



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 5, 2011

CBCA 2008, 2204

LIVING TREE CARE INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Phil Berwick, President of Living Tree Care Inc., Hillsboro, MO, appearing for Appellant.

Ernest J. Walker, Office of the Solicitor, Department of the Interior, Lakewood, CO, counsel for Respondent.

Before Board Judges **STERN**, **BORWICK**, and **DRUMMOND**.

BORWICK, Board Judge.

Appellant, Living Tree Care Inc. (Living Tree), seeks, in two appeals filed with the Board, an equitable adjustment for costs incurred in its contract with the Department of the Interior, National Park Service (respondent or NPS). The contract was for storm cleanup of the forests in the Ozark National Scenic Riverways. For the reasons below, we deny the appeals.

Findings of Fact

Background

General provisions of the Request for Quotations (RFQ)

On May 8, 2009, a storm passed over the Ozark National Scenic Riverways (Ozark Riverways), causing substantial damage to the forest. The NPS issued a request for quotations (RFQ) for cutting and removal of storm-damaged and fallen trees within and adjacent to specified roads and trails of the Ozark Riverways. The NPS divided the project into three sections -- numbered 1, 2, and 3 -- and estimated that the three sections would be roughly equal in the work required, but warned that actual quantities could differ. Therefore, the RFQ strongly urged all quoters to attend a scheduled site visit before submitting a quote to make their own determination as to the actual work required for each section. The sections covered an approximate area of fifty square miles.

The NPS conducted the site visit on July 1, 2009. At the commencement of the visit, each potential quoter was provided a copy of: (1) the National Geographic Ozark Riverways Trails Illustrated Map (Ozark trails map), which identified access roads, river and trail mileage and trail descriptions, and (2) the "Road List Storm Damage" (the road list), which "list[ed] the specific access roads/respective areas within the three sections that are identified in the Statement of Work [SOW] in need of storm damage clean-up." The list also provided "the estimated distances (length) of each and labels them as either heavily damaged, moderately damaged or lightly damaged." The Ozark trails map was commercially produced and did not show roads by name; rather, it identified roads by an NPS or county road number.

The Ozark trails map did not show the Welch Hospital Road, but the road list, produced by the NPS for this solicitation, did. The road list identified the Welch Hospital Road as: (1) placed in region two, (2) heavily damaged, and (3) approximately one-third of a mile in length.

Appellant's owner testified that the Welch Hospital Road was not visible during the site visit because the beginning of the road was obscured by a wall of brush. An NPS official who developed the contract's SOW, and who walked every road to develop the SOW, testified that the junction of the Welch Hospital Road with the main road was visible.

As a result of the site visit, the NPS issued an amended SOW in the RFQ. Paragraph 3.a of the SOW provided that the contractor “is responsible for identifying all vegetation to cut by the Contractor” and for “cutting all required vegetation [and] removing salvageable materials.” All cut material over ten inches, including logs, firewood, and merchantable pulpwood, became the property of the contractor.

Paragraph 3.b of the SOW provided that any questions regarding the cutting and removal of vegetation should be referred to the contracting officer or his or her designated representative.

Paragraph 3.c of the SOW provided that “portions of storm-damaged trees” that fell onto maintained landscape of developed areas of the park or onto maintained landscapes adjacent to roadway shoulders or trails should be removed from the park and hauled to an approved location outside of the park. There were identical requirements for “portions of storm-damaged trees that were uprooted, damaged and in danger of falling onto maintained areas.”

Paragraph 3.d of the SOW required the contractor “to fall [sic] all severely damaged or hazardous trees to minimize damage to surrounding trees, facilities and landscape features.” Paragraph 3.e of the SOW provided that “all logs and pulpwood shall be loaded and removed from the site.” (Emphasis supplied). Mechanical equipment within the woods was prohibited unless “specifically allowed in writing by the contracting officer.” Instead, trees and timber could be pulled via cables or other means “from a distance not to exceed fifty feet from the edge of the woods.” The cables, winches, and skidders to accomplish this task could be used from road shoulders, fields, or within the edge of the wood line and other areas with the contracting officer’s approval. Material under ten inches in diameter would be left within the woods where it fell, unless chipped and scattered.

Paragraph 3.f provided that access routes for the removal of trees would be “from established existing roadways.” No new access ways were to be constructed. Landings might be identified and approved by the contracting officer to facilitate timber removal and hauling on a limited basis.

Paragraph 5.b provided that if the contractor failed to provide equipment for the satisfactory prosecution of the work, the contracting officer could suspend the work until the equipment had been provided, or could withhold from the contractor any payments that were due.

Paragraph 7.a provided that the contractor shall observe and comply with all federal, state and local laws, park regulations, safety laws, ordinances and regulations in any manner affecting the conduct of the work. Paragraph 7.b required the contractor to procure, at its own expense, all necessary licenses and permits.

Paragraph 8.a of the SOW made the contractor responsible for the preservation from injury or damage of all public or private property resulting from the execution of the work. Paragraph 8.b made the contractor responsible for repair and restoration of any damage to property caused by the execution of the work.

Paragraph 11 of the SOW specified the hours of operation between 6:00 a.m. and 6:00 p.m. Monday through Friday, unless work outside of those hours was approved in advance by the contracting officer.

The time frame for completion was stated in paragraph 12 of the SOW as a maximum of forty-five days from the notice to proceed or a shorter period proposed by the contractor. Pursuant to paragraph 13, partial payment would be made when fifty percent of the work was completed by the contractor and accepted by the contracting officer with final payment upon completion of the work and acceptance. The contractor could decline the partial payment option and choose a lump sum payment after completion and acceptance of the work.

The amended RFQ incorporated an NPS document named the "site visit recap." Paragraph 3 of that document stated that the road list storm damage document, included as attachment 11, "lists the specific access roads/respective areas within the three sections that are identified in the Statement of Work in need of storm damage clean-up."

Question 11 of the site visit recap asked where the fifty-foot boundary--mentioned in paragraph 3.e. of the SOW started. The NPS answered that the fifty-foot boundary started from the edge of the timber, not from the edge of the access road, unless the timber went right up to the access road. Question 13 asked what if a hazardous tree extended beyond fifty feet, but part of it reached into the fifty-foot boundary. The NPS answered that the contractor was required to "go beyond" the fifty foot boundary and remove it. One quoter (question 14) asked if hazardous trees could be salvaged if the hazardous portions were removed. The answer, also incorporated into the solicitation and resulting contract, stated that hazardous trees suffering from loss of crown or limbs were required to be "totally removed." The amended RFQ designated Ms. Katherine Lodgson as the contracting officer.

The RFQ was classified as a commercial item procurement and incorporated the Commercial Items clause 52.212-04 (Mar. 2009) of the Federal Acquisition Regulation. The procurement was a total small business set-aside pursuant to FAR 52.219-06, 48 CFR 52.219-06 (2003)). Total funding was \$80,000.

The quotation and award

Appellant is a highly experienced arborist, but its experience is concentrated in urban environments, caring for trees in city parks. Appellant's owner attended the site visit and was in possession of the road list. He did not, however, rely upon the road list in determining the scope of work that would serve as the basis for the quote. Instead, he relied on the Ozark trails map, although NPS officials told the site-visit attendees to use the road list to estimate the scope of work. Appellant quoted \$75,000 to complete sections one through three with a completion time of thirty-five days. On July 17, 2009, appellant's owner wrote the contracting officer and advised that its quote had been based upon the assumption that appellant could selectively lay trees down on the forest floor if the trees could not be reached by crane from the road. If that were not the case, appellant increased its quote by \$5000.

On July 20, 2009, the contracting officer wrote appellant's owner and explained that the option to lay down vegetation on the forest floor pertained only to brush and materials under ten inches in diameter. That option did not apply to trees over ten inches in diameter. With that understanding, the NPS offered award of the contract for \$80,000 with a forty-five day completion time. Appellant accepted the NPS offer on July 22, 2009.

The awarded contract incorporated twelve attachments, including, but not limited to, the list of equipment that appellant intended to use to perform the work, the site visit recap which included the question and answers resulting from the site visit, the road list, procurement reference information identifying Ms. Katherine Lodgson as the contracting officer, and the correspondence of July 17, 2009, from appellant.

The NPS issued a notice to proceed on July 28, 2009, which was received by appellant on July 29. This would have made the completion date September 12, 2009. Mechanical issues with a piece of appellant's equipment and appellant's desire to coordinate site preparation work with the contracting officer's representative (COR), whom appellant's owner had not yet met, resulted in the contracting officer extending the completion date of the contract to September 17, 2009.

By memorandum of July 27, 2009, the contracting officer designated the contracting officer's representative (COR) with the following responsibilities: (1) to prepare daily diaries for the contracting officer's weekly review; (2) to inspect and reject work and materials; (3) to ensure compliance with technical terms and conditions; (4) to interpret contract terms and specifications where the interpretation does not involve contract cost and time; (5) to monitor delivery of government-furnished property, establish and inventory of such property, prepare site facilities and prepare an inspection report; (6) to prepare and recommend progress payment as the work progressed; (7) to stop work, if, in the COR's opinion, there was a possibility of significant resource damage or if the contractor were operating in an unsafe manner; (8) to enforce safety requirements, (9) to prepare a completion report; (10) to approve or disapprove applicable technical submittals; (11) to evaluate invoices, progress payment requests, and other requests for payment, and to recommend approval or disapproval to the contracting officer; and (12) to verify, if applicable, the return of government-furnished property. As for the COR's fourth responsibility, any disagreements with the contractor over interpretation of contract terms and specifications were to be immediately referred to the contracting officer.

The following duties were reserved to the contracting officer: (1) to make changes to the contract, (2) to terminate the contract in whole or in part, (3) to administer or make decisions concerning any claims under the contract, (4) to suspend work, except in the case of unsafe acts or conditions likely to result in accident or injury.

By memorandum of July 27, the contracting officer also appointed three inspectors to act essentially as the COR's assistants. Their duties were to observe the progress and performance of the contractor and to submit their observations to the contracting officer via the COR. The inspectors were not authorized to discuss, direct, approve, or propose to the contractor any changes that could result in an increase or decrease in the scope of work, price, or terms and conditions of the contract. The inspectors were not authorized to enter into any contractual or binding agreements with the contractor, or to stop the contractor from working, except in case of a safety violation that could result in damage to persons or property.

At the hearing on the merits, the contracting officer testified that she sent the appointment letters to appellant, and appellant's owner states that he was aware of the NPS officials' responsibilities and authorities; specifically, appellant's owner knew that the contracting officer had the final say on interpreting contract terms and conditions and approving of changes. Appellant's owner, however, denies receiving copies of the appointment letters.

On July 29, appellant's owner sent the NPS an e-mail message identifying appellant's work force and describing appellant's work plan. Appellant advised the NPS that he intended to start on the lighter areas first as described in attachment eleven, the road list. Appellant thus would start on the roads of section 3, move to section 1, and finally work on section 2, including the Welch Hospital Road. Appellant's owner testified at the hearing on the merits that his start date was August 3, 2009.

Performance of the work

Work on the alleged missing road

During the first week of work on the contract the COR took appellant's owner on a tour to identify required work. The COR identified the area around the Welch Hospital Road as a work area. According to the COR's testimony, the owner seemed surprised at the requirement. Appellant and its subcontractor started work on the Welch Hospital Road during the week of August 12, 2009. During work on the road, appellant's officials mentioned to the COR the extraordinary amount of work that was necessary, but never claimed that the work was beyond the scope of the contract. The COR acknowledged at the hearing on the merits that the area around the Welch Hospital Road was one of the severely damaged areas, but noted that it was identified as such on the road list.

Work beyond the fifty-foot boundary

Appellant worked with a four-person team and a subcontractor. Appellant's owner testified that he hired the subcontractor to haul logs that appellant's workers had stacked from the forest. Appellant allowed the subcontractor to keep the logs, and the subcontractor's compensation was the salvage value of the logs.

Appellant developed the practice of felling all trees to the ground and then cutting them at the fifty-foot boundary.¹ Appellant's operations manager testified that this continued for three or four days. Appellant's owner remembers the date being August 7, which is consistent with appellant's start date of August 3 and the operations manager's testimony that the practice lasted three or four days.

¹ When working, to mark the fifty-foot boundary, appellant drove stakes, spaced every one hundred feet, fifty feet from the edge of the roads.

On or about August 7, the inspectors reported to the COR that appellant had been cutting fallen trees at the fifty-foot boundary. An inspector had told appellant's operations manager that if a tree standing beyond the fifty-foot boundary had fallen within the fifty-foot boundary then the whole tree would have to be removed. The inspector testified at the hearing that he did not give directions, but urged appellant's operations manager to seek the advice of the COR. Appellant's operations manager testified that he took the inspector's interpretation as directions because "when I have a person standing in front of me . . . and I know there is a chain of command, saying this is what you should be doing, that tells me that's what I need to be doing." The operations manager testified that he felt uncomfortable second-guessing the inspector.

There is a dispute of fact as to whether the inspector gave appellant's operations manager directions as to how to proceed in removing trees beyond the fifty-foot boundary that fell or might fall within the boundary. We find as fact that the inspector acted solely within his designated authority and did not give appellant directions to remove all trees; rather, he urged appellant to consult with the COR and the contracting officer.²

The COR referred the matter to the contracting officer regarding the requirement for removing hazardous and non-hazardous trees standing beyond the fifty-foot boundary. Additionally, appellant's owner called the contracting officer asking her to confirm the inspector's interpretation.

The contracting officer then asked the United States Forest Service (FS) for a definition of "hazardous tree." On August 14, by e-mail message, the contracting officer forwarded to appellant's owner the following definition of "hazardous tree":

A tree is considered hazardous if it has defects that may cause a failure resulting in property damage, personal injury or death. In other words, in order for a tree to be considered hazardous, it must have a structural weakness and something to hit (target) if it falls.

² The presence of such disputed facts caused us before the hearing to reserve ruling on respondent's motion for failure to state a claim upon which relief could be granted. We deny respondent's motion because respondent could not demonstrate that there was no set of facts in support of appellant's claim that would entitle appellant to relief. *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770.

The contracting officer advised appellant that any tree that had already fallen is not considered hazardous. She instructed, however, that when a hazardous tree stands beyond the fifty foot boundary, but part of it is within the fifty-foot boundary, the contractor must go beyond the fifty-foot boundary and remove it. For already fallen trees that extend beyond the fifty-foot boundary, the contractor need only remove that portion of the tree that was within the fifty-foot boundary.

By e-mail message (and attached word document) of August 18, appellant wrote the contracting officer and sought seven working days for alleged “excusable delay.” Appellant maintained that between August 7 and August 14, the inspectors had ordered a change in scope of the contract and that the operations manager and the crew “continued according to the change in scope as directed [by] him in the field.” Appellant stated that it was instructed by the inspectors that any tree lying across the fifty-foot boundary “was ours” and this “was to mean trees already fallen and lying on the ground.” Appellant maintained that the alleged change in scope resulted in “the addition of significantly more work” because it now had to work on that portion of a tree that went beyond the fifty foot boundary. The alleged change in scope caused “extra pulling” and wear on the equipment.

The COR spent a day and a half covering every road that could be covered in that time frame looking for any signs of complete removal of fallen trees that had stood beyond the fifty-foot boundary. The COR could tell whether a fallen tree had been completely removed because such a tree would leave a large hole in the ground caused by the uprooted root ball. In contrast, a tree that had been cut down and removed would have left a stump. He reported to the contracting officer that he could find no instance beyond the fifty-foot boundary where appellant had removed an entire tree.

On August 24, 2009, the contracting officer rejected appellant’s request for additional time because it was the Government’s opinion that no extra work beyond the scope of the contract had been performed.

Alleged extra work on the contract performed by a subcontractor

Appellant performed work on the Welch Hospital Road using its subcontractor. The COR testified that he had a conversation with the subcontractor employee concerning removal of trees beyond the scope of the contract. The COR testified that he described to the contractor employee what trees the subcontractor could take and what trees the subcontractor could not take. The COR denies giving the subcontractor permission to harvest trees or logs that were beyond the scope of the contract. In fact, the subcontractor harvested trees on private property.

Appellant's operations manager, who participated in the conversation, has a different version. He testified that the subcontractor employee saw logs lying on the forest floor and, "seeing dollar signs," asked the COR, in essence, whether the subcontractor could remove them. The operations manager testified that the COR said that he would not miss them, or words to that effect. There is a dispute of fact as to whether the COR gave the subcontractor permission to remove fallen trees that were beyond the scope of the contract. Having observed the demeanor of the witnesses and considered their testimony and the record as a whole, we find as fact that the COR did not grant the subcontractor permission to remove trees beyond the scope of the contract.

The illegal river crossing

On September 19, 2009, appellant was still engaged in contract work. Its subcontractor was at the Jack's Fork River in the Blue Springs area, where there was a legal crossing. According to the COR, appellant's subcontractor asked the COR several days earlier whether he could drive a heavy piece of equipment across the river at the crossing. The COR replied that it was a legal crossing and the COR had no authority to prevent the subcontractor from trying. The COR, however, reminded the subcontractor about the bank across the river that the NPS did not maintain. Photographs of that bank show a highly angled slope of mud and gravel.

On or about September 19, appellant's subcontractor tried to drive a "skidder"-- a heavy piece of equipment -- across the river at that point and got stuck on the opposite slope. The subcontractor then backed across the river, maneuvered the skidder down-river to a shallower point, and crossed about one hundred feet from the legal crossing. That crossing was not legal.³ The skidder made unsightly tire tracks on the bank when it crossed. On September 22, 2009, NPS law-enforcement rangers issued a ticket in the amount of \$175 to appellant's owner, who had accepted responsibility for the matter. The fine was later increased to \$200. Appellant paid the fine and cleaned up the tire tracks that the skidder had made.

Partial payment, assessment of damages, and modification

³ The COR explained that the alternative legal route across the river would have required the subcontractor to load the skidder on a trailer and to drive twenty miles to the next legal crossing.

On or about August 21, 2009, appellant submitted an invoice in the amount of \$40,000 to the NPS. On or about September 4, 2009, the NPS reimbursed appellant but noted that seven roads were yet to be completed.

On September 24, 2009, the contracting officer wrote appellant and stated that while the work was steadily progressing, “due to setbacks you have encountered with equipment, subcontractor (per se) performance and your restoration of impacted resources, the [forty-five] day completion period was unfortunately not met.” The contracting officer proposed to extend the contract date to October 9, but to assess damages of \$125 per day for NPS monitoring costs for each day of delay exceeding the contract completion date. The contracting officer forwarded a modification for the signature of appellant’s owner.

On October 1, 2009, the parties negotiated an arrangement whereby appellant would do additional brush-clearing work in exchange for an extension of the contract completion date without the NPS assessing damages. The bi-lateral modification reads as follows:

This modification is being issued to extend the contract completion date of the contract.

Contractor has not yet completed all work required under this contract, therefore, an extension is granted modifying the completion date to not later than October 23, 2009.

In consideration for this extension, rather than incur a daily assessment for each day past the original completion date of September 17, 2009, the Contracting Officer . . . and the Contractor are in agreement that, at no cost to the Government, the Contractor shall clear and remove the concentrated brush in the areas along the road and campgrounds of Bluff View Road and Blue Spring Road on the Jack’s Fork River.

Contractor understands that there will be no deductions made to the project balance of \$40,000 provided all work is done satisfactorily and accepted as complete by the Government.

On November 11, 2009, appellant submitted his final invoice in the amount of \$40,000 for payment. On November 11, the COR certified that the work was satisfactorily completed. The contracting officer paid the invoice on or about December 1.

The claims

In the meantime, appellant submitted a claim for \$9000 for alleged extra work on Welch Hospital Road to the contracting officer. That claim was denied by the contracting officer on February 3, 2010. On May 6, 2010, appellant filed an appeal at this Board, which was docketed as CBCA 2008.

In that appeal, appellant raised matters that were not submitted to the contracting officer for her decision in the original claim. Consequently, appellant submitted a second claim to the contracting officer. In that claim, appellant sought: (1) \$6000 for work along the Welch Hospital Road, the alleged “missing road”; (2) \$3000 for the extra brush clearing that was the subject of the modification; (3) \$14,000 for extra work allegedly ordered by the COR, performed from August 7 through August 14, on trees that straddled the fifty-foot boundary; (4) extra work and clean-up necessitated by appellant’s subcontractor removing trees without appellant’s permission, but with the permission of the COR and inspectors; and (5) payment of the \$200 fine. By decision of August 26, 2010, the contracting officer denied the claim. On October 29, 2010, appellant submitted an appeal to the Board that was docketed as CBCA 2204.

The appeals were consolidated for hearing and tried in St. Louis, Missouri, on May 17 and 18, 2011. Briefs were submitted on July 8, 2011, with reply briefs submitted on August 8.

Discussion

We first address the NPS’s argument in its brief that the modification settled all of appellant’s claims and that all of appellant’s claims are barred by accord and satisfaction. The NPS is simply wrong; it confuses the doctrine of accord and satisfaction with release. As our appellate authority recently observed, in accord and satisfaction a claim is discharged because some performance other than that which was claimed to be due is accepted as full satisfaction of the claim. A release, in contrast, is a contract whereby a party abandons a claim or relinquishes a right that could be asserted against another. *Holland v. United States*, 621 F.3d 1366, 1377 (Fed. Cir. 2010).

In this matter, it is the NPS which accepted appellant’s additional brush clearing (the accord element) in satisfaction of the NPS claim for damages. In short, the Government extinguished its claim for damages by accepting from appellant the additional brush clearing work. Conversely, only appellant’s claim for damages for the additional brush clearing is discharged by the accord and satisfaction because appellant agreed to perform additional brush clearing, at no cost to the Government, in exchange

for remission of damages and the extension of the contract completion date. The modification does not address appellant's other claims nor does appellant release the Government from any other claims appellant might file in the future. *Cf. Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009) (release of any and all liability barred future claims); *M.A. Mortenson Co.*, ASBCA 53761, 06-1 BCA ¶ 33,180 (claims not barred by accord and satisfaction in change orders absent explicit release of those claims).

The case relied upon by respondent for the proposition that all of appellant's claims are barred is not on point. In *Corners & Edges, Inc. v. Department of Health and Human Services*, CBCA 693, et al., 08-2 BCA ¶ 33,961, we noted that a modification served as an accord and satisfaction as to the subject matter of the modification, in that case a reduction in the scope of work. Thus, in that case all claims arising from a reduction in the scope for work in those appeals were barred. Here, the subjects of the modification were the Government's claim for damages and appellant's extra brush clearing. Since there was no release of appellant's claims, the bar of accord and satisfaction is only applicable to appellant's extra brush work claim. We now consider the merits of appellant's remaining claims.

Claim for work on the alleged missing road

Appellant claims that government-required work on trees along the Welch Hospital Road represented a constructive change to the contract. For appellant to prevail on this claim, it must prove that the NPS directive to remove trees along the Welch Hospital Road represented an ordered change to the contract by an authorized official. *Flink/Vulcan v. United States*, 63 Fed. Cl. 292, 303 (2004) (additional inspection volunteered by contractor, not ordered by Government); *Fire Security Systems, Inc. v. General Services Administration*, GSBCA 12120, et al., 97-2 BCA ¶ 28,994 (GSA insistence on class A wiring for fire alarm system was required and not a change to the contract); *Franklin Pavlov Construction Co.*, HUD BCA 93-C-C13, et al. 94-3 BCA ¶ 27,078 (directive to remove and replace roof sheathing not a change to the contract); *Michael Weller, Inc. v. Office of Navaho and Hopi Indian Relocation*, GSBCA 10627-NHI, et al., 94-2 BCA ¶ 26,849 (extensive repair work not a change to the contract).

In this matter work on the Welch Hospital Road was included in the scope of work of the amended solicitation and the subsequently awarded contract by the site visit recap document and attachment 11 (the road list). Appellant even included work on the Welch Hospital Road on its work plan submitted to the NPS. Appellant, however, argues in its brief that it relied on the commercial map which did not show the Welch Hospital Road:

At each location it was not the road list that we all opened up, and that the inspectors opened up to view and to discuss, it was the [Ozark trails map].

Appellant's Reply Brief at 3. Appellant also argues that the Ozark trails map was the primary guidepost NPS officials used on a daily basis to identify, travel to, and perform work on the roads. *Id.* These arguments are beside the point for determining the contract's scope of work. The contractually relevant material for determining the scope of work, in addition to the scope of work section of the solicitation, was the road list which was incorporated into the amended RFQ and the resulting contract. The road list identified with particularity those roads in each of the three sections "in need of storm damage clean-up," including the Welch Hospital Road. The fact that appellant's workers and NPS officials used a commercial map to find their way during the site visit and during the performance of the work does not alter the scope of work of the contract.

Appellant argues that the Welch Hospital Road was not visible during the site visit. There are disputes of fact about the visibility of the road. The road was visible to government personnel when they developed the SOW; consequently, we find the alleged lack of visibility to be improbable. Nevertheless, even if the road were not visible during the site visit, work adjacent to the road was explicitly included as a contract requirement.

Work beyond the fifty-foot boundary

Paragraph 3.d of the SOW required the contractor "to fall all severely damaged or hazardous trees to minimize damage to surrounding trees, facilities and landscape features." Paragraph 3.e required "all logs . . . [to] be removed from the site." Question and answer 13, incorporated into the solicitation and resulting contract, supplemented the requirement by requiring removal of hazardous trees standing beyond, but extending over, the fifty-foot boundary. Question and answer 14 required unsalvageable hazardous trees to be "totally removed."

Appellant insists in its brief that it could render hazardous trees non-hazardous, such that it needed only cut fallen hazardous trees up to the fifty-foot boundary when those trees stood outside of, but fell across, the fifty-foot boundary. Appellant's Brief at 4; Appellant's Reply Brief at 10. But the contract is clear that such logs and unsalvageable hazardous trees were to be removed. In her e-mail message to the contractor of August 14, stating that appellant need not remove portions of fallen trees that had crossed a fifty-foot boundary, the contracting officer relaxed the requirement for complete removal of such fallen trees. However, the requirement for complete removal of hazardous trees that extended into the fifty-foot boundary remained.

The Government is entitled to strict compliance with the specifications irrespective of whether the contractor believes it has devised a better or more economical way of performing the work. *Teg-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1342 (Fed. Cir. 2006); *Betakut USA Inc. v. General Services Administration*, GSBCA 12512, 94-2 BCA ¶ 26,945; *Sunsav, Inc.*, GSBCA 7523-COM, et al., 86-3 BCA ¶ 19,290. Appellant's claim involves alleged extra work removing standing hazardous trees and fallen trees that extended into the fifty-foot boundary from the edge of the forest. Since removal of standing hazardous trees extending into the fifty-foot boundary was a requirement of the contract, that claim is denied. As far as the removal of fallen trees, NPS officials, after extensive inspection, could not detect from the presence of root ball holes in the ground any fallen trees that had been removed.

The illegal river crossing and the subcontractor's extra work

Paragraph 3.f of the SOW limited the contractor to using established access ways. Appellant was required by paragraph 7 of the SOW to adhere to all the rules and regulations of the NPS. Appellant's subcontractor used an illegal crossing. A prime contractor is responsible for the actions of its subcontractors. *Browne, Inc.*, ASBCA 24434, 80-2 BCA ¶ 14,471. Here, appellant appropriately agreed to restore the area the subcontractor had disturbed because of its illegal activity. While not strictly necessary, appellant's owner agreed to assume responsibility for the fine assessed for the illegal crossing. Appellant cannot recover the fine since reimbursement for fines is an unallowable cost, except when incurred as a result of compliance with specific terms and conditions of the contract. 48 CFR 31.205-15. Here the fine arose out of subcontractor actions that violated the contract.

The claim for the subcontractor's extra work must also be denied for the same reason we deny the illegal crossing claim. We have found as fact that NPS officials did not grant permission for the subcontractor to engage in the unauthorized or extra work. In any event, it was appellant's responsibility, not respondent's, to direct its subcontractor as to the proper scope of contract work. Appellant failed to do so and must bear responsibility for any excess expense it incurred associated with the unauthorized work of its subcontractor.

Decision

For the reasons stated above, the appeals are **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

JAMES L. STERN
Board Judge

JEROME M. DRUMMOND
Board Judge