

TRAILBOSS ENTERPRISES, INC.**CONTRACT NO. V463P-0048-95****VABCA-5454 & 5471****VA MEDICAL CENTER AND REGIONAL
OFFICE
ANCHORAGE, ALASKA**

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OPINION BY ADMINISTRATIVE JUDGE THOMAS

On September 26, 1995, the Department of Veterans Affairs (VA), awarded Contract No. V463P-0048-95 (Contract or TB Contract) to Trailboss Enterprises, Inc., (Trailboss or Contractor) for a base and two option years to furnish all labor, supplies, materials and equipment, as necessary for the care and maintenance of the Fort Richardson National Cemetery, Fort Richardson, Alaska (Cemetery). Numerous problems were encountered and only the base year was performed; the options were not exercised. The VA is claiming, pursuant to the Inspection Of Services Clause, that Trailboss owes \$61,074.82 for work not performed or not performed satisfactorily (charge back or reprocurement). VA withheld the last month's contract payment of \$12,472.58 (VABCA-5454) leaving Trailboss a balance due of \$48,602.24 (VABCA-5471).

Trailboss denies that the VA is entitled to any money, claiming the VA itself created many of the problems and did not meet its burden of showing the non-conforming work was a latent defect. A hearing was held in Anchorage, Alaska on January 26-27, 1999. The record consists of the Complaint, Answer, Appeal File (R4, tabs A-XYZ and AA-PP) Appellant's Exhibit (Exh. 1), Government's Exhibits (Exh. 2-4), and a two volume hearing transcript, together with post-hearing briefs and reply briefs from both parties.

Findings of fact

The Cemetery's prior maintenance contract plays a significant role in this dispute. On January 22, 1993, VIC Enterprises, Inc. (VIC) was awarded Contract No. V663 (789) P-3575-93 (VIC Contract) for a base and two option years to furnish all labor, supplies, materials and equipment, as necessary, for the care and maintenance of the Cemetery. The price was \$13,900 per month for both the base period and option years. According to the VIC Contract, the most critical aspects of the Cemetery maintenance work consisted of (1) headstone/marker setting and alignment, (2) lawn maintenance: fertilizing and weeding, (3) lawn maintenance: seeding, (4) lawn maintenance: mowing, trimming and edging, (5) refilling/backfilling sunken graves, and (6) general maintenance, trash and debris removal. Other items of work that were not listed as most critical were grave opening and backfill, "predig" gravesites, and "predig" cremation gravesites. The VIC

Contract contained a percentage deduction for failure to perform any of the above tasks. (Exh. 3)

Because of the Alaska weather, gravesites were to be "predug". By July of each year an area approximately 160' x 50' x 6' deep was to be dug and 100 full-size casket grave sites with wood cribs 6'x10' (both measurements "on center") were then to be constructed in the excavated area in a honeycomb like fashion. Some 35 cremation grave sites were also to be predug. In addition, and also by July 1 each year, 1,422 cubic yards of dirt was to be stockpiled to be used during the winter months. (Exh. 3, p. 19)

The VIC Contract contained the following provisions:

PERFORMANCE EVALUATION: A deduct analysis process will be accomplished through use of a random sampling method of surveillance. Random sampling will be done using MIL-STD-105D, Sampling Procedures and Tables for Inspection by Attribute. When sampling by attribute, a certain number of observations made during the periodic inspection will match the standard and the remaining number will not. The end result is the percent defective or defects per sample observation. Failure to meet the standard of acceptable percentage will result in rejection of the particular task in whole and a deduction in the monthly payment.

(a) The COTR will be assigned the responsibility for monitoring the Contractor's performance under this contract. As the representative of the Contracting Officer, the COTR will prepare the periodic checklists and issue the Contract Discrepancy Report (CDR).

(b) The CDR will be issued to the Contractor upon a determination of the seriousness and failure to furnish satisfactory performance under the contract and may be issued at any time. A copy of the CDR will be furnished the Contracting Officer for determination as to applicability to the provisions for Default or other clauses under this contract.

(1) Normally upon a determination that the acts or omissions do not impact critically on performance, the COTR will advise the contractor verbally of the actual or potential discrepancies. Failure of the Contractor to immediately correct and or achieve satisfactory performance by an agreed suspense date will result in issuance of the CDR.

(c) When a CDR is issued, payment for the period of service will be reduced by the appropriate

percentage as specified under the Performance of Work Requirements Summary herein. Any reduction in payment is subject to the provisions of the Dispute clause herein. The method used to determine if the Contractor's level of performance is acceptable will be random sampling. Random sampling will be done using the sampling Procedures and Tables for Inspection by Attributes (MIL-SID-105D).

PERFORMANCE OF WORK REQUIREMENTS SUMMARY

- a. The purpose of this exhibit is to:
 - (1) List the contract requirements from the task list considered most critical to acceptance of contract performance.
 - (2) Show, where applicable, the elements to be evaluated by the Government before contract performance of a task is considered unsatisfactory.
 - (3) Define the procedure the Government shall use in reducing the Contractors monthly payment if satisfactory performance of a task is not rendered within the period.
- b. The criteria for acceptable and unacceptable performance are as follows:
 - (1) The criteria shall be level of performance deemed acceptable by the COTR performing the inspection using the sampling method of surveillance discussed earlier.
 - (2) If the quality of work does not comply with the contract requirements, the COTR will initiate and the Contractor shall be required to complete a Contract Discrepancy Report (CDR).
 - (3) The CDR will require the Contractor to explain in writing why performance was unacceptable, how performance will be corrected and returned to an acceptable level, and how recurrence of the problem will be prevented in the future.
- c. The Government's quality assurance procedures will be based on the inspection of the Contractor's actual performance of work and all areas will be reviewed periodically to determine compliance with

the contract requirements as a whole.

CONTRACTOR IS CAUTIONED THAT THIS SUMMARY DOES NOT PROVIDE FOR THE FAILURE TO PERFORM ANY OF THE CONTRACT REQUIREMENTS. THE CONTRACTOR'S OMISSION OR FAILURE TO PROSECUTE WITH SUCH DILIGENCE AS WILL INSURE THE COMPLETION OF THE CONTRACT WORK OR ANY SEPARABLE PART THEREOF WILL BE SUBJECT TO THE PROVISIONS OF THE DEFAULT CLAUSE HEREIN.

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|---|------------|
| <p>(1) HEADSTONE/MARKER SETTING
AND ALIGNMENT</p> <p>(a) Failure to realign the required number
of headstones</p> <p>(b) Failure to set new headstones upon receipt</p> <p>(c) Failure to destroy replacement headstones</p> <p>(d) Failure to remove destroyed headstone
debris from cemetery</p> <p>(e) Improper setting of realigned and/or new
headstones</p> | <p>30%</p> |
| <p>(2) LAWN MAINTENANCE: FERTILIZING
AND WEEDING</p> <p style="padding-left: 40px;">Any and all turf areas in an unhealthy
condition</p> | <p>10%</p> |
| <p>(3) LAWN MAINTENANCE: SEEDING 10%</p> <p style="padding-left: 40px;">Poor or thinning turf condition</p> | |
| <p>(4) LAWN MAINTENANCE: MOWING, 35%</p> <p>TRIMMING AND EDGING</p> <p>(a) Turf height in excess of four (4) inches</p> <p>(b) Unmowed grass around headstones,
markers, monuments and all other vertical
surfaces</p> | |

(5) REFILLING/BACKFILLING SUNKEN 10%

GRAVES

(a) Failure to repair sunken grave sites in accordance with technical specifications

(6) GENERAL MAINTENANCE, TRASH AND DEBRIS REMOVAL 05%

(a) Failure to maintain, collect and remove trash, debris, dead or unsightly flowers and tree limbs in accordance with technical specifications.

TOTAL
100%

Note: 5% of the monthly payment has been determined to cover the Contractor's cost for supplies and other items to be furnished under the contract.

DEDUCTING FOR NON-PERFORMANCE - Deduct Formula (example)

If Quality of completed work is unsatisfactory (AQL of 6.5% exceeded)

and: Contract price is \$100,000.00 per month

and: Quality of completed work deduct percentage is 10%

and: Sample size is 50

and: Numbers of defects in the sample is 10 (reject number is 8)

Then: Deduction from the current month's invoice is:

Contract Price	=	\$100,000.00
X Deduct Percentage	=	.10
		10,000.00
X Percent of Sample Defective		.20
Deduction		2,000

The VIC Contract ran its three-year course without any apparent problems. The requirement was resolicited. Trailboss was the low bidder with a monthly cost of \$12,472.58, and was awarded Contract V463P-0048-95 on September 29, 1995. The TB Contract contained the same provisions as cited above in the VIC Contract. However, the TB Contract added the possibility that the VA, at its option, could chose 4' x 8' gravesites instead of the 6' x 10' and required that 200 of whichever size selected be predug by August of each year. The VIC Contract required only 6' x 10' and 100 predug by July. In addition to the number of predig full casket gravesites being doubled to 200, the cremation sites were increased from 35 to 264 and the construction material changed by amendment to 3/4" plywood. (R4, tab A) Mr. Tolliver, owner of Trailboss, maintained that he had never seen the amendment. Trailboss's bid of \$12,472.58 per month was

\$1,427.42 per month cheaper than VIC's bid (\$13,900).

Both Contracts contained FAR 52.246-4 Inspection of Services (Feb 1992), that states in pertinent part:

(c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

* * * * *

(e) If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.

(f) If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Government may (1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Government that is directly related to the performance of such service or (2) terminate the contract for default.

(R4, tab A, p.21)

The COTR for both Contracts was Cemetery Director James Fitzgerald. (R4, tab D) When Trailboss appeared to be the low bidder, he was concerned about losing an incumbent contractor and an extensive investigation was done to insure that Trailboss was a responsible contractor. (Tr. 163)

After award, Trailboss alerted the CO, Janice Henning, that VIC Enterprises had not complied with its Contract provision that required stockpiling of soil, i.e., that the dirt removed during the predigging of the gravesites was to be stockpiled then screened and later used as backfill during burials. (Tr. 243) She agreed and thought that the VA had to give Trailboss different instructions or more money to provide dirt in the middle of winter.

(Tr. 156)

Mr. Vic Carlson, owner of VIC, argued that the soil was not required by the VIC

Contract and that each Contractor had to supply its own dirt. VIC had installed a heated concrete pad and as long as it held its Contract, the stockpiling for the winter might not have been as critical. Mr. Carlson was upset and extremely vocal about losing the Contract. He visited CO Henning almost daily during the months of September and October. (Tr. 159) She suggested he rent some of his equipment to Trailboss and offered to issue a change order for the cost of the concrete pad. (Tr. 160) There was never any discussion about taking a credit on the VIC Contract for noncompliance with the soil requirement.

In a well-intentioned but ill-advised attempt to solve the dirt problem and ease the transfer from VIC to Trailboss, CO Henning created a concept that the parties and witnesses referred to as a "shared services contract." On October 2, 1995, VIC's Contract was extended for 1 month to perform all the contract duties while Trailboss was screening dirt to makeup for the dirt that VIC had failed to provide. (R4, tab II; Tr. 242) Unfortunately, the VA attempted to implement the "shared services agreement" without ever having VIC or Trailboss in the same room to discuss it. (Tr. 340) CO Henning met with Mr. Carlson and COTR Fitzgerald then called in Mr. Tolliver separately to tell him what was happening. (Tr. 340) The TB Contract was never modified to reflect the "shared services agreement."

Although VIC's Contract modification extending it through October 31 was signed by both parties on October 2, 1995, CO Henning writes Mr. Carlson on October 20, 1995, and says: "Per the meeting conducted on October 16, 1995, at my office with you and Mr. Jim Fitzgerald, it was agreed that your services are needed through October." (R4, tab F) The letter goes on to state :

The purpose of the meeting and this letter is to clarify your expected performance. Your duties for the remaining period in October are;

1. Perform any and all burials that may occur during the month, including providing dirt to fill that burial site.
2. Continue headstone setting as stones are delivered to the cemetery.
3. Raising and realigning stones as well as providing any topsoil needed and to pack off and reseed the affected areas.
4. You and your employees are expected to work hands on as necessary with the incoming contractor, Joe Tolliver and his employees, to ensure that all maintenance work is completed as necessary.
5. Both contractors are required to supply their own equipment for shared tasks. This is to eliminate any potential workman compensation issues.

6. It is expected that workers not actually performing duties would observe, measure or do sighting and/or write down the procedure as performed.

(R4, tab F)

A week later, on October 23, COTR Fitzgerald sent a confusing memo to CO Henning stating: "The contractor's [TB] performance is not meeting even the minimum or basic requirement for the standards set by the National Cemetery operational requirement." After complaining that Trailboss had not processed enough soil, he claimed that all the burials had been by VIC. Trailboss did damage some areas while performing snow removal. (R4, tab FF) According to CO Henning's hand written note, Mr. Tolliver "responded immediately" and took care of everything. (R4 tab FF, p.2)

VIC did little if anything to help the Trailboss transition process. Vic Carlson visited the site almost on a daily basis and was disruptive and annoying to the Trailboss workers. (Tr. 89) He refused to turn in the dump card to gain access to the dump and there was no transfer of performance records, etc. (Tr. 192) Mr. Carlson's disruptions became so bad that, on November 1, 1995, COTR Fitzgerald asked CO Henning to advise Mr. Carlson that he was no longer needed at the Cemetery unless attending a service or visiting a grave and "should he continue to attempt to create a disruption at the cemetery or disrupt the work of the new contractor action will be taken with the local MP office." (R4, tab GG) As of November 16, 1995, VIC had not returned the dump card or keys. Trailboss was unable to use them. On November 29, COTR Fitzgerald again wrote the CO saying that VIC was apparently going to be a "problem to the end" and "Should VIC not turn in the building keys and the 'dump card' by the close of business on Friday the first of December 1995, I will authorize the present contractor to complete his required dumping on Monday morning and I will forward the billing to VIC for payment." A meeting was held on December 27 with Vic Carlson, and he agreed to turn in the keys even though the VA had changed the locks. (R4, tab GG)

Mr. Tolliver stated that he went to Vic Carlson and offered to rent VIC's equipment but was turned down. (Tr. 240) Mr. Carlson testified that during the middle of the winter he went to Trailboss and offered to do the job with three other people and all his equipment. Trailboss would only pay for fuel and materials to do the job plus \$20 an hour for a guaranteed 40 hours per week. Trailboss rejected Vic Carlson's offer. (Tr. 490)

Mr. Tolliver did hire Dane Mattson, Ed Clark and Travis Carlson, Vic Carlson's nephew, who were the main workers from the VIC Contract. (Tr. 481) Dane Mattson had worked for VIC for the 3 years it had the VIC Contract. (Tr. 481) Mr. Mattson was an electrician, mechanic, etc., and he was hired to be the lead man for the TB Contract on November 1, 1994. (Tr. 134, 246) Trailboss also hired Mr. Shavers, an experienced carpenter, who began to construct the 4' x 8' full casket cribs that the VA selected. As in the VIC Contract, the TB Contract contained drawing MA00013/9/P, crib wall construction (typ), that showed the measurements for building the 6' x 10' cribs.

Apparently the winter passed without incident. (Tr. 42) On April 2, 1996, COTR Fitzgerald wrote to CO Henning expressing his concerns, which he also stated could be

unwarranted, that the Cemetery would not be ready for Memorial Day because "there has been little or no effort by the contractor to get any of the items accomplished." He also stated that he planned to rebid the TB Contract in the fall because "I do not have time to baby sit or wait for the contractor to show up on the job." (R4, tab GG) CO Henning responded that she would express his concerns to the Contractor but that "He has not failed to perform yet. We cannot automatically re-bid. He has to fail, then [we] put him on notice." (R4, tab GG) COTR Fitzgerald replied that his earlier message was "just a heads up for what may be coming." (R4, tab GG) He later said "We are documenting the contractor's daily functions and I feel sure that should default become a need we will be able to accomplish this with very little trouble." (R4, tab GG, p. 3) He testified that Memorial Day "went off without a hitch" and there were no problems with the facilities. (Tr. 49) Despite all of his railings against the Contractor, no CDR was ever issued to Trailboss, as COTR Fitzgerald testified:

Q Now, regardless of whether or not you think you should have been the one to do the CDRs or the contracting officer do the CDR, there were never any issued to Mr. Tolliver and Trailboss, were there?

A To my knowledge, no.

Q Okay. And that's because there were no material breaches of the contract such that would constitute a reason to issue a CDR while you were there, isn't that correct?

A To my knowledge that's correct.

(Tr. 48)

Yet on June 21, 1996, COTR Fitzgerald sent the CO a memo in which he listed 12 areas of non-performance and requested a 10 day cure notice be issued. (R4, tab FF) It was CO Henning's impression that while COTR Fitzgerald did nothing to delay Trailboss, "he did nothing to help it." (Tr. 167)

On June 22, Ms. Yvonne Payne became the Acting Director of the Cemetery and new COTR. (R4, tab GG) On June 24, former COTR Fitzgerald wrote to newly appointed CO Kenneth Carleton, that the grass was not being cut and "I would very much like to set this contractor straight or get rid of him prior to my departure. He has shown no interest or effort in the care and maintenance of the Fort Richardson National Cemetery." (R4, tab GG, p. 11)

Yet, at the hearing, former COTR Fitzgerald testified that trimming around the headstones was the only thing he was not satisfied with:

Q Were you satisfied with the performance of Trailboss while you were director?

A. Well, the majority of the performance of that contract was during the winter months, so as far as the winter servicing, yes, they performed the winter work I felt adequately.

Q Is there anything you were not satisfied with?

A Yes, towards the end of my time at Fort Richardson, once we'd entered the growing season, the grass and grounds, the trimming around headstones was not kept up. Grasses were allowed to be—to get too long. Trimming around the stones was not done in a timely manner. I mean you can't really do a—cut the cemetery and leave the headstones without trimming.

(Tr. 42)

On July 1, a cure notice was sent to Trailboss advising it of 13 deficiencies that the CO believed were endangering performance of the Contract. The Contractor was given 10 days to cure the deficiencies. (R4, tab GG, p. 12) There was a cure notice meeting the next day where Trailboss agreed to fix some items and give milestone dates for the others. On July 18, 1996, Trailboss responded with a letter stating their intentions on each deficiency. (R4, tab H) On July 19, 1996, the COTR sent Trailboss a Fall "to-do" list. One of the items stated that deducts would be applied to the last service payment. (R4, tab I)

In mid to late August, a problem was realized with the 4' x 8' cribs. They were too small for the vaults that had to go in them. There is controversy over how the 4' x 8' requirement came to be. According to Vic Carlson, he and his personal friend, Dane Mattson, while he was a VIC employee, developed an idea that called for the full casket grave sites to be only 4' x 8', which would save the VA space, time, and money. (Tr. 482) According to Mr. Carlson, they developed this idea after the first year of the VIC Contract and communicated it to COTR Fitzgerald. There is no explanation as to why the VA waited 2 years to implement their idea. Changing to 4' x 8' was not simply changing the size of the hole, because the lid construction had to be modified and the 4' x 8' was an *inside* dimension rather than *on center*. When the VA placed the requirement in the Contract it neglected to specify that the 4' x 8' was an inside dimension. (Tr. 484) This became critical because the 4' x 8' cribs, when constructed on center, were too small for the vaults. A vault goes into each crib and the casket is placed in the vault.

VIC's Mr. Carlson testified that there was a prebid conference conducted by COTR Fitzgerald where he asked, "The 4' x 8' are inside dimensions, right?" To which COTR Fitzgerald agreed. (Tr. 484) This testimony seems a bit too convenient coming from the only bidder who already knew the answer. In any case, no solicitation amendment was issued to clarify this issue. Such a brief reference, assuming it did occur, would not be sufficient to put attendees, let alone non-attendees, on notice of such a requirement. We find that bidders, other than VIC, would have no way of knowing that the 4' x 8' dimensions were not "on center" as shown on the 6' x 10' drawing.

Mr. Mattson testified that at some point he went out to "double check" the measurements and discovered that the vaults would not fit. (Tr. 135) At that point Mr. Shavers says he had built between 40 and 60 cribs. (Tr. 119) Mr. Mattson immediately notified Ms. Payne, who, according to Mr. Mattson, became angry and inquired as to why he had not notified her sooner. (Tr. 137) The VA had a meeting on August 29, and VA engineer Goeff Sutton came up with a plan to modify the cribs by adding spacer blocks to the short walls. (Tr. 138; R4, tab GG, p.18) The VA position was that Trailboss was responsible for this problem because Mr. Mattson waited so long to disclose the problem. There is nothing in the record to indicate why the VA thought Mr. Mattson had prior knowledge of the problem. VA must have obtained this information from Mr. Carlson, who credits Mr. Mattson as being the co-founder of the 4'x 8' idea. For his part, Mr. Mattson denies his paternity and says it was the first time he had thought about the problem. On cross Mr. Carlson called Mr. Mattson his personal friend but said he was a liar if he denied his involvement with developing the 4'x 8' crib idea. (Tr. 506) Mr. Mattson was employed by VIC when Trailboss prepared its bid.

On August 26, 1996, Trailboss advised CO Carleton that Mr. Kyle Downing would represent Trailboss on all technical issues. There is nothing in the record to indicate why Mr. Downing was assuming Mr. Mattson's role or what Mr. Mattson was doing at this time. On September 21, 1996, VA issued a Termination for Default (T/D), citing 5 items from the July 1 cure notice that had not been rectified. The T/D was to take effect at 4:00 P.M. September 30, 1996, which also happens to be the last day of the base period of the Contract. The termination letter tells the Contractor he has a right to appeal but does not include the appeal language to this Board. (R4, tab L) During this time frame, Mr. Carlson reappeared at the Cemetery and had an altercation with Mr. Downing. This resulted in a letter from CO Carleton to TB that Mr. Carlson was there on "official business" and should not be harassed. (R4, tab M)

On September 30, 1996, Trailboss "appealed" the T/D by letter to CO Carleton. (R4, tab O) In this response, Mr. Tolliver raised the problems that occurred in the first month and then responded in detail to the individual issues. On October 3, 1996, CO Carleton reviewed the "appeal" and found that 4 items had not been accomplished in a satisfactory manner. First, the lids were constructed of substandard material and some were too short. Second, the cremation area to be predug was not finished according to Contract specifications. Large rocks were left, and the area was not graded or seeded. Third, of the 168 grave sites that required refilling, the ones done earlier were excellent, but the most recent ones were not and 69 were unacceptable. Also, some 441 sunken graves needed work. Fourth, areas in Section J lacked seeding or other groundwork. CO Carleton determined that if the items were corrected by October 18, the T/D would have been converted to a Termination for Convenience and so instructed the Contractor. (R4, tab P)

COTR Payne says that a walkover to approve the work was scheduled for October 10, 1996 with a final inspection on the 18th. The walkover was postponed at Mr. Tolliver's request. CO Carleton was unavailable on the 11th so he asked COTR Payne to do it but she refused because she thought all three parties should be there. According to COTR Payne it snowed before the 18th, so when the parties met on the 18th she refused to make a decision on the quality of the work because it was covered with snow. (R4, tab MM) The snow is not a plausible reason for not sharing all of the deficiencies with the

Contractor. As will be discussed later, the VA had actual knowledge of all of the Contract deficiencies prior to October 18 and from the record before us seem to have chosen to keep them to themselves. Both Mr. Tolliver and CO Carleton refer to the October 18 meeting as a final inspection. (Tr. 263) Mr. Tolliver testifies that "We went around and looked at everything. And Kenny was happy with everything with the exception of those items that he identified on his punch list for me to do in the spring." (Tr. 266) A document titled "Final Inspection-Ft. Richardson Cemetery, 10/18/96," found among the handwritten documents of COTR Payne, list the same items that are designated as "punch list" items in CO Carleton's proposed modification. (R4, tab FF, 24)

CO Carleton, although armed with knowledge of the Contract deficiencies, the rectification of which he would subsequently procure against Trailboss's account, made several attempts to settle this matter during the Fall of 1996, offering to extend the Contract period to June 30, 1997 for completion of the "punch list items" and reducing the amount withheld to \$1,247.20. The proposed modification also stated "All items not listed below [punch list] are considered complete and are deleted from the contract requirements." The "punch list" items were as follows:

THAT REMAIN AS CONTRACT ITEMS TO BE COMPLETED

1. Excavate a shallow ditch/depression between the new cremation site and the adjoining roadway. Ditch shall have sloped sides and uniform appearance.
2. Seed both sides of new cremation site and the newly excavated trench.
3. Seed all Section J areas identified during October 1996 final inspection. Remove straw from same area.
4. Rework to specifications four hundred (400) sunken graves that are unacceptable as previously identified by the COTR. COTR will determine exactly which 400 graves will be repaired in the spring 1997 when the snow has melted and the ground has thawed enough for a determination to be made.
5. Complete work on perimeter of vault construction area to specifications.

(R4, tab S)

Meanwhile, on September 27, VA issued Request for Quotations (RFQ) KRC97-02 to VIC to furnish all labor, equipment and materials to operate the Cemetery from October 1, through November 30, 1996. On October 8, 1996, VA issued the Notice to Proceed to

VIC in the amount of \$13,900 per month, apparently negotiated down from the \$16,000 per month quotation received on September 30, 1996. A series of modifications and purchase orders were issued which kept VIC on the job at least until January 1999. (R4, tab LL)

Trailboss refused to sign the proposed modification/settlement because the COTR was to identify the sunken graves. On January 27, 1997, CO Carleton wrote Appellant advising him that the Termination for Default issued September 26, 1996 "will be enforced on 2/7/97 or the fifth working day after receipt of this letter, whichever comes first, unless a settlement is reached and documents signed by that date." (R4, tab T) Appellant's attorney, Eric Brown, Esq., responded to CO Carleton on January 29, submitting a claim for \$12,472.58 which Trailboss claimed was due for the work performed during September 1996. He argued that since the TB Contract had not been terminated for default or convenience, the follow-on contract which had been given to VIC should be re-bid, and claimed an unspecified amount for specialized equipment purchased for the Contract. 4, tab V)

CO Carleton responded to Attorney Brown's letter on April 15, stating:

The government has withdrawn the termination for default issued against this contract. Trailboss is still responsible for the contract tasks not completed during the contract period to include rework of the cremation site to specifications. The government will have this work completed by a third party and will use your final invoice amount of \$12,472.58 to pay for the work. Any funds that are left after work is completed will be returned to you. The Government will issue a bill of collection if additional funds are required.

(R4, tab V)

On June 3, 1997, CO Carleton denied the Trailboss claim for \$12,472.58, stating again that the money was being withheld for work not completed as of September 30, 1996. (R4, tab XYZ) Although CO Carleton had made reference in previous correspondence to a "final inspection" in October 1996, in this letter he says he and COTR Payne performed a thorough inspection in the spring, "after the snow melted and the ground unfroze." The letter stated the following tasks had yet to be performed:

1. Rebuild the cremation crib site to dimensions and structural specifications. All cribs shall be constructed of 3/4" plywood. Most cribs were constructed of fiberboard. The holes shall be aligned correctly when the cribs are replaced. Many holes are far out of alignment at present. The holes shall be dug deep enough to allow for 10" of backfill material to be placed over the cribs and still be level with the original ground level. The existing

layer of unsuitable backfill was placed on top of the existing ground level. The backfill material shall be materials not to exceed 1 minus and shall consist of 70S sand as specified in the contract. The existing backfill does not meet this specification and shall be removed and replaced. Attachment A gives a detailed account of the existing crib status with respect to construction materials and hole alignment. Crib 34B is virtually in the roadway edge and will have to be relocated.

2. Rebuild the casket crib site to dimensions and structural specifications. All cribs are to be 48" wide and 96" long. They are presently 41 to 42 inches wide. Many outside cribs are only 93" long. All internal support kickers shall support the plywood side. None of the interior cribs are constructed correctly. They shall be modified to support the plywood wall with out reducing internal dimensions. The lids are structurally deficient. Most interior supports are nailed to the plywood top that is to be supported, not the to 2"X4" side frame. Also the side framework was pieced with out reinforcement in virtually all cases. A number of frames were constructed of rotten wood. Attachment B gives a detailed account of crib dimensions, kicker support status, and lid status.

Also complete leveling and filling of perimeter around the casket crib area to rough grade.

Contractor was directed to access the new casket crib area from the rear of the cemetery. Instead, he accessed from the front and damaged both sides of the area. This area shall require renovation and seeding.

3. Repair 258 sunken grave sites. See Attachment C for details of graves not repaired. A number of sunken graves were repaired after heavy frost and freezing temperatures last year. Any damage done to turf as a result shall be replaced.

4. Excavate a shallow ditch between the cremation site and roadway, if required, after area is redone.

5. Seed both sides of the new cremation site and seed ditch after rework is accomplished.

6. Reseed Section J areas identified during October 1996 final inspection. Remove straw from same area.

7. Remove the backfill from the wooded areas adjacent to the casket crib area and the gate at the back of the cemetery. This was required to be hauled to the spoils area when it was excavated.

8. Reseed Section F if required. No grass could be seen last year.

The Government demands that you complete the above requirements to the satisfaction of the Government. Your response is required no later than 14 days after receipt of this letter. Should you decide to complete these requirements, they shall be completed no later than 34 days after receipt of this letter. All work will be scheduled and completed during the hours of 8:00 AM to 4:00 PM, Monday through Friday.

(R4, tab XYZ)

On April 21st, COTR Payne and Vic Carlson walked the Cemetery, "looking over the damage and trying to decide what to do and when." However the "reprocurement work" was not solicited until early September 1997. Apparently VIC, who was subsequently selected to be the reprocurement contractor, helped develop the scope of work for the reprocurement contract. COTR Payne states that hundreds of sunken graves were visible from 100 feet or more. (R4, tab MM)

On April 23, 1997, COTR Payne says that CO Carleton came out to go over all the things that Trailboss failed to complete within the Contract period. "It was somewhat perplexing to me that we were going through this again because I had already pointed out all these problem areas to Kenny the last week in Sept. and the first two weeks of Oct. At that time Kenny had not actually documented each individual grave site." CO Carleton graphed out each crib that was out of alignment. "Last fall when I complained about the grossly uneven placement of the boxes, Kenny told me he thought that within each 5' x 5' area, the cribs could be placed anywhere, that the contract did not state that the cribs were required to be centered." COTR Payne opined such a position was ridiculous. (R4, tab MM)

CO Carleton and COTR Payne were aware that Trailboss had used fiberboard instead of 3/4" plywood: "Last fall when I pointed out the materials used in the construction of the cribs was faulty, Kenny asked if I thought they would hold up. I said at that time I had no idea but that the contract was clear that the material used was to be 3/4" CDX plywood." On April 25 CO Carleton and COTR Payne opened each crib site, checking the quality and strength of the cribs and lids. They found kickers were missing and other deficiencies. "Kenny had seen this last fall but seemed to be looking at it through different eyes at that time." (R4, tab MM)

CO Carleton testified: "The contract was terminated by the time we knew of the deficiencies, and the extent of them, and what we really needed to do. If Mr. Tolliver had

taken the settlement when I offered him to start out with, he would have come up smelling like a rose and we'd have caught it right in the shorts, because we didn't know what the damage was at that time." (Tr. 452) This directly contradicts COTR Payne's account.

We find that the VA had been aware of most, if not all, of the Contract deficiencies since the end of September and early October, 1996. We reach this conclusion based on very detailed Memorandums for the Record kept by COTR Payne during the period April 21-29, 1997.

On September 7, 1997, a solicitation to perform the reprourement work allegedly not performed by Trailboss, was issued to 2 bidders. (R4, tab CC) The solicitation called for a firm fixed price contract with a lump sum bid and a contract term of September 15, 1997 to July 17, 1998. (R4, tab CC) A new drawing for the crib lid, dated May 1997, was included. The solicitation contained the following scope of work:

Cemetery maintenance requirements. Contractor agrees to furnish labor, material, and equipment to complete the following requirements in accordance with Section C. C. 4 Specifications:

1. Modify the new cremation crib site to correct dimensions and structural specifications. Excavate a shallow ditch between the cremation site and roadway if required, after area is redone. Seed both sides of the new cremation site and seed ditch after rework is accomplished.
2. Modify the new casket site to correct dimensions and structural specifications. Also complete leveling and filling of perimeter around the casket crib area to rough grade after modification. Reseed both sides of the new casket site where it has been damaged by vehicle traffic.
3. Remove the backfill from the wooded areas adjacent to the casket crib area and the gate at the back of the cemetery. Haul to the spoils area.
4. Repair 258 sunken grave sites. See Attachment C for details of graves to be repaired. COTR will identify which graves are to be repaired.
5. Reseed Section J areas which will be identified during pre-bid site visit. Remove straw from same area.
6. Reseed Section F as required.

Associated Professional Enterprises, Inc., whose President, John Dean, performed the Cemetery maintenance contract before VIC, and was not considered to have done a good job, submitted a lump sum bid of \$74,657.10. (R4, tab OO; Tr. 68-70, 96) VIC submitted a price of \$61,074.82 and was awarded Contract No. V463P-0081-97 (Reprocurement Contract). The VA performed no independent price estimate and there was no negotiation. (Tr. 521) While there were some general questions about material costs with very non-specific responses, there is no competent evidence in the record to support the reasonableness of VIC's price. The reprocurement work was performed by the 3 people concurrently performing the monthly contract work and 2 others were hired to perform the crib work. (Tr. 525) The work was done in the fall as Mr. Carlson testified:

And we did this in the fall time when there was no lawn to—maintenance, and the only thing you're doing is doing burials and maybe setting tombstones. We try to schedule the work for the fall time so that it's- it's'--everything else is done when you do this here full casket deal. It takes quite a bit of time.

(Tr. 520)

On January 29, 1997, Trailboss filed its claim for release of the retainage. (R4, tab U) The VA denied the claim in a non-final decision letter dated June 3, 1997. The letter reiterated the Contract deficiencies and gave Trailboss 34 days to complete them. (R4, tab U) A Final Decision was issued by the VA on October 20, 1997, denying Trailboss's request to release the \$12,472.58 retainage and demanding an additional \$48,602.27 for the cost of correcting the Contract deficiencies. (R4, tab EE)

DISCUSSION

The issue in these appeals is whether the VA is entitled to recover \$61,074.82, which it spent to correct Contract deficiencies. VA withheld the last month's Contract payment of \$12,472.58, leaving a balance of \$48,602.24. VA cites no authority for withholding the last month's payment to Appellant. In fact, VA cites no authority for any of its arguments other than one case for the proposition that Trailboss has the burden of proof to show any delays by the VA resulted in harm to Trailboss.

The VA maintains that it did not receive the benefit of its bargain and was required to expend substantial sums of money to correct the deficiencies of Trailboss. VA says the "shared services contract" was a benefit to Trailboss because they got full pay, only had to stockpile soil, and were not required to perform the 24 burials in that month. VA maintains that its failure to issue CDR's was justified because the provision does not refer to construction and it is really "form over substance" because Trailboss was put on written notice of its deficiencies. The cremation cribs, VA argues, did not comply with Contract requirements because Trailboss used oriented strand board (OSB) instead of $\frac{3}{4}$ inch plywood, the cribs were improperly aligned, and the backfill contained rocks. As for the full casket cribs, VA says Trailboss shared the blame for the "on center" problem, and that this is supported by Trailboss' agreement to share the costs for which VA was never billed. In any case, VA argues some of the crib lids were rotten, creating an unsafe condition in violation of the Contract, kickers were installed improperly, and some

"used" material, rather than "new" had been installed. Finally, VA says Trailboss was required to repair up to 258 sunken graves and did not do so. VA argues that its "reprocurement" was proper under the Inspection of Services Clause, maintaining that, if Trailboss failed to perform Contract requirements, it was authorized to have the services performed by another contractor.

Appellant argues that the shared services contract, lack of stockpiled soil, interference by Mr. Carlson, and actions of COTR Fitzgerald, including the delay in deciding the location of the full casket crib site and defective specifications, all contributed to his dilemma. According to Appellant, the VA totally ignored the CDR process and was thus arbitrary and capricious in administering this Contract. It claims Trailboss was never allowed to formally respond to the deficiencies. When no payments were retained until the end of the Contract, Trailboss argues it had no reason to believe that the deficiencies rose to the level of default. Trailboss maintains that the Contract was never terminated for default or convenience of the Government and there is no valid basis for a charge back. Appellant also argues that during the Contract period, the COTR had the opportunity to observe and conduct a reasonable inspection. Appellant argues that it is the VA's burden to establish that the defects were latent. Finally, Trailboss says the VA breached its duty of good faith and fair dealing.

The Inspection of Services Clause grants the Government the right to require reperformance of services and imposes a corresponding obligation to perform on the contractor. The clause explicitly recognizes that circumstances may exist where reperformance would not correct a deficiency and allows deductions for deficient or unperformed services. If necessary, the Government may have the work performed and charge the contractor or terminate. This clause contemplates that correction of deficiencies is the preferred remedy where problems are few, but that more serious remedies, including default termination, may be invoked for chronic shortcomings. The VA never performed any inspections resulting in deductions during the term of the Contract, as is contemplated by the clause.

Under the terms of the Contract, Trailboss would have received its monthly payment of \$12,472.58 for the month of September. It is the Government's position, however, that these earnings must be reduced by the value of the work Appellant did not perform or performed deficiently. The Government has the burden to prove both the entitlement to and the amount of its deductions. *Oliver's Landscape*, ASBCA No. 23488, 80-1 BCA ¶ 14,320; *Exquisite Service Company*, ASBCA No. 21058, 77-2 BCA ¶ 12,799. The VA did not place a value on the deficiencies that existed at the end of the Contract term but it did refer to them as "punch list items" in its proposed modification to extend the Contract to June 30, 1997 and so reduce the amount being deducted to \$1,247.20. These "punch list items" easily could have been resolved by the use of the deductions set out in the Performance Of Work Requirements summary.

The Inspection of Services Clause limits the Government's right to inspect to the term of the Contract. We do not understand the COTR's reluctance to approve or disapprove the work without the formal inspection scheduled for October 18, 1996. In the absence of a specified inspection schedule or other indication of an agreed time frame during which inspections are to be made, inspections must be conducted at reasonable times consistent with the requirement that the contractor's performance of the work not be unduly

delayed. *Ventilation Cleaning Engineers, Inc.*, ASBCA Nos. 16678 and 16774, 72-2 BCA ¶ 9,537. If the wrong materials were being used, or large rocks were in the refill dirt, they would have been visible. The COTR's statement in April 1997, as she walked the site, was that Trailboss had left "hundreds of sunken graves." Those sunken graves were either clearly visible during September and early October 1996 or had sunk over the winter, which would have been after the Contract term expired. COTR Payne stated that she had already pointed out all these problem areas to CO Carleton the last week in September and the first two weeks of October 1996.

We understand that the cold weather creates small windows for some of the Contract work requirements involved in this appeal. We do not condone the way Trailboss performed some of the tasks required by this Contract nor do we understand how former workers for VIC, who seemingly did everything in an acceptable manner when working for VIC, would have experienced so many performance problems while working for Trailboss. Appellant helped set the stage by its obvious lack of supervision and use of unacceptable materials.

In order to prevail, the VA has the burden of demonstrating a basis for the recovery it seeks. Although specifically requested to provide argument on the legal basis for its recovery, VA has chosen not to do so. The VA must prove that its inspection was timely and reasonable. There is nothing in this Contract that would allow the VA to conduct an inspection 7 months after the Contract ended.

There were "punch list items" when the Contract term ended. Based on the modification offered by the VA, the approximate value of those items was \$1,247.20 or 10% of the monthly payment, a far cry from the \$61,074.82 sought following the April inspection.

Assuming the inspection had been performed in a timely manner, the VA had a clear responsibility to mitigate, to the extent possible, the costs ultimately to be assessed. As we said in *Techcraft Systems*, VABCA No. 1894, 86-3 BCA ¶ 19,320 at 97,716:

The Court of Claims has held that CO's have broad discretion in a reprocurement, and that it is permissible to negotiate with prior bidders on the same contract, whether with one or all. 'The doctrine of mitigation of damages necessitates no more than reasonable efforts by the contracting officer to obtain as good a price for the defendant as she can.' *Blue Spruce International v. United States*, 216 Ct.Cl. 449 (1978); *H & H Mfg. Co., Inc. v. United States*, 168 Ct.Cl. 873 (1964).

We are mindful that these guidelines are very broad, and what is reasonable under one set of facts and circumstances may not be reasonable in other cases.

As stated by the court in *Cascade Pacific International v. United States*, 773 F.2d 287, at 293-94 (Fed. Cir. 1985):

[E]xcess reprourement costs may be imposed only when the Government meets its burden of persuasion that the following conditions (factual determinations) are met: (1) the reprocured supplies are the same or similar to those involved in the termination; (2) the Government actually incurred excess costs; and (3) the Government acted reasonably to minimize the excess costs resulting from the default.

The Government has established the award and payment under the reprourement contract. It is axiomatic that when the Government attempts to recover the excess costs incurred upon reprourement, it must first demonstrate that it took measures to keep those costs at a minimum. *KDI Precision Products*, ASBCA Nos. 17382, 17591; 73-2 BCA ¶ 10,231; *Matthews Company*, AGBCA No. 459, 76-2 BCA ¶ 12,164.

The burden is on the Government to prove that the reprourement method it selected was conducive to obtaining full and open competition, and that it acted reasonably to mitigate or minimize excess costs. *Erg Consultants, Inc.*, VABCA Nos. 3223, 3345-6, 92-2 BCA ¶ 24,905; *HLI Lordship Industries, Inc.*, VABCA No. 1785, 86-3 BCA ¶ 19,182. In most cases, the Government satisfies this burden by showing that it used sealed bid advertising to repurchase defaulted supplies and services. Furthermore, it is not uncommon for the Government to solicit those firms that bid on the original procurement. In fulfilling the obligation to secure the best price for the Government, a contracting officer must follow the same standard of reasonableness and prudence under the circumstances which he/she exercised in the timing and selecting of the method of reprourement. *Barrett Refining Corporation*, ASBCA Nos. 36590, 37093, 91-1 BCA ¶ 23,566 at 118,145; *Mid-America Painters, Inc.*, ENG BCA No. 5703, 91-1 BCA ¶ 23,367 at 117,232.

Federal Acquisition Regulation 49.402-6(b) authorizes the contracting officer to use "any terms and acquisition method deemed appropriate for the repurchase," provided that a reasonable price and competition to the maximum extent practicable are obtained. All that is required is that the Government act reasonably under the circumstances. *Ketchikan Pulp Co. v. United States*, 20 Cl. Ct. 164, 167 (1990).

As long as there is a sufficient number of potential contractors to assure competitive prices, this duty to mitigate costs of reprourement does not preclude the Government from exercising discretion regarding the method of reprourement (i.e., negotiation as opposed to formal advertising). *Orlotronics Corporation*, ASBCA No. 23287, 79-2 BCA ¶ 13,912; *Century Tool Company, Inc.*, GSBCA No. 4007, 78-1 BCA ¶ 13,050. The mere fact that there is a significant price increase in the reprourement does not render it unreasonable in the face of Government due care and diligence. *Churchill Chemical Corporation v. United States*, 602 F.2d 358 (Fed. Cir. 1979).

The Board is unaware of any case which holds that mere formal advertising, without more, is reasonable *per se*. A contracting officer cannot "blindly accept" a reprourement contractor's price and be said to have acted in a reasonable and prudent manner. *Wise Instrumentation and Control, Inc.*, NASA BCA Nos. 673-7, 1072-12, 75-2 BCA ¶ 11,478.

Other than VIC's lump sum bid amount, no evidence was offered concerning the reasonableness of the charge back cost. Having participated in the development of the scope of work, VIC was basically given a blank check. Many questions were raised about VIC's performing the \$61,074.82 reprourement work at the same time as its own contract. The VA had no independent in-house estimate of the probable cost of this work. Accordingly, the Board finds that the VA has not carried its evidentiary burden of showing that the manner in which the reprourement was conducted and the excess reprourement costs assessed in this case mitigated the Appellant's liability and represented the lowest reasonable price for the Government under the circumstances.

The "punch list" items the parties agreed to at the October 18th final inspection, and were never performed by the Appellant, would ordinarily entitle the VA to a credit. However, the VA took an all or nothing approach when it sought recovery of the lump sum \$61,074.82 in charge back costs, and failed to provide quantum evidence on individual items. Thus, we have no individual figures for the outstanding punch list items on which to calculate an award.

Nevertheless, because the Trailboss performance of this Contract was seriously lacking, a jury verdict might be appropriate. The Federal Circuit recited the conditions which must be met before utilizing a jury verdict approach in *Dawco Construction, Inc. v. United States*, 930 F.2d 872 at 880 (1991):

Before adopting the "jury verdict" method, the court must first examine three things: (1) that clear proof of injury exists; (2) that there is no more reliable method for computing damages; and (3) that the evidence is sufficient for a court to make a fair and reasonable approximation of the damages.

This Appeal overwhelmingly fails to meet the second and third test. It would be a shot in the dark were we to attempt a jury verdict under such circumstances. Boards of Contract Appeals are not empowered to guess at appropriate recoveries for parties who fail to meet their quantum burdens. *20/20 Labs, Inc.*, VABCA No. 4458, 95-2 BCA ¶ 27,630.

DECISION

For the forgoing reasons, the Appeals of Trailboss Enterprises, Inc., VABCA Nos. 5454 and 5471, under Contract No. V463P-0048-95 are sustained. Appellant, Trailboss Enterprises, Inc., is entitled to a judgment of \$12,472.58 plus interest pursuant to the *Contract Disputes Act* from January 29, 1997.

Date: **August 31, 1999**

William E. Thomas, Jr.
Administrative Judge
Panel Chairman

We Concur:

Morris Pullara, Jr.
Administrative Judge

James K. Robinson
Administrative Judge