.1, increased by an estimate for profit, is almost 87% of Walsh's bid for those items. The GE for all bid items, increased by an estimate for pollution liability insurance and for profit, is more than 95% of Walsh's bid, less than a $450,000 difference on a bid of more than $10,500,000.

f. Walsh's corrected total bid price was more than 97% of the second lowest bidder's total and more than 89% of the third lowest bidder's total.

(Tr. 154-65; exs. A-3 to -5, G-1, -5, -52, -68, -73)

8. On or before 28 August 1989, the CS telephoned Walsh's VP and requested confirmation of appellant's bid. The CS gave no indication of the arithmetic errors, any other specific error, or any question concerning appellant's bid. She did not mention the arithmetic corrections she had made to the bid totals. In response, the VP reviewed Walsh's bid sheets and checked the "math" on the bid. Appellant's VP then "faxed" to the CS a letter dated 28 August 1989, confirming the total bid amount of $10,488,000. The VP did not discover Walsh's alleged bid error related to salaries of site personnel, discovered after award and to be discussed below, during this review; however, even if he had been told of the arithmetic errors, he would not have delved into the details of the bid worksheets and discovered the alleged bid error. (Finding 4; tr. 92-98, 122-25, 135-36, 145-49, 211-13, 226-32, 246; ex. G-2)

9. Prior to award, the CO was informed by his staff that arithmetic errors had been detected on Walsh's bid papers, that appellant had received a favorable pre-award survey result, and that the bids had been reviewed without detection of any discrepancy among the bids that would have given the CO insight of a bid mistake or would have alerted the CO to a significant error by Walsh. The CO reviewed and compared Walsh's bid, the abstract of all bids, and the GE, looking for a reasonable range of amounts among the bids and the GE, as well as bid irregularities. In the CO's experience, arithmetic errors were not uncommon. His review detected no other error or reason to believe that any error existed in appellant's bid. He looked at bid and GE line item amounts, but relied most heavily on the grand totals based on his knowledge of various bidding and pricing strategies employed by prospective contractors as a revenue flow mechanism. He determined that Walsh's bid was within a reasonable range of the other bids and the GE. He found no reason to doubt appellant's responsibility as a contractor. (Tr. 26-37, 50-66, 74, 103-09, 122-24; exs. G-1, -5, -69)

10. On 20 September 1989, Contract No. DACW45-89-C-0538 (the contract), was awarded by the Government to Walsh in the amount of $10,528,290. Copies of the requisite bond forms were provided to appellant with a reminder that bonds were to be submitted within ten days. (Finding 2 (¶ 9.); tr. 74; exs. G-3 to -5)

Bid Mistake Alleged After Award

11. Upon receipt of notice of the contract award in September 1989, appellant's VP began to "buy out the bid," and to transfer the bid amounts to Walsh's cost accounting computer system. During that process, he discovered the alleged bid error. By a two-paragraph letter to the Corps dated 11 October 1989, Walsh's VP asserted that "a computer keypunch error" had caused a bid error by which appellant had "inadvertently left out . . . $844,661. . . . Our corrected price should have been $11,372,951 [the sum of $844,661 and $10,528,290, Walsh's apparent bid grand total after Government correction of arithmetic discrepancies in bid totals]." No mention was made by appellant of the earlier

arithmetic discrepancies detected on the face of the bid papers. Appellant requested that the contract award be rescinded, that it be allowed to withdraw its bid, and/or that the bid be considered non-responsive, explaining that "it would be impossible for [Walsh] to complete the work at the cost as shown on the Bid." By "impossible," Walsh meant commercially and financially impracticable. (Findings 4, 6-9; tr. 37-39, 147-48, 212-26, 240-49, 279-80, 300-01; exs. A-3, G-7, -59) Other than the letter, Walsh presented no evidence of the alleged error at that time.

12. Attached to a letter to the Corps dated 27 October 1989, Walsh submitted "as evidence of the error" three versions of one computer printout bid worksheet related to "general conditions," out of appellant's 25-50 printed bid worksheet pages that comprised the complete bid papers. The first version is dated 22 August 1989, 9:14 a.m. Concerning job site personnel, the sheet shows a project manager (PM) and a general superintendent, each with a weekly salary multiplied by 78 weeks, about the same as the 550-day initial performance period, and a field engineer, with weekly salary multiplied by 10 weeks. The total of those salaries is marked up by a labor burden of about 38%, yielding a job site labor total of $264,300. The second version is dated 22 August 1989, 5:36 p.m. In addition to the pertinent data shown on the earlier version of the page, a weekly salary amount is listed for an assistant PM, a structural superintendent, a project engineer, an office engineer, an unspecified number of instrument men, a safety engineer, a field accountant, and a secretary. However, no number of weeks is specified for any of the newly listed positions (the spreadsheet actually shows zero as the multiplier for weeks); therefore, the amount for each newly listed employee is zero and the job site labor total remains $264,300. The third version, also dated 22 August 1989, 5:36 p.m., had handwritten entries added on or about 27 October 1989, by Walsh's VP, as an indication of what he then asserted would have been the intended bid component for job site employees. The multiplier for all newly listed employees, except the safety engineer, is 78 weeks. The total for the safety engineer divided by the listed salary, yields 78 weeks, rather than zero as listed. No testimony or other evidence was presented to show that all the added employees were to work on the project for the full performance period. Further, while we have no evidence of the number of added survey workers ("instrument men"), typically a crew activity, the 78-week multiplier has been added by hand (indicating only one person, not a crew). In summary, this single printout does not show all of the details of the alleged error and fails to explain the discrepancies we detect. We find that Walsh did not establish a complete and convincing description of all the allegedly omitted entries. Nevertheless, the revised job site labor subtotal is marked up by 38% for labor burden and the job site labor total is handwritten as $1,108,968. That figure is handwritten elsewhere on the sheet as $1,108,963, and $264,300 is subtracted, leaving a handwritten remainder of $844,661 (these arithmetic discrepancies were not explained). The printout does not indicate how these bid amounts were to be incorporated into the bid items. (Finding 2 (¶ 1.); tr. 213-16, 232-36, 246-48; ex. G-8)

13. Walsh did not produce the handwritten change prepared by appellant's VP and given to the data entry person for input into the proposed bid spreadsheet on 22 August 1989. Neither did Walsh produce the balance of the computerized bid worksheet printouts. Walsh did not explain the amount by which each bid item price might have been affected by the alleged bid error, except that the general conditions total would have been spread over various bid items as a percentage markup. (Finding 4; tr. 230-36, 281) The data entry person was not identified by the VP and did not testify or otherwise provide evidence. No witness other than the VP testified as to matters related to the mistake.

14. In a letter to Walsh dated 9 November 1989, the CO declined to allow rescission of the contract. The CO based his decision, in part, on his lack of actual knowledge of the alleged error and insufficient indication of a mistake in bid, including closeness of the bid totals and the GE total, that would provide constructive knowledge of the error. The CO further notified appellant that he considered appellant's failure to provide performance and payment bonds a condition endangering timely performance of the contract. He asked Walsh to cure that condition within ten days or he would consider termination for default of appellant's right to proceed under the contract. The CO's letter was delivered to Walsh on 13 November 1989. (Tr. 27-39, 55-59, 77-81; exs. A-3, G-9)

15. On or about 13 November 1989, Walsh's president began to exercise direct control of further communications with the Government. Appellant's president is very experienced in the construction business and is a law school graduate. His letter to the CO dated 17 November 1989, stated, among other things, "[t]he magnitude of this error and the potential consequences to our firm are so significant as to require us to request your reconsideration of this decision." Walsh's president also requested a meeting with the CO. (Tr. 240-41, 250-60, 274-75; exs. A-3, G-10)

16. Based on a request by appellant's counsel dated 22 November 1989, the Government agreed that Walsh could submit its bonds as late as 29 November 1989 (exs. G-11, -12).

17. On 28 November 1989, Walsh requested review by the Chief of Engineers, Washington, DC, of the CO's actions concerning the alleged mistake in bid. Among other things, appellant's request letter stated "[t]he mistake is so large and Walsh's financial situation is such that it would be most difficult if not impossible for Walsh to proceed with the contract at the mistaken bid price." The Corps chief counsel referred appellant back to the CO and to the disputes process under the contract. In Walsh's follow-up letter to the CO dated 15 December 1989, appellant's counsel, among other things, recited Walsh's total bid amount as $10,528,290,[4] and wrote: "It would be unconscionable for the Corps, knowing the nature and magnitude of Walsh's mistake, to now seek to take advantage of Walsh by attempting to force it to perform at the substantially mistaken bid price." Walsh again requested a meeting with the CO and Walsh's president made other similar requests

by telephone. The CO neither met nor negotiated with appellant's representatives. (Tr. 83-84, 260-68, 278, 295-300; exs. A-3, G-13 to -15, -17, -19)

18. Walsh did not submit performance and payment bonds. Appellant's VP testified at the hearing that pollution liability insurance was connected to the alleged bid mistake, but did not explain how. Walsh's president testified at the hearing that he wanted to discuss pollution liability insurance with the CO as well as the alleged bid mistake. However, none of the contacts with the Corps or correspondence submitted to the Corps concerning the alleged bid mistake directly mentions pollution liability insurance. We attribute no weight to the above-described testimony given the lack of any evidence of concern with pollution liability insurance or assertion of any connection with the alleged bid mistake prior to the hearing. We find that matters related to pollution liability insurance had no involvement with the alleged bid error and did not impact Walsh's decision whether to supply the required bonds to the Government. In fact, the bonds were available but were withheld by appellant's president because he wanted a meeting with the CO to discuss the alleged bid mistake. (Finding 3; tr. 37-42, 67-68, 236-40, 257-302; exs. A-1, G-7, -8, -10, -12 to -14, -17, -22 to -25, -27, -28, -32, -34, -36, -41 to -44, -49, -59)

Termination for Default and Reprocurement

19. After 29 November 1989, the CO began considering termination for default of Walsh's right to proceed under the contract and resolicitation of the contract work. He perceived the work to be a high priority that needed to be moved forward and he did not consider appellant a viable contracting partner at that time. By his final decision letter dated 5 January 1990, the CO terminated Walsh's right to proceed under the contract for failure to submit the required bonds, thereby failing to prosecute the work with the diligence necessary to assure timely completion. (Finding 1; tr. 37-51; exs. A-2, G-20)

20. Reprocurement was initiated by Amendment No. 0002, to the original IFB, dated 8 January 1990, which converted the IFB to a competitive request for proposals (RFP). The only changes to the earlier IFB provisions were the insertion of a wage rate decision that had been issued after submission of the earlier bids and designation of a new time and date (19 January 1990) for submission of proposals. The RFP was issued to all previous bidders under the IFB, only, as a means of expediting submission of offers and re-award of the contract but also as a means of mitigating any extra costs to the Government. Walsh was excluded. The CO did not include appellant as a potential offeror because he wanted to protect the integrity of the procurement system, which he thought would be impacted if Walsh was allowed to bid a higher price than had previously been awarded. He thought it unfair that appellant could improve its financial position compared with its initial bid under which it had failed to perform. The CO did not believe appellant could or would offer a lower price based on Walsh's assertions that performance at the original bid price was commercially impracticable. He also questioned Walsh's ability to perform at the original bid price, if offered again, based on statements in correspondence previously

submitted by appellant. (Findings 11, 15, 17; tr. 42-49, 64-66, 77-81, 111-14, 132-33; exs. G-4, -5, -21, -35, -61)

21. On 15 January 1990, four days before proposals were due, appellant requested a copy of the RFP, which we found above was identical to the earlier IFB except for a new wage rate decision. On 17 January 1990, two days prior to the proposal due date, Walsh asked for an opportunity to submit a proposal for the reprocurement. The CO denied the requests. In a letter dated 18 January 1990, the day before proposals were due, Walsh requested that the CO rescind the termination. For the first time, appellant said that it was ready to submit the performance and payment bonds and proceed with the work. The CO declined to rescind the termination. By that time, the CO had lost confidence in Walsh as a responsible party to a contract that the CO considered fair to the Government. The CO reached these decisions based collectively on the following factors: (1) Walsh's previous statements indicating that performance at its original bid price would be financially and commercially impracticable; (2) appellant had failed to prove its mistake in bid after award or otherwise demonstrated any change in its circumstances that would justify a change of position one day before proposals were due; (3) the CO did not think it in the Government's best interests to award a contract for a high priority, inherently risky project involving hazardous and toxic wastes to a contractor that might struggle to perform at the award price; (4) the CO did not want to delay receipt of the reprocurement proposals, due the next day, and thereby delay re-award of the contract, and (5) Walsh had previously refused to go forward, instead seeking to leverage its non-performance to obtain relief for its alleged mistake in bid. (Findings 11, 14-15, 17-20; tr. 47, 59-66, 76-82, 130-32, 266-68, 292-94; exs. A-1, G-22, -24, -35)

22. A second updated wage rate decision was incorporated into the RFP. It was estimated by an experienced Government civil engineer estimator that the revised wage rate decisions would increase the overall costs of labor and the reprocurement contract by about $35,000. Best and final offers (BAFOs) were solicited. The low offeror, Barletta, agreed in its proposal and its BAFO to perform for $11,288,525, a price lower by $449,300, than its bid in response to the earlier IFB. Two of the other three remaining original offerors proposed BAFO prices lower than their respective original bids; one submitted a BAFO higher than its bid. In addition to Barletta, one other offeror did not change its BAFO from its offer in response to the resolicitation. One lowered the price in its BAFO, relative to its initial offer in response to the RFP, by $50,000. Another increased its BAFO by $851,000. (Findings 7, 20; tr. 152-54, 162-68, 181-82; exs. G-1, -29, -31, -52, -61, -62)

23. The CO judged the resolicited prices reasonable. Award was made to Barletta on 20 February 1990, in the amount of $11,288,525. The Government claims the difference between Walsh's and Barletta's contract prices ($11,288,525 - $10,528,290 = $760,235) and LDs for the period from contract award on 20 September 1989 to reprocurement contract award on 20 February 1990 (153 days x $300/day = $45,900). Regarding LDs, the Government presented no evidence concerning when Walsh should have

received notice to proceed, when Walsh should have completed the work, when Barletta was allowed to proceed, or when Barletta should have been finished the work. The successor CO testified that he had no way of knowing when Walsh would have completed the work if it had performed. (Findings 2 (¶¶ 2.-2.2.), 10; tr. 47, 197-99; ex. G-31)

24. Several Corps employees performed contracting, legal, engineering, and reproduction services related to the termination of Walsh's right to proceed under the contract and leading to award of the reprocured contract. The Government claims a total of $7,261.94 (increased from $5,362.99 asserted in the CO's final decision (COFD), as detailed below). Only part of the records pertaining to performance of these services was compiled at or near the time of their performance. Testimony related to the records and their preparation was incomplete and, in part, indefinite. The evidence supporting reproduction costs is an estimate prepared in 1998 of costs allegedly incurred in 1990. (The reproduction costs estimator did not testify.) In weighing this evidence, we consider that preparation of these documents at a later time and the quality and quantity of supporting testimony detracts from their reliability. Based on documents in the record, the Board was able to allocate the time and costs for those services between the two causes, termination and reprocurement. The Government's evidence of individual salary rates and applicable overhead incurred by the Government in support of the reprocurement effort was not challenged by appellant. The total supported by the record for salaries, overhead, the number of hours worked to award the reprocurement contract, and reproduction of materials in support of that effort is $3,961.29. (Tr. 111-18, 129-38, 150-52, 183-89, 196-97, 202-03; exs. A-18, G-38, -51, -61)

25. The work under the reprocurement contract was accepted by the Government as complete and the reprocurement contract amount was authorized for payment on 17 November 1995. Barletta's final contract price, as modified, was $14,775,329.47. All price increases above the reprocurement award amount resulted from post-award modifications to the reprocurement contract. Some of the contract modifications also allowed time extensions to the performance period. No LDs were withheld from Barletta. (Exs. A-8 to -11, G-39, -72) The Board was provided no evidence addressing whether the Government was involved with any delay to the start of Barletta's work, when performance of the originally specified, unmodified work was actually performed by Barletta, or the nature of the excusable delays experienced by Barletta.

26. In a COFD dated 6 December 1996, issued by a successor CO, the Government claimed $811,497.99 for reprocurement costs, plus interest, associated with the termination for default of Walsh's right to proceed under the contract. The amount of $811,497.99 is comprised of excess contract costs ($760,235), LDs ($45,900), and administrative costs ($5,362.99). Walsh timely appealed to the Board. (C&A (¶¶ 25); tr. 193-96; exs. G-45, -49)

DECISION

Motion to Dismiss

a. Mutuality of Intent

Appellant asks the Board to dismiss for lack of jurisdiction. It argues that "no contract came into existence between the parties" because there was "no meeting of the minds." Walsh explains that its offer of performance at a price of $10,488,000, could not have been accepted by the Government in the amount of $10,528,290. Appellant characterizes the Government's purported acceptance and award of the contract as a counteroffer. Appellant asserts that it did not accept the counteroffer. (App. mot. at 1, 8; app. post-hearing br. (app. br.) at 31)

The factual premise for the argument, according to Walsh, is that the Government changed the bid or offer by presuming the correctness of a bid line item unit price[5] and by assuming the correctness of individual bid line item totals for the purposes of adding a grand total of the bid line item totals. The Government then purported to accept the changed bid. According to appellant, a matching offer and acceptance are missing.

The key to understanding this portion of the dispute is to recognize the parties' agreed definition of the bid. In the context of this dispute, the bid was the unit price, in the case of unit-priced, estimated quantity bid items. (Finding 2 (¶¶ 3., 15.-15.2.))

Mutuality of intent is essential for the formation of a contract with the Government. Contract formation requires objective manifestation of an intent to enter into a contractual relationship. The terms of the offer and acceptance, taken as a whole, must exhibit sufficient and enforceable definiteness. *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1332 (Fed. Cir. 2000); *Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1319-20 (Fed. Cir.), *cert. denied*, 522 U.S. 857 (1997); *Modern Sys. Tech. Corp. v. United States*, 979 F.2d 200, 202 (Fed. Cir. 1992); RESTATEMENT (SECOND) OF CONTRACTS §§ 1, 33(1)-(2) (1981) (hereinafter RESTATEMENT).

The terms of the solicitation have not been attacked as unclear in appellant's motion. As pertinent here, the Government solicited bids and Walsh submitted its offer under the terms of a solicitation that envisioned the possibility of arithmetic errors in (1) the multiplication of line item bid prices with estimated quantities to derive bid line item extended prices and (2) the addition of all extended prices and lump sum prices. A procedure was included in the IFB for the express purpose of evaluating bids by resolving arithmetic discrepancies and proceeding under certain assumptions. (Finding 2 (¶¶ 3., 15.-15.2.)) By submitting a bid, appellant agreed to be bound by that procedure. Appellant has not alleged that those terms are ambiguous.

Walsh's offer manifested a willingness to enter into a contract based on the terms of the solicitation. No record evidence indicates any hesitancy or question on appellant's part prior to making its offer or in acknowledging award. (Findings 3-5, 10-11, 17)

The Government was justified in its reliance on the terms of the solicitation and on Walsh's bid, defined by the IFB as the line item unit prices in case of discrepancies on the face of the bid. In accordance with the terms of the solicitation and the bid, comprised of appellant's line item unit prices, the Government agreed to those terms in the manner invited by appellant's offer. RESTATEMENT §§ 24, 50(1), 58.

The bid was not changed as alleged by Walsh. The Government corrected arithmetic discrepancies in the extended prices and in the grand total in accordance with the terms of the IFB and by the use of the unambiguous line item unit prices submitted by appellant as its bid. Thereafter, the Government accepted the offer by unconditional award of the contract on the exact terms of the offer as provided in the solicitation, including the parties' advance agreement on the treatment of arithmetic discrepancies. (Findings 6, 10)

The Government's actions did not constitute a counteroffer or a "purported acceptance of an offer on different terms than the offer itself" as argued by Walsh (app. mot. at 9). The decisions cited by appellant involving counteroffers are inapposite.

From the time that Walsh learned of the arithmetic corrections by the Government in its bid totals, that is, when it received notice of award, until appellant submitted its motion to dismiss prior to the hearing, a period of years, Walsh did not challenge the appropriateness of the arithmetic corrections. Appellant did not object, at the time of award or for years thereafter, to the Government's promise to pay an extra $40,290, above Walsh's apparent but arithmetically incorrect offer. Instead, following award, Walsh prepared for contract performance as it began to set up its cost accounts for the job. (Finding 11)

Appellant, upon receipt of the award, moved forward with preliminary work under the contract. Walsh has not convinced us that it disagreed with the award, on these grounds, at or near the time of award. Walsh has presented no evidence that, at the time of award, it was in any way prejudiced by the Government's correction of its bid total to a higher price. No evidence indicates that appellant lacked the requisite intent to contract based on matters related to the arithmetic discrepancies.

b. Arithmetic Discrepancies

Walsh next argues that "the Government totally failed to meet its bid verification responsibilities." Appellant contends that "[w]hen a bid is known by the Government to be erroneous, an award in response to that bid will not create a valid contract," citing *Alta Elec. and Mech. Co. v. United States*, 90 Ct. Cl. 466, 476-77 (1940). (App. mot. at 10)

The FAR required an examination by the CO of the bid for mistakes. Where the CO had reason to believe that a mistake in bid might have been made, verification of the bid was to be obtained from the bidder, calling attention to the suspected mistake. In the event of a clerical mistake, apparent on the face of the bid, the mistake could be corrected by the CO before award after first obtaining verification of the bid intended. Any such correction of a clerical mistake was to be reflected in the award document but not made on the face of the bid. FAR 14.406-1, 14.406-2 (now FAR 14.407-1, 14.407-2).

Government contracting personnel knew of the arithmetic discrepancies, a type of clerical error. The bid for each unit-priced bid item, including bid item No. 3.2i, defined in the IFB as the unit price, was clear, unambiguous, and not challenged by appellant. The bid item price for bid item No. 3.2i was consistent with three of the four other bidders; however, the extended price for that bid item was not of the same order of magnitude as the GE or any other bid. The addition error in the grand total bid amount, after correction of the extended price for bid item No. 3.2i, was $40,290. That amount is less than 0.4% of appellant's bid. The extension and addition of the bid prices was arithmetically, objectively, in error. Based on the agreed formula for correction of such discrepancies, included in the IFB, the Government corrected the errors prior to award. (Findings 2 (¶¶ 3., 15.-15.2.), 6-7, 9-10)

The bid verification process employed by the Government did not call the arithmetic discrepancies to appellant's attention. However, the Government's notification did achieve the result intended in the regulation by causing Walsh to examine its bid calculations. Had the VP been told of the specific arithmetic errors, he would not have discovered the alleged bid error that was asserted after award. (Finding 8)

The CO suspected no error in the bid based on the arithmetic discrepancies. The totality of the circumstances did not indicate a bid error or any other error beyond the two arithmetic discrepancies. (Findings 5-9) We conclude that appellant has not proved the CO's judgment was unreasonable.

When appellant was supplied the award document indicating award in the higher amount, it did not object. Instead, Walsh adopted the higher award amount when it alleged a different and unrelated bid error, more than six weeks later. The later-alleged bid error was not based on the arithmetic irregularities, but was separately based on appellant's internal bidding problems allegedly discovered when it began, after award, to convert the underlying bid assumptions into a project budget. No mention was made of any prejudice or unfairness to appellant on account of either the higher award amount, the arithmetic discrepancies, or their correction. (Findings 8, 10-12)

Government contracting personnel, to be fully compliant with the regulation, should not have reflected the arithmetic corrections on the original bid document. FAR 14.406-

2(b) However, the original bid document, as annotated, indicated the original entries as well as the annotated corrections in a readable manner. Appellant has not explained and we fail to see how appellant was prejudiced by this technical violation of the regulation. *See WinStar Communications, Inc. v. United States*, 41 Fed. Cl. 748, 758 (1998) (correction of a procedural violation of the FAR would not have produced a different result).

The decisions cited by appellant concern situations where the bid contained an error, the CO had (or should have had) reason to suspect a bid error, or no language in the solicitation defined the bid so that an arithmetic discrepancy rendered the bid ambiguous. None of those situations prevail here.

Where the solicitation defines the bid as the unit prices, any errors are apparent and simple, and another bidder is not displaced, the Comptroller General's office has opined that the bid is the unit price and extended prices may be corrected. *Roy McGinnis & Co.*, Comp. Gen. No. B-239710, 90-2 CPD ¶ 251; *Price Indus., Inc.*, Comp. Gen. No. B-178751 (24 Sept. 1973) (unpublished, 1973 U.S. Comp. Gen. LEXIS 1490, 1973 WL 7574 (Comp. Gen.)); *Jayhawk Enter*., Comp. Gen. No. B-173477, 51 Comp. Gen. 283 (1971) (cited by the parties as *Hudson, Creyke, Koehler, Brown and Tacke*).

Appellant correctly notes that the *Jayhawk* decision states, among other things, that "if there is convincing evidence that the error occurred in the unit price [instead of an error in extension of price], the error is dealt with in accordance with the established principles of error correction . . ." (app. reply br. at 7). The quoted language points up the key distinction in this matter. In Walsh's case, there is no evidence, much less convincing evidence, of error in the unit price. That, coupled with the presumptive and corrective language included in the solicitation, leads to one conclusion - the extended price is the product of a simple multiplication or transcription error.

Walsh has implied, much after the fact, that its bid was somehow ambiguous. However, it has neither undercut the unit prices (the bid prices) with specificity, by showing some other amount that should have been considered, nor convincingly explained how the bid prices might be considered unclear or ambiguous. There is no convincing evidence that error occurred in a bid unit price.

The motion to dismiss is denied.

Termination for Default

Termination of the contractor's right to proceed under the contract is a drastic remedy that should be upheld only for good cause shown by the Government and based on solid evidence. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987), quoting *J.D. Hedin Constr. Co. v. United States*, 187 Ct. Cl. 45, 57, 408 F.2d 424, 431 (1969); *Thomas & Sons, Inc.*, ASBCA No. 51874, 01-1 BCA ¶ 31,166 at 153,946.

The Government contends that Walsh's right to proceed under the contract was terminated for default because the requisite performance and payments bonds were not supplied as required by the contract. Failure to provide the bonds can be a proper basis for a default termination. *Dieleman Constr. Co.*, ENG BCA No. 6213, 96-2 BCA ¶ 28,430 at 142,012; *Cole's Constr. Co.*, ENG BCA No. 6074, 94-3 BCA ¶ 26,995 at 134,448-49; *Glenn's Heating*, ASBCA No. 32723, 87-1 BCA ¶ 19,355 at 97,899; *Hargrove*, GSBCA No. 5117, 78-2 BCA ¶ 13,386; *see Austin Elcon Corp.*, ASBCA No. 26215, 82-1 BCA ¶ 15,718 at 77,762-63 (supply and services contract Default provision).

The Bid Guarantee provision of the solicitation required that the bonds be provided timely, that is, within ten days after award and presentation of the prescribed forms. Upon award on 20 September 1989, the bond forms were supplied to Walsh. (Findings 2 (¶¶ 8.-9.), 10)

Following award, the contractor asked the CO to rescind the award on account of an alleged mistake in bid. The bonds were not supplied while the CO considered the request. However, when the CO denied the requested rescission, he notified Walsh that the bonds were due within ten days or termination for default would be considered. The reinstated ten-day period began on 13 November 1989. The Government later allowed an enlargement of that deadline until 29 November 1989. Again, the bonds were not submitted. Instead, appellant pursued a course leading toward a claim related to the alleged mistake in bid. (Findings 11-18) "There is no dispute that the bonds were not furnished and that Walsh did not provide the bonds because the bid allegedly contained a unilateral error." *Walsh,* 98-1 BCA at 147,041.

Having not received the performance and payment bonds by 29 November 1989, the CO initiated procedures that led to termination for default of Walsh's right to proceed under the contract. The termination notice was dated 5 January 1990. (Finding 19)

The Government has made a *prima facie* showing of a breach by appellant of its substantial obligations under the contract. The burden now shifts to Walsh to show that the default was excusable, arose from unforeseeable causes beyond its control and without its negligence (Finding 2 (¶ 79.)), was otherwise not justified under all circumstances prevailing, or resulted from a breach or abuse of discretion by the Government. *Lisbon,* 828 F.2d at 765; *Magna Enters., Inc.*, ASBCA No. 51188, 02-1 BCA ¶ 31,660 at 156,419.

a. Mistake in Bid After Award

Walsh defends against the termination based on an alleged mistake in bid discovered after award of the contract. A unilateral mistake in bid amounting to $844,661 was alleged. On that basis, only, Walsh requested rescission of the contract.[6] Appellant did not

contemporaneously request rescission (or any other relief) based on the arithmetic discrepancies discovered by the Government prior to award.[7]

To show that it would have been entitled to rescission and thereby establish a defense against the termination, appellant must prove four elements by clear and convincing evidence: (1) a mistake in fact occurred prior to contract award; (2) the mistake was a clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error, (3) prior to award the Government knew, or should have known, that a mistake had been made, and therefore should have requested bid verification, and (4) the Government did not adequately request bid verification. *McClure Elec. Constructors, Inc. v. Dalton*, 132 F.3d 709, 711 (Fed. Cir. 1997) (listing five elements, the fifth of which, proof of the intended bid, is not required for rescission); *Rockwell Int'l Corp.*, ASBCA No. 41095, 95-1 BCA ¶ 27,459 at 136,808-09, *recon. denied*, 95-2 BCA ¶ 27,897; *Cal High Tech, Inc.*, ASBCA No. 50773, 99-1 BCA ¶ 30,221 at 149,512; FAR 14.406-4.

Appellant's rescission request fails at the third element. The Government also questions the existence of a mistake and the adequacy of proof of a mistake. We note in our findings of fact some incompleteness of that proof (findings 4, 12-13); however, given the failure by Walsh to satisfy the third *McClure* element, we need not dwell on those contentions.

Concerning the third element, no evidence indicates that the CO had actual knowledge, prior to award, of the $844,661 error alleged by Walsh. The error in the bid line items that allegedly resulted from the failure of the support person to enter the corrections provided by Walsh's VP to the proposed bid worksheet/spreadsheet, was known neither to appellant nor to the CO prior to award. It was discovered by Walsh's VP, the person who was in charge of bid preparation, only after he initiated contract performance on behalf of appellant following award when he began to examine the financial details and individual line items of the bid worksheets. (Findings 4, 11-14)

The earlier-detected arithmetic errors on the face of the bid prior to award are in no way connected with the mistake in bid alleged after award. The presence of those obvious arithmetic errors does not necessarily lead to a conclusion that other errors were embedded in the bid formulation process. As determined above, the CO had no reason to suspect any other bid error based on the arithmetic discrepancies. Appellant's arguments concerning price disparity are also unpersuasive as discussed at length below. *The Kato Corp.*, ASBCA No. 47601, 97-2 BCA ¶ 29,130; *GOECO*, ASBCA No. 46573, 96-2 BCA ¶ 28,412; *Transco Contracting Co.*, ASBCA No. 47289, 96-1 BCA ¶ 28,090.

Appellant argues that "a contract did not come into existence" on account of a failure of the CO to detect an "estimate mistake." By this argument, Walsh is asserting that the CO should have known of an error in the bid based on price "disparities giving rise to a duty of inquiry." (App. br. at 39-40)

Whether the CO knew or should have known of a mistake in bid is an objective test, *i.e.*, "whether under the facts and circumstances of the case there were any facts which reasonably should have raised the presumption of error in the mind of the [CO] . . . ." Disparity between or among bid prices and the Government estimate are factors for consideration in determining whether the CO should have known of an error in bidding. *Chernick v. United States*, 178 Ct. Cl. 498, 504, 372 F.2d 492, 496 (1967); *Walsh*, 98-1 BCA at 147,041 (and cases cited).

Appellant compares its bid item No. 2. price, only, with the other bidders, correctly indicating that Walsh was more than $1,000,000 lower than the next lowest bid for that one large item. Appellant further accurately notes that when bid item Nos. 1. and 2. are isolated and totaled, appellant's price for those two items combined is almost $800,000 lower than the next lowest bid for those two items combined. (Finding 7)

Appellant overlooks a number of pertinent facts that we gleaned from a comparison of the GE and the bids. From those facts we conclude that the CO was reasonable in his views that no presumptive error existed in Walsh's bid and that comparing the overall bid grand totals gives a more rational and complete picture of the acceptability of Walsh's bid. Appellant's focus on bid item Nos. 1. and/or 2., only, is misplaced. It is further contradicted by Walsh's allegation that a bid error by appellant, discussed above, is spread among various bid items (although no evidence was presented as to the specific amounts by which each bid item would have been increased by the alleged mistake in bid). (Findings 7, 9, 12-13)

We agree with appellant's VP on the date that bids were opened. Overall, the second low bid price was close enough. Walsh's VP was comfortable with Walsh's bid. The CO also reasonably found no reason to question Walsh's bid based on price disparity. (Findings 5-7, 9) There is no untoward disparity among the bids and the GE that would raise a presumption of error.

b. Insurance and Indemnification

Appellant argues that the solicitation provisions related to insurance and indemnification for Superfund work were ambiguous. Walsh suggests that the ambiguity "negates the existence of a contract" because "offer and acceptance was tainted" by the ambiguity (app. br. at 31). Appellant also contends that "the solicitation was unclear as to whether the government would provide or compensate for pollution liability insurance [and/or] indemnify the contractor . . . ." (app. br. at 43). Further, Walsh asserts that clarification of this matter in connection with the reprocurement contract resolves the ambiguity and shows that the latter contract was dissimilar and an insufficient basis upon which to allow the claimed excess costs of reprocurement.

If the solicitation was patently ambiguous, as Walsh's principal testified, Walsh or another prospective bidder should have inquired of the CO and/or submitted a bid protest. There is no evidence of either. Neither Walsh's home office nor its insurance carrier had any difficulty, at the time of bid preparation, with the alleged ambiguous provision. (Findings 2 (¶¶ 13.-13.5.2.), 3)

In unconvincing testimony at the hearing, Walsh's President attempted to weave pollution liability insurance concerns into its explanation for its failure to provide the bonds. There is no proven connection. (Finding 18)

In its post-hearing brief, appellant attempts to bootstrap an argument related to a post-award clarification of the reprocurement contract to show that the solicitation provision was ambiguous (app. br. at 43; app. reply br. at 12, 16-17). Such clarification was envisioned in the pertinent insurance provision. To the extent that the reprocurement contract price was increased after award on account of the clarification, the Government is not claiming that amount. (Findings 2 (¶ 13.), 23)

Having considered appellant's arguments that the termination of its right to proceed was improper, we conclude to the contrary. The totality of the circumstances surrounding the termination decision indicate a reasonable, deliberate process and decision.

Reprocurement

Subparagraph (a) of the Default clause makes Walsh liable for increased costs incurred by the Government in completing the work (finding 2 (¶ 79.)). The Government may also be entitled to common law damages, pursuant to subparagraph (d) of that provision, such as the administrative costs necessary to effect the reprocurement. *Marley v. United States*, 191 Ct. Cl. 205, 223-24, 423 F.2d 324, 334-35 (1970); *Premiere Bldg. Servs., Inc.*, ASBCA No. 51804, 01-2 BCA ¶ 31,626; FAR 52.249-10; FAR 52.249-10.

To recover excess reprocurement costs in the context of this case, the Government must prove (1) that the reprocured work was the same or similar to that specified in the contract awarded to Walsh, (2) that excess costs were incurred by the Government, and (3) that the Corps acted reasonably to minimize any excess costs resulting from the termination of Walsh's right to proceed under the contract. *Cascade Pacific Int'l v. United States*, 773 F.2d 287, 293-94 (Fed. Cir. 1985); *Premiere*, 01-2 BCA at 156,244.

a. Similar Work

Walsh contends that the Government did not prove that the work was the same or similar because no copy of the reprocurement contract was offered in evidence. However, the record is clear that the Government reissued the same solicitation as a RFP that had previously been issued as the IFB on which the contract was awarded to appellant. The only

change of any consequence was the insertion of revised wage rate decisions that had become effective after the bids had been submitted pursuant to the IFB. (Findings 20, 22)

We are not convinced that the monetary impact of increased labor costs attributable to updated wage rate decisions rather than caused by the default should be visited upon appellant. Therefore, Walsh is not responsible for the cost increase of $35,000 occasioned by the wage rate modification (finding 22). *Double B Enters., Inc.*, ASBCA Nos. 52010, 52192, 01-1 BCA ¶ 31,396 at 155,113; *Empresas Electronicas Walser, Inc.*, ASBCA No. 17524, 74-2 BCA ¶ 10,664.

b. Excess Costs Incurred

(1) Increased Contract Amount

The Government incurred excess costs for the reprocured contract amount, which was higher by $760,235 than the original contract to Walsh (finding 23). As concluded above, we deduct $35,000. The net increased costs amount to $725,235.

(2) Administrative Costs

Administrative costs may be proven by reasonable and reliable estimates. *ARCO Eng'g, Inc.*, ASBCA No. 52450, 01-1 BCA ¶ 31,218. The reliable portions of the documented and estimated administrative costs for the reprocurement effort amount to $3,961.29 (finding 24).

c. Mitigation of Damages

The Government must show that it acted within a reasonable time of the default, used the most efficient method of reprocurement, obtained a reasonable price, and otherwise limited its losses. *Cascade Pacific Int'l*, 773 F.2d at 294. However, the CO has broad discretion in determining how to effect a reprocurement. *Astro-Space Labs., Inc. v. United States*, 200 Ct. Cl. 282, 308, 470 F.2d 1003, 1017 (1972); *Premiere*, 01-2 BCA at 156,244. Further, "[t]he Government is not obligated to solicit every known source . . . . 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 . . . ." *Advance Bldg. Maint. Co.*, ASBCA Nos. 27183, 28219, 85-2 BCA ¶ 18,076 at 90,750.

Reprocurement was initiated three days after Walsh's right to proceed under the contract was terminated. All original bidders, except Walsh, received the RFP, submitted offers and BAFOs, and the reprocurement contract was awarded to Barletta 46 days after the termination. The reprocurement contract price, $11,288,525, was competitively obtained, was lower than the price that appellant said it should have bid ($11,372,951), and

was lower than Barletta's original third-low bid ($11,737,825). Competitive forces caused all but one of the previous bidders to lower their prices. BAFOs further lowered some offers. (Findings 7, 11-12, 19-20, 22)

Absent rebuttal by appellant, we conclude that the CO acted with reasonable dispatch, adequately competed the reprocurement among the original offerors given the relative urgency of the work (finding 1), obtained a price that was reasonable, and mitigated the Government's losses. Appellant's arguments to the contrary revolve around the CO's refusal to meet and/or negotiate with appellant and the CO's decision not to allow Walsh to make an offer in the reprocurement.

(1) Alleged Communication Failure

Appellant faults the Government, and the CO in particular, for failure to meet and discuss the lack of bonds with Walsh and its President. Prior to 29 November 1989, the CO engaged in forbearance concerning the bonds and considered appellant's alleged mistake in bid. The Government corresponded with Walsh concerning the mistake in bid and submission of the required bonds. After 29 November 1989, the CO proceeded with termination procedures after having (1) denied the requested contract rescission, (2) denied a reconsideration request, (3) received Walsh correspondence that spoke of the impossibility of performance by Walsh, and (4) received no bonds from Walsh. (Findings 14-19)

Walsh was using the bonds as leverage to obtain some relief in connection with its mistake in bid allegation. Because the bonds were available and, according to Walsh, it could have performed the contract (findings 18, 21), the proper course would have been to proceed with performance and submit a mistake in bid claim. Attempting to shift the blame to the CO is unavailing.

(2) Failure to Withdraw Default Termination

Walsh also suggests that the Government failed to mitigate its damages by failing to withdraw the termination for default when appellant belatedly agreed to provide the bonds and proceed with the work. While the CO had the discretion to withdraw the default termination, we cannot fault his decision to decline based on the reasons supported by evidence in the record (finding 21). In short, the CO had lost confidence in Walsh's responsibility as a contracting partner for the Government on this project. No abuse of discretion was shown.

(3) Refusal to Allow Walsh to Compete for the Reprocurement

Appellant argues that failure by the CO to allow Walsh to submit a proposal in response to the RFP was a failure to mitigate damages. In effect, the contractor suggests that the CO was obliged to allow appellant to compete for the reprocurement.

The CO gave several reasons for his considered judgment that Walsh was no longer a satisfactory contracting partner for the Government on this project. In summary, the CO had lost confidence in appellant. We find the CO's judgment convincing and reasonable based on the reasons provided and listed above in our finding 21. Of particular concern is Walsh's earlier refusal to go forward as it attempted, without success, to leverage that refusal to obtain relief for its alleged bid mistake. When the CO did not change his position and at the 11th hour, Walsh said that it would agree to go forward. Walsh had this option at the outset. Its change in position without any apparent financial or contractual basis damaged its credibility as a trustworthy and reliable contractor. The CO was left to decide whether Walsh would now go forward if it presented the low offer in response to the RFP, or would again change its position.

The CO is "'generally given wide discretion' in making responsibility determinations." *Bender Shipbuilding & Repair Co. v. United States*, 297 F.3d 1358, 1362 (Fed. Cir. 2002), quoting *John C. Grimberg Co. v. United States*, 185 F.3d 1297, 1303 (Fed. Cir. 1999). We will not substitute our judgment for the reasonable judgment of the CO. We conclude that the CO properly exercised his discretion in excluding Walsh from participation in the reprocurement. His decision did not constitute a failure of mitigation of damages. *Churchill Chem. Corp. v. United States*, 221 Ct. Cl. 284, 293-94, 602 F.2d 358, 364 (1979); *Double B*, 01-1 BCA at 155,114; *Envtl. Tectonics Corp.*, ASBCA No. 21204, 78-1 BCA ¶ 12,986 at 63,311.

LDs

The Government demands $45,900 as LDs measured by the time period from award of Walsh's original contract to the date of award of the reprocurement contract to Barletta (finding 23).

In the earlier decision, the Board pointed to the existence of an issue related to the proper time period for assessment of LDs and noted the extent of the performance period allowed for the reprocurement contractor. *Walsh,* 98-1 BCA at 147,043 (text and n.3). The Government argument assumes that the time period between award of the contracts is the best estimate of the extra time that would have been needed for completion by the reprocurement contractor. Time extensions allowed under the reprocurement contract, suggests the Government, are presumed to be the same as those that would have been allowed to Walsh if it had performed.

The Government, which has the burden of proof, has failed to prove facts that could tend to show that appellant should be liable for any specific amount of LDs (findings 23,

25). No legal authority has been cited for retaining LDs for any time period prior to the completion date set by the terms of Walsh's contract.

The contract provisions providing for LDs are instructive here. Those provisions speak to a failure "to complete the work within the time specified in the contract, or any extension" and if the contractor's right to proceed is terminated, "the resulting damage will consist of [LDs] until such reasonable time as may be required for final completion of the work . . . ." (Finding 2 (¶¶ 2.1.-2.2.))

We are not persuaded by the Government's argument that we can simply assume, without further evidence, that LDs should be measured by the time period between the award of the two contracts.

SUMMARY

The appeal is sustained in part and denied in part. The Government is entitled to payment from appellant in the amount of $729,196.29 ($725,235 for the increased reprocurement contract amount and $3,961.29 for costs to administer the reprocurement award) plus interest accruing from 6 December 1996, in accordance with FAR 52.232-17 (findings 2 (¶ 49.), 26).

Dated: 30 September 2002

STEVEN L. REED
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

NOTES

[1] Documents submitted by each party pursuant to Board Rule 4 (Rule 4 appeal file), supplements to the Rule 4 appeal file provided by each party prior to the hearing, and limited exhibits admitted at the hearing were consolidated by a pre-hearing Scheduling Order (15 May 1998). All such documents are cited as exhibits. Documents submitted by the Government are "G" exhibits; appellant's documents are "A" exhibits.

[2] Assuming a typical minimum 5% profit, based on the CO's experience and the GE profit computation worksheet (positing 5.9% profit), increases the total GE to $9,874,985.40. Adding 5% to the estimate for bid Item Nos. 1., 2., and 3.1, would increase those amounts to $1,335,253.50, $5,037,517.80, and $1,596,667.80, respectively. The GE also omitted any amount for pollution liability insurance, earlier estimated by the Corps' architect-engineer contractor at $200,000. Adding that amount, plus profit, to the GE increases the total to $10,084,985.40. (Tr. 82-83, 154-65, 174-81; exs. G-1, -52)

[3] The second low bidder was determined by the Government to be non-responsive because its bid bond was "not in effect at time of bid opening and [listed the] wrong solicitation" (exs. A-3, -5, G-1, -68, -73).

[4] Appellant's counsel cited the award amount without mention of any arithmetic discrepancies. The correction of those discrepancies is first mentioned by appellant, as a basis for relief, in the second motion to dismiss submitted to the Board prior to the hearing. (Tr. 39; app. mot. at 3-5, 8-14)

[5] Appellant alleges that "the Corps . . . made adjustments in a unit price . . ." (app. br. at 37). This is an incorrect statement of fact. The bid and award document, Standard Form 1442 and the attached Bidding Schedule, shows that no unit price has been changed. Government contracting personnel altered (1) a bid line item total amount, that is, the product of a bid unit price and an estimated quantity, and (2) the grand total of all bid line item total amounts.

[6] The record does not reveal that appellant intended for its request to be considered as a claim under the Disputes provision of the contract (finding 2 (¶ 52.)). No COFD was demanded.

[7] If Walsh's VP had been told of the specific arithmetic errors discovered by the Government prior to award, that information would not have caused the level of review necessary to discover the bid mistake alleged by appellant after award (finding 8).

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. 52952, Appeal of Walsh Construction Company of Illinois, rendered in conformance with the Board's Charter.

Dated:

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