



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 23, 2015

CBCA 3909

DNT ENVIRONMENTAL SERVICES, INC.,

Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

John A. Christy and Michael J. Eshman of Schreeder, Wheeler & Flint, LLP, Atlanta, GA, counsel for Appellant.

Kenneth R. Pakula and Sara E. McGraw, Office of General Counsel, Environmental Protection Agency, Washington, DC; and Kathleen K. Clever, Office of Regional Counsel, Environmental Protection Agency, Lenexa, KS, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SHERIDAN**, and **KULLBERG**.

SHERIDAN, Board Judge.

The Environmental Protection Agency (EPA) awarded contract EP-S7-11-07 to DNT Environmental Services, Inc. (DNT or contractor) for the remediation of properties contaminated by lead tailings¹ in St. Francois County, Missouri. In this appeal, the appellant, DNT, contends that the EPA failed to order the minimum quantities of two contract line item numbers (CLINs) required by the contract's indefinite quantity (IQ) provision. DNT claims it is entitled to \$411,853.19, the difference between the actual tonnage/cubic yardage ordered by the EPA, and the minimum tonnage/cubic yardage stated in the contract. DNT also contends that the EPA acted arbitrarily and capriciously when it

¹ Tailings are the by-products left over from mining and extracting resources.

denied payment for incentive #1. DNT claims it is entitled to an additional \$57,792.60, the amount of the denied incentive payment.

The parties elected to submit the case for decision on the written record pursuant to Rule 19 of the Board's Rules of Procedure. 48 CFR 6101.19 (2014). The record considered by the Board in issuing this decision consists of the appeal file (Exhibits 1 through 677); the EPA's appeal file supplement (Supplement, Exhibits 573-77);² the joint statement of facts (JSF 1-54); DNT's brief and reply brief, including the declarations of John Teague (May 18, 2015) and Zachary Waske (May 15, 2015); and the EPA's brief.

For the reasons set forth below, we deny the appeal.

Background

The Big River Mine Tailings Superfund Site encompasses parts of St. Francois County, Missouri. Exhibit 1³; JSF 1. The soil within the county is contaminated by lead and other heavy metals from old mine tailing storage. Exhibit 1, Performance Work Statement (PWS) at 1; JSF 1. In 2010, the EPA released an action memo under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980) and Superfund Amendments and Reauthorization Act (SARA), Pub. L. 99-499, 100 Stat. 1613 (1986), to reduce the amount of human exposure to the lead-contaminated soil within the site. As part of the site clean-up, the EPA commenced a time-critical removal action for the county in 2011. Exhibit 1, PWS at 1.

The EPA initiated the project to remediate the contaminated soil by issuing solicitation SOL-R7-11-00009. Exhibit 1; JSF 1-3. The solicitation contained a PWS⁴ describing what was required to perform the removal of contaminated materials at the site and indicated:

There are 300 residential properties and portions of 5 school properties requiring remediation under this contract as provided in **Enclosure A**. Areas

² Exhibits 573 through 577 in the appeal file supplement are not the same exhibits as Exhibits 573 through 577 in the appeal file.

³ All exhibits are found in the appeal file, unless otherwise noted.

⁴ The PWS was attachment 1 in the solicitation (Exhibit 1) and later the contract (Exhibit 6). In the contract the PWS is also referred to as the statement of work (SOW). For consistency and ease of reference, we will refer and cite to this document as the PWS.

to be remediated will be less than one acre per property as described in the Superfund Lead-Contaminated Residential Sites Handbook. The maximum depth of excavation is 24 inches.

PWS at 1; JSF 15.

Enclosure A was the list of properties to be remediated. In pertinent part, enclosure A listed the location (address) and an identification number for each property. Enclosure A contained a list of five schools and 307 residential properties. The PWS indicated “the objective of the excavation work is to remove lead-contaminated soil greater than or equal to 800 mg/kg [milligrams/kilograms] in areas delineated by the EPA.” PWS at 11-12. The contractor was to excavate until reaching a “composite-soil sample [that] indicates an average lead level of less than 1200 mg/kg.” The PWS stated that after removing contaminated material with “trucks covered with tarps [filled] to capacity,” the “lead-contaminated soil weight . . . will be measured by contractor-provided scales . . . for final monthly payment,” as part of a “fixed unit price contract that will be based on a price per short ton of lead-contaminated soil removed from each property.” PWS at 14. After excavation, the work sites were to “be backfilled with non-contaminated soil, topsoil, and gravel.” *Id.* at 17. After backfilling, the PWS called for “quality landscaping for each backfilled property.” *Id.* at 19.

The PWS contained two blank pricing charts, one for the “base period” and one for “option period 1.” Exhibit 1. The pricing chart for the base period, attached to the PWS, stated, in relevant part:

CLIN	DESCRIPTION	ESTIMATED QUANTITY	UNIT
0001	Excavation Minimum 130,000	370,000	TON
0002	Backfill/grading Minimum 100,000	285,000	CU YD
0003	Gravel Minimum 1,000	4800	TON
0004	Hydro-seeding Minimum 3,500,000	7,000,000	SQ FT

0005	Zoysia Grass Minimum 30,000	180,000	SQ FT
0009	Property Owner Satisfaction Incentive #1		

Id. The pricing chart noted that the “number specified under the ESTIMATED QUANTITY column represents the maximum for that CLIN.” Under contract clause I-46, FAR [Federal Acquisition Regulation] 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (Sep. 2002), the contract required “the government [to] make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates of work accomplished.” Exhibit 1 at 32-33.

After the contractor completed a property, the EPA was to inspect the property and request the homeowner’s participation in a survey about his or her experience with the contractor. Exhibit 1, PWS at 21. These surveys were part of the quality assurance surveillance plan (QASP). Exhibit 1, Enclosure D. The QASP contained several positive and negative incentive opportunities for prospective contractors. *Id.* Incentives ranged from a positive incentive for high survey marks to negative incentives for the late completion of identified properties within forty-five days of the contract’s expiration. *Id.* With particular relevance to this case, a contractor was entitled to earn a survey-based incentive via CLIN 0009, which provided in pertinent part:

Task 14: Property Owner Satisfaction Survey Incentive #1	At least 75% of Property Owner Satisfaction Surveys are submitted to EPA to be eligible for incentive award payment.	EPA review and analysis of Property Owner Satisfaction Surveys received.	When at least 75% of Property Owner Satisfaction Surveys are received by EPA, <u>and</u> 90% or more of them reflect a rating of at least ‘Very Good’, the Contractor will receive an incentive payment equal to 2.5% of the total contract period delivered dollar value.
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Id.

On May 3, 2011, the EPA held a pre-bid conference for the project. Exhibit 3 at 1-2; JSF 5-6. According to DNT, its vice-president was present at the pre-bid conference. Declaration of John Teague ¶¶ 3-4; JSF 1. Early in the meeting, while introducing the contract, the contracting officer (CO) stated that the contract was a “hybrid indefinite quantity contract that uses fixed unit prices for estimated quantities. Minimum and maximum quantities are specified. However, I want to stress to you that no exact quantity is guaranteed. Therefore you should consider that fact when developing your unit prices.” Exhibit 3, Enclosure D at 5; JSF 7, 10.

After the CO introduced the solicitation, a question and answer session began. An attendee asked, “What is the expectation of how many homes and schools are to be completed in the twelve-month contract?” Exhibit 3, Enclosure D at 29. The CO responded in relevant part, “we hope to complete all schools and at least fifty properties in the base period.” Exhibit 3, Enclosure D at 29; JSF 8. Later on, the issue of properties was discussed again, when an attendee asked, “How many sites for phase 1 and phase 2?” The CO responded:

If you mean contract periods, the first to be completed should be the schools, and after that, work can be begun on the properties. No guaranteed *number of properties* will be tasked. It’s based on the quality, progress and available funds.

Exhibit 3, Enclosure D at 36-37 (emphasis added).

The CO attempted to clarify further, stating in relevant part:

Another thing is about the pricing schedule. . . . I keep saying, you know, these quantities are not guaranteed, and that sort of thing. This is an indefinite quantity contract, which means that I have to tell you a minimum and a maximum, and it also means that the minimum is guaranteed. So every single one of these CLINs 1 thru 5, and 10001 thru 10015 have a specified minimum, right, under their description line. . . . So, you’re going to get a hundred and thirty thousand tons paid for. Okay? But you might get as much as three hundred and seventy thousand tons.

Exhibit 3, Enclosure D at 52.

Near the end of the question and answer session of the conference, an attendee asked the CO, “The one and thirty tons minimum, is that for three hundred properties and a 12-inch cut?” The CO replied:

No, what that's for is the base period of the contract. *So, whatever the number of properties you dig is really not the issue, because you're being paid. This is not a contract based on properties.* Okay. So, during the base year, you will receive money for a hundred and thirty tons of excavation guaranteed We can get out of that, if you don't perform, you know.

Exhibit 3, Enclosure D at 66-67 (emphasis added); JSF ¶¶ 7, 10.

At the end of the meeting, an attendee asked, "When do you envision sticking the first shovel in the ground?" The CO replied:

If we close on May 25th, and the successful bidder has plans that are fabulous and easy to accept, and approved very, very quickly, and they've provided us the required bonding very, very, quickly, then I would say mid-June, but there's a lot of ifs there. We're ready, but you guys have got to get ready.

Exhibit 3, Enclosure D at 72. After the pre-bid conference, the EPA amended the solicitation by issuing amendment 00002, "to incorporate the pre-bid conference transcript." *Id.* at 1.

In his declaration, DNT's vice-president, John Teague, stated that in developing DNT' bid he "reconciled the contractual language of the number of properties and the tonnage of excavation" and considered, "among other things, the cost to mobilize and demobilize each property," reaching a "cost to mobilize and demobilize each residential property [at] \$562.50 [per property]." Teague Declaration ¶¶ 8-11.

The EPA awarded contract EP-S7-11-07 to DNT on June 16, 2011. Exhibit 6; JSF 14. This contract was DNT's first experience as a prime contractor with the EPA. Teague Declaration ¶¶ 4, 6. The contract contained clause I-20, FAR 52.216-22(a)-(b), Indefinite Quantity (Oct. 1995), which stated:

(a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. 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

maximum. The government shall order at least the quantity of supplies or services designated in the Schedule as the minimum.

Exhibit 6 at 18. The contract's ordering clause, I-68, FAR 52.216-18, Ordering (Oct. 1995), provided:

(a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from [sic] **FOR THIS PROJECT, ENCLOSURE A WILL SERVE AS THE ORDERING INSTRUMENT.** SUBSEQUENT ORDERS FOR ADDITIONAL OR REPLACEMENT PROPERTIES WHERE ACTIVITIES WILL TAKE PLACE WILL BE ISSUED BY MODIFICATION OF THE CONTRACT. NO TASK ORDERS WILL BE ISSUED. [sic] through the date of the contract period of performance.

Exhibit 6 at 38 (emphasis added).

The contract contained a pricing schedule which listed in relevant part:

CLIN	DESCRIPTION	ESTIMATED QUANTITY	UNIT	UNIT PRICE	TOTAL
0001	Excavation Minimum 130,000	370,000	TON	\$7.65	\$2,830,500
0002	Backfill/grading Minimum 100,000	285,000	CU YD	\$8.10	\$2,308,500
0003	Gravel Minimum 1000	4800	TON	\$13.00	\$62,400
0004	Hydro-seeding Minimum 3,500,000	7,000,000	SQ FT	\$0.09	\$630,000

0005	Zoysia Grass Minimum 30,000	180,000	SQ FT	\$0.50	\$90,000
0009	Property Owner Satisfaction Incentive #1				\$160,535

Exhibit 6, Attachment 4; JSF 26-27. The base year of the contract was to run for twelve months, from June 16, 2011, to June 15, 2012. One option year was also noted as possible. *Id.*

The contract required several deliverables before the contractor could begin excavation. Prior to beginning site work, DNT was required to complete and obtain the EPA's approval for a project management plan (PMP), quality management plan (QMP), quality assurance project plan (QAPP), and health and safety plan (HASP). Exhibit 6, PWS at 6. Prior to beginning removal actions at each property, the EPA was responsible for providing DNT a signed access agreement for the property. Exhibit 6, PWS at 7.

On July 13, 2011, DNT submitted its PMP to an EPA contracting officer's representative (COR) for the project.⁵ Exhibits 24, 52; JSF 31. The PMP provided DNT's proposed approach for the remediation of the mining waste at the site. Exhibits 24, 52. The project's primary COR provided feedback, DNT corrected and clarified the PMP based on these comments, and DNT resubmitted the PMP on July 28, 2011. Exhibit 29 at 20; JSF 33. In the draft PMP, DNT wrote, "DNT anticipates being able to perform the target number of property remediations identified by the EPA during the first year, and understands that to be the five schools and at least fifty residential properties." Exhibit 29 at 19; JSF 34. DNT and the COR signed the revised PMP, on July 25 and July 28, 2011, respectively. Exhibits 31 at 22, 33 at 1; JSF 34, 36-37.

The PWS also explained the requirements for updates to the PMP: "The contractor shall update the PMP to reflect progress towards achievement of the performance objectives as necessary . . . due to EPA PO [project officer] within 10 calendar days of changes." Exhibit 6, PWS at 23. The PWS stated, "The contractor shall propose a schedule for the property clean-ups associated with this contract for the EPA's approval in the Project Management Plan," and also provided that "the EPA reserves the right to add properties to or remove properties from the list for any reason." Exhibit 6, PWS at 4.

⁵ A primary COR as well as other CORs were assigned to this project.

With the preliminary paperwork completed, the EPA issued the notice to proceed on August 17, 2011. Exhibits 6, 37; JSF 42. Two days later, on August 19, 2011, DNT informed the EPA that it would be on site to begin the preparatory work for the project. Exhibit 38; JSF 44. Ten days after that, on August 29, 2011, the primary COR sent DNT access agreements for several properties available for remediation. Exhibits 39-40; JSF 45. At that point, the EPA had acquired access agreements for DNT to work on 107 residential properties and five schools. Exhibit 27.

Throughout the performance of the contract, several disagreements arose among DNT, the CO, and the CORs assigned to the project. The first disagreement arose on September 21, 2011, when DNT and the EPA exchanged messages about the potential ramifications of the two months that the parties spent completing the pre-remediation deliverables. Exhibit 52; JSF 53. DNT was concerned with the late start of the project, stating:

we believe that the only issue . . . is the length of time during the development of the plans. We were given the notice [to proceed] on the contract just before the July holiday and then we had to work through holiday time, vacation time, and travel so we would like to know if we detail this in a letter to you if there would be an adjustment in the first year time line so that we had adequate time in the *field to complete as much as possible*.

Exhibit 52 (emphasis added). The CO responded, stating:

Actually, I believe you will have adequate time to complete the work as we expect to be complete within the contract year - even though your start date for onsite work was quite a bit later than we had initially hoped. However, what did take longer than we are used to is making your plans approvable.

Id.; JSF 53. When DNT sought advance permission, the EPA typically allowed DNT to work on weekends and holidays in order to mitigate the purported impact of the late start. Exhibits 91, 107, 113, 124 at 1; JSF 54-55.

In January 2012, the CO exchanged messages with DNT about the procedures required to bill for the minimum contract quantities. Exhibit 146; JSF 59. DNT asked in relevant part:

The contract has minimums for the line items we are able to invoice on a monthly basis. Our contract started on June 16, 2011 and currently runs for one year. We are currently at the six month time frame of the contract and everything is going as planned, but we wanted to know if we would possibly

be able to invoice some of the [CLINs'] minimum quantit[ies]. At start-up of this project we have put out over \$200,000 in hard cost for items that will be utilized over the one year contract. We thought that if we could invoice the difference in what we have moved to date versus the minimum per month that would give us some cash flow to offset some of the cost.

Since this is our first prime contract direct with the [EPA] I was not sure how the minimums were paid out and when.

Exhibit 146; JSF 59.

In response to DNT's question, the CO stated in relevant part:

The "minimum" quantities specified merely mean that we will be paying you for at least that number over the course of the base period. They are "guaranteed amounts." However, you can only invoice for what you have performed. If it turns out that through no fault of your own (but the non-availability of the "task" etc.) DNT cannot perform the minimum quantity, then EPA will pay DNT for the difference between the "performed" and the "minimum" stated. This would take place after the expiration of the base period.

If you are asking if you can invoice for minimums that you have not yet performed at this time, then the answer is no.

On a monthly basis, DNT can invoice for whatever it has completed, using the pricing schedule, by CLIN. So, the more you get done in a month's time, the more you are able to invoice for.

Exhibit 146.

DNT responded that it was confused by the CO's response, and wrote:

So are you saying at the end of the first year if we have performed the contract as we had planned and remediated as many properties as we were able given the time table, weather, etc. and we have not reached the minimum quantity we will still not be able to invoice for that minimum [and we will be able to invoice only for] what we have performed to that date? So I guess I am a little confused on your statement below, if we have worked and performed all we can in the first year but we fall short of the minimum quantity and there are

more properties that can be done[,] then the EPA will not pay the minimum amounts?

Exhibit 146.

The CO clarified her response in a follow-up message, stating:

No, that is not what I am saying. What I'm saying is that unless it's somehow your (DNT's) fault, you will at least be paid for the minimum quantity. EPA believes that if a contractor is making adequate progress they should be able to perform the minimum quantities stated within the base period. For instance, if DNT chooses not to work on some days or decides to lower crew numbers or size to "stretch out" the work, then you would not be paid for the minimum quantities. However, if DNT does their due diligence to accomplish the work and make sufficient progress, DNT should definitely have performed at least the minimum quantity within the base period. On the other hand, if for some reason weather becomes such an issue (or any "Act of God") that performance is significantly delayed so as to prevent DNT from performing the minimum quantity (through no fault of their own) EPA would pay DNT for the minimum quantity.

Exhibit 146.

On January 24, 2012, the primary COR reported his overall happiness with DNT's work, but informed the CO and DNT of two issues: hard hat violations and deviations from the approved sample collection methods. Exhibit 152 at 2; JSF 60.

By the end of February, two new developments arose. One of the schools halted DNT's work on its football field, concerned that the work would disrupt the football season and spring graduation ceremony that year. Exhibit 34, 169; JSF 61. Also, noting the low levels of excavation and backfill, and that DNT was "not even close to the minimum," the CO and COR began discussing ways that DNT could excavate the minimum quantities guaranteed under the contract, including extending the base period of the contract to afford DNT more time to maximize excavation and backfilling of contaminated materials. Exhibits 172, 178.

On April 17, 2012, just over ten months into the base year, the EPA sent another list of problems to DNT, citing violations including understaffed sites, failure to speed-up work as promised, and a lack of supervision from on-site managers. Exhibit 224; JSF 65.

Because of these defects, the CO concluded that the EPA would not exercise the option to continue DNT's work into the second year. Exhibit 224; JSF 65. The EPA executed modification 0006 on April 19, 2012, to inform DNT it would not be exercising the option period of the contract because DNT had not made sufficient progress in completing the tasked work. The EPA informed DNT:

In order to provide DNT the opportunity to complete work already tasked, clause I.23 FAR 52.217-8 OPTION TO EXTEND SERVICES (NOV 1999) is hereby invoked/exercised in full, extending the Base Period for 6 months after the original Base Period "end date". Consequently, the new contract expiration date is 12/15/12.

Exhibit 12. In internal discussions, the CORs expressed dissatisfaction with the decision not to exercise the option, as some felt that despite the slower than desired pace, DNT's performance had been without any significant issues or violations. Exhibit 229 at 1; JSF 67. One COR voiced his concern over the potential loss of a "responsible, responsive, and conscientious contractor." Exhibit 233.

On May 8, 2012, DNT asked for a meeting with the EPA to discuss the contract requirements. Exhibits 247; JSF 73. In the message to the EPA, DNT stated:

DNT feels that the contract minimums in the pricing schedule were provided to protect the contractor and not for the benefit of the government. The PWS does not require DNT to meet the contract minimums. The PWS requires DNT to perform in accordance with the PWS and the approved project management plan. DNT's pricing was developed based upon the ability to achieve at least the minimum during the 12 month base year with the performance of the documented schedule of 5 schools and 50 residential properties. This schedule was communicated in the Project Management Plan and approved by the EPA, and was consistent with the expectation communicated by the EPA at the pre-bid conference.

Analysis of work to date reveals that the effort per property has resulted in much less material being removed and backfilled than was expected and thus the minimums will not be reached though DNT has followed the approved Project Management Plan. Extending the period of performance for six months to recognize the revenue originally anticipated by the planned performance of 5 schools and 50 properties during a 12 month period, on a contract where the pricing must be aggressive to achieve the low-bid award, would result in a significant level of unplanned, unrecovered cost to DNT.

Exhibit 247.

The letter prompted internal discussions within the EPA about the contract requirements. Exhibits 247, 252, 254; JSF 70-73. In a memorandum to the CO the COR stated:

It was my understanding that [DNT was] obligated to meet the minimum quantity in order to earn the full amount. The number of properties that is required to make the minimum quantity was their estimate and was just that, an estimate. I didn't recommend they change their estimate because I thought they did the legwork to estimate how much it would take to reach the minimum. This contract is being paid on a price per ton basis and the amount of properties is irrelevant.

Exhibit 254.

The CO replied to the COR on May 15, 2015:

[The EPA] did not guarantee any number of properties and the contract is based on tonnage. It is DNT's implication that by approving their PMP, you approved them performing only the 50 properties and the 5 schools in the base period. I do not believe they have a leg to stand on to support our actions being a change order, but we still have to address their allegation.

Exhibit 254.

In response to the CO's request for documentation of DNT's violations and issues, the primary COR compiled a list of DNT violations over the course of the contract. Exhibit 281; JSF 74. Violations included late weekly reports, inconsistent staffing, missing access restrictions to work sites, unlocked gates, forgotten equipment at work sites, damages to property at remediated residences, and the lack of tonnage removed. Exhibit 281.

On May 31, 2012, the CO officially responded to DNT. Exhibit 285; JSF 75. She reiterated that the "exercise of Option Period I is not in the best interest of the government, but the EPA was "providing additional time for DNT to complete work already tasked." Exhibit 285; JSF 75. The CO also stated:

since minimum quantities are based NOT on the number of properties completed but on tons excavated, EPA tasked double that amount of properties at contract award to ensure quantities could and would be met. The PMP is a living document. As it became obvious to DNT that their initial plan was not

going to generate the minimum quantities, it should have been updated and presented to EPA for approval. . . . EPA cannot dictate the number of properties to be completed nor is pricing based on property completions. DNT is paid on tons excavated.

Exhibit 285. Four months into the extended contract, on October 11, 2012, the primary COR informed the CO that DNT had excavated only 86,000 tons. Exhibit 407. The CO took the position that “the EPA [could] make a good case for not paying [DNT] the minimum [tonnage/cubic yardage] based on their failure to make adequate progress.” *Id.*; JSF 76.

In total, the contract ran from June 15, 2011, until December 15, 2012. Exhibit 12. During that time, the EPA ordered 163 properties and five schools for remediation, with accompanying access agreements. JSF 132-33. DNT completed eighty-six properties and five schools, excluding the North County High School football field. Exhibits 6, 12; Supplement, Exhibit 547; JSF 80. The final construction report contained the following table, in relevant part:

Site	Material	Unit	Quantity
All	Contamination Material Removed -Total	Tons	89,817.51
All	Backfill Replaced - Total	CY	86,364
Residential	Contamination Material Removed -Total	Tons	42,116.99
Residential	Contamination Material Removed - Avg./Property	Tons	520
Residential	Backfill Replaced - Total	CY	44,604
Residential	Backfill Replaced - Avg./Property	CY	551
School	Contamination Material Removed -Total	Tons	47,699.48
School	Contamination Material Removed - Avg./Property	Tons	9540
School	Backfill Replaced - Total	CY	41,760
School	Backfill Replaced - Avg./Property	CY	8,352

Exhibit 482 at ii.

On December 28, 2012, DNT submitted two invoices, 30080-R and 30082. Exhibits 671, 672. Invoice 30080-R was for the payment of the “property owner satisfaction”

incentive, “commitment to local community” incentive, and “diesel chemical and particulate emissions ” incentive, totaling \$150,260.76. Exhibit 771. Invoice 30082 was for “excavation minimum 130,000” and “backfill/grading minimum 100,000,” totaling \$411,853.19. Exhibit 672. On January 6, 2013, DNT sent a message stating in relevant part, “DNT has completed field work on the subject contract for the Big River mining waste.” Exhibit 465.

The QASP provided the methodology for determining payment of incentive #1 and included an EPA “review and analysis” of the property owner satisfaction surveys it received. Exhibit 6, Enclosure D. As previously mentioned, the contract provided for incentive #1, a survey-based incentive, when “at least 75% of property owner satisfaction surveys are received by EPA and 90% or more of them reflect a rating of at least ‘very good.’” Exhibit 480. The amount of the incentive payment was equal to 2.5% of the total contract period delivered dollar value. *Id.*

After each property remediation was concluded, DNT and the EPA obtained feedback from property owners through surveys that included five rankings, “poor,” “acceptable,” “good,” “very good,” and “exceptional.” *Id.* The surveys also requested “yes” or “no” answers about whether the contractor was well behaved, mindful of property, and timely in its work. *Id.* The surveys concluded with an open-ended request for comment on the overall performance. *Id.*

Following demobilization, the EPA began work on determining DNT’s eligibility for the payment of incentive #1. DNT had completed eighty-six properties and eighty-one property owner surveys were submitted to the EPA, totaling a 94% response rate. Supplement, Exhibit 574; JSF ¶ 80. Of the eighty-one surveys, sixty-nine, or 85%, indicated performance ratings of very good or exceptional. Exhibit 535; JSF ¶ 82. Because only 85% of the surveys scored very good or exceptional, the EPA denied the incentive payment. Exhibit 535; JSF ¶ 82.

On May 9, 2013, DNT sent an initial inquiry to the EPA questioning the denial of the incentive #1 payment. Exhibit 515. The EPA explained:

After reviewing the surveys provided via hard copy, the EPA found the following: 86 properties were remediated, and 5 surveys were not completed by the homeowners, for a total return of 81 surveys (approximately 94%). Using the total of 81 properties, 69 were ranked as very good or above, while 12 were ranked lower. This gives us a total of 85% which does not meet the requirement for incentive payment #1.

Id.

DNT responded, stating:

During the project we discussed this incentive issue with you on several occasions as we felt that some of the property owners were being unfair toward DNT due to issues that were beyond our control. We even documented these issues throughout the project on our daily and weekly reports. You had told us that we could disregard these property owner surveys as long as the rating was based on issues beyond our control. So based on these conversations with you we believe that we have at least four or more surveys that could be eliminated from the overall count based on issues beyond our control.

Exhibit 516 at 1. DNT went on to address twelve of the properties that had been scored below “very good,” making various arguments that for eight of those properties the property owner should have given DNT higher scores. *Id.* at 2-5.⁶ On June 30, 2015, the COR wrote to the CO:

Do you want me to work up a response to this letter from [DNT]? After review[,] they did not earn this incentive, especially based on their response. Apparently, they didn’t take into consideration that some homeowners are not going to rate the contractors as high[ly] as others . . . that’s the nature of the satisfaction survey. Let me know if a letter is appropriate or an email response. Also, let me know if you disagree with me on this one.

Exhibit 526. The CO asked the COR for a response and stated: “One caution — we do have to have some input ourselves into their performance. We also have to consider if the homeowner ratings are fair considering what we know about the homeowner and the performance that was observed. Sometimes, we need to look at customer surveys with a grain of salt[,] if you know what I mean.” Exhibit 527.

From May through July 2013, the EPA continued to discuss internally whether DNT was entitled to payment for incentive #1. Exhibit 527. In one message, the CO reminded the primary COR that the EPA was required to consider whether the property owner’s rating was fair, considering what “we [the EPA] know about the homeowner and the performance that was observed.” *Id.* On July 29, 2013, the primary COR informed the CO that he still intended to deny incentive #1, explaining, “We can’t just throw out surveys because the

⁶ We note that of the twelve surveys in issue, only one of them included comments from the property owner that would have allowed the EPA to look behind the score to attempt to divine the property owner’s reasons for the lower score.

contractor feels they were treated unfairly. This is the nature of a satisfaction survey.” Exhibit 533. There is no indication in the record that the EPA seriously evaluated DNT’s argument that survey results for some of the properties should be disregarded or eliminated.⁷

On August 8, 2013, the EPA sent a message to DNT once again denying the “property owner satisfaction owner survey” incentive from invoice 30080-R and the “excavation minimum” and “backfill/grading minimum” from invoice 30082. The CO justified her denial of invoice 30080-R, stating:

DNT did not meet the criteria established in the QASP. . . . [j]ust 85% of the survey results reflected a rating of at least very good. This does not meet the specified requirement of 90% or more which was required . . . to earn incentive payment #1.

Exhibit 535 at 4-5. The CO explained her denial of invoice 30082, stating in relevant part:

Subject invoice appears to be for a dollar value equal to the difference between the amount DNT actually hauled (approximately 90,000 tons) and the minimum amount specified in the pricing schedule (130,000 tons). . . . DNT failed to make adequate progress, negating the EPA’s commitment to reimbursement of the minimum specified. . . . EPA will not pay DNT for the 130,000 ton minimum due to failure to make adequate progress.

Id. at 3-4.

On September 23, 2013, DNT filed a certified claim for invoices 30082 and 30080-R, seeking \$469,645.79, the “amount due based on minimum quantities outlined in the contract and the incentive based on property owner evaluations.” Exhibit 677.

The EPA CO issued a final decision denying the claim on March 21, 2014. Exhibit 570. Responding first to invoice 30082, the CO concluded that DNT “failed to make or even endeavor to make adequate progress, negating the EPA’s commitment to reimbursement of the minimum specified.” Exhibit 570. The CO explained:

EPA openly stated during the pre-bid conference that the quantity each assigned property would generate in tonnage was unknown and would vary based on size and depth/area of contamination. This resulted in an indefinite

⁷ DNT asserted that while it had proved eight properties were underscored, it was only asking that four be discarded or eliminated because that was all that was needed for DNT to meet the full requirement for payment of incentive #1. Exhibit 516 at 1.

contract which based payment on tonnage and not completion of individual properties. Furthermore, the rather large estimated quantity specified in the pricing schedule was a clear indication of EPA's expectation that the successful contractor could anticipate easily excavating over 130,000 tons within the base period of the contract. While the minimum tonnage specified in the pricing schedule was derived from being provided properties to excavate, the tonnage served as the basis for evaluating performance progress and reimbursement to the contractor

Id. Regarding DNT's PMP, the CO noted that:

Under this performance based contract it was up to the contractor to determine how [it] would achieve the minimum quantity and make adjustments as necessary if their initial plan proved inadequate. It is important to mention that DNT did not accomplish their original submitted plan of completing at least 50 properties along with the 5 schools during the original base period. . . . DNT's cost and pricing structure should have included performance of the government's clearly stated minimum tonnage based on the large scope delineated in the PWS. . . . DNT did not begin fieldwork . . . until . . . 3 months after contract award. . . . The EPA advised DNT of their failure to make adequate progress [repeatedly]. Prime weather conditions for maximum tonnage excavated were present during the contract performance period . . . [yet] no substantial increase to DNT's rate of production was experienced.

Id. The EPA also cited FAR 16.504(a)(1), stating:

EPA ordered over 120 properties via the contract award and through modifications of the contract. Properties tasked (ordered) included 5 schools. . . . DNT made no effort to furnish tasked (ordered) properties as required under FAR 16.504(a)(1).

Id. The CO then addressed the denial of the incentive #1 payment from invoice 30080-R, stating:

This is denied in its entirety. DNT did not meet the criteria established in the quality assurance surveillance plan (QASP). . . . just 85% of the results reflected a rating of at least very good. This does not meet the specified QASP requirement of 90% or more.

Id.

DNT appealed the decision to the Board, where the case was docketed as CBCA 3909. Exhibit 570; JSF 86.

Discussion

DNT seeks a total of \$469,645.79, asserting that it is owed \$411,853.19, the difference between the contract minimums set forth for CLINs 0001 and 0002 and the amounts DNT actually was paid for materials remediated, plus \$57,792.60 for payment of incentive #1. The contract in issue was for the remediation of contaminated material, which was accomplished by excavating the contaminated material and backfilling the excavated area with soil and gravel. The amount of excavation and backfilling is not in dispute. DNT excavated a total of 89,818 tons of material and backfilled the excavations with 89,969 cubic yards of soil and gravel. The EPA paid DNT for those amounts pursuant to the rates contained in the contract.

DNT, however, maintains that, pursuant to the contract, the EPA committed to pay DNT for 130,000 tons of excavation and 100,000 cubic yards of backfill as a minimum quantity, whether or not DNT actually excavated or backfilled that amount.

This dispute involves contract interpretation.

Contract interpretation begins with the plain language of the written agreement. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (citing *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). The contract must be read as a whole, giving reasonable meaning to all its parts. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract's plain language controls. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002).

ACM Construction & Marine Group, Inc. v. Department of Transportation, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,151.

“It is not the subjective intent of the drafter, but rather the intent that is conveyed by the language used, that governs the contract's interpretation.” *ACM Construction*, 14-1 BCA at 174,151 (citing *JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309 at 169,480; *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971)). “In addition, ‘the language of [the] contract must be given the meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances . . . unless a special or unusual meaning of a particular term or usage was intended, and was so understood by the parties.’”

ACM Construction, 14-1 at 174,151 (citing *Teg-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006); *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997)).

Resolving this dispute calls for us to follow basic rules of contract interpretation. Under the terms of this contract, DNT agreed to, among other things, excavate and remove contaminated materials at the rate of \$7.65 per ton, and backfill and grade the excavated materials at the rate of \$8.10 per cubic yard. The EPA estimated that the site contained 370,000 tons of contaminated materials, but did not guarantee that DNT could remove all of that material in the base year. The EPA guaranteed that it would make available for DNT's excavation a minimum quantity of 130,000 tons of contaminated materials in the base year. The EPA also estimated that the site would need 285,000 cubic yards of backfill and grading and guaranteed it would make available to DNT a minimum of 100,000 cubic yards of backfill and grading to replace the excavated materials. The contract also included enclosure A, which was the list of properties to be excavated and remediated by address. By executing the contract, and including enclosure A in the contract, the EPA ordered the full estimated amounts in the contract because the ordering clause provided that **"FOR THIS PROJECT, ENCLOSURE A WILL SERVE AS THE ORDERING INSTRUMENT."** By operation of these terms, once the contract was signed the EPA had ordered the five schools and 307 residential properties listed in enclosure A.

The contract provides that the contractor shall furnish supplies and services specified in the schedule up to and including the quantity designated as the maximum, and the Government shall order at least the quantity of supplies or services designated in the schedule. During the pre-bid meeting, a transcript of which was incorporated into the contract, the CO stated explicitly, "[W]hatever the number of properties you dig is really not the issue, because you're being paid. This is not a contract based on properties." Throughout the performance of the contract, the Government stated several times that contract payments were based not on properties, but rather on the tons of contaminated materials removed and the cubic yards of backfill that replaced the contaminated materials. While the contract used property addresses and DNT performed remediation by property, it is clear that the contract required payment based on the amounts of contaminated materials removed and replaced.

Prior to beginning the excavation, DNT was required to complete and obtain the EPA's approval of, among other things, its PMP [Project Management Plan] detailing its proposed approach for the remediation, as well as other contractually required quality management, quality assurance, and health and safety plans. DNT spent a long period getting through this approval process, likely because this was its first EPA contract. The EPA's approval of DNT's PMP, showing that DNT planned to remediate fifty properties

and five schools during the base year, did not in any way change the terms of the contract, or more specifically, affect the basis on upon which payment was to be made.

In addition to approving DNT's plans, the EPA was required to provide DNT a signed access agreement for each property, before removal action at that property could begin. This was the property owner's consent for DNT to enter onto his or her property. Until the access agreement was provided to DNT, the contractor was not allowed to remove contaminated materials from a property.

It appears that the EPA took reasonable steps to assist DNT in successfully performing this contract. We have reviewed the record and find no compelling evidence that the EPA's issuance of access agreements in any way delayed DNT's progress in removing contaminated materials. DNT made no complaints during the pendency of the contract that it lacked access to sufficient properties. It does not appear that DNT had to cease, at any time, removal action because the EPA had failed to timely issue access agreements. The EPA issued access agreements sufficiently in advance that DNT, had it been more fully mobilized, could have excavated the quantities set forth in the contract. The fact that DNT failed to excavate the minimum amount is not the fault of the EPA. Furthermore, we found no compelling evidence of a government-caused delay or other form of compensable delay (such as weather) that might have delayed DNT's progress. Although excavation at one of the schools was curtailed, the EPA made sure that it had issued sufficient access agreements to allow the contractor to fully continue working. The EPA further assisted DNT by extending the base contract period for several months, allowing DNT to excavate more properties. Any delays or lack of progress that occurred on this contract was of DNT's own making.

DNT has explained how it bid this contract and that it calculated its offer's excavation rate based in part on excavating only fifty residential properties and five schools during the base year of the contract.⁸ How DNT chose to calculate its bid for this contract, and the number of properties it planned on excavating, does not change the terms of the contract, which requires payment based on tons of contaminated materials excavated at a per ton rate and cubic yards of backfill at a per cubic yard rate.

⁸ The CO's statement made during the pre-bid conference that she "hoped" that contractors would be able to finish fifty residential properties and five schools in the base year did not change the payment terms of the contract from being based on ton/cubic yards remediated as opposed to the number of properties remediated. During the pre-bid conference the CO clarified that "no guaranteed number of properties [were] tasked," and that the contract was not based on the number of properties remediated.

DNT also posits that the COR's approval of its PMP somehow changed the terms of the contract to tie the remediation of fifty properties and five schools to the 130,000 tons of excavation set in the contract's pricing schedule. This simply is not the case. The PMP was never incorporated into the contract's pricing schedule, or issued as a change to, the contract. The PMP was only a vehicle by which DNT showed how it planned to approach the remediation, and that vehicle was intended to be updated as the remediation progressed.

DNT asserts that pursuant to the terms of the contract, it is entitled to be paid the difference between the actual tonnage and cubic yardage ordered by the EPA, and the minimum tonnage and cubic yardage stated in the contract. We disagree. To the extent DNT makes various other arguments for recovery of the \$411,853.19 it seeks, or any other amounts it seeks, we find those arguments to be unpersuasive.

We find that DNT was appropriately compensated under the terms of the contract for the tons of contaminated materials it actually removed and the cubic yards of backfill it actually provided. Had DNT maximized its excavation it would have increased its payments. However, DNT appears to have rested on its position that it only had to excavate fifty residential properties and five schools to recover full payment of the 130,000 ton minimum.

DNT also contends that the EPA acted arbitrarily and capriciously when it denied DNT incentive #1. DNT proffers that the EPA improperly failed to exercise its "review and analysis" discretion by including allegedly erroneous and irrelevant surveys. DNT alleges that the EPA's CORs told it that the EPA would eliminate surveys that were based on "erroneous factors." The EPA posits that it did review and analyze the surveys when it mathematically calculated the results. It adds that DNT has failed to justify why the EPA's decision not to pay incentive #1 was arbitrary and capricious.

When the Government is entitled to exercise its discretion, an appellant bears a heavy burden of proof in showing the determination made was arbitrary and capricious. *AFR & Associates, Inc. v. Department of Housing & Urban Development*, CBCA 946, 09-2 BCA ¶ 34,226, at 169,169 (citing *Balboa Insurance Co. v. United States*, 775 F.2d 1158, 1164 (Fed. Cir. 1985)). "[T]he greater the discretion granted to a contracting officer, the more difficult it will be to prove the decision was arbitrary and capricious." *Id.* (citing *Galen Medical Associates, Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004)).

In determining whether an agency action was so arbitrary and capricious as to constitute an abuse of discretion, the Board will consider:

- (1) evidence of subjective bad faith on the part of the government official, (2) whether there is reasonable contract-related basis for the official's decision,

(3) the amount of discretion given to the official, and (4) whether the official violated the an applicable statute or regulation.

AFR & Associates, Inc., 09-2 BCA at 169,169 (citing *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999)).

Whether the EPA abused its discretion in denying incentive #1 will be considered in light of the standards described above. We see no evidence of bad faith on the part of any of the EPA officials who were involved in deciding whether to pay incentive #1. Since DNT does not contend that the EPA violated a statute or regulation in denying incentive #1, the Board focuses on whether there is reasonable contract-related basis for the official's decision and the amount of discretion given to the official.

Here the official tasked with exercising her discretion is the CO. She did this after receiving input from the primary COR. Looking first to the amount of discretion given to the CO to pay incentive #1, as opposed to exercise of options periods or termination, the CO has less discretion because the QASP, incorporated into the contract, lists of the procedures that a CO must adhere to in deciding to pay incentive #1. The CO's discretion is thus limited to what the contract allows. In light of the EPA's requirement to abide by the QASP, we must determine whether the CO's decision to deny incentive #1 was founded on a reasonable, contract-related basis.

DNT asserts that the EPA was required to conduct a "review and analysis" of the surveys, disregarding erroneous surveys on the basis of discussions allegedly held on-site with the COR. That is not correct. The contract does not mandate a "review and analysis" that requires the EPA to discard a survey for any reason. Even if such culling was required, DNT has failed to provide sufficient evidence, beyond its own general statements and declarations, that any particular survey should be culled.

The Board conducted its own review of the contested surveys and has failed to find evidence of the claimed animosity or unfairness that DNT alleges. Rather, of the surveys that DNT disputes, only one has any additional information that the EPA could review or analyze beyond simple arithmetic, and the comment does not relate to DNT's post-determination reasons for dropping the survey. There was little else for the EPA to review and analyze when they calculated the survey results. Had there been additional comments containing explanations that would place the surveyee's concerns outside the blame of DNT, the EPA's duty may have required a more thorough investigation. However, with nothing to investigate under the contract's required evaluation methods, the CO acted reasonably in not culling surveys from the pool. DNT's claim for payment of incentive #1 is denied.

Decision

For the reasons set forth above, the Board **DENIES** the appeal.

PATRICIA J. SHERIDAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

H. CHUCK KULLBERG
Board Judge