



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 31, 2016

CBCA 3764

KLAMATH WILDLIFE RESOURCES,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Brian Shaw, Owner of Klamath Wildlife Resources, Redding, CA, appearing for Appellant.

Stephanie L. Lynch, Office of the Regional Solicitor, Department of the Interior, Portland, OR, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **VERGILIO**, and **ZISCHKAU**.

Opinion for the Board by Board Judge **VERGILIO**. Board Judge **ZISCHKAU** dissents.

VERGILIO, Board Judge.

On March 21, 2014, the Board received from Klamath Wildlife Resources (contractor; “contractor” at times also refers to its owner) a notice of appeal contesting the termination for default of its task order contract with the Bureau of Land Management, Department of the Interior (agency or BLM). The contractor was to conduct surveys of northern spotted owls (NSOs) pursuant to contract requirements including a referenced protocol. For each survey visit the contractor would make observations at 150 call stations and perform any necessary follow-up work. At the time of the termination, the contractor had conducted six

sets of surveys (i.e., six visits to each call station), and had just begun another round of surveys.

The parties have submitted this case on the written record. The record demonstrates that the contractor failed to comply with contract requirements when it conducted four-hour, not the six-hour, follow-up surveys required by the explicit language of the contract. The contract also required the contractor to provide identifying GPS (geographic or global positioning system) information for the locations of call stations visited, and to provide, at the request of the agency, GPS and map information supporting the actual survey conducted. By not providing the information as required and requested, the contractor failed to satisfy contract requirements. This negatively impacted the contract because the agency was unable to verify the accuracy and quality of the work. Based upon each instance of the contractor's refusal to act in accordance with contract requirements, the agency was justified in issuing a termination for default of the task order contract.

The contractor has not demonstrated that its failures to comply with contract requirements arose from excusable causes. The contractor references its successful performance of numerous other surveys, its finding of owls during these surveys, and the designation of its owner as a spotted owl expert. The first two of these items do not impact this analysis and the contractor's duty of performance due the agency. Of the third item, the specific expertise and experience did not assist the contractor in understanding its obligations under this contract. The contractor's obligations were express; the agency was not obligated to renegotiate contract requirements after award. The contractor did not comply with contract terms; the contractor could not dictate its obligations. Further, while one contracting officer's representative refused to talk with the contractor, communicating instead through email, and the contracting officer did not engage the contractor during performance, these actions and non-actions did not alter or impact the contractor's obligations, as the agency only required the contractor to fulfill the contract requirements. The agency was not required to lessen the six-hour follow-up survey requirement, to comply with the contractor's views, or to rely upon the contractor's statements that it was satisfactorily performing when the agency was unable to locate flagging or ensure that the contractor was visiting the correct spots for the call stations, and the contractor did not provide the information required under the contract which could have established compliance.

The Board concludes that the termination for default was valid and denies the appeal.

Findings of Fact

The underlying contract with the Forest Service

1. The contractor has an indefinite delivery, indefinite quantity contract with the United States Forest Service. Exhibit 3 (all exhibits are in the appeal file). The award date was April 3, 2012; delivery orders could be placed no later than September 30, 2016. Exhibit 3 at 1-2. With the issuance of task orders, the contractor would conduct northern spotted owl and marbled murrelet surveys in various locations of the Rogue River-Siskiyou National Forest and Medford District, BLM. Exhibit 3 at 4 (¶ C-1). The contract specifies that any warranted BLM contracting officer may award and administer a task order for work covered by the physical boundaries specified in the solicitation. Exhibit 3 at 4 (§ B).

2. As detailed under a scope of contract paragraph, “All field work shall be completed within the survey dates mandated by the appropriate protocols unless otherwise stated in this contract or task order.” For the northern spotted owl, work shall be accomplished in accordance with the direction provided in the Protocol for Surveying Proposed Management Activities That May Impact Northern Spotted Owls, February 2, 2011, with data collected regarding owl locations, pair status, and nesting activities. Exhibit 3 at 4 (¶ C-1). The parties both reference the February 2011 protocol as revised on January 9, 2012, as the applicable protocol. Exhibit 2.

3. The protocol details aspects of a complete survey and complete visit. A complete survey consists of two years of six complete visits per year, and spot checks, if appropriate. A complete visit occurs when all calling stations or calling routes within a survey area have been called within a seven-day period, including daytime follow-up surveys. Of relevance here, if a surveyor detects a spotted owl at night, a follow-up survey during the day (as soon as possible, preferably within forty-eight hours of the detection) would be required as part of the complete visit. Exhibit 1 at 8-9, 13-15, 23, 31-32. Details in the protocol state:

The objective of the daytime follow-up outing is to locate spotted owls by conducting an intensive daytime search of spotted owl habitat within the general vicinity (approximately a 0.5-mile radius) of the response location that prompted the follow-up. Daytime locations are very important in determining key nesting and roosting sites, which in turn provides [sic] more precise information for management. . . . Daytime follow-up surveys consist of both active calling with a digital device and visual searching.

. . . If owls do not respond to vocalizations given from road survey stations nearest the detection, surveyors should conduct daytime stand searches throughout the 0.5 mile area around the detection. This may take several hours, depending on the terrain. . . . Observers should watch for owls approaching without responding and other evidence of occupancy

Exhibit 1 at 14-15 (¶ 6.0).

4. The protocol also specifies that at least three complete visits should be conducted before June 30, to include at least one visit in April, one in May, and one in June. The protocol uses “should be” here and “must be” and “may be” elsewhere regarding other activities. Exhibit 1 at 13 (¶ 5.5.3, .4, .6).

5. For northern spotted owls, apart from the protocol, the contract provides specific details regarding all surveys:

Maps provided may include tentative call point locations and routes. The contractor shall establish call points and routes on the ground.

The contractor shall provide location UTM's [universal transverse mercators] collected with a GPS unit capable of 15 meter accuracy in NAD 1983 datum [North American Datum of 1983] for all survey stations and detections.

Call points shall be marked with white flagging and reflective tape.

Date, military time and surveyor's initials shall be marked on flagging each visit. Indelible ink (permanent) shall be used to mark flagging.

After a spotted owl is detected, a follow-up shall be completed as required by protocol. **This follow-up search shall be conducted for a minimum of 6 hours or until a spotted owl is visually located.** The initial detection and route traveled during the follow-up shall be marked on a topographic map. A follow-up may take up to 8 hours (up to 6 hours searching and 2 hours trying to determine pair status). Follow-ups shall be conducted for all spotted owl or spotted owl hybrid detections within or outside the survey area.

When a spotted owl nest is found, the contractor shall provide GPS locations collected with a GPS unit capable of 15 meters accuracy.

All reports and maps shall be clear and legible and shall be scanned and uploaded to a contractor furnished thumb drive. All original hard copy documents shall be submitted to the contracting officer.

Exhibit 3 at 5-6 (¶ C-3.B).

6. The contract's Inspection of Services--Fixed-Price (AUG 1996) clause includes the following subparagraphs:

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. **Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.**

(c) **The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract.** The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(e) If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements; and (2) reduce the contract price to reflect the reduced value of the services performed.

(f) If the Contractor fails to . . . ensure future performance in conformity with contract requirements, the Government may 1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Government that is directly related to the performance of such service or 2) terminate the contract for default.

Exhibit 3 at 10-11 (¶ E-1) (emphasis added).

7. A Contract Quality Control Plan clause contains a paragraph captioned "Contractor Quality Control Inspection." The clause states:

The Contractor shall ensure that performance meets contract specifications, in accordance with FAR 52.246-4, Inspection of Services -- Fixed Price, prior to requesting the Government to inspect for payment or acceptance. The Contractor shall contact the Contracting Officer upon completion of a unit. The Contracting Officer may observe the Contractor's inspection at any time and shall otherwise have unlimited access to inspection data.

Exhibit 3 at 11 (¶ E-2).

8. Under a section captioned "Government Quality Assurance Surveillance Plan," the contract specifies that the standards for acceptable performance are stated in the specifications, section C of the contract. Exhibit 3 at 11 (¶ E-4.A). Section C references the protocol and includes the items set out in Finding 5.

9. The contract's Unsatisfactory Performance clause provides:

If work falls below minimum survey standards or minimum standards for documentation such as maps, forms, and report, the Government will immediately notify the Contractor in writing and order improvement of the quality of future work. If the quality of future work is not raised to a satisfactory level within two consecutive workdays after receipt of notice in writing of unsatisfactory work, the Contractor's right to proceed may be terminated and the contract considered in default. Repeated failure to perform work at an acceptable performance [level] shall also be considered reason for contract termination and default action.

Exhibit 3 at 11-12 (¶ E-5).

10. The contract contains a Default (Fixed-Price Supply and Service) (APR 1984) clause, 48 CFR 52.249-8 (2012), and a Termination for Convenience of the Government (Fixed-Price) (MAY 2004) clause, 48 CFR 52.249-2. Exhibit 3 at 20.

11. The contract includes the contractor's quality control plan, which provides in pertinent part:

For many years now, the contractor has carried out sensitive species surveys. . . . Also, the best way to keep track of a field biologist's position is to make routine survey checks by the supervisor and using GPS tracking (track log, or waypoint/timestamp tracking) to assure presence at the calling station This has been the selling point of our Quality Control.

Exhibit 3 at 52 (¶ I.A). The plan was incorporated into the contract by reference. Exhibit 3 at 10-11 (¶ E-2), 42 (¶ L-4(a)(3)).

12. As to quality control and inspection procedures, one paragraph of the contract (incorporating the details of the contractor's proposal) states:

Track Logs of Surveyor Movements: Garmin Rino©.

As stated before, a very important factor in evaluating the effectiveness of a wildlife survey is judging whether or not the surveyors are in the right place. In this case, with a team of surveyors working established survey routes . . . the geographical element is multiplied. The biologist is expected to drive or hike to . . . a set of call stations The solution to monitoring a surveyor location given these parameters can be found in GPS technology, with Garmin RINO . . . units that display an employee's position and thereby indicate their geographic location on the ground. [The contractor]'s quality control inspection technique will also make use of this GPS feature, remotely monitoring each surveyor[']s location in respect to where the known call point/listening location is. While formal quality control inspections will capture only [a] small portion of the crew's activities, the use of the RINO GPS units will make every individual's location effectively an item of [contractor] crew knowledge at all times.

Additionally, Garmin Rino GPS units have a "tracking" feature. This allows for a log, or track, or waypoints showing the surveyor[']s movements through space or at a stationary location for a period of time Tracks are downloadable onto a mapping program (MapSource or TOPO!). Track logs can then be assessed for surveyor movements through terrain using these GPS units and can be later inspected by the Contractor for surveyors' proximity to each call point and movement between call points or through suitable habitat. Track logs cannot be manipulated on the actual unit, before being downloaded. There is no way for a surveyor to "fake" a location, as it electronically traces the surveyor wherever he/she goes. *This method ensures the Contractor and Government that surveyors were physically at each station they reported, and is especially effective for "hike-in" MAMU[marbled murrelet]/NSO stations to make certain surveyors hiked all the way to each station.*

To guarantee that surveyors are reaching the somewhat more difficult hiking . . . call/survey stations that are assigned to them, we will check GPS track logs for the surveyors who complete these stations. Track logging will be

conducted at least once per week and will be focused in the more difficult to access survey areas.

Exhibit 3 at 53-54 (§ II.A) (emphasis added). By adopting the contractor's technical proposal, the contract specifies that the owner (who is also the project manager) "will be responsible for: making certain [quality control] is followed, biologists are at their correct calling stations and along their appropriate routes, as well as checking completed survey forms" among other activities. Exhibit 3 at 55.

Task order contract

13. On September 18, 2012, the BLM placed a task order, L12PD01774, under the Forest Service contract to obtain northern spotted owl surveys for the estimated period of March 1, 2013, through August 31, 2014, with 426 days of performance time. As amended with an effective date of March 14, 2013, the task order included pricing for 1800 station visits and thirty follow-up surveys. The 1800 figure represents 150 call stations visited six times in each of two survey years. The total allocated price was \$44,400 (\$22 per call station and \$160 per follow-up). There were 150 call stations distributed over three distinct areas with 24, 48, and 78 call stations in the areas, although some material references 25, 48, and 77 call stations in the areas. Exhibits 4-5, 26, 31, 67, 99. The agency contracting officer designated a contracting officer's representative with specified authorities and the express limitation that the representative shall not change any of the terms or conditions of the contract; the record does not indicate that the authorities or restrictions changed. Exhibit 4 at 6.

14. The agency held a pre-work meeting. The Board finds to be accurate the agency's summary of the pre-work meeting with which the contractor has not taken issue. Of relevance here, the agency and contractor reviewed contract requirements and the agency indicated that it

has established call points and has already given them to [the contractor] in a shape file. Since these were done by GIS [geographic information system], the [agency] anticipates that some points will need to be moved for better calling purposes (creek noises) or habitat issues. The [agency] prefers that [the contractor] sends us the updated GPS data for all of the points.

Exhibit 47 at 3. Also, "Everyone agreed to the times and specifications in the contract for follow-ups." Exhibit 47 at 4.

Visit 1

15. From April 16-24, 2013, the contractor performed the first of its visits and follow-ups. On April 29, 2013, the agency inquired after performing an inspection at some of the call stations: “I was wondering if you did call points BB13, BB48, BB47, and BB22 at different locations than what were on the maps. My inspectors were not able to find flagging at those call stations. If so, do you have GPS coordinates for those call stations?” The contractor responded that same day:

We will continue to flag call stations where flagging has been removed between visits. Again, this is a somewhat common occurrence. For instance, on the adjacent siskiyou nf [national forest] last year we had about 8 stations where flagging was removed after all 6 visits. We reflagged after each visit. We will do the same for these nso projects. Not much else we can do. I’ve brainstormed this topic with many government biologists and Co’s [contracting officers].

Exhibit 8 at 1. As revealed in email and voice mail messages, the contractor provided a follow-up explanation on April 30, stating that flagging often gets moved by cows, people, weather, and roadside brushing (i.e., the clearing or trimming of areas off the edges of the roadway). The contractor looked and concluded that roadside brushing had occurred in the area. The contractor indicated that he feels good if 80% of the flagging is there. Exhibits 9-10, 11 at 2. The contractor assured the agency that “he is doing an honest and thorough job out there and that the [agency] has nothing to worry about. He said ‘why would we not do all the call stations if we are out there anyway[?]’” Exhibit 10. On May 1, 2013, the contracting officer’s representative received a GPS track log map from the contractor relating to visit 1, relayed a thank you for the reassurance, and specified that the agency would like to continue to receive the track log maps. Complaint, Attachment 1. The record does not indicate the coverage or details of the map; there is no particular proffer by the contractor that the map or other information demonstrates that the four stations for which the agency did not find flagging were surveyed. That is, the contractor did not provide GPS coordinates for the four sites questioned by the agency. Further, as relevant to this dispute, a track log is distinct from a track log map. During performance, the contractor expressed the view that it would provide the agency with the track log map, but was not obligated to send the actual track log; the contractor states that it “would have bid more on the contract if that were the case [that it would provide both track log and track log map].” Exhibit 39 at 1. The contractor’s quality control plan, which was part of the task order contract, addressed track logs. Findings 11-12. The track logs in the record identify stations by number, but do not indicate GPS coordinates, and provide a route for the associated survey. Complaint, Attachment 9 (as revised Mar. 5, 2015).

16. In completing the review of the invoice for the first visit, the agency noted that the contractor has skipped three call stations (a skipped station--skipped, e.g., because an owl responded nearby--is distinct from an unflagged station). The agency stated that it would be paying only for call stations visited and follow-ups that the contractor actually did perform, with payments on a unit price per call station. The agency paid for 147 call station visits and three follow-ups. Exhibits 16 at 1, 17-19.

Visit 2

17. In May 2013, the contractor performed visit 2 surveys and follow-ups. Exhibits 22-23. The agency inspected twenty-five call stations in one area; it found no survey flagging at six call stations, only visit 1 flagging at three call stations, and nothing written on the flagging at another call station. Exhibit 26 at 6. The agency did not tell the contractor of problems for the two other areas, although one call station lacked flagging and there was no sign of clearing/brushing along the roadway. Exhibits 24 at 3, 26 at 2, 27 at 3-4. The contracting officer's representative informed the contractor on June 13, 2013:

For visit number 2 [in the one area with twenty-five stations], only 64 percent of your flags were found. Taking into consideration your phone messages about how flagging gets lost in the woods, we are going to give you benefit of the doubt this one time only, and assume you did actually call those stations for spotted owls. In the future, we [are] going to need to find 98 to 100 percent of your flagging for each visit for each project area, so take great care in how and where you are attaching your flagging. If this continues to be a problem, you will be required to redo the survey visits. Note that the contract specifies that flagging is required at each call station with date, military time, and initials (section C-3, B, 7 and 8). So far, you have not written the times on your flags. We will require that for the rest of the visits, also.

Another issue we noticed was that you indicated you ended call station HS17 for visit 2 at 02:26 and started HS20 14 min. later at 02:40, when it took us 30 minutes to get between points during our inspection. Also, HS20 had no flagging and the HS17 flagging had nothing written on it. You can understand how we are led to believe that you either didn't call those stations, or you are doing them in the wrong locations out there.

If you are still convinced that someone or something is tearing down your flagging right after your survey visits, one way you can reassure us of your efforts is to keep a GPS track log of your surveys and send us the original, GPS track log or shapefile for each visit. A map of them will not be

acceptable since that is too easy to create in GIS by hand. This comes from your own quality control plan, page 15, given to us when you solicited for this contract. So far, you have not given us any “track log, or waypoint/timestamp tracking” as described in your own quality control plan.

Exhibit 26 at 3-4. Neither party has put into context the final statement about the lack of a track log, in light of the agency’s recognition that it had received a track log concerning a visit 1 survey. Finding 15. Further communications occurred on June 13 and 14. The contractor stated that it had sent the GPS track log as an attachment to an email message and promised to send it again. Exhibit 27 at 1. The contractor has not identified the log in the record or attempted to demonstrate that it had visited the sites with missing flagging. Regarding the contractor’s request for the agency to accompany the contractor on surveys, the agency declined the request. The agency added:

[F]inding and reading your call station flagging out there is the evidence that we will have to rely on to know you have called those stations. If we had time to be out there all the time while you were surveying, then we would also have the time to just do the surveys ourselves. . . .

If you want to provide us with additional evidence that you have called each station, that is up to you, but the contract specifies that there needs to be flagging with visit number, date, initials, and survey time. For visits three through six, you will only get paid for the call stations that you show evidence as surveying.

Exhibit 26 at 1. The contractor took issue with this approach:

Bottom line is that we were chosen as the contractor for this job based on our quality of work and expertise, and to be micro managed like this based on something as unreliable as flagging, is simply absurd. Finding spotted owls is the purpose of this contract and we are doing that perfectly.

. . . .

Bottom line is that you hired us as a professional environmental consulting firm to do this work. And there is something called “Professional Integrity” and we expect to be treated with that respect as we earned this contract mostly based on that integrity.

. . . .

So we can keep looking for things wrong with each other or we can simply have trust and faith in each other's professional abilities and integrity and know that if we are getting the owls and if you are finding most of the flags out there during each visit, then you can rest assured that we are doing our job well. Because relying on a piece of flagging always blowing in the wind on Traveled roads in stormy rainy Oregon is just not a reliable prospect.

Exhibit 26 at 1-3. Regarding expertise, in March 2012, the California Department of Forestry and Fire Protection designated the contractor's owner as a Spotted Owl Expert after concluding that he met the minimum qualifications under state law. Exhibit 136. The United States Fish and Wildlife Service also designated the contractor's owner as a spotted owl expert. Exhibit 3 at 45.

Visit 3

18. In June 2013, the contractor performed visit 3 surveys. Exhibit 30 at 3, 9. In one area inspected, the agency found flagging with the surveyor's initials, visit number, call point number, date, and time at all twelve call stations inspected. Exhibit 31 at 6. For a second area, the agency identified no problems. For a third area, no visit 3 flagging was present at seven locations, with three of these locations not indicated on the contractor's data sheets as having been surveyed. Exhibit 33 at 4. In sum, the agency inspected forty-eight call stations out of the 150; at seven of the inspected stations, the agency found no evidence of flagging from visit 3. Exhibit 53 at 4.

19. As part of an email exchange on July 12, 2013, the agency informed the contractor of the need for six-hour follow-up surveys and provided the inspection results, noting, similar to comments for visit 2:

After a spotted owl is detected, a follow-up shall be completed as required by protocol. **This follow-up search shall be conducted for a minimum of 6 hours or until a spotted owl is visually located.** The initial detection and route traveled during the follow-up shall be marked on a topographic map. A follow-up may take up to 8 hours (up to 6 hour searching and 2 hours trying to determine pair status). Follow-ups shall be conducted for all spotted owl or spotted owl hybrid detections within or outside the survey area.

During your followups where you were unable to locate the owls during the day, you have only been spending 4 hours on each.

. . . [With respect to flagging not found, u]nfortunately, finding and reading your call station flagging out there is the evidence that we will have to rely on to know you have called those stations. If we had time to be out there all the time while you were surveying, then we would also have the time to just do the surveys ourselves.

If you want to provide us with additional evidence that you have called each station, that is up to you, but the contract specifies that there needs to be flagging with visit number, date, initials, and survey time. For visits three through six, you will only get paid for the call stations that you show evidence as surveying.

Exhibit 33 at 3-4. The contractor wrote that the agency should not expect to find all off-road flagging out in the woods, as animals, including deer, take down the flagging. “From here on out, I will take pictures of the flagging with initials/military time, etc. We DID sign all of visit 3 in military time as you saw.” Further, “Regarding follow-up surveys, the protocol has ALWAYS stated a FOUR HOUR follow up. Remember, [the contractor] had the same . . . contract . . . from 2008-2011 . . . and we always did a 4 hour follow-up survey. I am a spotted owl expert . . . There should never be a reason for a 6 hour much less an 8 hour follow up survey. That is simply harassment to the owl.” Aware that the 2012 protocol and the 1992 protocol indicate that follow-up surveys may take several hours, and do not state four hours, the agency informed the contractor that the agency was requiring the contractor to fulfill the contract requirement for a six-hour follow-up survey. Exhibits 33 at 1-2, 34. The agency was consistent in its reply that it requires the contractor to follow the contract. Exhibit 33 at 1. As part of this email exchange, on July 12, the contractor specified that it would find a way to get the six-hour follow-up done from then onward: “From here on out [I will] find a way to ge[t] the 6 hour follow up done. I’ll bring another person along to do follow ups with [me] so we can minimize harassment to 3 hours with 2 people.” Exhibit 34. The contractor has not introduced evidence that could demonstrate that this approach would comply with protocol or contract requirements (e.g., the contractor has suggested that a follow-up of several hours would be accomplished by four hours of follow-up; two people listening for owls for the same three-hour period is not the same as listening for a six-hour period). Aside from the proposed attempt to comply with the dictates of the agency, by July 16, the contractor again was explaining to the agency (which had insisted on the six-hour follow-up without disturbing owls) that a follow-up should not take more than four hours. Exhibit 38; Finding 22.

20. On July 18, 2013, the contracting officer’s representative informed the contracting officer that the contractor had “failed to meet protocol for visit #3 by June 30 as there was no evidence that he surveyed seven (7) of the 48 call stations that were inspected”

and that with inspections occurring on July 1 and 3, the representative opined that there “was not time to remedy the missed survey call stations because the third visit needed to be completed by the end of the day on June 30.” Exhibit 53.

Visit 4

21. In July 2013, the contractor performed visit 4 surveys, Exhibits 54-59, and the agency conducted inspections. In one area seven call station locations had flagging identifying a visit 1 survey, but not a visit 4 survey. Of these seven, two had writing only for visits 1 and 2 (that is, not for visits 3 or 4), two had writing only for visits 1 and 3 (that is, not for visits 2 or 4), and three had writing only for visit 1 (that is, not for visits 2, 3, or 4). The agency specified, in email exchanges occurring on July 16: “If you plan to invoice us for the[se] call stations for visit #4, you will need to go back and survey them.” The agency inquired of the contractor: “I am asking you if you have done these call stations in slightly different locations. If so, please provide for me the new coordinates. Otherwise, I will assume they were not surveyed.” Exhibit 37 at 1-2. In response, the contractor sent an email message to the agency, stating in pertinent part:

Just left you the third voice message of the day. It was in regard to us taking a GPS point at most of the off road call points where we get good GPS signal for the final 2 visits. This will ease all of this finger pointing and he said she said problem with the flagging.

Sound good? We can either take a photo of the GPS point/time location or if we have time we can send those points in a shape file to you with all of the time, date, coordinate attributes as part of the shape file.

Exhibit 37 at 1.

22. Separately, on July 16, the contractor continued to dispute the six-hour follow-up survey identified in the contract:

“Several hours” in my usfws [United States Fish and Wildlife Service] training means up to 4 hours. Not for the California spotted owl, but for the northern spotted owl throughout its range. I already mentioned that we would be bringing in an extra person in the field now to [one of the three areas surveyed] to help with follow ups. I then asked you “Sound Good?” And that is what you didn’t respond to. But the contract refers to the protocol as what to follow. And in my expert training that means 4 hour follow ups. It was just a uses [sic--United States Forest Service] employee putting that 6-8 hours into the

contract, and that person was not an expert. So the “Several Hours” for follow ups is up to interpretation, and since my word is equal to the top experts in nso [northern spotted owl] biology (I represent usfws on all things nso) then my interpretation (and nearly all nso land managers I know) conduct 4 hour follow ups. That 6-8 hour follow up statement in the contract should never have gotten in there as it is not typical and harrassive towards owls. And the contract states “Survey to nso protocol” which has never included 6-8 hour follow ups.

So again if it ever came to it, I can gather all my nso expert colleagues and usfws friends who would easily corroborate what is common knowledge, as per what I stated above.

Exhibit 40 at 1.

23. In July, the contractor indicated that it would be providing approximate routes drawn for at least visit 4, and that follow-up surveys should rarely last beyond four hours (only if an owl is found, for example, at hour 3 3/4), as confirmed by un-named specialists. Further, “There is nothing that states that we will send the actual track log to you in the contract. We would have bid more on the contract if that were the case. I’ll look back and make sure I resend those maps that you didn’t receive of our track logs.” Exhibits 38, 39 at 1. The contractor made further requests to talk in person or on the telephone with the contracting officer’s representative. Exhibits 45-46. The agency did not meet with or talk to the contractor.

24. On August 2, 2013, for visit 4, the contractor invoiced for 150 call stations and four follow-ups. Exhibit 67 at 2.

Visit 5 and a notice of noncompliance

25. The agency informed the contractor on July 30, 2013:

Please plan to record your GPS coordinates at all your call stations and spotted owl locations for visits 5 and 6. Section C-3, B. #6 states: “The contractor shall provide location UTM’s collected with a GPS unit capable of 15 meter accuracy in NAD 1983 datum for all survey stations and detections.”

Exhibit 60 at 3. In a response of that same day, the contractor stated that there was no requirement here to provide GPS coordinates, because they are known for each call point.

The contractor specified that it would provide GPS locations of off-road call points, as a courtesy; however, it

will NOT be GPS'ing every single point, as it is not and never has been a requirement of this contract. Please contact all of the other biologists ([five named individuals]) for verification that we HAVE NEVER had to do this, and it is NOT a requirement of this contract. That would be considered "micromanagement" and absolute distrust of the contractor if that was a requirement, which it is NOT.

Exhibit 60 at 1-2. In a follow-up shortly thereafter, the contractor referenced the requirement that the contractor shall establish call points and routes on the ground, and concluded that the requirement applies only if the contractor is delineating call points, which this contractor contends it was not. After alluding to the pre-work meeting between the contractor and Forest Service, the contractor noted, "Again, we thus WILL NOT be GPSing all of the call points on the ground, as it is NOT required by the contract. Again, please contact all of the biologists I mentioned in the past email for extensive verification of this." Exhibit 64.

26. When conducting this visit, the contractor encountered an inaccessible road. That agency had provided no notice of this. However, through its efforts, the contractor changed its plans and performed the surveys. Exhibit 68 at 1-2. By the end of July, the contracting officer's representative was told by his supervisor to stop interacting with the contractor. Exhibit 68 at 5.

27. In response to a contractor query, the contracting officer for the underlying Forest Service contract sent an email message on August 7, 2013, to the contractor and various BLM personnel, assuring the contractor that the BLM had made inquiries to her regarding the specifications and requirements of the contract. The message concludes: "And I want to assure you that [named individual] is an excellent COR and understands the specifications and protocol of the parent contract very well and he administers those requirements accordingly in his task order." Exhibit 72.

28. On August 12, 2013, the contractor provided a shapefile and GPS coordinates for visit 5 call stations in one of the three areas. The contractor noted that for three call points, near or at the bottom of steep ravines in thick forest cover, the GPS location does not match the ground location. The contractor indicated that the GPS coverage was not perfect. Exhibit 75 at 1. The contractor also provided data sheets for the other two locations, and GPS information on some of the stations. The contractor further explained that a night watchman for a private lumber company had been removing flagging, but noted that flagging from visits 4 and 5 should be found. Exhibit 76.

29. The agency inspectors for visit 5 found flagging at all twelve of the twenty-five call stations inspected in one location and deemed the work acceptable. Exhibit 78.

30. The contractor informed the agency on August 17, 2013, that cattle at various locations were eating flagging “like crazy.” Further, the contractor noted that nearly all of the call stations had been GPS’d, such that locations surveyed between August 14-16 could not be questioned. Exhibit 80.

31. On August 19, 2013, a contracting officer’s representative signed a notice of noncompliance for the contractor’s continuing to spend only four hours on follow-up surveys with no owl responses. The notice identifies three instances for visit 5 of four-, not six-, hour follow-ups. Exhibit 84. The contractor responded to the contracting officer, disputing the need for a six-hour follow-up, while contending that the protocol’s requirement for a follow-up survey of several hours is satisfied with a four-hour follow-up. The contractor acknowledged that the contract specifies six hours, but contended that the contract is simply wrong. The contractor added:

Bottom line here is that -- this notice of noncompliance is absurd and I will continue to protect what is “normal bothering” of owls already, and not extending that “bothering” time spent with owls into what IS CONSIDERED BY USFWS TO BE HARASSMENT OF A LISTED SPECIES. I will continue to do 4 hour follow up surveys as that is and what has always been required.

Exhibit 101 at 2. The record offers no support, other than the contractor’s contention, for the assertion that a six-hour follow-up survey constitutes unacceptable harassment of an owl or is not proper under the protocol. Further, for all follow-ups at issue in this appeal, the contractor did not perform a six-hour follow-up, although an owl response did not occur.

32. On August 20, 2013, the contractor invoiced for 150 call stations and five follow-up surveys. The contractor stated that there “was no follow up on the whole ‘flagging’ and ‘GPSing call points’ thing.” The contractor referenced contacts with Forest Service personnel, and suggested that what is required under a Forest Service task order is all that is required under this task order. Again, the contractor noted the absence of BLM personnel at the pre-work meeting for the Forest Service task order. Exhibit 99 at 1, 3.

Visit 6

33. In August the contractor conducted visit 6 surveys. The contractor provided the agency with GPS data for nearly all of the call stations. Exhibit 104. The agency chose five stations to inspect, found flagging at each, and determined that one station was at the wrong location; that is, the point did not match the location identified by the agency. The agency explained:

The actual location we requested to survey (HS21) is on a decommissioned road that would have required - 5 min walk in. The location they picked is on the other side of the ridge and in poor habitat. This is why we had requested they send us the GPS points of their call stations (which is clearly required in the contract - item #6). . . . In another instance the call station (HS20) was in the wrong location, down on the main road rather than up another spur road that would get better coverage.

Exhibit 107 at 1. These two stations relate to the flags that were not found during visit 2. Finding 17. The apparent distances between the actual and requested call stations suggest an explanation as to why flagging was not found during agency inspections. Exhibit 114 at 4-5.

Order to show cause, cure notice, visit 7, termination for default

34. In response to the contractor's seeking payment for seven call stations in visit 3 for which the agency had refused to pay because the contractor had not provided support that the stations had been surveyed, the agency explained to the contractor in an email message dated September 19, 2013:

[I]n order for us to do quality control (make sure you put the stations where we wanted you to) we need to be able to A) find evidence of where you conducted the call stations in the field from flagging hung at the station, which we have had a bit of trouble with and thus why those 7 stations are not being paid, and B) Have GPS points supplied to us to verify the location was correct. In fact, after I did receive call station locations (not till visit 6) I found out that two of them in [one project area] are in the wrong spot and did not call the habitat that we had intended to have called! If we had caught that on visit 1, we could have corrected it, but at visit 6 it's a bit late in the game. Just an example of why this information is important and is not superfluous.

Exhibit 114 at 3. This quotation was prefaced by the statement that the contractor was required to collect GPS information for all call stations. Also on that date, in an email message to the agency, the contractor expressed frustration as to not having received a telephone call in response to his requests, and voiced again his view that providing GPS locations for call stations identified by the agency was not required and particularly was not required for quality control purposes. Exhibit 116 at 2.

35. Through agency-internal exchanges on September 20, 2013, in response to an inquiry if there was an option to terminate the contract for the convenience of the Government (based on observations of dollars and time expended by the agency), the contracting officer wrote that the contract would be terminated for default. Exhibit 106.

36. On September 25, 2013, the contracting officer provided the contractor with a cure notice identifying seven conditions to be cured within ten days of receipt of the notice and noting that failure to cure could result in a termination for default. These seven items relate to (1) GPS tracks of call points for visits 1 through 5; (2) coordinates for missing flagging stations; (3) particular data for visit 3; (4) particular data for visit 4; (5) coordinates for particular locations; (6) data and follow-up information for five call stations; and (7) data for three instances when the contractor seemingly surveyed call stations twice per survey visit. The notice also identifies seven items as those that cannot be cured and are said to have adversely affected the contract, with items 1, 6, and 7 relating to the same circumstances and alleged violation: (1) three survey visits needed to be completed before June 30, 2013; (2) survey visit 1, 48 of 150 call stations visited, no flagging on four stations; (3) visit 1, follow-up surveys of six hours required if no owl responses; (4) survey visit 2, 55 of 150 call stations visited, no flagging on ten stations; (5) visit 2, follow-up surveys of six hours required if no owl responses, notice of non-compliance sent; (6) survey visit 3 had to be finished by June 30, 2013, flagging missing from call stations; and (7) no evidence that seven of forty-eight call stations were surveyed by June 30, 2013. Exhibit 117.

37. The contractor replied informally on September 26, 2013, asserting that all items already had been cured, and formally by letter dated September 30, 2013, with an item-by-item response. Exhibits 18-19.

38. On February 18, 2014, the contracting officer issued a show cause notice to the contractor. The notice specified that the contractor had demonstrated that it satisfactorily had cured items 4, 6, and 7 of the cure notice, and stated that the contractor had failed to cure items 1, 2, 3, and 5. The notice included the following:

The survey contains 150 call stations, each of which were to be visited three (3) times prior to June 30, 2013 unless an exception to the Protocol applied,

e.g. a call station's proximity to owl auditory responses at night. For Visit #1 you failed to survey four (4) of the 48 stations the BLM inspected, for Visit #2 you failed to survey 10 of the 55 call stations inspected and for Visit #3 you failed to survey seven (7) of the 48 stations inspected. Because these visits needed to be completed by June 30, 2013, and this deadline is long past these violations of the Contract cannot be cured.

Following Visit #1 per the Protocol you did two follow up surveys as a result of spotted owl detection. The follow up search was for only four hours even though you did not locate a spotted owl visually during that time. Following Visit #3 you also did two follow up surveys and again spent only four hours on the search even though you did not locate a spotted owl visually. These violations of the contract cannot be cured because the follow up visits were to be completed within seven days of the day the visit began.

Exhibit 126.

39. On March 13, 2014, the contracting officer made a determination and findings in support of a termination for default of the underlying task order contract. The findings address the notice of non-compliance, Finding 31; the cure notice, Finding 36, with seven items to be cured, of which the agency concluded that the contractor cured three, but not four, of the items; and the subsequent show cause notice, Finding 38. This document stated that the contractor was required to provide GPS tracks for call points for visits 1-5. Four distinct items are identified: (1) the need for coordinates for missing flagging stations as requested by the contracting officer's representative on June 13, 2013; (2) seven of twelve call stations had flagging but no indication that visit 4 was conducted; (3) the contracting officer's representative requested that the contractor provide GPS coordinates on July 16, 2013; and (4) the Government found discrepancies and inaccuracies between the contractor's data sheets and the field data, namely on three occasions call stations were surveyed twice per visit although the protocol required that seven days elapse between visits. Exhibit 129 at 1-2. The findings continue:

The issues listed above were not addressed in the Contractor's response to the Show Cause Notice in a manner that demonstrated that he would perform in accordance with the statement of work for the remainder of the contract period of performance. The Contractor's interpretation of the U.S. Department of Agriculture (USDA), Forest Service Indefinite Delivery, Indefinite Quantity (IDIQ) Contract . . . continues to be different from the contract and Task Order requirements that have been highlighted in numerous non-compliance e-mails from the Contracting Officer Representative (COR). The Contractor continues

to differ on interpretation of wording between Call Points and Track Logs, among other verbiage, and the need for BLM versions.

[The contractor's] reason for the GPS readings being different from BLM Inspectors was due to a question of accuracy of the readings in the northern hemisphere. The Contractor's response concluded that the terrain did not accurately allow for the determination of the Call Points. The Government determined this response to be inexcusable.

[The contractor] also addressed flagging, and stated that the terrain was too steep and too deep for the flags to be found easily. The Contractor continued to assert that flagging was removed by cattle, deer, weather, and people after being placed in the appropriate locations. The Contractor provided an alternative to the flags being currently used, and proposed the option to utilize more sturdy flags in the future. The Government determined this response to be unacceptable.

Exhibit 129 at 2-3. The contracting officer made the determination that the contractor did not provide an acceptable response to the show cause notice that would demonstrate an allowable excuse for the unsatisfactory performance. "The Contractor failed to perform the provisions of the contract and has not completed the contract according to the IDIQ contract specifications." Exhibit 129 at 3.

40. On March 14, 2014, the contractor informed the agency that it had staffed a crew and would begin visit 7 spotted owl surveys on March 15. The contractor identified changes it would make in flagging and signatures, and specified that it "will GPS ALL of the call stations on EACH visit, as it did on visit 6 the previous year, and submit a shapefile and other file types after completing a visit to a given survey area. Exhibit 30.

41. On March 15, 2014, the contracting officer issued a unilateral contract modification terminating for default the task order for failure to perform the provisions of the contract. The default was effective immediately, with the notification that the agency shall not be liable for any amount of supplies or services not accepted and the contractor shall be liable for any and all rights and remedies provided by law, including excess procurement costs. The certified mail receipt is marked "return to sender/refused/unable to forward." Exhibit 33.

42. On March 20, 2014, the contractor e-mailed the agency, the message beginning with "Seriously -- you wait until we (KWR) begins its second year of surveys while we are out of cell range to tell us that the contract was terminated?" Further on,

I am VERY EASY to work with typically. But not if I'm treated unprofessionally and with NO dignity and am ignored, which all were the case both last summer and through the winter and now into spring. Now you have managed to frustrate a very friendly, highly reputable company (we are a GSA schedule, highly vetted 899 schedule environmental consultant). As our recent response to your very-tardy response to our September 30 response to your completely unnecessary "cure notice" AND our recent "bend over backwards to appease you" e-mail both show, KWR is more than willing to work with ANY entity to make a contract happen. But you didn't even give either party the opportunity to make that happen last summer - when this easily could have been remedied with a simple 15 minute phone conference.

....

Bottom line -- for you to Default a contract that was going smooth by trusting the decision making of an extremely inexperienced COR biologist over a very seasoned US Fish and Wildlife Certified Spotted Owl Expert is simply absurd -- especially without AT LEAST CONFERRING WITH THE CONTRACTOR before making your hasty, ONE-SIDED decisions you did last summer (belatedly, after the summer survey was already over also). But 14 flags not found out of 900 is 99% of flagging found is EXCELLENT and is not and will not ever be a reason for Defaulting a contract. Give me a break. NOR is concurring with a rash COR regarding his made up interpretation of a GPSing requirement HALF WAY through the field season last season (he didn't even bring it up until visit 4 of 6) -- and then going along with that decision that was not discussed at EITHER pre-work meeting -- as being "LAW" mid way through the field season, when the contractor wasn't even equipped to complete that work -- is SUPREMELY ABSURD.

You have never given me the chance to show how reasonable we are. It has not been possible because you basically did NOT communicate with us at all last summer on this matter when this matter was VERY EASY to remedy.

Exhibit 132 (names omitted). In this message, the contractor also referenced the pre-work meeting with the Forest Service and the contractor's performance under task orders under that contract, and opined on what the Forest Service contracting officer would have required under the contract.

43. On March 21, 2014, the Board received the contractor's notice of appeal contesting the termination for default. Although the contractor seeks payment for work performed prior to its learning of the termination for default, the contractor has not demonstrated that it filed a claim for payment.

Discussion

The contractor disputes the termination for default. The agency bears the initial burden of proof to demonstrate that the default is justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *MLJ Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935. "A breach is material when it relates to a matter of vital importance, or goes to the essence of the contract." *Kiewit-Turner, A Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 15-1 BCA ¶ 35,820, at 175,175 (2014); *Platinum Logistic Services Co.*, ASBCA 57965, 13 BCA ¶ 35,392 (based upon repeated instances of non-compliance, the agency would have been justified in terminating the contract for default; the contracting officer exercised restraint, giving the contractor the opportunity to comply).

In support of its termination for default determination, the agency identifies four categories of the contractor's failures to comply with contract requirements: (1) failure to provide GPS data pursuant to the contract; (2) failure to mark call points with flagging and to mark flagging with date, time, and surveyor's initials; (3) failure to meet requirement for six-hour follow-up surveys; and (4) failure to make three complete visits by June 30. Agency's Closing Brief at 4-10. Further, the agency relies upon the contractor's failure or inability to cure items identified in the cure notice and notice to show cause.

The contract required the contractor to (1) establish call points and routes on the ground, (2) provide locations with GPS information for all survey stations and detections, (3) mark flagging for each visit, and (4) conduct a follow-up survey for a minimum of six hours. Finding 5. The agency had the right to inspect and test all services: "Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires." "The Government has the right to inspect and test all services called for by the contract[.]" Finding 6. The contractor committed to using GPS tracking technology and making the GPS data available to the agency, upon request. Findings 11, 12. The record indicates that these requirements were made applicable to this task order. Finding 14. The contract permitted the agency to issue a termination for default based upon the contractor's repeated failure to perform at an acceptable level or failure to ensure future performance in conformity with contract requirements, or, under the Default clause, for failure to perform within a cure period after receipt of a notice of the failure. Findings 6, 8-10.

This contractor failed to provide GPS information regarding the locations of the call stations and its survey back-up data largely until visits 5 and 6. The agency sought this data as permitted under the contract. Lacking this data, the agency was deprived of the benefits of verifying the contractor's quality control, Findings 11-12. The agency could not ensure that the survey visits were appropriately conducted. The lack of information hampered the agency's ability to determine the actual locations of all call stations surveyed by the contractor. The contractor also steadfastly refused to conduct six-hour follow-up surveys. These failures relate to material requirements of the contract. The six-hour surveys relate to time commitments of the contractor to perform and the opportunity to gather information about owls. What is particularly material is the contractor's steadfast refusal to perform in accordance with these contract requirements concerning GPS information of actual call station locations (an initial refusal) and six-hour follow-ups (a total refusal). By not performing fully, the contractor affected the administration of the contract and the quality of the results.

Relating to these matters, in its final brief, the contractor encapsulates some of the friction that existed between the contractor's owner and the agency and is apparent in the findings:

Finally--[the contractor] found ALL of the owls and protected activity centers that are out in all three survey areas. THIS is the bottom line--did the contractor find the owls? Yes, he did. And this is also on the record. This business of arguing over the minutia of the protocol is simply absurd--and cost [the contractor] all kinds of extra time spent, which again is discussed below further.

....

Finally, the gall that the [agency] has to question a US Fish and Wildlife Certified Spotted Owl Expert . . . in with regards to the interpretation of Northern Spotted Owl Protocol procedures, is simply short-sighted, disallowing, and unprofessional of an industry expert in the field. And to carry it to the end, not even listening to the expert['s] opinion and sticking to the wrongly stated contract specifications when other **adjacent BLM Resource Area contracts (Klamath Falls, Coos Bay)** actually state **“four hour follow up”** surveys, versus six, shows the COR's rigidity and lack of seeking out second opinions or corroboration of the Spotted Owl Expert['s] knowledge.

Contractor's Final Brief at 3, 6.

The expertise of the contractor's owner does not reflect expertise in contract interpretation or guarantee that performance will satisfy particular requirements of a protocol or any contract or task order. The expertise of the contractor does not place the contractor above the contract or shield the contractor from oversight. The agency has a right, if not an obligation, to ensure that surveys are conducted pursuant to the terms and conditions of the contract. While the contractor points out that it was successful in finding owls, that aspect of performance was only one portion of the contract; the contractor was also required to take steps during the survey process in accordance with the requirements of the contract and protocol. That is, the contractor had to conduct six-hour follow-up surveys, as required, and ensure with GPS support the locations of the call stations. The agency continually sought to ensure that the contractor so performed. That other contracts specified a four-hour follow-up does not alter the express language of this contract. Any agency gets to choose its requirements; here, there was no objection prior to award. A contractor cannot reduce its obligations because it concludes that requirements are inappropriate or unnecessary.

The failures by the contractor to conduct six-hour, not four-hour, follow-up surveys and to timely provide GPS call station and survey location information constituted material breaches by the contractor. The agency gave the contractor sufficient warning of its intent to require the six-hour follow-up surveys and to require the GPS information such that it could appropriately perform inspections and ensure that surveys complied with contract requirements. The agency has established material breaches by the contractor, justifying the termination for default.

The contractor maintains that the contract should not be defaulted for the violations asserted by the agency; the contractor bears the burden to show excusable causes. The record reveals no basis to excuse the contractor from performing the explicit contract requirements relating to six-hour follow-up surveys and providing GPS information for the locations of call stations and the surveys. Those failures, without an excusable basis for non-performance, here support the termination for default.

The contractor is correct that the lack of flagging and failure to complete three visits by June 30 do not serve to justify the default. With performance on-going, through the first four visits the agency informed the contractor that payment would be made only for locations for which proof of a survey existed. Findings 16-17, 19. Proof could be the actual flag or GPS information. The agency did not tell the contractor that the contract would be terminated for default if proof was not provided; rather, the language simply stated that deductions would be made, consistent with the Inspections clause, Finding 6. Further, the agency cannot rely upon the contracting officer's representative's writing that no less than 98% of flagging must be found. Finding 17. The contract did not contain a quantitative requirement for acceptability. The representative lacked the authority to change the

requirements of the contract. The contracting officer did not incorporate the language into a change order.

The contractor is correct that, by itself, an inspector's stating that flagging was not found does not demonstrate the contractor's failure to conduct a survey at a given call station. Through no fault of a contractor, flagging can be removed (by human, other animal, machine, weather, or otherwise), even if properly placed. The agency has offered no specifics regarding its inspections; there is no GPS data to verify the locations of the inspectors, or details of the inspections. What is material is that the bases for default go beyond the lack of flagging: the contractor failed to provide evidence beyond the say-so of its owner that it was conducting surveys at the specific locations. Some flagging identified fewer than all visits. This suggests that the contractor did not survey at the given location for visits not identified on the flagging. The contractor has not provided the GPS support which should have been available under the contract and pursuant to the quality control promised by the contractor. Such information, under the contractor's control and sought by the agency, would have been useful to demonstrate that the contractor properly conducted each survey. The agency reasonably concluded that some locations had not been surveyed on some visits. This justifies the non-payment for locations without marked flagging for a given visit.

The agency faults the contractor for not finishing three complete visits by June 30. The record does not support the agency on this point as a basis for default. The protocol states that three visits "should be" completed by the end of June. Finding 4. The record does not demonstrate that the protocol and contract required the agency to exclude any further surveys by the contractor to complete any irregularities identified by the agency, even if accomplished after June 30.

The contractor also raises the lack of in-person or telephone discussions with a contracting officer's representative and the contracting officer. The limited contact with the contractor does not invalidate the actions of the agency. The agency was clear throughout the period of performance that it required the contractor to comply with the terms and conditions of the agreement. The contractor offered a different view of its obligations; however, the agency was reasonable in insisting upon compliance with the terms of the task order contract. The limited communications did not alter that clear message. That is, the use of email, as opposed to in-person or telephone conversations, to address concerns of the contractor did not excuse the contractor from fulfilling contractual obligations. Similarly, the pre-work meeting attended by the Forest Service and the contractor and the contractor's performance under separate task orders issued by the Forest Service under the contract do not impact the contractor's obligations under the task order here at issue. Those incidents do not impede the agency from enforcing provisions of the task order contract. Moreover, despite the contractor's oft-repeated assertions that BLM's actions were inconsistent with

what the Forest Service contracting officer had discussed during a pre-work meeting, that contracting officer informed the contractor that BLM was properly administering the contract, thereby discounting the import of the contractor's contentions.

The contractor has not established the existence of an excusable basis for non-compliance. The contractor failed to provide the bargained-for performance with respect to follow-up surveys, GPS data, and quality control support information. The contractor's lapses were material to the contract, given that the quality assurance promised by the contractor and not provided affects the integrity of the related surveys and resulted in the agency's expenditure of additional time and money in administering the contract. The agency, which did not obtain complete surveys of all call stations it sought, was faced with a contractor who unreasonably insisted upon an incorrect interpretation of contract provisions. The contract was clear on these requirements.

In summary, the termination for default is supported by the contractor's failure to perform six-hour follow-up surveys and its failure to provide GPS location data as required by the contract and the quality control plan within the contract. The contractor's failure to perform was not excusable; the ill-informed understanding of the contractor's owner/expert regarding its obligations under the contract are not here mitigating factors when the agency consistently required compliance.

Further payment to the contractor

The contractor also seeks to be paid for work performed prior to the termination for default, for visit 7, Findings 40-42, and for the entire 2014 project year. Based upon the existing record, a sum certain claim has not been presented to the contracting officer. The contractor sought payment in its complaint and final brief. However, lacking a claim to the contracting officer, there is no valid claim for the Board to resolve for work performed. 41 U.S.C. § 7103 (2012). Any future claim for relief for work performed, but uncompensated, will have to be made consistent with the Termination for Default clause or otherwise.

A few comments on the dissent

The majority has read the same record as the dissent. The Board reviews a contracting officer's decision on a de novo basis. Unlike the dissent, the majority concludes that the contractor's failure to perform six-hour follow-up surveys and failure to provide GPS data for actual survey locations constituted breaches of the contract that support the default. The express language of the contract dictated the six-hour requirement. The agency highlighted the need for the contractor to comply upon review of information from visit 3 and subsequent visits. Despite hoping to engage in a discussion on this matter, the contractor never

conducted a six-hour follow-up, insisting that its four-hour follow-up sufficed. The cure notice identified the inadequate (too short) follow-ups as items that could not be cured. The contractor did not state that it would comply with the requirement. The failure and refusal to comply with the requirement justified the default and offers an explanation for what might otherwise seem to be a premature determination to default. Such a default is fully consistent with the Unsatisfactory Performance clause, E-5.

Particularly in a situation when flagging was not always found and the contractor was providing verbal assurances, but not proof, of surveys, the agency wanted assurances that the surveyors were surveying correct locations. The agency and contractor knew the GPS coordinates of each survey station identified by the agency; this knowledge does not reveal the actual survey locations and GPS coordinates selected by the contractor. The contract required the contractor to collect GPS data on survey locations and make it available to the agency upon request. “The contractor shall establish call points and routes on the ground.” “The contractor shall provide location UTM’s collected with a GPS unit . . . for all survey stations and detections.” “Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance[.]” “The Government has the right to inspect and test all services called for by the contract[.]” The contractor’s inspection and quality control commitments further obligated the contractor to collect and provide the GPS information upon request. The contractor assured the agency that it would utilize a tracking system that verified that surveyors were physically at each station they reported while indicating the employee’s geographic location on the ground. The agency had a right to request surveying data for each survey. The contractor’s refusal to provide the data, which would have enabled the agency to determine actual survey locations for each visit, was a contractor material breach of the terms and conditions of the contract that supported the default.

Decision

The Board **DENIES** the appeal; the termination for default is upheld.

JOSEPH A. VERGILIO
Board Judge

I concur:

STEPHEN M. DANIELS
Board Judge

ZISCHKAU, Board Judge, dissenting.

I cannot agree with the panel majority's conclusion to sustain a termination for default here. Without any analysis of the key language of the contract specifications, or of the default notice, the panel majority simply adopts the contracting officer's conclusory and erroneous position that the contractor (KWR) was required to provide "Garmin GPS tracks for call points for visits 1-5." The contract clearly did not require the contractor to provide Garmin GPS "tracks" for visits 1-5, and the CO and COR showed by their actions (and inactions) during the relevant contract performance period that the contractor was *not* required to provide Garmin GPS "tracks." Moreover, KWR had performed this same type of work for the Department of Agriculture's Forest Service (different COs and CORs from the Department of the Interior's Bureau of Land Management CO and COR handling the task order here) from 2008-2011, with essentially the same contract specifications, and the Forest Service had never interpreted the specifications as requiring KWR to provide GPS "tracks" for every call station visit. All of the pertinent terms and conditions at issue here come from the Forest Service IDIQ contract, not the BLM task order.

The CO lists two other supporting grounds in the default notice but the panel majority agrees that those grounds cannot support the default here. The majority cites a fourth ground, failure of the contractor in several instances to conduct six-hour follow-up survey visits rather than four-hour follow-up visits after detection of an owl, but this ground is nowhere to be found in the default notice. The panel does not offer a reasonable interpretation of the follow-up survey requirements because it ignores section 6 of the contract protocol that provides for follow-up searches up to "several hours, depending on the terrain." Additionally, the CO waived default on this basis by accepting and paying for the follow-up surveys for visits 1-6, and KWR offered a reasonable approach to satisfying the follow-up survey requirements which was ignored by the CO.

The record shows that the CO did not exercise reasoned discretion in her default actions, and in fact, had made up her mind to default KWR *fifteen days before* she even issued a cure notice to KWR and over *five months before* she issued the show cause notice. Accordingly, the default termination cannot be sustained and must be converted to one for the convenience of the Government.

To understand the dispute as to whether KWR was required to provide "Garmin GPS tracks" for each call station for visits 1-5, some background is needed. A "visit" refers to the contractor surveying the 150 call stations identified by UTM coordinates and on maps provided by BLM to KWR prior to the beginning of performance. During the first season of performance (April to August 2013), KWR was to conduct six separate visits of the 150 call stations identified by BLM. For the Northern Spotted Owl portion of the Forest Service's

February 8, 2012, IDIQ contract, the contractor was to conduct field surveys to locate these owls, and identify pair status and nesting activities. The IDIQ contract states in the notes for section B that “delivery orders and maps for survey areas will be issued as actual survey units are identified.” BLM issued a task order (dated September 18, 2012), under the Forest Service IDIQ contract, that shows an estimated start of work on March 1, 2013, and a completion date of August 31, 2014. Amendment 1 of the BLM task order increased the number of call station surveys from 900 (6 visits x 150 call stations per visit) to 1800 (12 visits), and decreased follow-up surveys and other activities.

In the amendment, the agency provided GPS coordinates and maps identifying the precise locations of the 150 call stations which the contractor was to visit. This was not the first time for a contractor to survey this forest area for owls. In fact, this surveying activity had been ongoing in prior years and the contractor’s surveyors would be working on “established survey routes.” In addition, the agency would provide, as government furnished property, the prior contractors’ deliverables, namely the survey reports and field forms generated during previous survey contracts. These reports would indicate the call stations by an alpha numeric label (e.g., “MA77”) and show survey results including the visual or audible identification of an owl, as well as pairing and nesting information collected by surveyors during prior contracts for this same type of survey work. Visit 1 was conducted in April 2013, visit 2 in May, visit 3 in June, visit 4 in July, and visits 5 and 6 in August.

Here is what the CO says in her September 25, 2013, cure notice about the alleged requirement for the contractor to provide “Garmin GPS tracks” (emphasis added):

Conditions to be Cured:

1. Contractor to provide Garmin GPS tracks for the call points for visits 1-5 as outlined in Contractor’s Quality Control Plan and Forest Service Contract AG-04N7-C-120011C-3, B-6. Data needs to be provided for those visits.
2. Contractor was asked for coordinates (GPS tracks) on 13 Jun 2013 for missing flagging stations. The coordinates were not provided. AG-04N7-C-120011C3, B-6. Data needs to be provided for those visits.

Cure notice item 1’s reference to “GPS tracks” may refer only to GPS “coordinates” as suggested by the first sentence of item 2. While it appears that the COR at least orally had started to demand after visit 6 that KWR provide KWR’s own GPS track log electronic files, the CO in the cure notice seems to limit her demand to GPS/UTM coordinates for the call stations. GPS/UTM coordinates, GPS track log electronic files, and GPS track log maps are distinct from each other. The contract specification provision cited by the CO, section C-3,

subpart B-6, is part of subsection B (“Spotted Owl”), which reads as follows (emphasis added):

B. Spotted Owl

Areas shall be surveyed for Northern Spotted Owls in strict compliance with techniques detailed in “Protocol for Surveying Proposed Management Activities that may impact Northern Spotted Owls” February 2, 2011. All surveys include but are not limited to the following:

- 1) Both night[t]ime and daytime surveys may be conducted. . . .
- 2) Spot calling as defined in protocols shall be used.
- 3) Surveys shall be conducted by use of high quality digital callers with well recorded spotted owl calls.
- 4) The entire survey area shall be “covered” (as defined in the protocols).
- 5) Maps provided may include tentative call point locations and routes. The contractor shall establish call points and routes on the ground.
- 6) The Contractor shall provide location UTMs collected with a GPS unit capable of 15 meter accuracy in NAD 1983 datum for all survey stations and detections.
- 7) Call points shall be marked with white flagging and reflective tape.
- 8) Date, military time and surveyors initials shall be marked on flagging each visit. Indelible ink (permanent) shall be used to mark flagging.

Sections C-4 (Contractor Responsibilities) and C-5 (Progress Reports) identify the deliverables the contractor was to provide at the end of each survey visit. The deliverables are stated as: “Field visit forms (including map showing stations and/or transects and detections/responses) and follow up (and/or nest tree) forms where appropriate shall be completed in their entirety for each survey.” There is no mention of “Garmin GPS tracks,” UTM coordinates, GPS track logging files, or GPS track logging maps.

In responding to the CO’s cure notice allegation that KWR was required to provide “Garmin GPS tracks for the call points for visits 1-5,” KWR stated that section C-3 subpart B-6 says nothing about requiring the contractor to provide GPS track log electronic files.

Second, KWR stated that the requirement to provide location UTM coordinates for call stations was meant only in cases where the initial agency-furnished maps provided only *tentative* call stations and routes as stated in subpart B-5. Here, BLM admits it “already had chosen the call [station] points and has maps and GPS coordinates for the call points it desires to be surveyed” and that “BLM asked contractor to provide updated GPS data if he needs to call points at slightly different locations.” BLM’s government-furnished maps and UTM coordinates were not tentative but well known and established based on prior surveys in prior years. This interpretation of section C-3 subparts B-5 and B-6 was also consistent with the understanding of the Forest Service in KWR’s prior contracts in 2008-2011 regarding surveys in the same forest. And there is no evidence in the record that the CO and COR for this BLM task order understood the IDIQ contract specifications as requiring the contractor to provide location UTM coordinates for all call stations for visits 1-5, at least until the cure notice was issued on September 25, 2013, well after survey visits 1-6 were completed.

Contemporaneous communications from the COR (the CO was never heard from until the cure notice) from the beginning of performance through the end of visit 4 entirely contradict BLM’s cure notice position. Near the very beginning of contract performance, in an April 30, 2013, email reply to KWR after KWR had completed the surveys of all 150 call stations in visit 1, the COR states: “Please also let us know if you have had to place any call stations in slightly different locations than what our maps have shown. That will help us find your flags more easily. Please write down those UTM coordinates during your second visits if there are any cases like that.” This statement from the COR supports the understanding of KWR that the UTM coordinates were to be provided only if there were any changes to the agency’s pre-determined locations of the call stations.

The souring of the relationship between the COR and KWR’s owner resulted from the fact that the BLM inspectors, who would go into the forest to audit some of the call stations during each visit to look for the flagging that *was contractually required* by subparts B-7 and B-8, would be unable to find a few of the flags. For four of the call stations during visit 1 (April 2013), the inspector could not find flagging. KWR provided a track log map for the most difficult of the hike-in stations. The COR responded by thanking KWR for the map, stating he would “like to continue to receive those” (although a month later he told KWR he did not want the track log maps any longer). Neither the COR nor the CO demanded from KWR “Garmin GPS tracks,” GPS track log electronic files, or the UTM coordinates for the 150 call stations of visit 1. KWR provided the contractually required deliverables, and KWR’s visit 1 work was accepted and paid for by BLM.

For visit 2 (May 2013), BLM inspectors found no flagging at six call stations but concluded that KWR’s work was generally acceptable. The missing flags, however,

prompted the COR to write to KWR stating that BLM was “going to need to find 98 to 100 percent of your flagging for each visit” and that if lack of flagging continues to be a problem “you will be required to redo the survey visits.” The COR further stated that “the contract specifies that flagging is required at each call station with date, military time, and initials (section C-3, B-7 and 8)” and that KWR had not been writing times on its flags. The COR added (emphasis added): “If you are still convinced that someone or something is tearing down your flagging right after your survey visits, one way you can reassure us of your efforts is to keep a GPS track log of your surveys and send us the original GPS track log or sharpfile for each visit. A [track log] map of them will not be acceptable since that is too easy to create in GIS by hand.” The COR did not take the position that the contract required KWR to provide “Garmin GPS tracks,” GPS track log electronic files, and UTM coordinates for the 150 call stations for visit 2. The COR *only* referenced the contract requirement relating to *flagging* the call stations. KWR provided the visit 2 deliverables, and KWR’s visit 2 work was accepted and paid for by BLM.

For visit 3 (June 2013), the COR notified KWR that seven call stations lacked visit 3 flagging, and that if KWR did not produce additional evidence that it surveyed those seven call stations, KWR would not be paid for them. The COR stated (emphasis added):

Unfortunately, finding and reading your call station flagging out there is the evidence that we will have to rely on to know you have called those stations. . . . If you want to provide us with additional evidence that you have called each station, that is up to you, but the contract specifies that there needs to be flagging with visit number, date, initials and survey time. For visits three through six, you will only get paid for the call stations that you show evidence as surveying.

BLM deducted from KWR’s payment the amounts for the seven call stations without flagging. As was the case for visits 1 and 2, the COR cites to the contract requirement for *flagging*. Neither he nor the CO took the position that the contract required KWR to provide “Garmin GPS tracks,” GPS track log electronic files, or UTM coordinates for the 150 call stations for visit 3. BLM made no demand for “Garmin GPS tracks,” GPS track log files, or UTM coordinates for the visit 3 call stations. KWR provided the visit 3 deliverables, and KWR’s visit 3 work was accepted and paid for by BLM with a deduction for the seven call stations for which flagging was not located. Neither the CO nor the COR demanded that KWR go back and re-survey the seven call stations for which no visit 3 flagging was found. BLM elected to deduct payment for those stations as its remedy.

After the visit 4 surveys (July 2013) and inspections, the COR notified KWR that there were no notations of visit 4 surveys being done at another seven call stations, and that

if KWR plans to invoice BLM for those seven locations, “you will need to go back and survey them.” The COR adds that “if you have done these call stations in slightly different locations . . . please provide for me the new coordinates. Otherwise, I will assume they were not surveyed.” In a July 16, 2013, response, KWR volunteered for visits 5 and 6 to take a GPS reading “at most of the off road call points where we get good GPS signal” and “take a photo of the GPS point/time location or if we have time we can send those points in a sharp file to you.” For visit 4, the COR again did not take the position that the contract required KWR to provide “Garmin GPS tracks,” GPS track log files, or UTM coordinates for the 150 call stations for visit 4, and the COR did not demand any of these from KWR. KWR provided the visit 4 deliverables, and BLM accepted and paid KWR for surveying all 150 stations for visit 4.

In a July 30 email message, the COR told KWR: “Please plan to record your GPS coordinates at all your call stations and spotted owl locations for visits 5 and 6. Section C-3, B., #6 states: ‘The contractor shall provide location UTMs collected with a GPS unit capable of 15 meter accuracy in NAD 1983 datum for all survey stations and detections.’” KWR responded the same day stating, correctly, that the intent of the cited B-6 provision is that the contractor is to provide the GPS coordinates of call stations “only if [the contractor has] to relocate a call point,” but here “the GPS coordinates are already known for each call point.” At the pre-work meeting before performance began, BLM affirmed this same understanding. KWR reiterated its offer “over and above the scope of the contract” to provide GPS locations of the off-road call points, and stated that it would have increased its bid price if providing GPS data for every call station for every visit had been a part of the contract requirements.

In an August 7 email message from KWR to the Forest Service CO, KWR’s owner notes that he spoke with the Forest Service drafter of the specifications who confirmed that GPS track log electronic files were not required submissions by the contractor. KWR’s owner noted that the BLM COR “suddenly wanted GPS track log [files] themselves for each point submitted after visit 4 (didn’t even mention it before that on visits 1 thru 4). So I again had to explain to him that that is not required.” There is no indication in the record that the Forest Service CO responded to KWR.

On August 12, KWR’s owner provided to BLM a track log electronic file of his own call station surveys during visit 5, as a good faith gesture, noting it was not required by the contract. The KWR owner stated that this GPS track logging consumed several hours of additional field and office work to do the data processing which he had not included in his bid. He also noted that due to the rock cliffs and terrain, he could not get a good GPS signal at several locations. BLM inspectors found the surveys during visit 5 to be acceptable. On August 17, KWR’s owner submitted track log files and track log maps for the hike-in call points relating to visit 5, and noted numerous visit 5 call stations where flagging was

observed being eaten or having been removed by grazing cattle. The COR responded, thanking KWR and stating: “We received your email and data.” KWR provided the visit 5 deliverables, and BLM paid KWR’s invoice for the visit 5 survey of the 150 call stations.

Regarding visit 6, which was to take place in the second half of August 2013, the COR transmitted a CO partial suspension of work for seventeen call stations due to an unavoidable closing of a road on August 19 through the end of August. KWR was able to survey the affected call stations prior to the August 19 closures. The COR thanked KWR’s owner for taking that initiative.

On August 20, KWR transmitted to the COR track log files and maps from visit 5 and the first day of visit 6, again noting that this was extra work not required by the contract. KWR also advised that it had previously transmitted pictures of the flags and GPS displays at the call station points.

On September 4, KWR transmitted to the COR the contract deliverables (survey data forms and maps) for all 150 call stations of visit 6, as well as GPS track log files and track log maps for virtually all of the 150 call stations for visit 6, even though KWR notes that the latter were not required by the contract and that KWR incurred additional costs not included in its bid to process the points in the field, process the data in the office, and create the track log files. BLM paid KWR’s invoice for the visit 6 call stations. In a final invoice for retainage covering invoicing on visits 1-6, KWR sought payment for all call stations it surveyed, but BLM continued to require a deduction of seven call stations relating to visit 3 for KWR’s failure to prove that those call stations were surveyed due to a lack of the contractually required flagging.

In a September 10, 2013, email message to the CO, the COR notes that using KWR was not cost-effective due to the number of hours he spent administering the contract and inspectors spent inspecting the work. He asked: “Is it an option to terminate this contract for the convenience of the Government?” In a response twelve minutes later, the CO responds: “Let me get back to you in the morning. We are going to default him.” The cure notice was not issued until September 25, 2013, fifteen days after this email exchange in which the CO tells the COR that “We are going to default him [KWR].”

In the September 25 cure notice, the CO cites as support for requiring KWR to provide “Garmin GPS tracks for the call points for visits 1-5” not only specification section C-3, subpart B-6, but also KWR’s “Quality Control Plan.” But the CO was wrong in concluding that KWR’s quality control plan required KWR to submit to BLM – long after the survey visits were completed, accepted, and paid for – “Garmin GPS tracks” for those visits. KWR’s quality control plan states that the KWR supervisor will make “routine survey

checks” “using GPS tracking (track log, or waypoint/timestamp tracking) to assure presence at the calling station.” This KWR *internal* monitoring for quality control as stated in the quality control plan “will capture only [a] small portion of the crew’s activities” and “[t]rack logging will be conducted at least once per week and will be focused in the more difficult to access survey areas.” Not only is KWR’s reading of this language as not requiring it to provide GPS track log electronic files to the agency entirely reasonable, BLM’s contrary and after-the-fact interpretation – that KWR undertook in its quality control plan to conduct track logging at every call station for every visit and to provide to BLM its track logging electronic files from every call station for every visit – is clearly erroneous. If the CO wanted to receive GPS track logging files for every call station for every visit, she could have issued a change order to the contract requiring KWR to do just that. The CO, however, did not do so.

Moreover, in connection with visits 5 and 6, KWR provided to the agency the GPS/UTM coordinates for all call stations for which it was able to obtain a GPS signal, even though no reasonable reading of the contract required it to do that. It is clear that the Forest Service knew how to specify a requirement for “each visit” in its IDIQ contract. And, it did so for the call station flagging requirement – section C-3, subpart B-8 states: “Date, military time and surveyors initials shall be marked on flagging each visit.” That “each visit” language is missing in subparts B-5 and B-6 and that is precisely because the requirements of B-5 and B-6 were consistently understood by the Forest Service, BLM, and KWR as referring to a situation where the contractor was going to establish call points at the beginning of contract performance, not the situation here where BLM defined the location of the call stations and required updated UTM coordinates for a call station *only if* the contractor concluded that a call station should be moved to a slightly different location. BLM simply changed its position when the CO issued the cure notice on September 25, 2013. The cure notice was issued as a pretext for defaulting KWR, because the CO had decided to default KWR fifteen days earlier.

The panel majority also neglects to analyze IDIQ contract section E-5, which requires the agency to “immediately notify the Contractor in writing and order improvement of the quality of future work” and that “if the quality of future work is not raised to a satisfactory level within two consecutive workdays after receipt of notice in writing” then the agency may consider terminating the contractor’s right to proceed. Here, the CO never timely notified KWR that the “Garmin GPS tracks,” Garmin GPS track log electronic files, GPS track log maps, or UTM coordinates were required by the contract for every call station for every visit. The first notice from the CO came in the September 25, 2013, cure notice. BLM could not default KWR for failing to provide any of this data for visits 1-5 because BLM never timely notified KWR that it believed these to be contractually required at the time the work was performed. The contract’s “immediate” notification requirement and the “two consecutive workday” agency monitoring were necessary for this type of contract work because the owl

surveys and follow-up surveys had to be done within very tight time windows and could not be re-done weeks or months later. The survey season had to end August 31, so no surveying could be done after that point until the next year's season. Here, the COR repeatedly communicated to KWR that it would not be paid for surveys of call stations in visits 1-6 only where contractually required *flagging* could not be found by the BLM inspectors. BLM imposed a remedy in a very few flagging situations by simply deducting payment for call stations that it deemed were not surveyed by KWR. It is unjust (and clearly erroneous) for the BLM CO to have imposed a default remedy after-the-fact when the agency failed to timely notify the contractor of its new (and wrong) interpretation of the contract long after KWR had performed the surveys.

KWR responded to the cure notice by email on September 26 and then in a detailed sixteen-page response dated September 30. The record indicates that the next communication from BLM to KWR was a "show cause notice" dated February 18, 2014, over four-and-a-half months after KWR's cure notice response. This show cause notice advises that KWR had "cured" three of the seven items identified in the September 25 cure notice but that four items were not "cured." Three of the four items relate to providing "Garmin GPS tracks" or "coordinates" for each call point for visits 1-5, and the other item relates to BLM deeming KWR as having failed to survey seven call stations during visit 3 due to lack of flagging being found by inspectors and flagging issues during visit 4. The show cause notice also noted that KWR did two follow-up surveys in visits 1 and 3 lasting only four hours rather than six hours. KWR responded on February 28, 2014, raising the same points that it did in its cure notice response: that the contract did not require it to provide GPS tracks/coordinates for every call station for every visit, and that KWR went beyond the contract requirements by providing GPS track logs, track log maps, and GPS coordinates for virtually all stations during visit 6 and many of the difficult hike-in stations during visit 5.

Regarding the length of follow-up surveys issue, KWR previously had responded to the CO that section 6 of the contract protocol identified that follow-up surveys "may take several hours, depending on the terrain" and did not require six-hour follow-ups under the conditions that were present here. Section C-3 subpart B-9 begins by saying that a follow-up "shall be completed as required by protocol" and then adds that the follow-up shall be "conducted for a minimum of 6 hours or until a spotted owl is visually located." The CO's complaint in the show cause notice about two four-hour follow-ups for visit 1 is untimely as that work was accepted and paid for by BLM more than nine months earlier. When the issue was raised again after visit 3, KWR's owner said he would bring another KWR surveyor so that two surveyors could do follow-ups of three hours each to meet the six hours that the COR wanted done, and minimize the harassment to the owls as indicated in the protocol for follow-up surveys. Although the panel majority appears to conclude that this would not

comply with section 6 of the contract protocol and section C-3 subpart B-9, it does not explain why KWR's approach did not reasonably comply with all of those provisions. Nothing in the contract protocol or in B-9 precludes the use of two surveyors.

The panel's conclusion, that KWR violated the contract, focuses only on C-3 subpart B-9, and fails to harmonize the six-hour minimum provision with contract protocol section 6 that provides that follow-up surveys may take up to "several hours, depending on the terrain." The "several hours" and "depending on the terrain" language must be taken into account, so a rule of reasonableness must be considered for assessing the length of follow-up survey work. The CO did not consider those factors, but on the other hand, she did not even predicate her default on the follow-up surveys. Although KWR's owner stated that his four-hour follow-ups were reasonable and in accord with the industry standard by surveyors under the contract protocol, there was no refusal by KWR to conduct a follow-up of six hours if that was required under the circumstances, and he proposed using two persons for future follow-up surveys. By waiting until after all the visit 1-6 follow-up surveys were completed to serve KWR with the noncompliance notice, and accepting and paying for the follow-up surveys in visits 1-6, the CO waived any right to default KWR on this basis. And in the show cause notice response, KWR stated that it was willing to perform the year 2 survey visits so that "BLM is completely satisfied with KWR's work." There is no indication of an anticipatory repudiation by KWR to warrant default on this basis. Clearly, the CO did not deem the length of follow-up surveys to be a material basis for the default because she entirely omits addressing the issue in the default notice.

The CO defaulted KWR on March 13, 2014, without any analysis of the contract language, disregarding (1) BLM's own failure to provide timely "immediate" notice of any alleged contract violations, (2) BLM's erroneous interpretation that the contract required KWR to provide "Garmin GPS tracks" for visits 1-5, (3) KWR's delivery of the contract deliverables and BLM's acceptance and payment for KWR's work performed during visits 1-6, and (4) KWR's voluntary submission beyond contract requirements of the GPS coordinates for virtually all 150 calling stations by the end of visit 6. The panel majority simply adopts the CO's erroneous conclusions, contrary to the overwhelming evidence of performance in the record, and fails to address the clear evidence that the CO had decided to default KWR fifteen days before issuing the cure notice and more than five months before issuing the show cause notice. For all these reasons, the default termination must be overturned. The CO's default termination was not an exercise of reasoned discretion; it was an abuse of discretion.

JONATHAN D. ZISCHKAU
Board Judge