STAFF, INC.,	)	**AGBCA No. 99-138-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
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	)	
Representing the Government:	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

October 20, 1999

OPINION BY ADMINISTRATIVE JUDGE JOSEPH A. VERGILIO

Staff, Inc. (contractor) of Redmond, Oregon, filed this appeal with the Board on January 29, 1999. The respondent is the U. S. Department of Agriculture, Forest Service (Government). The dispute involves an indefinite-quantity contract, No. 53-9JHA-3-1R11, for the harvesting of tree seedlings at the Humboldt Nursery on the Six Rivers National Forest in McKinleyville, California.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. ' ' 601-613, as amended. The parties elected to submit the case pursuant to Board Rule 11, without a hearing. Each party filed a brief.[1]

[1] Although afforded the opportunity to file a reply brief, Staff did not file a reply brief timely. Its most recent request for reconsideration of its request for an additional extension of time to file a submission is hereby denied; it has failed to state a basis meriting reconsideration.

The contractor submitted a claim to recover $16,684.87, for what it describes as a Anet contract deficiency,@ which the contracting officer denied in full. Now, the contractor seeks to recover a total of $46,032.39--$29,513.39 for what it describes as a Anet contract deficiency@ and $16,519 for what it contends was work in excess of the maximum limitation.[2]

The record fails to support the contractor=s allegations for any aspect of its claim in terms of entitlement (breach and causation) and quantum. In short, the contractor has not demonstrated that it was unpaid for any work properly performed or that actions by the Government violated the terms and conditions of the contract. The record demonstrates that the contractor failed to properly perform aspects of the contract; its own actions and inactions resulted in deductions and any additional costs to the contractor.

Apart from entitlement, the contractor fails to support the quantum portion of its claim for Anet contract deficiency.@ The contractor utilizes what it describes as its actual and anticipated costs, overhead, and profit under the contract. The record does not support the claimed costs or rates. The numbers used by the contractor reflect that it made a profit on the contract, albeit less than it anticipated. Had the contractor=s calculations utilized a more modest projected profit rate, there would be no Anet contract deficiency,@ and by implication, no basis for relief. Thus, even had the record supported the claim for entitlement, the contractor has not met its burden to recover on the quantum aspect of its claim.

The Board denies the appeal.

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[2] In contrast to the increase in the amount sought under the Atheory@ of Anet contract deficiency,@ which simply incorporates new figures for the contract price and deductions, the Board lacks jurisdiction over the claim for $16,519, which is unrelated to any matters submitted to the contracting officer for a decision. In raising this allegation, the contractor does not address either a contractual provision which requires the contractor to provide written notice of its intent to not perform in excess of the maximum quantity (Appeal File (AF) at 113 (& I.7(d)), or the fact that the Government provided notice that both specified that maximums would be exceeded and noted the option of not performing (AF at 517, 522), or the fact that the contractor performed in excess of the maximums without objection until well after performance. Also, the contractor has not attempted to justify the amount of recovery it seeks.

FINDINGS OF FACT

The contract

1. On December 2, 1992, the Government awarded to Staff, Inc. an indefinite-quantity contract, No. 53-9JHA-3-1R11, to lift and load, and grade and pack tree seedlings at the Humboldt Nursery in the Six Rivers National Forest, McKinleyville, California (AF at 56, 58, 113-14 (& I.8)). The Government accepted the contractor=s unit prices to perform activities for which minimum and maximum quantities are specified (AF at 66 (' B, item 2), 98 (& H.3(b)(1)).

2. The contract describes with particularity the work the contractor shall and shall not perform (AF at 70-78 (& C.5, lifting and care of seedlots; & C.6, loading full tubs and distributing empty tubs in field; & C.7, loading and unloading seedling tubs in packing shed; & C.8, grading of seedlings; & C.9, root pruning; & C.10, top pruning; & C.11, taping; & C.12 packaging of seedlings; & C.13, loading for storage; & C.14, cleanup; & C.15, definitions), 213-14).

3. Section E of the contract contains the Inspection of Services--Fixed Price (FEB 1992) clause from the Federal Acquisition Regulation (FAR) (48 C.F.R. ' 52.246-04) (AF at 80 (& E.1)), as well as procedures for the inspection and acceptance of the various activities of performance (AF at 82, 84-85, 210-11 (&& E.7 through E.11)).

4. Regarding the inspection of lifting and loading, for example, the contract specifies that the AGovernment will make continuous inspections of the work in progress to ensure that all technical specifications are being met@ (AF at 82 (& E.7(a))). Moreover, if the contractor performs any of six items listed, the Government is to document the occurrence and make a payment deduction for damages as shown in section G of the contract. The six items are lifting less than two handsful of seedlings; pounding, beating, rubbing, or flailing seedlings to remove excess soil; failure to cover lifted seedlings with wet burlap; piling seedlings on the ground or otherwise exposing the roots to the air for longer than allowed; walking or standing on seedlings at any time; and leaving unpulled seedlings in the seedbeds. (AF at 82 (& E.7(b)).)

5. Regarding the inspection of seedling processing, for example, the contract specifies that the Government will utilize a particular grading rule and/or the specifications in place at the time the seedlot is being processed. If the contractor performs any itemized actions, the Government is to document the occurrence and make a payment deduction for damages as shown in section G of the contract. Deductions are to occur when (in excess of prescribed, acceptable parameters) root pruning is improper, seedlings are improperly culled, or cull seedlings are packed. (AF at 84, 211 (& E.9).)

6. In section G, between paragraphs G.8 and G.9 is a paragraph designated as AI?.##, payment for lifting and loading,@ which specifies that payment is to occur at the unit prices for each linear foot of seedling bed satisfactorily lifted and loaded, less deductions for damages. Deduction rates are dictated on a per activity basis; e.g., $.20 per seedling piled on the ground, or per seedling left in the ground after a seedling bed has been lifted. (AF at 94-95 (& I?.##).) Payment for grading and

packing is to be made at the unit prices, less deductions. Deductions are for wasted seedlings at rates per size of seedling. (AF at 95 (& G.9).)

7. The contract contains the applicable standard grading rules (AF at 163-67 (Contract, ' J, Exhibit A)). Within these rules is a discussion of quality control, including the following:

> In addition to the C.O.R. [contracting officer=s representative] and designated Inspector(s), Government Quality Monitors will monitor all processing activities for compliance with Humboldt Nursery Standard Grading Rules. Quality Monitors will sample continuously throughout the packing/processing, storage and shipping process. They will report their findings immediately and directly to the C.O.R. and Inspector(s). Daily quality reports will be made for each seedlot packed.
>
> The quality standards and tolerances outlined above are considered necessary for the successful establishment of plantations on Government lands. Every attempt will be made to assure that Humboldt Nursery seedlings meet these standards. If, in any sample, more seedlings than allowed are found to not meet nursery standards, the Contractor will be notified immediately and the Contractor shall correct the quality problem on the spot. Additional samples will be taken then to determine if the quality has improved. Should the average of these sampled seedlings fall below nursery standards, the entire seedlot will be declared unacceptable.
>
> If quality problems are not corrected in a timely manner, the C.O.R. will shut down the grading belt until the C.O.R. is satisfied the problem shall be corrected. The customer will be notified of the situation. . . . If the quality deficiency cannot be corrected (example, roots pruned too short), the whole seedlot shall be declared wasted and the Contractor will be charged accordingly.

(AF at 166 (& 10).)

8. One paragraph of the special contract requirements is the Superintendence by the Contractor clause (APR 1984) (FAR 52.236-6):

> At all times during performance of this contract and until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the work a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor.

(AF at 101 (& H.11).)

9. Another paragraph of the special contract requirements is a Workmanship clause:

> All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

(AF at 101 (& H.12).)

Performance

10. On Friday, December 11, 1992, during a pre-work meeting, the Government scheduled initial training, pursuant to clause H.6,[3] for Monday, December 14 (AF at 238). Training was delayed because of the contractor=s delays in obtaining bonding. On December 16, 1992, a crew for the contractor arrived at the nursery, received training, and began performance. (AF at 246, 568-69.)

11. Contract diaries, work orders and notices of non-compliance, prepared by Government personnel, reveal that often the contractor was performing work improperly, with unacceptable levels of performance, for which the Government took deductions. The Government made the contractor aware of the acceptable and unacceptable levels of performance on a contemporaneous basis (particularly when items needed to be reworked), and through the payment process when deductions were taken. (AF at 238-502, 508-22.) Declarations of Government personnel, made under penalty of perjury and prepared for inclusion in the evidentiary record, support the conclusions reflected in the diaries (Government Brief, Attachments).

12. Correspondence, dated December 18, 1992, from the contractor to the Government lends credence to the actions and conclusions of the Government personnel:

> In order to improve the quality of work being done I am going to slow down the crew, use less sorters in order to relieve the pressure on the pruners. If it is [necessary] we will remove employees who continue to use bad judgement in sorting or who continue to abuse the seedlings. We will also remove any pruners who do not improve in their workmanship. The pruners and sorters will go through another pre-work meeting prior to continuing work on this seed-lot. We also have brought in another foreman to help oversee today[=]s operations. We will also gladly accept any and all advi[c]e from the Forest Service Inspectors and try their suggestions also if our method is failing.

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[3] Clause H.6 specifies that crew supervisors shall attend a pre-work training session on proper lifting, handling, and loading of nursery stock and on proper seedling processing. The date and time of the training sessions will be set by the Government at least 1 day prior to the start of the contract operations. Thereafter, the Contractor shall be responsible for the proper training of its crews. (AF at 99-100 (& H.6.)

(AF at 259.)

13. Throughout the contract period, the contractor signed payment invoices, which assessed deductions and specified, by line item, the quantity of work performed; on none of the invoices did the contractor object to the deductions (AF at 759, 767-69, 773-78, 780, 789-97, 799-805, 809-15). On March 29, 1993, the contractor signed a payment invoice for a total earned under the contract of $378,947.44 less deductions of $12,828.52 and a withholding of $1,000 at the contractor=s request; the contractor did not annotate the invoice with any objection or disagreement (AF at 809-15).

14. Although the Government deemed some of the work to be not performed in a skillful and workmanlike manner, the contracting officer never utilized contract clause H.12 (Finding of Fact (FF) 9), to require the contractor to remove an individual. The Government, by individuals other than the contracting officer, did make Asuggestions@ that individuals (including a superintendent (FF 8)) be relocated to other areas of work, because of inadequate performance. While the contractor asserts that the Asuggestions@ amounted to directives, the record supports the conclusion that the individuals were not performing adequately and that the Government was not improperly interfering with the contractor=s ability to perform the contract. The contractor has presented no credible support for its assertion that the Government was improperly inspecting or otherwise deviating from contract requirements (FF 2-8). (AF at 363-65, 370-73, 395-96, 405-09, 440-42, 453-54, 467-68, e.g.) For example, the limited observations of one of the contractor=s supervisors contained in an undated, unsworn letter to whom it may concern (AF at 27-28) are insufficient to successfully rebut the observations of Government personnel, memorialized in contemporaneous contract diaries or letters, that the contractor was intentionally damaging the root systems of trees (AF at 440-48).

15. The contractor completed performance on March 18, 1993 (AF at 216).

16. The contractor utilized employment agencies to obtain many personnel for performance. The record does not demonstrate the qualifications of the individuals, or their ability to perform according to the contract requirements. The record is not adequate to support the contractor=s contentions that the Government acted inconsistently with the contract requirements or that the contractor=s performance did not merit the deductions for inadequate performance. Unsworn statements do not amount to reliable proof. Whatever differences may have existed between the contractor and various Government personnel, the differences do not convince the Board to find as a fact that the Government reached conclusions contrary to the contract or inappropriately interfered with the contractor=s performance. The Board finds that the daily reports accurately reflect the contractor=s performance, which at times was unsatisfactory.

Alleged discrimination

17. On March 9, 1993, the contractor=s operations manager lodged a complaint alleging discrimination based upon race in the administration of the contract. A civil rights officer from the Forest Service, Office of Civil Rights, conducted a preliminary inquiry, which included interviews (apparently not given under oath) and the review of documentation. A preliminary inquiry report was prepared, dated April 26, 1993. The report does not conclude that the contractor properly performed the contract, that the deductions were inappropriate, or that the Government breached the

contract by the manner of administration. (AF at 44, 833-45). The record contains no final report, or reference to a final report.

The dispute

18. By letter dated April 17, 1993, the contractor informed the contracting officer of areas of concern (AF at 546). The contracting officer and contractor discussed the letter, and arranged for a meeting to be attended by various people from the contractor and Government (AF at 547). By letter dated May 13, 1993, the contractor refined its assertions, as it sought the assistance of the contracting officer in resolving issues which had arisen under the contract. The contractor raises specific factors which it contends it did not anticipate in pricing its bid and which caused it to incur a loss on the contract. The contractor identifies the items as daily production information, the rotation of inspectors, belt monitor/inspector standard conflicts, H.12 workmanship clause/ interference with contractor/employee relationship, H.11 superintendence by the contractor, and discrimination/personality conflict. (AF at 38-41.)

19. On May 14, 1993, the parties met and discussed the various issues. Thereafter, by letter dated May 18, 1993, the contracting officer informed the contractor, that should it wish to press its position, it would need to submit a claim under the Disputes clause. The letter provides additional guidance. Also, it specifies that should the contractor Adecide not to file a claim, please complete the enclosed contract release and final payment@ form. (AF at 553.)

20. As evidenced by it response to inquiries from bonding companies, the Government was aware in May, August, and December 1993, and March, July, and November 1994, that the contract remained open (AF at 716, 723-25, 729-30). In January, April, and June 1995, the Government stated, in response to inquiries from a bonding company, that the contract will remain open until it receives a contract release from the contractor (AF at 732-43). In May 1997 and April 1998, the Government responded to the contractor=s submittal of forms for an assignment of claim (AF at 736-38, 743-45); thus, the Government was reminded that the contract remained open.

The claim

21. Over 5 years after the contractor completed performance and the Government informed the contractor of the total payments and deductions to be made under the contract, by letter dated August 17, 1998, to the contracting officer, the contractor submitted a claim to recover $16,684.87 (AF at 6). The letter (AF at 6) describes the Aissue or claim@ as follows, with the calculations:

> Daily production reports to Contractor should have been provided, as it would have given Contractor time to correct and maintain cost controls. Due to the Forest Service=s failure to provide the daily production reports, Contractor has incurred the following net deficiency:
>
> | | |
> |---|---|
> | Cost of contract labor: | |
> | Barrett Business Services, Inc. | $265,191.00 |
> | Kelly Services | 13,889.77 |
> | | $279,080.77 |
> | Overhead (15%) | 41,862.11 |

	$320,942.88
Profit margin (15%)	48,141.43
	$369,084.31
Other expenses:	
Bonding	12,048.00
Lodging	14,500.00
Total contract requirement	$395,632.31
Original contract amount	$402,000.00
Less contract deduction	- 23,052.56
Net contract	$378,947.44
Net Contract Deficiency	**16,684.87**

22. By letter dated October 23, 1998, the contracting officer denied the claim, stating in part:

> The contractor=s basic assumption is that the government=s alleged failure to provide production records caused the contractor to incur a Anet deficiency@. Staff has presented no information to establish any connection between the production records and his deficiency. Merely demonstrating that he made less profit than anticipated does not prove that it was the fault of the Forest Service. The more credible explanation is that the contractor=s quality deductions reduced his profit. Quality is and was the sole responsibility of the contractor.

(AF at 4.)

23. In its claim, the contractor asserts that lack of daily production reports resulted in its contract deficiency. The contractor was well aware of the Government=s dissatisfaction with the work performed; the contractor signed reports containing deductions for deficiencies. (FF 11, 13.)

24. In its brief, dated May 14, 1999, the contractor revises to $46,032.39 the amount it seeks. It seeks $29,513.39, as the Anet contract deficiency@--with the same calculations as above (FF 21), but with $378,947.44 as the contract amount, and $12,828.52 for deductions. The numbers used by the contractor reflect that it made a profit on the contract, albeit less than it anticipated. Had the contractor=s calculations utilized a more modest projected profit rate, there would be no Anet contract deficiency,@ and by implication, no basis for relief. It further seeks to recover $16,519 for work in excess of the maximums.

DISCUSSION

Now the contractor seeks to recover a total of $46,032.39--$29,513.39 for what it describes as a Anet contract deficiency@ and $16,519 for what it contends was work in excess of the maximum. This latter amount is not properly before the Board. The contractor has not sought this amount as part of a claim presented to the contracting officer. 41 U.S.C. ' 605(a).

Laches

The Government asserts laches as a basis to bar the contractor from pursuing the claim. The Government relies upon S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5 (Fed. Cir. 1985); LaCoste v. United States, 9 Cl. Ct. 313 (1986). The Government maintains that the contractor, without apparent justification, waited more than 5 years to submit a claim. Further, the Government contends that its ability to provide a thorough defense is seriously compromised when its primary witnesses are unavailable.

Performance was complete on March 18, 1993 (FF 15). By letters dated April 17, and May 13, 1993, the contractor presented to the contracting officer various issues (FF 18). By letter dated May 18, 1993, the Government informed the contractor of its right to pursue a dispute, and noted that it could submit a request for final payment and a contract release (FF 19). The contractor took no affirmative step to pursue its dispute until it submitted a claim on August 17, 1998. Throughout the 5-year period, the Government was aware that the contract remained open (FF 20), but apparently did nothing to finalize the contract after performance was complete. The contracting officer, contracting officer=s representative, and an inspector (who also supervised others) each provided a declaration included in the record, such that each could be a witness in this case. The Government has not demonstrated prejudice in its ability to present its case in response to the issues raised. Therefore, the Board does not bar the contractor from proceeding.

Entitlement

The contractor raises several bases in support of its assertion that its Anet contract deficiency@ resulted from the Government=s inappropriate actions and inactions. The contractor=s allegations are either explicitly refuted by documentary evidence or sworn declarations or are not persuasively supported by the record.[4] The record does not demonstrate that the Government required more than specified in the contract, or that the contractor in fact performed, or had the ability to perform, at the level of competency here asserted by the contractor.

The contractor maintains, in its submission of May 14, 1999, that the contracting officer breached the contract by not providing written documentation for the removal of individuals, and that this failure inappropriately interfered with the contractor=s ability to manage its workforce. Because the contracting officer did not remove any individual, there was no action to document. Thus, the lack of written documentation does not constitute a breach of contract. Other Government individuals did request or require that the contractor remove individuals from particular tasks, because of unsatisfactory performance. The contractor heeded the oral requests or directives, such that the contracting officer did not need to issue a written request. (FF 14.) The contractor has not

[4] The contractor supports its claim with unsworn statements (which provide accounts of instances of alleged abuse, but also suggest that the Government was enforcing the contract in terms of ensuring that the contractor performed in accordance with specifications) (AF at 27-37, 55) and the preliminary report from a civil rights officer (the report was prepared based upon limited data gathering and reached no specific conclusion that the Government violated the contract; the record does not contain or reference a final report) (FF 17).

demonstrated either a breach of the contract provision or any improper interference with performance.

The contractor asserts that the Government breached the contract by providing training on the same day of performance as opposed to earlier. The Government was prepared to offer training earlier; the delay in training resulted from the contractor=s difficulties in obtaining bonding (FF 10). The Board does not find the Government liable for such a delay which is not attributable to the fault or negligence of the Government. Moreover, the contractor has not demonstrated any damage resulted from the training occurring when it did.

The contractor asserts that the Government interfered with the contractor=s performance by providing inconsistent bases for inspections and by not providing on a daily basis the inspection reports and figures for the quantity of trees packed. The record does not support the contentions of the contractor[5] (FF 11-14, 16).

In summary, the record supports the Government=s conclusions that the contractor=s performance merited the deductions. The record does not demonstrate that the Government breached a contract provision or breached implied duties of fair dealing and non-interference.

Quantum

Even were the Board to conclude or assume that the Government both acted inappropriately and caused the contractor harm (that is, breach and causation), the contractor utilizes an irrational basis for the quantum it seeks. The methodology of calculations is not tied to Government actions and inactions. The contractor has failed to support its claimed costs and rates. (FF 24.)

At best, had the contractor prevailed it could recover for all inappropriate deductions. The record fails to support recovery of any amount in excess of the specific deductions.

DECISION

The Board denies the appeal.

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JOSEPH A. VERGILIO
Administrative Judge

Concurring:

[5] The contractor has not identified a contract provision which required the Government to provide production reports on a daily basis. The contractor maintains that, during the pre-work meeting the Government agreed to provide the reports; however, the contractor could not have relied upon any such statement when pricing its bid.

EDWARD HOURY
Administrative Judge

HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
October 20, 1999