ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Maggie's Landscaping, Inc.	)	ASBCA Nos. 52462, 52463
	)	
Under Contract No. DAAD05-92-D-7022	)	

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OPINION BY ADMINISTRATIVE JUDGE KETCHEN

These appeals arise from a contracting officer's final decision (COFD) denying Maggie's Landscaping, Inc.'s (Maggie's or appellant) claims for additional compensation for grounds maintenance at the Edgewood Area (EA) of Aberdeen Proving Ground, Maryland. The government (or respondent) asserted claims for overpayment to Maggie's due to reduced mowing requirements and for the cost of removal of Maggie's trailer from EA. A hearing was conducted, and briefs were filed. Only entitlement is before us for decision.

FINDINGS OF FACT

A. The Contract

1. On 5 June 1992, the government awarded Contract No. DAAD05-92-D-7022 to Maggie's for grounds maintenance at EA in the estimated amount of $583,817 for the base year period of 1 July 1992 to 31 March 1993. The contract was a unit price, requirements contract based on estimated frequencies of mowing, clipping, and edging of 93 designated areas at EA. The government exercised the contract options for four additional years of mowing services. This extended the contract through the mowing season that ended in November of 1996. (R4, tabs 1-2, 4, 6, 10)

2. The contract included, among other provisions, FAR 52.214-29, ORDER OF PRECEDENCE—SEALED BIDDING (JAN 1986); FAR 52.243-1, CHANGES—FIXED-PRICE (AUG 1987)—ALTERNATE II (APR 1984); FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984); FAR 52.216-18, ORDERING (APR 1984); and FAR 52.216-21, REQUIREMENTS (APR 1984). (R4, tab 1)

3. Paragraph (b) of the Ordering clause provided that "[a]ll delivery orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order and this contract, the contract shall control." FAR 52.216-18(b) (APR 1984). Paragraph (a) of the Requirements clause provided, in relevant part, that "[t]he quantities of . . . services specified in the Schedule are estimates only and are not purchased by this contract" and "[e]xcept as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as 'estimated' . . . in the Schedule, that fact shall not constitute the basis for an equitable price adjustment." FAR 52.216-21(a) (APR 1984). Paragraph (b) of the Requirements clause provided that the contractor shall furnish to the government all services specified in the schedule and called for by monthly delivery orders "[s]ubject to any limitations . . . elsewhere in this contract." FAR 52.216-21(b) (APR 1984). Paragraph (c) of the Requirements clause provided that "[e]xcept as this contract otherwise provides, the Government shall order from the Contractor all the . . . services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule." FAR 52.216-21(c) (APR 1984).

4. Section B of the contract identified each of the mowing areas by a contract line item number (CLIN) for which the government could issue delivery orders. It specified an estimate of the quantity, that is, the frequency, of mowing for each of the 93 mowing areas for the base year and each option year. Section B indicated the number of acres of each mowing area and identified each mowing area either by an E number (*e.g.,* E1) or by FHU(S) for single family housing units, FHU(M) for multiple family housing units or FHU(TS) for trailer spaces. Section B also contained Maggie's unit price and extended price for each mowing area. (R4, tab 1, § B)

5. Section C of the contract contained the contract specifications. Paragraph C.1.1. Scope of work stated: "[t]he estimated quantities of work are listed in Technical Exhibit 2a, Work Load Estimates." (R4, tab 1, § C at 1) Technical Exhibit 2a (TE 2a) repeated the identical § B mowing task area bid items by E number or FHU, and the frequency of mowing for each of the 93 mowing areas for the base year and the four option years for each of the five mowing seasons. The mowing season ran from April to November, except for the base year mowing season that ran from July through November 1992. TE 2a indicated mowing frequencies, respectively, as either 31 times (weekly), 17 times (biweekly), 8 times, 6 times, 4 or 2 times. TE 2a identified the three FHU weekly areas, gave the estimated acreage for each and estimated 19 units per week mowing for FHU(S), 19 units of mowing per week for FHU(M) and 16 units of mowing per week for FHU(TS).

All mowing frequencies indicated in contract § B, TE 2a, and in the Delivery Orders (DO(s)) as issued were labeled as estimated. (R4, tabs 1, 13-49, TE 2a at 23-26) The contract included Technical Exhibit 3, entitled "Grass Mowing Map"; Figure 1, entitled "Surveillance Activity Checklist"; and Figure 2, entitled "Assignment Sheet." (R4, tab 1 at J-1, J-2)

6. Contract § C provided for measurement and payment for Maggie's completed mowing work as follows:

> C.6.2.1.1. Measurement. The number of acres per mowing area as indicated in Technical Exhibit 2a are approximate and the quantity indicated will be the acceptable acreage for the area. Payment will be based on an area basis and not an acreage basis. The contractor shall be required to provide the government a flat rate per acre cost indicated as EX in technical exhibit 2a for additions or deletions. This cost will include trimming and all other requirements associated with mowing. The flat rate acreage cost will be used for new areas which are added, areas deleted, and as a reduction for partial mowing of areas already listed.

(R4, tab 1, § C at 11) Maggie's included a price of $40 per acre for the EX (EXTRA MOWING) CLINs (R4, tab 1 at 7, 15, 23, 31 and 39 of 40).

7. Contract § C as amended by Addendum No. 1 also specified mowing requirements in relevant part as follows:

> C.6.2.1. Mowing/trimming. The contractor shall mow and trim grass on approximately (1,352.79) acres, as indicated in Technical Exhibit 2 in accordance with the weekly schedules as prepared by the contractor and approved by the COR.
>
> . . . .
>
> C.6.2.1.2. Scheduling. The contractor shall be required to accomplish all assignments in accordance with a predetermined weekly schedule. The mowing schedule shall be prepared by the contractor in accordance with the government's estimated mowing frequency provided in Technical Exhibit 2 and shall be finalized by review and approval from the COR. . . .
>
> C.6.2.1.3. Review/Approval. The contractor shall submit to the COR a draft copy of the mowing schedule for the

> upcoming week. . . . Upon approval the reviewed draft shall be returned to the contractor by the COR . . . and is subject to have priorities and changes, including additions and/or deletions at the discretion of the COR.
>
> . . . .
>
> C.6.2.1.4. Frequency for mowing. All mowing frequencies indicated in the technical exhibit are estimated. The government reserves the right to increase or decrease the total mowing assignments.
>
> . . . .
>
> C.6.2.2.2. . . . The contractor shall follow the order of the flow chart submitted with his proposal each and every week of the mowing season unless changes are approved in advance by the COR.
>
> . . . .
>
> C.6.3.1.2. The areas as indicated in Exhibit 2a are deemed sufficient in size to allow cutting with tractor-drawn whirl wind, reel or sickle bar mowing equipment with the exception of areas adjacent to buildings and structures. The areas which cannot be reached by tractor-drawn or self-propelled equipment shall be cut by small power hand mowers or hand tools. The COR has the option to specify the type of equipment to be used in any area.
>
> . . . .
>
> C.6.4.1.3. Mowing height. Mowing height shall be two inches unless specified otherwise. During certain seasons and under certain conditions, the COR may direct changes in mowing heights as required. Request by the government/COR to increase or decrease the mowing height shall be performed by the contractor at no additional cost to the government.

(R4, tab 1, § C at 11-15)

8. The government could change the mowing priority and require mowing of areas on specific days (R4, tab 1, ¶ C.6.2.1.3.3).

9. Contract ¶ C.6.4.1.8 directed that Maggie's "shall not mow or continue mowing in any assigned area when equipment causes rutting, soil compaction, or scalped areas due to wet or soft grounds" (R4, tab 1, § C at 16). The contract also directed Maggie's to discontinue operations during excessive rainfall. Exceptions to this requirement could be made at the Contracting Officer Representative's (COR) direction. (R4, tab 1, ¶ C.6.4.1.8)

10. The contract schedule incorporated Maggie's technical proposal (TP) dated 16 February 1992 (R4, tab 1 at 1). The incorporated TP described Maggie's "operational concept" and included its "flow chart" (hereinafter work plan or work plan and flow diagram) required by the contract. (R4, tab 1, ¶ C.6.2.2.2) The work plan and flow diagram described the order in which Maggie's proposed to perform the work on a weekly and biweekly basis, and described both Maggie's large mowing equipment and smaller mowing and trimming equipment and its proposed plan for their use. The large equipment included a self-propelled Jacobsen ("Jake") F-10 reel mower, a tractor drawn Woods B-315 ("Bat Wing") rotary mower, and three tractor-drawn Woods C-114 rotary mowers. Maggie's planned to use the Jake alone to mow weekly areas (31 cuts per mowing season) in 17 large open, level areas, where the Jake's high productivity and fine-cut capability could be fully utilized, with priority given to command interest areas (CIA). It anticipated using the Bat Wing in large open areas requiring weekly or less frequent, biweekly mowing (17 cuts per mowing season) where the mower's high productivity could be fully utilized. The C-114 mowers would be used away from buildings in areas large enough to accommodate this equipment. (R4, tab 1, TP at 4)

11. The area/equipment/labor matrix in Maggie's TP identified the areas where it planned to use each piece of major equipment, *i.e.,* the Jake F-10, the Woods B-315 tractor-mower and the Woods C-114 tractor-mowers. The matrix indicated use of the Jake alone on 17 of the EA areas and on two additional areas in combination with the Woods B-315. (R4, tab 1, TP at 16-17) Maggie's equipment description included small F-935 mowers, push mowers, string trimmers, edgers, and blowers. Maggie's description of its mowing equipment and work plan nowhere indicated that the height of grass would limit use of the Jake, although the Jake mowed less efficiently when the grass height exceeded four and a half inches (tr. 1/119-20; R4, tab 1, TP at 4). Maggie's work plan and equipment description did not specify limitations on use of the B-315 and the C-114 rotary mowers due to the need to remove windrows of grass left from use of these machines (R4, tab 1, TP at 4-5).

12. Maggie's work plan and equipment description conveyed that it would adjust its performance to meet the varying needs of a requirements contract for grass mowing. Maggie's TP stated:

> In order to maintain production IAW COR schedules,
> ([Contract §] C.6), the Project Manager will use the following

> in decreasing order of priority to cope with delays resulting from weather, Acts of God, equipment or personnel problems, COR revision of production requirements, etc: . . . . [alternatives available listed]

(R4, tab 1, TP at 5) Maggie's work plan described simultaneous mowing activities for a typical workday. It described in very general terms its crews and equipment and various mowing options, including a varied approach to execution of its work plan by combinations of crews and equipment, including how Maggie's would employ them to perform the government's mowing orders based on seasonal circumstances. Maggie's TP stated generally that trimming crews would work with the mowing equipment and follow after it, except in those areas requiring only trimming around buildings and housing areas. (R4, tab 1, TP at 4-5) Maggie's TP did not condition its work plan and equipment use on the height of grass, a fixed mowing schedule, or its equipment spread. Maggie's TP described its work plan as flexible and geared to respond to the government's varying mowing needs (R4, tab 1, TP at 5).

13. Maggie's planned to mow, trim and edge an average of 863.30 acres per week (R4, tab 1, TP at 19). Maggie's flow diagram depicted simultaneous mowing of the weekly areas (31 cuts per season) from the north and from the south through the middle portion of EA. It planned to mow half of the biweekly areas (17 cuts per season) on the east side of EA on odd weeks and the other half of the biweekly areas on the west side on even weeks. (R4, tab 1, TP at 20)

B. Performance in General

14. In the contract's 1992 base year, the government issued DOs for the mowing season that began in July and extended through November. For the option years, the government issued DOs for each month of the season that ran from April through November. Each monthly DO issued for the base year and option years set forth the government's anticipated monthly requirements and clearly identified them as estimated mowing frequencies of weekly, biweekly or longer. Every year Maggie's was made aware that the DOs contained only estimates of mowing frequencies. (R4, tabs 13-49; tr. 2/266-67, 276, 384-88, 3/471-74)

15. The contract authorized approval of the weekly mowing schedules for EA by COR David Williams for the 1992 base year or COR Roger R. Stoflet for the four option years. COR Stoflet assigned the review and approval of the weekly mowing schedules for EA to the Alternate Contracting Officer's Representative Jean Wagner (ACOR or ACOR Wagner). Although COR Stoflet was aware that the contract incorporated the TP, he did not consider it pertinent to his executory responsibilities under the contract (tr. 3/483-84, 485, 487, 495). However, ACOR Wagner, who was principally responsible for administration of Maggie's contract at EA and who issued the weekly mowing

assignments, was aware that Maggie's TP was incorporated into the contract. She considered the TP's work plan and flow chart when she assigned areas for Maggie's to mow each week consistent with the government's mowing requirements based on the height of grass. (Tr. 5/812) The parties used the contract-specified assignment sheet procedure both to assign each week's mowing requirements and to account for the work completed each week (findings 7, 16; R4, tab 1, ¶¶ C.6.2.1.5, C.6.2.1.5.1, C.6.2.1.6, C.6.2.1.7; SR4, tabs 72, 76, 78-79; tr. 2/384-86, 390-93, 5/805, 815).

16. Maggie's performed mowing based on the government's issuance of approved weekly assignment sheets (finding 7). Using the monthly DO schedules of estimated mowing frequencies as a guide, during each week of the mowing season Maggie's would go through EA and prepare a list of the areas that Maggie's proposed to mow the following week. Maggie's would present this list to the government. The COR or ACOR, but principally the ACOR, reviewed the weekly assignment sheet and approved or modified it by additions or deletions of areas Maggie's had to mow to reflect the government's weekly mowing needs as determined either by general observation or by measurement of grass height. At the end of each week, Maggie's returned the assignment sheet to the government with notations indicating the work it had performed. Maggie's submitted monthly invoices and was paid based on the approved weekly assignment sheets reflecting satisfactorily completed work. (R4, tab 1, ¶¶ C.6.2.1.6, C.6.2.1.7; fig. 2; tr. 1/136, 5/990, 993; findings 7, 15) Maggie's verified that the described procedure was the one the parties followed and did not object to it during performance (tr. 5/990-93).

17. Maggie's President, Marilla Coryell acknowledged that the monthly invoices Maggie's submitted for payment for completed mowing work did not match the monthly DO mowing estimates because the actual mowing the government ordered each week necessarily differed from the DO estimates the government prepared prior to the mowing season. We find that the monthly DOs issued by the government in advance of each mowing season contained only estimates of mowing frequencies that the government could order by the weekly assignment procedure to meet its needs. (R4, tabs 13-49, 51; tr. 1/145-47, 2/266-67, 276, 384-88, 3/471-74)

18. The government assigned areas for mowing for which the EA Department of Public Works (DPW) was directly responsible based on an assessment that sufficient grass growth had occurred to warrant mowing and on ground conditions. It also ordered mowing for tenant agencies, which were included within the contract areas, based on the contract mowing criteria and the desires for mowing of these tenant agencies, which provided separate funding for mowing their areas (R4, tab 65; tr. 2/264-67, 384-93, 3/545, 555, 5/799, 800, 848). The government did not assign mowing of an area unless there was sufficient grass growth to require mowing (tr. 3/555). Dry conditions caused the government not to assign areas for mowing because of a lack of grass growth. The government did not order mowing of areas if Maggie's equipment could cause damage to

the grass and grounds because of wet conditions. (SR4, tabs 72, 76, 78-79; tr. 2/267, 393, 429, 438, 3/537, 5/805, 815, 848)

19. Although the government's weekly mowing assignments varied from the estimated frequencies during the 1992 base year of performance, they were not then significantly below the monthly DO estimated amounts. During the contract's base year, which ran from July to November, Maggie's had difficulty keeping up with mowing assignments because of the deterioration of its equipment during mowing (R4, tab 88; tr. 2/267, 438-39).

20. In the option years, the government assigned mowing somewhat less frequently, but not significantly so, at the beginning of each mowing season than it did during periods of peak grass growth later in the mowing season. This generally occurred due to considerations of the health of the grass, wet ground conditions when mowing could not be assigned due to possible damage to the grounds or due to cold weather or dry conditions that may typically occur in early April in Maryland that could affect grass growth (tr. 2/426-27, 3/506-12, 5/848). Mowing assignments fell off in November of each year due to decreased grass growth because of cold, frosty weather and the shorter days (tr. 430-35; SR4, tab 92; ex. A-1).

21. Ms. Coryell complained at the beginning of each mowing season for the option years, as well as at other times during the mowing seasons, that the government was not assigning enough areas for mowing. She wanted the government to assign mowing work on a more frequent basis during the April-May period so that Maggie's could mow at a lower height of grass suitable for use of Maggie's equipment, particularly the Jake. (Tr. 3/506-10, 535-36) Ms. Coryell asserted that the government's failure to assign areas for mowing at an appropriate frequency at the beginning of each mowing season caused Maggie's considerable difficulty and additional expense. She testified that mowing the higher grass that resulted was more time consuming, requiring increased use of mowing equipment other than the Jake and use of additional personnel. (Tr. 1/25-26, 36, 42-47, 72-74, 199, 204; R4, tab 50)

22. Paragraph C.6.3.1.2 stated that the mowing areas would allow mowing with reel mowing equipment (the Jake), and the contract incorporated Maggie's TP which contemplated mowing 17 weekly areas with the Jake alone (R4, tab 1; *see* finding 7). The contract thus designated a particular method of performance for use in the areas designated for mowing with the Jake.

23. If the estimated mowing frequencies, or cuts, of mowing in the DO estimates for the 17 weekly areas in which Maggie's planned to use the Jake for the beginning months of the option years are compared with the actual cuts Maggie's performed, Maggie's performed significant quantities of mowing in the Jake weekly areas in April and

May of 1993 and 1994. The actual mowing as a percentage of the estimated DO cuts is as follows:

April 1993	100%	12 areas	(4 cuts of 4 est.)
	75%	4 areas	(3 cuts of 4 est.)
	25%	1 Area (E56)	(1 cut of 4 est.)
May 1993	100%	17 areas	(4 cuts of 4 est.)

(The government did not assign area E56 for mowing after May 1993, as this area, a former Nike missile site, was abandoned.)

April 1994	75%	16 areas	(3 cuts of 4 est.)
May 1994	100%	16 areas	(4 cuts of 4 est.)

For the subsequent years, the government also ordered substantial quantities of mowing in the Jake areas during the months of April and May at the beginning of the mowing seasons, recognizing that in some instances the government increased the DO estimated quantities of mowing to 5 cuts per month. The record shows the following:

April 1995	100%	6 areas	(4 cuts of 4 est.)
	75%	3 areas	(3 cuts of 4 est.)
	50%	7 areas	(2 cuts of 4 est.)
May 1995	100%	13 areas	(5 cuts of 5 est.)
	80%	2 areas	(4 cuts of 5 est.)
	60%	1 area	(3 cuts of 5 est.)
April 1996	100%	3 areas	(4 cuts of 4 est.)
	75%	7 areas	(3 cuts of 4 est.)
	50%	6 areas	(2 cuts of 4 est.)
May 1996	100%	13 areas	(5 cuts of 5 est.)
	75%	3 areas	(4 cuts of 5 est.)

(SR4, tab 92)

24. Thus we find that for April and May of 1993 and 1994, the government ordered mowing for all contract mowing areas with sufficient repetitiveness. The contemporaneous record does not support the allegation that the government deferred issuing mowing orders at the beginning of the mowing seasons from a point when the Jake could have been used efficiently to a point when it could not.

25. Generally, on a dollar value basis the government ordered relatively less mowing than estimated in the DOs for the option years than in the short base 1992 year of five months. This occurred due to dry conditions that affected grass growth, health of grass considerations, wet ground conditions, environmental considerations, changes in the desires of tenant agencies at EA for less mowing, and Maggie's inability on occasion to complete work ordered. (R4, tab 65; SR4, tab 92; tr. 2/264-67, 388-89, 429, 438, 3/467-69, 471, 545, 555, 5/848)

26. In the short base year of the contract that ran from July through November 1992, Maggie's performed actual mowing of 97.5% of the DO yearly estimate (in dollars), or nearly equivalent to the levels of the monthly DO estimates. In the option years, the government ordered mowing as a percentage of the DO estimates (in dollars) for each season of: 81.5% (1993), 77.6% (1994), 67.3% (1995) and 76.7% (1996). (R4, tabs 13-49; ex. A-1) Maggie's agreed, with a few exceptions, through bilateral modifications to adjust the DO estimates in dollar value to equal the amounts in dollar value of grass actually mowed. The exceptions included unilateral modifications for DOs 1-4 (unilateral modifications 101-401 for July–Oct. 1992, respectively) and unilateral modifications for DOs 22-27 (unilateral modifications 2201-2701 for April–Sep.1995, respectively). The unilateral modifications for DOs 1, 3 and 4 show an increase in the dollar value of the actual work performed over the DO estimates. The unilateral modifications for DOs 2 and 22-27 show a decrease in the dollar value of actual work performed compared to the dollar value of the DO estimates. (R4, tabs 13-16, 34-39)

27. If the dollar values of the government's actual mowing orders (without subsequent wage increase adjustments) for each season are compared with the dollar values of the contract estimates as bid by Maggie's, the government ordered the following percentages of contract mowing estimates as bid:

> 1992 (base year). 67%. (This figure is skewed by the contract bid estimate in dollar value for the eight month period of this mowing season, since the government only placed mowing orders in five months of the season from July through November of the 1992 base year).
>
> 1993 Option Year 1 95%
>
> 1994 Option Year 2 90%
>
> 1995 Option Year 3 76%
>
> 1996 Option Year 4 90%

(R4, tab 1 § B, tabs 2, 4, 6, 8; ex. A-1) We also find that in the option years the dollar value of the DO estimates of mowing for each year totaled a larger quantity of mowing than the contract estimates in dollar value as bid for each year. (R4, tabs 1 § B, tabs 2, 4, 6, 8; ex A-1) We infer from our examination of the DOs that the DO estimates sometimes assumed mowing would occur periodically (*e.g.*, every week) from April to November, 35 weeks, without regard to seasonal and other variations while the contractual estimates, based on a 31-week mowing season, did not.

28. During the entire four option years, generally dry weather contributed to the government's reduced mowing orders. During the 1995 mowing season, Option Year 3, COR Stoflet did not reduce Maggie's mowing assignments for EA areas for which the DPW was directly responsible because of DPW funding restrictions, although the head of DPW had directed him to prepare a plan for doing so. (SR4, tabs 91, 97; tr. 3/470, 5/790-93) The reduced mowing assignments resulted from reduced grass growth due to the particularly dry conditions that occurred during that season. Wet conditions that occurred periodically during 1995 through 1996 fostered increased grass growth but also caused the government to reduce mowing assignments at certain times due to potential rutting damage by Maggie's equipment. (Finding 7; tr. 2/417, 425-26, 3/450, 470; SR4, tab 88; ex. G-11)

29. In sum, we find that except for the 1995 mowing season (Option Year 3), which was an exceptionally dry period, the actual amount of mowing work performed by Maggie's was not significantly less than the contract estimates as bid by Maggie's.

C. Change to Grass Height in the Jake Areas

30. By memorandum from ACOR Wagner to Maggie's dated 17 June 1994, the government directed Maggie's until further notice to raise the height of the grass after mowing for all weekly areas to three inches from the two inches specified by ¶ C.6.4.1.3 (finding 7; SR4, tab 95). The government directive included the 17 weekly areas in which Maggie's TP indicated that it planned to use the Jake. The required after-mowing grass height for all weekly areas remained at three inches for the remainder of contract performance through the final 1996 mowing season, except when the government specifically directed mowing to a two inch height for special events (tr. 1/74-75, 119-20, 5/861-66; SR4, tab 95).

31. The government's action in raising the grass mowing height to three inches on a semi-permanent basis meant the grass had to grow to at least 4.5 inches before the government assigned areas for mowing. The government preferred cutting only one third of the length of a blade during mowing to avoid shock to the grass (tr. 1/119). The government's action in raising the height to three inches affected Maggie's planned use of the Jake for mowing the 17 weekly areas due to the Jake's reduced mowing efficiency at the higher grass heights, although the Jake could mow the grass at the higher heights by

adjustments to the cutting blades. However, at the higher grass heights the Jake would tear and hack the grass and roll the grass over rather than cutting it, which required re-mowing to get the grass to an acceptable condition. Mowing the higher grass also resulted in additional maintenance on the Jake. As a result of the government's action, Maggie's modified its method of mowing including diverting its large rotary mowers to the Jake areas from their planned use in other areas. Using the rotary mowers required additional time and personnel to mow assigned weekly areas and also left windrows of grass clippings that required additional time and labor to remove, and use of alternative mowing methods increased the mowing time and cost required. (Tr. 1/42-47, 70, 74-77, 80, 120, 2/349-51) Maggie's sought to sell the Jake since it became inefficient at the revised, higher three-inch grass height and Ms. Coryell requested the government's approval for doing so. The COR advised Ms. Coryell that if Maggie's sold the Jake, which was a reel mower, it would have to have available for mowing equivalent mowing equipment in accordance with the requirements of ¶ C.6.3.1.2. Paragraph C.6.3.1.2 provided that the TE 2a areas were of sufficient size to allow mowing with tractor-drawn whirl wind, reel or sickle bar mowing equipment and that the COR could specify the type of equipment to be used in any area. In addition, under the TP incorporated into the contract Maggie's expressly agreed it would have the Jake available. (Tr. 1/76-77, 121, 3/488-92, 4/718-19; R4, tabs 1 (TP at 4-7, 17), 64 at 3, 65 at 16; SR4, tab 93)

D. Contract Administration

32. Maggie's presented evidence that conflicts occurred between Ms. Coryell and government personnel, particularly COR Stoflet and ACOR Wagner. Ms. Coryell states that she complained about the government's inappropriate contract administration, including overly severe inspections, extra mowing without compensation, and inappropriately reduced mowing orders. (Tr.1/28-50; R4, tabs 50-51)

33. Maggie's Ms. Coryell complained to the CO about ACOR Wagner's administration of Maggie's contract and Ms. Wagner's overinspection of Maggie's mowing work in 1992 and 1993 (R4, tabs 50-51). Ms. Coryell testified that COR Williams corrected ACOR Wagner's administration during the 1992 mowing season after Maggie's brought this matter to his attention. Maggie's Ms. Coryell testified generally that after Roger Stoflet became COR at the beginning of the 1993 mowing season ACOR Wagner's regular inspections of Maggie's work every week became overly severe. Ms. Coryell testified that ACOR Wagner required Maggie's to correct areas that were not mowed properly such as, for example, when small areas of grass were not mowed or when Maggie's missed mowing around a tree. (Tr. 28-50, 54-55; R4, tabs 50-51) She complained in her testimony that ACOR Wagner each week issued reports of Maggie's deficiencies, which Ms. Coryell called "gig sheets," specifying the areas that Maggie's had mowed improperly and that at the end of some weeks Maggie's had accumulated a considerable number of these gig sheets. (Tr. 48-49) Ms. Coryell also testified that

"Ms. Wagner, at one point - - and at times, we were congenial. I don't mean to give the impression that it was a horrible battle with her" (tr. 78).

34. COR Williams testified that during his tenure as COR in 1992 when the circumstances warranted he required Maggie's to re-mow areas that Maggie's had not mowed properly. ACOR Wagner similarly testified that when the circumstances warranted she required Maggie's to re-mow areas that Maggie's had not mowed properly. (Tr. 2/271, 280, 5/823, 826) ACOR Wagner explained that Maggie's would allow the blades on its mowers to become dull and nicked. This condition caused the mowers to tear and pull the grass rather than cutting it cleanly (tr. 5/823-25). This left the grass with a rough, jagged and uneven appearance. When these circumstances occurred, ACOR Wagner required Maggie's to re-mow areas to the proper height and appearance. ACOR Wagner pointed out that she applied a general rule of thumb that if she found that after mowing an area had deficiencies amounting to 4% of the area, including deficiencies in the height of the grass, she would require Maggie's to re-mow the area (tr. 5/823, 860). In addition, ACOR Wagner explained that there is a weed called "pine cone grass" that grew relatively tall to a height of 7" to 12" in high visibility areas at EA. When these weeds grew in a Jake area, the Jake would push the weeds down without cutting them. The weeds would spring back up after the mower passed leaving an inappropriate, unattractive, uncut appearance. When tall weeds remained in an area after mowing, ACOR Wagner required Maggie's to re-mow the affected area with a rotary mower to cut them to an acceptable height under the contract. (Tr. 5/826)

35. We find that the inspections ACOR Wagner conducted were appropriate and that ACOR Wagner reasonably required Maggie's to re-mow areas when necessary to an acceptable height and appearance. We thus determine that Maggie's has not proved that ACOR conducted overly severe inspections. We also determine that Maggie's has not proved by a preponderance of evidence that in administering the contract ACOR Wagner acted inappropriately in her dealings with Maggie's personnel.

36. Maggie's also complained about the hostile attitude of government personnel toward Ms. Coryell in a meeting held to discuss her complaints about the government's contract administration she raised in an undated letter the government received on 22 July 1993 (R4, tab 50; tr. 1/62-63). Ms. Coryell stated that as a result of the accusatory nature of government personnel during the meeting she did not submit further written complaints to the government. Other than very general, testimonial assertions by Ms. Coryell, there is no credible evidence that government actions during the described meeting or in general during contract performance were inappropriate. Government personnel, including COR Stoflet, dealt with Maggie's with appropriate decorum and courtesy during the meeting in question. Government witnesses vouched for COR Stoflet's generally calm demeanor, courteous behavior and even-handed approach under all circumstances (tr. 2/271, 277-78, 280, 5/823, 826, 849, 882).

37. Maggie's has failed to prove by clear and convincing evidence that government officials acted inappropriately or in bad faith in the administration of Maggie's contract, if that is the thrust of Maggie's proof. Assuming, *arguendo*, that Maggie's allegations are valid (which we determine were unproven), Maggie's has failed to prove by a preponderance of the evidence that the circumstances of inappropriate or discourteous treatment toward Ms. Coryell or any other contractor employee about which it complains were the basis for the government's reducing its orders for mowing rather than the government's actual mowing requirements.

E. Modification of Mowing Areas

1. Trees

38. Ms. Coryell counted 639 new trees that the government planted during contract performance from 1993 through 1996 that Maggie's maintains affected its efficiency due to additional mowing and trimming around the trees. She did not identify the number or location of the trees planted in particular years or those trees planted that replaced trees existing at the time of contract. According to Maggie's, all the trees the government planted affected Maggie's work and increased its costs. (R4, tabs 56 attach. 1, 60; tr. 1/125-27, 2/352-53, 3/541)

39. The new trees the government planted affected Maggie's mowing efficiency in those areas where Maggie's had to mow around the trees at a slower pace using different, less efficient equipment than the large mowing equipment it used for mowing large, open, unobstructed areas. Maggie's modified its method to use a trim tractor and string trimmers to perform additional trimming around the new trees, although those planted in 1995 were at least 22 feet apart and would accommodate passage of any of Maggie's equipment. (R4, tabs 56 attach. 1, 60; SR4, tab 85; tr. 1/127, 2/395-96)

40. The government does not dispute that it planted 438 new trees in the contract mowing areas causing Maggie's to perform additional work at increased costs. However, it disagrees that it planted an additional 201 trees affecting Maggie's performance and increasing its costs. The government concedes that Maggie's was underpaid for the cost impact of the trees it planted. It provided the dates it planted the 438 new trees and a dollar allowance for Maggie's increased costs. (Gov't br. at 20, 28-29; tr. 2/395-96, 406-08, 3/541; R4, tabs 60 (first unnumbered attach.), 66; SR4, tab 85) The government calculated its offered adjustment based on the year and number of new trees planted that affected Maggie's performance by adding $.20 per tree to the unit prices for each time Maggie's mowed the affected areas. (R4, tabs 60, 64-66) Maggie's rejected the government's proposed resolution concerning the trees (tr. 2/406-08, 3/541). We find that the government planted 438 new trees that affected Maggie's performance and caused it increased costs. Maggie's failed to prove by a preponderance of credible evidence that the additional 201 trees the government planted affected its work and increased its costs.

2. Fences

41. The government installed new fences in various EA areas during contract performance. Ms. Coryell walked one side of the newly installed fencing and determined that the government installed 10,643 linear feet (l.f.) of new fencing. She doubled this quantity to 21,286 l.f., maintaining that Maggie's had to trim both sides of the fencing at an increase in costs for this more labor intensive work. Maggie's for safety reasons did not have to mow or trim on the inside of fences that cordoned off hazardous areas containing unexploded ordnance. (R4, tabs 60, 64-65; SR4, tab 84 at 1-2; tr. 2/401-06) Maggie's did not identify by credible evidence the years when the government installed the new fencing, where the government installed the new fencing, or account for the reduction in acres of the affected areas where the fencing barred access to one side of the fence.

42. The government agrees that it installed 3,341 l.f. of new fencing that required additional trimming and impacted Maggie's work, but only in mowing areas E6, E9, E19, E30 and E61a (R4, tabs 60, 64-65; *see* gov't br. at 16, 28, 30). The new fences barred personnel from security or hazardous areas; were moved from locations behind tree lines into Maggie's mowing areas reducing the acreage Maggie's had to mow; were installed in black topped areas, including gate areas on roads and in parking areas, that did not require mowing or replaced temporary fences that existed at the time of award with permanent fences. (R4, tabs 60, 65 at 34; SR4, tab 84; tr. 2/401-06) The government continued to pay Maggie's at the full contract unit prices each time it mowed the areas that had been reduced in acreage by the new fencing (tr. 1/128-30, 2/352-53, 406; R4, tabs 56 attach. 2, 64-65). The government determined that the new fencing increased Maggie's costs by $8,724 based on whether Maggie's had to mow or trim on both sides of the fence or whether the location of the fences had an impact on Maggie's performance. The government reduced the increased costs it calculated by $1,820 where the new fencing reduced the acreage Maggie's had to mow to arrive at a net impact cost to Maggie's of $6,904. (R4, tabs 60, 64-65) We are persuaded that the new fencing caused Maggie's harm by way of increased costs for 3,341 l.f. of new fencing the government concedes affected Maggie's performance and increased its costs.

43. In summary, we determine in this entitlement proceeding that the government changed the work when it planted 438 new trees and installed 3,341 l.f. of new fencing that modified Maggie's mowing areas, although the parties dispute the quantum impact (R4, tabs 60, 64-65).

3. Mowing Area Acreage Reductions

44. During the term of Maggie's contract, the government constructed new buildings in Maggie's mowing areas E24, E27, E32, E49a and E60. The construction sites and new structures reduced the overall acreage in the areas to be mown and caused

Maggie's to modify its mowing procedures. The government made no attempt to modify the contract's mowing requirements for the affected areas during construction or after completion of the new structures. Maggie's continued to mow and trim the modified areas, working around the construction sites and afterward at the completed structures. Maggie's received payment in full at the contract unit prices each time it mowed the affected areas, although the new structures reduced the overall acreage in the affected areas. (R4, tabs 60, 64-65, tr. 2/402-06)

45. Maggie's presented generalized evidence that construction of the new structures in mowing areas increased its costs. Although the construction and new structures reduced the overall mowing acreage in the affected areas, according to Maggie's, it had to reduce use of its more efficient, large mowers in the affected parts and increase its use of less efficient labor-intensive, smaller mowing and trimming equipment. Maggie's provided testimony that as a consequence of the government's action its costs increased. (Tr. 1/186)

46. The government affirmatively claimed a credit for Maggie's reduced mowing of 92.6 acres in various contract mowing areas due to construction of new buildings, installation of new fencing that barred mowing in hazardous areas, restriction of mowing in forested areas and bird nesting areas (environmental areas), and reduced mowing in improperly graded areas and areas containing rubble and debris (R4, tabs 60, 63, 65-66; tr. 2/402-06). The government provided calculations reflecting its analysis of Maggie's cost savings for the reduced mowing acreage for which the government affirmatively claims a credit. The government reduced its claim for a credit by the increased costs it calculated Maggie's incurred due to the new fencing the government installed. The government established the locations of the construction of the new structures and the environmental and hazardous area restrictions to mowing and provided calculations generally concerning how these restrictions to mowing reduced Maggie's mowing acreage and mowing costs. The government's evidence also indicated that in areas E15, E16B, E42A, and E54 the acreage Maggie's had to mow was reduced. These included areas that were not graded properly and areas containing rubble and debris that did not require mowing. (R4, tabs 60, 64-65) Maggie's in defense against the government claim provided generalized evidence amounting only to unsupported allegations that the new construction and modifications to its mowing areas increased its cost (tr. 1/186, 3/518-19). We find that the government proved by a preponderance of the evidence that the 92.6 acre reduction in the areas Maggie's had to mow decreased Maggie's mowing costs.

F. Areas Allegedly Mowed Without Reimbursement

47. In July 1992 and in September 1992, Dave Williams, the COR for the 1992 base year of the contract, admonished Maggie's for its poor paperwork and warned Maggie's to report in writing the work it completed in order to receive payment. He warned Maggie's not to perform work unless it received approval through mowing

assignments, as did the CO. (R4, tabs 52 at 2, 64 at 3, 65 at 27; SR4, tab 70) Both COR Williams and COR Stoflet testified that Maggie's was not ordered to perform work for which it was not paid, including extra mowing beyond the boundary of area E21, a weekly mowing area, into area E26, an area that required mowing only once a month (tr. 2/255-64; 3/454-57, 5/794, 858-59; exs. G-1, -2). Maggie's Ms. Coryell testified that based on government requests Maggie's on a regular basis mowed area E21 beyond its 50-feet boundary into area E26. Maggie's maintained that it performed unscheduled mowing for which it did not receive payment based on the government's verbal orders or written notes (R4, tabs 50-51, 53; tr. 1/51, 55-57, 5/969-74, 976-81). Maggie's did not provide any of the written notes it alleges directed it to perform extra work, although Ms. Coryell stated that Maggie's was not compensated for extra, unscheduled mowing the government ordered informally (tr. 5/969-74). Maggie's has not provided credible evidence detailing when or the locations where it provided extra work for which it was not paid. We find that Maggie's has not proved by a preponderance of credible evidence that it performed extra mowing for which it was not paid. We also find that Maggie's has failed to prove by a preponderance of evidence that it performed extra mowing of E21 into area E26. (Tr. 1/255-64, 276, 2/455-57; ex. G-2)

48. Maggie's also provided testimony that it performed work in some areas for which it received payment at the EX CLIN rate of $40 per acre initially but was only paid at the unit prices for the areas when it mowed them subsequently (tr. 1/55-56, 2/255-64, 3/455-57, 5/969-74). While Maggie's cleared additional areas in E26, E53, E61 and E62 as directed by the government during the 1992 base year, these areas were within the boundaries of scheduled areas for which Maggie's was responsible for mowing at the contract unit prices when ordered. The government made a one-time only payment to Maggie's initially at the beginning of contract performance under the EX CLIN rate to mow and clear these overgrown areas within the boundaries of some of the mowing areas to get them into a manageable condition. (Tr. 3/536-37) Thereafter, Maggie's was paid at the area unit prices for work there (tr. 2/255-64, 3/454-57; exs. G-1, -2).

G. Office Trailer

49. Maggie's office trailer remained at EA after performance of the instant contract for Maggie's use during performance of a subsequent contract in 1997 (tr. 1/91-97). The government asserted an affirmative claim under the captioned contract in the amount of $2,713.00 for having to dispose of this trailer left at the site after completion of that work. (R4, tab 66) However, the government states in relevant part: "To maintain this issue, the government must assert it under a different contract, for which the board has not exercised jurisdiction. . . ." and "[i]t was lawfully permitted to remain as Appellant performed the follow on contract" (gov't br. at 20, 34).

H. Maggie's and Government Claims

50. Under date of 15 December 1996, Maggie's submitted certified claims totaling $179,522 including claims for amounts due for additional work performed in areas E21, E53, E61 and E62 ($29,000), amounts due for new plantings and fences ($72,329), and termination costs relating to changes in mowing frequencies ($68,049). Although the claims were dated 15 December 1996, Maggie's did not submit them at that time. The CO received them by certified mail on 25 March 1997. (R4, tabs 53, 54)

51. On 22 April 1997, the CO wrote Maggie's that the government had completed its evaluation of the claims. The CO stated that there was insufficient information with respect to some claims, including those relating to unpaid work, new plantings and fences, and denied others, including the claim relating to mowing frequencies. The CO did not include a notice of appeal rights. (R4, tab 55)

52. On 15 October 1998, Maggie's submitted revised, certified claims totaling $618,266. Maggie's claimed that there was (A) a constructive change as a result of tree plantings and new fence lines, (B) a breach of contract as a result of the government's failure to pay for work, and (C) a partial termination as a result of a change in mowing frequencies in the option years. Maggie's calculated that it was entitled to $319,571 for loss of efficiency, $37,500 for loss of useful value of equipment and increased maintenance costs, $106,229 for reallocated overhead costs pursuant to paragraph (k) of the Termination for Convenience clause, $69,495 for profit, $26,533 for proposal preparation costs, and $58,939 for the failure to pay for work due including loss of the use of money. Maggie's stated that although it appeared the government had performed portions of the contract with its own forces, Maggie's was unable to quantify any damage as a result of that. Maggie's asserted that it was entitled to Contract Disputes Act interest dating back to the 15 December 1996 claims. The CO received the claims on 19 October 1998. (R4, tabs 56, 57; the individual claim items add up to $618,267 possibly due to rounding)

53. On 20 August 1999, the CO issued a COFD denying the claims in their entirety and asserting government claims for a total of $46,535. The CO determined that Maggie's was underpaid by $10,544 for trees and fences (thus implicitly acknowledging the validity of Maggie's claims to that extent) and overpaid by $54,366 for areas not mowed because of environmental or construction conditions. In addition, the CO claimed $2,713 for disposal of Maggie's office trailer. The COFD requested that Maggie's reimburse the government for the net amount of $46,535. (R4, tab 66) Maggie's filed a timely appeal from the COFD. The Board docketed the appeal as ASBCA No. 52462 insofar as it related to appellant's affirmative claims and ASBCA No. 52463 insofar as it related to the government's claims.

DECISION

I. Mowing Performance

The issues Maggie's raises, among others, concern partial termination for convenience, constructive change, and cardinal change based on the government's scheduling of less mowing than the DO estimates. Maggie's contends:

> the government has no obligation pursuant to a requirements contract to *issue* delivery orders equal to the government's estimated quantities. . . . However, *once issued*, a contract for the work encompassed by a delivery order is formed, and a subsequent reduction in the scope of the work ordered constitutes a partial termination . . . . [Emphasis in original, citations omitted]

(App. br. at 26) The government contends that the DO schedules of mowing frequencies were estimates and it ordered its weekly mowing requirements in accordance with the contract's weekly assignment procedure.

Maggie's argument overlooks that, with a few exceptions, Maggie's agreed through bilateral modifications to adjust the amounts in the DO estimates to equal the amounts Maggie's actually mowed (finding 26). In addition, both the Requirements clause and Ordering clause provided that their provisions were subject to limitations elsewhere in the contract (finding 3). Contract § C provided conditions that limited the Requirements and Ordering clauses where it stated that the government would order its mowing requirements, identified as estimated mowing frequencies in the monthly DOs, by the weekly assignment procedure (findings 7, 15). Under these circumstances, the monthly mowing frequencies estimated in the monthly DOs the government issued "were not an unconditional commitment by the Government, but subject to the weekly scheduling of requirements" pursuant to the assignment procedure of ¶¶ C.6.2.1.2, C.6.2.1.3. *International Maintenance Resources, Inc.*, ASBCA No. 50162, 02-2 BCA ¶ 31,878 at 157,494. Thus a constructive partial termination or a constructive change did not result when the government did not place orders for mowing equivalent to the DO estimates. *Id.* *See Earth Property Services, Inc.*, ASBCA No. 36764, 91-2 BCA ¶ 23,753 at 18,942 (not a partial termination for convenience or constructive change where government ordered less than DO amounts, which were labeled as estimates, contractor knew the DO amounts were estimates and participated in weekly assignment procedure without objection).

The government's weekly mowing orders in amounts less than the DO estimates, even if considered significant, did not constitute a constructive change. Maggie's assumed the risk that the government's considerable flexibility in ordering its mowing needs would be less than the DO estimates. The ". . . only limitation upon the government's ability to

vary its requirements under a requirements contract is that it must do so in good faith." *Technical Assistance International, Inc. v. United States,* 150 F.3d 1369, 1373 (Fed. Cir. 1998). *See Shader Contractors, Inc. v. United States,* 276 F.2d 1, 4 (Ct. Cl. 1960) (contractor assumed risk of a considerable, good faith variation in the requirements ordered). *See also Clearwater Forest Industries, Inc. v. United States,* 650 F.2d 233, 249 (Ct. Cl. 1981) (ordinarily no government liability in requirements contract where orders vary significantly from estimates). The government "will be presumed to have varied its requirements for valid business reasons, *i.e.,* to have acted in good faith, and will not be liable for the change in requirements" in the absence of a showing by the contractor that the government did not act in good faith by reducing its requirements solely to avoid its contract obligations. *Technical Assistance International v. United States,* 150 F.3d at 1373. Thus a change in operations by a contracting entity made independent of the contract that results in a reduction in requirements will not constitute a breach or a constructive change. *Id.* at 1374. *See Medart, Inc. v. Austin,* 967 F.2d 579, 581 (Fed. Cir. 1992) (". . . risks associated with variance between actual purchases and estimated quantities are allocated to the contractor."); *Empire Gas Corp. v. American Bakeries Co.,* 840 F.2d 1333, 1340-41 (7th Cir. 1988) (where a buyer reduces its requirements "the essential ingredient of good faith" is that it is not trying to get out of the contract based on second thoughts about the bargain's advantages and disadvantages). *East Bay Auto Supply, Inc.,* ASBCA No. 25542, 81-2 BCA ¶ 15,204 at 75,282 (government not liable for differences between estimates and orders absent bad faith); S*entinel Protective Services, Inc.,* ASBCA No. 23560, 81-2 BCA ¶ 15,194 at 75,239 (government not liable for unforeseen circumstances such as an act of God, a drought, causing reduced requirements).

We will not imply the government acted in bad faith. *See Contract Management, Inc.,* ASBCA No. 44885, 95-2 BCA ¶ 27,886 at 139,108 citing *DynCorp,* ASBCA No. 38862, 91-2 BCA ¶ 24,044, *aff'd,* 972 F.2d 1353 (Fed. Cir. 1992) (table). We assume that the government acts in good faith subject to the contractor overcoming this presumption by clear and convincing evidence. *Am-Pro Protective Agency, Inc. v. United States,* 281 F.3d 1234, 1239 (Fed. Cir. 2002).

Maggie's has neither alleged nor proved that the government's reduction in mowing orders occurred for other than good faith business reasons. Nothing in the government's actions indicates that it was trying to get out of this contract when it ordered less than its estimates. In this regard, it exercised the options extending the contract for four years. And it legitimately reduced orders for valid business reasons, including the dry and wet conditions experienced, changes in desired maintenance levels by tenant agencies and Maggie's failures to keep up with the work ordered (findings 18-19).

Maggie's also contends that the government's failure to order mowing substantially equivalent to monthly DO estimated amounts beginning in 1993 combined with its failure to follow Maggie's work plan and flow diagram in the incorporated TP in placing mowing orders constituted a constructive change (app. br. at 21, 33). Maggie's maintains that due

to the delay in the government's issuance of work orders in the early part of the mowing seasons, it could not achieve the mowing efficiency using the Jake on which it primarily based its bid due to the increased height of grass that resulted (app. reply br. at 2). We disagree with these contentions.

The government chose to incorporate into the contract Maggie's work plan as reflected in Maggie's TP. It could neither ignore nor sabotage Maggie's work plan by its actions in issuing work orders for mowing. *See F & F Laboratories, Inc.,* ASBCA No. 33007, 89-1 BCA ¶ 21,207 (government bound by an attachment to the contractor's offer).

Maggie's pointed out that COR Stoflet did not consider Maggie's TP in administering the contract in support of its argument that the government did not follow the TP in issuing work orders. However, Maggie's has not linked in any way its allegation concerning COR Stoflet's failure to consider Maggie's TP to any alleged inefficiency in its operations based on the government's orders for its mowing requirements. Nor has Maggie's shown specifically how it could not follow its work plan in utilizing its equipment to meet the government's orders for its mowing requirements that approached the contract estimated mowing frequencies as bid. (Finding 27) In this regard, COR Stoflet delegated to ACOR Wagner the principal responsibility for issuing orders to Maggie's for mowing at EA each week. ACOR Wagner was aware that the contract included the TP work plan, including the description of its planned equipment utilization, and took this into consideration in issuing work orders each week based on the government's requirements for mowing (finding 15). Maggie's thus has not proved that the COR Stoflet's action concerning the incorporated TP prevented Maggie's from following its work plan.

Maggie's also has failed to prove that the government postponed the issuance of mowing orders early in the mowing seasons in 1993 and 1994, or otherwise, from a point when the Jake could have been used efficiently to a point when it could not. The government ordered significant quantities of mowing at the beginning of each mowing season with sufficient repetitiveness that should have kept the Jake fully employed. (Findings 23-24) As well, while the work orders issued by the government reflected less mowing than the DO estimates for the option years, the mowing work ordered was not significantly less than the contract estimates, except for the 1995 mowing season. In that year, the government's requirements for mowing decreased because of the exceptionally dry weather, a risk that Maggie's assumed under this requirements contract. (Findings 27-29) *See Medart v. Austin,* 967 F.2d 579, 581 (Fed. Cir. 1992).

Maggie's next contends that the drastic difference between its work plan and its actual performance after the 1992 base year constituted a cardinal change. It maintains that although the fundamental mission of mowing grass remained the same the government's failure to order mowing substantially equivalent to the issued DO amounts caused extensive modifications to its work plan, including variations in the equipment

spread and mowing sequence. According to Maggie's, the government's action drastically altered the project, significantly reduced its revenue, and the changed work constituted an entirely different project.

Maggie's work plan consisted of a generalized description of how it would use its equipment and personnel to perform the work. Maggie's TP characterized its work plan as flexible and able to cope with weather impacts, acts of God, equipment and personnel problems, and anticipated adjustments based on government revisions to its varying mowing requirements (finding 12). Maggie's flow diagram generally indicated only that Maggie's would mow weekly areas both from the north and south at EA and the biweekly areas on the east and west sides of EA on an alternating weekly basis (finding 13). Under these circumstances, Maggie's has not shown how the government's reduced mowing orders prevented Maggie's from following its flexible work plan and flow diagram described in the TP, which anticipated variations in the government's mowing orders (finding 12). Nor has Maggie's proved the reduction caused it to incur highly increased costs. Its vague evidentiary assertions do not establish government liability for a profound contract change beyond the scope of the contract that constituted a cardinal change. Generalized assertions do not meet Maggie's required burden of proof. *The Swanson Group, Inc.,* ASBCA No. 47677, 96-2 BCA ¶ 28,565 at 142,604, *aff'd on recon.,* 97-1 BCA ¶ 28,684.

The government's orders of mowing requirements though less than the contract estimate did not constitute a change to the work so drastic or profound that it effectively required Maggie's to perform at highly increased costs duties materially different from those on which the parties originally based their bargain. *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1332 (Fed. Cir. 2003), *cert. denied,* 124 S. Ct. 2016 (2004); *Gassman Corp.,* ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 at 151,741 (a cardinal change is a drastic change to the work that requires performance of duties materially different than bargained for by the parties; one must ascertain whether the changed work is essentially the same contract work awarded). The duties Maggie's performed throughout the contract were not materially different from the contract work the parties agreed to at time of award, although the government did not order mowing at the levels Maggie's desired. A cardinal change did not occur.

Maggie's also contends that the government's failure to assign significant amounts of mowing work at the beginning of each mowing season increased its costs to mow the higher grass that resulted. It contends this constituted a partial termination for convenience of the work or a constructive change. Maggie's has not proved, however, that the reduced orders were for other than the government's reduced requirements (findings 23, 27).

II. Change in Mowing Height

Maggie's next contends that the government's 17 June 1994 increase in the mowing height from two inches to three inches constituted a constructive change and increased its costs due to the adjustments it had to make in its intended work plan and spread of equipment. Maggie's maintains that the higher grass height affected the planned use of its Jake in 17 of the EA mowing areas because the Jake would not mow the higher grass efficiently, and mowing the higher grass increased the Jake's maintenance costs. As a result, Maggie's changed its equipment spread and used a rotary mower, requiring additional time, personnel and costs for mowing and for personnel to pick up the windrows left by the rotary mower. The government insists that ¶ C.6.4.1.3. provided it with the unrestricted right to increase the mowing height to three inches without cost.

Contract ¶ C.6.4.1.3. provided that the "[m]owing height shall be two inches unless specified otherwise." It provided that the COR may require changes increasing or decreasing the height without cost to the government "during certain seasons and under certain conditions." (Finding 7) The contract does not define the meaning of "during certain seasons and under certain conditions."

Although ¶ C.6.4.1.3 provided the government with the necessary flexibility to modify the mowing height to meet the effects of seasonal weather patterns on grass growth and ground conditions, this provision contemplated only a temporary modification in mowing height based on varying seasonal conditions. It reasonably inferred that the government would revert to the contract specified two-inch mowing height once the seasonal variation ceased. However, the three-inch mowing height effectively became the contract requirement and the two-inch mowing height became the exception the government would assign on a specially needed basis. When the government on 17 June 1994 altered the established mowing parameters by changing the mowing height to three inches on a semi-permanent basis, it went beyond the temporary nature of ¶ C.6.4.1.3 and constructively changed the contract, entitling Maggie's to an equitable adjustment to the extent of its increased costs. The government's action in effect eliminated Maggie's use of the Jake and increased Maggie's costs due to the changes it had to make in its equipment spread, personnel requirements, and scheduling.

III. Contract Administration

Maggie's also has failed to prove its contentions of "high-handed and arbitrary conduct of COR Stoflet" (app. br. at 29) or other alleged government improprieties (findings 35, 37). Even assuming such assertions to be true, which Maggie's has not proved, Maggie's has not proved by a preponderance of the evidence that the government's reduced mowing orders were based on such alleged government improprieties or that they were for other than good faith, valid business reasons of reduced

mowing requirements. We deny Maggie's appeal to the extent it is based on alleged government improprieties by government personnel.

IV. Modifications to Mowing Areas

A. Trees

Maggie's contends that the government planted 639 trees planted in its mowing area during performance that amounted to a constructive change. The government agrees that it planted 438 trees at EA in some of Maggie's mowing areas that constituted a change causing Maggie's to incur increased costs (gov't. br. at 28). Although the government and Maggie's dispute the quantum of these additional costs, we now decide only entitlement. Accordingly, the 438 new trees planted were not contemplated by the contract and constituted a change to the work that entitles Maggie's to an equitable adjustment. We deny that portion of Maggie's claim based on the additional 201 trees planted because it failed to prove liability, causation or injury as to these. *Cosmo Construction Co. v. United States*, 451 F.2d 602, 605-06 (Ct. Cl. 1971).

B. Fences

Maggie's contends that the government erected 10,643 l.f. of new fencing during performance that affected its work and increased its costs. The government denies that it erected new fencing to the extent that Maggie's alleges affected the work but concedes it erected 3,341 l.f. of fencing that affected Maggie's work and increased its costs (gov't br. at 28). The government established the years in which it erected new fencing. It proved that it erected new fencing in areas where Maggie's did not have to mow or replaced existing fencing that Maggie's was responsible for mowing around at the time of award. There were other areas where the government erected new fencing that decreased Maggie's mowing requirements because they barred Maggie's access to areas that Maggie's had to mow prior to installation of the fences. (Findings 42, 46) Maggie's failed in its obligation to prove by a preponderance of the evidence that the government's erection of new fencing caused it damage beyond the 3,341 l.f. of fencing the government concedes affected Maggie's work (finding 42). *Cosmo Construction Co. v. United States,* 451 F.2d at 605-06.

C. Mowing Area Acreage Reductions

Both during and after construction of new structures in Maggie's mowing areas, the government continued to assign these areas for mowing. Maggie's mowed and trimmed the affected areas to the extent possible and received full payment at the contract unit prices. The government asserts an affirmative claim that it is entitled to reimbursement for overpayment to Maggie's where the construction of new structures reduced the amount of acreage Maggie's had to mow. The government also claims reimbursement for areas

where new fencing barred Maggie's from mowing in hazardous areas and environmental and other restrictions to mowing reduced the acreage Maggie's had to mow and its costs.

Maggie's maintains in defense that mowing around construction, the new structures and the new fences required it to change its method and manner of mowing and increased its costs. Maggie's also contends that the government is not entitled to a credit for reductions in the amount of mowing Maggie's performed in areas where the government constructed new buildings. It maintains that ¶ 6.2.1.1provided that "[p]ayment will be based on an area basis and not on an acreage basis" (app. br. at 30). Maggie's argues that the contract required payment at the agreed contract unit prices for the affected areas before and after construction of new buildings (app. reply br. at 13). Maggie's does not address the government's claim for a credit for the reduced amount of mowing Maggie's performed due to restrictions limiting mowing in environmental, hazardous and other areas.

We apply the principle that the contract must be read as a whole. We interpret the provisions of this contract so as to give reasonable meaning to all parts of the agreement and to avoid an interpretation that renders parts meaningless, superfluous or creates internal conflicts within the contract's provisions. *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965).

As Maggie's contends, ¶ 6.2.1.1 provided that Maggie's would be paid on an area basis and not on the basis of the acres assigned to the various mowing areas. We agree that the plain meaning of the parties' agreement as to this portion of ¶ 6.2.1.1 was that when Maggie's mowed an area in its entirety it would be paid on the basis of the price Maggie's bid for the area even though the area if measured might contain more or less acreage than the acreage for each area represented by § B of the contract, at least if the acreage was approximately correct.

However, Maggie's argument completely ignores the remaining and related provisions of ¶ 6.2.1.1. These provisions expressed the parties' intent that an adjustment to Maggie's payment would be made if the government increased or decreased the size of an area thus changing the amount of mowing Maggie's had to perform. Considered on this basis and reading ¶ 6.2.1.1 in its entirety in conjunction with the Changes clause, we determine that the 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 (finding 46). The government in this entitlement proceeding proved that construction of new structures, installation of new fences and restrictions to mowing in environmental areas, hazardous areas and other mowing areas reduced the acreage Maggie's had to mow and generally reduced its costs in those areas affected. *See GAP Instrument Corporation*, ASBCA No. 51658, 01-1 BCA ¶ 31,358 at 154,867 (damage

incurred must be real and not academic). We determine on this basis that the government is entitled to a credit, the amount of which must be determined as part of quantum.

V. Areas Allegedly Mowed Without Reimbursement

Maggie's contends that in the contract's 1992 base year it mowed and received extra compensation under the EX CLIN of $40 per acre for mowing of areas within E26, E53, E61 and E62 that the government periodically allowed to become overgrown. It seeks compensation for mowing these same areas in the option years, although they were within the boundaries of areas it mowed and for which it received payment at the contract unit prices. Maggie's also seeks additional compensation for alleged extra mowing in other unidentified areas based on government directives given by notes and verbal orders. The government maintains that Maggie's has not provided evidence of the extra work claimed.

Maggie's has not persuaded us by credible evidence or legal authority that it is entitled to additional compensation for mowing previously cleared areas included within the boundaries of designated mowing areas for which it received payment for mowing at the contract unit prices. It did not prove that it expanded its mowing of area E21 into area E26 at the government's direction each time it mowed area E21. Maggie's provided only generalized evidence at trial that it mowed additional areas within or adjacent to E53, E61 and E62 at the government's request without compensation. It did not prove by a preponderance of evidence the extent it allegedly mowed areas without compensation, the dates or number of times it mowed these areas or their location. (Findings 47-48) Maggie's testimony that the government ordered extra work verbally and with written notes, which were not produced, amounts to unsupported allegations on which we may not rely to determine government liability for the alleged extra mowing work. *Grady & Grady, Inc.*, ASBCA No. 48629, 96-1 BCA ¶ 28,025 at 139,917 ("Unsupported allegations do not constitute proof or evidence.")

VI. Office Trailer

The government concedes that it is not entitled reimbursement under the captioned contract for the cost to remove Maggie's office trailer from EA (gov't br. at 34).

CONCLUSION

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 1.f. of new fences installed. We dismiss ASBCA No. 52463 as to the removal of Maggie's office trailer from EA for lack of jurisdiction. The appeals are otherwise denied. The appeals are remanded to the parties to negotiate quantum consistent with this decision.

Dated: 2 June 2004

EDWARD G. KETCHEN
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 Nos. 52462, 52463, Appeals of Maggie's Landscaping, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals