Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: **Contract Dispute of Technical Innovative Concepts, Inc.**
Under Contract DTFACE-08-C-00040

Docket No.: **08-ODRA-470**

Appearances:

For the Contractor: Jeffrey K. Jenkins, President;

For the FAA Central Region: Mary Ellen Loftus, Esq., Acting Regional Counsel

I. Introduction

Technical Innovative Concepts, Inc., ("TIC") filed this Contract Dispute with the Office of Dispute Resolution for Acquisition ("ODRA") on October 9, 2008 challenging the termination for default of Contract DTFACE-08-C-00040 (the "Contract") for the installation of a security fence and associated equipment at the Charles B. Wheeler Airport, in Kansas City, Missouri ("Project"). The Central Region ("Region") of the Federal Aviation Administration ("FAA") had awarded the Contract to TIC on June 12, 2008, obligating TIC to provide performance and payment bonds prior to commencing work on the Project. The Region terminated the Contract 64 calendar days later due to TIC's failure to provide the required bonds. The Region also claims entitlement to $25,306 as excess procurement costs after awarding a subsequent contract to the next lowest offeror under the same Solicitation. As discussed below, the ODRA recommends the termination for default of TIC be upheld and that the Region be awarded $25,306 in damages against TIC.

II. Findings of Fact

1. On April 28, 2008, the Region issued Solicitation DTFACE-08-R-28039 ("SIR"), entitled "Install Security Fence Airport Traffic Control Tower, Charles B. Wheeler (downtown) Airport, Kansas City, Missouri." *Dispute File ("DF")*, Tab 15, at 1. The Independent Government Cost Estimate was that the Contract amount would be $345,114. *DF* Tab 3.

2. Contract Line Item ("CLIN") 1 called for:

> Demolition and disposal of existing fence, foundations, grounding wire.Mobilization/insurance, installation of CCTV security equipment, monitors, telephone intercom and cipher key pad system and components.

DF Tab 15, at 2.

3. CLIN 2 called for:

> Install chain link fence fabric, fence posts, braces, barbed wire overhang and wire ties; install reinforced concrete pavement and curbing; install fold-over pole, pole foundation, conduit, cables and components for gate control video (GCV) install fence ground counterpoise, underground power/control circuits from building to fence power/control stations, and to gate entry pedestal stations.

DF Tab 15, at 2.

4. Page 1 of the SIR, on the form entitled "Solicitation, Offer, and Award (Construction, Alteration, or Repair)" contained in blocks 12A and 12B a notice that both performance and payment bonds, valued at 100% of the contract price, would be due "Fifteen (15) calendar days after award." *DF* Tab 15.

5. The SIR indicated that attachment J-2 contained FAA Specification FAA-CE 1661 dated February 15, 2008, and that attachment J-3 contained thirty drawings as an attachment to the specification. *DF* Tab 15, at 25.

6. The Dispute File includes a package of *31* drawings ("Drawing Package") filed with the ODRA by the Region on February 5, 2009 as a supplement to the record. *DF* Tab 45.

7. Mr. Cornelius O. Shepard, Jr., served as the Contracting Officer ("CO") for this procurement. *Shepard Second Affidavit*, ¶ 1. On the day the SIR was issued, April 28, 2008, Mr. Shepard mailed to TIC the SIR documents, including specification FAA-CE-1661 dated October 12, 2007 and the Drawing Package. According to Mr. Shepard, the specification of October 12, 2007 and the Drawing Package were the only specifications and drawings used in conducting this procurement. *Id.*, at ¶ 3.

8. Mr. Carlos Walker, the Construction Coordinator on the Project, indicated that the reference in the SIR and the Contract to a specification dated February 15, 2008 was in error. *Walker Affidavit*, ¶¶ 1 and 5. Mr. Walker did not address why the SIR and the Contract listed 30 drawings, but the Drawing Package itself contains 31 drawings. Mr. Walker indicated that there were no changes in the drawings between the time when they were mailed to TIC in April of 2008 and the time of TIC's termination. *Id.*, at ¶ 3.

9. Comparison of the Drawing Package with the lists contained in the SIR and the Contract reveal that the additional drawing is Drawing No. CE-E-7587-Y3, "Site Grading, Sanitary & Storm Details," revised on October 1, 2007. *Compare DF* Tab 15 § J, Tab 45 § J, and Tab 45 (Drawing Package).

10. The legends in each of the drawings contained in the Drawing Package show the dates of revisions. The latest revision is shown on the drawing entitled, "Title,

Legend, & Symbol Sheet," Drawing No. CE-D-7587-700-CS. It indicates that it was revised on March 25, 2008, *i.e.*, almost one month before the Region published the SIR. *DF* Tab 45 (Drawing Package).

11. The SIR was amended only once, on April 30, 2008 ("Amendment"). The Amendment, which changed the risk level identified under AMS Clause 3.14-2, "Contractor Personnel Suitability Requirements (April 2008)", is immaterial to the present Contract Dispute.

12. TIC submitted a proposal dated May 27, 2008, and listed as its address on the Standard Form ("SF") 1442 (Rev. 4-85), "5350 S. Western, Ste 500; Oklahoma City OK 73109-4533." *DF* Tab 45. TIC priced its proposal at $346,200. *Id*.

13. Six offerors submitted proposals in response to the SIR, with TIC offering the lowest price. *DF* Tabs 21 and 40. The CO clarified minor discrepancies in TIC's offer, and verified TIC's past performance references. The past performance references indicated that TIC had experience installing closed circuit television systems. *DF* Tab 41, at 2.

14. The Region awarded the contract to TIC, with an effective date of June 12, 2008. *DF* Tab 45.

15. The Contract/Award cover sheet lists TIC's address as "5350 S WESTERN STE 400; OKLAHOMA CITY OK 73109-4533." This address is the same as the address contained on the SF 1442 that TIC submitted, except that Contract/Award cover sheet directs the mail to suite "400," rather than "500." *DF* 45. The record does not explain why there are two addresses listed in the contract documents.

16. The Contract incorporated by reference the following material clauses from the FAA Acquisition Management System ("AMS"):

    3.3.1-15 Assignment of Claims (April 1996)

…

3.4.1-4	Performance Bond Requirements (April 1996)
3.4.1-5	Payment Bond Requirements (April 1996)
…	
3.10.6-6	Default (Fixed Price Construction (October 1996)

DF Tab 45.

17. On June 12, 2008, the CO forwarded a certified, return receipt letter ("June 12 Letter") to TIC informing the company that it had received the award. The June 12 Letter was directed to suite 500, *i.e.*, the address provided by TIC with its proposal. It enclosed several documents, including Standard Forms 25 and 25A, which are used for performance and payment bonds, respectively. The June 12 Letter also informed TIC that it was to submit its performance and payment bonds within 15 calendar days. *DF* Tab 46.

18. On June 12, 2008, the CO separately sent to TIC five sets of the Drawing Package and five copies of Specification No. FAA-CE-1661, dated October 12, 2007. *Shepard Second Affidavit*, ¶ 7.

19 The Region did not receive a response to the June 12 Letter. *Shepard Second Affidavit*, ¶ 14.

20. On July 2, 2008, the CO sent a cure letter to TIC by facsimile stating:

> You are hereby notified that the government considers your failure to provide shop drawings, performance bonds, payment bonds and certificate of insurance as outlined in the award letter dated June 12, 2008 [Sic] which was received by your company on June 14, 2008 a condition that is endangering performance of the contract.
>
> Therefore, unless this condition is cured within 5 days after receipt of this notice, the Government may terminate for default under the terms and conditions of the Default (Fixed-Price Construction clause of this contract.). [Sic]

DF 74 (containing the letter dated July 2, 2008).

21. On July 2, 2008, the firm of Hilb, Rogat & Hobbs sent a letter addressed generally to the Central Region of the FAA advising that the firm was assisting TIC in providing performance and payment bonds. The author further advised, "Subject to the review of underwriting document by the surety I expect terms for approval to be received within the next week." *TIC's Supplement to the Dispute File*, Exhibit E. The letter did not raise questions regarding the stated scope of work contained in the Contract.

22. By letter of July 7, 2008 TIC's President, Jeffrey Jenkins, responded to the cure letter. He asserted that TIC did not receive the Region's June 12 Letter until June 23, 2008 because it was directed to Suite 500 rather than Suite 400. Although Mr. Jenkins stated that TIC had not received "the drawings and specifications mentioned for submittals" and requested that they be forwarded "as soon as possible" (*DF* Tab 74), in later pleadings filed with the ODRA TIC acknowledged that the contract documents were received two weeks after award. *TIC Statement of Facts*, ¶ 2, filed April 13, 2009. The ODRA finds based on this evidence that TIC did in fact have in its possession the entire Contract, including the Drawing Package and the Specification, on *or before* June 23, 2008.

23. On July 22, 2008, the CO sent via facsimile transmission a second cure letter to Mr. Jenkins ("July 22, Letter"). The July 22 Letter once again cited TIC's "failure to provide shop drawings, performance bonds, payment bonds and certificate as outlined in the award letter dated June 12, 2008 as a condition that is endangering performance." In response to TIC's assertion that it did not receive the drawings and specification, Mr. Shepard noted that TIC would have used them to prepare its price proposal. He also noted that if TIC indeed had received the notice of award on June 23 rather than June 14, then there still "was sufficient time to comply with the submission time frame of the contract and award letter." Mr. Shepard required TIC to cure its failures to perform within five calendar days. *DF* Tab 74.

24. By Letter of July 29, 2008, CO Shepard gave TIC 10 days to present, in writing, any facts bearing on the question of whether TIC's "failure to perform arose from causes beyond your control and without fault or negligence on your part." *DF* Tab 74.

25. On July 30, 2008, Mr. Jenkins responded. The body of his letter stated in full:

> During review of our bid on the subject project which took place while obtaining a performance bond, we discovered we mad [sic] a mistake in our bid. We inadvertently left out the conduit and some other electrical work.
>
> From the discussions we had during the site visit, Technical innovative [Sic] Concepts understood the work request included a fence, CCTV and Access Control, and bid accordingly. We were also lead to believe that there was conduit in the existing buildings that could be used to rout all of the cable. After and extensive review of the specifications and contract documents, it has come to our attention that we inadvertently failed to include $200,000.00 in electrical costs in our bid. Because of an over site [Sic] and the incorrect belief that conduit was already available we did not include these costs in our bid.
>
> To resolve this over site [Sic], we request that you reject our bid of $346,200.00 dated May27, 2008 as nonresponsive or allow us to raise the bid $200,000.00 which would be a bid of $546,200.00, and award at this price, should we still be below the next low bidder.

DF Tab 74.

26. According to Mr. Jenkins, on August 6, 2008, TIC sent the CO a letter containing an assignment of claims. While TIC has not put into evidence a copy of the letter itself, it has provided:

    a. A Notice of Assignment form in favor of the Native American Funds Management Services, LLC, with a blank acknowledgment line for CO Shepard to sign;

    b. Copies of several, nearly identical documents labeled "Irrevocable Assignment of Claim," executed by Mr. Jenkins on behalf of TIC, and in favor of the Native American Funds Management Services, Inc.;

c. A "Funds Management Agreement," which an unknown surety apparently required as a condition to issuing its bond.

TIC Supplement to the Dispute File, Exh. B. Notably, copies of actual bonds are not included in the submission. TIC also included a poor copy of a U.S. Postal Service Delivery Confirmation Receipt, and a Postal Service "Track & Confirm" web page indicating that the documents left the Kansas City facility on August 7, 2008, but nothing indicates receipt of the documents by the CO. *Id.*, at Exh. B1.

27. On August 15, 2008, the CO terminated the contract on the grounds that TIC had failed to provide the required payment and performance bonds. *DF* Tab 74.

28. TIC, by letter dated August 26, 2008, requested that the CO reconsider his decision to terminate TIC's contract for default. Mr. Jenkins asserted several reasons why the termination should be reconsidered:

> Dear Mr. Shephard [sic]:
> We are requesting that you reconsider termination for Default for the following reasons:
>
> 1) The project was bid from a set of specifications and site visit. There were no drawings provided that indicated an expanded scope of work.
>
> 2) TIC received the drawings for this project for the first time in correspondence postmarked June 12, 2008. Prior to this receipt, and during the bid phase of the contract, these drawings were not available to the contractor. Much of the work which was left out of the bid is only shown on these drawings and not referenced in the Specification with scope of work provided for Bid dated October 12, 2007.
>
> 3) The provided drawings dated October 1, 2007 had items that were not reflected in the written scope of work. Such items as, Microbore Under pavement, Microbore under sidewalk, and Install #4/0 ground wire between fence and ATCT EES, [sic]
>
> 4) Many of the electrical items not included in the bid are a result of not having the drawings while bidding the project. I point out the scope of work did not list any drawings as part of the RFP package, and they were not mentioned or referenced during the site visit.

5) TIC provided a letter to you dated July 2, 2008, from our bonding company that stated the bond would be issued within two weeks. However, the bonding company was seeking the specifications and drawings to confirm issuance of the bond. To date, the government has not taken action on this item.

6) TIC provided a letter to you dated July 7, 2008, advising you that we had not received the specifications or drawings that you mentioned, and you failed to provide us with a set of specifications or drawings. To date, the government has not taken action on this item.

7) TIC provided a letter to dated August 6, 2008 regarding assignment of claims from our bonding company requiring that it be signed by the government and returned before they will issue the bond. To date, the government has not taken action on this item.

8) Upon examining the work, the bonding company was concerned about the additional work that was added by the drawings after the bid and award of the contract.

DF Tab 74.

29. On September 12, 2008 the Region awarded a replacement contract ("Replacement Contract") to Frontier-Arrowhead Joint Venture, LLC, which was the second lowest bid under SIR No. DTFACE-08-R-28039. This was the same SIR that resulted in the award to TIC. The resulting contract, DTFACE-08-C-00089, was in the amount of $371,506. *DF* Tab 78; *Shepard Second Affidavit* ¶ 26.

30. After attempting to use the pre-dispute services of the ODRA, TIC, on October 9, 2009, filed a Contract Dispute dated September 29, 2009. In the Contract Dispute, TIC stated:

Dear Ladies & Gentlemen of the Dispute Board:

We are requesting your assistance in captioned matter due to the Contracting Officer C.O. Shepherd's refusal to respond to our multiple requests to resolve this matter.

1. We believe that our bid was substantially lower than the Government's estimate. The Government was obligated to inform us to verify our bid. The Government failed to disclose the additional scope of work or renegotiate the additional work. The project was bid from a set of specifications and site visit. There were no drawings provided that indicated an expanded scope of work.

2. TIC received the drawings for this project for the first time in correspondence post marked June 12, 2008. Prior to this receipt and during the bid phase of the contract, these drawings were not available to the contractor. Much of the work which was left out of the bid is only shown on these drawings and not referenced in the Specification with scope of work provided for Bid dated October 12, 2007.

3. The provided drawings dated October 1, 2007 had items that were not reflected in the written scope of work. Such items include Microbore Under pavement, and Microbar under sidewalk, and Install #4/0 ground wire between fence and ATCT EES.

4. Many of the electrical items not included in the bid are a result of not having the drawings while bidding the project. I point out the scope of work did not list any drawings as part of the RFP package, and they were not mentioned or referenced during the site visit.

5. TIC provided a letter dated August 6, 2008 assignment of claims from our bonding company requiring that it be signed by the Government and returned before they will issue the Bond. To date, the government has not taken action on this item.

6. Upon examining the work the bonding company was concerned about the additional work that was added by the drawings after the bid and award of the contract.

TIC Contract Dispute, at 1.

31. After an unsuccessful attempt to resolve the Contract Dispute through mediation, the Region filed its Response to the Contract Dispute on January 5, 2009. The Response generally denied TIC's argument, and asserted that the termination for default was proper. The Region further asserted entitlement to $25,306 in excess

reprocurement costs based on the difference in the price of TIC's terminated Contract, and the price of the Replacement Contract. *Region's Response*, at 9-10.

32. After the Region filed its Response and its Dispute File, the parties had the opportunity to conduct discovery. Discovery ended on March 5, 2009. *See Status Conference Memorandum* dated December 4, 2008; *ODRA Letter* dated February 4, 2009; and *ODRA Letter* dated March 23, 2009.

33. TIC filed its Supplement to the Dispute File on April 13, 2009. Of note is an affidavit from Mr. Jeffry K. Jenkins, which stated in part:

> The specification and drawings provided as part of the solicitation were different than the specifications and drawings provided to TIC after the contract was awarded and forwarded to TIC's Bonding Company for evaluation.

TIC Supplement to the DF, Jenkins Affidavit, ¶ 5.

34. Based on Mr. Jenkins' affidavit, as quoted above, the ODRA found that an issue of material fact required it to deny a Motion for Summary Judgment that the Region had filed on April 24, 2008. The ODRA expressly directed TIC as follows:

> In addition to the elements of the submissions required by the ODRA Procedural Regulations, the parties specifically are directed in this case to address the issue of whether there was a change in the scope of work and in contract drawings and specifications after the award of the contract to TIC. TIC is directed to identify and provide all relevant portions of the pre- and post-award contract documents including drawings and specifications that it contends reflect a change in the scope of its work under the contract. TIC further specifically is directed to address the basis for its contention that the scope of work, in fact, changed post-award.

Contract Dispute of Technical Innovative Concepts, 08-ODRA-00470, Decision on Motion for Summary Judgment dated August 12, 2009 at 11 ("Summary Judgment Decision").

35. The Region filed its Final Submission on September 16, 2009, as required by the ODRA in the Summary Judgment Decision. TIC, however, failed to provide its Final Submission by the initial deadline. The ODRA *sua sponte* granted an extension of time to TIC and reiterated the direction to TIC to "identify and provide all relevant portions of the pre- and post-award contract documents including drawings and specifications that it contends reflect a change in the scope of its work under the contract." *ODRA Letter* dated September 18, 2009, *quoting* the Summary Judgment Decision *supra.* The ODRA's letter indicated that the record would close on September 23, 2009, and required TIC to file its Final Submission before close of business on that date. *Id.*

36. TIC filed its Final Submission on September 23, 2009.

III. Discussion

This Contract Dispute challenges the Region's termination for default of TIC's Contract for the Project. Although the Region based its action on TIC's failure to provide both performance and payment bonds, TIC asserts that the default was improper due to various difficulties surrounding the Contract specifications. TIC also asserts that the CO failed to execute an Assignment of Claims form that arguably would have enabled TIC to obtain the bonds in question. In addition, the Region has asserted an affirmative claim of entitlement to $25,306 for the higher price of the Replacement Contract award to the next lowest offeror under the SIR. As discussed more fully below, the ODRA recommends, sustaining the termination for default, and awarding the Region $25,306 in damages.

A. The Relative Burdens of Proof

The ODRA explained the relative burdens of proof earlier in this Contract Dispute when it denied the Region's Motion for Summary Judgment. As previously stated,

> … default termination is a "drastic sanction" and that the terminating agency will be held "to strict accountability for its actions in enforcing this sanction." *H. N. Bailey and Associates v. United States*, 449 F.2d

> 387, 391 (Ct. Cl. 1971); *Contract Dispute of Concrete Modular Systems, Inc.*, 03-ORDRA-00286. Moreover, the burden of proof is on the terminating agency to justify its actions. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). Once this burden has been satisfied, the burden shifts to the contractor to establish that its failure to perform was due to excusable causes beyond its control and was caused by the Government. *Id.* More specifically, …, one of the grounds of defense that a contractor may assert in a termination for default situation is that, without its fault or negligence, the contractor was prevented from fulfilling its contractual obligations as a result of actions or inactions on the part of the Government. *See Reply* at 2, Paragraph 4; *Appeals of D.A. Services, Inc.* ASBCA No. 53138, 05-1 BCA ¶ 32820.

Contract Dispute of Technical Innovative Concepts, 08-ODRA-00470 Summary Judgment Decision at 10. In contract disputes, the parties generally must satisfy their burdens of proof by a preponderance of the evidence. *See Contract Dispute of Carmon Construction, Inc./GAVTEC, Inc.*, 07-ODRA-00425 at 15.

B. The Region's Right to Terminate the Contract

The law and the facts demonstrate that the Region has met its burden to prove that the termination of the Contract for failure to provide the bonds was justified. The Contract incorporated the standard clauses from the Acquisition Management System ("AMS") relating to construction bonds, *i.e.*, clause 3.4.1-4, "Performance Bond Requirements (April 1996)," and clause 3.4.1-5, "Payment Bond Requirements (April 1996)." *FF 16.* Identical language in both clauses states: "Failure to submit an acceptable bond may be cause for termination of the contract for default." *Id.* These AMS clauses are consistent with clauses analyzed by other forums that have upheld terminations for default based on failures to provide bonds. *See e.g., Airport Industrial Park, Inc. v. United States*, 59 Fed. Cl. 332, 334-35 (2004) (collecting cases); *Appeal of Walsh Const. Co. of Illinois*, ASBCA No. 52952, 02-2 BCA ¶ 32,004; *Quick-Deck, Inc.*, PSBCA 1451, 86-2 BCA ¶ 18,986, at 95,876; *AJN Reporters*, GSBCA 5022, 78-2 BCA ¶ 13,298. In the present case, the SIR and the resulting contract required the successful awardee to provide both performance and payment bonds within 15 calendar days after contract award. *FF 4 and 17.*

The Findings of Fact show that TIC never met (within 15 days or otherwise) its contractual obligation to provide conforming bonds. *FF 19 to 26.* TIC's concerns over when it received the Notice of Award are immaterial. Specifically, from TIC's receipt of the notice of award on June 23 to the issuance of the second cure notice on July 22, almost one month had elapsed, which is well beyond the deadline established in the Contract. Although the second cure letter provided TIC five additional days to cure its performance, TIC still did not provide the bonds. *FF 20.* Moreover, after the show cause letter of July 30, and up to the actual letter terminating the Contract for default dated August 15, 2008, TIC had not provided the bonds. *FF 25 to 27*. Thus, as of the date of termination, 64 calendar days[1] had elapsed since the award of the Contract and TIC had never submitted payment and performance bonds. Accordingly, unless TIC has demonstrated justifiable grounds for its failure to provide the required bonds, the termination for default must be sustained.

C. TIC has Failed to Prove Excusable Grounds for Not Providing the Bonds

The Contract contained AMS Clause 3.10.6-6, "Default (Fixed Price Construction (October 1996)" (hereinafter, "AMS Default Clause") (*FF 16*), which provides in relevant part:

> (b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if--
>
> (1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include;
>
> (i) acts of God or of the public enemy,
>
> (ii) acts of the Government in either its sovereign or contractual capacity,
>
> (iii) acts of another Contractor in the performance of a contract with the Government,
>
> (iv) fires,
>
> (v) floods,
>
> (vi) epidemics,

[1] Sixty-four days is the period of time between June 12, 2008 to August 15, 2008.

(vii) quarantine restrictions,

(viii) strikes,

(ix) freight embargoes,

(x) unusually severe weather, or

(xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers;

Id. TIC proffers two[2] basic arguments under the AMS Default Clause to defend against the termination for default. First, it asserts changes and defects with the specifications and drawings. Second, TIC claims that the CO improperly failed to execute an assignment of claims in favor of Native American Funds Management Services, LLC, which allegedly would have enabled TIC to obtain the necessary bonds. As discussed below, neither defense has merit.

1. TIC has Failed to Show Changes or Material Defects in the Contract Specifications or Drawings

Over the course of performance, and in this Contract Dispute before the ODRA, TIC has taken a variety of inconsistent positions regarding alleged problems with the contract drawings. None of the positions are credible or even colorable, and do not establish any basis for relief from the termination for default.

As set out in Section II above, the ODRA finds that TIC has offered at least three separate and inconsistent versions of events. One version asserts that there were no drawings at the time of bidding, *FF 25, 28, and 30.* Yet in April of 2009, Mr. Jenkins executed an affidavit referencing, "specifications and drawings provided as part of the solicitation …" *FF 33*. Another version of events comes from TIC's letter dated July 7,

[2] TIC also briefly asserted a third defense in its Contract Dispute, *i.e.*, that the Region should have recognized an error in TIC's bid based on the Government's estimate. *See FF 30*. The evidence, however, shows that TIC's proposed price of $346,200 bid was $1,086 *more* than the Government's estimate. *Compare FF 1 and 12.* TIC did not pursue this defense in its Final Submission, but nevertheless, the ODRA finds no basis in law or fact to support a defense that the Region improperly made an award based on a patent mistake in TIC's proposal.

2008, almost a month after award, in which TIC indicated that it did not have the drawings. This second version of events conflicts with the statements in TIC's letter dated August 26, 2008 (at paragraph 2) and later pleadings to the ODRA, wherein Mr. Jenkins acknowledged that the Government sent the drawings via correspondence dated June 12, 2008. *FF* 28; *see also TIC Statement of Fact* ¶ 2, filed April 13, 2009.[3] TIC's third version emerged in Mr. Jenkins' Affidavit, filed as part of TIC's Supplement to the Dispute File. Mr. Jenkins asserted under oath, "The specification and drawings *provided as part of the solicitation* were different than the specifications and drawings provided to TIC after the contract was awarded and forwarded to TIC's Bonding Company for evaluation." *FF 33* (emphasis added). Thus, TIC's version of events has changed over time from the initial allegation that there were no drawings, to an allegation that it never received the drawings, and finally, to the allegation that the pre-award drawings were changed after award.

TIC simply has been unable to advance a clear and consistent defense in this case. Moreover, TIC cannot support any of its defenses with credible evidence or legal authority. For example, although one of TIC's positions argues that it bid based only on "a set of specifications and site visit," and that drawings were not part of the SIR, the preponderance of the evidence shows (1) that the RFP expressly referenced thirty drawings (*FF 8*); (2) the CO forwarded TIC the drawings prior to the closing date (*FF 7*); and, (3) there were no material amendments to the SIR (*FF 11*). Thus, the facts do not support TIC's defense. TIC fares no better under law. The ODRA has previously held:

> A contractor who limits a part of his bidding estimate to one part of the contract documents, ignoring the provisions of other contract documents, is still charged with the knowledge of what is required by all of the contract documents read as a whole, and will be held responsible for assuring that all of the requirements of the entire contract are met.

[3] This statement in TIC's pleading is consistent with the CO's representation that on the date of award, June 12, 2008, he sent TIC five sets of drawings and five copies of the specification. *FF 18.*

See Contract Dispute of Strand Hunt Construction, 99-ODRA-00142. If TIC truly submitted a proposal without reviewing the drawings that were incorporated by reference in Attachment J, then it bore the risks of any resulting mistakes in its proposed price.

The record also does not support Mr. Jenkins' sworn statement that the Region changed the specifications and drawings. Despite the ODRA's express direction to "identify and provide all relevant portions of the pre- and post-award contract documents including drawings and specifications that it contends reflect a change in the scope of its work under the contract," (*FF 34 and 35*), TIC's Final Submission is silent on the point. Other evidence also shows that TIC has not established a defense. The revision dates in the Drawing Package show the latest revision was on March 25, 2008, *i.e.*, almost one month before the Region published the SIR. *FF 10*. Further, the Region submitted two corroborating affidavits indicating that the same drawings and specifications were used both before and after award. *FF 7 and 8*. Accordingly, the preponderance of the evidence shows that no material[4] contract changes exist that would excuse TIC's failure to provide the bonds in a timely manner.

2. The Contracting Officer was not Obligated to Execute the Assignment of Claims Document

TIC charges that the CO is to blame for TIC's failure to fulfill its bonding requirement. More specifically, TIC asserts in its Final Submission:

> 1. The Government failed to follow the FAR [*i.e.*, the Federal Acquisition Regulation] when it failed to answer the Request for Information from the bonding company which would have allowed TIC to provide the bonds.

[4] The ODRA has reviewed the record with particular care given TIC's *pro se* status. As the ODRA noted in the Findings of Fact, above, the Drawing Package in *DF* Tab 45 contains Drawing No. CE-E-7587-Y3, "Site Grading, Sanitary & Storm Details," revised on October 1, 2007, which is not listed in Section J. *FF* 8 and 9. The ODRA also noted the erroneous date for the specification referenced in Section J of the SIR. *FF* 7 and 8. No evidence in the record shows that TIC raised these discrepancies as part of a prebid inquiry. Further, TIC did not submit a request for information concerning these apparent non-issues prior to its termination, nor has TIC ever referenced these matters in any document submitted as part of this Contract Dispute. The ODRA therefore concludes that these administrative discrepancies are immaterial to the present Contract Dispute.

2. The government failed to acknowledge the Assignment of Claims as directed in the FAR. This would have granted the bonds to the government.

3. The government was negligent when it terminated the contract with TOC, since it held on to the Assignment of Claims for 8 days and did not execute the forms as directed by law.

TIC's Final Submission at 5. As discussed below, the ODRA finds each of these assertions lacks merit. Regarding its first assertion, *i.e.*, that the CO failed to respond to the bonding company's alleged questions, TIC has failed to show that the bonding company actually asked any questions. *See FF 21.*

TIC also errs in its second and third arguments, quoted above. Despite express guidance from the ODRA,[5] TIC erroneously persists in citing the Federal Acquisition Regulation (FAR) in this Contract Dispute. Section 40110 of Title 49 of the United States Code authorizes the Administrator of the FAA "to develop and implement an acquisition management system for the Administration that addresses the unique needs of the agency, …" 49 U.S.C. § 40110(d)(1). The same code section provides that the FAA's AMS is not subject to the FAR. 49 U.S.C. § 40110(d)(2)(G). Accordingly, the ODRA rejects TIC's arguments to the extent they are based on the FAR.

Aside from erroneous citations to the FAR, the ODRA finds no basis for the general proposition that a contracting officer is obligated to acknowledge an assignment of contract revenue to a surety. Preliminarily, the ODRA notes that the AMS Guidance indicates that the FAA "*may* permit assignment of contract payments to help contractors obtain independent financing." *AMS Guidance* T.3.3.1.A.16.b. (emphasis added). If the Contracting Officer permits assignments, then the assignment must be in accordance with AMS clause 3.3.1-15, "Assignment of Claims (April 1996)" ("AMS Assignment Clause"). These AMS provisions are in accord with the Assignment of Claims Act, embodied in general statutes codified at 31 U.S.C. § 3727 and 41 U.S.C. § 15. The AMS Assignments Clause and the statutes broadly protect the Federal Government from the difficulties that could arise if contracting officers and disbursing officials had a general

[5] *See* ODRA Conference Memorandum dated April 30, 2009, at 3.

obligation to acknowledge assignments of payments under government contracts. As the Court of Claims stated:

> The Act has three basic objectives: first, to prevent persons of influence from buying up claims which might then be improperly urged upon Government officials; second, to prevent possible multiple payment of claims and avoid the necessity of the investigation of alleged assignments by permitting the Government to deal only with the original claimant; and third, to preserve for the Government defenses and counterclaims which might not be available against an assignee. *United States v. Shannon*, 342 U.S. 288, 291-92, 72 S.Ct. 281, 96 L.Ed. 321 (1952); *United States v. Aetna Surety Co., supra*, 338 U.S. at 373, 70 S.Ct. 207.

Kingsbury v. United States, 563 F.2d 1019, 1024 (Ct.Cl. 1977). The only exceptions in the AMS Assignment Clause and the statutes are for the benefit "a bank, trust company, or other financing institutions." AMS Assignment Clause; 31 U.S.C. § 3727(c); and 41 U.S.C. § 15(b). Sureties providing bonds, however, are not considered financing institutions. *General Casualty Co. of America v. Second National Bank of Houston*, 178 F.2d 679 (5th Cir. 1950); *Matter of Balboa Insurance Co.*, B- 187283, 76-2 CPD ¶ 381. Thus, contrary to TIC's assertion, contracting officers are not obligated to acknowledge all assignments of contract proceeds, and in particular, they are not required to acknowledge an assignment to a surety.

The ODRA finds in the present case that the purpose of the assignment to Native American Funds Management Services, LLC, was not to finance performance of the contract, but rather, the purpose was to obtain surety bonds. The Funds Management Agreement provided by TCI clearly states in the recitations:

> WHEREAS, pursuant to the terms of the Contract, Principal [TIC] is required to provide Obligee [the Region] a Surety Bond,[6] hereinafter referred to as Bond, guarantying Principal's Performance & Payment of its obligations to Obligee under the Contract; and

[6] The ODRA notes that the agreement apparently contemplates a single bond to cover both performance and payment obligations. A single bond, however, would not satisfy the contractual requirements for two separate bonds. *See Airport Industrial Park, Inc. v. United States*, 59 Fed. Cl. 332, 334-35 (2004).

> WHEREAS, the Principal has made application for said bond to Individual Surety Program hereinafter referred to as Surety;
>
> WHEREAS, as a condition of issuing its surety bond, Surety requires that all payments due from Obligee to Principal for work performed under the Contract be deposited into a special account for disbursement by Manager [Native American Funds Management Services, LLC] to the various suppliers and subcontractors for materials and/or services furnished on the Contract as the request of Principal; …

TIC Supplement to the Dispute File, Exh. B. (emphasis added); *see also FF 26.* Thus, as the underlined text shows, the purpose of the assignment was not to finance the project, but rather, to obtain a Performance and Payment Bond. In these circumstances, the CO was not obliged to acknowledge TIC's assignment for the benefit of sureties, and therefore, TIC has failed to show justification for its failure to provide the required bonds.

3. TIC is unable to Justify Its Failure to Provide the Bonds

As shown above, TIC has failed to establish grounds under either the AMS Default Clause or the AMS Assignment Clause that would excuse its failure to provide performance and payment bonds as required by the Contract. The ODRA, therefore, recommends sustaining the Region's termination of TIC's contract for default.

D. Damages

As noted above, the Region claims $25,306 in damages, representing the difference between TIC's terminated Contract amount of $346,200, and the Replacement Contract award, which was based on the next lowest proposal, from Frontier-Arrowhead Joint Venture, LLC, ("Frontier-Arrowhead "), in the amount of $371,306. *FF 29.*

The AMS Default Clause provides two bases for recovery of costs. Paragraph (a) provides for recovery of "any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time…. This liability includes any increased costs incurred by the Government in completing the work."

Paragraph (d), on the other hand, provides, "[t]he rights and remedies of the Government in this clause are in addition to any other rights and remedies provide by law or under this contract." The language of the AMS Default Clause substantially agrees with the language of the FAR default clauses analyzed by other government contract forums. The case law typically distinguishes between "excess reprocurement costs" under paragraph (a), and common law damages under paragraph (d). *See e.g.*, *Cascade Pacific Int'l v. United States*, 773 F.2d 287, 293-94 (Fed. Cir. 1985). *Appeal of Interstate Forestry, Inc.*, AGBCA No. 89-114-1, 91-1 BCA ¶ 23,660, *citing*, *Rumley v. United States*, 152 Ct.Cl. 166, 285 F.2d 773, 777 (1961).

The record before the ODRA does not demonstrate that the subsequent contract is complete and that the costs actually have been incurred.[7] The record does support, however, the award of common law damages in the amount the Region requests.[8] As the ASBCA has noted, "Common law damages measured by the reasonable excess costs of completing the work in compliance with the contract are recoverable whether the work is in fact completed by the Government or not." *M. C. & D. Capital Corporation*, ASBCA No. 40159, 91-3 BCA ¶ 24084 (denying summary judgment), *citing*, *Cascade Pacific International v. United States*, 773 F.2d 287, 293-94 (Fed. Cir. 1985); *Hideca Trading*,

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[7] The standard test to recover excess procurement costs has been described as follows:

> 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 [terminated contract], (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 [the contractor's] right to proceed under the contract.

Walsh Construction Company of Illinois, ASBCA No. 52952, 02-2 BCA ¶ 32,004, *citing*, *Cascade Pacific Int'l v. United States*, 773 F.2d 287, 293-94 (Fed. Cir. 1985); *Premiere Bldg. Servs., Inc.*, ASBCA No. 51804, 01-2 BCA ¶ 31,626. Like the terms used in the paragraph (a) of the subject Default Clause, element two focuses on the costs incurred, and *not the price*, under the subsequent contract. The Region has not submitted into evidence the invoices paid, vouchers, disbursing records or other evidence of what it has actually paid. Instead, the ODRA only has before it the basic contact with an award price of $371,306. *FF 26*.

[8] Recognizing that "… technical rules of pleading are a relic of the past," the ODRA will not deny a remedy due to erroneously pleadings so long as fair notice is given. *See Cascade Pacific Int'l v. United States*, 773 F.2d 287, 295 (Fed. Cir. 1985). In the present case, TIC has had fair notice; the Region's demand for the $25,306 was provided to TIC in the Agency Response, TIC had the opportunity to conduct discovery, and TIC had the opportunity to submit evidence as part of its Final Submission in accordance with the ODRA's Procedural Regulations.

Inc., ASBCA No. 24161 et. al., 87-3 BCA ¶ 20,040, at 101,449-50. Indeed, in *Cascade Pacific*, the Federal Circuit rejected a claim for excess reprocurement costs, but nevertheless permitted a common law damages award based on "… the price of the substituted performance, as measured by the prices the Government would have paid under [a] successor requirements contract, …." *Cascade Pacific*, 773 F.2d, at 294.

The Region awarded the Replacement Contract to Frontier-Arrowhead based on the same SIR and contract documents that created the contract with TIC. *FF 26*. Frontier-Arrowhead provided its $371,306 offer in response to the same competitive solicitation as TIC, and was the lowest price after TIC. *FF 26*. Six offers (including TIC's) were received. *FF 13.* Notably, TIC has not challenged the reasonableness of the price despite the opportunity for discovery, and indicated in correspondence to the Contracting Officer that it needed to raise its own price by $200,000 for a total price of $546,200. *FF 25*. The ODRA, therefore, concludes $371,306 represents a reasonable market value to use for awarding damages to the Region. *Accord, Zero–Temp, Inc.*, ASBCA No. 21590, 78-1 BCA ¶ 13212 ("This Board has frequently held that the second low bid received on a contract which is subsequently terminated for default constitutes a reasonable measure of the fair market value…") That market value, less TIC's original contract amount of $346,200, results in a damage calculation in favor of the Region in the amount of $25,306.

IV. Conclusion

For the foregoing reasons, the ODRA recommends: (1) upholding the termination for default of Contract Number DTFACE-08-C-00040; and, (2) awarding the Region damages against TIC in the amount of $25,306.

_____/s/_____
John A. Dietrich
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/_____
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