HOWELL IT IS,	)	**AGBCA No. 2003-137-2**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Daniel R. Howell	)	
Howell It Is	)	
1232 Lewis Oak Road	)	
Gridley, California 95948	)	
	)	
Representing the Government:	)	
	)	
Wen Yen, Esquire	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
33 New Montgomery, 17th Floor	)	
San Francisco, California 94105-4511	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

April 11, 2003

Opinion for the Board by Administrative Judge VERGILIO.

On December 6, 2002, the Board received a notice of appeal from Howell It Is, of Gridley, California (contractor or Howell), concerning its contract with the respondent, the U. S. Department of Agriculture, Forest Service (Government). The fixed-price contract, No. 53-9SCP-02-4K-200, was for monitoring forest vegetation in 20 units of the Lassen, Plumas, and Tahoe National Forests in California. The contractor maintains that the Government breached the contract by failing to identify 20 units for performance, as the Government identified and paid for 18 units. Objecting to a termination for the convenience of the Government issued after performance to delete 2 units of work, the contractor submitted a claim to receive $1,914.29 (payment at the contract price for the 2 units), the amount the Government withheld. The contracting officer denied the claim. This appeal ensued. The contractor seeks $1,468.29, the contract price less the costs it saved by not performing on the 2 units.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA). On January 17, 2003, the contractor elected to proceed utilizing the Board's small claims procedure, which results in a decision by one judge, which is final and conclusive and shall not be set aside except in cases of fraud, and which shall have no value as precedent. 41 U.S.C. § 608; Rule 12.2. Following the submission of the appeal file and supplements (here referenced as Exhibit 4 (Howell submission of January 28, 2003,

pages 1-9), Exhibit 5 (Howell submission of February 16, 2003, pages 1-4), and Exhibit 6 (Government submission of declaration of contracting officer's representative, pages 1-4, with Exhibits A-F)), and after telephone conferences during which each party expressed its view of the case, the record in this proceeding closed.

The fixed-price contract directs that the Government will select 20 units for performance by the contractor; this is not a fixed unit-price, indefinite quantity contract. The Government failed to identify 20 units for this contractor. Because it selected units for performance by another contractor, the Government permitted this contractor to perform on 18 (not 20) units. The Government failed to satisfy its contractual obligations, thereby breaching the contract.

The post-performance, retroactive notice of termination for convenience is not effective in such circumstances when the Government diverts work away from the contractor. To permit such a termination for convenience would reform the contract into an indefinite quantity contract, which was not the contract type utilized. The contractor is entitled to receive the contract price less its savings from not performing on the units in question. The contractor is to recover $1,468.29, plus interest under the CDA.

FINDINGS OF FACT

The request for quotations

1. The Government issued a request for quotations (RFQ) to monitor forest vegetation within treatment units of a specific pilot project on the Lassen, Plumas, and Tahoe National Forests (Exhibit 1 at 7 (¶ D.1, Scope of Contract)) (all exhibits are in the appeal file).

2. The request specifies: "Changes in the terms and conditions of this contract may be made only by written agreement of the parties" (Exhibit 1 at 3 (¶ C.1(c) Changes)). The request contains a Termination for the Government's Convenience clause:

> The Government reserves the right to terminate this contract, or any party hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(Exhibit 1 at 4 (¶ C.1(l) (Termination for the Government's Convenience)).)

3. The request identifies a single line item for performance, consisting of 35 units, with "unit" used to reference a sample stand (Exhibit 1 at 1 (¶¶ 19-24), 7 (¶ D.1)). The request details how units would be selected:

> **D.7.3 Selection of units for monitoring plots**
>
> The Contractor shall install and measure treated stand structure monitoring plots in 35 units planned for treatment. The treatment units, listed in Exhibit 2, were selected at random under the following procedures. All of the units that had approved treatment plans as of May 1, 2002 were ranked according to assigned random numbers. The 35 top ranked units that were untreated at the time of solicitation were selected for this 2002 HFQLG Treated Stand Structure Monitoring Contract.
>
> The intent is for the contractor to install and measure the plots in the units planned for treatment before any of the planned vegetation management treatments occur. In the event that vegetation management activities have begun in a candidate stand, the Contractor will notify the Government and within five days a replacement unit will be selected from the random list of treatment units. The alternate units are ranked next in sequence after the selected units and will be assigned in sequence.

(Exhibit 1 at 9 (¶ D.7.3, Selection of units for monitoring plots).) On one page, Exhibit 2 identifies 35 selected treatment units by district; on a second page it identifies alternate treatment units by rank (Exhibit 1 at 31-32).

4. The request specifies, "Contract time will run continuously from issuance of the notice to proceed without suspension during periods when no work is performed." The anticipated start work date is July 10, 2002; the required completion date is September 15, 2002. (Exhibit 1 at 16 (¶ D.12, Contract Time).)

5. Howell It Is submitted a quotation with a signature and date of July 3, 2002. As indicated by the effective date, the contracting officer believed she awarded a contract, No. 53-9SCP-02-4K-200, to Howell on July 31, 2002, when she signed a contract for commercial items; the award price is $33,500, for a single line item of 35 units. (Exhibit 1 at 1.) The document contains the terms and conditions of the RFQ, but no signature from Howell indicating acceptance (Exhibit 1).

6. Given the later-than expected start work date, Howell did not agree to perform a contract for 35 units by the required completion date of September 15. As related in a declaration by the contracting officer's representative, at the pre-work meeting held on August 5, 2002:

> I explained that it was the Forest Service's preference to have only one contractor do the monitoring work because the method by which I had to designate alternate units according to their numerical order made administering two separate contracts very difficult. However, by the end of the meeting, it was decided that Mr. Howell

> would inform me by August 7, 2002, whether he would be able to add additional personnel to accomplish the work for all 35 units or, alternatively, what limitations he proposed on the number of units he could complete by September 15, 2002. . . .
>
> 7. Mr. Howell indicated that he preferred to work on 20 out of the original 35 units and indicated his preference to work units in certain geographic areas. Subsequently, I contacted Mr. Dufour, whose proposal for the Monitoring Contract was the agency's second choice, and inquired whether Mr. Dufour would be interested in doing work for the remaining 15 units. Mr. Dufour agreed to do so at a cost of $16,909.75 . . . which was prorated for 15 units from his original proposal. [T]he Contracting Officer[] was agreeable to this arrangement.
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> 8. I explained to both Mr. Howell and Mr. Dufour that the units were being divided between them geographically, per Mr. Howell's preference. The units on the alternate list were also divided geographically. . . . I explained to both Mr. Howell and Mr. Dufour that because I had to designate alternates by numerical order rather than geographic location, if a unit became unavailable on one contractor's list, it may happen that the next alternate in numbered order could be on the other contractor's list which would result in one contractor doing less work and the other doing more.

(Exhibit 6 at 2-3 (¶¶ 6-8).) The declaration states that the explanation described in paragraph 8 occurred "prior to work commencing" (Exhibit 6 at 4 (¶ 12)). The declaration does not specify if the explanation occurred prior to, after, or at the time that the lists of selected and alternate units were distributed, or when with respect to contract formation.

The contract

7. With a signature and date of August 8, 2002, Howell agreed to a proposed contract modification that would reduce the quantity of work to 20 units with a prorated adjustment in price. With a signature and date of August 9, 2002, Howell entered into what is captioned a "modification of contract" to perform work on 20 units at the total, fixed price of $19,142.86, thereby incorporating the terms and conditions of the RFQ. The modification is signed by the contracting officer with a date of August 7, 2002 (the stated effective date of the modification). The contract identifies (through a revised Exhibit 2 to the contract) on one page the selected treatment units, totalling 19 (not 20) units, and on another page alternate treatment units by rank. This alternate list concludes with: "Alternates are substituted in order when conditions prevent inventory of selected unit(s). Check with C.O.R. before making substitution as multiple contractors are working on this project." However, the modification itself is two pages; a two-page modification would not include the two pages of the exhibit identifying the selected and alternate treatment units. (Exhibit 2.) The contract does not cross-reference another contract or explicitly state that an alternate may be selected from other than the list which is part of the contract.

8. A contract, No. 53-9SCP-02-4K-206, entered into between the Government and Frank Dufour, is for that contractor to perform work on 15 units at a total, fixed price of

$16,909.75. The first page of Exhibit 2 to that contract identifies the selected treatment units, which total 16 (not 15) units; the second page of the exhibit identifies alternate treatment units by rank. This alternate list concludes with the same language quoted above: "Alternates are substituted in order when conditions prevent inventory of selected unit(s). Check with C.O.R. before making substitution as multiple contractors are working on this project." The contract is signed by the contracting officer with a date of August 9, 2002 (the stated effective date of the contract), and is signed by Dufour with a date of August 8, 2002. (Exhibit 6 at 3 (¶¶ 7-8) and Exhibits B, D.) The units in the Howell contract are different from those in the Dufour contract (Exhibit 2; Exhibit 6 at Exhibit D).

Performance and the dispute

9. Not all selected treatment units were available for performance, such that the Government chose alternate units. The Government identified a total of 18 (not 20) units for performance by this contractor, and a total of 17 (not 15) units for performance by Dufour. (Exhibit 6 at 4 (¶ 12).) The Government paid Dufour $2,254.69 for the 2 additional units, based upon the unit price calculated from that contract (Exhibit 6 at Exhibit F); the Government reduced Howell's contract total by $1,914.29, based upon the unit price calculated from that contract (Exhibit 3 at 4).

10. On October 15, 2002, this contractor did not sign the Government-requested contract release, under which the contractor would accept payment for a total of only 18 units. In reserving its rights under the contract, the contractor expressly disputed payment of less than the full price of the contract, and indicated that a claim will be submitted within 30 days. (Exhibit 4 at 2.)

11. By letter of October 19, 2002, the contracting officer informed the contractor that its contract was terminated for the convenience of the Government, with the explanation that the reduced number of units arose from substituting units as proscribed in clause D.7.3 (Exhibit 3).

12. As ascertained from the notice of appeal and the record, the contractor submitted a claim to the contracting officer to receive payment for the additional 2 units. By letter dated November 4, 2002, the contracting officer denied the claim. Without specific proof in the record regarding the date the contracting officer received the claim, the Board finds that the receipt occurred on October 25, 2002, which is two days after this contractor states that it received the proposed contract amendment and the same day that the other contractor signed a modification to increase the number of units from 15 to 17 under that contract (Exhibit 6 at Exhibit F).

13. On December 6, 2002, the Board received from the contractor a notice of appeal of the contracting officer's decision. On January 17, 2003, the contractor elected to proceed utilizing the small claims procedure.

14. The contractor maintains that by not performing on 2 units under the contract, it has saved out-of-pocket costs totalling $446.00 (Exhibit 4 at 1). The developed record does not demonstrate that this figure incorrectly represents the contractor's savings. The Board concludes that this figure reflects the contractor's true savings.

DISCUSSION

This dispute involves questions of contract interpretation and the Government's use of the termination for convenience clause. The contractor maintains that the firm, fixed-price contract obligated the Government to identify 20 units for performance by the contractor. Because the Government identified 18 (not 20) units, the contractor asserts that the Government breached the contract. Further, the contractor contends that the retroactive termination for convenience is not effective. The Government maintains that it administered the contract according to its terms, which did not guarantee that the contractor would provide services on 20 units, such that the termination for convenience is supported by the language of the contract and the circumstances.

The contract

A contract did not arise with the Government issuing a contract in response to the receipt of quotations. Regulation specifies the legal effect of quotations:

> A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. Therefore, issuance by the Government of an order in response to a supplier's quotation does not establish a contract. The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.

48 CFR 13.004 (2002).

The Government failed to recognize the difference between a quotation (which is not an offer) and an offer. After obtaining a quotation, the Government selected Howell as the contractor it would like; however, it was up to Howell to consummate, or not, the contract. Howell here rejected an award to perform on 35 units with the specified completion date (Findings of Fact (FF) 5, 6). Howell accepted a contract to perform on 20 units at a fixed price (FF 7).

Contract interpretation

The contractor views its contract as obligating the Government to identify a total of 20 units for performance. The Government reads the contract as providing no such guarantee, because the selection of replacement units for performance according to ranking could alter the actual number of units of performance under the contract.

The contractor's interpretation of the contract is reasonable and prevails over that of the Government, the drafter of the contract. The contract is a fixed-price contract for performance on 20 units. No specific language indicates that fewer (or greater) than 20 units may be identified for performance; this is not a fixed-price, indefinite quantity contract. The record does not establish that the intent of the parties at the time of contracting is other than the contractor contends in its interpretation. The declaration by the contracting officer's representative (FF 6) describes his discussions with the two contractors that the final performance could result in

variations in the fixed number of units performed by each contractor. The declaration does not specify that such conversations occurred prior to contract formation; therefore, one cannot conclude that the contractor was aware of the Government's interpretation. The Government's unexpressed intent does not bind the other contracting party. Moreover, under the Government's interpretation, given the potential unavailability of units on the selected and alternate lists in the other contract, this contractor could be obligated to perform on a total number of units greater than 20. Because the Government's proffered interpretation is contrary to the expressed intent of the contractor, it is not reasonable.

Neither party has addressed the fact that the list of "selected units" in the contractor's contract contains 19 (not 20) units, while that of the other contractor contains 16 (not 15) units (FF 7, 8). Whether these lists were developed after the parties agreed to the contracts, or simply reflect a failure to integrate properly the agreement between the parties, the contract expressly provides that this contractor will perform on 20 units for a fixed price. Moreover, the selection clause (FF 3) provides for the substitution of alternate units if the initially selected units are not available for monitoring, thereby providing a mechanism to ensure that performance on 20 units would be accomplished under the contract; the clause does not provide for the selection of an alternate unit outside of the contract.

Termination for convenience

The Government supports its actions under the termination for convenience clause. To permit the use of the termination for the convenience clause under the given contract and facts, would change the contract into an indefinite quantity contract, containing risks different from those in the firm, fixed-price contract utilized.[1] The Termination for Convenience clause is not to be used to reform the contract. This is not the situation where the Government encountered a true reduction in its overall requirements.

The Government had a requirement for work on 35 units. Under this contract, the contractor was to perform on 20 units. The Government permitted the contractor to perform on only 18 units, as the Government utilized another contractor to perform on a total of 17 units, thereby depriving this contractor of work on 2 units. The recovery under the fixed-price contract should not be less than that available under a requirements contract. As stated in Rumsfeld v. Applied Companies, Inc., No. 01-1630 (Fed. Cir. Apr. 2, 2003):

> The combined teaching of Locke, Torncello, and Ace-Federal is that the government breaches a requirements contract when it has requirements for contract items or services, but diverts business from the contractor and does not use the contractor to satisfy those requirements. In that case, the contractor is entitled to recover damages in the form of lost profits, provided it is able to meet the requirements for lost profits recovery noted in California Federal Bank. The

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[1] The Government did not issue a notice of termination for convenience during the performance period of the contract. Rather, it diverted business away from this contractor and satisfied its requirements at a greater price with the other contractor. The Government has not shown support for a constructive, retroactive termination for convenience of a contract under such circumstances.

> critical point is that the government's breach of its obligation "to fill all its actual requirements . . . by purchasing from the awardee," Medart, 967 F.2d at 581, has the effect of taking away from the contractor the opportunity to earn a profit.

If one reads the list of selected and alternate units in the contract as defining the Government's requirements to be satisfied by this contractor, it is correct that, given prior activity on selected units and the ranking of alternate units, the Government no longer had a requirement for this contractor to perform on more than 18 units. However, as already noted, this interpretation of the contract deprives the contractor of the benefit of its bargain in entering into the firm, fixed-priced contract utilized. The Termination for Convenience clause is not to be used to reform the contract. This is not the situation where the Government obtained work on a total of only 33 of the 35 units, with this contractor having work on only 18 of the 20 units anticipated.

The termination for convenience is not valid and does not serve as a defense to the breach of contract.

Quantum on recovery

Given the breach of contract by the Government, the contractor is entitled to recover the contract price less the costs saved by not performing. See Rumsfeld quoted above. The record demonstrates that the contractor is entitled to the contract price of $1,914.29 (FF 9) less $446.00 (FF 14) which is $1,468.29.

DECISION

The Board grants this appeal. The contractor is to recover $1,468.29, plus interest pursuant to the CDA, 41 U.S.C. § 611, from October 25, 2002.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
April 11, 2003