



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 19, 2021

CBCA 6304, 6786

DAWSON & DOUGLAS INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Casey G. Hull, Owner of Dawson & Douglas Inc., Monroe, OR, appearing for Appellant.

Zoey L. Kohn, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **VERGILIO**, and **DRUMMOND**.

BEARDLSEY, Board Judge.

These consolidated appeals arise from a dispute involving a timber sales contract known as the Parker Wyatt Timber Sale contract (contract or sale). Dawson & Douglas Inc. (D&D) appealed decisions by the United States Department of Agriculture, Forest Service (Forest Service) contracting officer to not extend the timber sales contract and to assess damages against D&D in the amount of \$100,513.97. For the reasons set forth below, we deny the appeals.

Findings of Fact

Under the contract, D&D purchased timber from the Government on land managed by the Forest Service, agreeing to pay \$11.39 per ton for an estimated 49,241 tons of saw timber, or an estimated sale cost of \$560,854.99. Appeal File, Exhibits 7, 10.¹ The appraised value of the timber was \$2,165,908.50. Exhibit 2. The contract required D&D to cut timber and provide slash treatment² within various units in the Oregon Umpqua National Forest. Exhibit 10. The contract also required that D&D construct certain specified roads and perform road maintenance work. *Id.*

The contract had an original termination date of March 31, 2016, and a specified road completion date of October 31, 2014. *Id.* Due to government delay in awarding the contract to D&D, the contract termination date was extended to March 31, 2017, and the specified road construction completion date was extended to October 31, 2015. Exhibits 12, 13, 18, 22.

Throughout the term of the contract, D&D failed to timely complete the specified road construction, post-haul road maintenance, and slash treatment (collectively known as “compliance work”). The proper treatment of slash is essential to reducing the risk of wildfire, while the timely construction of roads and completion of post-haul road maintenance is critical to both protect natural resources and to limit and repair damage caused by logging operations. D&D had only completed \$38,947.41 of the \$154,187.15 worth of specified road construction by October 31, 2015. Transcript at 21, 23-24; Exhibit 82. D&D repeatedly failed to complete slash treatment “within 30 days of removal of approximately three-quarters of the volume in the unit” or “within thirty days of the beginning of the next Normal Operating Season,” depending on when the Included Timber was removed as required by the contract. Transcript at 50-54; Exhibit 10 at 106. As of February 2017, D&D had completed slash work in only six of the twenty-six sale units. D&D admitted to the contracting officer that it could not “afford to do compliance work without income.”

¹ All exhibits are found in the appeal file, unless otherwise noted.

² Slash is defined in the contract as “vegetative debris including, but not limited to, cull logs, blasted or pushed-out stumps, chunks, broken tops, limbs, branches, rotten wood, damaged brush, damaged or destroyed reproduction, saplings or poles, resulting from Purchaser’s Operations.” Slash treatment required D&D to “pile, burn, yard, construct fire lines or otherwise treat slash” within designated areas.

On repeated occasions, D&D's actions violated the terms of the contract, and the Forest Service worked with D&D instead of suspending the contractor. In June 2016, D&D used unapproved logging methods and an unapproved temporary road to log unit 12. Rather than suspending operations, the Forest Service instructed D&D on appropriate methods. D&D was also warned repeatedly, but not suspended, about the need for accurate removal permits. In addition, D&D failed to complete required slash work on logged units. The Forest Service, however, allowed D&D to continue work on the condition that D&D worked diligently to complete the slash work.

The contract's sale area map identified the methods, such as helicopter yarding,³ downhill skyline yarding, mechanized yarding, and skyline yarding, that D&D was required to use to remove timber from each unit of the sale. Exhibit 10 at 123-24. The Forest Service followed a National Environmental Protection Act (NEPA) process to determine which logging method should be used in each unit. Transcript at 29, 33. The contract stated that "[m]ethods or equipment other than those specified may be approved" by the contracting officer. Prior to the start of the 2015 operating season, D&D submitted a request for logging system changes to five units. The contracting officer granted D&D's modification requests for three of the five units. In May 2016, D&D requested additional changes to logging system operations in multiple units, including unit 20H. Exhibits 30, 35. D&D made these requests to perform the logging "the way it best fit" D&D. The contracting officer denied most of these requests due to environmental concerns and to protect the natural resources, noting that there was no environmental impact statement in place for the use of heavy machinery in the units, some of the changes violated NEPA guidelines, some slopes were too steep to change the logging method, and the contract logging method for unit 20H would cause "less damage to the stand." Transcript at 40-44; Exhibits 37, 39.

The contract required the Forest Service to inspect D&D's work "[u]pon [the] Purchaser's written request and assurance that work has been completed." The Forest Service had to inspect D&D's work within five business days of D&D's request or notify D&D of the need for postponement and the time when inspection could be made. D&D never made a written request for inspection of its road work or slash work. Transcript at 21, 59. Nonetheless, the Forest Service conducted inspections of D&D's work on a regular basis, as is evidenced by the twenty-five inspection reports in the record. In fact, D&D complained that the inspections were "constant interruptions to [D&D's] operations." D&D, however, also alleged that the engineering representative doing the inspections was gone due to fire assignments because D&D "made two calls to Rd [sic] man to set up times to do this and was not able to make contact." D&D states that "[t]hree summers in a row we were held up due to engineers being gone on fires." D&D further alleges that its "equipment sat five

³ Yarding means timber removal.

days waiting for a road engineer to be present for” the work to be done. Forest Service representatives also frequently visited the sale, reminded D&D of upcoming deadlines, and encouraged D&D to meet its contractual obligations.

On August 1, 2017, the contracting officer wrote to D&D stating,

This is a courtesy reminder that the Parker Wyatt Timber Sale . . . terminates on September 30, 2017. . . . Because you did not meet the road completion date, you do not qualify for contract term extension. This contract may qualify for a Contract Term Adjustment under standard provisions B8.21. If you are aware of any days that qualify, you must request these at least 10 days prior to the termination date.

Transcript at 98; Exhibit 72. Contract section B8.231 permitted a contracting officer to grant D&D’s written request for a contract term extension (CTE) only if D&D completed the specified road construction by the specified road completion date of October 31, 2015. Exhibit 10 at 63. Because D&D failed to complete the specified road construction by October 31, it was not entitled to a CTE. The contracting officer, however, granted D&D several contract term adjustments (CTAs)⁴, including granting D&D a 108 day CTA in May 2017 and a twenty-two-day CTA in September 2017, extending the completion date for the contract to October 22, 2017. Despite the extension, D&D removed its personnel and equipment from and did not perform any work on the sale after July 2017.

As of October 22, 2017, D&D extracted saw timber with an estimated market value of \$2,271,826.49 from the sale but left multiple areas of work incomplete. D&D did not complete the slash treatment work, specified road work, or road maintenance. D&D also failed to even begin timber removal in unit 20H. D&D alleged that the same sale administrators from this contract extended the contract of another timber company working in the Umpqua National Forest on a different sale under similar circumstances. D&D complained that it should have been given more time since there was only \$5000 of road work left to complete.

On October 23, 2017, the Forest Service notified D&D that the contract had terminated uncompleted. Exhibit 75. On May 7, 2018, the Forest Service contracting officer provided D&D with an itemized damage appraisal report, showing the estimated cost to complete the outstanding slash piling, specified road work, and post-haul road maintenance. Exhibit 76. The contracting officer determined that the estimated cost to the Forest Service

⁴ A CTA is granted due to time lost for reasons outside of the purchaser’s control that fall in between the normal operating seasons, such as a fire closure, flood, and market changes. Transcript at 45-46; Exhibit 10 at 62 (¶ B8.21).

to complete the work totaled \$112,204.45 — \$57,072.11 to complete the post-haul road maintenance work, \$4800.34 to complete the specified road work, and \$50,332 to complete the slash treatment work. Transcript at 68-71, 102-10, 112-14; Exhibit 76 at 369, 371-72. The contracting officer had her representatives visit the sale to determine the work left to be completed and used the appraisal costs from the contract to estimate the cost to complete the work. Transcript at 101-02. After applying a credit in the amount of \$11,690.48 for timber that D&D had failed to remove from unit 20H as calculated pursuant to contract clause B9.4, the contracting officer issued a final decision demanding payment from D&D in the amount of \$100,513.97 pursuant to contract provision B9.5. Transcript at 115-17; Exhibit 78. Contract clause B9.5, Settlement, reads:

If obligations of Purchaser have not been fully discharged by Termination Date, any money advanced or deposited hereunder shall be retained and applied toward unfulfilled obligations of Purchaser without prejudice to any other rights or remedies of Forest Service. Such funds may be treated as cooperative deposits under B4.218 for uncompleted work 30 days after receipt of written notice from Contracting Officer to Purchaser of work to be done and Purchaser's failure to deny the obligation or to do the work.

Exhibit 10 at 70. Contract clause B4.218, Cooperative Deposits, reads:

On a basis of cooperation or assistance (16 USC 572) and by a written agreement, Forest Service shall perform under this contract, as well as furnish other services in connection with activities under this contract. When Forest Service is to perform such work, Purchaser shall make one or more deposits to cover the estimated cost of the work. On request of Purchaser, Forest Service shall render monthly accounts, as may be specified in such agreement.

Id. at 47. The contract also stated that “Purchaser’s Timber Sale Account will be charged for any slash treatment requirements waived or for work taken over by Forest Service.” *Id.* at 106 (¶ C6.7).

D&D timely appealed the contracting officer’s decision recognizing the terminated as incomplete sale and demanding payment in the amount of \$100,513.97. In its first complaint, D&D disputed the Forest Service’s claim, arguing that D&D did not materially breach the contract, that D&D’s non-performance of the contract should be excused, and that the contracting officer’s decision that D&D defaulted on the contract and the termination should be overturned. D&D also requested damages in an amount to be determined but “currently estimated to exceed \$125,000.” In response to the Forest Service’s motion to dismiss, however, D&D withdrew its claim for damages. D&D submitted its second claim to the contracting officer, asserting that had D&D known that the contracting officer would have granted D&D an extension with a possible rise in price had it just felled trees in unit

20H and that only \$5000 in specified road work remained, D&D would have felled the trees in unit 20H and “made every effort possibly know [sic] to finish these two things to try and get time added.” D&D did not request damages but instead asserted that it was entitled to one more extension of the sale. The contracting officer denied D&D’s second claim that an extension or that additional time should have been granted. D&D timely appealed to the Board the contracting officer’s second decision. The Board consolidated both appeals. In its second complaint, D&D admitted that it had not completed the sale. D&D, however, asserted that it “just ran out of time” because it was denied changes to its logging methods, was held up by inspectors, the sale was remote, the road package was the largest D&D had been involved with, D&D was told that it would not get an extension, and D&D’s “best calculation” for the cost to complete the sale was \$40,000.

After repeated notice to the parties, the Board held a virtual hearing in these appeals. D&D chose not to attend or participate in the hearing. The Forest Service did participate in the hearing and two witnesses testified. Accordingly, the Board will consider D&D’s case to have been submitted on the record pursuant to CBCA Rule 19 (48 CFR 6101.19 (2019)).

Discussion

The sale terminated on the contract completion date of October 22, 2017. D&D does not dispute that it failed to complete the logging and compliance work by the adjusted contract completion date. D&D, however, attempts to establish that it was entitled to one more extension of the contract and that it ran out of time to complete the sale due to the Forest Service’s wrongful rejection of D&D’s request to change the logging methods, failure to timely inspect and approve D&D’s road construction operations, and the Forest Service’s breach of the implied duty of good faith and fair dealing.

D&D contends that the Forest Service wrongfully rejected its proposed logging system modifications resulting in the Forest Service’s breach of contract and the implied duty of good faith and fair dealing. A contracting officer’s discretionary authority may be overturned only by a showing that it “was made in bad faith or was so arbitrary and capricious as to constitute an abuse of discretion.” *AFR & Associates, Inc. v. Department of Housing & Urban Development*, CBCA 946, 09-2 BCA ¶ 34,226. “Where the Government is entitled to exercise its discretion, the ‘plaintiff has an unusually heavy burden of proof in showing that the determination made . . . was arbitrary and capricious.’” *Balboa Insurance Co. v. United States*, 775 F.2d 1158, 1164 (Fed. Cir. 1985) (quoting *Royal Indemnity Co. v. United States*, 529 F.2d 1312, 1320 (Ct. Cl. 1976). “In evaluating whether an action is arbitrary, capricious, or an abuse of discretion, the following factors are considered: (1) evidence of subjective bad faith on the part of the government official, (2) whether there is a reasonable, contract-related basis for the official’s decision, (3) the amount of discretion given to the official, and (4) whether the official violated an applicable statute or regulation.” *ALK Services, Inc. v. Department of Veterans Affairs*, CBCA 1789, et al., 13

BCA ¶ 35,260 (citing *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999)). We reject D&D's unsupported assertion implying that the Forest Service acted in an arbitrary and capricious manner in denying D&D's requests to change the logging methods for certain units. The Forest Service properly sought to protect the natural resources, preserve the environment, and cause less damage to the stand. D&D has failed to show that its proposed methods complied with the contract, much less that the Forest Service's determinations were arbitrary or capricious. The contract specified the method for logging each unit, determined after consideration of the environmental impacts of the logging method. The Forest Service may insist on receiving what it bargained for under the contract "in strict compliance with the contract specifications." *First Kuwaiti Trading & Contracting W.L.L. v. Department of State*, CBCA 3506, 19-1 BCA ¶ 37,214 (citing *VSE Corp. v. Department of Justice*, CBCA 5116, 18-1 BCA ¶ 36,928); *Kirschner Brush Mfg. Co.* 605 E. 132 St. Bronx, NY 10454, GSBCA 5842, et al., 1982 WL 7260 (citing *R.G. Robbins & Co.*, GSBCA 4748-R, 79-1 BCA ¶13,665 (1978)).

The Forest Service also did not breach the contract's duty of good faith and fair dealing by rejecting D&D's proposed changes to the logging methods. The implied duty of good faith and fair dealing requires the Government to use reasonable decisionmaking when considering a contractor's request for a contract modification. *Butte Timberlands, LLC, v. Department of Agriculture*, CBCA 646, 08-1 BCA ¶ 33,730 (2007) (applying the reasonableness standard to the Government's denial of a contract modification request to change the method of performing work in a timber sales contract). D&D failed to demonstrate to the Forest Service that D&D's proposed logging methods were acceptable, particularly in light of contract requirements and environmental concerns. D&D has failed to show that the Forest Service made unreasonable decisions or breached the duty of good faith and fair dealing.

D&D asserts that the Forest Service failed to timely inspect and approve D&D's road construction operations, and this failure materially impaired D&D's ability to complete the work on the sale. The factual record does not support D&D's theory of relief. A breach can be found if the Government hinders performance of the other party through "actions that unreasonably cause delay or hindrance to contract performance." *Michael Johnson Logging v. Department of Agriculture*, CBCA 5089, 18-1 BCA ¶ 36,938 (citing *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1542 (Fed. Cir. 1993)). Numerous inspections did occur, despite D&D's failure to request the inspections in writing as the contract required, but D&D provided no evidence that the inspections were untimely. Instead, D&D complained that the constant inspections were disruptive. Moreover, even if D&D was delayed "three summers in a row or sat five days waiting for a road engineer," as was baldly asserted, D&D has failed to prove that these delays actually materially impaired its ability to complete the work. The fact that D&D stopped working on the site three months before the contract ended, and D&D's statement, after-the-fact, that it could have logged unit 20H and completed the road

work but chose not to do so, also support a finding that the Forest Service did not hinder D&D's performance. D&D's claim that the Forest Service delayed its contract performance by failing to timely inspect, therefore, must be rejected.

D&D suggests that it was entitled to a CTE. Per the contract terms, the Forest Service could not grant a CTE because D&D did not complete the specified road work by October 31, 2015. D&D did not even complete the specified road work by the contract completion date. D&D alleges without support that the Forest Service granted the contractor on another timber sale a CTE, despite that contractor's failure to complete compliance work timely. D&D's assertions provide no basis to deviate from the express contract requirements here. The Forest Service did grant D&D numerous CTAs; the last one extended the sale from September 2017 to October 2017, but D&D performed no work on the site during this period and did not request to extend the sale past October 2017. The record does not demonstrate that D&D was entitled to one more extension of the contract.

D&D asserts without evidence or further elaboration that "this [presumably D&D's default] was the intent of [a Forest Service representative] the whole time." "To prove bad faith by the Government, a contractor must establish, by clear and convincing evidence, that a government official acted with 'some specific intent to injure the [contractor].'" *J.R. Mannes Government Services Corp. v. Department of Justice*, CBCA 5638, 17-1 BCA ¶ 36,911 (quoting *Am-Pro Protective Agency, Inc. v United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002)). D&D has provided no evidence of any "specific intent to injure" D&D. To the contrary, the record demonstrates numerous efforts to assist D&D, through regular inspections, timely responses, approval of modifications, granting CTAs, and providing D&D with opportunities to correct compliance issues and continue working on the sale.

D&D argues that the Forest Service's rejection of proposed changes to logging system operations as well as the Forest Service's failure to timely inspect and approve D&D's road construction operations rendered completion of performance within the contract term impossible. The factual record proves otherwise, while D&D discounts its obligation to complete performance within the contract-established time frame. As such, we reject D&D's claim of impossibility.

Pursuant to the contract, D&D is obligated to cover the estimated costs of the work that the Forest Service must perform on D&D's behalf. D&D challenges the \$112,204.45 in costs claimed by the Forest Service to complete the remaining compliance work on the sale, estimating that its "best calculation" of the cost to complete the work was \$40,000. The Forest Service "bears the burden to prove legal liability, 'the fact of loss with certainty,' and 'the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation.'" *Native American Construction Services, LLC v. Department of the Interior*, CBCA 5232, 16-1 BCA ¶ 36,512 (quoting *Willems Industries,*

Inc. v. United States, 295 F.2d 822, 831 (Ct. Cl. 1961)). “It is true, of course, that the proof of damages need not be exact. A reasonable basis is enough—but some convincing basis must be advanced.” *Id.* (quoting *Twigg Corp. v. General Services Administration*, GSBCA 14386, et al., 00-1 BCA ¶ 30,772). We find that the Forest Service presented sufficient evidence to support the decision not to extend the contract further and its claim for the costs in the amount of \$100,513.97 to complete the compliance work D&D left unfinished.

Decision

We conclude that D&D failed to complete the contract within the time specified and that D&D must pay the Forest Service \$100,513.97. We find that D&D withdrew its incomplete claim for damages. D&D’s appeals, therefore, are **DENIED**.

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

We concur:

Joseph A. Vergilio

JOSEPH A. VERGILIO

Board Judge

Jerome M. Drummond

JEROME M. DRUMMOND

Board Judge