

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Maggie's Landscaping, Inc. ) ASBCA No. 56748  
 )  
Under Contract No. DAAD05-92-D-7022 )

APPEARANCES FOR THE APPELLANT: Gilbert J. Ginsburg, Esq.  
Washington, DC  
  
Philip C. Jones, Esq.  
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Rockville, MD

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
LTC Dana J. Chase, JA  
CPT Bernal Rodriguez, JA  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE JAMES

Maggie's Landscaping, Inc. (Maggie's) submitted a claim for changes under the captioned grounds maintenance contract at the Edgewood Area (EA) of the U.S. Army Aberdeen Proving Ground (APG), MD, in 1997 and amended it in 1998. The contracting officer's (CO's) August 1999 decision denied Maggie's claim and asserted a government claim for unperformed work. Maggie's timely appealed that decision to the ASBCA. Maggie's claim was docketed as ASBCA No. 52462 and the government's claim as ASBCA No. 52463. Our 2 June 2004 decision on entitlement in *Maggie's Landscaping, Inc.*, ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647 at 161,568-69 (*Maggie's I*), sustained ASBCA No. 52462 with respect to changed mowing height, 438 new trees planted and 3,341 linear feet of fences installed, and otherwise denied it. Our decision denied ASBCA No. 52463 with respect to the government's claim for an equitable adjustment for Maggie's reduced mowing requirements and remanded the appeals to the parties to resolve damages. We assume familiarity with that decision.

After the parties failed to resolve quantum, we reinstated the appeals, redesignated as ASBCA No. 56748, of which the Board has continuing jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. Pursuant to the Board's 5 November 2009 order, in the nature of pleadings, Maggie's filed a "Statement of Costs" (SOC) and the government replied thereto (GSOC). The parties agreed to include the hearing testimony and documentary evidence from *Maggie's I* in the record of ASBCA

No. 56748. After a two-day hearing in November 2010, the parties submitted post-hearing and reply briefs.

### FINDINGS OF FACT

1. Under date of 15 December 1996 Maggie's submitted a certified, \$179,522 claim to the CO under the captioned contract for additional work performed in four designated areas in EA and for changes in mowing frequencies, which claim the CO received on 25 March 1997 (*Maggie's I*, finding 50).

2. On 15 October 1998 Maggie's revised its claim to \$618,266 including constructive changes due to tree plantings and new fences, and for breach and partial termination damages (*Maggie's I*, finding 52).

3. The CO's 20 August 1999 final decision denied Maggie's claims and asserted a claim of \$46,535 for the net difference between an underpayment due to added trees and fences (\$10,544), and an overpayment for areas not mowed (\$54,366) plus the government's costs of disposing of Maggie's office trailer (\$2,713). Maggie's timely appealed that decision. (*Maggie's I*, finding 53)

4. The Board's 2 June 2004 decision in *Maggie's I* determined that--

[T]he government is entitled to an equitable adjustment in the contract price for Maggie's reduced mowing requirements in those areas reduced in size by building construction, environmental and hazardous area restrictions and restrictions to mowing in other areas....

and held—

We sustain ASBCA No. 52462 with respect to the government's modification of the contract mowing height in June 1994, the 438 new trees planted and the 3,341 l.f. of new fences installed. We dismiss ASBCA No. 52463 as to the removal of Maggie's office trailer [for which the government conceded it was not entitled to reimbursement]. The appeals are otherwise denied.

*Maggie's I* at 161,568-69.

5. Maggie's 4 December 2009 SOC (R4, tab 47) included the following amounts:

• Mowing height change from 2" to 3"	\$405,489
• 438 new trees	3,640
• 3,341 linear feet of new fencing	8,724
• Unpaid mowing	<u>38,760</u>
Total due to Maggie's:	<u>\$456,613</u>

6. The government's 8 January 2010 GSOC included the following amounts:

• Mowing height change	\$ 0
• 438 new trees	3,640
• 3,341 l.f. of new fencing	6,904
• Reduced mowing acreage	<u>(54,366)</u>
Net total due to the government:	<u>(\$43,822)</u>

#### Mowing Height Change

7. The contract designated the "Jake" F-510 mower for exclusive use on 17 areas for weekly mowing (Nos. E-1, -2, -3, -4, -10, -12, -17, -21, -23, -29, -32, -40, -47, -48, -49, -56, -63) (R4, tab 1 at 1-7 of 40, technical proposal at 15-16). After September 1993 Maggie's ceased work on area E-56 (supp. R4, tab 92).

8. (a) *Before* the 17 June 1994 mowing height change, Maggie's president, Marilla Coryell, stated that Maggie's mowed the Jake areas in three or a little more days, and the other areas in four days with two tractor-mowers and push mowers and one or two persons with weed eaters (*Maggie's I*, tr. 1/26-27, 37). She later stated that on a "typical day" she used the Jake with one operator and "maybe one weed eater" and used three rotary mowers and three smaller trim mowers with six operators on the non-Jake areas (tr. 1/46, 53, 56<sup>1</sup>).

(b) Ms. Coryell stated that *after* the mowing height change, Maggie's used a "large tractor and a trim tractor and/or a push mower or three and a weed eater"; she "put...two to four people in any [Jake] area to make up for what the [Jake] did"; she "had two tractors...on any Jake areas" and "if I would have one Jake and a small crew following shortly in...the weekly areas, I now nearly tripled that" (tr. 1/56, 59, 61-62, 69).

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<sup>1</sup> Unless preceded by *Maggie's I*, transcript citations are to the 2010 quantum hearing.

(c) Ms. Coryell derived the cost for the mowing height change by deducting the pre-17 June 1994 costs of mowing the 17 areas by the Jake with one operator plus “maybe” one laborer to pick up clippings, from the post-17 June 1994 costs to maintain the ex-Jake areas using three rotary mowers and tractor operators, followed by two laborers who trimmed (tr. 1/41, 45-47, 55-56, 59, 61-62, 69).

9. Based on the following data:

<u>Quantities and rates</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>Record Cites</u>
Actual weekly mowings:	16	27	26	(R4, tabs 28-49)
Tractor operator	\$9.57/hr.	\$10.90/hr.	\$11.45/hr.	(tr. 1/132, 2/94-95)
Laborer	\$8.50/hr.	\$ 9.56/hr.	\$10.04/hr.	(tr. 2/95)
3 tractor operators	x 4 days x 8 hrs./day = 96 hrs./wk			(tr. 1/68)
2 laborers	x 4 days x 8 hrs./day = 64 hrs./wk			(tr. 1/67)
Overhead rate	51.57%	42.36%	41.80%	(tr. 1/133)

Maggie’s calculated its (a) *tractor operators’* direct costs for 1994-96 of \$71,531.20 and overhead thereon of \$31,494.52, (b) *laborers’* direct costs for 1994-96 of \$41,930.24 and overhead thereon of \$18,469.72, (c) total direct and overhead costs of \$163,425.68 (\$71,531.20 + 31,494.52 + 41,930.24 + 18,469.72), (d) a deduction for costs of one Jake tractor operator of \$20,118.24 and (e) net increase in burdened labor costs plus overhead of \$143,307.44 (\$163,425.68 - \$20,118.24) (app. br. at 6-8).

10. Maggie’s alleged that it could not access its payroll and other records because its computer was locked (R4, tab 47 at 6 n.3; tr. 2/100). There is no evidence that the government was responsible for such locking. The appeal record contains incomplete weekly and monthly employee hours and wages (exs. G-1, G-2 at 1, 3, 7, exs. G-5, G-11) and Maggie’s 1994-96 tax returns showing employee wages (R4, tab 47, ex. 3 at 4, ex. 4 at 5, ex. 5 at 17). These documents do not show which employee wages and hours were for changed work and in which of the 93 areas (*Maggie’s I*, finding 1) they were incurred. They provide little support for Maggie’s foregoing operator/laborer numbers.

11. APG’s weekly mowing assignment sheets set forth start and finish dates for mowing each EA area. These sheets show that during the 42 weeks before the mowing height change, Maggie’s mowed 16 weekly areas (not including area E-56) exclusively with the Jake on 161 days, averaging 3.833 days/week (161 days/42weeks), and during the 90 weeks after the change mowed those 16 areas on 376 days, averaging 4.177 days/week (376 days/90 weeks). Those assignment sheets do not show the number of persons and hours each person worked on those areas. (Supp. R4, tabs 72, 76, 78, 79)

12. The cost of the increased work due to the changed mowing height and minimal use of the Jake on 16 areas can be derived from the 2.76 hours per week increased time to mow those areas after 17 June 1994 (finding 11):

Post-6/17/94	4.177 days/wk. x 8 hrs./day =	33.42 hrs. wk.
Pre-6/17/94	3.833 days/wk. x 8 hrs./day =	<u>30.66 hrs./wk.</u>
Difference		= 2.76 hrs./wk.

We use Maggie's hourly wages and overhead rates (finding 9). We adjust the number of weeks mowed after 17 June 1994 by adding to the weeks in which all 16 ex-Jake areas were mowed, the full time equivalent weeks in which fewer than 16 such areas were mowed, totaling 19.8 weeks in 1994, 24.56 weeks in 1995 and 26.94 weeks in 1996 (R4, tabs 76, 78, 79). The average hourly rates for two operators and two laborers are:

Tractor operators:

1994 - \$9.57 x 19.80 wks. x 1.5157 =	\$287.20
1995 - \$10.90 x 24.56 wks. x 1.4236 =	381.10
1996 - \$11.45 x <u>26.94</u> wks. x 1.418 =	<u>437.40</u>
Subtotals: 71.30 wks.	\$1,105.70
\$1,105.70 ÷ 71.30 = \$15.51/hr. x 2 operators = \$31.02/hr.	

Trimmer/laborers:

1994 - \$8.50 x 19.80 wks. x 1.5157 =	\$255.09
1995 - \$9.56 x 24.56 wks. x 1.4236 =	334.25
1996 - \$10.04 x <u>26.94</u> wks. x 1.418 =	<u>383.54</u>
Subtotals: 71.30 wks.	\$972.88

\$972.88 ÷ 71.30 = \$13.64/hr. x 2 laborers = \$27.28/hr.

\$31.02 + \$27.28 = \$58.30/hr. average rate for labor

2.76 hours/week x \$58.30/hr. x 71.3 weeks = \$11,472.74.

#### 438 New Trees Change

13. Maggie's 15 December 1996 certified request for equitable adjustment cited "\$0.25 per obstacle per cut" as the "precedent amount established in 1986 on APG for each obstacle added" (*Maggie's I*, R4, tab 53 at 5). In the SOC, Maggie's claimed \$3,640, which the GSOC accepted. In November 2010 Ms. Coryell claimed \$0.50 per tree based on unidentified APG contracts that used \$0.75 and \$0.50 per tree prices (tr. 1/72-73). Maggie's asserts \$11,567 for the 438 trees (app. br. at 10), but the figures it used to derive that amount, including \$0.50 per tree, are not supported by record evidence. The appeal record contains no documentation of the 1986 APG "precedent" and the APG contracts.

14. CO Representative Roger Stoflet provided technical information to DCAA auditor Michael Phillipe, who calculated \$3,640 in added mowing costs due to the 438 trees that the government planted in 18 areas mowed by Maggie's. Messrs. Stoflet and Phillipe multiplied the number of trees by their respective mowing frequencies, and by \$0.20 per tree, "[b]ased on \$.15/tree on a prior contract Plus \$.05 inflation (\$.15 + \$.05 = \$.20)" (*Maggie's I*, R4, tab 60 at 2; tr. 1/177-81, 2/16-18). The APG contract preceding Contract No. DAAD05-92-D-7022 is not in the record.

15. Maggie's SOC stated: "B.1. Impact of Trees. The amount claimed above [\$3,640] is the costs impact [sic] determined by the Government's technical evaluation."

16. We find, weighing the evidence, that the cost of added work to mow around the 438 trees was \$3,640.00.

#### 3,341 l.f. of New Fencing

17. Maggie's SOC states that it "accepts" the government's \$8,724.00 calculation of direct costs for the 3,341 linear feet of fencing added in mowing areas E-6, E-9, E-19, E-30 and E-61A (R4, tab 47 at 2-3, tab 60 at 3; app. br. at 11).

18. The government's final calculation was not, however, \$8,724.00. The government's final calculation reduced Maggie's \$8,724 cost by \$1,820 to reflect the decreased acreage mowed due to new fencing erected, for a net amount of \$6,904 (*Maggie's I*, finding 42, R4, tab 60 at 3; GSOC at 3; tr. 1/181-84, 186-89, 2/18-21).

19. The government's formula for the reduced acreage cost (mowing frequency times price per acre) omitted the decreased acreage (tr. 2/28-32). The correct formula is mowing frequency times reduced acres times price per acre. The government's prices per acre for areas E-6 (\$30.81) and E-61A (\$48.66) are erroneous because the prices differed from year to year. The correct prices per acre for area E-6 are \$30.09 for 1994, \$30.81 for 1995 and \$31.34 for 1996, and for area E-61A are \$48.20 for 1994, \$48.66 for 1995 and \$49.01 for 1996 (R4, tab 5 at 3, 8, tab 9 at 3, 8, tab 12 at 3, 8). The adjusted cost due to decreased acreage for area E-6 is \$1,346.19 ( $\$30.09 \times 26 \text{ mowings} \times .6 + \$30.81 \times 22 \text{ mowings} \times .6 + \$31.34 \times 25 \text{ mowings} \times .6$ ) and for area E-61A is \$427.96 ( $\$48.20 \times 5 \times .98 + \$48.66 \times 1 \times .98 + \$49.01 \times 3 \times .98$ ), totaling \$1,774.15 ( $\$1,346.19 + \$427.96$ ).

20. We find that the cost of added work to mow around the 3,341 linear feet of new government fencing was \$6,949.85 ( $\$8,724.00 - \$1,774.15$ ).

Reduced Mowing Requirements (Government Claim)

21. The government's \$54,366 claim entitled "AREAS WHERE THE CONTRACTOR WAS PAID, HOWEVER THE AREA WAS NOT MOWED" has three categories described in terms of causes that prevented mowing: (i) "Due to Wetlands Designations, Unexploded Ordinance, Etc." including 10 areas, E-5, E-26, E-15, E-25, E-61A, E-14A, E-14B, E-42A, E-42B and E-54, for an alleged subtotal of \$40,969. (ii) "Reduction in Acres Mowed During Construction of Buildings, Etc." including 6 areas, E-27, E-24 (twice), E-60, E-32 and E-49A, for an alleged subtotal of \$11,699. (iii) "Reduction in Acres Mowed After Construction of Buildings, Etc." including 5 areas, E-27, E-24 (twice), E-60 and E-32, for an alleged subtotal of \$1,698. (R4, tab 60 at 4-5) Maggie's did not dispute the number of acres not mowed in any of the three categories.

22. The government's category (i) areas E-15, E-14A, E-16B, E-42A, E-42B and E-54 did not identify a date, month or even the year when the impacting event occurred (R4, tab 60 at 4-5; tr. 1/204-05, 2/33-40, 51, 69-75). The government identified the month when the impacting event occurred for four category (i) areas: E-5, E-26, E-25 and E-61A. We allow the costs that accrued after the last month so identified, and adjust those costs by the applicable year's CLIN price and the actual number of mowings in each applicable year in those four areas (R4, tabs 72, 76, 78, 79).

23. The government's category (ii) identified the specific building constructed and the period from commencement to completion of its construction for each of areas E-27, E-24 (twice), E-60, E-32 and E-49A (R4, tab 60 at 4-5; tr. 1/205-08). We allow the costs that accrued during the period so identified, and adjust those costs by the applicable year's CLIN price and the actual number of mowings in each applicable year in those areas (R4, tabs 72, 76, 78, 79).

24. For the government's category (iii), although the time periods supposedly *followed* those in category (ii), in fact the time periods respondent identified were identical to those in category (ii) for the very same areas and buildings (R4, tab 60 at 4-5). Since the category (iii) items and periods overlap category (ii), their costs are duplicative. We disallow the alleged category (iii) costs.

25. The costs, calculated and adjusted as stated above, of items allowed in categories (i) and (ii) are as follows:

Category (i)

<u>Area</u>	<u>Acres</u>	<u>Mowings x Years x Annual Price</u>	<u>Price</u>
E-5	5	15/'95 x \$27.04; 21/'96 x \$27.96	\$4,963.80
E-26	30	2/'94 x \$10.06	603.60
E-25	4.5	9/'94 x \$19.75; 13/'95 x \$20.09; 13/'96 x \$20.34	3,165.04
E-61A	8	3/'94 x \$48.20; 1/'95 x \$48.66; 3/'96 x \$49.01	<u>2,722.32</u>
Subtotal:			\$11,454.76

Category (ii)

E-27	3	3/'93 x \$21.85; 14/'94 x \$22.22; 12/'95 x \$23.01; 9/'96 x \$23.59	\$2,595.18
E-24	1.5	15/'94 x \$36.21; 9/'95 x \$36.85	1,312.21
E-24	1	12/'93 x \$35.91; 15/'94 x \$36.21; 9/'95 x \$36.85	1,305.72
E-60	3	10/'96 x \$20.49	614.70
E-32	3	14/'95 x \$49.42; 11/'96 x \$50.82	3,752.70
E-49A	0.5	7/'95 x \$13.43; 12/'96 x \$13.63	<u>128.79</u>
Subtotal:			\$9,709.30

Total (\$11,454.76 + \$9,709.30) \$21,164.06

DECISION

Mowing Height Change. Maggie's damage calculations for the mowing height change claim were based upon Ms. Coryell's testimony regarding the quantities of operators, laborers and equipment used to mow the Jake areas before and after the 17 June 1994 mowing height change (findings 8(a), (b)). We do not accept those calculations because they are not validated and supported by documentary evidence showing which of Maggie's employee wages and hours were for changed work and in which of the 93 acres such wages and hours were performed (finding 10). We have determined the cost of the increased hours Maggie's spent to mow the 16 ex-Jake areas after 17 June 1994 by multiplying 2.76 hours per week of increased time due to use of rotary mowers, by the hourly wages plus overhead for two mower operators and two trimmer/laborers, and by the number of weeks the 16 ex-Jake areas were mowed after 17 June 1994, resulting in \$11,472.74 (finding 12).

438 New Trees Change. We found \$3,640.00 was the added cost of mowing around the 438 new trees (findings 15, 16).

3,341 Linear Feet of New Fencing. After correcting the government's cost for reduced acreage to \$1,774.15 (finding 19), we found that the net cost to mow around the 3,341 linear feet of new fencing was \$6,949.85 (\$8,724.00 - \$1,774.15) (finding 20).

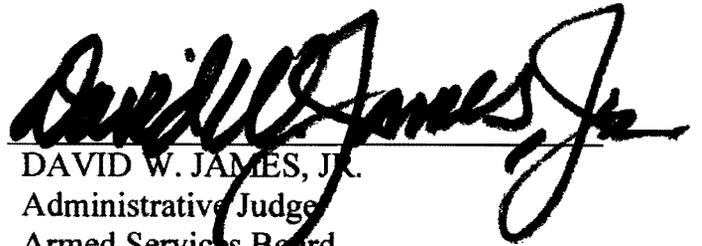
Reduced Mowing Requirements (Government Claim). We found that areas E-6 and E-61A in the government's cost offset in the 3,341 l.f. of new fencing claim (finding 19) are not among the government's reduced mowing requirements claim (finding 21), so there is no duplication of costs. We disallowed those portions of the government's category (i) claim where there was no evidence of the date, month or even the year of the impacting event that reduced the acreage, and allowed the costs of those portions in which the time of the impact was identified (finding 22). We disallowed the government's category (iii) claim as duplicative of its category (ii) claim (finding 24), and allowed the price for the areas claimed, as adjusted to reflect the applicable CLIN price for such areas during the periods in which they were not mowed, namely \$11,454.76 for category (i) areas and \$9,709.30 for category (ii) areas, for a total price reduction of \$21,164.06 (finding 25).

CONCLUSION

We have allowed \$22,062.59 for Maggie's three claims (\$11,472.74 for changed mowing height + \$3,640.00 for 438 new trees + \$6,949.85 for 3,341 l.f. of fencing). We add 10% profit (\$2,206.26) thereto, for a total of \$24,268.85 (\$22,062.59 + 2,206.26) plus CDA interest from 25 March 1997 (finding 1) until paid. We have adjusted the government's claim to an amount of \$21,164.06. No CDA interest shall run on the amount of the government's claim.

We sustain this appeal to the extent set forth above deny the balance thereof.

Dated: 22 July 2011



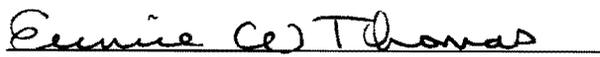
DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



MARK N. STEMPLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56748, Appeal of Maggie's Landscaping, Inc., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals