



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: April 17, 2024

CBCA 7751

INDEPENDENCE CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Jay B. Stoddard, President of Independence Construction, Inc., Eureka, MT, appearing for Appellant.

Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

Before Board Judges **LESTER** and **O'ROURKE**.

**LESTER**, Board Judge.

Appellant, Independence Construction, Inc. (ICI), has elected accelerated disposition of this appeal, as permitted by section 7106(a) of the Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2018), and Board Rule 53 (48 CFR 6101.53 (2023)). Accordingly, this decision is being issued by a panel of two judges.

ICI seeks payment for excavation and related work that it performed on a United States Forest Service (USFS) road construction project before a USFS contracting officer terminated the contract for default, as well as reimbursement for the costs of two land surveys that ICI commissioned to demonstrate how much excavation work it had performed.

Although the USFS paid several of ICI's invoices for excavation work, the USFS contracting officer declined to pay ICI's last invoice after finding that the excavation work was unacceptable and not in compliance with task order specifications.

At a hearing in this matter, which was conducted in Kalispell, Montana, on March 12, 2024, ICI focused more on proving how much excavation work it performed under the task order than on establishing how its work complied with the task order specifications. To the extent that ICI addressed compliance issues, it argued only that the roadway areas and cut slopes that it excavated were as good as if not better than what the task order specified. Despite ICI's opinions about the quality of its work, the USFS is entitled to strict compliance with the specifications in the parties' agreement, and ICI failed to establish that the USFS had to accept and pay for something else. Further, the cost of reprocurement work for which the USFS had to pay to have another contractor fix the defects that ICI left behind overwhelms any value that the USFS received from ICI's work. As discussed further below, ICI has not identified a basis for requiring the USFS to pay additional sums for work that did not satisfy the requirements of its task order. ICI's appeal is denied.

### Findings of Fact

#### I. ICI's Multiple Award Task Order Contract

In 2019, the USFS awarded ICI a firm-fixed-price indefinite-delivery-indefinite-quantity (IDIQ) multiple award task order contract (MATOC). *See* Appeal File, Exhibit 5.<sup>1</sup> Under the MATOC, ICI was entitled to compete against other MATOC contractors for task orders involving road and bridge construction services in the northern region of the USFS's Region 1. *Id.* at 1, 7; *see id.* at 13 (“[E]ach task order shall be competed amongst all contract holders.”). The MATOC indicated that “[a]ny supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule.” *Id.* at 24 (quoting Federal Acquisition Regulation (FAR) 52.216-18(a), Ordering (Oct. 1995) (48 CFR 52.216-18(a) (2018))). Each task order, when awarded, was to identify a project-specific location and include project-specific specifications and drawings. *Id.* at 7, 10.

ICI's MATOC provided that “[a]ll delivery orders or task orders” issued through the competitive process would be “subject to the terms and conditions of this [MATOC]” and that, “[i]n the event of conflict between a . . . task order and [the MATOC], the [MATOC]

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<sup>1</sup> Unless otherwise noted, all exhibits cited in this decision are contained in the appeal file.

shall control.” Exhibit 5 at 25 (quoting FAR 52.216-18(b)). The MATOC also incorporated by reference two standard specifications published by the United States Department of Transportation—“Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects’ (FP-03, U.S. Customary Units)” and “Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects’ (FP-14).” *Id.* at 9-10.

The MATOC contained a provision—clause H-9, “Conformity With Drawings and Specifications”—that addressed the scope of the contractor’s obligation to have its work conform with a task order’s drawings and specifications, as follows:

Unless working tolerances are specified, all work performed and materials furnished shall be in reasonably close conformity with lines, grades, cross sections, dimensions, and material requirements shown on the drawings, indicated in the specifications, or designated on the ground. “Reasonably close conformity” is compliance with reasonable and customary manufacturing and construction tolerances.

Exhibit 5 at 19.

The MATOC also incorporated by reference the contract clause at FAR 52.246-12, Inspection of Construction (Aug. 1996), Exhibit 5 at 11, which required the contractor to “maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements” and “to ensure strict compliance with the terms of the contract.” FAR 52.246-12(b). That clause also required the contractor, “without charge, [to] replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price.” *Id.* 52.246-12(f). It provided that, “[i]f the Contractor does not promptly replace or correct rejected work, the Government may . . . by contract or otherwise, replace or correct the work and charge the cost to the Contractor or . . . terminate for default the Contractor’s right to proceed.” *Id.* 52.246-12(g). It indicated that “the Government shall accept, as promptly as practicable after completion and inspection, all work required by the contract or that portion of the work the Contracting Officer determines can be accepted separately.” *Id.* 52.246-12(i).

Other clauses incorporated by reference into the MATOC were FAR 52.228-15, Performance and Payment Bonds—Construction (Oct. 2010); FAR 52.228-13, Alternative Payment Protections (July 2000); FAR 52.233-1, Disputes (May 2014), Alternate I (Dec. 1991); FAR 52.236-5, Material and Workmanship (Apr. 1984); FAR 52.236-21, Specifications and Drawings for Construction (Feb. 1997), Alternate I (Apr 1984) and

Alternate II (Apr. 1984); FAR 52.243-4, Changes (June 2007); and FAR 52.249-10, Default (Fixed-Price Construction) (Apr. 1984). *See* Exhibit 5 at 23, 24, 37, 38.

## II. The Task Order Solicitation

On September 16, 2021, the USFS issued a competitive request for prices to the Region 1 MATOC holders for a road realignment project—basically, a rerouting of a portion of an existing road, National Forest System Road (NFSR) 38—near the Spotted Bear Ranger District in Montana’s Flathead National Forest. The affected portion of that road sat on a deep and steep hillside, above a riverbank, and was suffering from severe erosion that was causing the road to fail. Exhibit 3; Hearing Transcript (Transcript) at 49-51. The work to be performed was described in the task order as follows:

The Ranger View Realignment project will relocate 2,347 feet of road along NFSR 38 at milepost 51.9 (47.939488° N, -113.541942° W). At the location of the failing slope, NFSR 38 will be moved approximately 150 feet North-East into the cut slope, away from the South Fork of the Flathead River. This relocation will allow for the failing slope to eventually erode into a predicted stable side-slope ratio of 1:1-1/2 (vertical to horizontal) without negatively impacting the roadway or public safety.

The work includes but is not limited to realignment of 2,347 feet of NFSR 38; realignment of the NFSR 2849 and 38 intersection; removal and installation of culvert cross-drains; approximately 16,000 cubic yards of excavation; obliteration of existing segments after realignment; placement of aggregate surfacing; removal and replacement of a road closure berm; snow removal for site access; and, erosion control measures in accordance with the plans and specifications.

Exhibit 1 at 3.

Consistent with the language in the MATOC, the solicitation notified the bidders that “[a]ll provisions and clauses of the parent solicitation, 12034319R0009 and subsequent individual awarded contract apply to this task order solicitation and any resultant contract.” Exhibit 1 at 1. It provided, consistent with the MATOC, that the “‘Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects’ (FP-14, U.S. Customary Units)” were incorporated by reference into the task order specifications. *Id.* at 4. It also incorporated the Forest Service Supplemental Specifications (FSSS) into the solicitation and any resultant contract. *Id.*

The solicitation's "Description/Specifications/Statement of Work" (SOW), which would be included in the resulting task order, provided that, although "[t]he precise details of performing work are not stipulated except as considered essential for the completion of the work," the successful awardee would be required to "[f]urnish all labor, material (but for government furnished), equipment, tools, transportation, and supplies necessary to complete the work according to the contract." Exhibit 1 at 3. To accommodate traffic to and from the nearby Spotted Bear River recreation complex, the successful awardee would be permitted to close the road fully only between March 15 and May 15. After May 15, shutdowns of the road would be limited to a maximum of forty-five minutes at a time because of transport needs associated with the nearby Spotted Bear River complex:

Full closure of NFSR 38 will only be allowed between March 15–May 15. After May 15, traffic can be delayed a maximum of 45 minutes and a minimum of 15 minutes is required to pass traffic between each delay interval. Additional closures will require Forest Service approval. Contractor coordination will be required between this project and the Spotted Bear River Road Aggregate Laydown project.

*Id.*; see Exhibit 1B at 3 n.9 (language in construction drawings addressing limitations on road closure times after May 15).

Based on normal weather conditions in the project area, the road closure and opening requirements provided the successful awardee with two options regarding when to perform the required work. If the awardee wanted to work with the road fully closed for extended periods of time, it could do so from March 15 through May 15, but, to gain access and get equipment to the roadway site during that period, the awardee would have to engage in, and pay for, significant snow removal efforts. See Exhibit 1B at 3 n.10 ("Snow removal, to access the project site, will be necessary and is the responsibility of the contractor."); Transcript at 60. Alternatively, the awardee could elect to perform its work in the late spring or summer months, which would not require snow removal expenses, but, as noted above, the contractor would need to limit closures to a maximum of forty-five minutes at a time and ensure that, when opened, the roadway was passable for traffic. Transcript at 60-61.

Accompanying the solicitation, and incorporated into it, see Exhibit 1 at 4, were the drawings for the project. The drawings indicated that the contractor would have to "construct the project in compliance with [FP-14 and the FSSS]." Exhibit 1B at 3 n.1. They further indicated that "[a] preliminary survey line (p-line) has been established by the Government and staked on the ground in 2019" and that, using the p-line (which "will be almost the center line of the new road," Transcript at 88) as its reference point, "the Government will set construction stakes for the project" that the contractor would have to

follow in constructing the roadway. Exhibit 1B at 3 n.8; *see* Transcript at 88-89. Specifically, for cut slopes, the Government sets reference stakes along the top of the clearing limit, a fixed distance (usually five or ten feet) above the anticipated top edge of the cut slope, and then co-locates grade stakes (with appropriate notations) with the reference stakes. Transcript at 91-104. The grade stakes are to be moved to the top of the cut after excavation of the cut slope is completed. *Id.* at 91-92, 103-04.

Included in the drawings were diagrams of typical sections of the roadway. Exhibit 1B at 4. Typical sections 2 and 3, taken together, establish the roadway construction specifications for the large majority of the project (beginning at Station 4+60 and ending at Station 20+30). *Id.* The diagrams for these two typical sections identified the following parameters for the ultimate product that the contractor would deliver:

- The ground line of the cut slope rising above the roadway was to have a slope of “1 V:1 H”—that is, a one-to-one vertical-to-horizontal slope ratio—that smoothed out, for the last ten feet at the top of the cut slope, into a somewhat less vertical and more horizontal shape.
- There had to be a sloped ditch at the base of the cut slope (where the cut slope would otherwise meet the upper shoulder of the roadway) with a required slope of “1 V[ertical]:3 H[orizontal].”
- The typical diagram established a required width of the roadway in each location (nine feet on each side of the roadway for typical section 2 and nine feet on one side of the roadway and eleven feet on the other for typical section 3), with a 2% slope away from the center of the road on each side (presumably to minimize pooling of water on the roadway during or after storms).
- The fill slope running from the downhill shoulder of the roadway was to have a slope ratio of “1 V[ertical]:1-½ H[orizontal]”—that is, a one-to-1.5 vertical-to-horizontal slope ration—until leveling out for ten feet at the fill slope’s outer limit.

*See id.* Other parts of the drawings showed additional specific requirements and specifications for the placement and construction of the roadway, associated culverts and catch basins, outlet ditches, and berms. *Id.* at 5-11.

The FSSS, which, as previously mentioned, was incorporated into the task order, *see* Exhibit 1 at 4, identified the acceptable construction tolerance variations for the project, including the “[m]aximum allowable deviation from construction stakes and drawings.”

Exhibit 1C at 42 n.(a); *see id.* at 37 (section 204.13: “Slope, shape, and finish to the designated tolerance class”). The applicable “tolerance class” for roadway excavation under this project was in column “F” of a chart included in the FSSS, *id.* at 42; Transcript at 77, 137, 225, which identified the following maximum allowable deviations from the tolerances identified in the task order drawings: for roadbed width (feet), an additional foot beyond the roadbed width identified in the contract drawings (including the measurements identified in typical sections 2 and 3) was acceptable; for subgrade elevation (feet), a variation of plus-or-minus 1.0 foot was permitted; for centerline alignment (feet), a variation of plus-or-minus 1.0 foot was permitted; and, for “[s]lopes, excavation, and embankment (% slope),” a deviation from the staked slope (measured from the slope stakes or hinge points) of plus-or-minus 5% was permitted. *Id.* at note (b).

The solicitation also provided that a “Payment Bond and Performance Bond for 100% of the contract price” would have to “be provided within 10 days of award.” Exhibit 1 at 1.

The solicitation indicated that the USFS anticipated issuing the notice to proceed to the awardee in October 2021 and that task order performance would have to be completed by July 1, 2023. Exhibit 1 at 4.

### III. The Task Order Award

Of the five bids that USFS received in response to the solicitation for the task order, ICI’s bid was the lowest. Exhibit 2. Because both the USFS’s cost estimate for the project, which USFS had disclosed in the solicitation, and other bids were significantly higher than ICI’s bid, Raymond Garleb, the USFS contracting officer, requested that ICI check and verify its bid, which ICI did. Exhibit 35 at 4, 6, 8; Transcript at 21, 24-25.

On September 28, 2021, the USFS contracting officer awarded the task order to ICI with a price of \$188,197. Exhibit 3 at 1. The awarding document indicated that “[t]his is a [task order] of a parent contract” and that “all terms and conditions of the parent contract are applicable to this [task order].” *Id.* at 2. The task order also incorporated the provisions of the solicitation, including its incorporation of the FSSS and the drawings that accompanied the solicitation.

### IV. ICI’s Performance Under the Task Order

The day after the task order was awarded, ICI informed Mr. Garleb that it intended “to wait until the snow melts and the county will allow hauling the heavy machinery over their portion of the east side road” before commencing the project work. Exhibit 113 at 1; *see* Transcript at 61 (indicating that ICI, as permitted by the task order, chose to begin work

after May 15 rather than between March 15 and May 15). In making this decision, ICI discussed the delay in commencing work with the USFS engineer assigned to this project, Jennifer Brady, who told ICI that its plan was acceptable to the USFS as long as it was prepared to open the existing road every forty-five minutes. Exhibits 36 at 63, 113 at 1. ICI acknowledged that obligation.

On June 10, 2022, when ICI was ready to commence work, *see* Exhibit 35 at 18, the contracting officer issued a notice to proceed, and he and Travis Taylor, the contracting officer's representative (COR) for the task order, met with ICI's president, Jay B. Stoddard, for a pre-work meeting during which they discussed the USFS's specifications for the project and the need for conformance with task order requirements. Exhibits 10 at 1, 4; 12 at 1; Transcript at 21, 27-28. ICI did not ask any questions or express any concerns at that meeting, Transcript at 21, 28, 62, and began its work at the project site that day. Exhibit 112 at 1. Although there were some performance-related issues during the first month of work, such as ICI's incorrect placement of a culvert, Transcript at 13, 82-87, and some confusion involving invoices being accidentally submitted under the wrong task order, Exhibit 36 at 12-16, those issues are not relevant to the resolution of ICI's current claim.

At some point on or before July 14, 2022, ICI told the COR and the USFS's engineer that, to perform its construction work, ICI was going to need to begin closing the road for at least several hours at a time. Exhibits 36 at 3, 113 at 6-7, 13-14. The USFS employees responded that, because the road that ICI wanted to close provided the only access to and from the Spotted Bear Ranger Station compound and was regularly used by rangers, several trailhead and outfitter operations, and other private businesses, full road closure during the summer was not a viable option. Exhibits 36 at 17-18, 113 at 5. They explained that, for that reason, the solicitation for the task order had been written to allow the awardee the option of working between March 15 and May 15 with a closed road. Exhibits 36 at 17, 113 at 5. The COR informed ICI that he could not authorize a road closure during the summer beyond the forty-five-minute allowance in the task order but that ICI could delay work until March when road closure would be acceptable. Exhibits 36 at 24, 113 at 4, 13-14.

Despite the direction of the COR, ICI closed the roadway for more than five hours while working at the project site on July 18, 2022. Exhibit 112 at 16; Transcript at 29. Hearing complaints from third parties about the road closure, the COR and the USFS forest engineer hurried to the site to require its reopening. Exhibit 112 at 16. At that point, Mr. Stoddard reported that the required task order work was impossible to perform without closing the road and that the project design was faulty. *Id.* at 17. The COR immediately issued a notice of non-compliance with contract requirements, Exhibit 117, and, on July 20, 2022, the contracting officer sent a cure notice complaining about the five-hour road closure and effectively telling ICI that the USFS would not tolerate a recurrence. Exhibit 14 at 1.



On July 21, 2022, while at the site at ICI's request for final inspection of the subgrade, the COR took spot measurements using a TruPulse laser to verify the quantities of excavation that ICI had performed. Exhibit 112 at 18; Transcript at 108. The COR discovered excavation work that did not appear to comply with the task order specifications. Exhibit 112 at 18; Transcript at 108. He found that "portions of [the] cut slope appear to have a concave rather than linear shape with loose uncompacted material at the bottom" and that "[m]uch of [the] ditch line is missing," with "no evidence of compaction on [the] latter portion of [the] road." Exhibit 112 at 18; *see* Transcript at 123-24.

The COR returned to the project site on July 27, 2022, Transcript at 110, and, through a series of additional measurements, including the use of the reference and grade stakes that marked necessary excavation locations, determined that the excavation work had not been performed to the required width; did not comport with the tolerances specified in the task order for roadway elevation and alignment; had cut and fill slopes that were not properly shaped and were outside specified tolerances; and did not meet the required vertical-to-horizontal slope ratio requirements. Exhibits 18, 18A, 36 at 45, 112 at 19; Transcript at 36, 92-93, 106-07, 111-12, 125, 129-34, 146-51. In a series of subsequent measurements, the COR found that, taking into account the allowable 1.0-foot variation in the roadway width identified in the task order specifications (set forth in Exhibit 1C at 42), forty-five of the COR's eighty-four roadway width measurements showed out-of-specification work. *See* Exhibit 31 at 4-5. For cut slopes, which were to have a one-to-one vertical-to-horizontal slope rate, with a maximum allowable deviation of plus-or-minus 5% from the staked slope measured from slope stakes or hinge points, sixty-five of the COR's sixty-nine cut slope measurements showed out-of-specification work. *Id.* at 5; Transcript at 156. For fill slopes, to which (as specified in the task order drawings) a 1.0-to-1.5 vertical-to-horizontal slope rate applied, with a maximum plus-or-minus 5% allowable deviation, thirty of the fifty fill slope measurements showed out-of-specification work. Exhibit 31 at 5; Transcript at 156. Some cut slopes were essentially vertical at the top, creating erosion and falling hazard issues, and required graded drains were missing at the toe of the cut slope. Transcript at 125-26.

The COR issued a notice of non-compliance on July 28, 2022, Exhibit 18, indicating that the "[r]esults of survey inspection conducted on 07/27/2022 indicate roadway excavation work is not within specified tolerances with respect to elevation and alignment" and that "[c]ut slopes are not shaped properly and not within specified tolerances." Exhibit 118. The COR also informed ICI on July 28, 2022, that he had rejected ICI's most recent invoice because, based on his measurements, ICI had not performed the 9000 cubic yards of acceptable excavation work for which ICI billed. He indicated, however, that he would be willing to recommend approval of up to 5000 cubic yards of excavation work if ICI resubmitted its invoice for that amount of work. Exhibits 36 at 60, 113 at 9; Transcript at 138-40. ICI quickly submitted a revised invoice, seeking payment for the 5000 cubic yards

of excavation that the COR said he would approve, Exhibits 24 at 2, 36 at 60; Transcript at 139-41, and the USFS paid that invoice. Transcript at 139.

On July 29, 2022, the contracting officer, the COR, and Ms. Brady met with Mr. Stoddard to discuss the status of the project. Exhibits 9 at 1, 112 at 20; Transcript at 112-13. Mr. Stoddard proposed a design for drains (involving curved downspouts) different from those identified in the task order specifications, with a task order price increase to compensate for the increased cost of ICI's design. Exhibits 9 at 1, 15 at 1, 36 at 49, 113 at 10; *see* Transcript 141-42. The USFS rejected that proposal as requiring more ongoing maintenance by the USFS than the drains specified, making it not viable, and because of the increased cost to the USFS of ICI's plan. Exhibits 9 at 1, 15 at 1; *see* Transcript at 66-67, 142-43. Mr. Stoddard then stated that the job could not be constructed as designed; that there were too many "microwave-sized" rocks at the location, which hampered excavation; and that measurements in the drawings were incorrect. Exhibits 9 at 1, 15 at 1. Mr. Stoddard indicated that he was going to hire an independent surveyor to come out and check elevations and alignments to prove the COR's measurements wrong, and the contracting officer represented that ICI was entitled to do that. Exhibits 9 at 1, 113 at 10. Mr. Stoddard responded that, if the USFS would not accept ICI's redesign, ICI did not intend to complete the project. Exhibits 9 at 1, 112 at 20. By August 3, 2022, ICI had removed its equipment from the project site. Exhibit 15 at 2.

During the course of these dealings with ICI, the contracting officer realized that ICI had never provided the USFS with copies of its performance and payment bonds for the contract as required by FAR 52.228-15, a clause incorporated into the MATOC, and by the task order language itself. Exhibits 16 at 1, 36 at 65; Transcript at 39-40; *see* Exhibits 1 at 1, 3 at 2, 5 at 23, 37-39 (MATOC and task order provisions requiring bonding). On August 3, 2022, the contracting officer issued a cure notice directing ICI to provide the USFS with copies of its bonds within the next eight days and a stop work order pending delivery of the bonds. Exhibits 9, 13, 16. In subsequent conversations with ICI's representative, the contracting officer learned that ICI had never obtained bonding for the project, and ICI indicated its belief that the USFS had waived its right to require bonding by not requesting copies of bonds when it awarded the task order. Exhibit 9. The contracting officer disagreed and, on August 17, 2022, issued a show cause notice demanding that ICI obtain bonding for the project and provide him with copies of the bonds. Exhibits 9, 17. ICI neither responded to the show cause notice nor obtained bonding, and, on September 6, 2022, the contracting officer issued a decision terminating ICI's task order for default, accompanied by a written modification to the task order implementing the termination, based on ICI's failure to obtain bonding. Exhibits 7 at 1, 19. ICI did not appeal the contracting officer's decision terminating the task order for default, and the propriety of the default termination is not before us in this appeal.

As of the date of termination, the USFS had paid ICI \$120,690.50 for work performed under the task order, the bulk of which was for excavation work. *See* Exhibit 8 at 1; Transcript at 40-41, 129. In his termination decision, the contracting officer informed ICI that “[a]ny final invoices that you wish to submit for this project,” beyond those that had already been submitted and paid, “will be reviewed and action taken accordingly.” Exhibit 19.

ICI submitted an invoice on September 10, 2022, seeking payment of a total of \$33,731—\$32,494 for 5908 cubic yards of excavation work, \$737 for culvert installation work, \$300 for catch basin work, and \$200 for culvert removal. *See* Exhibits 26, 37 at 1. By letter dated September 12, 2022, the contracting officer informed ICI that he could not process the invoice “because the work has not been accepted by the Government.” Exhibit 20; *see* Exhibit 37 at 3. He represented that, “to process an invoice, the invoice must be correct, and the work *must* be accepted.” Exhibit 20. He noted that the COR “did not accept [ICI’s] measurements/calculations,” that the USFS had “asked for verification of [ICI’s] measurements,” that ICI had not provided it, and that, “as a result, payment could not be made.” *Id.*

On November 14, 2022, ICI provided the contracting officer with a survey of the project site that it had hired River Design Group (RDG), a professional land surveying firm, to perform and asserted that the survey “shows the road to be within specifications in all dimensions.” Exhibit 37 at 8. The contracting officer responded that, since the task order had been terminated for lack of bonding, the survey was unnecessary. *Id.* at 9. ICI replied that, because the survey showed that its excavation work was “within spec,” it was “time for you to accept the work,” *id.* at 11, and that the USFS “still owe[s] me \$33,731 plus the cost of the survey.” *Id.* It further asserted that, “[i]f you don’t agree, put it in a final decision letter and I will proceed with an appeal to the board of contract appeals.” *Id.*

#### V. ICI’s Claim and Appeal to the Board

On November 28, 2022, the USFS contracting officer received a claim from ICI demanding payment in the sum certain of \$36,954.75—\$33,731 for work performed and \$3223.75 for the cost of the RDG survey. Exhibits 25, 37 at 18. In its claim, ICI again represented that the survey conducted by RDG, also known as “Flathead Geomatics,” “shows the road is completely within specification” and that ICI is entitled to payment for all of its work. Exhibit 25.

The contracting officer issued a decision on January 25, 2023, denying ICI’s claim. Exhibits 31, 37 at 26. With regard to ICI’s request for payment for excavation work, the contracting officer stated that, following review of the COR’s on-site analysis of the work

performed, he had “determined that the work performed is NOT within acceptable standards and cannot be accepted at this time” and “that the Government cannot authorize payment for work that is not accepted.” Exhibit 31 at 2. With regard to ICI’s request for reimbursement of independent surveying costs, the contracting officer indicated that when, during a meeting on July 28, 2022, the parties had discussed ICI’s right to have an independent surveyor survey the site, “[t]his would be at NO COST to the Government as [ICI was] responsible for meeting the specification.” *Id.* at 1. Included in the decision was language notifying ICI of its appeal rights. *Id.* at 2.

ICI filed a notice of appeal with the Board on April 19, 2023. On September 26, 2023, after ICI had filed its complaint and the USFS had filed its answer, ICI elected to invoke the accelerated procedure in Board Rule 53. The Board then ordered expedited discovery and granted ICI’s later-filed motion to compel the USFS to produce documents relating to a reprocurement contract.

The Board conducted a single-day hearing in Kalispell, Montana, on March 12, 2024, at which four witnesses testified: Mr. Garleb, the USFS contracting officer; Mr. Taylor, the USFS’s COR; Mr. Stoddard, ICI’s president; and Andrew Belski, Professional Land Surveyor (PLS), from RDG.<sup>2</sup> At the commencement of the hearing, ICI represented that, in addition to its claim of \$33,731 for unpaid excavation work and \$3223.75 for the cost of the RDG survey, ICI was seeking payment of \$6525.37 for the cost of a second RDG survey. Transcript at 8-9, 43. According to ICI, it commissioned the second survey to show the status of the roadway following completion of the work of a reprocurement contractor, Woodring Brothers Excavation (Woodring), that the USFS hired to correct the work that ICI had performed and to finish the roadway. Exhibit 48. An overlay of the first and second surveys, ICI alleged, would show “the differences between” them. *Id.* Although the Board could initially find no documentation in the record regarding a second RDG survey, it became apparent that ICI had attempted to submit an appeal file supplement in early January 2024 that contained the invoice for the second survey (Flathead Geomatics invoice no. 11814) and the second survey. ICI, however, never responded to a notice from the Clerk’s Office about a defect in its filing, and the exhibits were thus never filed. At the hearing, the Board accepted the invoice and second survey for purposes of having a complete record.

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<sup>2</sup> The Board accepted Mr. Belski, based upon his qualifications, as an expert witness in professional land surveying for purposes of testifying at the hearing.

## VI. Completion of the Roadway by a Reprocurement Contractor

When terminating ICI's contract, the USFS was aware that the roadway was in a precarious state, even if it was temporarily safe for passage. Exhibit 113 at 25-31. By October 2022, however, structural failures on fill slopes were becoming visible, creating the likelihood of impending shoulder failures. *Id.* at 30; Transcript at 163-65.

At some point in 2023, while this appeal was pending, the USFS entered into a contract with Woodring to complete the roadway at a cost of more than \$200,000. Transcript at 38-39, 166-67, 169. The reprocurement was "designed to correct the conditions left by [ICI]." Stoddard Written Testimony, Attachment 7 at 1. Because ICI's excavation had created hazards that soil backfilling could not correct, the USFS had to issue new specifications for the reprocurement contract that significantly increased the width of cut slopes in various locations to correct ICI's excavations (which had created high-maintenance areas of likely erosion) in order to obtain a one-to-one vertical-to-horizontal slope ratio. Transcript at 167-69, 176, 179; Stoddard Written Testimony, Attachment 7.

### Discussion

#### I. The Issues on Appeal

The claim that ICI submitted to the USFS contracting officer and that is currently before us raises two issues that we must decide: (1) whether the USFS is required to pay ICI \$33,731 for excavation work that the USFS found did not meet task order specifications, and (2) whether ICI is entitled to reimbursement for \$3223.75 in costs that it incurred in August 2022 to commission an independent land survey of the project area. At the hearing, ICI raised a new, third issue that is not identified in its claim: whether it is entitled to reimbursement of \$6525.37 for costs that it incurred for a second land survey in July 2023, several months after filing this appeal.

Before addressing those issues, we note several matters that were the subject of testimony at the hearing but are *not* properly before the Board in this appeal.

First, although the task order at issue was terminated for default in September 2022 based upon ICI's failure to obtain performance and payment bonds, the validity of that termination is not before us. ICI did not appeal the contracting officer's termination decision. To the extent that ICI might have suggested during the hearing that the USFS waived the requirement for ICI to obtain bonding by not demanding the bonds earlier or that the bonding issue was perhaps not the true motive for termination, those questions are

irrelevant to this appeal because ICI never timely challenged the default termination. We have no authority to question the termination here.

Second, at the hearing, the parties discussed that, despite the task order requirement for ICI to open the road every forty-five minutes during the late spring and summer months, ICI closed the road for more than five hours on July 18, 2022. As the testimony at the hearing showed, this closure increased tension between the parties and resulted in the USFS's issuance of a notice of non-compliance and a cure notice. Ultimately, however, that closure has nothing to do with the issues before us—namely, whether ICI's excavation work satisfied the task order specifications and how much, if anything, ICI should be paid for that work. Neither ICI nor the USFS has asserted a claim for damages arising out of the five-hour road closure, rendering the testimony about it largely irrelevant to this decision.

Third, ICI presented evidence to show that the road project at issue here was essentially impossible to construct without closing the road for hours at a time, and the USFS in turn, presented evidence to the contrary. Yet, ICI did not seek damages for delay, wrongful interference, or hindrance of its work in either its claim to the contracting officer or this appeal. Similarly, ICI did not in its claim allege impossibility of performance affecting the quality of its work. To the contrary, ICI alleged in its claim that its excavation “is completely within specification” and that, as a result, it should be paid for its work. Exhibit 25. Even if the USFS should have allowed ICI to close the road for more than forty-five minutes at a time during the late spring and summer months, an issue we need not address, we lack jurisdiction to entertain ICI's allegations of impossibility because ICI did not raise impossibility of performance as a basis for relief in its claim. *See Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) (holding that a board lacks jurisdiction over a claim that presents “‘a materially different factual or legal theory’ of relief” than that presented in the original claim submitted to the contracting officer (quoting *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015))).

We recognize that ICI has elected to be represented in this appeal through its corporate president, a non-lawyer. Because of that, we have granted ICI great leeway in this appeal, waiving various procedural rules, accepting evidence out of time, and creating a different structure for the presentation of hearing testimony than normal. Ultimately, however, a contractor seeking payment from the Government bears the burden of establishing its entitlement to payment. *Johnson Management Group CFC, Inc.*, HUD BCA 96-C-132-C15, et al., 99-2 BCA ¶ 30,520, at 150,709, *aff'd*, 308 F.3d 1245 (Fed. Cir. 2002); *C.G. Norton Co.*, IBCA 1647-1-83, 84-1 BCA ¶ 16,923, at 84,189 (1983). The fact that a contractor elects to be represented through a company official rather than an attorney does

not eliminate, modify, or lessen that burden. *Western Pressure Cleaning, Inc.*, AGBCA 86-309-3, 87-3 BCA ¶ 20,108, at 101,827.

## II. ICI's Request for Payment for its Excavation Work

“Under a construction contract terminated for default, the contractor is entitled to payment for value of work in place it performed at the time of termination.” *J.G. Enterprises, Inc.*, ASBCA 27150, 83-2 BCA ¶ 16,808, at 83,543; see *Angel Menendez Environmental Services, Inc. v. Department of Veterans Affairs*, CBCA 19, et al., 08-1 BCA ¶ 33,731, at 167,002 (2007) (“[W]hen a contract has been properly terminated for default, a contractor’s recovery is limited to those costs that are associated with ‘work in place’ that the Government has available to it for use in completing a terminated project.”).<sup>3</sup> Such a valuation, however, must take into account deficiencies, defects, and non-compliance in the contractor’s work. “[T]he Government, just as any other party, is entitled to receive that for which it contracted and has the right to accept only [work] that conform[s] to the specification.” *Cascade Pacific International v. United States*, 773 F.2d 287, 291 (Fed. Cir. 1985). “[S]hould [a contractor] be properly terminated for default without making any acceptable deliveries,” it potentially could “get nothing for the original work.” *Laka Tool & Stamping Co. v. United States*, 650 F.2d 270, 272 (Ct. Cl. 1981).

The USFS has not argued that ICI should get nothing for its excavation work. To the contrary, the USFS has already paid ICI more than \$120,000 under the terminated task order, with the bulk of that amount covering excavation. Ultimately, however, the USFS declined to pay ICI’s final excavation invoice after finding that the excavation work did not comport with the task order specifications. Under the task order, all of ICI’s work product had to be “in reasonably close conformity with lines, grades, cross sections, dimensions, and material requirements shown on the drawings, indicated in the specifications, or designated on the ground.” Exhibit 5 at 19. The contract also entitled the USFS to “strict compliance with the

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<sup>3</sup> In presenting its case to the Board, the USFS, like the contracting officer in his decision denying ICI’s monetary claim, argued that ICI is not entitled to payment because the USFS never “accepted” ICI’s excavation work. In the context of a construction project, the agency’s rejection of work does not mean that the product being delivered is returned to the contractor (as goods delivered under a manufacturing contract might be). The results of whatever work the construction contractor performed remain a part of the Government’s property. Because the Government retains that work product, even if it was not acceptable or “accepted,” a “value of work” analysis is more appropriate in determining whether compensation is warranted.

terms of the [task order]” and to work product that “conforms to [task order] requirements.” *Id.* at 11 (incorporating FAR 52.246-12(b)).

As the USFS established at the hearing, the upper portions of the cut slopes that ICI carved into the hillside above the road were often left in a somewhat concave shape, creating high risks of erosion and instability. Walking the Board through photographs of the grade and reference stakes that the USFS had placed at the site to guide ICI’s excavation work, coupled with measurements that the USFS’s COR took, the USFS established that ICI had not met the staked width and slope requirements of the task order specifications. ICI’s excavation work left the roadway, including its cut and fill slopes, in a fairly fragile state.<sup>4</sup>

At the hearing, ICI focused most of its time and attention on attempting to prove how much excavation work it performed, rather than on whether that excavation work met specifications. It presented the testimony of its expert witness, Andrew Belski, who, as the owner of RDG, conducted a survey of the project site in August 2022 to capture and map the topographic surface or contour of the site as of the date of the survey—basically, to provide an as-built drawing of the site. Transcript at 212-13. In its claim, ICI alleged that this survey showed that ICI’s roadwork “is completely within specification.” Exhibit 25. Yet, Mr. Belski acknowledged that his work does not tell us that and that he lacks the knowledge or expertise as a land surveyor to conduct such an analysis. Transcript at 211-12, 219. To prove that ICI’s work met specifications, another step is necessary, one that ICI did not take. Nevertheless, the COR, who acknowledged the quality of Mr. Belski’s survey work, undertook the effort to overlay measurements from the site and task order specifications onto the computer-aided design file of Mr. Belski’s survey drawings, which showed a majority of comparative areas not within the tolerances required by the task order. *Id.* at 145-51. Contrary to ICI’s position that RDG’s survey proved its compliance with specifications, it ultimately proved the opposite.<sup>5</sup>

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<sup>4</sup> To the extent that, at the hearing, ICI’s primary witness indicated that, had ICI been given time, it would have fixed the excavation problems, ICI had already decamped from the project before the USFS terminated ICI’s contract for default and had stated that it was not going to perform any more work. ICI’s assertion that, with more time, it could and would have fixed the excavation problems is not credible.

<sup>5</sup> In presenting a second survey that Mr. Belski conducted in July 2023, which Mr. Belski explained “show[s] the yardage difference” between the as-built conditions when ICI finished and the conditions a year later after Woodring finished its reprocurement contract work, Transcript at 209-10, Mr. Stoddard explained that this second survey showed that ICI “did do 15,000 yards of excavation, not the 10,000 that was accepted.” *Id.* at 210. Yet, the amount of excavation performed is not the issue in the appeal—the issue is whether



We must also reject ICI's argument that it is entitled to recover all of its excavation costs without regard to its compliance with task order specifications. The situation here appears very similar to one that another board of contract appeals considered in *Truckla Services, Inc.*, ASBCA 57564, 17-1 BCA ¶ 36,638, *aff'd* 730 F. App'x 926 (Fed. Cir. 2018), where an agency, after terminating a construction contract for default, found that much of the stone that the contractor laid as part of its work was not properly placed and declined to pay that portion of the contractor's last invoice tied to the improperly placed stone. The board denied the contractor's demand for payment for the improperly performed work:

Truckla contends that it placed 22,781 tons of stone and was only paid for 9,465, thus it claims it was not paid for 13,316 tons of stone. Truckla claims entitlement to an additional \$349,944.48 for placed stone. The contract provided that Truckla was to be paid "for stone satisfactorily placed." . . . Truckla concedes that the hardpoints did not conform to the contract requirements, thus some stone placed on the hardpoints was not "satisfactorily placed." Truckla mislaid additional stone during its operations. [A replacement contractor] attempted to recover the mislaid stone but was unable to locate or recover all of it. Thus, Truckla has not shown that it, instead of [the replacement contractor], satisfactorily placed stone for which it was not paid.

*Id.* at 178,448-49 (record citations omitted).

ICI suggests that, even if its excavation work was not completely in sync with task order specifications, its work was good enough for the USFS's purposes and that, unless the USFS pays for that work, the USFS will have received the benefit of ICI's excavation work without having to pay for it. It is true that, on a construction project terminated for default where "the Government has received a benefit from the work which was accomplished," the contractor must be paid for the value of that work. *Ventilation Cleaning Engineers, Inc.*, ASBCA 16678, et al., 72-2 BCA ¶ 9537, at 44,430. Here, though, ICI's excavation work left the roadway site in a perilous condition, with concave slopes in some locations that created erosion and falling debris issues that affected the long-term viability and safety of the roadway. Where out-of-specification construction work may have some value to the Government, the terminated "contractor's recovery for 'work in place' may be offset by any excess procurement costs that the Government may incur." *Angel Menendez*, 08-1 BCA at 167,002; *see MOQA-AQYOL JV, Ltd.*, ASBCA 57963, 17-1 BCA ¶ 36,909, at 179,829-30

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ICI's work product met the task order specifications. ICI did not rebut the USFS's evidence that ICI's work product did not.

(denying claim on unpaid invoices for work performed before default termination where the replacement contractor had to remove most of the contractor's work and start over); *F&D Construction Co.*, ASBCA 41441, et al., 91-2 BCA ¶ 23,983, at 120,031 (agency should pay for the value of terminated construction work "less the Government's excess cost to complete the contract").

Here, the USFS paid its reprocurement contractor, Woodring, more than \$200,000 to fix ICI's excavation defects and to complete the project. That amount dwarfs the \$33,731 that ICI seeks for the unpaid portion of its excavation work. ICI spent significant time at the hearing attempting to establish that Woodring did not really perform that much work; that Woodring was directed to follow specifications that were very different from those in ICI's task order (which the USFS explained was because corrective action to fix ICI's errors necessitated extensive revisions to the drawings); and that the USFS ultimately wasted money on the replacement contractor. Yet, the USFS's evidence regarding the gravity of the problems that ICI's excavation caused, as well as the extensive changes that had to be made to extend the width of cut slopes to eliminate erodible overhanging areas that ICI left and to create smooth one-to-one vertical-to-horizontal slopes, was left essentially un rebutted. In these circumstances, it is clear that any value to the USFS from ICI's excavation work was overwhelmed and undercut by the corrective work in which the USFS had to engage to fix it.

ICI is not entitled to any additional payment for its excavation work.

### III. The Cost of RDG's First Survey

As discussed above, ICI hired RDG to conduct a survey of the project site in August 2022. ICI claims that the USFS is financially responsible for the cost of this survey. ICI appears to allege that the contracting officer directed it to hire RDG to conduct the survey, with that direction constituting a contract change for which ICI is entitled to be compensated. *See Len Co. & Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967) (holding that, "if a contracting officer compels the contractor to perform work not required under the terms of the contract, his order to perform, albeit oral, constitutes an authorized but unilateral change in the work called for by the contract and entitles the contractor to an equitable adjustment"). Here, though, the evidence in the record indicates that, although the contracting officer did not object to ICI's plan to survey the site, he did not order or require ICI to conduct a survey. The contracting officer's acquiescence in ICI's assertion that it was going to bring in an outside land surveyor is not the same as a direction to do so or an agreement that the Government would pay for it. *Copertini, Zavaroni & Poli*, ASBCA 2381, 1955 WL 8861 (Aug. 19, 1955) ("The mere acceptance [by the Government] of such

volunteer . . . work does not constitute a change order.”). ICI has identified no basis for charging the USFS with the costs of a land survey that it voluntarily elected to order.

#### IV. The Cost of RDG’s Second Survey

ICI also seeks payment for a second survey that RDG conducted in July 2023, several months after filing this appeal. As the USFS correctly notes, ICI never submitted a request to the contracting officer for payment for the second survey, Transcript at 46, and it was not a part of the claim that forms the jurisdictional basis of this appeal. To the extent that ICI’s request for this payment is a part of its “claim,” we lack jurisdiction to entertain it because ICI never presented it to the contracting officer for a written decision. *M. Maropakos Carpentry, Inc. v. United States*, 609 F.3d 1323, 1328-29 (Fed. Cir. 2010). To the extent that, because the second survey was ordered during the pendency of this appeal, we might consider it as part of ICI’s costs and expenses incurred in pursuing the appeal, ICI is not a prevailing party and is not entitled to recover its litigation expenses. *Paradise Pillow, Inc. v. General Services Administration*, CBCA 5237-C(3562), 17-1 BCA ¶ 36,628, at 178,366.

#### Decision

For the foregoing reasons, ICI’s appeal is **DENIED**.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.  
Board Judge

I concur:

Kathleen J. O’Rourke

KATHLEEN J. O’ROURKE  
Board Judge