



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF
GRANTED IN PART: September 25, 2018

CBCA 5764

FUTURE FOREST, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Alan I. Saltman of Smith, Currie & Hancock, LLP, Washington, DC, counsel for Appellant.

Randall J. Bramer and Lori Polin Jones, Office of the General Counsel, Department of Agriculture, Washington, DC; and Andrew Moore, Office of the General Counsel, Department of Agriculture, Albuquerque, NM, counsel for Respondent.

Before Board Judges **VERGILIO**, **SHERIDAN**, and **ZISCHKAU**.

Opinion for the Board by Board Judge **SHERIDAN**. Board Judge **VERGILIO** concurs in part.

The appellant, Future Forest, LLC (Future Forest), seeks to recover for what it asserts is the failure of the United States Department of Agriculture, Forest Service (the Forest Service) to release the proper amount of contractually required acres under the White

Mountain Stewardship contract (WMSC).¹ Under the contract, Future Forest was to be paid a range of prices to treat and remove small diameter trees and biomass. In count I of CBCA 5764, Future Forest seeks \$1,115,645.69 for the alleged gross lost profit it claims as a result of the Forest Service's failure to release the guaranteed annual minimum of 5000 acres in program years eight and ten of the contract. In count II, appellant seeks \$14,743,430.72 for the alleged gross lost profit it claims as a result of the Forest Service's failure to release the 150,000 acres that appellant claims it was entitled to under the WMSC.

The Forest Service has moved for summary relief, urging the Board to deny CBCA 5764. The Forest Service argues that it met and exceeded the WMSC's unambiguous terms requiring it to release 50,000 acres when it released 71,000 acres over the ten years of the contract. Alternatively, the Forest Service argues that it released the annual minimum in all but the tenth year of performance, and that it will pay Future Forest for the shortfall in year ten.

In CBCA 5863, appellant seeks \$14,743,430.72, alleging that the Forest Service breached the implied duty of good faith and fair dealing required under the WMSC. CBCA 5863 is not currently before the Board on motion for summary relief.

The facts of the case reveal that while some individuals in Future Forest and the Forest Service believed the Forest Service originally intended to release 150,000 acres over the ten-year term of the WMSC, under the terms of the contract itself, the Forest Service guaranteed to release only 5000 acres each program year. Prior to award, the solicitation was amended to make even clearer the annual 5000 acre minimum guarantee. Also, shortly after contract award, the WMSC was bilaterally modified to allow the Forest Service to achieve that annual minimum guarantee using an agreed upon equivalent in tons of material, whichever came first. For the reasons below, we conclude that the Forest Service was only required to release 5000 acres or its equivalent in tons, and partially grant the Forest Service's motion for summary relief.

Background

The White Mountain Stewardship Project (WMSP) was the first project of its kind for the Forest Service. Recognizing that the Apache-Sitgreaves National Forest constituted a very dense forest that was unstable and vulnerable to intense wildfires, the Forest Service

¹ In this decision we refer to the document proffered by the Forest Service as the WMSC although Future Forest posits that the document it used during performance was not identical to what the Forest Service asserts was the WMSC. The differences, and which differences are material, are discussed later.

sought a way to procure long-term services that provided a range of solutions to reduce the effects of wildfire. The Forest Service settled on the idea of a stewardship project. During project formation, the Forest Service discussed treating 150,000 acres of forest at a rate of 15,000 acres a year. However, when it ultimately issued the request for proposals (RFP) on the project, RFP-R3-01-04-10, the Forest Service elected to include in the RFP a minimum guarantee of only 5000 acres a year. RFP provision B.1.0 provided, in pertinent part:

Minimum Guarantee: The Government will guarantee a minimum for each program year of work of 5,000 (five thousand) acres of forest land that is in need of landscape biomass management with approved environmental analysis.

The RFP informed prospective offerors that WMSP was being procured as an indefinite delivery indefinite quantity (ID/IQ) contract “with the release of acres by issuance of task orders based on the availability of funding each year for 10-years.” The RFP included the clauses found in Federal Acquisition Regulation (FAR) 52.216-22, Indefinite Quantity (OCT 1995) (48 CFR 52.216-22) (2018)), as well as 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); and FAR 52.217-2, Cancellation Under Multi-Year Contracts (OCT 1997) (48 CFR 52.217-2).

While setting forth a minimum annual guarantee of only 5000 acres, the original scope of project in the RFP noted that “[t]he Government anticipates releasing approximately 150,000 acres by the end of the contract . . . [and] approximately 15,000 acres at regular intervals.” The original scope of project also stated: “To reach the end result of 150,000 acres by the end of the contract, the Government may release up to 25,000 acres maximum at the regular annual interval.”²

² Section C of the RFP contained background on the Apache-Sitgreaves National Forest and the WMSP. Several standard contracting definitions were set forth in RFP provision C.4.1:

Indefinite Delivery/Indefinite Quantity (ID/IQ): “Task Order Contract” for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

Volume Estimate. The estimated volumes of timber by species designated for cutting, and expected to be cut under Utilization Standards listed in Section C.4.4. and on subsequent Task Orders after award. The estimated volumes are not to be construed as guarantees or limitations of the timber

In response to questions asked by potential offerors on March 28, 2004, the Forest Service responded:

The Forest Service **will make efforts** to ensure that 15,000 NEPA approved acres will be available to the successful offeror each year with **5,000 acres guaranteed per year and 150,000 over the term of the contract.**

On May 6, 2004, amendment 5 to the solicitation was issued further clarifying the minimum guarantee of 5000 acres but also changing the 150,000 acres to a total of 50,000 acres over the ten program years of the contract:

Minimum Guarantee: The Government will guarantee a minimum, for each program year of work, of 5,000 (five thousand) acres **for a total of 50,000 acres over the 10 year term of the contract** of forest land that is in need of landscape biomass management with approved environmental analysis. Forest Service has completed approximately 30,000 acres of the environmental analysis process, including all required environmental approvals. An additional 5,000 acres are included from the Rodeo-Chediski Environmental Impact Statement (EIS), which was recently released, but is subject to appeals. Additional environmental analysis is being prepared to provide at least two (2) years of project work in advance of the issuance of task order for each contract year.

Amendment 7 was issued on June 3, 2004, to replace the statement in the original RFP's scope of project referring to the Forest Service releasing "[a]pproximately 15,000 acres at regular intervals . . . to reach the end result of 150,000 acres by the end of the contract." Amendment 7 adjusted downward the 150,000 acres to 50,000 acres and read:

The awarded Contractor shall provide necessary expertise, supervision, labor, equipment, tools, materials, supplies, transportation, and services to perform Biomass Management that may include tree removal, treatment of existing slash and dead trees, erosion control, resource protection, and haul road maintenance, as examples of the type of work for the Apache-Sitgreaves National Forest for a period of ten (10) years **for a minimum guaranteed acreage of 5,000 acres per year for a total of 50,000 acres** from the date of award under the Stewardship Authority. **It is desired that** approximately 150,000 acres will be treated with a combination of treatments with the end

volumes to be designated for cutting under the terms of this contract.

result of complete removal of all residue generated by the performance of this contract.

After all eight RFP amendments were issued, the RFP clearly stated that the contract would be issued for “a minimum guaranteed acreage of 5,000 acres per year for a total of 50,000 acres” over the ten years of contract, but that the Forest Service “anticipated” releasing “approximately 15,000 [acres] at regular annual intervals through the use of task orders” and planned for “150,000 acres to be treated during the ten year term of the contract.”

Future Forest’s general manager, Dwayne Walker, in his declaration of December 5, 2017, says that he understood the RFP to state that “each year the [Forest Service] would issue task orders totaling between 5,000 and 25,000 [acres] to meet the total of 150,000 over the term of the contract.” Mr. Walker asserts that in addition to the 5000 acres per year, the original RFP “also *guaranteed* that the [Forest Service] would order 150,000 or more acres over the 10-year term of the contract, but that the contractor was not required to harvest more than 150,000 acres.” (Emphasis added.) Mr. Walker relates his pre-award impression when the Forest Service amended the RFP:

[W]e at [Future Forest] were taken aback when, on May 6, 2004, the [Forest Service] amended the original RFP to say “the Government will guarantee a minimum, for each program year of work, of 5,000 (five thousand) acres for a total of 50,000 acres over the term of the contract . . .” Our concerns were, however, lessened by numerous statements after that from the Administrative Contracting Officer [ACO] (Rufus Cole) as well as the Forest Supervisor (Elaine Zieroth) and her contracting staff, that the [Forest Service] would still treat 150,000 acres over the term of the contract. [ACO] Cole specifically told me “don’t worry, the amendment is only to make the Regional Forester feel better, we’re still going to release 150,000 acres.”

12. Whenever I mentioned to [ACO] Cole that the Forest Service appeared to be off schedule for meeting its obligation to provide us with 150,000 acres, he told me that if, toward the end of the contract, the [Forest Service] were still off schedule that it would issue additional task orders so that 150,000 acres were ordered.

Mr. Walker declares that similar statements were made “numerous times” by ACO Cole after contract award.

One offeror, Joseph Papa, the executive director of the White Mountain Regional Development Corporation, noted in his declaration of December 20, 2017, that he seriously

considered not submitting a proposal on the solicitation when the Forest Service “amended the RFP to reduce the minimum number of acres to be ordered during the term of the contract from 150,000 to 50,000,” but, “[o]ur thoughts changed after we received assurances from the Forest Supervisor, the Contracting Officer and the contracting staff that it was still the Forest Service’s intention to provide 150,000 acres under the contract.”

In a declaration of December 19, 2017, Martin Devere, who was hired as a consultant to White Mountain Forestry, LLC, another prospective offeror, recalls:

I remember being extremely surprised in May of 2004, when the Forest Service amended the original RFP to say “the Government will guarantee a minimum for each program year of work, of 5,000 (five thousand) acres **for a total of 50,000 acres over the term of the contract.**”

14. However, subsequent to the issuance of that amendment, meetings were held with the Forest Service . . . [and] potential offerors (including the group represented by Mr. Walker) . . . were assured by Forest Service personnel, including the contracting officer, Forest Supervisor and some of the contracting staff on the forest, that the Forest Service would still treat 150,000 acres over the term of the contract.

ACO Cole notes in his declaration of December 11, 2017, that he was involved in the source selection and other pre-award matters relating to the WMSC and was the ACO from early 2004 to approximately 2011. ACO Cole declares that he never told Mr. Walker or anyone else at Future Forest that the contract required the Forest Service to release 150,000 acres, and that he is not aware of any one else in the Forest Service who would have made such an assertion.³

Section C.2.0 of the RFP warned offerors that, “notwithstanding any remarks or clarifications given at the [pre-award] conference, all terms and conditions of the solicitation remain unchanged unless they are changed by amendment to the solicitation. If the answers to conference questions or any solicitation amendment, create ambiguities, it is the responsibility of the Offeror to seek clarification prior to submitting an offer.”⁴

³ Although the parties dispute what was said in conversations between ACO Cole and Mr. Walker, what was discussed has not been shown to be material to this decision.

⁴ This verbiage was also set forth in the contract.

Future Forest's initial proposal was submitted on June 18, 2004, and was based on the Forest Service releasing 5000 acres per year. The Standard Form (SF)-33 (Solicitation, Offer and Award Page) was signed by Mr. Walker, with block 14 acknowledging the amendments to the RFP.⁵ The technical proposal stated:

e. Work Plan and Schedule. Assuming 5,000 acres are available per year, after task orders are issued, mobilization would begin within a week with two crews if the areas are available. Work would be scheduled 9 hours per day, 5 days per week and average production would be about 12 acres per day per crew.

After evaluation of the initial proposal, the Forest Service started discussions with Future Forest and requested that Future Forest explain how it planned to treat the minimum 5000 acres per year “[g]iven that the guaranteed minimum of this solicitation is 5,000 acres but with the *chance* that acres ordered could range up to 25,000 acres in any given year.” (Emphasis added.) Future Forest's response to the project evaluation panel's question was submitted on June 29, 2014, representing: “for planning purposes, Future Forest LLC has developed a standard model utilizing 5,000 acres within the Apache-Sitgreaves National Forest.” When Future Forest was questioned about its proposal pricing, it explained to the Forest Service that to obtain a better market value for some material, “the Forest Service will need to guarantee availability of 15,000 acres or more.” In its alternative proposal Future Forest represented that “[c]urrently there is no market value in 95% of the material.” The alternative proposal went on to focus on the need for the Forest Service to provide a “ten year assurance of acres at the 15,000 acre per year level” to obtain better pricing. There is no indication in the record that the Forest Service pursued discussions on the alternative proposal or in any way guaranteed the 15,000 acre per year level. Future Forest does not appear to have adjusted its proposal pricing to reflect a 15,000 acre per year minimum guarantee level. At no point during the pre-award process or contract performance did Future Forest indicate in writing that it had based its cost proposals on anything other than “a minimum guaranteed acreage of 5,000 acres per year for a total of 50,000 acres” over the ten years of contract performance.

Noting that Future Forest's proposal still seemed high, on July 9, 2004, the Forest Service requested a best and final offer (BAFO) for the pricing Future Forest had provided. The Forest Service received Future Forest's BAFO on July 13, 2004. The Forest Service then asked Future Forest to submit a second BAFO to reflect the prices of negotiated treatment methods it would be paid for land restoration under the proposed contract. On

⁵ Mr. Walker declares that neither he nor Rob Davis, the other person who worked on Future Forest's proposal, “remember[s] preparing a list of amendments or attaching such a list to the SF-33” that was submitted.

July 28, 2004, appellant submitted a second BAFO that clarified its pricing and offered reduced pricing of services if new industries were established in the area. The BAFO submission provided Future Forest's prices for work set forth in paragraphs B.1 through B.5, but Future Forest states it did not resubmit the SF-33 or other documents the parties had been addressing during the parties' exchanges.

Richard Salazar, then the ACO and acquisition manager director for the Forest Service region responsible for administering the Apache-Sitgreaves National Forest, awarded Future Forest the WMSC, contract 53-8173-04-0001, on August 10, 2004. At the time of award, the WMSC, in pertinent part, included the following language related to the type of contact and the amounts guaranteed:

B.1.0. This schedule describes the type(s) of work the Contractor may anticipate under the White Mountain Stewardship Project (WMSP), **Indefinite Delivery/Indefinite Quantity (ID/IQ) contract**.

....

The Schedule of Items contains two sub-sections: Bid Prices for the value of forest products removed, and Cost Items for Biomass Management which includes thinning small trees and treatment of topwood residue from larger trees whose main stem sections are valued as goods. Task Order(s) will be issued over the life of the contract and will use unit prices established at the time of award to determine the cost of tree thinning services performed. The value for sawtimber "goods" will be adjusted at scheduled points every three years during the contract, as determined by the Government. Standard Forest Service timber sale rate re-determination and appraisal methods in effect at the specified times will be used to determine the adjustment. In short, the rate will be adjusted by adding the initial bid premium (amount bid above the specified minimum) to the new appraised minimum value.

....

Minimum Guarantee: The Government will guarantee a minimum, for each program year of work, of 5,000 (five thousand) acres **for a total of 50,000 acres over the 10 year term of the contract** of forest land that is in need of landscape biomass management with approved environmental analysis.

Section B of the contract included several pages of the pricing related to the WMSC. Section C addressed the background of the WMSP, and among other things stated:

SCOPE OF PROJECT

The awarded Contractor shall provide necessary expertise, supervision, labor, equipment, tools, materials, supplies, transportation, and services to perform Biomass Management that may include tree removal, treatment of existing slash and dead trees, erosion control, resource protection, and haul road maintenance, as examples of the type of work for the Apache-Sitgreaves National Forest for a period of ten (10) years **from the date of award under the Stewardship Authority. Approximately 150,000 acres will be treated with a combination of treatments with the end result of complete removal of all residue**

Release of the acres to be treated will be done annually over the life of the contract (10-years). The Government anticipates releasing approximately 15,000 at regular annual intervals through the use of task orders. To reach the end result of 150,000 acres by the end of the contract, the Government may release up to 25,000 acres maximum at the regular annual interval.

The WMSC's Performance of Work Statement, Section C.1.0. General Information, also stated: "Approximately 150,000 acres will be treated with a combination of Biomass Treatments."

The verbiage of the document the Forest Service proffers as the WMSC differs from the language in the RFP amendments which specified that the Forest Service was only offering a minimum guarantee of 5000 acres per year for a total of 50,000 acres over the ten-year term of the contract.

Mr. Walker executed bilateral modification 1 on behalf of Future Forest on September 9, 2004. Modification 1 reinforced the 5000 acre minimum guarantee and allowed the Forest Service to meet it by releasing acres or tons of material;

1. Schedule of Items unit of measure is changed from Oven Dried Ton (OD Ton) to Green Ton (G Ton). 2 Green Tons, when dried = 1 OD Ton.
2. Minimum Guarantee of 5,000 acres is amended to include a Ton equivalent—whichever is reached first, acres or tons either OD or Green [Tons]—(10.71 G Tons/Acre = 5.355 OD Tons/Acre = 53,550 G Tons/5,000 acres or 26,775 OD Tons/Acre).

Robert Taylor was a resources staff officer hired by the Forest Service for the Apache-Sitgreaves National Forest who retired from the Forest Service because of what he refers to as “the Regional Office’s changed interpretation of the WMSC and its lack of support and commitment to it.” Mr. Taylor worked with the contracting officer’s technical representatives (COTRs) assigned to the WMSC, Kerry Nedrow and, later, Jerry Drury, who became the COTR in March 2009. Mr. Taylor states in his declaration of November 5, 2017:

12. In the early years of the WMSC, there was no question that the Forest Service (or more precisely the Regional Office (including the Administrative Contracting Officer)) did not view the WMSC as merely guaranteeing 50,000 acres over the 10-year term of the contract. That is, as discussed below, there never was any discussion about a minimum guarantee of only 50,000 acres until early 2008. In fact, what I was given by the ACO as a copy of the WMSC contract to administer was a rather haphazard assemblage of unsigned documents, which among other things, did not contain RFP Amendment 5 with its express reference to 50,000 acres.

13. I have recently been provided with a copy of the version of the contract, which respondent included in the appeal file in this case at 00602-00739. I have reviewed that document and can state that it is not a copy of the version of the contract that my staff and I treated as the actual WMSC.

14. In the early years of the WMSC, the contract was administered as one where the Forest Service was to provide the contractor with 150,000 acres over the term of the contract in annual amounts between the stated minimum to be ordered each year of 5,000 acres and the stated maximum to be ordered each year of 25,000 acres.

15. In order to perform the WMSC, the Region had been allocating as much as it could from other programs to the WMSC. Additionally, unexpended end-of-year funds on other projects both from within the Region and other Regions were re-directed to the WMSC (This was an important source of funding for the WMSC.) Even so, the WMSC barely received enough money to proceed with the contract as planned.

16. Starting in the fall of 2007, the Regional Office became resistant to re-allocating such end-of-year funds on other projects to the WMSC.

A total of twenty-seven modifications were issued over the term of the contract. From approximately September 2004 to May 2014, the Forest Service issued task orders releasing 71,737.90 acres, from which Future Forest treated 2,601,846.15 green tons of material. These acres and tons were released by the Forest Service through the issuance of task orders. According to the ACO, the contract records show that during year eight of the contract, from August 10, 2011, to August 9, 2012, the Forest Service offered Future Forest a total of 139,454.14 tons of green material. During year ten of the contract, from August 9, 2013, to August 8, 2014, the Forest Service issued two task orders for a total of 938 acres to be treated, yielding 52,891.08 green tons of material.

Future Forest signed or acknowledged final invoices, final inspection forms, and task order release forms accepting payment for the acres and tons ordered. The WMSC was operated until close of business on August 8, 2014, and expired on August 10, 2014.

After the WMSC expired and beginning on or about August 13, 2014, Future Forest began corresponding with the Forest Service through its attorney about potential claims related to the amount of acreage released under the WMSC.⁶ Future Forest asserted “the Forest Service at several places in the RFP advised offerors that, over the 10-year term of the WMSC, ‘[a]pproximately, 150,000 acres will be treated with a combination of treatments.’” The correspondence noted that “other portions of the contract, *i.e.*, the minimum guarantee, assured that in no year would the Forest Service release less than 5,000 acres.” Future Forest posited it was entitled to: (1) lost profits on the difference between the amount of acreage it should have been provided for restoration treatment and the amount of acreage it actually received; (2) compensation for the company’s alleged failure to receive a rate redetermination at the mid-point of the WMSC that would have reduced the rates to be paid for certain timber under contract; and (3) compensation for the value of timber Future Forest alleged it did not receive due to damage caused by the Wallow Fire in June 2011

The parties engaged in mediation from approximately September 5, 2014, until May 31, 2017, and resolved some of Future Forest’s pending or potential claims. On September 16, 2015, Future Forest submitted a certified claim to the ACO in the amount of “\$17,921,213.74 owing to the Forest Service’s having provided Future Forest only 70,268 acres of the 150,000 acres that should have been provided under the [WMSC].” Future Forest referenced its letters of April 15, 2015, April 14, 2015, January 15, 2015, November 7,

⁶ The record as developed by the parties during the pendency of the contract’s administration contains no indication that appellant maintained its current interpretations and arguments during contract performance.

2014, and August 13, 2014, for support of the \$17,921,213.74 it sought in damages.⁷ Future Forest alleged that in program year eight the Forest Service released only 3749.9 acres to Future Forest, for a shortfall of 1250.1 acres, and in year ten released only 293 acres, for a shortfall of 4707 acres.

On June 6, 2017, Future Forest appealed the deemed denial of its claim to the Civilian Board of Contract Appeals, where it was docketed as CBCA 5764. Count 1 of appellant's complaint in CBCA 5764 avers that for work performed on the WMSC, Future Forest's gross profit was \$187.28 per acre. Future Forest seeks \$1,115,645.69 in "lost gross profit" based on the Forest Service's alleged failure to provide the "contractually guaranteed" 5000 acres for land restoration treatment during two years of the WMSC. Specifically, appellant alleges that the respondent failed in program year eight to provide 1250.1 acres and in year ten to provide 4707 acres. In count 2, the amended complaint avers that appellant is entitled to \$14,743,430.72 in "lost gross profit" based on the Forest Service's alleged failure to provide a total of at least 150,000 acres over the ten-year period of contract performance. Future Forest avers that the Forest Service failed to release 78,724 acres over the ten-year term of the WMSC, and that multiplied by the \$187.28 per acre factor resulted in \$14,743,430.72 in "lost gross profit."

Future Forest's claim is further articulated in Mr. Walker's declaration, where he states that the document the Forest Service asserts is the WMSC is not the document he used during the pendency of the contract term. Mr. Walker declares:

24. On or about August 10, 2004, [Future Forest] received a signed copy of the contract that was awarded, which is included in the Appeal File at [Exhibit] 78.

25. The awarded contract was consistent with the content of [Future Forest's] second Best and Final offer. Moreover, it is virtually identical to the original RFP issued by the [Forest Service] on March 4, 2004. For reasons unknown to me, it did not, however, contain § B.1.0 in which the 5,000 acre per year minimum appears. As discussed below, this fact necessitated Modification 1 to be issued so as to assure that this proviso was included. [Exhibit] 78 contains the document that, at all times, the parties treated as the actual WMSC originally executed by the contracting officer on August 10, 2004.

⁷ The \$17,921,213.74 Future Forest sought in its claim "[f]or the profits lost on the 78,724 acres" of the 150,000 acres that Forest Service failed to release, was later downward adjusted to \$14,743,430.72, when Future Forest lowered the lost gross profits figure of \$227.65 per acre to \$187.28 per acre.

26. Because [Future Forest] did not include a SF-33 or any other document in its Best and Final Offer of July 28, 2004, indicating that [Future Forest] intended to be compliant with, or bound by, the amendments to the RFP, nor did it in any way cross reference or incorporate by reference [Future Forest's] initial proposal of June 18, 2004 into that offer, the contract set out in [Exhibit] 78 does not contain either a list of the RFP amendments themselves. Nor does it contain anything to support a position that [Future Forest] is bound by them. Indeed, the figure of 50,000 acres does not appear anywhere in [Exhibit] 78. I have reviewed the so-called True and Final version of the contract, which respondent has included in the [Appeal File] at pages 00602-00739. That document is not the version of the contract that the [Forest Service] awarded and sent to [Future Forest] on or about August 10, 2004. Nor is it the version of the WMSC that [Future Forest] and the [Forest Service] treated as the actual WMSC executed by the contracting officer.

(Footnote and citations omitted.)⁸ Mr. Walker's declaration provides additional background regarding his interpretation of the contract:

5. The original RFP and the [Forest Service]'s answers to questions with regard to it confirmed my view of the RFP – that in addition to 5,000 acres per year, the RFP also guaranteed that the [Forest Service] would order 150,000 or more acres over the 10-year term of the contract, but that the contractor was not required to harvest more than 150,000 acres.

6. At the time it issued the RFP, the [Forest Service] also passed out a schedule showing planned treatment acres over the life span of the contract of some 175,575 acres at pages 02234-02236, and in the answers to bidder questions, reiterated that the contractor had a right of first refusal on acres over 150,000, at page 00208.

7. In its answers to questions, the [Forest Service] had also stated that:

a. The Forest Service will make efforts to ensure that 15,000 NEPA approved acres will be available to the successful offeror each year with 5,000 acres guaranteed per year and 150,000 over the term of the contract.

⁸ The declaration does not explain how such an approach would have constituted a compliant offer.

8. This was exactly how I'd interpreted the RFP, i.e., that each year the [Forest Service] would issue task orders totaling between 5,000 and 25,000 [acres] to meet the total of 150,000 over the term of the contract.

9. My interpretation was based not only on my knowledge of how the RFP had developed but also various portions of the RFP.

10. While these sections indicated that the RFP provided that the [Forest Service] would order 150,000 acres over the 10-year term of the contract, other sections, for example Scope of Project on page 7 of 154, and the [Forest Service]'s answers to questions noted above also indicated that 150,000 acres was the maximum quantity of services that the [Forest Service] could require the contractor to perform under the contract. With the guaranteed minimum being 150,000 acres and the maximum which the [Forest Service] could require the contractor to perform being 150,000, the RFP for this "indefinite quantity contract" was pretty definite as to the quantity of work that was to be performed under it.

....

15. On June 18, 2004, [Future Forest] submitted its initial proposal. The proposal included a signed Standard Form 33 ("SF-33"), a Business Proposal, and a Technical Proposal.

16. Neither Rob Davis (the other person who worked on [Future Forest]'s proposal) nor I remember preparing a list of amendments or attaching such a list to the SF-33 that we submitted as part of our June 18, 2004 proposal. After a thorough search, we also could not find a complete copy of that proposal nor any such list.

....

27. After [Future Forest was] awarded the contract and got up to speed, each day we were thinning about 200 acres and removing some 138 truckloads of material. There were, however, several occasions in the early years of the contract when we feared that the [Forest Service] was not issuing enough task orders to reach the total of 150,000 acres. As I previously indicated, when we specifically sought assurances from [ACO] Cole that the [Forest Service] would order 150,000 acres pursuant to the WMSC, on each occasion I was

advised that if, toward the end of the contract, the [Forest Service] were still off schedule that it would issue additional task orders so that 150,000 acres was ordered.

....

29. Later in the term of the contract, whenever I complained to the people on the Apache-Sitgreaves who administered the contract – Kerry Nedrow, Jerry Drury and his direct supervisor Bob Taylor, I got substantially the same answer as I had gotten from [ACO] Cole – I would be told not to worry, that the [Forest Service] understood that it was obligated to provide [Future Forest] with 150,000 acres under the contract.

(Citations omitted.)

The document that Mr. Walker declares he received from the ACO upon award on August 10, 2004, is different from what has been proffered by the Forest Service as the WMSC. In block 14, Acknowledgment of Amendments, on the cover page of the SF-33, both the WMSC and Future Forest’s versions provide “See Attachment.” However, the page of the WMSC listing the eight amendments to the RFP by number and date is missing from the document proffered by Future Forest. Also, section B.1.0, Schedule of Items, is missing from the document proffered by Future Forest as its version of the contract.⁹ It is in section B.1.0, Schedule of Items, that the WMSC clearly states that the contract was for a period of ten years “for a minimum guaranteed acreage of 5,000 acres per year for a total of 50,000 acres.”¹⁰

On August 29, 2017, a Forest Service ACO issued a final decision addressing Future Forest’s claim. The ACO concluded that Future Forest understood the terms and conditions of the WMSC contract and bilateral modification 1 establishing “the contract minimum guarantee as 5,000 acres or 53,550 tons of treatment per year, whichever comes first.” The ACO determined that the Forest Service met its minimum guaranteed obligation every program year of the contract except year ten.

⁹ Section B.1.0 was included in the original RFP and later amended.

¹⁰ The WMSC also contains section B.5, Notes, which defines several categories including, but not limited to the Biomass Treat and Remove category.

The Forest Service calculated the acres and tons of material released to Future Forest in year eight by both program year¹¹ (October 1, 2011, through September 30, 2012) and by contract year (August 10, 2011, through August 9, 2012).¹² In program year eight, the Forest Service released 4636.90 acres yielding 139,454.14 tons of material to be treated. In contract year eight it released 7157.90 acres yielding 306,146.61 tons of material. The Forest Service concluded that in program year eight it met the minimum guarantee by tons and in contract year eight it met the contract minimums both in acres and tons.

The Forest Service calculated that in year ten (August 9, 2013, through August 10, 2014, the contract termination date) it had released 938 acres yielding 52,991.08 tons of material to be treated. Concluding that it had not offered 658.92 tons of the 53,550 green ton minimum required in year ten, the Forest Service went on to quantify the value of the 658.92 ton shortfall. The ACO also noted:

The Government exceeded the total minimum guarantee of 50,000 acres and 535,000 green tons of material guaranteed over the 10-year life of the WMSC. The Government offered a total of 71,737.90 acres for treatment, from which Future Forest treated 2,601,846.15 green tons of material. In light of the minimal shortfall and the government having exceeded the 10-year minimum contractual guarantee, it is not clear how any shortfall in year 10 harmed Future Forest.

However, since the WMSC guaranteed minimum acreage of 5,000 acres (or equivalent tons) per year for a total of 50,000 acres (or equivalent tons) over ten years, and the Government did not provide 658.92 tons of material in year 10, the Government agrees to provide consideration to Future Forest for the balance of tons not ordered in year 10.

In rejecting Future Forest's damages calculation, the ACO noted that no supporting data had been provided on the \$187.28 per acre figure used, and that the figure constituted

¹¹ The WMSC is unclear as to what constituted a program year. In some places it indicates it ran from the date of contract award, August 10, through August 9 the following year, and expired on August 10, 2014. The Forest Service used the August 10 through August 9 time frame to calculate the tons of material it released. It is not clear why Future Forest disputes the Forest Service's calculations, other than they used acres to calculate the shortfalls.

¹² The WMSC minimum guarantee clause requires the Forest Service to release a minimum of 5000 acres or 53,550 tons each program year. The parties have not addressed what period constitutes a program year, so the Board is unable to verify the amounts released.

lost profits that were not supported by data or the circumstances. The ACO calculated an amount for the year ten shortfall, using cost data from the two task orders issued in year ten to reach an average cost per ton of \$13.94, but that analysis would benefit by further explanation. As for the portion of Future Forest's claim asserting that the Government failed to provide a total of at least 150,000 acres of land for restoration treatment, the ACO denied that claim in its entirety as "inconsistent with the terms of the WMSC."

On June 13, 2017, Future Forest submitted another claim to the Forest Service of \$14,743,430.72 in "lost gross profit" based on the Forest Service's alleged breach of the implied duty of good faith and fair dealing, positing that it failed to make "reasonable, good-faith efforts to fulfill the reasonable expectation it had created to release 150,000 acres under the WMSC, and not to undercut it." A final decision was issued on September 22, 2017, denying the claim in its entirety. Future Forest timely appealed the final decision to the Civilian Board of Contract Appeals, where it was docketed as CBCA 5863.

Citing CBCA 5764, the Forest Service moved for summary relief, which Future Forest opposed. While respondent's motion for summary relief argued generally that there was no breach of contract, the Forest Service did not make any argument specifically addressing the cause of action raised in CBCA 5863. Appellant moved to the strike portions of respondent's reply relating to CBCA 5863. We conclude that the motion for summary relief was not directed to CBCA 5863 and, therefore, this decision does not address CBCA 5863.

Discussion

I. The standard for summary relief

Resolving a dispute by summary relief is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "The purpose of summary judgment is not to deprive a litigant of a [hearing], but to avoid an unnecessary [hearing] when only one outcome can ensue." *Vivid Technologies, Inc. v. American Science, & Engineering, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999). A party seeking summary relief bears the burden of establishing the absence of any genuine issue of material fact, and all justifiable inferences must be drawn in favor of the non-movant. *Celotex*, 477 U.S. at 322-23; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). All significant doubt over factual issues must be resolved in favor of the party opposing summary relief. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333, at 177,128 (citations omitted). When a motion for summary relief is properly supported, an adverse party may not rest upon the mere allegations or denials of its pleading. "The party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not

sufficient.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987), *quoted in Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139, at 176,394. A dispute is genuine if the evidence is such that a reasonable trier of fact could decide for the non-moving party. *Anderson*, 477 U.S. at 248. In considering summary relief, the judge’s only function is to determine whether there is a genuine issue for a hearing. *Id.* at 249.

While we are to draw all reasonable inferences in favor of the non-moving party, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,” summary relief in favor of the moving party is appropriate. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Mingus*, 812 F.2d at 1390.

“The non-movant must be able to provide additional evidence or point to some part of the record before the Board which indicates that the facts differ significantly from the way the moving party has presented them, or that they are subject to a reasonable interpretation other than that presented in the motion for summary judgment.” *P.J. Dick Contracting, Inc.*, VABCA 3386, et al., 92-1 BCA ¶ 24,599, at 122,727 (1991) (quoting *Fire Security Systems, Inc.*, VABCA 3086, 90-3 BCA ¶ 23,235). “A fact is considered to be material if it will affect the Board’s decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant” *Tucci & Sons, Inc. v. Department of Transportation*, CBCA 4779, 16-1 BCA ¶ 36,258, at 176,887 (quoting *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, et al., 08-2 BCA ¶ 33,975, at 168,055-56). “Allegations without support are not evidence.” *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,970 (quoting *Max Castle*, AGBCA 97-128-1, 97-1 BCA ¶ 28,833, at 143,845).

A nonmoving party need not present its entire case in response to a motion for summary relief to defeat the motion, but must present sufficient evidence to show evidentiary conflicts exist on the record as to material facts at issue. *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986); *A-Son’s Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,205 (citing *Mingus Constructors, Inc.*, 812 F.2d at 1390-91).

II. Contract interpretation

Contract interpretation is a question of law and is often suitable for disposition on summary relief. *Corners & Edges, Inc. v. Department of Health & Human Services*, CBCA 648, 07-2 BCA ¶ 33,706, at 166,890. The contract must be considered as a whole and

interpreted as such to give reasonable meaning to all of its parts. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996).

The starting point for contract interpretation is the language of the written agreement. *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). In interpreting the language of a contract, reasonable meaning must be given all parts of the agreement so as not to render any portion meaningless, or to interpret any provision so as to create a conflict with other provisions of the contract. *Hercules, Inc. v. United States*, 292 F.3d 1378, 1380-81 (Fed. Cir. 2002); *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983). The nature of the contract is determined by an objective reading of its language, not by one 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); *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,061.

Champion Business Services v. General Services Administration, CBCA 1735, et al., 2010-2 BCA ¶ 34,539, at 170,345, *modified on reconsideration*, 10-2 BCA ¶ 34,598.

“The primary objective of contract interpretation is to determine the intent of the parties at the time an agreement is created.” *600 Second Street Holdings LLC v. Securities & Exchange Commission*, CBCA 3228, 13-1 BCA ¶ 35,396, at 173,666 (citing *Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562, 1565 (Fed. Cir. 1987); *Gildersleeve Electric, Inc. v. General Services Administration*, GSBCA 16404, 06-2 BCA ¶ 33,320). “The language of the agreement ‘must be given that meaning that would be derived from the contract by a reasonable[y] intelligent person acquainted with the contemporaneous circumstances.’” *Id.* (quoting *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965)). “[A]n interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible.” *Hol-Gar*, 351 F.2d at 979. Moreover, the conduct of the parties prior to the dispute is especially strong evidence of the contract's true meaning. *See Blinderman Construction Co. v. United States*, 695 F.2d 552, 558 (Fed. Cir. 1982) (“It is a familiar principle of contract law that the parties' contemporaneous construction of an agreement, before it has become the subject of a dispute, is entitled to great weight in its interpretation.” (citation omitted)). Applying these principles to the contract, it is clear that the WMSC

required the Forest Service to release a minimum of only 5000 acres or 53,550 green tons of material a year. Except for year ten, the Forest Service met the contract requirements.

III. The motion for summary relief and response

Respondent moves for summary relief, arguing that (1) the four corners of the WMSC, including modification 1, make clear that Future Forest was guaranteed task orders totaling no more than 50,000 acres or its equivalent in green tons over the ten years of contract; (2) the WMSC's unambiguous terms control; (3) Future Forest was fully aware of the contract terms and entitled to no more than the contractually agreed minimum; (4) the Forest Service met and exceeded the minimum amounts guaranteed by the WMSC; and (5) by providing the minimum guaranteed amounts, the Forest Service was not in breach of the WMSC.

Appellant responds that because respondent has failed to demonstrate that there are no genuine issues of fact on the relevant issues summary relief should not be granted. Appellant asserts that: (1) the RFP as initially issued did not contain the "the minimum guarantee of 5000 acres for a total of 50,000 acres over the ten years of contract" and the terms of the original RFP became the contract; (2) there is no evidence that Future Forest acknowledged the RFP amendments or that 5000 acres per year for 50,000 acres over the entire term of the contract was the amount that the Forest Service guaranteed; (3) Future Forest's offer was superseded by its subsequent BAFOs and any putative acknowledgment of the RFP amendments that may have occurred did not transcend into Future Forest's final offer which the Forest Service accepted; (4) the document that the Forest Service asserts was awarded as the WMSC is not the true and final version of the contract; (5) the document that Future Forest asserts was the contract required the Forest Service to issue task orders totaling at least 150,000 acres during the ten-year term of the contract; (6) the document that Future Forest asserts was the contract was not an ID/IQ contract; (7) the Forest Service and Future Forest had a concurrent interpretation of the contract as providing for the release of 150,000 acres; and 8) modification 1 did not revise the requirement for the Forest Service to release 150,000 acres for thinning over the ten-year term of the contract.¹³ Finally, Future Forest asserts the Board would err if it did not allow appellant "additional discovery that it needs to ferret out evidence to properly defend itself."

IV. Interpretation of the WMSC

¹³ To the extent Future Forest may have made other arguments, these arguments were considered but not deemed sufficiently convincing to warrant further discussion.

a. The terms of the WMSC state that Future Forest was guaranteed a minimum acreage of 5000 acres per year for a total of 50,000 acres over the term of the contract

We begin our analysis of respondent's motion by interpreting the terms of the contract before us. The Board must determine whether the WMSC included the guarantee of 50,000 acres over the ten years of contract, as the Forest Service asserts or, alternatively, as Future Forest contends, committed the Forest Service to "issue[ing] task orders totaling between 5,000 and 25,000 [acres] to meet the total of 150,000 over the term of the contract." Because the parties disagree on the terms that constitute the contract, it might appear that there are material facts in dispute and the Board might have to assess the credibility of witnesses—something we cannot do on a motion for summary relief. However, by addressing appellant's arguments point-by-point we conclude that this appeal is amenable to summary relief.

In deciding this motion, we consider the evidence in the light most favorable to the non-movant, Future Forest, without making credibility determinations or weighing conflicting evidence. For this purpose, we accept Mr. Walker's declaration that the document he received on August 10, 2004, and treated as the contract was not the same as the document that the Forest Service proffers as WMSC. We also accept that the contracting officer sent Future Forest a copy of the WMSC that omitted the list of amendments and section B.1.0, and that the copy Mr. Walker and some Forest Service personnel worked from during the contract term did not contain the list of amendments and section B.1.0. Even though Mr. Walker apparently worked from an incomplete document, we conclude that the portions missing from his document were still applicable terms of the WMSC.

The RFP as it was originally issued clearly stated, in pertinent part, that "[t]he Government will guarantee a minimum, for each program year of work, of 5,000 (five thousand) acres of forest land that is in need of landscape biomass management." While the original RFP did not specifically state a ten-year total of 50,000 acres, it seems clear that with an annual guaranteed minimum of 5000 acres, simple multiplication would result in an interpretation that Future Forest would receive a minimum of 50,000 acres if the contract was performed for the full ten years. While other provisions of the RFP informed potential offerors that the Forest Service "intended" to release 15,000 acres a year for 150,000 acres over the ten-year term of the contract, the Forest Service issued RFP amendments 5 and 7 making it clear to potential offerors that it was only guaranteeing to release a minimum acreage of 5000 acres per year.

The WMSC was an ID/IQ contract,¹⁴ a contract type under which a contractor is to provide “[a]n indefinite quantity, within stated limits, of supplies or services during a fixed period” of time during which the Government will “place[] orders for individual requirements.” 48 CFR 16.504(a) (2015). This type of contract “provide[s] the government purchasing flexibility for requirements that it cannot accurately anticipate.” *Travel Centre*, 236 F.3d at 1318. While an ID/IQ 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.” *Id.* at 1319; see *Mason v. United States*, 615 F.2d 1343, 1349 (Ct. Cl. 1980) (“A guaranteed minimum purchase amount is . . . essential to there being an enforceable indefinite quantities contract.”). Accordingly, “under an ID[/]IQ 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.” *Travel Centre*, 236 F.3d at 1319.

ID/IQ contracts frequently contain terms informing prospective contractors that the Government “intends” to order a certain number of items, but in the contract section addressing the minimum guarantee, the amount is set significantly lower. Longstanding case law holds that where an ID/IQ contract itself does not guarantee a higher minimum amount, the Government is only liable for the stated minimum. In *Travel Centre*, 236 F.3d at 1318-19, the Federal Circuit discussed ID/IQ contracts in the context of minimum guarantees:

[A]n ID[/]IQ 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. 48 CFR § 16.504(a) (2000). See also *Dot Sys[tems], Inc. v. United States*, 231 Ct. Cl. 765 (1982). That is, under an ID/IQ contract, the government is required to purchase the minimum quantity stated in the contract, but when the government makes that purchase its legal obligation

¹⁴ Without explaining how it supports its position, Future Forest asserts several critical elements of an ID/IQ contract were missing from the WMSC and, thus, the WMSC was not an ID/IQ contract. The Board does not find Future Forest’s argument compelling. The WMSC included the clauses found in FAR 52.216-22, Indefinite Quantity (OCT 1995); FAR 52.216-18, Ordering (OCT 1995); and FAR 52.216-19 Order Limitations (OCT 1995), and contained guaranteed minimums. The parties treated the WMSC as if it were an ID/IQ contract. The Board further notes that in an ID/IQ contract, where a minimum guaranteed amount is lacking, the contract is enforceable only to the extent performed. *Pros Cleaners v. Department of Health & Human Services*, CBCA 6077, slip op. at 4 (August 30, 2018); *Carrington Group, Inc. v. Department of Veterans Affairs*, CBCA 2091, 12-1 BCA ¶ 34,993, at 171,984-85.

under the contract is satisfied. *See, e.g., Mason v. United States*, 222 Ct. Cl. 436, 615 F.2d 1343, 1346 (1980). Moreover, once the government has purchased the minimum quantity stated in an ID[/*]IQ contract from the contractor, it is free to purchase additional supplies or services from any other source it chooses. An ID[/*]IQ 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.**

....

Regardless of the accuracy of the estimates delineated in the solicitation, based on the language of the solicitation for the ID[/*]IQ contract, Travel Centre could not have had a reasonable expectation that any of the government’s needs beyond the minimum contract price would necessarily be satisfied under this contract.*

. . . [w]hen an ID[/*]IQ contract between a contracting party and the government clearly indicates that the contracting party is guaranteed no more than a non-nominal minimum amount of sales, purchases exceeding that minimum amount satisfy the government’s legal obligation under the contract. Accordingly, under the terms of the ID[/*]IQ contract at issue, GSA was only required to purchase the minimum quantity stated in the contract—sales that would lead to \$100 in revenue. Prior to the termination of the contract, Travel Centre realized over \$500,000 of gross sales under the contract. Sales of more than \$500,000 netted Travel Centre over \$100 of revenue. Therefore, GSA satisfied its obligation under the contract. Because GSA met the legal requirements of the contract at issue, its less than ideal contracting tactics fail to constitute a breach. Therefore, Travel Centre is not entitled to any legal relief, including damages.**

236 F.3d at 1319. We follow *Travel Centre* and conclude that, through the stated minimum guarantee in the RFP and WMSC, the Forest Service only guaranteed an annual minimum of 5000 acres for 50,000 acres over the term of the contract.

Mr. Walker acknowledges that on May 6, 2004, he knew the Forest Service had amended the original RFP to say, “[T]he Government will guarantee a minimum, for each program year of work, of 5,000 (five thousand) acres for a total of 50,000 acres over the term of the contract.” Other potential offerors were aware of that amendment, and Mr. Walker notes that discussions were held between the Forest Service and potential offerors, in which the 5000 minimum was discussed. Even if, taking the facts in the light most favorable to the

non-movant, as we must, and accepting that Mr. Walker did not receive a full copy of the contract when it was initially executed, Future Forest was still aware of the 5000 acre minimum guarantee. Furthermore, the fact that Future Forest worked from an incomplete copy of the WMSC does not mean that the missing list of RFP amendments and section B.1.0 magically “dropped out” of the WMSC. The contract’s SF-33 referenced the RFP amendments and the contract had page numbers that put Mr. Walker on notice of any missing pages had he bothered to check. Future Forest’s argument that the missing pages changed the terms of the WMSC is unavailing.

Starting with the original RFP, and continuing with Future Forest’s technical proposal and answers to the evaluating panel’s questions, the only minimum guarantee mentioned in the WMSC was 5000 acres a year. Given the undisputed facts presented here, Future Forest, and specifically Mr. Walker, well understood that Future Forest had agreed to the guaranteed annual minimum of 5000 acres. While some Forest Service personnel informed prospective offerors that they “intended” to release 15,000 acres a year for 150,000 acres over the ten-year term of the contract, that did not change the clear contract language providing only a minimum guarantee of 5000 acres a year.¹⁵

b. Bilateral modification 1 evidences Future Forest’s clear understanding of the 5000 acre minimum guarantee that could also be met in tons of material

Shortly after the contract was awarded, Future Forest executed modification 1, which referenced the 5000 acre guaranteed minimum and, additionally, allowed the Forest Service to provide the guaranteed minimum in acres or tons of material, whichever came first. Thus, had we not found that the RFP, RFP amendments, and WMSC as awarded, made abundantly clear that the Forest Service was only guaranteeing a minimum of 5000 acres annually for 50,000 acres over the term of the contract, the minimum guarantee was reiterated, once again, by modification 1, which was a bilateral agreement between the parties.

Mr. Walker’s execution of modification 1 was an explicit acknowledgment of his awareness and acceptance of the annual 5000 acre minimum guarantee that applied to the WMSC.

Mr. Walker has never denied that he was aware that the WMSC contained an annual minimum guarantee of 5000 acres. He attempts to explain the minimum guarantee away in his declaration by saying he understood that the Forest Service “would issue task orders totaling between 5,000 and 25,000 [acres] to meet the total of 150,000 [acres] over the term

¹⁵ Using the formula set forth in modification 1, instead of releasing acres, the WMSC could also be fulfilled by releasing green tons and oven dried tons.

of the contract.” But a complete reading of the WMSC does not support Mr. Walker’s interpretation which cherry picks an isolated sentence instead of reading the contract as a whole to give meaning to all its parts. Mr. Walker’s selective interpretation ignores the guaranteed minimum and the lengths the Forest Service went through to amend the RFP. While we are to draw all reasonable inferences in favor of Future Forest, the record taken as a whole cannot lead a rational trier of fact to find Mr. Walker’s interpretation reasonable given the history of the RFP process and WMSC award. Furthermore, had Mr. Walker actually believed the 150,000 figure was guaranteed, he had sufficient notice that his interpretation contrasted with the stated minimum guarantee, requiring Future Forest to raise the patent ambiguity created by his interpretation.¹⁶

c. The WMSC required the Forest Service to release at least 5000 acres per year for a total of 50,000 acres over the term of the contract

Over the ten-year term of the WMSC, 71,737.90 acres were released to Future Forest. The Forest Service argues that it met the WMSC terms because it “exceeded the total ten year minimum guarantee of 50,000 acres and 535,000 green tons.” The Forest Service also argues that Future Forest had material available to operate in year ten of the contract so it is unclear how it suffered harm from its failure to receive the 658.92 tons of material.¹⁷ We reject respondent’s argument that the terms of WMSC were met by the Forest Service releasing 71,737.90 acres to Future Forest over the ten years of the contract. The agency ignores an explicit annual minimum guarantee in the contract. Even the ACO recognized that the Forest Service guaranteed to release to Future Forest at least 5000 acres annually.

V. Discussion and analysis of Future Forest’s arguments against summary relief

Having concluded that the WMSC contained a minimum guarantee of 5000 acres per year for a total of 50,000 acres from date of award, we move on to address appellant’s arguments that the WMSC somehow guaranteed more than that amount. Many of appellant’s arguments revolve around its position that the RFP and subsequent WMSC should be interpreted as committing to a minimum guarantee of 15,000 acres per year for 150,000 acres over the entire term of the contract. This is a position the Board wholly rejects, as we have

¹⁶ Future Forest’s argument that modification 1 did not revise the requirement for the Forest Service to release 150,000 acres over the ten-year term of the contract is unavailing as Future Forest indicated that it was well aware of the 5000 acre minimum guarantee.

¹⁷ The Forest Service acknowledges that the contracting officer determined that Future Forest is owed “\$9,183.81 for the cost of uncompensated treatment of green tons and \$21,912.40 in unrealized value of recoverable green tons not offered in year 10, plus interest.”

found that throughout the procurement process and resultant contract, a guaranteed minimum of 5000 acres was clearly stated.

We find it telling that Mr. Walker, appellant's primary declarant, has never explained how he reconciled the language in the original RFP containing the minimum guarantee with his current interpretation. Future Forest had notice from the original RFP that the Forest Service "guaranteed" a release of a only 5000 acres a year. Furthermore, RFP amendments 5 and 7 "put a fine point" on the minimum guarantee of 5000 acres per year for a total of 50,000 acres over the ten years of contract. RFP amendment 5 adjusted the 150,000 acres downward to 50,000 acres in the clause containing the minimum guarantee, and RFP amendment 7 downward adjusted the statement in the original RFP's scope of project referring to 150,000 acres to a minimum guaranteed acreage of 5000 acres per year for a total of 50,000 acres. Amendment 7 reiterated the Forest Service's "intention" to treat "approximately 150,000 acres" under the contract, but clearly, in the context of the RFP and RFP amendments the Forest Service **did not** guarantee that 150,000 acres would be released. Future Forest's arguments and Mr. Walker's declaration conveniently skirt the minimum guarantee language to reach an interpretation that cannot be supported by the terms of the original RFP, RFP amendments, and the subsequent WMSC.

There is no compelling evidence that once the RFP was issued the Forest Service ever intimated that it "guaranteed" it would release 15,000 acres a year or 150,000 acres over the ten-year term of the WMSC. While some Forest Service personnel appear to have indicated an intent to release 150,000 acres, the terms of the RFP and the resultant WMSC, including modification 1, had been altered to obviate any reasonable interpretation that the Forest Service was promising to release 150,000 acres over the ten-year term of the contract. Prospective offerors, including Mr. Walker, were informed that while the Forest Service "intended" to release 150,000 acres for treatment to satisfy the Regional Forester,¹⁸ the minimum guaranteed amount was set at 5000 acres. Furthermore, even if the original RFP became the WMSC, it still contained the annual guaranteed minimum of 5000 acres that we cannot ignore. We reject Future Forest's arguments that the RFP as initially issued became the WMSC, or that the WMSC could be reasonably interpreted to guarantee 15,000 acres a year or 150,000 acres over the term of the contract.

- a. Future Forest acknowledged the RFP amendments and agreed that the WMSC's "minimum guarantee" was 5000 acres per year

¹⁸ The Regional Forester was the individual responsible for funding the WMSC on an annual basis.

Future Forest avers that we should deny the motion because there is no evidence that it acknowledged the RFP amendments or that 5000 acres per year for 50,000 acres over the entire term of the contract was the amount that the Forest Service guaranteed. This argument fails because Future Forest's technical proposal submitted on June 18, 2004, acknowledged the minimum guarantee of 5000 acres per year, and none of its subsequent pre-award submissions indicated that had changed. It is clear that pre-award, Future Forest understood that the RFP on which it made its proposals contained a minimum guarantee of 5000 acres per year. Mr. Walker has never denied this fact and there is significant evidence showing he was well aware of the 5000 acre figure and kept Future Forest's proposal prices higher in light of the 5000 acre minimum guarantee. No pre-award actions on the part of the Forest Service indicated that it considered the 5000 acre minimum guarantee to be inapplicable. We accept that some employees in the Forest Service conveyed an intention to order more than the agreed upon minimum, but conclude that intentions are not contractually binding where an ID/IQ contract states a clear guarantee. *See Travel Centre*, 236 F.3d at 1318-19.

Additionally, Mr. Walker signed the SF-33, containing Block 14, Acknowledgment of Amendments, stating "See Attachment." By his signature, Mr. Walker acknowledged that there were RFP amendments. It is unfortunate, but immaterial, that Future Forest did not receive the page listing the amendments. Nevertheless, the record is clear that Mr. Walker was well aware of and acknowledged the RFP amendments that made clear the 5000 acre annual minimum guarantee for 50,000 acres over the ten-year term of the contract. If Future Forest had any doubt as to the terms of the amendments it was acknowledging by Mr. Walker's signature, it should have inquired. Future Forest was under a duty to inquire further as to reference to amendments. *Arcadis U.S., Inc. v. Department of the Interior*, CBCA 918, 08-1 BCA ¶ 33,807, at 167,353; *e.g.*, *Champion Business Services v. General Services Administration*, CBCA 1735, 10-2 BCA ¶ 34,539, at 170,346 (noting a contractor's obligation to inquire in the face of a patent ambiguity in a contract). Appellant's various arguments that it should not be bound by the RFP amendments are unavailing.

Appellant cites to no authority requiring an awardee to specifically acknowledge each RFP amendment in order to be bound by those amendments. In *Overhead Electric Co.*, ASBCA 25656, 85-2 BCA ¶ 18,026, the appellant argued that in the absence of the acknowledgment of a solicitation amendment it would not be required to perform. The Armed Services Board of Contract Appeals disagreed, responding:

This argument is incorrect; if not specious. It is true that a contract must be awarded to a low bidder who is responsible and whose bid is responsive to the solicitation. Depending upon the nature of a solicitation amendment, a failure to acknowledge its issuance may cause the bid to be nonresponsive. As a general proposition any amendment which affects price, quality, quantity,

delivery, or other significant performance matters must be acknowledged before a bid may be considered to be responsive. Stated conversely, a failure to acknowledge such an amendment renders the bid nonresponsive.

Amendments which do not fit into the above category do not carry the same connotation. A failure to acknowledge such an amendment is considered to be only a minor irregularity which may be waived. A bid thus is responsive even in the absence of an acknowledgment.

Thus, appellant's argument that since the contract required compliance with Amendment No. 2 its acknowledgment of the issuance thereof must have been accepted fails. The amendment was part of the contract even in the absence of appellant's failure to acknowledge it since the Government could, and did, waive the failure.

Id. at 90,460. FAR 14.405 notes that the acknowledgment of receipt of an amendment may be waived if the bidder received the amendment. *See* 48 CFR 14.405. Future Forest has not denied that it received the RFP amendments.

As discussed earlier, the history pertinent to the WMSC makes clear that during the procurement process the Forest Service, through the RFP amendment process, clarified the guaranteed quantities as opposed to the "intended" quantities. If Future Forest believed 150,000 was actually guaranteed under contract, that would create a patent ambiguity with the contract terms only guaranteeing a minimum of 5000 acres a year. Certainly, such an ambiguity, if it actually occurred, would have been patent and created a duty on the part of Future Forest to inquire. *Metric Constructors, Inc. v. National Aeronautics & Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999). As earlier noted, Mr. Walker never specifically declared that he did not understand that the WMSC contained a 5000 acre minimum guarantee. The fact that he readily executed modification 1 shortly after contract award confirms that he fully understood that the Forest Service was guaranteeing only a minimum of 5000 acres a year.

Mr. Walker's interpretation, that the Forest Service would release "between 5,000 and 25,000 [acres] to meet the total of 150,000 over the term of the contract," ignores the term "minimum guarantee" and all the connotations that are associated with a minimum guarantee in an ID/IQ contract. His interpretation also conflicts with well-established contract principles that 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). By interpreting the contract the way he did, Mr. Walker effectively read out the contract language setting a minimum guarantee. His interpretation is unreasonable.

We understand that Mr. Walker may have been given verbal assurances that the Forest Service “intended” to release 150,000 acres, and that may be how he felt wronged by receiving only 71,000 acres over the ten year contract. However, the facts remain, the Forest Service went to lengths to make clear to prospective bidders that it was offering “a minimum guaranteed acreage of 5,000 acres per year for a total of 50,000 acres” over the term of the contract. Even had the contracting officer stated something to the effect “I guarantee the Forest Service will release 150,000 acres over the term of the contract,” verbal representations made by the contracting officer do not overcome the express terms of the contract. *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2978, 16-1 BCA ¶ 36,285 at 176,955 (“Although the CO may have stated the contract was firm-fixed-price, the express terms of the modification manifestly contradict any verbal representation the CO might have made.”) The intent of individuals does not equate to a contractual obligation, particularly where the contract is an ID/IQ contract setting forth a minimum guaranteed amount. *Id.*

b. Future Forest’s BAFO did not change the annual minimum guarantee of 5000 acres

Future Forest argues that its offer was superseded by its subsequent BAFO, and any putative acknowledgment of the RFP amendments that may have occurred did not carry over into the offer which the Forest Service accepted. The fact that Future Forest submitted a final BAFO that included different pricing does not somehow vitiate its earlier acknowledgment of the RFP amendments or other parts of the contract that were unaffected by the BAFO. The authority cited by appellant involved pre-award proposal pricing and a question of which proposal should be considered by the Government for award; it is not applicable here. Furthermore, while we might consider decisions of the United States Court of Federal Claims and General Accountability Office for their persuasive value, we are not bound by them. *Optimum Services, Inc. v. Department of the Interior*, CBCA 4968, 16-1 BCA ¶ 36,357.

Future Forest’s initial proposal noted it was “assuming 5,000 acres are available per year,” and there is no indication in its subsequent offers that this assumption ever changed. There is no indication in the record created during the term of the WMSC that Future Forest did not intend to be bound by the RFP’s stated minimum of 5000 acres. The WMSC clearly stated that the Forest Service was offering “a minimum guaranteed acreage of 5,000 acres per year for a total of 50,000 acres.” The minimum guaranteed amount was never modified.

c. The document missing the RFP amendments and section B.1.0 used by Future Forest was not the entire WMSC

We accept Mr. Walker's declaration that the version of the contract that he received upon award is not the same version the Forest Service proffers as the WMSC. Nonetheless, as we found earlier, the actual WMSC contained the RFP amendments, section B 1.0, and modifications 1 through 27.

To argue that a guaranteed 150,000 acre figure remained viable in the WMSC only revives potential confusion that the Forest Service amply addressed and remedied when it issued RFP amendments 5 and 7 and modification 1.

d. The parties did not have a concurrent interpretation of the contract as guaranteeing the release of 150,000 acres

We conclude that the minimum guarantee language that remained consistent in all iterations of the RFP and the resultant WMSC, clearly demonstrates that Future Forest understood that there was a minimum guarantee of 5000 acres in this contract. While certain Forest Service personnel may have "intended" to see more acres released, and told prospective offerors of their "intent," by issuance of modification 1 the Forest Service reaffirmed that it was guaranteeing to release only 5000 acres a year.

While Future Forest personnel interpreted the expressed intent of some Forest Service personnel as "committing" the Forest Service to releasing 150,000 acres over the term of the contract, this interpretation is not reasonable in the context of an ID/IQ contract. Future Forest has never asserted that the Forest Service told it they were changing the minimum guarantee set forth in the RFP and WMSC. The minimum guarantee of 5000 acres a year has remained consistent.

We do not look to individuals' purported interpretations to interpret the WMSC provisions because the terms are clear on their face. *McAbee Construction*, 97 F.3d at 1435. Also as we have previously noted a verbal interpretation of an agency official, even a contracting officer, does not change the express terms of a contract. *Jane Mobley Associates, Inc.*, 16-1 BCA at 176,955. Furthermore, intentions, plans, or desires on the part of an agency to order more than the stated minimums set forth in a contract do not equate to contractual commitments. *Travel Centre*, 236 F.3d at 1319. Given the facts of this case, we do not accept that the Forest Service bound itself to releasing any more than 5000 acres a year. The issue of the annual minimum guarantee and guaranteed amount over the ten-year term of this contract has been resolved by this partial grant of summary relief.

e. The number of acres or tons of material that the Forest Service released during years eight and ten is not amenable to summary relief because the facts are undeveloped

Future Forest calculated its claim in terms of acres, concluding that it was shorted 1250.1 acres in year eight and 4707 acres in year ten. Future Forest asserts that it is entitled to recover \$187.28 per acre for the acres that were not released. In defending against this motion, appellant posits that “the 53,550 minimum [green ton] annual guarantee is . . . unenforceable” because it was calculated using a green ton/acre equivalency set out in modification 1, which was the result of an unreasonably inaccurate estimate prepared by Mr. Johnson.¹⁹ Other than arguing that the 53,550 green ton minimum is unenforceable, appellant provides no alternate quantum calculation for green tons. Instead, appellant urges us to use acres instead of green tons to address the shortfalls.

The Forest Service quantified the shortfalls in both acres and tons for year eight and concluded that in program year eight it met the minimum guarantee both in acres and tons. For program and contract year ten the Forest Service calculated that it had released 938 acres yielding 52,991.08 tons of material to be treated, and concluded that it had not offered 658.92 tons of the 53,550 green ton minimum required in year ten. The Forest Service went on to quantify the value of the 658.92 ton shortfall as \$31,096.19, consisting of \$13.94 per ton factor for costs of services plus \$21,912.40 for value of the material it would have been able to sell.

The record is not sufficiently developed for us to calculate the potential shortfalls or to quantify damages in this appeal. Future Forest avers in its complaint that in year ten the Forest Service only released 3749.9 acres while the Forest Service calculates in its final decision that it released 4636.90 acres. The Board record is unable to glean from the record which party is correct. There also appears to be an outstanding issue on whether acreage or the green ton equivalency should be used to address the shortfalls. At this stage, Future Forest has not established a sufficient basis to discount the specific language in the bilateral modification. It appears from the parties’ briefing that there may be other disputed facts with regard to these and other issues that must be resolved prior to the Board fully addressing this appeal. We are not satisfied that the present record provides sufficient support to address all outstanding issues including quantum. The Board may defer parts of a decision until it can be founded on a more complete factual record. *DJM/REZA v. Department of Veterans Affairs*, VABCA 6917, 05-1 BCA ¶ 32,943, at 163,209.

VI. Conclusion

¹⁹ As support for this conclusion appellant attached to its brief an unidentified document titled “THE APS BIG PROJECT.” No information was provided about the document’s creation or date.

The Forest Service did not contract for an annual minimum guarantee of 15,000 or 150,000 acres over the term of the WMSC. We grant summary relief in part, concluding that the WMSC provided an annual minimum guarantee of only 5000 acres per year for a total of 50,000 acres over the ten-year term of the contract. We deny the remainder of the motion pending further development of the record.

Decision

For the foregoing reasons, respondent's motion for summary relief is **PARTIALLY GRANTED**. The Board will schedule further proceedings by separate order.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

I concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

VERGILIO, Board Judge, concurring in part.

I would grant the agency's motion for summary relief. The underlying certified claim seeks a sum certain "owing to the Forest Service's having provided Future Forest only 70,268 acres of the 150,000 acres that should have been provided" under the contract. Because the contract does not guarantee that 150,000 acres would be provided, the agency's motion for summary relief should be granted and the appeal denied. I reach this result consistent with rules for contract interpretation and applicable standards for resolving a motion for summary relief. I focus my inquiry on the language of the contracts (as viewed each by the contractor and agency) and not on parol or extrinsic evidence such as the request for proposals, amendments, and other information. The plain language of each contract is clear and unambiguous and does not support the position of the contractor.

The document proffered by the contractor as the contract in dispute does not require the agency to provide 150,000 acres for the contractor to service. The Scope of Project clause states that approximately 150,000 acres will be treated and that the agency intends to achieve that by the end of the contract. The Performance Work Statement, General Information, clause also states that approximately 150,000 acres will be treated. However, a Task Orders clause indicates that the agency will issue work orders consistent with an Indefinite Quantity clause that states that the quantities specified in the schedule are estimates only and are not purchased by this contract. There is no guarantee that 150,000 acres will be available to be serviced. The contractor's interpretation that the contract guarantees servicing of 150,000 acres is inconsistent with the specific language of the Indefinite Quantity clause (that amount is not purchased, but an estimate), and the notion of an indefinite quantity—a guarantee that all 150,000 would be purchased is a definite quantity. Moreover, a bilateral modification specifies that a minimum guarantee of 5000 acres is amended to include a weight equivalent, the minimum satisfied by whichever is reached first. Under this version of the contract, with no other guarantee identified, the only guarantee is for 5000, not 150,000, acres over the life of the contract. The contractor has provided no valid basis to discount the bilateral modification. With or without the bilateral modification, the contractor does not prevail. With the modification there is a minimum guarantee; without the modification the contractor gets paid per order performed.

The agency's version of the contract expressly states that the overall guarantee is for 50,000 acres or its weight equivalent. This is not a guarantee of 150,000 acres. The contractor does not prevail.

The contractor's reliance upon extrinsic evidence, including the beliefs of its president and other contractor personnel and offerors, and agency officials that 150,000 acres would be serviced under the contract, is of no weight and details are not necessary. The plain language of each contract—as viewed by the contractor and by the agency—is clear that there is no guarantee that 150,000 acres will be serviced. A written agreement has value; extrinsic evidence is not to be used to contradict a plain meaning.

The contractor's claim to the contracting officer is specific in alleging a total requirement and shortfall. The attempt in the complaint to expand the appeal into a review of annual requirements and alleged annual violations is outside the scope of the claim, as additional inquiry is required to establish annual requirements, and would require consideration of annual orders. The legal theory and amount sought is different for the failure to meet annual minimums aspect of the complaint from the total guarantee claim and should not be considered. *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1005-06 (Fed. Cir. 2015). I would neither make other factual findings or legal determinations nor keep the case open to require the agency to resolve a claim not before it.

In my view, the agency's motion for summary relief should be granted and the contractor's claim denied.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge