UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 24, 2012

CBCA 2625

D&M GRADING, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

David R. Simpson, President of D&M Grading, Inc., Richland, OR, appearing for Appellant.

Marcus R. Wah, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **BORWICK**, **VERGILIO**, and **POLLACK**.

VERGILIO, Board Judge.

On November 16, 2011, the Board received a notice of appeal from D&M Grading, Inc. (contractor) concerning a task order (AG-04M3-D-11-0027) under its roadway vegetation maintenance contract (AG-04M3-C-09-0025) with the Department of Agriculture, Forest Service (agency). The contractor was required to perform brushing over and along roads. The contractor completed approximately twenty-one of forty-eight miles of work. After a termination for default, the agency has retained payment otherwise due the contractor to offset its costs for the reprocured work. The contractor maintains that the default is improper, the agency required work other than routine brush maintenance, a differing site condition exists, it is entitled to additional payment for work on the road, and the agency must pay for the work performed and may not assess any damages against the contractor.

The contractor's position fails. The contract and task order do not limit work to routine brushing. The work is described as brushing specific areas in compliance with guidance regarding the areas to be treated and what that treatment entails. The contract and task order do not restrict work to areas satisfying particular conditions of density or other descriptions and do not indicate how recently or at what level maintenance may have been performed. The work is for brushing over and along given roads. The contract and task order language is unambiguous. The contractor has not demonstrated that the language must be interpreted based upon words with a particular meaning or term of art in the industry. The contractor made incorrect assumptions about the conditions and undervalued the level of difficulty of the work. The contract places the risks for such errors on the contractor.

The Board upholds the termination for default and the agency's retention of money otherwise due the contractor to offset the agency's reprocurement costs. The Board denies the contractor's claim; there is no differing site condition and no basis to pay the contractor additional money or to invalidate the default determination. The Board denies the appeal.

Findings of Fact

1. The contractor was one of the multiple awardees of an indefinite quantity contract for roadway vegetation maintenance work. The "typical service activities" in the description of work provision specifies that road maintenance service types of work will consist of routine work necessary to maintain the National Forest Road System in a functioning condition. Exhibits 1 at 9; 2 at 86-87, 91-92 (all exhibits are in the appeal file). A section relating to a line item for roadway vegetation maintenance describes the service required: "Remove and dispose of vegetation to provide for user safety, and to facilitate routine roadway surface and drainage maintenance." Exhibit 1 at 77. The performance standard states:

> Vegetation maintenance is attained when vegetation has been removed, damaged trees have been removed or treated, and residual debris has been properly disposed of (as shown on the **Standard Brushing Typical** and described in the **Acceptable Quality Levels**).
>
> NOTE: Standards for maintenance level 5 & 4 road segments are greater than those for maintenance level 3 & 2 road segments (see **Standard Brushing Typical**).

Exhibit 1 at 77. Prices are stated on a per mile of roadway basis; however, those prices are not binding, as the task orders for specific work are competed. The pricing recognizes that every segment of a road may not require maintenance; however, payment occurs over the

entire distance of the included road. Exhibits 1 at 51, 74; 2 at 91-92. The contract-described process for issuing task orders specifies that based upon the task-order-specific quotes received from each indefinite quantity contractor, the agency is to make an award consistent with the selection criteria of the task order. Exhibit 1 at 24-25.

2. The agency sought pricing for roadway vegetation maintenance work related to specific portions of roads. Exhibit 4 at 109 (¶ 842.01). The language is similar to that of the underlying contract. "Roadway vegetation maintenance is complete when the vegetation has been removed from the designated treatment area per the attached drawings." Exhibit 4 at 109 (¶ 842.02). A Location of Work clause indicates that all maintenance level roads are included and specifies that vegetation shall be removed to a maximum height of six inches above ground surface, trees larger than six inches diameter at breast height (dbh) are designated to remain, and all woody debris within the clearing limits shall be lopped and scattered outside the clearing limits. Exhibit 4 at 109 (¶ 842.03). After receipt of the task order information, the contractor determined not to make a site visit, deeming the site inaccessible due to snow pack. The task order information does not indicate the conditions of the roadways and surrounding areas to be brushed or indicate when any area had last been maintained (routinely or otherwise). The contractor relied upon its experience to formulate its quote. Exhibits 29 at 189; 42 at 223.

3. This contractor successfully engaged in the competition for the here-relevant task order for brushing specific miles (totaling 48.6 miles) of given roads. On the per mile basis, the contractor's task order price was lower than its indefinite quantity contract price and the task order prices of the competitors. Exhibits 2 at 92; 3 at 93-96, 101; 4 at 97-114; 29 at 189; Contractor's narrative at 4 (the contractor also notes the competitive environment surrounding the pricing).

4. The indefinite quantity and task order contracts contain a Site Visit (April 1984) clause, 48 CFR 52.237-1 (2011); a Payments (April 1984) clause, 48 CFR 52.232-1; a Limitation on Withholding of Payments (April 1984) clause, 48 CFR 52.232-9; a Differing Site Conditions (April 1984) clause, 48 CFR 52.236-2; and a Default (Fixed-Price Supply and Service) (April 1984) clause, 48 CFR 52.249-8. Exhibit 1 at 30, 32, 69 (¶ L.11).

5. With an effective date of June 21, 2011, the parties bilaterally modified the task order contract by altering some of the specific roads to receive vegetation maintenance. Exhibit 11 at 131-33. A notice to proceed specifies the contract start date of July 5, 2011; the completion date is September 5, 2011. Exhibits 12 at 136, 142; 13 at 145. Upon reviewing the site conditions, the contractor conveyed to agency personnel the contractor's view that the site conditions deviated from those described in the contract and task order and that additional compensation was required. Exhibits 23 at 177 ("because of the difficulty of

brushing due to the uneven/rough travelway"); 25 at 181 (heavy brush); 29 at 189 (roads neglected for thirty years).

6. The contractor provided invoices to the agency for $12,132.50 and $690, reflecting 21.1 and 1.2 miles, respectively, of satisfactorily completed work. Exhibits 40 at 217; 41 at 221; 44 at 237; 48 at 253-55.

7. By email message dated August 4, 2011, to the agency, the contractor stated a belief that the work on these roads is beyond the scope of the contract and noted that the contractor respectfully declines to complete the contract. The message specifies that, in the course of its business, having brushed about 3000 miles of roads, the contractor has never seen such neglected roads in the Pacific Northwest. Exhibit 31 at 193. In response, the contracting officer sent the contractor a cure notice, dated August 4, indicating the contract completion date of September 5, 2011. Exhibit 34 at 201-02. In response, by letter dated August 10, the contractor sought termination of the contract or a substitution of roads. The contractor reiterates a belief that the roads differ substantially from those ordinarily encountered and generally recognized as inherent in roadway vegetation maintenance. Exhibit 42 at 223-25. The agency responded, opting neither to issue a termination for convenience nor to substitute roads, and stating that the conditions do not differ substantially from those ordinarily encountered or recognized as roadway vegetation maintenance because vegetation varies from light to heavy. Exhibit 43 at 229-30.

8. By decision dated September 8, 2011, the contracting officer issued a termination for default; the contractor's right to proceed was terminated for failure to perform. Exhibit 53 at 267. On September 20, 2011, the contracting officer unilaterally modified the contract, noting the termination for default based upon the contractor's refusal to continue performance and indicating that the agency was reprocuring the work. The agency has paid to the contractor $690 of the invoiced amounts. Exhibit 55 at 285, 287.

9. On September 19, 2011, the agency entered into a task order contract, for $27,878, with another of the indefinite quantity contractors to complete the 26.3 miles of work that remained under this contractor's terminated contract. Exhibit 54 at 272-75. The terms and conditions for the task order are the same for the reprocurement contractor as for this contractor, except that the reprocurement contractor must only brush those roads not completed by the contractor. Exhibits 4 at 97-117; 11 at 133; 54 at 271-83.

10. By letter dated December 6, 2011, to the contractor, the contracting officer identifies the difference in price between this contract and the reprocurement contract, and the administrative and other costs chargeable to the contractor. To offset reprocurement

costs, the agency retains the $12,132.50 otherwise earned by the contractor; however, the agency does not seek additional payment from the contractor. Exhibit 60 at 299-301.

11. Despite the contractor's assertions, the record does not demonstrate that the agency required the contractor to perform work other than that required under the task order contract. The agency utilized the reprocurement contract to obtain services to provide the vegetation maintenance that the contractor failed to complete. Although the contractor points to instances that the reprocurement contractor may not have fully brushed segments of a road, Exhibit 65, because of a lack of specificity and proof, the record does not demonstrate that the agency administered the reprocurement contract in a manner that is inconsistent with the acceptable quality levels described in the indefinite quantity contract. Exhibit 1 at 79-80.

12. On November 16, 2011, the Board received the contractor's notice of appeal.

Discussion

The contract calls for vegetation maintenance without limitation regarding the density or other characteristics of the vegetation to be treated or conditions of the roads and surrounding terrain. The contract and task order do not state that only routine brushing will be required; rather, the required brushing is defined by the characteristics of the vegetation to be removed. That is, because the contract and task order do not indicate the conditions of the vegetation on and along the roads to be treated, a type I differing site condition cannot exist, given that an element for such a differing site condition is that conditions "differ materially from those indicated in this contract." 48 CFR 52.236-2(a)(1). Regarding a type II differing site condition, 48 CFR 52.236-2(a)(2), the record does not demonstrate that the encountered vegetation and/or surrounding conditions were of an unusual nature which differ materially from those conditions ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. The agency has stated that the conditions do not differ substantially from those ordinarily encountered and generally recognized. The contractor states a different conclusion but provides no support or confirming evidence. The Board determines that the contractor's statements alone do not establish the contractor's proposition. One contractor's understanding cannot be extrapolated to demonstrate a generally recognized understanding, particularly here where the task order sought prices for work on and along specific roads–variances are an inherent character of the work required under the task order. The record demonstrates that a differing site condition did not exist. The agency did not require the contractor to perform work outside the scope of the task order contract.

The contractor misinterprets the contract and task order which require the vegetation on, along, and over, specific segments of a road to be brushed according to identified

standards. The contract and task order contract neither indicate that all work will be routine nor specify the conditions of the areas to be treated. This contractor accepted the risks of performing the called-for brushing for the unit price in its task order. The obligations and price were set through the competitive process. It is immaterial that the site was inaccessible at the time the contractor formulated its task order pricing; either one does not seek the award or one accounts for the unknown element in pricing. There is no basis to shift contractor risks to the agency. The contractor was obligated to perform the work at the fixed unit price.

The contractor did not complete the required brush work. The agency was justified in issuing the termination for default. The contractor has not demonstrated an impropriety in the default or that its failure to perform was excusable. The contractor's failure to perform did not arise from causes beyond the control and without the fault or negligence of the contractor. Therefore, under the Default clause, the Board upholds the default and the contractor is liable for the excess reprocurement costs of the agency.

The record reveals no basis in the agency's competitive award of the reprocurement contract or administration of that contract that serves to relieve this contractor of its liability under the Default clause for the agency's excess reprocurement costs. The agency is entitled to retain $12,132.50 (otherwise due the contractor as payment for satisfactory performance) to offset its excess reprocurement costs.

Decision

The Board **DENIES** the appeal.

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JOSEPH A. VERGILIO
Board Judge

We concur:

_____ _____
ANTHONY S. BORWICK HOWARD A. POLLACK