



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: September 17, 2015

CBCA 3725

HEARTHSTONE, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Jason S. Randolph, Dandridge, TN, counsel for Appellant.

Jay McWhirter, Office of the General Counsel, Department of Agriculture, Atlanta, GA, counsel for Respondent.

Before Board Judges **SOMERS**, **POLLACK**, and **SULLIVAN**.

SULLIVAN, Board Judge.

On February 27, 2015, the Board issued a decision denying in part the appeal filed by appellant, Hearthstone, Inc., of the contracting officer's final decision terminating Hearthstone's timber sale contract for default and assessing reprourement costs. *Hearthstone, Inc. v. Department of Agriculture*, CBCA 3725, 15-1 BCA ¶ 35,895. In our decision, with regard to the claim for reprourement costs asserted by the Department of Agriculture, Forest Service, we stated, "Neither party has addressed the Government's reprourement costs claim in the submissions to date, leaving the Board unable to adjudicate the Government's claim on the current record." *Id.* at 175,482. Following that decision, we directed the Forest Service to submit further support and briefing regarding the claim for reprourement costs and provided Hearthstone an opportunity to respond. After considering

the information submitted by the parties, we find that the Forest Service has not met its burden to establish its entitlement to such costs.

Statement of Facts

Initial Board Decision and Subsequent Proceedings

On September 26, 2006, the Forest Service awarded to Hearthstone the White Bull timber sale contract in the amount of \$349,427.29. Appeal File, Exhibit 14.¹ Because Hearthstone failed to cut any timber and failed to make an initial progress payment, the Forest Service terminated the contract for default on January 22, 2013. Exhibit 88. In a decision issued on November 13, 2013, the contracting officer sought damages from Hearthstone pursuant to the default provision of the contract. Exhibit 89 at 344-45.

Hearthstone appealed to the Board the contracting officer's decision seeking damages arising from the termination for default. The parties submitted the appeal for a decision on the record, pursuant to Rule 19 of the Rules of the Civilian Board of Contract Appeals. 48 CFR 6101.19 (2013). After considering the parties' submissions, the Board found the Forest Service's decision to terminate the contract for default was proper because Hearthstone failed to meet the requirements of the contract and the contracting officer had a reasonable basis for believing that Hearthstone would be unable to complete the contract in a timely manner. *Hearthstone, Inc.*, 15-1 BCA at 175,479-80.

The Board was unable to resolve the appeal in its entirety, however, because neither party had addressed in its submissions the Forest Service's claim for procurement costs. We also found that the Forest Service had failed to provide "any of the contracts, bills, or other information necessary to evaluate the demand for procurement costs." *Hearthstone, Inc.*, 15-1 BCA at 175,482. To enable the Board to decide this aspect of the appeal, the Board invoked its authority pursuant to Rule 4(e) and directed the parties to submit further evidence and briefing regarding the Forest Service's claim. *Id.*

In an order issued the same day as the decision, the Board explained that "neither appellant nor respondent ha[s] addressed [the contracting officer's decision assessing procurement costs] in briefing. Respondent also has not provided the documentary evidence underlying the demand for damages. Therefore, the Board is unable to resolve this aspect of Hearthstone's appeal without further submissions by the parties." Order (Feb. 27,

¹ All exhibits are found in the appeal file unless otherwise noted. The page numbers cited are the Bates numbers indicated on the exhibits.

2015) at 1. The Board directed the Forest Service to “supplement the [appeal file] with the documents that support the contracting officer’s decision, dated November 13, 2013.” *Id.* at 2. The Board also requested further briefing to explain the Forest Service claim for reprourement costs and how it comported with applicable precedent. *Id.* In the same order, the Board provided Hearthstone an opportunity to respond to this submission and supply any additional documents that it wanted the Board to consider in resolving the remaining issues on appeal. *Id.*

In response to the Board’s order, the Forest Service submitted a brief and seven additional documents for the appeal file. These documents included a document described as the “contracting officer response” to the Board’s order, which is an unsigned statement from the contracting officer that explained aspects of the claim for reprourement costs, the mailing list for the re-sale that was the basis of the Forest Service’s claim, the bill for advertising the re-sale, the calculation of the costs to re-mark the timber that was offered in the re-sale,² and a signed statement from two Forest Service employees regarding the work they undertook to prepare for the re-sale.³ Hearthstone submitted a short brief in response to the Forest Service’s submission.

Claim For Reprourement Costs

The Forest Service seeks damages pursuant to clause BT9.4, Damages for Failure to Cut or Termination for Breach. If a timber sale is terminated, the clause provides for an assessment of damages calculated by subtracting the timber’s value, as determined by an appraisal or resale, from the terminated contract’s value:

- (a) In event of Purchaser’s failure to cut designated timber on portions of the Sale Area by Termination Date or termination for breach . . . Forest Service shall appraise remaining Included Timber . . . Such appraisal shall be made with standard Forest Service method in use at time of termination.

² The Forest Service included this calculation for the costs to re-mark the timber, although, as the contracting officer explains in his unsigned statement, the Forest Service did not include these costs in the claim for reprourement costs to Hearthstone. Exhibit 93. According to the contracting officer, the decision not to include these costs shows how reasonable the Forest Service was in the calculation of its claim. *Id.*

³ The other two documents the Forest Service submitted were the Board’s February 27, 2015, decision and order.

(b) If the sale is resold, damages due shall be the amount by which Current Contract Value, plus costs described in paragraph (d) of this Section, exceeds the resale value at new Bid Rates.

Exhibit 20 at 154. Paragraph (d) of the clause provides for the recovery of certain administrative costs related to the resale, including the costs of resale, the loss attributable to the delay in the receipt of stumpage payments, and any increase in reforestation costs:

(I) The cost of resale or reoffering, including but not limited to, salary costs, document preparation and duplication costs, mailing costs, and timber sale advertisement costs.

....

(iii) The Government's loss caused by the delay in receipt of stumpage payments. Such loss will be measured by interest at the Current Value of Funds Rate established by the Secretary of the Treasury, on the unpaid contract value at Termination Date

Id. at 155.

As noted, the Forest Service submitted an unsigned statement from the contracting officer as part of its response to the Board's February 27, 2015, order. In that statement, the contracting officer asserts that following *Hearthstone's* termination, the Forest Service reappraised and ultimately resold the timber in a sale called the "White Bull Reoffer." Exhibit 93. The contracting officer reports that five months elapsed between the termination of *Hearthstone's* contract on January 22, 2013, and the award of the resale contract on June 19, 2013. *Id.*

Despite the fact that the Board's February 27, 2015, decision expressly noted the absence of "any of the contracts, bills, or other information necessary to evaluate the demand for procurement costs," *Hearthstone, Inc.*, 15-1 BCA at 175,482, the Forest Service provided neither the White Bull Reoffer contract nor the terms and conditions of the White Bull Reoffer solicitation in response to the Board's decision and order. Instead, relying simply upon the contracting officer's unsigned statement, the Forest Service avers that the resale contract "contained the same contract provisions and requirements as the White Bull Sale and was essentially the same contract. The only differences between the two contracts were the rates for the included timber, based on the new appraisal and subsequent bid, and the included volumes which received growth for the period of time between the original cruise and the time of the reoffer." Exhibit 93. The contracting officer states that both

contacts contained clause CT8.23, Addition of New Growth, which set the growth rates to be used if the contract were extended. *Id.* The contracting officer calculated seven percent timber growth using a one percent per year growth rate for the seven years between the original appraisal and the reappraisal. *Id.* The contracting officer also reports that he used the seven percent figure in place of a new survey of the timber because a new survey would have added thousands of dollars to the damages. *Id.*

Pursuant to clause BT9.4(b), the Forest Service seeks \$105,744.64—the difference between the bid price Hearthstone offered, as adjusted through the rate redetermination (\$342,876.74), and the highest bid price on resale (\$237,132.10). Exhibit 89. The Forest Service also seeks to recover the following administrative costs incurred in conducting the White Bull Reoffer sale:

1. Preparing reoffer packages	\$2365.22
2. Contracting officer's review of packages	\$202.46
3. Preparing reoffer packages for mailing	\$137.85
4. Reoffer show-me trip ⁴	\$323.60
5. Mailing reoffer packages	\$131.46
6. Advertising reoffer	\$113.75
TOTAL:	\$3274.34

Exhibits 93, 96-99. The Forest Service calculates the interest on the delayed stumpage payments to be \$7714.73. Exhibit 89.⁵ Adding together the damages sought under BT9.4(b) and procurement costs pursuant to clause BT9.4(d), and deducting the amount Hearthstone

⁴ On a “show-me” trip, the Forest Service shows the timber to potential bidders. Exhibit 99. The Forest Service also explains the timber sale contract and answers bidders’ questions on specific contract clauses and on the appraisal results. *Id.*

⁵ In his initial decision, the contracting officer determined that the current interest rate for the current value of funds was one percent and that the midpoint date of the White Bull Reoffer was September 2, 2015. Based upon this data, the contracting officer calculated one percent interest on \$342,876.74 for twenty-seven months to be \$7714.73. Exhibit 89. The Forest Service did not discuss the claim for interest in its supplemental contracting officer’s submission but maintained that it was still entitled to the full amount of damages claimed in the contracting officer’s final decision. Exhibit 93.

has remaining on deposit, the Forest Service seeks a total of \$79,259.37 in reprourement costs.⁶ Exhibit 89.

Discussion

Burden of Proof

The Government bears the burden of proving its entitlement to reprourement costs. *Cascade Pacific International v. United States*, 773 F.2d 287, 293 (Fed. Cir. 1985); *CDA, Inc. v. Social Security Administration*, CBCA 1558, 12-1 BCA ¶ 34,990, at 171,972. To recover reprourement costs, the Government must establish that (1) the follow-on sale was substantially similar to the sale on which the contractor defaulted, (2) the Government incurred costs as a result of the follow-on sale, and (3) the Government acted reasonably to mitigate its damages. *Hearthstone, Inc.*, 15-1 BCA at 175,482 (citing *Cascade Pacific*, 773 F.2d at 294). Failure to present evidence on each of these points will result in the denial of the Government's claim for reprourement costs. *Pyramid Packing, Inc.*, AGBCA 86-128-1, 92-2 BCA ¶ 24,831, at 123,894-95; *see also Patty Armfield*, AGBCA 91-1851-1, et al., 93-1 BCA ¶ 25,235, at 125,687 (1992). If the Government meets its burden, the burden shifts to the contractor to prove the effects of changes to the reprourement contract on the costs sought. *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1300-01 (Fed. Cir. 2002).

The Board has provided the Forest Service with two opportunities to meet its burden to prove its claim for reprourement costs arising from *Hearthstone's* default of its timber sale contract. The Forest Service had the first opportunity when it submitted the appeal file and briefing in response to *Hearthstone's* appeal. The Forest Service had a second opportunity when, following the Board's decision upholding the termination for default but finding that neither party had addressed the claim for reprourement costs, the Board directed the agency to provide support for its claim. Although the Forest Service provided the statement from the contracting officer and some of the supporting documentation for the costs incurred, the Forest Service has not provided the re-sale contract or any other documents that are necessary to evaluate the claim for reprourement costs. Without this support, the Board finds that the Forest Service has failed to meet its burden on two of the

⁶ In the supplemental submission, the Forest Service provided evidence of administrative costs incurred in the amount of \$3274.34 on the White Bull Reoffer, \$1448.34, more than the amount sought in the contracting officer's final decision. Exhibits 93, 96-99. Adding the difference between these two figures to the amount set forth in the contracting officer's decision, the amount sought would increase to \$80,707.71.

three elements necessary to prove its claim. Based upon this finding, the Board rejects the Forest Service's claim for procurement costs and grants Hearthstone's appeal in part.

The Forest Service Has Failed To Show The Contracts Were Substantially Similar

Determining whether the resale contract is substantially similar to the sale on which the contractor defaulted requires the Board to compare the items sold in the resale contract with the items for sale in the original contract. *Cascade Pacific*, 773 F.2d at 294; *John S. Davis*, AGBCA 78-185, 79-2 BCA ¶ 14,130, at 69,500. The original contract and the follow-on contract are substantially similar if the differences between them do not substantially alter the character of the work. *See Seaboard Lumber*, 308 F.3d at 1297; *Braden Forestry Services, Inc.*, AGBCA 78-170, 80-1 BCA ¶ 14,267, at 70,273; *NEH Logging*, AGBCA 76-187, 77-2 BCA ¶ 12,850, at 62,549.

The contracting officer explains that the White Bull Reoffer and Hearthstone's defaulted contract "contained the same contract provisions and requirements" and were "essentially the same contract." Exhibit 93. The contracting officer further states that the only differences between the two contracts are "the rates for the included timber . . . and the included volumes." *Id.* The Board is unable to verify these statements because the Forest Service failed to include a copy of the White Bull Reoffer contract in either the initial appeal file or the supplement in response to the Board's order. Without the resale contract or other evidence regarding the terms of the procurement, the Board is unable to compare Hearthstone's contract with the White Bull Reoffer contract and determine whether the terms of the contracts are substantially similar.

The Forest Service Has Not Established It Acted Reasonably To Mitigate Its Damages

To prove that it acted reasonably to mitigate excess costs resulting from a contractor's default, the Government must show that it resold within a reasonable time of the contractor's default, used the most efficient method of resale, and obtained a reasonable price. *Cascade Pacific*, 773 F.2d at 294; *Astro-Space Laboratories, Inc. v. United States*, 470 F.2d 1003, 1018 (Ct. Cl. 1972); *Interstate Forestry, Inc.*, AGBCA 89-114-1, 91-1 BCA ¶ 23,660, at 118,520-21 (1990). A competitive procurement is firm evidence that the price obtained was reasonable. *See Interstate Forestry, Inc.*, 91-1 BCA at 118,521 (citing *Astro-Space*, 470 F.2d at 1018); *Rhocon Constructors*, AGBCA 86-125-1, 91-1 BCA ¶ 23,308, at 116,894 (1990). Whether the Government acts within a reasonable time to procure following a contractor's default depends on the facts and circumstances of the case. *See Astro-Space*, 470 F.2d at 1017-18 (award of procurement contract within thirty-three days of default was found reasonable); *Davis*, 79-2 BCA at 69,500 (award of procurement contract within nine days of default found reasonable); *NEH Logging*, 77-2 BCA at 62,550 (finding that a nine

month delay before re-advertising the defaulted contract was excessive). The Forest Service must, however, submit proof evincing the details of the follow-on sale to show that it mitigated its losses. *Cascade Pacific*, 773 F.2d at 294 (without submission of follow-on contract, board could not make a finding regarding mitigation efforts); *Rhocon*, 91-1 BCA at 116,894 (without reprourement contract in the record, agency could not show it had mitigated its damages).

In explaining how the Forest Service acted reasonably to mitigate its losses, the contracting officer states that only five months elapsed between Hearthstone's default and the award of the White Bull Reoffer and that the Forest Service used the growth rate estimate in Hearthstone's contract to estimate the increase in volume, rather than incur additional expenses to survey the area to be harvested. Exhibit 93. While these statements are helpful in assessing the efforts of the Forest Service, we do not find the statement to be sufficient evidence in this case for us to find that the Forest Service acted reasonably. *See Cascade Pacific*, 773 F.2d at 294. Since the Forest Service has not provided the terms and conditions of the bidding procedure for the reprourement, the reprourement contract, or similar support to carry its burden, the Board cannot find that the Forest Service reasonably mitigated its losses.

Decision

The Forest Service has failed to meet its burden to prove its claim for reprourement costs arising from Hearthstone's default. Hearthstone's appeal of the contracting officer's decision terminating the contract for default and assessing reprourement costs is **GRANTED IN PART**.

MARIAN E. SULLIVAN
Board Judge

We concur:

JERI K. SOMERS
Board Judge

HOWARD A. POLLACK
Board Judge