WILLIAM A. BLOODGOOD,	)	**AGBCA No. 97-178-2**
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Appellant	)	
	)	
Representing the Appellant:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

May 19, 1998

OPINION BY ADMINISTRATIVE JUDGE EDWARD HOURY

This appeal arose from Contract No. 53-64R4-5-09 between the Forest Service, U. S. Department of Agriculture, and William A. Bloodgood of Iberia, Missouri (Appellant). The contract was awarded on May 5, 1995, and was for timber-stand improvement on 238 acres in the Mark Twain National Forest in Missouri. Essentially, the work required Appellant to select dominant hardwood or pine crop trees, achieve a specified spacing between crop trees, and cut competing trees and vegetation in accordance with the specifications.

Appellant's contract was terminated for default for failure to make satisfactory progress. Appellant did not appeal the Contracting Officer's (CO's) decision to terminate the contract. The CO reprocured the incomplete work and assessed Appellant $4,229.30 for the excess cost of reprocurement. Appellant filed a timely appeal.

Appellant alleges that the specifications were interpreted or enforced differently in the reprocurement contract than in Appellant's contract. The Government filed a Motion to Dismiss alleging that Appellant had not appealed the termination for default and therefore, may not now raise matters relating to the termination such as the alleged disparate contract administration.

Appellant elected the Board's Expedited procedure, 7 CFR § 24.21, Rule 12.2, requiring a decision within 120 days of the election, and allowing for a decision by one judge. The target date for a

decision is August 4, 1998. Decisions processed under the Expedited procedure will be short and contain only summary findings of fact and conclusions of law. Expedited decisions do not serve as precedent and are not appealable except for fraud.

FINDINGS OF FACT

1. Appellant's bid of $35 per acre was 48 percent below the Government's estimate. However, Appellant verified its bid after being notified of a possible error. The contract price for the 238 acres was $8,330. The contract was awarded May 5, 1995. The Notice to Proceed was effective June 5, 1995. The period of performance was 203 days. Therefore, all work was to be completed by December 25, 1995.

2. Throughout June, July and early August, Appellant was frequently not on site working. He made very little progress in comparison to the time used. By letter dated August 14, 1995, the CO sent Appellant a Cure Notice requesting a revised work progress schedule indicating that Appellant would be completing on time.

3. By letter dated August 17, 1995, Appellant stated that he had underestimated the size of the trees and that he could not make the needed progress, given the size of his crew. Appellant also noted that the CO's Representative (COR's) daily diaries, in two instances, indicated that the work was unacceptable, but did not indicate which specifications were not being met. A review of the two diaries cited by Appellant indicates that the work was not acceptable because Appellant was not on site and was not making adequate progress. Other diaries where the quality of work was specifically mentioned indicated that the work was acceptable.

4. Sub-area 4A, the first sub-area worked on by Appellant, was 31 acres. Appellant's progress schedule indicated this area should have been finished July 1, 1995. As of August 17, 1995, only 21 acres had been finished. Appellant failed to perform any further work on Sub-area 4A and was not seen again at the work site. The payment provision of the contract provided completed items of work would be paid for after inspection and acceptance.

5. By letter dated September 15, 1995, the CO advised Appellant that Appellant was obligated to continue working pending resolution of any dispute, and that unless Appellant contacted the CO by September 22, 1995, the contract would be terminated. Appellant did not contact the CO. By letter dated September 22, 1995, the CO terminated the contract, concluding that Appellant's failure to correct the lack of progress was not excusable. Appellant did not appeal this decision. The record shows that Appellant was paid the full contract price of $35 per acre for the 21 acres that Appellant completed.

6. In reprocuring the 217 incomplete acres, the CO solicited bids from 22 contractors and received bids from four. The specifications were identical to those used for Appellant's contract. The apparent low bidder bid $8,660. However, the low bidder failed to verify its bid when apprised of an apparent error. Consequently, the CO awarded the contract to the next low bidder on January

12, 1996, in the amount of $11,824.34. The reprocurement work was completed, the contractor was paid, and the CO assessed Appellant $4,229.30 in excess cost of reprocurement. Appellant filed a timely appeal, asserting that "the subsequent contractor either had different specifications or that the original specifications were flagrantly violated."

7. Appellant asserts that clauses C.221, Treatment Method, and C.222, Leaning, Hanging and Spring Trees, were interpreted or enforced differently in the reprocurement contract than in Appellant's contract. Both clauses are set forth below:

> 221 - Treatment Method: Stems will be felled and shall be completely severed below the lowest live limb within six (6) inches of the ground. Any leave tree nicked to the cambium layer will not be acceptable. Stems over ten (10) inches DBH may be girdled. Stems to be girdled must have two (2) continuous chainsaw cuts or one (1) axe cut completely encircling the tree. The chainsaw cuts must sever the cambium layer, be a minimum of two (2) inches apart and be located below the lowest live limb. Axe cuts must be two (2) inches wide, through the cambium, and encompassing the entire stem.
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> 222 - Leaning, Hanging and Spring Trees: Where reasonable effort will remove felled trees they shall not be left hanging in or leaning on standing trees. The Contractor must release or cut all "spring trees" present or that he creates. A "spring tree" is a tree of any species or size that is bent over or prohibited from growing a straight pole from the original leader.

(Appeal File (AF) 21.)

8. Appellant provided three photographs of fallen or cut trees purporting to show that clauses C.221 and C.222 were administered to hold Appellant to higher standards than the reprocurement contractor. There is no evidence that any of Appellant's work was rejected because of clauses C.221 or C.222, or in fact that any of Appellant's work was rejected for any reason. Appellant was paid for all completed acres. There was no foundation for the photographs, i.e., when, where and by whom taken. In this regard, it is noted that it is more than 2 1/2 years after the default termination on September 22, 1995, and that conditions in the forest do not remain the same.

DISCUSSION

Appellant appealed from a CO's final decision assessing excess costs of reprocurement. This is a Government claim and the Government has the burden of proof. The Government must show that it reprocured the same work, that it mitigated the excess costs, and that the work has been completed and paid for. M.A.W. Company, AGBCA Nos. 95-226-1, 96-185-1, 97-1 BCA ¶ 28,759.

The facts show that the Government promptly reprocured the same work after defaulting Appellant. The reprocurement was performed on a competitive basis, and the work was completed and paid for.

(Finding of Fact (FF) 6.) Therefore, the Government has established a prima facie case to recover the excess cost of reprocurement.

Appellant contends that the Forest Service accepted work from the reprocurement contractor that the Forest Service did not accept from Appellant. The Government asserts that Appellant's defense relates to the propriety of the default termination, that Appellant did not appeal the default termination, and that therefore, it is now too late to raise this issue in the context of the reprocurement appeal. The Government further asserts that Appellant did not indicate in its appeal of the excess cost that it also intended to appeal the default termination, and that even under the Fulford Doctrine[1] a contractor must at least advise that the default termination is also being appealed when timely appealing the excess costs determination, or the appeal of the default termination will be considered untimely. Metimpex, ASBCA No. 4658, 59-2 BCA ¶ 2421.

The Government is correct as to the law, but incorrect as to the facts. Appellant raised the propriety of the default in its excess cost appeal, although indirectly. (FF 6.)

The Government filed a Motion to Dismiss recognizing that this Board has limited the application of the Fulford Doctrine,[2] and arguing that the Board should extend the limitation to cover the Default clause in the present appeal, 48 CFR § 52.249-8. Further, the Federal Circuit recently emphasized the finality of a default termination, though not in the context of an appeal of excess reprocurement costs. Ra-Nav Laboratories, Inc. v. Widnall, 137 F.3d 1344 (Fed. Cir. 1998). However, Appellant is not represented by counsel and this appeal is being processed as an Expedited appeal which will not create a precedent. Moreover, for the reason stated below, it is not necessary for the Board to address the issue raised in the Government's motion.

In order to recover the excess cost, the Government must reprocure utilizing essentially the same specification used in the contract that was terminated for default. Here, the Government used the same written specification. However, even where the same written specification is used, a significant change in the manner in which the specification is interpreted or enforced can, in the context of a reprocurement contract, result in a reprocurement being dissimilar from the original procurement, and thereby obviate recovery of the excess cost. See Douglas County Aviation, AGBCA Nos. 82-264-1, 83-142-1, 85-3 BCA ¶ 18,257. Essentially, Appellant has raised this issue.

After Appellant was advised that its bid was 48 percent below the Government's estimate, Appellant verified its bid and was awarded the contract (FF 1). Appellant's lack of progress did not relate to rejected work but rather to Appellant's not being on site and not working (FF 3, 4). After being sent

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[1] The Fulford Doctrine, allowing the question of the excusability of a default termination to be raised in the context of an appeal of excess costs, arose from Fulford Manufacturing Co., ASBCA Nos. 2143, 2144, 6 CCF ¶ 61,815 (May 20, 1955).

[2] See Ace Reforestation, Inc., AGBCA No. 84-272-1, 87-3 BCA ¶ 20,218; Mike Horstman, AGBCA No. 87-388-1, 89-2 BCA ¶ 21,752; and Interstate Forestry, Inc., AGBCA No. 89-114-1, 91-1 BCA ¶ 23,660.

a Cure Notice for failing to make adequate progress, Appellant acknowledged that it underestimated the amount of work (FF 3). Appellant then abandoned the contract. The evidence presented by Appellant of disparate treatment is not persuasive (FF 7, 8). It follows that the Government reprocured the same work and that it is entitled to the excess cost.

DECISION

The appeal is dismissed.

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EDWARD HOURY
Administrative Judge

Issued at Washington, D.C.,
May 19, 1998