UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 15, 2013

CBCA 1789, 1845, 1929, 1930

ALK SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Dennis P. Zapka and David H. Boehme of McLaughlin & McCaffrey, LLP, Cleveland, OH, counsel for Appellant.

Tracy Downing, Office of the Regional Counsel, Department of Veterans Affairs, Nashville, TN; and Philip Kauffman and Phillipa L. Anderson, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **McCANN**.

HYATT, Board Judge.

These consolidated appeals seek breach damages under three contracts awarded by respondent, the Department of Veterans Affairs (VA), National Cemetery Administration (NCA), to appellant, ALK Services, Inc. (ALK), at the Ohio Western Reserve National Cemetery, in Rittman, Ohio (cemetery). The first appeal (CBCA 1789) claims damages based on a substantial reduction in orders for snow removal services compared to the previous year's contract. The remaining appeals challenge VA decisions not to exercise some of the option years on all of the three contracts and also claim damages for reduced orders under the

contracts that were in place. ALK asserts that VA officials acted in a bad faith, retaliatory manner against it and breached the three contracts. The VA denies these allegations and asserts that these were indefinite delivery indefinite quantity (IDIQ) contracts, each with minimum amounts which were ordered and fully paid for. The VA adds that, during the periods the contracts were in place, ALK provided all the services the agency required and it did not use VA employees to perform any of the services covered by the contracts. Regarding its contracting officer's decisions not to exercise certain option years, the VA points out that the agency was not obligated to exercise the option years.

Findings of Fact

Background

Four contracts entered into between the VA and ALK are pertinent to the disputes before us. ALK subcontracted with Orville Land Maintenance (Orville) to perform the covered services on all four contracts. ALK subsequently filed claims with respect to three of the four contracts, alleging bad faith on the part of the VA and the cemetery director.

Leading up to and during the pendency of these disputes, the VA had, at various times, between eight and eleven permanent and temporary employees working on the grounds of this 273 acre national cemetery. The VA used contractors to perform certain work that its own employees were unavailable to perform due to staffing limitations. With respect to these appeals, the VA entered into contracts with ALK for snow removal, grounds maintenance, installation of headstones, and grass mowing.

The Snow Removal Contract (CBCA 1789 and 1845)

Effective October 1, 2007, the VA awarded contract VA250-07-P-0219, for snow and ice removal at the cemetery, to ALK. Under the statement of work, the contractor was to supply all necessary supervision, labor, materials, supplies, tools, and equipment to perform the snow and ice removal operations. The snow removal contract was for a base year from October 1, 2007, through September 30, 2008, with three one-year renewal options to begin on October 1 and run thorough September 30 of each option year. Appeal File (CBCA 1789), Exhibit 1.

The services included in the snow removal contract were set forth in five contract line items (CLINs). Appeal File (CBCA 1789), Exhibit 1. CLIN 0001 provided for snow removal on streets and parking lots; CLIN 0002 called for ice melt application on streets and parking lots; CLIN 0003 provided for snow removal on sidewalks, walkways, and speciality areas; CLIN 0004 called for ice melt application on sidewalks, walkways, and specialty areas; and

CLIN 0005 provided for snow removal on designated streets on weekends and holidays. *Id*. Each CLIN stated an estimated number of occurrences to be provided, the per occurrence cost, and the total estimated cost (derived by multiplying the estimated number of units by the per unit cost).

Paragraph I.1 of the solicitation, which was incorporated into the contract, included a schedule of unit prices with instructions for prospective contractors on how to formulate them:

> The itemized services listed below are an estimated maximum amount[;] the minimum quantity is one occurrence. Monthly billing and payment will be on an "as-needed/as-used" basis only and will include only the work activities that have been authorized by the COTR [contracting officer's technical representative] and have actually occurred during the month. There is no guarantee that all of these estimated quantities will be fully utilized during that month. There is no guarantee that any of these estimated quantities will be fully utilized during any period of the contract.

Appeal File (CBCA 1789), Exhibit 1. Paragraph II.1, provided, in pertinent part, that "[t]his is an Indefinite Quantity Indefinite Delivery [IDIQ] contract for Snow/Ice removal of two (2) inches or more of snowfall" at the cemetery. *Id*.

The snow removal contract included the clauses set forth at Federal Acquisition Regulation (FAR) 52.212-4, Contract Terms and Conditions-Commercial Items (Sep 2005), 48 CFR 52.212-4 (2006); FAR 52.216-18, Ordering (Oct 1995), 48 CFR 52.216-18; FAR 52.216-19, Order Limitations (Oct 1995), 48 CFR 52.216-19; FAR 52.217-8, Option to Extend Services (Nov 1999), 48 CFR 52.217-8; and FAR 52.216-21, Requirements (Oct 1995), 48 CFR 52.216-21. Appeal File (CBCA 1789), Exhibit 1.

FAR 52.216-21, Requirements (Oct 1995), provides:

> (a) This is a requirements contract for the supplies or services specified and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.
>
> (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to

> the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.
>
> (c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

48 CFR 52.216(a)-(c); Appeal File (CBCA 1789), Exhibit 1.

Notably, the clause set forth in FAR 52.216-22, Indefinite Quantities (Oct 1995), which is intended to be included in all indefinite quantity contracts, was not incorporated in the snow removal contract. In pertinent part this clause provides:

> (a) . . . The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.
>
> (b) . . . The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the *maximum*. The Government shall order at least the quantity of supplies or services designated in the Schedule as the *minimum*.

48 CFR 52.216-22. FAR 16.504(a)(2) requires that for an IDIQ contract to be binding it must contain a minimum quantity that is more than nominal. The first sentence in paragraph I.1 of the contract states that "[t]he itemized services listed below are an estimated maximum amount[;] the minimum quantity is one occurrence." There were no maximum amounts designated in the contract's schedule. Appeal File (CBCA 1789), Exhibit 1.

The VA ordered work under the base year of the snow removal contract, for which ALK was paid $82,294.73. Appeal File (CBCA 1789), Exhibit 4. On October 1, 2008, the VA exercised the first option, ordering an additional year of services for fiscal year (FY) 2009, from October 1, 2008, through September 30, 2009 (FY 2009). *Id.*, Exhibit 2. The approximate value of the first option year was stated as $78,614.29. *Id.* The VA ordered snow removal services amounting to $30,278.17 during FY 2009. *Id.*, Exhibit 4.

On June 18, 2009, ALK submitted a written claim to the VA contracting officer alleging that the VA had acted in bad faith in refusing to issue work orders under the snow removal contract for FY 2009. ALK sought $48,336.12 in damages.[1] Appeal File (CBCA 1789), Exhibit 4. While acknowledging that the terms described the snow removal contract as an IDIQ contract, with a stated minimum of one occurrence and an estimated value for the first option year of $78,614.29, ALK asserted that "when the totality of events surrounding the drastically reduced payments to ALK for snow removal are reviewed as a whole, it is clear the [VA] has breached its obligation to act in good faith under the [snow removal] contract." Specifically, ALK attributed the breach to the cemetery director who, ALK claimed, stopped ordering work under the snow removal contract after ALK employees became involved in an investigation the director was conducting with respect to an altercation between the then-COTR (who was acting as the cemetery's foreman and the operation and maintenance supervisor) and another VA employee.

On August 17, 2009, the VA contracting officer issued a final decision denying ALK's claim. Appeal File (CBCA 1789), Exhibit 6. In rejecting ALK's claim, the contracting officer reasoned that (1) ALK had been compensated for each occurrence it had invoiced; (2) the snow removal contract had an estimated minimum quantity of one occurrence; and (3) there was no guarantee that the estimated quantities would be fully utilized during the contract period. ALK appealed this decision, which was docketed as CBCA 1789.

Also on August 17, 2009, the VA notified ALK that it was not exercising its option for the second option year (FY2010) on the snow removal services contract. Appeal File (CBCA 1789), Exhibit 7. In response, ALK's counsel wrote the contracting officer on September 16, 2009, requesting a meeting and asserting that the failure to exercise the option for the second option year was a separate additional breach of the VA's duty to act in good faith. In an email message dated September 18, 2009, the contracting officer declined to meet with ALK's counsel:

> The contracting officer's final decision has already been rendered on the claim submitted. It also included the appellant's rights and procedures.
>
> The decision to exercise an option period or to not exercise the option period of a contract is solely at the discretion of the Government.

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[1] The $48,336.12 appellant seeks is the difference between the estimated value of the option year one contract ($78,614.29) and the amount of work actually ordered by the cemetery ($30,278.17) for that winter. Appeal File (CBCA 1789), Exhibit 4.

I am not changing my decision and a meeting would be of no benefit.

ALK submitted a claim to the contracting officer on September 25, 2009, seeking $80,176.26 for the VA's failure to exercise its option for option year two of the snow removal contract. Supplemental Appeal File (CBCA 1845), Exhibit 12. The claim alleges that the VA's decision not to exercise the option "is clear retaliation against ALK for [the Orville employees'] participation in the [VA's] investigation of [the COTR], and even more troubling, for filing the June 18, 2009 claim with the contracting officer which brought to light the [VA's] retaliatory conduct." When the contracting officer failed to issue a final decision, ALK appealed the deemed denial of its claim to the Board; its appeal was docketed as CBCA 1845. *Id.*, Exhibit 13.

The Grounds Maintenance Contract (CBCA1929)

On September 14, 2006, the VA awarded commercial items contract VA786-P-0109 to ALK to provide various services associated with grounds maintenance at the cemetery. This contract provided for a maintenance program for the cemetery's trees, shrubs, and turf, in fourteen CLINs. Among other things, the work consisted of: aerating; upkeep; overseeding; mulching; removal and control of woody and/or herbaceous vegetation; liming; soil testing; soil preparation; shrub and tree installation, establishment, and maintenance; plant bed cultivation; rodent, skunk, and pest control (herbicide, fungicide, insecticide, and rodenticide); and collection and disposal of debris. Each CLIN listed showed an estimated number of units to be provided, the per unit cost, and the estimated total cost (derived by multiplying the estimated number of units by the per unit cost). The grounds maintenance contract provided for a base year from the date of award to September 30, 2006, with four one-year renewal options to begin on October 1 and run thorough September 30 of each option year. The estimated grand total cost of the contract base year (assuming all line items were ordered) came to $221,459.75.

The grounds maintenance contract contained the clauses set forth at FAR 52.212-4, Contract Terms and Conditions-Commercial Items (Feb 2007), 48 CFR 52.212-4; FAR 52.216-18, Ordering (Oct 1995), 48 CFR 52.216-18; FAR 52.216-19, Order Limitations, 48 CFR 52.216-19; FAR 52.217-8, Option to Extend Services (Nov 1999), 48 CFR 52.217-8; and FAR 52.216-21, Requirements - Alternate I (Apr 1984), 48 CFR 52.216-21. The contract was not described as an IDIQ contract, nor did it contain the clause found at FAR 52.216-22, Indefinite Quantities (Oct 1995), 48 CFR 52.216-22, which is to be used in all indefinite quantity contracts and requires the contract schedule to designate maximum and minimum

quantities. There were no maximum or minimum quantities set forth in the contract's schedule.

The VA exercised three of the options for option years, with the contract for FY 2009, covering the period from October 1, 2008, through September 30, 2009, estimated at a maximum total of $233,554.89. The VA informed ALK in August 2009 that it would not be exercising the option for the fourth year on the grounds maintenance contract. The estimated contract price for this option year, assuming all line items were awarded in maximum quantities, came to $239,734.05. A new grounds maintenance contract, with fewer line items, was subsequently awarded to a small disadvantaged veteran owned small business (SDVOSB).

On October 5, 2009, ALK wrote the contracting officer, stating that "within the past year, certain events . . . have lead to what we believe to be multiple breaches of the grounds maintenance contract by the [VA]." ALK asserted that it had witnessed "a number of cemetery employees performing work which ALK is contractually bound to perform," and that it believed the VA to be in breach of the contract because "the decision of the [VA] not to exercise option year four of the grounds maintenance contract was made in bad faith and was an abuse of discretion."

After the contracting officer responded that he had "found no evidence of bad faith exercised by any VA officials against ALK," ALK's attorney wrote the contracting officer on December 7, 2009, asserting that the cemetery director was acting in a retaliatory manner and claiming that "ALK has witnessed a number of cemetery employees performing work which ALK is contractually bound to perform." The letter asserts further that the VA "has, thereby, breached the contract." While referencing the grounds maintenance contract, ALK averred:

> [I]t is not a secret at this point that [the cemetery director] is doing, and has done, everything in her power to attempt to drive ALK out of performing <u>all</u> work at the cemetery. This is clearly evidenced by a number of factors (all of which post-date [an ALK subcontractor's employee's written statement about the July 29 incident,]) including but not limited to, 1) permitting cemetery employees to remove snow in breach of the snow removal contract; 2) refusing to permit ALK employees to remove snow accumulations as required by the contract; 3) a drastic and unexplainable reduction in payments from the initial year of the snow removal contract to the first option year of the contract; 4) a failure to exercise the option year of the snow removal contract; 5) permitting

> cemetery employees to perform headstone work in breach of the headstone contract; and 6) failing to exercise the option year for the headstone contract.

Supplemental Appeal File (CBCA 1929), Exhibit 5.

ALK alleged in this letter that on or about May 5, 7, and 15, 2009, Orville employees observed cemetery employees spraying weeds at three locations and, also during this time period, saw cemetery employees treating landscaping beds with non-selective herbicides. Supplemental Appeal File (CBCA 1929), Exhibit 5. Orville's owner also testified at the hearing that he observed cemetery employees clearing leaves on several occasions. In contrast, the cemetery director testified that she did not direct the cemetery employees to perform any duties which were covered by the grounds maintenance contract.

In the December 7 letter, ALK demanded damages for breach of the grounds and maintenance contract in the amount of $239,734.05 which it claims "represents the total of Option Year 4 which would have been due, plus an amount which represents the lost revenue to ALK for the work which was performed by the cemetery employees in violation of the grounds contract, in a yet to be determined amount."[2] The certification required by the Contract Disputes Act (CDA), 41 U.S.C. § 7103(b) (Supp. IV 2011), for claims over $100,000 was executed by ALK's attorney. When the contracting officer failed to respond to ALK's December 7 claim, ALK appealed that failure to the Board, where it was docketed as CBCA 1929. Supplemental Appeal File (CBCA 1929), Exhibit 6.

The Headstone Contract (CBCA 1930)

On August 1, 2008, the VA awarded commercial items contract VA786-P-0504 to ALK to provide services to install, clean, raise, realign, and replace the upright headstones at the cemetery in accordance with the schedule and statement of work set forth in the contract. Appeal File (CBCA 1930), Exhibit 1. The contract provided for a short base period from August 1, 2008, to September 30, 2008, with four one-year renewal options to begin on October 1 and end on September 30 of each option year. *Id.*

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[2] Appellant did not provide a breakdown as to the amount it sought in "lost revenue" until it submitted its post-hearing brief. In that brief, appellant identified $54,000 as the amount it sought and stated that this amount was "inclusive of the multiple leaf cycles and weeding cycles which ALK was prevented from performing" and represented "the difference between the grounds contract amount of $233,534.89 in Option Year 3 . . . and the $180,000 it was actually paid."

The headstone contract contained the clauses set forth at FAR 52.212-4, Contract Terms and Conditions-Commercial Items (Feb 2007), 48 CFR 52.212-4; FAR 52.216-18, Ordering (Oct. 1995), 48 CFR 52.216-18; FAR 52.216-19, Order Limitations, 48 CFR 52.216-19; FAR 52.216-21, Requirements (Oct. 1995), 48 CFR 52.216-21. Appeal File (CBCA 1930), Exhibit 1. The contract also contained the clause found at VA Acquisition Regulation (VAAR) 852.216-70(b), Estimated Quantities (Apr. 1984), which provides:

> As it is impossible to determine the exact quantities that will be required during the contract term, each bidder whose bid is accepted wholly or in part will be required to deliver all articles or services that may be ordered during the contract term, except as he/she otherwise indicates in his/her bid and except as otherwise provided herein. . . . The fact that quantities are estimated shall not relieve the contractor from filling all orders placed under this contract to the extent of his/her obligation. Also, the Department of Veterans Affairs shall not be relieved of its obligation to order from the contractor all . . . services that may, in the judgment of the contracting officer, be needed. . . .

48 CFR 852.216-70(b). This contract was not stated to be an IDIQ contract and did not contain the clause found at FAR 52.216-22, Indefinite Quantities (Oct 1995), 48 CFR 52.216-22, which is to be used in all IDIQ contracts and requires the contract schedule to designate maximum and minimum quantities. There were no maximum or minimum quantities set forth in the contract's schedule.

Contract section B.3, Price Schedule, sets forth the various types of work required under the contract, the estimated quantities of units, the unit prices, and the total cost anticipated. Appeal File (CBCA 1930), Exhibit 1. The work that could be ordered consisted of CLIN 0001, install headstone (initial); CLIN 0002, clean headstone; CLIN 0003, raise and realign headstone; and CLIN 0004, install headstone (replacement). *Id*.

ALK performed work on the headstone contract during 2008 and 2009; however, the VA decided not to exercise the option for services for FY 2009, which would have been in effect from October 1, 2008, through September 30, 2009. On October 5, 2009, ALK's attorney wrote the contracting officer asking for a meeting to discuss "multiple breaches" of the headstone contract, including cemetery employees performing work covered by the contract and the VA's failure to exercise the option for option year two. ALK's letter repeated the previous allegations of retaliation on the part of the cemetery director and its complaints about the snow removal contract, and alleged that the decision to not exercise the

option for option year two of the headstone contract "was made in bad faith and was an abuse of discretion." Supplemental Appeal File (CBCA 1930), Exhibit 2.

After speaking to the cemetery director about the issues raised in the October 5 letter, the contracting officer responded:

> [T]he only work performed by cemetery staff was to "bump and run" the headstones after they were set to straighten them. Based on contract requirements, ALK had to maintain the initial headstone setting for 120 calendar days, and after that, it was the responsibility of the cemetery staff to maintain the headstones. Therefore, no work was taken away from ALK by these actions and this does not constitute a breach of contract.
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> In regards to not exercising the option year, as Contracting Officer, I make the business judgment when VA decides not to exercise an option on a contract. The allegations in your letter played no part in my decision to allow ALK's contract to expire. A cure notice was issued to ALK on 4/20/09 for substandard work. As evidence[d] in the cure notice, performance problems existed. While the Contracting Officer has the discretion to terminate a contractor for cause as a result of performance deficiencies, I determined to allow the contract to continue and to conduct a new acquisition for the services.
>
> After review of your allegations, I have determined that no bad faith was exercised by any VA officials against ALK.

Supplemental Appeal File (CBCA 1930), Exhibit 4.

On December 8, 2009, ALK submitted a claim to the contracting officer demanding $73,505 in damages, which ALK asserts represented the amount ALK would have been due for option year two, "plus an amount which represents the lost revenue to ALK for the work which was performed by the cemetery employees in violation of the headstone contract, in a yet to be determined amount." Supplemental Appeal File (CBCA 1930), Exhibit 4. When the contracting officer failed to respond to ALK's December 8 claim, ALK appealed the deemed denial of its claim to the Board, where it was docketed as CBCA 1930. *Id.*, Exhibit 6.

The Grass Mowing Contract

On April 3, 2007, the VA awarded to ALK commercial items contract VA786-P-0221 for grass mowing, edging, and trimming at the cemetery. The work consisted of CLIN 0001, mowing; CLIN 0002, trimming; and CLIN 0003, curb and sidewalk edging. Each CLIN showed an estimated number of units to be provided, the per unit cost of each item, and the total estimated cost (derived by multiplying the estimated number of units by the per unit cost). The contract showed for each fiscal year an estimated quantity of twenty-nine units of mowing, twenty-nine units of trimming, and fifteen units of curb and sidewalk edging would be needed. The grass mowing contract provided for a base period from the date of award to September 30, 2007, with three one-year renewal options to begin on October 1 and run thorough September 30 of each option year. Appeal File, Exhibit 13.

The grass mowing contract contained the clauses set forth at FAR 52.212-4, Contract Terms and Conditions-Commercial Items (Feb 2007), 48 CFR 52.212-4; FAR 52.216-18, Ordering (Oct. 1995), 48 CFR 52.216-18; FAR 52.216-19, Order Limitations (Oct 1995), 48 CFR 52.216-19; FAR 52.216-21, Requirements (Oct 1995), 48 CFR 52.216-21; VAAR 852.216-70(b), Estimated Quantities (Apr 1984), 48 CFR 852.216-70(b); and FAR 52.217-8, Option to Extend Services (Nov 1999), 48 CFR 52.217-8. Appeal File, Exhibit 13.

The grass mowing contract provided, "[T]he contractor shall begin mowing at the start of the contract when directed by the COTR and continue throughout [the] entire growing season with the final mowing occurring as seasonal growth has ceased ending in the fall as directed by the COTR. The required operation frequency will be determined by the COTR and the contractor will be compensated on a per operation cost basis." Appeal File, Exhibit 13.

The options for all three option years of the grass mowing contract were exercised, and ALK continued providing grass mowing, edging, and trimming services at the cemetery through September 30, 2010. Appellant has not alleged that the cemetery director or any other VA official acted in bad faith in administering this contract.

ALK's Allegations of Bad Faith and Retaliation

The cemetery director testified that when she assumed her position in February 2007, she observed that employee morale at the cemetery was low and there was a degree of divisiveness between the VA employees in the field and those in administration who worked in the office. She said she had received some verbal complaints about the COTR and understood that he had instructed the field employees directly under his supervision, not to

make complaints to the director without going through him. Eventually, she concluded that the COTR was contributing to the poor morale.

It is not disputed that the COTR, who testified about the events raised by ALK, was a hard taskmaster who set demanding standards for contractors and employees alike. Transcript at 61. He had been verbally counseled for using language that some individuals regarded as offensive. Nevertheless, it is also clear from the record that this COTR excelled at ensuring the cemetery grounds were in exceptional condition at all times during his tenure and achieved the national shrine status that veterans, their families, and the Nation expect and deserve. *Id.* at 62.

Over time, the COTR had developed a good working relationship with ALK and Orville to the point that he issued what essentially amounted to "standing instructions" to plow and salt the cemetery whenever it snowed. He managed the grounds services contract in a similar manner, holding a monthly meeting to assess what would be needed for the month. He encouraged ALK to provide services when it saw that an item covered by one of its contracts needed attention.

The cemetery director described her relationship with the COTR as cordial and professional. The COTR, who also testified, did not believe he had a good working relationship with the director for a variety of reasons. He suggested that she thought he was "a dinosaur" because he emphasized using resources to maintain the cemetery at the expense of adequate recordkeeping. In addition, he acknowledged that after he challenged the propriety of both the director and the maintenance mechanic (whom she had hired) being at the cemetery after hours, "communication just stopped." Transcript at 66-75. While the director may have engaged in informal counseling with the COTR prior to July 29, 2008, there is no documentation in the record of any formal complaint or personnel action involving him until that date.

On July 29, 2008, a disagreement occurred involving the COTR and a temporary VA employee at the cemetery. The resulting altercation was observed by two Orville employees as well as by other cemetery employees. According to the Orville employees, who provided written statements and testimony about the incident, the COTR and the temporary laborer engaged in a heated argument about setting headstones. They recollected that the temporary employee took aggressive steps toward the COTR, screamed, and used profanity. Neither Orville employee observed any physical contact between the COTR and the laborer. Several cemetery employees, who also observed the incident, all stated that the COTR grabbed the temporary employee's arm and the employee pushed forcefully away. The COTR ordered the temporary employee to go to the administration building, where the employee proceeded to

damage the lunch room. The temporary employee was told to go home, was fired, and was not rehired by the VA.

The temporary employee who was involved in the altercation testified at trial on behalf of ALK. He stated that when he returned to the cemetery to pick up his belongings, he met with the cemetery director. According to this witness, the director asked him to prepare a statement describing the incident because she wanted the COTR "gone." He testified that he reluctantly agreed to prepare a statement about the incident because she said that he would receive permanent employment, including benefits, at the cemetery. This witness also testified that sometime after the incident he called the acting foreman, the maintenance mechanic, whom he considered to be a friend. The acting foreman then asked him to help persuade the other crewmen to submit complaints about the conduct of the COTR, which he did. The acting foreman also asked this witness if he had any information about whether ALK or Orville bribed the COTR to get the three contracts, and told this witness that he was having trouble getting Orville to listen to his directions concerning contract work. [3]

Citing the July 29 incident, as well as other complaints she had received concerning the COTR, the cemetery director placed him on administrative leave on August 5, 2008.[4] After that, the cemetery director forwarded the statements, together with her recommendation that the COTR be removed from his position, to the cemetery's servicing human resources (HR) office,[5] which continued the investigation. Taking into account several factors, including the COTR's long-time unblemished record of service, the cemetery director's

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[3] Orville's owner also testified that the acting foreman told him to his face that he wanted to be rid of Orville.

[4] The cemetery director testified she had received several complaints against the COTR from other employees. She had been in the process of investigating these complaints when the July 29, 2008, incident occurred. She asked the employees to put their complaints into written statements and used these statements, and the statements regarding the July 29 altercation, to recommend to her supervisors that the COTR be removed from his position. Transcript at 211.

[5] The NCA has established a network system which it calls the Memorial Services Network (MSN). Five regional MSN offices located throughout the country supervise and provide personnel and logistical support for cemeteries and personnel within their respective geographical area. The cemetery received supervision and support from the MSN IV office in Indianapolis, Indiana.

supervisors in the regional office declined to take disciplinary action against the COTR.[6] Shortly thereafter, in April 2009, the COTR voluntarily retired from federal service.

After the COTR was placed on administrative leave, the cemetery director assumed the COTR responsibilities for ALK's contracts. In this role, the director administered ALK's contracts differently from the way in which the former COTR had administered them. She chose to call ALK each time she wanted to order services, rather than to continue the former COTR's "standing order" approach for mowing, grounds maintenance, and snow removal. The cemetery director administered ALK's contracts until she left the cemetery in March 2010. She named the maintenance mechanic as the foreman with supervisory duties involving outdoor maintenance of the cemetery. Transcript at 384.

While the option for the snow removal contract was exercised for FY 2009, according to the cemetery director, there were fewer instances in which snow accumulation exceeded two inches, so she did not order as many snow removal services that year.[7] She testified that during FY 2009 she was not aware of VA employees doing snow removal work that ALK should have performed under its contract. Her practice of having ALK provide snow removal services only after the snow accumulation reached two inches impacted the amount of services ALK provided under the snow removal contract.[8] Fewer grounds maintenance services were ordered from ALK after the cemetery director became the COTR. Orville employees testified to their opinions that generally the cemetery was not groomed to the standards of the previous COTR. They also submitted photographs showing snow at the cemetery grounds on various occasions during FY2009. It is not clear from the photographs that the snow exceeded two inches, however.

The cemetery director testified that at some point after the COTR was placed on administrative leave, the acting foreman, along with several employees, came to her and stated that they felt they could do future snow removal work in-house using VA employees. The

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[6] Based on the administrative record before us, it is unclear whether the director gave the COTR notice of her complaints against him or an opportunity to respond; however, after the director's supervisors in the regional office determined that disciplinary action against the COTR was not warranted, the issue became moot.

[7] Pursuant to the terms of the contract, ALK was expected to perform snow removal services only after the snow accumulation reached two inches.

[8] It is unclear from the record whether the decrease in the use of ALK's snow removal services occurred because of decreased snowfall, because of the cemetery director's practice of ordering the services only after an accumulation of two inches, because the VA was diverting work to its own employees, or some combination thereof.

cemetery director was persuaded that using cemetery personnel could result in cost savings. She thus recommended that the VA not exercise the option for FY 2010. Transcript at 178.

The cemetery director was promoted to another position within NCA and left Rittman in March 2010. Transcript at 384.

Discussion

ALK seeks damages for the breach of the FY 2009 contracts by reason of the significantly reduced orders for services and for the failure to exercise options for these services for FY 2010. Both bases for relief are subsumed under appellant's overarching accusation that the cemetery director "embarked on a program to secure the termination of ALK" in "retaliation for ALK's participation in the 'investigation' and proposed removal of the [COTR]." ALK characterizes the actions taken by the director against the COTR as a "vendetta" and a "witch hunt" taken in bad faith, which was then extended by the director to ALK and Orville, resulting in lost orders under existing contracts and failures to exercise option years under the contracts. Since this is the primary focus of ALK's case, we address the evidence and allegations concerning bad faith at the outset.

Bad Faith

Allegations of bad faith conduct on the part of agency employees are difficult to prove, particularly in light of the well-settled precept that government officials are presumed to act conscientiously and in good faith in the discharge of their duties. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1238 (Fed. Cir. 2002); *T&M Distributors, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999); *Spezzaferro v. Federal Aviation Administration*, 807 F.2d 169, 173 (Fed. Cir. 1986); *Torncello v. United States*, 681 F.2d 756, 770 (Ct. Cl. 1982); *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301 (Ct. Cl. 1976). The Court of Appeals for the Federal Circuit, observing that "showing a government official acted in bad faith is intended to be very difficult," has explained that:

> [i]n order to overcome the presumption of good faith [on behalf of the government], the proof must be almost irrefragable. "Almost irrefragable proof" amounts to clear and convincing evidence. In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some specific intent to injure the plaintiff.

Galen Medical Associates, Inc. v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004) (citations omitted); *accord AFR & Associates, Inc. v. Department of Housing and Urban Development*, CBCA 946, 09-2 BCA ¶ 34,226 at 169,170; *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062; *see also*

Am-Pro, 281 F.3d at 1239-40 (clear and convincing evidence is "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable"'). This burden is substantially higher than the preponderance of the evidence standard commonly applied to breach claims. *Am-Pro,* 281 F.3d at 1239-40; *Singleton Enterprises v. Department of Agriculture*, CBCA 1981, 12-1 BCA ¶ 34,924.

According to appellant, the confrontation that occurred on July 29, 2008, involving the COTR and a temporary VA employee, served as the catalyst for the VA's subsequent actions. Appellant asserts that the director was displeased by the statements of Orville's employees recounting that event, which supported the COTR's version of the incident and conflicted with the observations of cemetery employees. ALK describes the cemetery director's investigation of the incident as a vendetta against the COTR, with respect to which ALK was on the wrong side. ALK adds that its statements were viewed by the cemetery director as hindering her progress in removing the COTR. Ipso facto, ALK argues, the cemetery director was motivated to retaliate against ALK. ALK identifies the decline in orders for snow removal, regular grounds maintenance, and headstone setting services during FY 2009, and failure to exercise option years under these contracts as evidence of her animus against ALK.

ALK supported its allegations primarily through testimony to the effect that after the Orville workers at the cemetery submitted statements about the altercation, they were treated differently at the cemetery; services under the contracts were ordered less frequently; and when services were ordered they were more costly to perform because the work had piled up and required a larger crew. Orville's owner experienced friction with the new foreman. ALK witnesses also attested that they observed cemetery employees performing tasks that should have been ordered from ALK under its contracts. In addition, an Orville employee testified that cemetery employees drove heavy vehicles through the rows after headstones were set, causing misalignments of the headstones and leaving ruts in the ground. Finally, the former temporary VA employee, who had hoped to get a permanent job with the VA, testified that (1) he understood the director to say she wanted the COTR "gone" and (2) the acting foreman did not like ALK because Orville would not take direction from him.

Much of this testimony is too general in nature to prove personal animus or a pattern of oppressive behavior directed toward ALK. ALK's allegations of bad faith, particularly in the absence of any examples of overt VA actions evidencing hostility toward the contractor, do not meet the evidentiary standard enunciated by the Court of Appeals for the Federal Circuit. For example, ALK makes much of the fact that the cemetery director asked several times for statements regarding the Orville employees' observations of the COTR's behavior at the cemetery, yet there is no corroborating information in the record that she actually engaged in any conduct designed to coerce ALK, Orville, or VA employees to make false statements against the COTR or in any substantive way tried to mold the statements that were offered. On the record before us we are not inclined to impute any statements made by the

acting foreman to the cemetery director. The positions taken by appellant are largely supported by little more than its subjective interpretation of the facts. The fact that orders were reduced and options were not exercised are not inherent acts of bad faith. Moreover, the fact that the VA exercised options for all of the option years on the mowing contract, under which ALK provided mowing services at the cemetery throughout the years in issue, countervails the notion that personal animus and a desire to be "rid of" ALK was the driving factor in the VA's actions under the other contracts.

Appellant asks us to discount the cemetery director's testimony concerning her actions and decisions with respect to running the cemetery. We decline to do so. The cemetery director's demeanor at the hearing was forthright and her testimony was credible. There was no obvious malice in her recommendation that the COTR be removed from his position. From her view, the COTR had behaved inappropriately under her watch and she recommended removal. Although her supervisors disagreed with her recommendation, the record establishes only that she was trying to manage what she perceived to be a difficult situation. Moreover, even if we could conclude from the record that she harbored personal animosity toward the COTR, it does not automatically follow that she extended that personal animus to ALK or its subcontractor.

Although we recognize that Orville sincerely believes that bad faith motivated the reduction in orders for services and non-exercise of option years, there is no clear and convincing evidence that this is the case. At best, the record manifests a difference in philosophies on how best to accomplish the work needed at the cemetery, with the cemetery director's preferences prevailing. The COTR maximized his usage of the contract services. The director thought that the cemetery could be adequately maintained with fewer contract services and that in the future VA employees could assume some of the work that ALK had been performing. Other than the fact that the services it was asked to perform on the FY 2009 snow removal, lawn maintenance, and headstone contracts was reduced compared to the prior year, ALK has not identified any specific instances of behavior on the part of VA officials that might be suggestive of bad faith.

In short, the record does not provide clear and convincing proof that the cemetery director acted with malice toward ALK. The record more readily supports the conclusion that the director was faced with addressing a serious incident involving the COTR and she took what she considered to be the appropriate steps to address that incident. She investigated the incident and, as required, forwarded the results of her investigation and her recommendations through the chain of command. She had the right to recommend that the COTR be removed from his position and her supervisors had the right to disagree with her. As to employee disciplinary actions, reasonable persons may disagree as to what they observed, as well as the

appropriate action to be taken.[9] The facts here were straightforward, reasonably investigated by the cemetery director, and appropriately acted on by the NCA. The typical process was followed and the matter resolved. It became moot because shortly thereafter the COTR retired.

Other Breach of Contract Theories

Although bad faith on the part of any VA official has not been proven, the inquiry does not necessarily end. Appellant has alleged that the VA breached the contracts by not awarding work to it and by using VA employees to perform services on some of the contracts that ALK "was obligated to perform" under these contracts. Whether the VA can be said to have breached the contracts in this manner requires a review of the respective contractual obligations of the parties to these contracts. Respondent characterizes the contracts as IDIQ contracts,[10] and appellant seems to agree with that characterization as to the snow removal

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[9] While NCA officials may have disagreed with the director's recommendations, this does not demonstrate anything other than that reasonable minds may disagree. It does not show that her recommendations arose from personal animus toward the former COTR.

[10] An IDIQ contract provides for an indefinite quantity, within stated limits, of supplies or services for a fixed period. 48 CFR 16.504(a) (2005). The contract must require the Government to order and the contractor to furnish at least a stated minimum of quantity of supplies or services. *Id*. In addition, the contract must specify the total maximum and minimum quantity of supplies or services the Government will acquire under the contract. *Id.* 16.504(a)(4)(ii). An IDIQ contract obliges the buyer to purchase from the seller only a stated minimum quantity. Once the Government purchases that quantity, its legal obligation under the contract is satisfied. *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002).

> [W]hile an IDIQ contract provides that the government will purchase an indefinite quantity of supplies or services from a contractor during a fixed period of time, it requires the government to order only a stated minimum quantity of supplies or services. That is, under an IDIQ contract, the government is required to purchase the minimum quantity stated in the contract, but when the government makes that purchase its legal obligation under the contract is satisfied. Moreover, once the government has purchased the minimum quantity stated in an IDIQ contract from the contractor, it is free to purchase additional supplies or services from any other source it chooses. An IDIQ contract does not provide any exclusivity to the contractor. The government may, at its discretion and for its benefit, make its purchases for similar supplies and/or services from other sources.

contract.[11] None of the contracts, however, included the FAR clauses required for an IDIQ contract, while each contract contained the clause found at FAR 52.216-21, Requirements (Oct. 1995), 48 CFR 52.216-21, mandated for requirements contracts. IDIQ and requirements contracts are both types of indefinite quantities contracts. Whether a contract is of one variety or the other is a matter of law determined by an objective reading of the language of the contract, not by a party's characterization of the instrument. *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002); *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); *Maintenance Engineers v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984). The Board is not bound by what the contract is called or by the label attached to it by the parties. *Maintenance Engineers*, 749 F.2d at 726 n.3; *Mason v. United States*, 615 F.2d 1343, 1346 (Ct. Cl. 1980); *Carrington Group v. Department of Veterans Affairs*, CBCA 2091, 12-1 BCA ¶ 34,993, at 171,984.

Based on our review of the contracts, we conclude that the most reasonable interpretation is that they were all intended to be requirements contracts. The grounds maintenance and headstone contracts are clearly stated to be requirements contracts. Although the snow removal contract is called an IDIQ contract for a minimum occurrence of one, this language is offset by the lack of a clearly stated maximum order, the failure to include the mandatory FAR clause for an IDIQ contract, the inclusion of the requirements contract clause, and the treatment of the contract as a requirements contract prior to the removal of the COTR. As such, during the contract period in issue, the VA was in fact obligated to fill all its requirements for the services specified in the contracts by placing orders for those services from ALK's contracts.

The nature of a requirements contract is such that the estimated quantities are not guaranteed to be ordered. As our appellate authority has explained, this type of contract "calls for the government to fill all of its actual requirements for specified supplies or services during the contract period by purchasing from the awardee, who agrees to provide them at the agreed price." *Rumsfeld v. Applied Companies,* 325 F.3d 1328, 1334 (Fed. Cir. 2003) (citation omitted). This means that the Government is not free to order its requirements from another contractor or to use government employees to perform the work:

> When the government's actual, continuing, requirements subject to a requirements contract do not change, it does not have the arbitrary right to

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T*ravel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001) (citations omitted).

[11] The Board pointed this out in a decision denying the Government's dispositive motion to dismiss the appeal on the ground that it involved an IDIQ contract and the Government had purchased the minimum quantity of services. *ALK Services, Inc. v. Department of Veterans Affairs*, CBCA 1789, 10-2 BCA ¶ 34,518, at 170,246 n.1.

> reduce the amount of those requirements that it purchases from the contractor, or to change its method of fulfilling those requirements, such as by developing and using its own capabilities at the contractor's expense, and the contractor need not prove that the government acted in bad faith in order to recover.

Lockheed Martin Aircraft Center, ASBCA 55164, 08-1 BCA ¶ 33,832, at 167,446.

At the same time, the Government is entitled to reduce or otherwise change its requirements for legitimate business reasons. When a contractor alleges that the Government breached its contract by reducing its requirements, the contractor bears the burden to prove that the government acted in bad faith, for example, by reducing its requirements solely to avoid its contractual obligations. In the absence of a showing that the Government acted in bad faith, it will be presumed to have reduced its requirements for valid business reasons. *Technical Assistance International, Inc. v. United States*, 150 F.3d 1369, 1373 (Fed. Cir. 1998).

To the extent that some requirements were filled by cemetery employees, the contracts may have been breached:

> [T]he government breaches a requirements contract when it has requirements for contract items or services, but diverts business from the contractor and does not use the contractor to satisfy those requirements. In that case, the contractor is entitled to recover damages in the form of lost profits, provided it is able to meet the requirements for lost profits recovery noted in *California Federal Bank* [*v. United States*, 245 F.3d 1342, 1349 (Fed. Cir. 2001) (contractor may recover lost profits when they are the proximate result of the breach, there would have been a profit absent the breach, and there is enough evidence on which to base a reasonable estimate of the amount)]. The critical point is that the government's breach of its obligation "to fill all its actual requirements . . . by purchasing from the awardee," has the effect of taking away from the contractor the opportunity to earn a profit.

Applied Companies, 325 F.3d at 1339.

Here, the VA's actual need for services was not certain, hence the use of a requirements contract to allow for fluctuations in orders. The need for snow removal and yard work are weather dependent. There is also no guaranty that the options or that the frequency of need for the services will be viewed in a uniform fashion throughout the life of the contract. Under a requirements contract, the Government is generally accorded significant freedom in determining its requirements, because it has specifically bargained for such flexibility. The limitation on this freedom is that the Government must act in good faith.

Technical Assistance, 150 F.3d at 1371-72. The Federal Circuit recently restated the governing principles with respect to breach of contract damages:

> Damages for breach of contract are designed to make the non-breaching party whole. One way to accomplish that objective is to award "expectancy damages," i.e., the benefits the non-breaching party would have expected to receive had the breach not occurred. Expectancy damages "are often equated with lost profits, although they can include other damage elements as well." To recover lost profits for breach of contract, the plaintiff must establish by a preponderance of the evidence that (1) the lost profits were reasonably foreseeable or actually foreseen by the breaching party at the time of contracting; (2) the loss of profits was caused by the breach; and (3) the amount of the lost profits has been established with reasonable certainty.

Anchor Savings Bank, FSB v. United States, 597 F.3d 1356, 1361 (Fed. Cir. 2010) (citations omitted).

ALK's witness testimony and documentation fail to provide the details needed to establish a breach and obtain relief under the contract. The testimony of ALK's witnesses provided few specifics as to occasions when any VA employees actually performed contract work, and even fewer dates and times when such work was performed. Also, the contemporaneous correspondence in the record does not support a finding that the VA routinely substituted its employees to perform services that ALK should have provided. While appellant's witnesses testified that contract work was diverted from ALK, the cemetery director attested that, while she was the COTR, she was not aware of any circumstances where VA employees provided services that should have been ordered from ALK.

Orville employees testified anecdotally about fewer snow removal services being ordered during FY 2009. The cemetery director attributed this to her practice of only calling ALK to provide services when the snow accumulation reached a height of two inches or more, the height set forth in the contract. She also recalled that there was less snow accumulation in FY 2009 than in the previous year. These are plausible reasons as to why less snow removal was required, particularly given the dearth of evidence provided by ALK. Although ALK submitted meteorological records for the winter of 2008-2009, it failed to correlate this data with testimony and photographs identifying specific dates or times when it believed snow removal should have been called for but was not. ALK submitted pictures of snow at the cemetery grounds, in support of its contention that the cemetery was not as well maintained under the director's stint as COTR. These examples suggest the possibility that the VA may have diverted some snow removal work from ALK, but are insufficient to allow us to quantify the number of occasions on which they occurred.

Similarly, ALK failed to adduce evidence sufficient to meet its preponderance of the evidence burden to prove that the VA improperly used its employees to perform work on other contracts that ALK had with the VA. Regarding the grounds maintenance contract, ALK identified by actual date only three instances where its contractor observed VA employees spraying weeds, alleging these were services that should have been ordered from ALK. While these three incidents were noted at the hearing, further details were lacking. Even accepting that the three dated incidents occurred, they appear to have been isolated, negligible, and unquantifiable in terms of hours of work performed and income lost.

Orville employees testified that after the departure of the former COTR, the cemetery grounds were not groomed to his impeccable standards. We believe this testimony, but it does not follow that the cemetery grounds were therefore maintained at substandard levels. There is room for flexibility in the extent of maintenance needed. The director suggested that she did not believe that the services were needed as frequently as they had been ordered by the former COTR.

ALK witnesses also attested that the director, through the new grounds foreman, shut down its leaf blowing efforts on one occasion and lengthened the periods between leaf removal maintenance. This forced it to use larger crews to remove the larger quantities of accumulated leaves for the same unit price. Similarly, ALK adduced testimony that weeds were allowed to accumulate to the point where an order for weed removal required larger crews and more equipment. We note that, in addition to the covenant not to interfere with a contractor's performance, under a requirements contract, the Government is not permitted to interfere with a contractor's reasonable expectations or render performance more costly. Thus, this testimony supports a finding that the grounds maintenance contract may have been breached in this regard.

Unfortunately, appellant has not furnished any documentation or other evidence from which an appropriate award of damages might be fashioned. Appellant asserts, with no legal support, that it should simply be awarded the balance of the contract price for these three contracts based on the maximum estimates. This is not the proper measure of damages under a requirements contract. Rather, the contractor is entitled to an award of lost profits on work that would have been awarded but for the breach. In the absence of data showing what work should have been awarded, and what costs of performance were avoided, there is no basis from which the Board might reasonably approximate an appropriate award of damages that would compensate the contractor without potentially overcharging the Government. To fashion a jury verdict, there must be some evidence which would enable us to make an informed, reasonable judgment which is fair to both parties. *BENMOL Corp. v. Department of the Treasury*, GSBCA 16374-TD, 05-1 BCA ¶ 32,897, *aff'd sub nom. Benmol Corp. v. Paulson*, 188 F. App'x 994 (Fed. Cir. 2006) (citing *Raytheon Co. v. White*, 305 F.3d 1354,

1367 (Fed. Cir. 2002)). Given the present record, any award of damages, including the balance of the contract prices using the maximum estimates, would be speculative.

Non-Exercise of Option Years

ALK also asserts that, acting out of bad faith, the VA elected not to exercise the options for FY 2010 services on the grounds maintenance, headstone and snow removal contracts.

When a contract contains an option to extend its term, unless the contract provides otherwise, the Government enjoys broad discretion and is under no obligation to exercise it. *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988); *AFR & Associates*, 09-2 BCA at 169,168-69; *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 44, et al., 08-1 BCA ¶ 33,854, at 167,584; *Integral Systems, Inc. v. Department of Commerce*, GSBCA 16321-COM, 05-2 BCA ¶ 32,984, at 163,472. The Government's decision not to exercise an option can thus provide a vehicle for relief only if the contractor proves that the decision was made in bad faith or was so arbitrary or capricious as to constitute an abuse of discretion. *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 09-1 BCA ¶ 34,103, at 168,636; *Greenlee*, 07-1 BCA at 166,062; *Aspen Helicopters, Inc. v. Department of Commerce*, GSBCA 13258-COM, 99-2 BCA ¶ 30,581, at 151,024.

As we found earlier, appellant has failed to establish by clear and convincing evidence that any VA officials acted in bad faith during the administration of these contracts; what remains is the issue of whether the VA's decision not to exercise the options for the option years of the contracts was so arbitrary or capricious as to constitute an abuse of discretion. In evaluating whether an action is arbitrary, capricious, or an abuse of discretion, the following factors are considered:

> (1) evidence of subjective bad faith on the part of the government official, (2) whether there is a reasonable, contract-related basis for the official's decision, (3) the amount of discretion given to the official, and (4) whether the official violated an applicable statute or regulation.

McDonnell Douglas Corp. v. United States, 182 F.3d 1319, 1326 (Fed. Cir. 1999); *accord Sword & Shield Enterprise Security v. General Services Administration*, CBCA 2118, 12-1 BCA ¶ 34,922, at 171,726 (2011); *AFR & Associates*, 09-2 BCA at 169,169. Pursuant to the terms of the contracts, the VA had broad discretion on the issue of whether to exercise the contracts' options.

The cemetery director testified to her belief that the VA would save costs by using the VA employees to perform at least some, if not all, of the snow removal and grounds services contracts that ALK provided under contract. The VA is not required to provide empirical data or prove, as appellant seems to assume, that actual cost savings were realized. It is sufficient that the director reasonably believed that using VA employees would save money, and that we accept that belief as her motivation. In the absence of a showing that the Government acted in bad faith, it will be presumed to have made its decision based on valid business reasons. *Technical Assistance*, 150 F.3d at 1373.[12]

To summarize, although we find, upon review of the fully-developed record, that the contracts, particularly as administered by the original COTR, constituted requirements contracts and that some work may have been improperly diverted from ALK, we cannot grant the appeals because of a lack of basic information needed to quantify the work that should have been given to ALK or to derive a jury verdict award of damages.

Decision

The appeals are **DENIED**.

_____
CATHERINE B. HYATT
Board Judge

We concur:

_____
ANTHONY S. BORWICK
Board Judge

_____
R. ANTHONY McCANN
Board Judge

[12] If the VA employees did in-house work that ALK would have had to be paid to do, it stands to reason that there was some cost savings. However, even had there been no cost savings, that does not give rise to or provide support for appellant's claim.