

VABCA

APPEAL OF NATIONAL PRINTING AND COPYING

PURCHASE ORDER NO. 70795

JACKET 302-317

January 20, 2006

APPEARANCES

Navin Vora, Vice President, National Printing & Copying, Beltsville, Maryland, for the Appellant.

Thomas Kelly, Esq., Office of General Counsel, Washington, D.C., for the U.S. Government Printing Office.

OPINION BY ADMINISTRATIVE JUDGE SHERIDAN

BACKGROUND

These timely appeals were taken from a December 5, 2003, United States Government Printing Office (GPO) contracting officer's final decision terminating for default National Printing and Copying, Inc.'s (National Printing or Contractor) Jacket Number 302-317, Purchase Order Number 70795, for failure to make delivery of the product in accordance with the specifications. The Government also collected from National Printing \$2,795.20 in excess procurement costs it asserts were incurred when obtaining a follow-on contractor to perform the defaulted work.

The appeal from the default action was docketed on July 29, 2004, as VABCA-7211 GPO, and the appeal from the collection of the excess procurement costs was docketed as VABCA 7345 GPO, on April 7, 2003. The Public Printer, by Interagency Agreement dated June 7, 2004, designated the Department of Veterans Affairs Board of Contract Appeals (VABCA or Board), to hear appeals of final decisions by GPO contracting officers. These appeals were consolidated for processing and the parties elected to submit them for decision on the record in accordance with Rules 11 and 13.

The record before the Board consists of the pleadings; the Appellant's Complaint (Compl.) (with Attachments 1 through 6); the Government's Answer (Answer); and the Appeal File (R4F), consisting of tabs 1 through 16. Also, as part of the record, the Government submitted what it had characterized as a Motion for Summary Judgment. Pursuant to our Briefing Order dated April 7, 2005, we will treat this document as the Government's Main Brief and render our decision on the record without a hearing, pursuant to Board Rule 11, as per the request of the parties. The Government's Main Brief (Gov't Br.) contains Attachments (Attach.) 1 through 3 (with Attachment 3 being the Declaration of Calvin Adgeron). The Appellant elected not to submit a Reply Brief in these matters.

APPLICABLE CONTRACT PROVISIONS

20. Default.

(a)(1) The Government may, subject to paragraphs (c) and (d) below, by written

notice of default to the contractor, terminate the contract in whole or in part if the contractor fails to-

(i) Deliver the supplies or to perform the services within the time specified or any extension thereof;

(ii) Make progress, so as to endanger performance (but see subparagraph (a) (2) below); or

(iii) Perform any of the other provisions. (2) The Government's right to terminate under subdivision (1) (ii) and (iii) above, may be exercised if the contractor does not cure such failure within 10 days (or such other period as the Contracting Officer may determine to be reasonable and authorize in writing) after receipt of the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates 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 terminate, and the contractor will be liable to the Government for any excess costs for those supplies or services.

(c) Except for defaults of subcontractors at any tier, the contractor shall not be liable for any excess costs if the failure to perform arises from causes beyond the control and without the fault or negligence of the contractor. Examples of such causes include acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the contractor and subcontractor, and without the fault or negligence of either, the contractor shall not be liable for any excess costs for failure to perform unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the contractor to meet the required delivery schedule.

(f) The Government shall pay the contract price for completed supplies delivered and accepted. The contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government. (h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

21. Actual Damages.

Unless otherwise prescribed, the contractor is, upon failure to provide services, materials, supplies, and equipment within the time specified for delivery, chargeable with all expenses caused the Government by reason of such delays in delivery for which no extension of time is provided, as actual damages to the Government on account of such delays. Also, the contractor will be charged, as

actual damages, for all expenses caused the Government occasioned by delivery of materials, supplies, and equipment not conforming to specifications.

GPO Contract Terms, Contract Clauses ∂ ∂ 20, 21, GPO Publication 310.2 (Rev. 6-01) (emphasis added).

FINDINGS OF FACT

GPO Jacket Number 302-317, Purchase Order Number 70795 (hereinafter referred to as the Contract) was issued to National Printing on November 24, 2003. (R4F, tab 4) The Contract required National Printing to supply 200,005 Dual Window Kraft Envelopes with delivery to destination by December 1, 2003. As the low bidder, National Printing was to be paid \$5,005.00 for the envelopes. (Id.) The next low bidder was F.M. Envelope, Inc., whose bid was \$7,800.20. (R4F, tab 3)

On the same day it was awarded the Contract, National Printing ordered the envelope stock from its supplier, XPEDX. XPEDX assured the Contractor that the envelope stock would be supplied late on November 26 or in the early morning of November 28. (Compl., ∂ 6) National Printing planned to complete the printing part of the Contract by the weekend and deliver the envelopes via truck to the destination on Monday, December 1, 2003. (Compl., ∂ 7)

This was not possible, National Printing avers, because the machine at XPEDX's production plant that produces the envelopes broke due to motor failure. (Compl., ∂ 9) The individual in charge of the plant could not reach executives at XPEDX, to inform them of the breakage, National Printing states, because the office was closed for the Thanksgiving holiday. (Compl., ∂ 10) It so happened that Mr. Navin Vora, the Vice-president of National Printing, was also out of town over that weekend, and did not learn of the problem until he returned Monday, December 1, when he realized that the envelopes had not been delivered to National Printing's plant. (Compl., ∂ ∂ 12, 13) National Printing alleges that Mr. Vora tried to call GPO Contracting Officer (CO) Robert T. Marchone to discuss the situation. The contracting officer was unavailable, so Mr. Vora left a message informing CO Marchone of the problem and asking that his call be returned. (Compl., ∂ ∂ 14, 15) Meanwhile, Mr. Vora received a message from XPEDX that the part needed for the machine was on back order and would not be available until December 12 or 15. (Compl., ∂ 16) Mr. Vora continued to attempt to reach CO Marchone but was unable to speak to him until December 4. (Compl., ∂ ∂ 16-20)

Ms. Kim Polk, a GPO Printing Specialist, called National Printing on December 2, 2003, to determine if the Contract delivery schedule had been met. Appellant's employee, Sue (whose surname is not part of the record), indicated she would check the status of the order and callback. (R4, tab 6) Information on the order was not provided until December 4, 2003, when Mr. Vora, reached CO Marchone informing him of the equipment breakage and that the equipment would not be fixed until around December 12 or 15. Also participating in that telephone call was Mr. Tim Catron from XPEDX, who confirmed that the equipment was broken. (R4F, tab 8) Mr. Vora asked CO Marchone to check with the agency to see if the late delivery was "'O.K.' with them." (Compl., ∂ 22)

On December 4, 2003, CO Marchone issued a Show Cause Notice indicating that the GPO was considering terminating the Contract for default. National Printing was required, by December 5, 2003, to present, in writing, any facts proving that its failure to perform was beyond its control and without its fault or negligence. The Contractor was warned that a "failure to present an acceptable explanation within this time may be considered as an admission that none exists." The Show Cause Notice was sent via facsimile to National Printing on December 4, 2003. (R4F, tab 9)

National Printing, by Mr. Vora and Sue, responded to the Show Cause Notice with a facsimile reply to CO Marchone on December 4, 2003. The response alleged that the problem was beyond National Printing's control, because the envelope supplier had "screwed us up." National Printing represented that the envelopes had been ordered from their supplier in a timely fashion, and that the supplier promised to deliver the stock on November 28, 2003, in time to meet the delivery date. It further explained, that shortly thereafter, the supplier informed National Printing that "the machine which produces 'dual window envelopes]' went out of order due to motor failure" and that because of the long holiday weekend (Thanksgiving), the supplier was unable to contact a technician to repair the motor or provide a new one. According to the response from National Printing to the Show Cause Notice, the envelope supplier told National Printing they would be ordering a replacement motor Monday (December 1) and would be unable to deliver the envelopes until December 15, 2003. National Printing also warned GPO that, even if they got the envelope stock on December 15th, they would need at least a week to print the envelopes and would be unable to deliver the envelopes to the destination until December 22, 2003. (R4F, tab 10)

On December 5, 2003, at 10:55 a.m., Printing Specialist Polk called National Printing and spoke to Sue notifying her that the GPO was defaulting National Printing. When Sue asked why, Ms. Polk said that GPO believed that waiting until December 22, 2003 for the delivery was "too long to wait." (R4F, tab 13)

As required by GPO regulations, a memorandum was sent by CO Marchone to GPO's Contract Review Board on December 5, 2003, seeking concurrence in the default of National Printing and procurement of Jacket Number 302-317, Purchase Order Number 70795. As reason for the default action the Contracting Officer stated "[t]he contractor has not delivered the job and stated they would not be able to deliver until December 22, 2003." (R4F, tab 14) The Contract Review Board concurred in the default and procurement actions that same day. (Id.)

CO Marchone terminated the Contract on December 5, 2003. The reason for the default action provided by CO Marchone asserted that National Printing "failed to make delivery of the product in accordance with the specifications." (R4F, tab 15) National Printing was also advised that:

[T]he same or similar items terminated may be reproced against your firm's account, on such terms and in such manner as the contracting officer deems appropriate. In that event, your firm shall be held liable to the Government for any excess costs.

(R4F, tab 15)

Following receipt of the default termination notice, Mr. Vora contacted CO Marchone. In its Complaint National Printing asserts:

Mr. Navin immediately contact[ed] him [Mr. Marchone] and asked him about the reason for the termination and request[ed] him to allow us to complete the job, as the stock will reach us on 12-12-03, and employing our full force of staff, working overtime on Saturday and Sunday, we will complete and deliver the consignment on 12-19-03, positively. Mr. Marchone replied that the job will be on rebid again . . . we were hoping that we will bid lower to get the job.

(Compl., ¶ 26) The Government, in its Answer, admits that Mr. Vora called Mr. Marchone but denies the remaining allegations in that paragraph of the Complaint. (Answer, ¶ 26)

Following the default action, on December 9, 2003, CO Chris J. Brown sent a memorandum to GPO's Financial Management Service, Voucher Examination Branch (FMCE), referencing Jacket Number 302-317, Purchase Order Number 70795, and advising them that "[w]e have declared National Printing and Copying in default of contract for the above Purchase Order due to their failure to produce this requirement. Please take the necessary action to recover any additional costs upon reprourement of this order." (R4F, tab 16)

The reprourement contract was awarded on December 11, 2003, through the issuance of Purchase Order No. 70977, Jacket No. 302-573, to F.M. Envelope, Inc., in the amount of \$7,800.00. (Gov't Br., Attach. 1 and 2) F.M. Envelope, Inc. was the next low bidder on the original procurement, and its bid was \$2,795.20 above that of National Printing. (R4F, tab 3) Purchase Order No. 70977 required F.M. Envelope, Inc. to provide 200,005 Dual Window Kraft Envelopes with delivery to destination by December 22, 2003. (Gov't Br., Attach. 2) CO Brown notified FMCE on December 15, 2003, that the reprourement contract had been awarded to F.M. Envelope, Inc., and asked that "[a]ny additional costs for the reprourement should be recovered from National Printing and Copying who has been notified of the default action." (Gov't Br., Attach. 1) Calvin Adgerson, GPO's Chief of the Examination and Billing Branch, notes on January 26, 2004 that:

Based on records maintained in the ordinary course of business by GPO's Office of the Comptroller, I have determined that on January 26, 2004, GPO completed its recovery of the total \$2,795.20 in excess reprourement costs by offsetting funds due National Printing and Copying from other accounts.

(Gov't Br., Attach. 3)

National Printing duly appealed the termination for default and GPO's collection of \$2,795.20 in excess reprourement costs, which were docketed as VABCA-7211 GPO and VABCA-7345 GPO, respectively.

While it did not request a hearing or file a brief or affidavits in these appeals Appellant made certain allegations in its Complaint, which relate to our discussion. The Complaint sets forth Appellant's conclusion that a reprourement contractor would need a minimum of two weeks to complete the work. National Printing asks "why were we deprived of the opportunity to complete the job?" as the reprocured work would not be completed until around December 22, 2003 anyway. (Compl., ¶ 29[sic]) The Government's Answer denies the allegation and further asserted that "Appellant was unable to complete the order within the time required by the original contract and there was no guarantee that the envelope manufacture's equipment would be repaired in time to meet his proposed delivery schedule." (Answer, ¶ 29)

Appellant's Complaint continues "We have no grievances about that now," and goes on to state:

We are voluntarily declaring oursel[ves] as [in] "default" on this job, due to vendor's unexpected machine problem [which was] proved [to be] the legitimate situation by the vendor's verbal discussion with Mr. Marchone.

(Compl., ¶ 30, 31 [sic]) The Government's Answer admits the paragraph stating that Appellant has no grievance now. (Answer, ¶ 30) It also admits that Appellant is in default, and denies the remainder of the statement for lack of knowledge or information sufficient to form a belief as to its truth. (Answer, ¶ 31)

DISCUSSION

Following a confluence of events beginning with its envelope supplier's machine breaking around the Thanksgiving holiday, Appellant failed to deliver the contractually required 200,005 envelopes to the destination by the delivery date. The CO terminated Appellant's contract for default approximately four days after the delivery required under the Contract became overdue. Although Appellant avers in its Complaint, "we are voluntarily declaring oursel[ves] as [in] 'default' on this job," it also asks, "why were we deprived of the opportunity to complete the job?" (Compl., ¶ 27, 5)

The first issue presented here is whether the Contracting Officer's decision to terminate the subject contract was proper. It is well settled that a termination for default is a "drastic action . . . which should be imposed only for good grounds and on solid evidence." *J. D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969), *Brandywine Prosthetic-Orthotic Service, Ltd.*, VABCA No. 3441, 93-1 BCA 25,250. When a default action is challenged, the Government bears the burden establishing by a preponderance of the evidence that there were grounds for the default termination and that the contracting officer's actions were justified. *Systems Development Corporation*, VABCA Nos. 1976R, 2354R, 87-3 BCA ¶ 20,167 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987)).

Time is of the essence in any contract containing a fixed date for performance, provided the Government has not waived the delivery date. *Simmonds Precision Products, Inc. v. United States*, 546 F.2d 886 (Ct. Cl. 1976); *Pelliccia v. United States*, 525 F.2d 1035 (Ct. Cl. 1975); *De Vito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969); *Control Mechanisms, Inc.*, ASBCA No. 27180, 84-2 BCA ¶ 17,330. In a supply contract, as the Contract is here, where the delivery schedule has not been met, the Government may terminate the Contract for failure to make timely delivery, without issuing a cure notice. *Comspace Corporation*, DOTCAB No. 4011, 01-2 BCA ¶ 31,569; *General Cutlery*, GSBCA No. 13154, 96-1 BCA ¶ 27,957; *American Aerospace Technology Corp.*, ASBCA No. 36814, 91-3 BCA ¶ 24,298; *Air, Inc.*, GSBCA No. 8847, 91-1 BCA ¶ 23,352.

There is no dispute that Appellant failed to deliver the contract work within the contractual performance period. In its Complaint National Printing appears to concede that it was in default. The contracting officer gave Appellant the opportunity to show reason why a default action was not warranted when it issued its Show Cause Notice. Appellant responded by providing a full panoply of the events it believed excused its failure to make timely delivery. Appellant's reasons for its delivery failure did not satisfy the Government and the Contracting Officer took the default action following the concurrence of GPO's Contract Review Board. Ultimately, in its own Complaint, the Appellant declared itself in default.

Under the evidence presented in this record, the Government has established that the grounds for the default termination were valid and the contracting officer's actions were justified. Once the Government establishes a prima facie case of default, the burden shifts to the contractor to prove that its failure to perform was excusable, and that the termination for default should be converted to one for convenience. *Hannon Electric Co. v. United States*, 31 Fed. Cl. 135, aff'd, 52 F. 3d 343 (Fed. Cir. 1994). Here, National Printing bears the burden of proving that the contracting officer failed to properly exercise his discretion by failing to consider relevant information or consider information that was inaccurate. See *Jamco Constructors, Inc.*, VABCA Nos. 3271, 3516T, 94-1 BCA ¶ 26,405, recons. den. 94-2 BCA ¶ 26,792; *Walsky Construction Co.*, ASBCA No. 41541, 94-1 BCA ¶ 26,264, recons. den. 94-2 BCA ¶ 26,698; *Quality Environment Systems, Inc.*, ASBCA No. 22178,

87-3 BCA @ 20,060.

Appellant wholly failed to provide compelling evidence excusing its failure to deliver. See GPO Contract Terms, Contract Clause @ 20 (c) and (d), GPO Publication 310.2 (Rev. 6-01). While the machine breakage experienced by Appellant's supplier clearly impacted National Printing's ability to deliver the envelopes, the machine failure is not, in and of itself, a reason to excuse a failure to make timely delivery. Traditionally, the Government looks to the contractor on a supply contract to assemble and secure the means and entities necessary to perform. The prime contractor generally is considered principally responsible for the performance of its subcontractors and suppliers and an "excusable default" is normally said to be one which is beyond the control, fault, or negligence of both the contractor and subcontractor or supplier. Cf. *Bromion, Inc. v. United States*, 411 F.2d 1020, 1023-24 (Ct. Cl. 1969) (decision referenced Federal Acquisition Regulation (FAR) Default (Fixed-Price Supply and Service) Clause, FAR 52.249-8, (c) and (d) which is identical to the clause in this Contract found at GPO Contract Terms, Contract Clause @ 20, GPO Publication 310.2 (Rev. 6-01). (Where GPO adopts the FAR contract provisions or other regulatory language as its own, it will be presumed that the uniform interpretation given to those words has also been accepted. *Gold Country Litho*, GPOBCA No. 22-93, 1997 WL 742506 (March 17, 1997)). National Printer is responsible for ensuring the supplies it will need to complete a job on time are available.

Appellant had several options to mitigate delay; we see nothing so special or unique about this procurement that would have deterred the Contractor from obtaining the envelopes from another supplier. The record is devoid of evidence that National Printing sought an alternative envelope source. Likewise, National Printing has not shown what, if anything, it attempted to do to expedite the needed machine repairs. Instead, when the failure occurred, it appears that National Printing merely relayed the news of the delay to Government personnel in a matter of fact manner, advising that the envelopes would be delivered almost three weeks late, assuming the machine could be repaired and all else went as planned. When the machine broke, both the Contractor and its supplier were inaccessible even though the specified delivery schedule was tight. A more prudent contractor would have been available to troubleshoot problems that might hinder a timely delivery. Under the totality of the circumstances present here, any assertion that the delay was beyond the Contractor's control rings hollow. *Nitro Electrical Corp.*, VABCA No. 3377, 95-1 BCA @ 27,492; *J.G. Enterprises, Inc.*, VABCA Nos. 1752, 1753, 86-2 BCA @ 18,889; *Medical Necessities, Inc.*, VABCA No. 3370, 91-2 BCA @ 23,973; *T.A. Industries, Inc.*, VABCA No. 2941, 90-3 BCA @ 22967. See also *Gatewood & Associates, Ltd.*, GSBICA No. 9182, 93-1 BCA @ 25,247; *Cryer & Parker Electronics, Inc.*, ASBCA No. 15150, 71-2 BCA @ 8943. We also note that some assertions were set forth in the Complaint that were not supported by documents in the record. We will not address those assertions except to say that we have previously noted that more is needed in the way of facts than mere assertions made in a complaint or by counsel. See *Invacare Corporation*, VABCA No. 6574, VABCA No. 6599 - 6600, 02-2 BCA @ 32040, *Snack Time Foods, Inc.*, VABCA No. 3729, 93-2 BCA @ 25,825; *Elmstar Electrical Corporation*, VABCA No. 3385, 91-3 BCA @ 24,222. Proving that a contracting officer's decision to terminate for default was arbitrary, capricious, or an abuse of discretion is a burden that falls on the contractor. A termination decision will not be reversed unless the contractor can prove that the decision represents an abuse of discretion or was arbitrary and capricious. *Darwin Construction Co. v. United States*, 811 F.2d 593 (Fed.Cir.1987). Having examined the facts presented by this record we conclude that the Contracting Officer exercised his discretion reasonably in arriving at the decision to terminate, and that his decision was neither arbitrary, capricious, nor an abuse of discretion.

We turn to the question of whether the CO acted reasonably in his reprourement of

the defaulted envelopes. The Government's burden of proving that its reprourement was proper is met by establishing that: 1) the reprocured items are the same as, or similar to, the terminated items; 2) the costs were actually incurred; and 3) the Government acted reasonably to minimize the excess costs. *Cascade Pacific International v. United States*, 773 F. 2d 287, 293 (Fed. Cir. 1985); *International Dictating Services of Boston*, VABCA No. 2260, 88-3 BCA ∂ 21,182; *Techcraft Systems*, VABCA No. 1894, 86-3 BCA ∂ 19,320. In the matter before us, using terms identical to the original purchase order but changing the delivery date, the GPO on December 11, 2003, awarded the reprourement contract to the next low bidder in a timely fashion. The Government incurred excess costs of \$2,795.20 in securing the envelopes that National Printing failed to deliver. While Appellant argues the Government should have "rebid" the contract, so it would have the opportunity to provide the envelopes at a later date, it is clear to the Board that the CO acted reasonably in obtaining the envelopes from the next low bidder, albeit at a price that was \$2,795.20 more than what it was to pay Appellant. There is no absolute requirement that the defaulted contractor be solicited or awarded the reprourement. *Spectrum Leasing Corp.*, ASBCA Nos. 25724, 26049, 85-1 BCA ∂ 17,822; *Proven Profit Sys.f Inc.*, GSBCA No. 5752-TD, 81-2 BCA ∂ 15,258; *Tom W. Kaufman Co.*, GSBCA No. 4623, 78-2 BCA ∂ 13,288; *ATA Defense Industries, Inc.*, B-275,303, 97-1 CPD ∂ 61 (1997).

Contracting officers have broad discretion in a reprourement and the doctrine of mitigation of damages necessitates no more than reasonable efforts on the part of the contracting officer. *ETEX Company*, VABCA 3415, 93-3 BCA ∂ 26,116. The contracting officer's duty is not to obtain the lowest possible price; his or her obligation is to act reasonably and prudently under the circumstances presented to obtain a reasonable reprourement price. *Cascade Pac. Int'l v. United States*, 773 F. 2d 287 (Fed. Cir. 1985); *Barrett Refining Corp.*, ASBCA No. 36590, 91-1 BCA ∂ 23,566. The choice of which procurement method to use falls within the contracting officer's broad discretionary powers in reprocurring items on a defaulted contract. See *Astro-Space Laboratories, Inc. v. United States*, 470 F.2d 1003 (Ct. Cl. 1972), cited in, *Old Dominion Security, Inc.*, GSBCA No. 9126, 90-2 BCA ∂ 22,745; *Gold Country Litho*, GPOBCA No. 22-93, 996 WL 812956 (September 30, 1996); *Asa L. Shipman's Sons, Ltd.*, GPOBCA No. 6-95, 1995 WL 818784 (August 29, 1995). In terms of reprourement, contacting the next low bidder on the original procurement is hardly unusual. Indeed, it is considered presumptively reasonable as a measure for mitigating reprourement damages. See *American Marine Upholstery Co. v. United States*, 345 F. 2d 577 (Ct. Cl. 1965), cited in, *ETEX Company*, VABCA 3415, 93-3 BCA ∂ 26,116; *Techcraft Systems*, VABCA No. 1894, 86-3 BCA ∂ 19,320. See also *Zoda v. United States*, 180 F. Supp. 419 (Ct. Cl. 1960), cited in, *Sterling Printing, Inc.*, GPOBCA No. 20-89, 1994 WL 275104 (March 28, 1994), recons. den., *Sterling Printing*, GPOBCA No. 20-89, 1994 WL 377592 (July 5, 1994) (citing *United Microwave Co.*, ASBCA No. 7947, 1963 BCA ∂ 3,701). Cf. *American Photographic Industries, Inc.*, ASBCA Nos. 29272, 29832, 90-1 BCA ∂ 22,491, recons. den., 90-2 BCA ∂ 22,728 (holding the Government failed to mitigate damages because it did not contact the second low bidder on the original contract). Here, particularly since the award to the next low bidder was so close in time to the original procurement, the CO acted reasonably and prudently in exercising his discretion when awarding the reprourement contract to the next low bidder. The record indicates that the machine in question was still broken when the reprourement contract was awarded on December 11, 2003. (Compl, ∂ 16) A new solicitation would have added more time to the procurement, and the record does not compellingly establish that National Printing would have been able to timely complete the work, even if it had been awarded a contract.

DECISION

For the foregoing reasons, we conclude that the CO acted reasonably in his

decision to terminate the delivery order, as well as in his subsequent actions to reprocur the envelopes. Accordingly, the appeals of National Printing and Copying, Inc., are hereby Denied.

PATRICIA J. SHERIDAN

Administrative Judge

Panel Chair

We Concur:

GARY J KRUMP Chief

Chief Administrative Judge

RICHARD C. WALTERS

Administrative Judge

VABCA No. 7211