Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: November 4, 2005

GSBCA 16527, 16657

FRANKLIN'S CLEANING AND SUPPLY COMPANY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Bradley Alan Rush, Silver Spring, MD, counsel for Appellant.

Joel David Malkin, Office of Regional Counsel, General Services Administration, Chicago, IL, counsel for Respondent.

HYATT, Board Judge.

These consolidated appeals are from contracting officer decisions denying claims asserted under a contract to perform custodial services for the Federal Building and United States Courthouse in Urbana Illinois. Appellant, Franklin's Cleaning and Supply Company, has elected to proceed under the Board's expedited procedure for small claims, which is available solely at the election of the appellant when the total monetary amount in dispute is $50,000 or less. Rule 202 (48 CFR 6102.2 (2004)). This rule permits issuance of a decision in summary form. Decisions issued under the small claims procedure are final and conclusive and shall not be set aside except in cases of fraud affecting the Board's

proceedings. 41 U.S.C § 608 (2000); Palmer v. Barram, 184 F.3d 1373 (Fed. Cir. 1999). This decision has no value as precedent.

Findings of Fact[1]

Background

Franklin's Cleaning and Supply Company was incorporated in July 1996. The company is located in East St. Louis, Illinois, and has a post office box mailing address in Belleville, Illinois. The company was certified as a participant in the United States Small Business Administration's (SBA's) 8(a) program in 1997. As an 8(a) program participant, Franklin's was automatically qualified as a small disadvantaged business. Supplemental Appeal File, Exhibits 101, 102; Transcript at 10-12.

Following Franklin's acceptance into the SBA's 8(a) program, it was awarded a small business set-aside contract with the General Services Administration (GSA) to provide cleaning services for the National Archives Building in Chicago, Illinois beginning in 2000. Transcript at 11.

On September 18, 2001, GSA issued a request for proposals for the provision of janitorial and related services for the Federal Building and United States Courthouse in Urbana, Illinois. The procurement was set aside for small businesses and the closing date for submission of proposals was October 15, 2001. Appeal File, GSBCA 16527, Exhibit 1.

Ms. Franklin, appellant's president, found this solicitation on GSA's website and decided to submit a bid for the work. She testified that she found the statement of work and pricing format of the Urbana contract to be similar to that in the Archives solicitation and that she prepared her bid based on her experience with and understanding of the Archives contract. Appeal File, GSBCA 16527, Exhibit 1 at 9, 11-12.

GSA received six offers in response to the solicitation, including one from Franklin's. After the closing date for receipt of offers, the agency performed a price analysis. Based on this analysis, Franklin's evaluated price, which was slightly higher than that of the incumbent contractor, was neither the high nor the low offer. There were two lower offers, as well as

[1] Franklin's has appealed two separate contracting officer's decisions involving the same contract. Since there are two Rule 104 files, the citations include the docket number of the case for which the Rule 104 file was provided. The record also includes a supplemental appeal file, which pertains to both cases.

other offers that were higher than Franklin's evaluated price. After considering Franklin's price and past performance ratings, the contracting officer determined that Franklin's offer constituted the best value to the Government and awarded contract number GS05P02GAC0204 to Franklin's on October 29, 2001. Performance under the contract commenced on December 1, 2001. Appeal File, GSBCA 16527, Exhibit 1; Appeal File, GSBCA 16657, Exhibits 2, 3, 23; Transcript at 172-74.

The Urbana Contract's Terms and Conditions

This fixed-price contract was for a base year with four option years. In addition to custodial services, the contractor was required to quote prices for services to be ordered on an as-needed basis. These included such floor maintenance tasks as (1) stripping and sealing; (2) stripping an application of multiple finish coats; (3) carpet cleaning by extraction; and (4) carpet cleaning by shampooing. The Government could also order high cleaning and snow removal services above and beyond manual snow removal for building entrances, steps, landings and sidewalks. (Manual snow removal was to be provided as part of the monthly contract price for custodial services.) The solicitation and contract contained a line item with a monthly price for the provision of basic custodial and related services, plus separate line item prices for special services enumerated separately and to be provided only if ordered by the Government. GSA could also choose to obtain these extra services from sources other than the custodial contractor, depending on the best interests of the Government. Appeal File, GSBCA 16527, Exhibit 1 at 4.

The statement of work, inspection, and quality requirements sections of the contract described the janitorial and related services to be provided for the monthly price. For the monthly fee, the contractor was to provide basic custodial services such as maintaining most of the building's interior space free of obvious dirt, debris, and dust.[2] In addition, the

[2] The contract does provide significant detail as to what the custodial duties involve. For example, it states that glass surfaces are to be clean and free of smudges; furniture is to kept dusted and free of dirt and debris; carpets are to be free of obvious spots and stains; and other floor services are to be maintained in accordance with the best trade practices. Additionally, drinking fountains are to be cleaned so as to be sanitary and free of water marks or other debris or encrustation; metal surfaces are to be maintained in a polished and lustrous condition; trash is to be collected and removed regularly; and rest rooms are to be cleaned and sanitized.

The contract also required support services, which included, but were not limited to, the following:

contractor was to maintain the grounds and outside areas in a neat and clean manner. This included watering, pruning, mowing, trimming, edging, raking, fertilizing, and controlling weeds. The contractor was expected to perform these services using its own personnel. Finally, the contractor was expected to provide waste removal, pest control, and ground maintenance, and snow removal, using subcontractors to perform these services. Appeal File, GSBCA 16527, Exhibit 1 at 12-13.

The contractor was required to furnish all supplies, equipment, and employee training necessary for performance of the work. The contractor was also required to provide appropriate uniforms for its employees. Appeal File, GSBCA 16527, Exhibit 1 at 13.

In addition, the contractor was to supply the contracting officer's representative (COR) located in the building with a telephone number or pager number at which the contractor's supervisory employee could be contacted during all times that work was in progress under the contract. The contractor was also required to provide phones for its employees' use in conducting business. Appeal File, GSBCA 16527, Exhibit 1 at 12-13.

The Inspection and Acceptance section of the contract, Paragraph A, addresses remedies available in the event of a failure to perform. These include the right to require the contractor to redo the deficient work in conformance with contract requirements, at no additional cost, or to reduce the contract price to reflect the reduced value of the deficient services. Further, should the contractor fail to undertake corrective action, or take the necessary action to ensure future performance is in conformity with contract requirements, the Government may perform the services itself and charge the cost back to the contractor, or alternatively, it may terminate the contract for cause. Appeal File, GSBCA 16527, Exhibit 1 at 15. Paragraph B of this same section sets forth Federal Acquisition Regulation (FAR) clause 52.246-4 - Inspection of Services - Fixed Price. This clause permits the Government to terminate for default in the event a deficiency is identified upon inspection and the

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> servicing main lobbies and high public use areas; servicing complaints and performing special cleaning required by vacating of space by building occupants; alterations to the building; set-up and breakdown of conference rooms; clean-up work made necessary by toilet floods and similar occurrences; assisting in loading, unloading, and moving of furniture, supplies, carpet, etc., on the premises; providing all cleaning and servicing requirements as identified by the COR [contracting officer's representative]; and miscellaneous grounds maintenance.

Appeal File, GSBCA 16527, Exhibit 1 at 11.

contractor either fails to promptly perform the service again or take appropriate action to ensure future performance in conformity with contract requirements. *Id.* at 15-16.

The contract contained a cancellation provision under which the contract could be cancelled "without cost, by either the contractor or GSA upon **90** calendar days after receipt of written notice." (Emphasis in original.) The cancellation clause further provided that:

> Such a cancellation does not relieve the contractor [of] the obligation to perform work under this contract prior to the effective cancellation date, nor does it relieve GSA from the obligation to pay for such work.
>
> Such a cancellation will not provide any settlement costs to the contractor and will not result in any action by GSA to gain performance by a surety or to obtain reprocurement costs.

Appeal File, GSBCA 16527, Exhibit 1, at 25; Stipulation 15.

The contract contained provisions required by the Services Contract Act of 1965. These provisions mandate that the contractor and its subcontractors pay the minimum specified wages and fringe benefits, as determined by the Department of Labor (DOL), to employees performing work under the contract. As a means of enforcement, the contract further provides that if an appropriate official of DOL determines that any employee of the prime contractor or its subcontractor has been underpaid, the contracting officer shall withhold the relevant amounts from payments due the prime contractor. Appeal File, GSBCA 16527, Exhibit 1 at 44-48.

Ms. Franklin testified that in preparing her bid she determined what it would cost to provide the requisite janitorial services and supplies and arrived at a monthly line item price. This price did not include the costs associated with the regular services that the Government expected would be provided by subcontractors. There were no separate line items in the solicitation for waste removal, pest control, or ground maintenance and snow removal. She expected that she would bill the charges of the subcontractors separately, which she said was the practice under the Archives contract with which she was familiar. Transcript at 19-20.

Performance of the Contract

Franklin's took over the cleaning contract on December 1, 2001. At that time, and at the suggestion of the contracting officer's representative at the site, two employees of the predecessor contractor were hired to continue to perform custodial work for appellant. Also

at the recommendation of the COR, Franklin's entered into subcontracts with the companies that had previously provided pest control, landscaping, snow removal, and waste removal services for the building. Transcript at 23-24, 121, 148-49.

Franklin's completed the base year satisfactorily and GSA exercised its option for the first option year, which was also performed satisfactorily for the most part. In November 2003, GSA exercised its option for the second option year of the contract. Appeal File, GSBCA 16657, Exhibit 11.

GSA's contracting officer testified that at the time the agency exercised the second option year, extending Franklin's contract to cover the period from December 1, 2003 through November 30, 2004, Franklin's performance was, on balance, considered to be satisfactory. Transcript at 198-99.[3]

Installation of Telephone

Ms. Franklin testified to her understanding that the provision of pagers to her two custodial employees at the site would satisfy the contract's requirement that her company provide telephones for her employees' use for making calls in conducting business under the contract. She derived this understanding from conversations with Ken Walker, a custodial employee who, prior to being employed by Franklin's, had worked for a number of years as a custodian at this building for several predecessor cleaning contractors. Mr. Walker advised Ms. Franklin that he would be permitted to fax his requests for supplies to her, and that he could manage with just a pager. Transcript at 32-35.

In January 2002, the GSA contracting officer notified Ms. Franklin that the agency had encountered problems contacting the company's employee on his pager, which apparently did not work in the basement of the building, where the employee's office was located. The contracting officer reminded Ms. Franklin that the contract required appellant to furnish the COR with (1) the name of the person to contact both for matters requiring

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[3] Although the contract was renewed, a complaint with respect to grounds maintenance had been received prior to the completion of the first option year. In September 2003, the Assistant Regional Administrator of GSA wrote an electronic message expressing serious dissatisfaction with the deterioration of grounds maintenance at the Urbana Courthouse, mentioning among other issues, the presence of thistles and weeds all over the property, untrimmed edges, choking vines, and weeds in paving joints. Appeal File, GSBCA 16657, Exhibit 9.

immediate attention and for routine daily work matters, and (2) a telephone or pager number by which that employee may be contacted. She also pointed out that, under the contract, to the extent the company's employees needed to conduct business such as ordering supplies, contacting subcontractors, and the like, that the company was required to supply phone service for this purpose. Appeal File, GSBCA 16657, Exhibit 6.

After receiving this letter, Ms. Franklin arranged to have a telephone installed in Mr. Walker's office. The cost incurred for the telephone and monthly service charges was $565. Transcript at 35-36; Supplemental Appeal File, Exhibit 109.

Department of Labor Investigation

By letter dated January 28, 2004, the Department of Labor notified GSA's contracting officer that there would be an investigation of Franklin's Urbana Courthouse contract for compliance with provisions of the Service Contract Act. The letter requested that GSA supply information concerning the subject contract, such as copies of the contract, date of contract award, and a description of the service work being performed under the contract. Appeal File, GSBCA 16657, Exhibit 13.

Ms. Franklin testified that she was contacted by DOL shortly after she terminated the employment of Ken Walker, the supervisory custodial employee she had hired from the previous contract. (Actually, Ms. Franklin terminated Mrs. Walker's employment with her firm on February 24, 2004.) She understood the DOL investigation to have been prompted by Mr. Walker's allegation that she had not paid him properly. Transcript at 56-57.

In March 2004, a United States District Court judge with chambers at the Urbana Courthouse wrote to DOL expressing concerns about Franklin's alleged failures to pay its janitors fully and in a timely manner. Appeal File, GSBCA 16657, Exhibit 15.

Following completion of DOL's investigation, Franklin's was not found to have underpaid any of its own employees,[4] but was required to pay back wages and fringe benefits found to be due to one of its subcontractors' employees. The amount in question was $467. Supplemental Appeal File, Exhibit 121; Transcript at 55-60.

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[4] At the hearing, Ms. Franklin testified that the janitors' complaints to building tenants about underpayments had to do with deductions and garnishments that she was required by law to make. Transcript at 38.

Cancellation of the Contract

On March 1, 2004, GSA sent written notification to Franklin's that it was exercising the cancellation clause of the contract, with the effective date of cancellation being May 31, 2004. Appeal File, GSBCA 16657, Exhibit 14.

In November 2002, GSA's Public Buildings Service (PBS) entered into a memorandum of understanding with the Committee for Purchase From People Who Are Blind and Severely Disabled (Committee for Purchase), and NISH (formerly the National Industries for the Severely Handicapped), representing Community Rehabilitation Programs (CRPs). The memorandum established a strategic alliance among these parties for the development of business opportunities for the employment of people with severe disabilities while providing best value service for GSA's customers. Pursuant to this memorandum the parties agreed, among other things, that PBS would recognize the JWOD (Javits-Wagner-O'Day) Program[5] as the vendor of choice for all PBS-contracted custodial work and would provide to NISH CRPs the right of first refusal to perform custodial services for PBS. Appeal File, GSBCA 16657, Exhibit 25.

To implement this memorandum of understanding, GSA contracting officials were instructed that at the end of every option year under existing janitorial or custodial contracts they should evaluate whether or not there might be an opportunity to provide the work to NISH. In the summer of 2003, it was determined that the opportunity to provide services at the Urbana Courthouse, combined with the Danville Courthouse, located approximately twenty-five miles from Urbana, should be offered to NISH. The offer was communicated to NISH, and NISH undertook to perform an initial site survey as a preliminary measure in evaluating whether the opportunity would be appropriate. Transcript at 180-81. The process

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[5] In 1938, the Wagner-O'Day Act was enacted to provide employment opportunities for people who are blind by allowing them to manufacture mops and brooms to sell to the Federal Government. In 1971, under the leadership of Senator Jacob Javits, Congress amended this Act (41 U.S.C. §§ 46-48c) to include people with severe disabilities and allow the program to also provide services to the Federal Government. The Javits-Wagner-O'Day (JWOD) Program provides employment opportunities for Americans who are blind or have other severe disabilities. It orchestrates Government purchases of products and services provided by nonprofit agencies that employ people with disabilities throughout the country. This socioeconomic initiative is intended to provide Federal customers with a wide array of products and services, while offering employment opportunities and increased independence to people with severe disabilities. *See* www.workworld.org.

for providing custodial contract opportunities to NISH is a lengthy one, however. After completion of the site survey, the Committee for Purchase must approve the contract, which can only occur after an impact study has been done on the current custodial contractor. It usually takes at least a year to get a location approved for the procurement list of NISH opportunities. *Id.* at 182.

In the case of the combined Urbana and Danville locations, the earliest a NISH contractor could have been approved to take over the work would have been the fall of 2004, Transcript at 182-83, although GSA may have started negotiating with NISH early in 2004 to get the paperwork in place in time for a contract award when the incumbent contractor's option year expired. *Id.* at 196-97.

At the time GSA exercised the cancellation clause of Franklin's contract, in March 2004, it did not have a replacement contractor in hand to provide the requisite custodial services. GSA asked a contractor performing at another GSA building to help out temporarily. That contractor took over for about four months until a NISH contract was in place. Transcript at 212-14.

Invoices for Subcontractor's Charges

Prior to the exercise of the option to extend Franklin's performance from December 1, 2003 through November 30, 2004, Franklin's realized that there were no line items in the contract for the costs of subcontractor services for waste removal, pest control, and ground maintenance. Although Franklin's had provided these services as required by the contract, and had paid its subcontractors, it had not billed the Government for the costs it had incurred. Franklin's then contacted the contracting officer by telephone and by letter to bring this matter to GSA's attention. Transcript at 152; Appellant's Hearing Exhibit 48.

After receiving notification in October 2003 that the Government planned to exercise the option for the period from December 1, 2003 through November 30, 2004, Franklin's submitted revised option year pricing for GSA's consideration, seeking separate line item payments for these subcontractor services. Supplemental Appeal File, Exhibit 108; Transcript at 152-53.

When the Government issued contract modification P0003, exercising its option to extend Franklin's contract performance through November 30, 2004, it did not revise Franklin's contract price to add the proposed costs for grounds maintenance, pest control, and waste removal services. Appeal File, GSBCA 16657, Exhibit 11; Supplemental Appeal File, Exhibit 108; Transcript at 152-53.

A GSA contracting officer with responsibilities involving numerous contracts, including janitorial, mechanical maintenance, architecture, engineering and construction contracts, in the Great Lakes Region, testified concerning her knowledge and experience with janitorial contracts. She stated that GSA uses a performance-based boilerplate specification and statement of work for its janitorial and related services contracts for buildings throughout the region. The contract awarded to Franklin's used that same performance-based specification and statement of work. The contracting officer testified that she had administered approximately a dozen janitorial contracts using this standard language. In her experience, this is the first time a contractor has sought to be reimbursed separately from the monthly payment for subcontractor expenses. Transcript at 169, 176-78.

Deductions for Deficient Cleaning

In the final month of Franklin's performance under the contract, GSA determined, in an inspection of the site, that the cleaning services were deficient. In describing her visit to the premises in May 2004, the supervisory property manager confirmed that in her view the deficiencies were for cleaning services items that Franklin's was to provide for its monthly fee. These included significant landscaping problems with overlong grass, proliferation of weeds, failure to trim, and a large amount of tree debris left in the lot to be hauled away. Inside the building it was clear that floors were not regularly scrubbed -- "the lobby floor [had] a film on it that you could write in," the bathroom floors were visibly dirty, especially at the edges and corners, offices were extensively dusty, and she noted significant debris and dirt build-up on carpeted surfaces. Appeal File, GSBCA 16527, Exhibit 27.

After the inspection was performed, GSA contacted Franklin's in a certified letter dated May 20, 2004, enclosing the inspection report, which had already been provided to Franklin's employee at the Courthouse. Franklin's was advised that failure to correct all noted deficiencies within twenty-four hours after receipt of the letter could result in deductions from the company's final payment under the contract. Appeal File, GSBCA 16257, Exhibit 15.

Franklin's pointed out that in February 2004 it had fired one of its two employees located at this building and had been unable to put a replacement at the site due to delays in obtaining the necessary clearances from GSA.[6] Thus, Franklin's continued to be shorthanded

[6] Ms. Franklin pointed out to GSA in her claim letter that she had made every effort to hire a second janitor for the site but that GSA had taken some forty-five days to obtain the requisite security clearance for the person she had proposed to hire. By the time clearance was forthcoming, the individual she had identified for the position had taken

and in all likelihood would be unable fully to satisfy GSA's concerns as noted in this inspection report within the twenty-four hour period permitted for the correction of the noted deficiencies. Appeal File, GSBCA 16527, Exhibit 15; Transcript at 83.

When the Franklin's contract ended on May 31, 2004, the Government paid $1,475 to another contractor to clean up what it deemed to be areas in which Franklin's had neglected to perform its routine custodial duties. This amount included scrubbing of the lobby, sweeping of the parking lot, tree trimming, debris removal, and deep cleaning of the restrooms. In addition, Franklin's was charged for the cost of weed control and fertilization of the grounds, as well as the cost of lawn mowing, which had not been corrected when required. Appeal File, GSBCA 16527, Exhibits 27, 29.

A performance evaluation completed after Franklin's contract was concluded gave the company poor ratings for quality of services and business relations. The evaluator stated that "I would not give a recommendation for this contractor. She is a very poor business person and a poor communicator." Supplemental Appeal File, Exhibit 126.

Contractor's Claims

On June 29, 2004 and July 1, 2004, Franklin's sent letters to the contracting officer disputing the amounts deducted from the final payment due under the cancelled custodial contract. By letter dated July 29, 2004, the contracting officer issued a decision, adjusting the deduction taken, from the amount of $2,835.85 to $1,910.85, based on the actual costs incurred by the Government in rectifying performance deficiencies attributable to Franklin's. Appeal File, GSBCA 16527, Exhibits 23-24, 29. On October 25, 2004, Franklin's appealed this decision to the Board. *Id.*, Exhibit 35. This appeal was docketed as GSBCA 16527.

Subsequently, Franklin's submitted a second claim, seeking additional relief, in the amount of $37,055, for changed work under the contract and for the Government's "wrongful breach" of the subject contract. The claim was submitted to the contracting officer by letter dated October 25, 2004. In it, Franklin's asked for reimbursement of the amounts DOL required it to pay to a subcontractor's employee, the expense of installing a telephone at the Courthouse, the cost of subcontractors' services that were incurred but not paid for, and, for breach of the contract, its anticipated profits, plus attorney fees for pursuing this claim.

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another job and was no longer available. Appeal File, GSBCA 16527, Exhibit 24.

Since additional claims were pending with the contracting officer, counsel asked the Board, and the Board agreed, to suspend proceedings in GSBCA 16527 until the additional claims had been considered by GSA. On November 9, 2004, GSA asked the contractor for additional information to support its claims. Additional information was provided to GSA in a submission from Franklin's made on March 16, 2005. By letter dated April 29, 2005, the contracting officer denied these claims as well. Appeal File, GSBCA 16657, Exhibit 23. Franklin's appealed the contracting officer's second decision on June 1, 2005. This appeal was docketed as GSBCA 16657. At the request of the parties, the Board consolidated the two appeals in an order dated June 6, 2005. On July 7, 2005, appellant elected to proceed under the small claims procedure.

Discussion

Appellant now seeks equitable adjustments to the contract price for what it considers to be changed work; a refund of what it regards as improper deductions for allegedly deficient work; reformation of the contract to permit recovery of the amounts paid to its subcontractors for grounds maintenance, waste removal, and pest control; and an award of anticipated profits for what it regards as the Government's bad faith exercise of the option for the second year option followed by cancellation of the contract prior to its full completion. Appellant contends that much of the amounts it claims to be owed are attributable to the Government's "bad faith administration" of this contract, particularly just prior to the exercise of, and during the performance of, the second option year.

Subcontractor Costs

Appellant seeks post-award reformation of the contract to permit payment of the costs it incurred to contract with subcontractors for the provision of waste removal services, pest control services, and grounds maintenance services.[7] Appellant did not include these costs in the monthly fixed fee to be paid by the Government for basic custodial services required under the contract. Respondent argues that appellant should have included these fees in the monthly price quoted and that its failure to do so constitutes a unilateral mistake in business judgment. Appellant maintains that the contract was not clear with respect this and that in

[7] Although appellant initially alleged that it should be paid these amounts based on a prior course of dealing, either in earlier option years or under the Archives contract, there is no evidence in the written record, nor was any testimony adduced at the hearing, to support recovery under this theory. Accordingly, in its post-hearing brief, appellant asked that the Board consider the theory of recovery that it believes is supported by the evidence.

its experience there should have been separate line items for these charges. Thus, appellant contends that its failure to include these amounts was attributable to its misreading of the specifications and that it should therefore be granted relief, by way of reformation, under the principles enunciated in *Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157 (Fed.Cir.1987).

The circumstances in which post-award reformation of a contract based on a contractor's unilateral mistake is available have been succinctly summarized by our appellate authority as follows:

> Parties to a contract are generally bound by its terms. However, we have recognized in limited circumstances that if the government has knowledge, or constructive knowledge, that a contractor's bid is based on a mistake, and the government accepts the bid and awards the contract despite knowledge of this mistake, then a trial court may reform or rescind the contract. *United States v. Hamilton*, 711 F.2d 1038, 1046 (Fed.Cir.1983); see also *Ruggiero v. United States*, 190 Ct.Cl. 327, 420 F.2d 709, 713 (1970). Such relief may be appropriate to prevent the government from overreaching when it knows the contractor has made a significant mistake during the bidding process. *See Ruggiero,* 420 F.2d at 713 ("[W]hat we are really concerned with is the overreaching of a contractor by a contracting officer when the latter has the knowledge, actual or imputed as [to] something he ought to know, that the bid is based on or embodies a disastrous mistake and accepts the bid in face of that knowledge."). Generally, a contractor may obtain reformation or rescission of the contract only if the contractor establishes that its bid error resulted from a "clear cut clerical or arithmetical error, or a misreading of the specifications." *Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157 (Fed.Cir.1987); *Hamilton*, 711 F.2d at 1046. If the contractor's error does not constitute one of these kinds of mistakes, then the contractor is not eligible for reformation of the contract. *See Liebherr,* 810 F.2d at 1157; *Hamilton*, 711 F.2d at 1046. In limited circumstances, however, we have held that, if the government has breached its explicit regulatory duty to examine the contractor's bid for mistakes, then the trial court may rescind a contract, despite an otherwise inexcusable error by the contractor. *See Hamilton,* 711 F.2d at 1048; *see also* 48 C.F.R. §14.407-1.

Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000).

Appellant urges that it has established that it misread the specifications and that reformation is appropriate because increasing appellant's prices by the omitted amounts will

not cause the price to exceed that of the next lowest offeror.[8] It is not enough to establish solely that the contractor misread the specifications, however. To be eligible for the remedy of reformation, a contractor must also prove that the Government knew, or should have known, of the bidding error and overreached by accepting the contractor's offer. Here, we have no basis for charging the Government with constructive knowledge of the contractor's pricing error. The price analysis does not reveal any severe disparity in prices quoted by the competing offerors such that the Government might reasonably be viewed as having been put on notice of a potential mistake. *See, e.g., Wheeled Coach Industries v. General Services Administration,* GSBCA 10314, 93-1 BCA ¶ 25,245 (1992); *George A. Harris Enterprises, Inc.*, GSBCA 9888, 90-1 BCA ¶ 22,405 (1989).

Since the appellant has not proven all of the elements necessary to obtain reformation of the contract, this portion of its appeal must be denied.

Changed Work

Franklin's also seeks to recoup certain costs it maintains it incurred because of Government actions that, in its view, effectively changed the scope of its contract. In this category, it groups the costs it expended to install a telephone for the use of its supervisory custodian at the building and the requirement that it absorb the cost of back wages due to a subcontractor's employee.

Franklin's maintains that it should not have been "required" to install a telephone for the use of Mr. Walker. Appellant argues that prior contractors were never required to install a telephone for the use of the custodial staff, so Franklin's should not have been required to do this either. Although Franklin's has proven that it did indeed incur the expense of installing a telephone, the record does not establish that the Government improperly ordered it to do so. The contracting officer did no more than inform Franklin's of complaints received from building occupants concerning the inability to contact custodial staff when necessary and remind appellant of the pertinent contract provisions. It was up to Franklin's to determine how best to meet its contractual obligations. Franklin's responded by installing a phone, which the contract made clear was its responsibility. There is no basis for finding that the Government's actions constituted a change order.

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[8] Appellant thus suggests that the requirement of FAR 14.406-4(b)(2) has been met.

Nor does the DOL investigation of which appellant complains give rise to a basis for recovery. We decline to infer, as appellant requests, that the building occupants improperly "sicced" DOL on Franklin's because they were unhappy with the company's decision to terminate the employment of its janitors.[9] The only letter in the record before us that was sent to DOL by a building tenant was written after the DOL investigation was well underway. In addition, the contract's provisions clearly make appellant liable for wage underpayments attributable to its subcontractors. We have no explanation of why the subcontractor's employee was underpaid. If this was attributable to changes in the wage determination applicable to this employee, there are contractual procedures that should be followed to obtain an adjustment to the contract price. Franklin's has not pursued this remedy. Otherwise, Franklin's only recourse is to seek to collect these amounts from the responsible subcontractor.

Deductions for Deficiencies in Cleaning

The matter docketed as GSBCA 16527 seeks return of monies deducted from payments due to Franklin's under the contract. The Government maintains the deductions were properly taken for work that either was not performed or was not performed to standard, and that the money withheld represents the cost to GSA of correcting the deficiencies. Appellant contends that the monies GSA paid to other contractors represented expenses for special and more extensive cleaning than was required under its contract and that GSA should not have deducted these expenses from the payments due. In addition, Franklin's maintains that to the extent deficient work may have related to work included in the basic contract, it was GSA's fault that it could not staff the contract fully because of excessive delays in clearing Franklin's proposed replacement employee.

With respect to Franklin's complaint about the length of time required to get an approval to bring a new employee on board at the Courthouse, we note that as a general rule, it is the responsibility of the contractor to obtain and retain necessary qualified personnel to perform the contract work. Only in rare cases would the inability to staff a contract form a basis to excuse performance. *See, e.g., Carolina Security Patrol, Inc.*, GSBCA 5602, 81-1 BCA ¶ 15,040. Franklin's seems to suggest that this is one of those exceptions -- while previously GSA was able to obtain the necessary clearance fairly quickly (in a matter of a

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[9] One of appellant's contentions regarding the alleged "bad faith administration" of the contract is that a judge with chambers in the building befriended the two janitors whom she hired from the predecessor contractor and, in appellant's view, inappropriately attempted to interfere with appellant's personnel matters and policies. *See* Appeal File, GSBCA 16657, Exhibit 12; Transcript at 38-45, 53.

few weeks at most), in this case it took some forty-five days, at which point the individual proposed by Franklin's was no longer available to work for the company. When Franklin's pointed this out the GSA, the contracting officer responded that the clearance process at the time was experiencing a backlog.

Based on the skimpy record provided here, we have no basis to conclude that the amount of time taken was excessive, since we have no information as to why the employee's clearance was delayed. In most cases, where a clearance is required for contractor employees to have access to Government premises, it is the contractor's obligation to have cleared staff available to replace employees who leave the contractor's employ for any reason. *See R & B Bewachungs, GmbH*, ASBCA 34430, 91-3 BCA ¶ 24,300. Appellant has not cited us to any authority that would support the contention that in this case the Government was at fault for the contractor's inability to perform fully under the contract. Appellant is not entitled to remission of the amounts deducted based on the fact that it was shorthanded at the time.

Nor does the record support Franklin's contention that the costs incurred were for cleaning services outside of those required under the base contract. The written documentation provided by GSA's contracting officials who performed the inspection offsets Franklin's contentions that the costs reflected items that its custodians were not required to clean.

"Bad Faith" Cancellation of the Contract

Finally, appellant attempts to invoke the holdings of *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982) and *Krygoski Construction Co. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1210 (1997), in support of its contention that GSA improperly resorted to the cancellation clause of the contract. Appellant argues that, because GSA had been exploring the possibility of replacing its custodial contracts at the Urbana Courthouse and at other nearby locations with disabled contractors under the JWOD program, in fact GSA exercised the second option "without any intention of allowing Franklin's to fully perform." As compensation for this "bad faith" cancellation of the contract, Franklin's seeks lost profits of some $16,344.

This contention is dubious at best, for a number of reasons. First, we note that the cases relied on by Franklin's delineate limitations on the Government's exercise of its unilateral right to terminate a contractual relationship for its convenience, an extraordinary remedy that permits the Government to avoid breach of contract damages and that is not generally available to the contractor. The cancellation clause in this contract is mutual in its effect -- either GSA or the contractor could avail itself of the option to cancel the contract, without incurring a penalty, with ninety days' notice to the other party. The underlying

rationale for imposing restrictions on the Government's exercise of the unilateral right to terminate for its convenience is that the privilege is one-sided -- it entitles the Government to avoid breach of contract damages when it decides, abruptly and without notice, it no longer wants or needs to procure the products or services provided by the particular contractor with which it has contracted. Such a right is not provided in the cancellation clause of the contract.

Additionally, even assuming, arguendo, that the *Torncello* principle should extend to the entirely different clause contained in the subject contract, the circumstances in this appeal are not similar to those that arose in *Torncello* and its progeny. In *Torncello*, the Government awarded a requirements contract for various services knowing that at least one particular service covered by the contract was available at cheaper prices elsewhere. The Government intended from the inception to obtain those services elsewhere at the lower price. When Torncello complained that it was entitled to supply these requirements under its contract, the Government retroactively relied on its right to effect a partial termination of these requirements for its convenience. In that case, the plurality held that absent "changed circumstances" the Government cannot exercise its right to terminate a contract for its convenience.

In this case, the evidence does not support the conclusion that GSA deliberately renewed the option with the intent to cancel prior to the conclusion of a full year of performance. Rather, the evidence shows that GSA was working with the Committee for Purchase and NISH with the intent of eventually placing the custodial contracts at the Urbana and Danville locations under the JWOD program. It appears that at the time it exercised the option, GSA expected the option year to be fully performed by Franklin's, which it considered to be a relatively satisfactory contractor at the time the option was exercised. This is supported by the fact that GSA had no immediate replacement available for Franklin's and used a non-JWOD follow-on contractor to handle custodial work at this location for a number of months before it was able to enter into a contract with the Committee for Purchase and NISH for this location.

To summarize, the cancellation clause, which establishes a mutual right of cancellation with ninety days' notice to the other party,[10] is sufficiently distinct from the Government's unilateral right to terminate a contract for its convenience to render *Torncello* and its progeny inapplicable. Moreover, we are not persuaded that the facts recited by

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[10] Indeed, had Franklin's wished, it could have exercised this clause itself to limit its potential "losses" resulting from the failure to include subcontractor costs in its monthly rate.

appellant in its post-hearing brief constitute the type of "bad faith" or abuse of discretion required to invalidate the Government's decision to cancel this contract. As such, appellant has not shown entitlement to breach of contract damages.

Performance Evaluation

Appellant, in its post-hearing brief, for the first time raises the unsatisfactory performance evaluation given to Franklin's following the cancellation of its contract. Appellant asks that the Board, in addition to providing the other relief requested, correct the performance evaluation received by Franklin's based on the deficiencies complained of under the second year option contract. This type of relief is not available to Franklin's in this forum. *See TLT Construction Corp.*, ASBCA 53769, 02-2 BCA ¶ 31,969; *CardioMetrix*, ASBCA 50897, 97-2 BCA ¶ 29,319; *Techno Engineering & Construction, Ltd.*, ASBCA 41539, 94-1 BCA ¶ 26,340 (1993). The Armed Services Board of Contract Appeals has succinctly explained the rationale for dismissing such requests:

> A performance evaluation under a contract is an administrative matter not a Government claim, and a contractor's request that a contracting officer change an evaluation is not a contractor claim. . . . . Second, the Board lacks authority to issue injunctive relief.

TLT Construction, 02-2 BCA at 157,912, citing *G. Bliudzius Contractors, Inc.*, ASBCA 42365, 92-1 BCA ¶ 24,605.

In closing, we note that appellant attempts to excuse the deficiencies in its proof by alluding to the abbreviated time available for pursuit of discovery and the development of its case under the small claims procedure. This point is not well taken, given that the option to elect the expedited small claims procedure under the CDA and the Board's Rules is available solely to contractors. When this option is exercised, the resulting schedule is imposed on the respondent and the Board, as well as on the appellant. The small claims procedure does not shift the burden of proof or of persuasion. An eligible litigant is expected to have evaluated the pros and cons of this procedure when deciding if an expedited schedule would be advantageous to the effective presentation of its case in a timely and inexpensive manner. If significant discovery may be needed, and the issues to be resolved are somewhat complex, this may not be the best route for an appellant to select. In any event, insufficient time to pursue discovery and develop the evidence necessary to support the contractor's claims under the small claim procedure does not present a valid excuse for a contractor's inability to meet its burden to prove a claim by the preponderance of the evidence, nor is the invocation of this excuse likely to dispose the Board to overlook shortcomings in the evidence before it and grant a claim that is not persuasively proven.

Decision

The appeals are **DENIED**.

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CATHERINE B. HYATT
Board Judge