EXCESS COST OF REPROCUREMENT MAY RESULT IN EXCESS WORRIES FOR THE CONTRACTOR

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When the Government defaults a contractor, but still needs the goods or services, it may reprocure them, and, if the reprocurement is conducted properly, charge any excess costs to the contractor. The cost to the contractor may be substantial. Sometimes, however, the Government conducts the reprocurement improperly, as in *M.E.S. and Travelers v. U.S.,* COFC No. 10-92 (May 23, 2012). A bit of background helps understand the case.

The default clause, FAR 52.249-8, states:

> If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services.

The method for conducting the reprocurement is explained in FAR 49.402-6 Repurchase against contractor's account:

> When the supplies or services are still required after termination, the contracting officer shall repurchase the same or similar supplies or services against the contractor's account as soon as practicable. The contracting officer shall repurchase at as reasonable a price as practicable, considering the quality and delivery requirements…. [T]he contracting officer shall obtain competition to the maximum extent practicable for the repurchase.…If repurchase is made at a price over the price of the supplies or services terminated, the contracting officer shall, after completion and final payment of the repurchase contract, make a written demand on the contractor for the total amount of the excess, giving consideration to any increases or decreases in other costs such as transportation, discounts, etc….

Note the similarity of "excess cost of reprocurement" with the commercial concept of "cover costs", in the Uniform Commercial Code ("UCC") § 2-712. "Cover"; Buyer's Procurement of Substitute Goods.

> (1) After a breach within the preceding section the buyer may "**cover**" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
>
> (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as

hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach. []

When the government properly defaults a contract but still needs the goods or services it may reprocure the goods (which is commercially known as "cover," as set forth in the UCC), and charge any excess costs to the defaulted contractor. The reprocurement relieves the government of the burden or proving market value in a suit for breach of contract. Accordingly, in order to obtain excess costs of reprocurement, the government must demonstrate that it conducted a reprocurement action reasonably designed to minimize the excess costs. When the reprocuement was not so designed, the right to excess costs is lost. Marley v. U.S, 423 F.2d 324 (Ct. Cl. 1970). An excess reprocurement claim requires the government to demonstrate that (1) the reprocured supplies are the same or similar to those involved in the default termination ; (2) the Government actually incurred excess costs; and (3) the Government acted reasonably to minimize the excess costs resulting from the default. Cascade Pac. Int'l v. U.S., 773 F. 2d 287, 293-4 (Fed. Cir. 1985).

The Government can usually demonstrate the three grounds for assessing excess costs by showing the comparable specifications, producing the payments made on the new contract, and demonstrating that it took reasonable steps to minimize costs. The Government doesn't even need to compete the supplies, but merely must "obtain competition to the maximum extent practicable for the repurchase." FAR 49.402-6. M.E.S., however, is an example of a reprocurement gone wrong. The Postal Service awarded a contract to construct a postal facility in 1998, but terminated the contract for default in June 1999 because MES failed to adhere to the schedule and caused a four and one half month delay in project completion. The Postal Service did not reprocure the project until July 2004—almost five years later. The court noted that the delay caused increases in architectural, engineering, construction management, site maintenance and cost escalation for labor and material. The court found that it was "abundantly clear that had the Postal Service immediately reprocured, it could have completed the project within the original budget." Furthermore, the court found the Postal Service delays in reprocurement to be unjustified, noting internal memos in which the contracting officer stated there was no reason not to commence reprocurement in 2000. The court concluded that the Postal service *did not* reprocure in a reasonable fashion, and there was no excuse for the nearly five year delay, which resulted in large cost increases. Accordingly, the Court refused to assess the excess reprocurement costs.

HINT: First, contractors should ensure that they do not place themselves in a position where their contract could be defaulted. But if this happens, and you cannot reverse it through litigation, insist that the government reprocure in a reasonable fashion, without delay, and for the same or similar items or services. If those requirements are not met, the reprocurement costs cannot be assessed against the contractor.