



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 14, 2012

CBCA 2199

VELETA CORPORATION,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Patricia Shadburn Davis, President of Veleta Corporation, Evergreen, CO, appearing for Appellant.

Daniel B. Rosenbluth, Office of the General Counsel, Department of Agriculture, Golden, CO, counsel for Respondent.

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

ZISCHKAU, Board Judge.

Appellant, Veleta Corporation, appeals from a contracting officer's decision denying its \$352,729 claim for an equitable adjustment on a contract with the Department of Agriculture's Forest Service to cut and remove timber in the Arapaho-Roosevelt National Forest, near Boulder, Colorado. Veleta contends that the Forest Service changed the contract by requiring it to cut and remove additional trees not required by the contract. In particular, Veleta claims that in preparing its proposal, it relied on a marked sample area prepared by the Forest Service for a pre-proposal site visit that showed far fewer large lodgepole pine trees marked to be cut and removed than was ultimately required by the contracting officer's representative (COR) during contract performance. The Forest Service responds that the contracting officer never changed the contract specifications and that the COR only required

Veleta to cut and remove the trees required by the specifications. The Forest Service points to Veleta's failure to notify the contracting officer of any alleged change and cost impact until after it had completed performance. The parties submitted this case for a decision on the record.

We conclude that even if the COR required Veleta to cut more lodgepole pines in some areas than Veleta anticipated when preparing its proposal, Veleta has not demonstrated that it performed additional work beyond the contract requirements or that it incurred increased costs of performance as a result of the asserted change. Accordingly, we deny Veleta's appeal.

Findings of Fact

The Forest Service issued solicitation AG-82X9-S-08-0166 ("Gold Lake Fuels Reduction Project") on July 22, 2008. Appeal File at 13; Respondent's Record Supplementation (Jan. 5, 2012), Exhibit 4. The solicitation contemplated a firm, fixed-price contract to treat up to 216 acres located on the Boulder Ranger District of the Arapaho-Roosevelt National Forest. Appeal File at 17. Section B of the solicitation identifies the pricing schedule for five line items, in which each item consisted of a tract of land ranging from twenty to sixty-one acres in size called a "treatment unit." Each treatment unit line item contains the following tasks:

- A. Thin - DxPRE [Designation by Prescription]
- B. Slash Treatment
- C. Yarding (including Skid Road Construction)
- D. Product Removal
- E. Temporary Road Management (includes Landings, Staging Areas & Skid Roads)

Appeal File at 14. Tasks A, B, C, and E called for unit pricing on a per acre basis; task D was not separately priced. The first four treatment unit parcels were to be part of the base contract, while unit 5 was to be an option the Forest Service could exercise by contract modification. The solicitation's statement of work in section C provides in relevant part:

The Contractor will provide all labor, supplies, and equipment (including mobilization) to thin all designated vegetation. The Contractor will also provide equipment to skid, deck, and remove included timber. Contractor will need to supply all labor, supplies, and equipment to perform road maintenance and sub-soiling.

The Forest Service estimates 380 CCF [100 cubic feet, a volume unit of measure] of merchantable timber on this project. The successful Contractor will have [an] option to pay for all or a portion of the 380 CCF regardless of whether the material is removed or piled.

Appeal File at 17. The statement of work notes that technical specifications for the procurement are contained in “Attachment One” of the solicitation. The technical specifications provide:

The purpose of the Gold Lake Fuels Reduction #1 and optional Timber Removal Contract is to treat hazardous fuels on Forest Service Lands and to have an immediate effect on fire behavior. The proposed treatments under this contract include thinning and removal of designated timber.

Appeal File at 45.

Table 1 in the technical specifications sets forth, for each treatment unit, the number of acres, estimated volume of sawtimber, and numbers of trees to be treated. For unit 2, the table shows sixty-one acres, 70.39 ccf sawtimber volume, 2889 trees, 66.03 ccf POL (products other than saw logs) volume, 5114 trees POL, and 9731 stems less than 5” dbh (diameter at breast height – diameter of a tree measured outside of the bark at a height of 4.5 feet above ground level on the uphill side). Appeal File at 45. The specifications contain a utilization provision in which the Forest Service agrees to sell and the contractor agrees to purchase, cut, and remove “Included Timber,” defined as merchantable timber products that must be purchased by the contractor at rates established through a separate timber sale contract. Appeal File at 47. Table 2 of the specifications identifies “Included Timber” quantity estimates for lodgepole pine, ponderosa pine, and douglas fir sawtimber and POL. Appeal File at 50. Lodgepole pine accounted for the vast majority (321 of the 380 ccf) of the total estimated included timber. Under table 2 appears the following note in bold face: “Volume quantities listed herein are made available with the understanding that values shown are Forest Service Estimates and are not guaranteed. For these reasons, Offerors are urged to examine the Project Area and make their own estimates.” Appeal File at 50.

“Silvicultural Summary Prescriptions” for each of the five treatment units are included as exhibit 1 of the technical specifications. The prescriptions for units 2 and 3 are the same. For unit 2, the silvicultural goal is: “Maintain or develop a network of existing and future old growth that provides adequate habitat which is well dispersed, effective, and accessible to associate wildlife species. Trees will be cut and removed using a whole tree operation. Limbs and tops will be removed at the landing site.” Appeal File at 58. The paragraph entitled “Desired Condition” provides in relevant part: “Old growth stands would have

populations of old trees and their associated structures On a landscape scale, it would be desirable to re-create the historical mosaic of forest age and structure, including sizable openings. Ponderosa Pine would remain the most dominant species in the unit with lesser amounts of Lodgepole Pine and Douglas Fir than is currently present.” The prescription concludes with the “End Result - Specifics: Forested Stands” specification, which provides in pertinent part:

1. Retain all trees that are marked in orange, appear to contain dens, or have large nests.
2. Reduce existing basal area up to 40%.
3. Preference for leave trees will be Douglas fir, ponderosa pine, and lodgepole pine. Do not include limber pine in spacing or existing basal area.
4. Cut and remove lodgepole pine trees that are greater than 5” DBH.
5. (Situation) If a healthy ponderosa pine or Douglas-fir (less than 5” DBH and greater than 40% live crown) is located within the dripline of an 8” to 13” DBH ponderosa pine, cut and remove the overstory tree.
6. Cut and remove . . . ponderosa pine trees between 5” and 13” DBH
7. Favor trees with the greatest live crown ratio regardless of size.
8. Protect residual conifer regeneration and saplings from operations where trees are not a ladder fuel. Maintain approximately 1-2 pockets of regeneration (5+ conifers) for every 5 acres where possible.
9. Reduce existing basal area by 20% within 50’ of either side of trails or roads.

Appeal File at 58. Within each unit, there may be up to four, five, or even more forested stands which are aggregations of trees having similar characteristics that separate them from one another. Respondent’s Motion for Summary Judgment, Exhibit E (Declaration of Kevin Zimlinghaus (Apr. 28, 2011) ¶ 4). Section E of the solicitation contains the specifications for the quality assurance plan. The first performance work standard concerns “Thinning of conifers, 40% reduction in basal area (DxPRE)” with a listed performance standard of “+/- 5% of 40% basal area reduction” with “[n]o designated ‘leave’ trees cut.” Appeal File at 116.

Section L of the solicitation contains the clause AGAR 452.237-71, entitled Pre-Bid/Pre-Proposal Conference (FEB 1988), notifying prospective offerors that the Forest Service was planning a pre-proposal conference, encouraging offerors to submit questions prior to or during the conference, and cautioning that notwithstanding any remarks or clarifications given at the conference, all terms and conditions of the solicitation remain unchanged unless they are changed by amendment to the solicitation.

In approximately June 2008, Kevin Zimlinghaus, the silviculturist for the project, marked a sample area of approximately four acres within unit 2 using the prescriptions for unit 2 contained in a draft version of the solicitation. Appeal File at 162-63. The purpose of creating the sample area was to show prospective offerors how trees would be selected for thinning according to the prescriptions. However, the draft prescriptions for units 2 and 3 as of June 2008 did not contain the direction to “cut and remove lodgepole pine trees that are greater than 5” DBH” because that prescription was later added by the silviculturist to the final published version of the solicitation. As a result, there were some lodgepole pines greater than 5” dbh that were not marked for cutting in the sample area. The record does not indicate the number of lodgepoles marked for cutting, the number not marked, what other types of trees were marked for cutting, or what the basal area reductions would have been according to the sample area markings. One of the revisions to the unit 2 prescriptions in the final version of the specification included in the solicitation as published and issued on July 22, 2008, was the requirement to “cut and remove lodgepole pine trees that are greater than 5” DBH.” The sample area markings were not adjusted to take account of the final solicitation revisions.

On July 31, 2008, the Forest Service’s COR for the project, Colin Hutten, conducted a pre-bid/pre-proposal conference for the project that included a site visit to the project area. Mr. Hutten describes the site visit as follows:

I led a pre bid trip for interested offerors on July 31, 2008 During this trip, I reviewed the cutting specifications outlined in section J with the offerors and showed them a sample mark area that Silviculturist Kevin Zimlinghaus had prepared. . . . There were no requests for clarification on the sample mark area as compared to the contract specifications regarding lodgepole pine made by any of the offerors, including Veleta Corporation. The contract specifications in section J that were presented to the offerors on that trip were the same ones that were in the final solicitation. While describing the 40% basal area reduction to the offerors, I made it clear on several occasions that if they cut too many trees in certain acres within the units and exceeded the allowable reduction percentage, there would be other acres within the same units that they could avoid cutting trees in to make up the difference. These acres could include rock outcroppings where mechanized equipment would not be able to operate in or slopes over 35% We visited portions of all 5 units and I encouraged the potential offerors to do a complete site inspection of each unit before submitting a bid.

Respondent’s Motion for Summary Judgment, Exhibit D (Declaration of Colin Hutten (Apr. 28, 2011) ¶ 3). Damien Davis, George Karn, and Sanborn Brown attended the

conference/site visit on behalf of Veleta. Appeal File at 192. The COR's notes of the pre-proposal conference were included in amendment 2 of the solicitation which was issued on August 6, 2008. Appeal File at 190-93.

Veleta submitted its proposal on August 20, 2008. In its two-page technical proposal (excluding past performance references), Veleta indicates that for thinning operations it would “[u]tilize a shear, or similar, attachment on appropriate equipment for mechanical cutting of trees” and “[h]and fellers with chainsaws, working in conjunction with mechanical felling” Appellant’s Record Supplementation (Jan. 6, 2012). Veleta was selected for award, and the contract was signed September 18, 2008. Appeal File at 13. The contract price was \$280,500, covering units 1-4. The Forest Service issued a notice to proceed effective October 20, 2008, with a performance period of two years. Appeal File at 198, 23. On January 29, 2009, prior to Veleta actually commencing tree cutting, the COR met with Veleta’s Damien Davis and George Karn. Mr. Davis asked the COR whether or not lodgepole pines greater than 5” dbh will be cut regardless of whether they are next to roads or trails. The COR answered that the 20% basal area reduction requirement for areas next to roads and trails was a higher priority than removing all lodgepole greater than 5” dbh. It was at this meeting that the COR and the silviculturist first realized that the sample area was completed before the final revisions were made to the solicitation before its issuance. Appeal File at 258. This discussion shows that even before cutting began, Veleta was aware of the unit 2 prescription to cut and remove lodgepole pines greater than 5” dbh and was seeking guidance on applying that prescription in the context of the other prescriptions. Equally significant is the COR’s response that the lodgepole pine removal paragraph was not to be applied indiscriminately, but rather was to be applied consistent with the prescription’s basal area reduction requirements, including the 20% basal area reduction prescription for areas within 50’ of trails or roads.

Veleta began performance in unit 2 on February 7 by felling the trees marked in the unit 2 sample area and then other trees in a nine-acre adjacent area. *See* Complaint at 34. One sawyer, using a chain saw, completed the cutting of the marked trees in the sample area in five hours. *See* Complaint at 2.

On February 23, Veleta’s Mr. Davis requested inspection and approval for billing from the COR (Mr. Hutten) on the area in unit 2 for which Veleta had performed tree selection and felling. *See* Complaint at 3. The COR and a Forest Service inspector checked surveillance plots to see if Veleta was complying with basal area reductions. In his daily report for February 23, 2009, the COR concluded that the plots showed that more trees had to be cut. After review by the COR and the Forest Service’s silviculturist, the COR told Mr. Davis that lodgepole pines greater than 5” dbh had to be cut as stated in the unit 2 specification. Mr. Davis acknowledged the prescription for removing lodgepole pines

greater than 5” dbh, but he also noted that the sample area had lodgepole pines greater than 5” that were not marked for cutting. The COR advised Mr. Davis that after the solicitation was revised the sample area had not been adjusted. Mr. Davis replied that he would have to rework a lot of the area he had already cut. Appeal File at 260. The COR did not require Veleta to go back into the sample area to cut the remaining additional lodgepole pines that were greater than 5” dbh, Complaint at 34, but did require it to remove all lodgepole pines greater than 5” dbh from the nine-acre area. Appeal File at 262. Veleta has offered no evidence indicating that cutting the lodgepole pines in the nine-acre area was inconsistent with the unit 2 prescriptions. Although Veleta alleges that Mr. Davis at this meeting “disputed COR Hutten’s change of the specifications and indicated that it did not comply with Unit 2 Specifications or the Sample Area selection,” Complaint at 3, there is no indication in the record that Veleta advised the contracting officer, prior to mid-November 2009, that it believed the directions from the COR were a change to the contract affecting Veleta’s cost of performance.

In an affidavit, the COR states that he informed Mr. Davis that if there were acres where Veleta exceeded a 40% basal area reduction by cutting lodgepole pines greater than 5” dbh, he would offset acres adjacent to the heavier cut acres by either not cutting trees at all or reducing the amount of basal area to be removed to remain within the allowable tolerance for the unit. The COR added that Veleta was “paid in full for all the acres within the units even though there were acres within the units where they did not either fully cut and remove 40% of the basal area or did not cut and remove any trees at all” and that this “was an acceptable approach to both the Contractor and the Forest Service on how to compensate for acres where the Contractor exceeded the 40% Basal Area reduction.” Hutten Declaration ¶¶ 4-5. The Board finds these unrebutted statements of the COR to be true and supported throughout the record.

Daily diary entries, which we find credible and unrebutted, indicate that in some areas Veleta removed all lodgepole pines but did not meet the basal area reduction requirements; in other areas Veleta removed large percentages of lodgepole pines (up to 90%) and the COR permitted sparser cutting in adjacent areas to balance the amount of work; and Veleta was not using mechanical means for tree removal. Appeal File at 264, 266-67. In a Veleta invoice dated February 25, 2009, Veleta billed for the first thirteen acres of tree thinning services at the contract rate of \$860 per acre. Appellant’s Record Supplementation (Jan. 25, 2012). Veleta made no mention of any alleged change or that it was incurring (or seeking) additional costs for performance resulting from the February 23 and January 29 discussions and directions from the COR.

In response to the contracting officer’s request for a schedule to complete unit 2, Mr. Davis advised the contracting officer by letter of March 24 that Veleta would complete

cutting of trees in unit 2 by March 25 and complete skidding and processing operations for unit 2 by approximately May 1. Appeal File at 101. In the letter, there is no mention by Mr. Davis of any alleged change to the specifications by the COR or that the COR had imposed cutting requirements requiring Veleta to perform extra work. In a Veleta invoice dated April 7, 2009, Veleta billed for the final sixteen acres of tree thinning services in unit 2 and the first six acres in unit 3 at the contract rate of \$860 per acre. Appellant's Record Supplementation (Jan. 25, 2012). The invoices make no mention of any claimed extra work by Veleta.

During April-May 2009, Veleta was skidding and processing in unit 2 and substantially completing the tree cutting/thinning task in unit 3. Appeal File at 271-77. On May 21, Veleta expressed concern to the COR that it was overcutting an area in unit 3 and wanted assurances that it would not receive a reduced payment for exceeding the basal area inspection percentages. The COR assured Veleta that a deduction would not be made for following directions to cut all lodgepole pine over 5" dbh. Given the large amount of lodgepole that had been cut in the unit, the COR permitted Veleta to stop cutting ponderosa pine trees and to extend the no-cut areas around rock outcroppings where no trees would be cut, including lodgepole pines. Appeal File at 278.

At no point during the tree cutting work in unit 2 or unit 3 through May 2009 did Veleta ever advise the contracting officer that it received directions from the COR constituting a change to the contract affecting Veleta's cost of performance. The COR's daily diaries and Veleta's invoices are the only contemporaneous, written reports of contract performance during the crucial period of February through July 2009, when virtually all tree cutting in units 2 and 3 occurred. In a Veleta invoice dated June 2, 2009, Veleta billed for thirty-three of the remaining thirty-four acres of tree cutting services in unit 3 at the contract rate of \$860 per acre. Appellant's Record Supplementation (Jan. 25, 2012). By early July, Veleta had substantially completed processing in unit 2. Appeal File at 287; Appellant's Record Supplementation (Jan. 9, 2012) (Veleta July 7, 2009 invoice). By early August, Veleta had billed for about half of the processing services in unit 3. *Id.* (Veleta July 21 and Aug. 7, 2009 invoices).

The record shows a course of performance from February through July 2009 in which the parties applied the prescription of cutting lodgepole pines greater than 5" dbh subject to an overall 40% basal area reduction requirement, the 20% basal reduction requirement within 50' of trails and roads, and the tree retention requirements. The record does not indicate the percentage of lodgepole pines greater than 5" that were cut in units 2 and 3, but clearly not all of them were cut. To the extent that Veleta cut more trees in one area and less in another, Veleta has not introduced evidence indicating that it performed extra work or that it incurred additional costs in performing its actual work beyond what it would have incurred had it

followed selection criteria based on its own (and undefined) interpretation of the sample area markings and contract specifications.

In its appeal, Veleta argues that it was required to cut all or substantially all lodgepole pines in units 2 and 3, thereby causing higher costs of performance. The record indicates only one area, a nine-acre section noted in the February 24 daily diary, in which all lodgepoles greater than 5" dbh were cut at the COR's direction. But even for that area, there is no evidence on basal area reduction. Indeed, Veleta has not introduced into the record any basal area reduction amounts for any part of the project, either by forested stand, surveillance plot, or unit. Instead, Veleta claims that the volume of lumber that it cut and processed in units 2 and 3 far exceeded the Forest Service's estimates contained in the solicitation. We find that the record does not demonstrate that Veleta cut more timber than the Forest Service estimated in the contract. Ultimately, the Forest Service determined that the volume of timber purchased by Veleta under associated timber sales contracts was 182 ccf for unit 2 and 164 ccf for unit 3. Hutten Declaration ¶ 6. Those figures, which include a reduction factor for calculating quantity, are not convincingly rebutted by Veleta, particularly when Veleta agreed to those figures for the purchase of the timber. Veleta submitted into the record a June 4, 2011 declaration from Sanborn Brown, Veleta's subcontractor who purchased log decks from Veleta in units 2 and 3. He states that his company removed a total of 386 cords. Appellant's Response to Motion for Summary Judgment (June 7, 2011), Exhibit 3 (Declaration of Sanborn Brown (June 4, 2011) ¶¶ 1-2). We find no persuasive evidence in the record for determining volume based on the cord quantity identified in Mr. Brown's declaration. Accordingly, we see no basis in the record to reject the revised volumes determined contemporaneously by the Forest Service and agreed to by Veleta in its timber sales contracts.

Although basal areas were reduced by more than 40% within some acres, Veleta has not demonstrated to us, or previously to the contracting officer, that actual basal area reductions exceeded 40% in unit 2 or unit 3, or in any forested stands within units 2 or 3. We find supported by the record (and not rebutted by Veleta) the basal area reduction amounts for unit 2 (36%) and unit 3 (32%) calculated by the Forest Service's silviculturist. Zimlinghaus Declaration ¶ 5; Appeal File at 6, 355-63.

In a letter to the contracting officer dated November 15, 2009, Damien Davis stated that Veleta had used the solicitation and specifications and information from its site visits in preparing its proposal and had performed additional work not required by the contract:

Veleta began its performance of this contract by cutting the marked sample area in Unit 2 and then an area adjacent and west of the sample area. We then requested feedback from Colin Hutten, COR, on the area for which Veleta had

performed selection and cutting. After review by Colin and the Silviculturist for this project, Colin told us that all 5” dbh and greater lodge pole needed to be cut to obtain approval. We pointed out that this was not how the prescription read and was not how the sample area was marked (not all lodge pole in excess of 5” dbh in the 40% reduction area were marked). Colin clarified that with the pending beetle epidemic the Silviculturist wanted this change implemented in the performance of our contract.

During the performance of the requirements in Unit 2, we noted that our production rate had been significantly impacted by this requirement. Upon completion of the unit and quantification of the ccf volume produced on this unit, the ccf Table 1 volume of 136.42 was exceeded by 210.58 ccf, totaling 347.00 ccf (refer to USDA Forest Service “Bill for Collection” . . .), or an increase of 154.36%.

....

Applying the increase[d] production in Unit 2 of 154.36% to our contract amount for Unit 2 of \$100,650.00 establishes an increase to the contract for Unit 2 of \$155,363.34. This unit is 100% complete.

Applying the increase[d] production in Unit 3 of 206.29% to our contract amount for Unit 3 of \$95,700.00 establishes an increase to the contract for Unit 3 of \$141,154.96.

Appeal File at 199-200.

In a November 18, 2009 letter responding to Veleta, the contracting officer stated: “Regarding the issue of all 5” dbh and greater lodge pole needing to be cut to obtain approval, I believe all 5” dbh and greater that were cut by you was done so to obtain the 40% reduction desired and as contained in your contract. I fail to see where a change occurred.” Appeal File at 208. The contracting officer noted that if Veleta wished to pursue a claim, it should identify the supporting contract clause and a sum certain for the relief sought.

On June 1, 2010, Veleta submitted a claim requesting an equitable adjustment to the contract in the amount of \$246,100 based upon extra work required by the COR. Appeal File at 243-45. In its claim, Veleta asserted that the COR represented at the pre-proposal site visit that the sample marked area in unit 2 “reflected the application of the Specifications for Units 2 and 3, as stated in Reference 1, specifically Exhibit 1, Silvicultural Summary Prescriptions, Stand Descriptions 2 and 3.” Veleta also asserted:

As a part of its overall examination of the Project Site and Specifications, Veleta compared the Forest Service's markings in the Sample Area with the corresponding Specifications for Units 2 and 3, confirming that the Sample Area selection and the Specifications matched. Veleta based its production and cost estimates, and its proposal for Units 2 and 3 on this evaluation and review. Based on these criteria, Veleta established a production rate of five acres per crew day at a value of \$1,650.00 per acre and submitted a proposal accordingly.

Appeal File at 244. Veleta's equitable adjustment amount is explained as follows:

The impact of performing the work according to your interpretation of the specifications lowered Veleta's production rate from 5 acres per day to less than two acres per day. It therefore required an additional one and one-half days to complete the same amount of acreage as compared to the Sample Area. The selection, felling, and processing crew, at a minimum, consisted of a Hahn 110 processor with one and sometimes two operators, a John Deere Grapple log skidder with operator, and a Case 440 skid steer or ASV PT80 with operator, one sawyer, and one field manager. The respective hourly billing rates (which we have established for the purpose of this claim and which we feel are fair market value) are: \$200.00, \$150.00, \$90.00, \$40.00 and \$55.00 come to a total crew rate of \$535.00 per hour. This rate multiplied by the additional twelve hours (one and one-half days) totals \$6,420.00 to complete three acres or an additional \$2,140.00 per acre.

Appeal File at 244-45. Using fifty-seven acres (excluding the four-acre sample area) for unit 2 and fifty-eight acres for unit 3, Veleta computed a total of \$121,980 for unit 2 and \$124,120 for unit 3, for an overall total of \$246,100, constituting its requested equitable adjustment for extra work in units 2 and 3.

Veleta's proposal and unit pricing do not support its quantum calculations. Veleta's proposal does not provide any labor rates, total crew rates, labor mix, equipment costs, or production rates against which we might judge its proffered costs. Its proposal's unit pricing shows thinning (DxPRE) of unit 2 at \$860 per acre, slash treatment at \$430 per acre, and yarding at \$312 per acre, and temporary road management is provided as a lump sum amount of \$2928 for all sixty-one acres. Veleta's proposal states that it would use a combination of mechanical and hand felling, but the record does not indicate that in actual performance Veleta used any mechanical felling for units 2 or 3. From our review of the evidence in the record, we can see no adequate basis for finding that Veleta's proposal production rate was

five acres per day, that Veleta's actual production rate "was lowered to less than two acres per day," or that Veleta incurred costs of \$2140 per acre for alleged additional work.

Veleta requested an opportunity to enter into alternative dispute resolution procedures with the contracting officer in a letter of June 24, 2010. The contracting officer declined the invitation on June 28, 2010, noting that she had not yet rendered a final decision and thus there was no dispute at that point. The contracting officer issued a final decision on July 30, 2010, denying Veleta's claim. Appeal File at 1-12. In the decision, the contracting officer states that each party was unaware of the discrepancy in the marking of trees in the unit 2 sample area for the pre-proposal site visit, and that Veleta's Mr. Davis had advised the COR that he had not conducted his own cruise estimate but rather had relied solely on the sample area to calculate Veleta's production rate and proposal pricing. Appeal File at 10. Because the units 2 and 3 specifications were never changed from the time of solicitation issuance, award, and through the end of the contract, the contracting officer concluded that Veleta had not demonstrated entitlement to an equitable adjustment.

The daily diaries show performance in various units (including some remaining processing in unit 3) during the period from January 2010 through nearly the end of October 2010, subject to some equipment and weather delays. Appeal File at 301-49. Veleta completed all contract performance on approximately October 25, 2010. Appeal File at 349.

On October 28, 2010, Veleta filed a notice of appeal here, challenging the contracting officer's decision and seeking the claim amount of \$246,100. On December 1, 2010, Veleta filed its complaint. For calculating quantum in its complaint, Veleta reverted to the percentages of increased timber volume that it used in its November 15, 2009 letter to the contracting officer. Veleta multiplied its calculated unit 2 and unit 3 volume increases (154.36% and 206.29% respectively) by the contract pricing for unit 2 and unit 3 (\$100,650 and \$95,700 respectively) to arrive at a total quantum of \$352,782.87. Complaint at 13-14. The Forest Service filed its answer and the appeal file on January 3, 2011. Veleta supplemented the appeal file on January 14. The Forest Service filed a motion for summary relief on May 4, 2011. Veleta filed its opposition to the motion on June 9. On June 16, 2011, the parties agreed to submit the case on the record pursuant to Board Rule 19, thereby converting the summary relief submission into a Rule 19 record submission. The parties filed additional briefs and exhibits in July 2011, and the parties further supplemented the record in January 2012.

Discussion

Veleta's case is premised upon the assertion that the Forest Service compelled it to perform more work than was required under the contract. Specifically, Veleta argues that

the COR changed the unit 2 and 3 selection and cutting specifications when he deviated from the selections identified in the sample area and directed that all lodgepole pines greater than 5" dbh be cut. Complaint at 32-38. Veleta points to the COR's directions on February 23, 2009, when he reviewed the cut four-acre sample area and a nine-acre adjacent area and advised Mr. Davis that all lodgepole pines greater than 5" dbh would have to be cut. Veleta states that the COR "amended the '100% selection and cutting requirement'" on March 11, 2009, "by stating that it applied to the areas where the basal reduction requirement was 40%, but not in the areas where the basal reduction requirement was 20%, that is, 50' either side of forest roads and trails" Complaint at 34.

We conclude that Veleta has not shown that it performed extra work in units 2 and 3. The record shows a give-and-take during the course of performance in which the parties applied the prescription of cutting lodgepole pines greater than 5" dbh subject to an overall 40% basal area reduction requirement, the 20% basal reduction requirement within 50' of trails and roads, and the tree retention requirements. Although Veleta is correct that the Forest Service enforced a cutting prescription that may have deviated from the marked sample area, the record clearly shows that Veleta was not required to and did not in fact cut all lodgepole pines greater than 5" dbh. To the extent that Veleta may have overcut some areas and undercut other areas, Veleta has not shown that it performed extra work. There is no evidence from Veleta on actual basal area reductions (or the percentage of lodgepole pines greater than 5" dbh) in units 2 and 3, either by forested stand, surveillance plot, or unit, and we find adequate record support for the Forest Service's determination that the final basal area reductions for units 2 and 3 were less than 40% each.

Veleta attempts to demonstrate that it performed extra work by relying on the volume of timber removed. Even if we were to ignore the explicit disclaimers in the solicitation and contract regarding the volume estimates, and were to use the estimates as reasonable figures for the expected volumes of removed timber, we are not persuaded that the actual volumes of removed timber differ substantially from the estimated volumes. Veleta disputes the actual amounts calculated by the Forest Service, but Veleta also agreed to those amounts in making payment under the associated timber sale contracts. Thus, we are not persuaded that the volume data supports Veleta's claim of extra work.

Veleta's quantum is also unsupported because Veleta provides no persuasive evidence of any increased costs of performance attributable to the alleged extra work. The record provides no rational basis to find Veleta's actual incurred costs or what its costs would have been if selection and cutting had occurred according to its understanding of the sample area selections. Veleta discusses productivity rates, both expected and actual, but we find the rates to be unsupported by the record. For example, although Veleta states that it anticipated cutting and processing five acres per day based upon the sample area, the evidence does not

show that the sample area was representative of the unit-wide work or that the expected rate was reasonable. No schedule or other rate-related information from Veleta adequately supports what Veleta claims was its expected cutting and processing rate. Veleta's comparison of unsupported expected production rates with unsupported actual rates does not advance its quantum claim. In sum, Veleta has not persuaded us with record evidence that it incurred additional costs of performance due to alleged extra work.

Veleta's argument of bad faith conduct by the contracting officer is the only argument not resolved by our findings and conclusions above. Veleta argues that the contracting officer acted in bad faith in refusing to engage in alternative dispute resolution and "in her dismissive response to Appellant's attempts to reach a mutually agreeable resolution to the issue in controversy." Complaint at 51. We find no evidence of bad faith. The contracting officer properly sought backup data from Veleta and the Forest Service to evaluate Veleta's November 15, 2009 letter claiming a contract change. Thereafter, the contracting officer considered the record and concluded that there had been no contract change and that Veleta had performed only work that it was required to perform under the contract. At the time that Veleta requested the contracting officer to engage in alternative dispute resolution, the contracting officer had not issued her final decision and she may not have completed all of the analysis she needed to understand the issues. Her decision not to enter into alternative dispute resolution at that point clearly did not amount to bad faith. In sum, we find no evidence of bad faith by the contracting officer.

Decision

We have considered all of Veleta's arguments in its submissions but find no basis for its entitlement to an equitable adjustment. Accordingly, we **DENY** the appeal.

JONATHAN D. ZISCHKAU
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

R. ANTHONY McCANN
Board Judge