GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

C&D TREE SERVICE, INC.	)	
	)	CAB No. D-1347
	)	
Under Contract No. 02-0014-AA-2-0-KA	)	

For the Appellant, C&D Tree Service, Inc.: Richard L. Morehouse, Esq., Greenberg Traurig, LLP. For the District of Columbia: Darnell E. Ingram, Esq., Office of the Attorney General.

Opinion by Administrative Judge Monica C. Parchment with Chief Administrative Judge Marc D. Loud, Sr. concurring.

OPINION

Filing ID #53566428

This appeal arises from the Appellant's request for an equitable adjustment under its contract for tree trimming services with the District of Columbia. During the course of contract performance, the District changed the way that it ordered tree trimming services from block-by-block orders to tree-by-tree orders, which the Appellant contends was a constructive change to the contract entitling it to an equitable adjustment in the contract price. For the reasons stated herein, the Board holds that the Appellant is not entitled to an equitable adjustment for a constructive change, and the appeal is denied.

FINDINGS OF FACT

1. The Appellant, C&D Tree Service, Inc. ("C&D"), and the District of Columbia Department of Public Works entered into Contract No. 02-0014-AA-2-0-KA on May 15, 2002. (Appeal File ("AF") Ex. A.) The contract was for tree trimming services at various sites throughout the District of Columbia. (AF Ex. A ¶ B).

2. The original solicitation sought up to four separate contracts to trim trees of all sizes in four award groups: District Wards 1 and 2 constituted the first award group; Wards 3 and 4, the second; Wards 5 and 6, the third; and Wards 7 and 8, the fourth. (*Id.* ¶ I.9; Undisputed Material Facts[1] ("UMF") ¶ 3.) Appellant's bid prices were the lowest on all four award groups, resulting in the award to Appellant of a single contract for all four segments. (UMF ¶ 4.)

3. The contract was an indefinite delivery/indefinite quantity ("IDIQ") contract for tree trimming services, with fixed unit prices based on the size of the trees trimmed. (AF Ex. A ¶¶ B.1.1, F.1; UMF ¶ 2.) The contractor was required to furnish the specified trimming services to the District, "when and if ordered," and the District would order a minimum of $10,000.00 worth of services.[2] (AF Ex. A ¶ B.1.2.)

[1] See section D of the Joint Pretrial Statement, pages 5-7.

[2] Based on the solicitation's expectation that multiple contracts would be awarded based on four Ward groups, the Appellant interpreted the contract to require the District to order a minimum of $40,000.00 in tree trimming services. (Hr'g Tr. vol. 2, 167:7-14, 213:4-214:7, May 30, 2012.) In either case, the parties have stipulated that the contract's minimum order was $40,000.00. (*See, e.g.*, Joint Pretrial Statement 1; UMF ¶ 14.)

4. The contract's period of performance was one year from the date of award. (AF Ex. A ¶ F.2.1.) The contract also allowed the District to extend the term of this contract by exercising up to four one-year option periods with the total contract duration not to exceed five years. (AF Ex. A ¶ F.2.) Thus, the last option year terminated on May 15, 2007. (Hr'g Tr. vol. 1, 97:17-19, May 29, 2012.)

5. The parties agree that the contract did not "dictate the manner in which the District was required to assign tree trimming work to Appellant." (UMF ¶ 6.) Under paragraph B.1.2 of the contract, delivery or performance was to be made "only as authorized by orders issued in accordance with the Ordering Clause."[3] (AF Ex. A ¶ B.1.2.)

6. Further, as it relates to the Appellant's contract performance, paragraph B.1.3 of the contract states, "[t]here is no limit on the number of orders that may be issued. The District Government may issue orders requiring tree trimming services to multiple destinations or performance at multiple locations." (AF Ex. A ¶ B.1.3.) Paragraph C.1.1 further states that the "contractor shall furnish all labor, material, and equipment necessary to trim street line trees located at various sites in the District. The location of the trees will be issued when the contract is awarded." (*Id.* ¶ C.1.1.)

7. Addendum No. 3 to the solicitation, incorporated into the contract, consists of responses to the questions raised by the bidders during the procurement process. (AF Ex. A, Addendum #3.) In its responses to Questions Nos. 5 and 6, the District reserved the right to issue, on rare occasion, emergency work orders that would require that tree trimming services be performed by the contractor within 48 hours. (*Id.*) It also specified that the Appellant must provide at least two tree trimming crews on a daily basis. (*Id.*)

C&D's Predecessor Contract Before November 2006

8. The Appellant claims that, in compiling its bid for the disputed contract, it relied upon the District's prior ordering practices under C&D's earlier tree trimming contracts, where the District used a block-by-block ordering process. (Hr'g Tr. vol. 1, 67:10-19.) In this regard, the Appellant testified that it relied upon the historical labor, equipment, and overhead costs under the District's prior ordering method in calculating its cost per tree when it bid for the current contract. (Hr'g Tr. vol. 1, 67:15-19.)

9. The Appellant contends that the District had ordered tree trimming services from the Appellant on a block-by-block basis since at least 1989.[4] (Hr'g Tr. vol. 1, 53:20-54:8, 67:13-69:3.) To support this contention, the Appellant introduced its 1997[5] tree trimming contract with the District (Contract No. OMS-5160-AA-DB, dated March 4, 1997).[6] (*See* Appellant's Hr'g Ex. 1B.) Although, the 1997 contract was a requirements contract, rather than an IDIQ (*id.* at

[3] The Board finds, however, that although paragraph B.1.2 references an ordering clause, the contract does not appear to contain a *per se* "Ordering Clause."
[4] The Appellant had filled tree-trimming orders under the District's predecessor contracts as both a prime contractor and a subcontractor. (Hr'g Tr. vol. 1, 53:20-54:3.)
[5] The 1997 contract was solicited on December 18, 1996, and is consequently referred to as the "1996 contract" in the record. (*See* Appellant's Hr'g Ex. 1B at 1.)
[6] Only pages 1, 7, and 13 of the 1997 contract were admitted into evidence. (Hr'g Tr. vol. 2, 192:7-8, 326:18-19)

13), it included a clause identical to paragraph C.1.1 of the current contract (*id.* at 7).[7] The Appellant's CEO, Scott F. Nelson, testified that prior to the disputed contract, the District had never ordered the Appellant to trim trees on a tree-by-tree basis as its standard practice. (Hr'g Tr. vol. 1, 69:9-71:10.) He also testified that individual tree ordering was "very rare" prior to November 2006. (Hr'g Tr. vol. 1, 69:18-72:16.)

10. Under the 1997 contract, the District's standard way of issuing work orders was the "block-by-block" method, under which it assigned tree trimming work by identifying city blocks where multiple trees required trimming. (UMF ¶ 7.) The Appellant's CEO testified that after a District employee identified streets that required tree trimming, the District would then issue work orders to C&D to trim all the trees on a designated block. (Hr'g Tr. vol. 1, 58:6-59:4.) Nelson also testified that C&D's own arborists would sometimes "identify subject streets that were in need of tree care." (Hr'g Tr. vol. 1, 58:6-9.)

11. The Contracting Officer's Technical Representative ("COTR") for the disputed contract, John P. Thomas, testified that under the block-by-block ordering method District employees would "comb the city" to identify trees that needed trimming. (Hr'g Tr. vol. 3, 576:4-578:18, May 31, 2012.) When the District's field inspectors identified trees that required trimming, they took the information down on hand-written lists, which would later be transferred to Excel spreadsheets back at their offices. (Hr'g Tr. vol. 3, 582:14-20.) The District would identify trees according to its old MISTRE electronic inventory system, which assigned a unique 16-digit identifier to each tree, helping to identify its location within the District. (Hr'g Tr. vol. 1, 60:11-61:10; Hr'g Tr. vol. 3, 578:19-579:19.)

12. After the District determined which block(s) contained trees that required trimming, the Appellant would post "no parking" signs on the block designated for tree trimming work approximately 72 hours prior to working on that block. (Hr'g Tr. vol. 1, 58:12-16.) Using teams that consisted of a six person crew, two aerial lifts, and a chipper truck, the Appellant would perform tree trimming work up one side of the designated block and then back down the other side of the same block. (Hr'g Tr. vol. 1, 58:16-59:4.)

The District's Work Ordering Method After November 2006

13. During the last option year of the contract which is the subject of this appeal, around November of 2006, the District changed the way in which it ordered tree trimming work from C&D.[8] (UMF ¶ 7.) Instead of directing the Appellant to trim all (or most) trees on a city block, the District started directing the Appellant to trim specific, individual trees throughout the city. (UMF ¶ 7.)

[7] *See supra* Finding 6.

[8] Previously, around November 2005, the disputed contract ran out of funding and the District made the decision to competitively solicit a new contract for these same tree trimming requirements that had been performed by the Appellant. (Hr'g Tr. vol. 1, 72:17-75:1.) The Appellant subsequently protested this solicitation and corrective action was taken by the District to reinstate the second half of the 4th contract option year and the 5th option year of the Appellant's 2002 contract. (Hr'g Tr. vol. 1, 75:3-9.) During the course of these events, the Appellant provided no tree trimming services to the District until the District began ordering from the Appellant under the contract again in November 2006. (Hr'g Tr. vol. 1, 72:11-16.)

14. This change in the way the District ordered tree trimming services from the Appellant coincided with the city's implementation of the "City Works" program. (Hr'g Tr. vol. 3, 581:18-582:10.) The COTR, however, testified that, while the City Works program was not fully implemented until November 2006, this software had actually been procured by the District a few years earlier. (Hr'g Tr. vol. 3, 582:1-8.)

15. The City Works program allowed the District to manage its workload and tree inventory more efficiently by allowing the District to input various data into a searchable format and create work orders from these data sets. (Hr'g Tr. vol. 1, 77:2-8; Hr'g Tr. vol. 3, 582:13-583:21.) Because the City Works program was connected to the Mayor's call center,[9] citizen complaints began to drive more of C&D's assignments to prune certain trees in the District. (Hr'g Tr. vol. 3, 582:21-583:6, 588:20-589:4.) However, the COTR testified that, even after the City Works implementation, the District did not solely rely on citizen complaints to determine which trees to trim. Field inspectors from the District, who were now equipped with tablet computers running City Works, continued to independently select trees for trimming services by the Appellant including, for example, varying species of trees that were required to be trimmed at certain seasonal timeframes across the city. (Hr'g Tr. vol. 3, 585:7-588:18, 604:7-609:4; *see also id.* at 575:15-578:18.)

16. The written record in this case also reflects that after the District began to order tree trimming services on an individual tree basis under City Works, the District would still periodically order tree trimming services for multiple trees on a city block. (*See* Dist. Hr'g Ex. 7 at 1762-67, 1776-78, 1783-84; *see also* Hr'g Tr. vol. 2, 267:10-12, 282:3-20, May 30, 2012.)

17. The Appellant testified that the cost of performance when orders were made on a tree-by-tree basis was significantly greater than it had been under the block-by-block ordering system. (Hr'g Tr. vol. 1, 66:8-16.) According to the Appellant, productivity decreased because workers had to move far more often, and the condition of trees assigned to the Appellant for individual trimming were "the worst of the worst." (Hr'g Tr. vol. 1, 66:21-67:9, 116:2-117:1, 136:15-20.) The Appellant claims that it suffered increased labor and fuel costs, higher dumping fees, and increased costs of performance due to the poor condition of the assigned trees. (Hr'g Tr. vol. 1, 113:16-117:4.)

18. Both Nelson and the COTR testified, however, that while the District would periodically prioritize certain tree assignments as requiring the most immediate attention, the Appellant largely had discretion to prioritize the manner and order in which it completed its tree trimming tasks. (Hr'g Tr. vol. 2, 293:4-17; Hr'g Tr. vol. 3, 592:4-20.) This, in turn, allowed the Appellant to coordinate trimming any number of trees within the same part of the city to improve its efficiency. (Hr'g Tr. vol. 2, 293:22-294:3.)

19. The parties do not dispute that in the course of the contract the District issued orders for at least $40,000.00 worth of tree trimming work from Appellant, and thus ordered the minimum quantity expressly required under the contract. (UMF ¶ 14; Hr'g Tr. vol. 2, 214:1-9.)

[9] The Mayor's call center allows District residents to directly contact the city government to request that varying services be performed by District agencies. (Hr'g Tr. vol. 3, 582:21-583:3, 601:18-602:3.)

Contract Extension and Proposed Price Adjustment

20. On May 7, 2007, the Contracting Officer's assistant, Kathy Hatcher, emailed the Appellant to schedule a meeting to discuss a possible 6 month extension to the contract, as well as issues related to a separate tree removal contract that was also being performed by the Appellant. (Appellant's Hr'g Ex. 1 at 19.) The disputed contract was set to expire in May 2007 at the time the parties were arranging to conduct this meeting. (Hr'g Tr. vol. 2, 227:11-228:18.)

21. On or about May 11, 2007, the Appellant met with District contracting officials, including Contracting Officer ("CO") Jerry Carter, COTR Thomas, and Hatcher. (Hr'g Tr. vol. 1, 93:18-19; Hr'g Tr. vol. 3, 547:2-6, 592:21–593:6; UMF ¶ 8.) At the meeting, in addition to discussing its separate tree removal contract, the Appellant's CEO hand-delivered a letter to the CO dated May 9, 2007, which claimed that the Appellant had suffered damages associated with the District's shift from block-by-block orders to tree-by-tree orders under its tree trimming contract. (Appellant's Hr'g Ex. 1 at 23-25; Hr'g Tr. vol. 1, 93:12-19.) The letter stated that more work was required to trim trees under the individual tree ordering approach due to the poor condition of the trees selected for individual trimming and complained of the decrease in the amount of the trees trimmed. (Appellant's Hr'g Ex. 1 at 25.) The letter therefore requested a return to the block-by-block approach by the District or an equitable price adjustment under the contract. (*Id.*)

22. At the meeting the CO agreed to extend the disputed contract by a period of 6 months beyond its original expiration date of May 2007. (Hr'g Tr. vol. 1, 98:1-9.) The CO also agreed to consider an adjustment to the pricing under the contract. (Hr'g Tr. vol. 3, 434:13-435:13; 552:8-15.) The CO and the COTR, however, testified that the District did not agree at the May 11, 2007, meeting that the District would definitively alter the contract pricing for the 6 month extension period or grant an equitable adjustment to the contract. (Hr'g Tr. vol. 3, 437:2-14, 594:2-22.) Following this meeting, the CO directed the COTR to undertake the necessary administrative work to prepare for the funding of the Appellant's contract for an additional 6 month period. (Hr'g Tr. vol. 3, 595:4-17.)

23. Following the foregoing meeting,[10] the CO issued a unilateral modification to the contract that extended the term by six months, through November 14, 2007, expressly at no additional cost.[11] (Appellant's Hr'g Ex. 1 at 27.) Hatcher admitted that she independently assumed that the District would negotiate new prices with the Appellant in connection with the 6 month extension period and informed the Appellant that the District would issue a bilateral modification in the future reflecting negotiated pricing for this extension period.[12] (*See id.* at 26; Hr'g Tr. vol. 3, 552:19-22.) No evidence was presented at the hearing which established that the

[10] While the modification itself is dated May 10, 2007, it was forwarded to C&D on May 11, 2007. (*See* Appellant's Hr'g Ex. 1 at 26.)

[11] Although the modification extending the contract term was unilaterally executed by the District, the Appellant still signed and returned the modification document to the District on May 14, 2007. (*Id.* at 28; Hr'g Tr. vol. 1, 99:19-100:2.)

[12] CO Carter testified that he had not seen Hatcher's email prior to testifying. (Hr'g Tr. vol. 3, 427:16-428:7.) His testimony further reveals that Hatcher took the lead in administering the contract and could subsequently make recommendations to him on contract pricing matters. (*See, e.g.*, Hr'g Tr. vol. 3, 439:4-21; 447:19-449:9; 488:2-489:4.)

CO directed Hatcher to engage in these price discussions, or knew that these discussions were taking place.

24. Following the District's issuance of the 6 month contract extension, on September 4, 2007, the Appellant submitted new proposed unit prices to Hatcher to be applied in this extension period.[13] (Appellant's Hr'g Ex. 1 at 31-32.) The Appellant's new proposed unit pricing for the extension period included an additional $150.00 fee per tree. (Hr'g Tr. vol. 1, 105:14-17.) The District, however, never formally responded to, or accepted, this proposed pricing. (Hr'g Tr. vol. 1, 118:12-15.) On December 27, 2007, the Appellant sent an additional letter to CO Carter requesting a response to its proposed price adjustment to the contract during the extension period to which the CO never replied.[14] (Appellant's Hr'g Ex. 1 at 35-36; Hr'g Tr. vol. 1, 120:3-19.)

The Appellant's Request for Equitable Adjustment

25. The Appellant subsequently submitted a Request for Equitable Adjustment ("REA") to CO Carter in the amount $613,500.00 as damages for an alleged constructive change resulting from the District's shift from ordering tree trimming service on a block-by-block basis to an individual tree-by-tree system on April 29, 2008. (Appellant's Hr'g Ex. 1 at 6–14; UMF ¶ 11.)

26. In calculating its damages in the REA, the Appellant began by determining the monthly average revenue generated under the previous block-by-block ordering method. (Appellant's Hr'g Ex. 1 at 10.) After making various adjustments in this calculation,[15] the Appellant determined that there was a "net underage of payment" in the amount of $444,538.33 for the extension period.[16] (*Id.*) The Appellant then added a 30% mark-up for costs unrelated to the change to individual tree ordering, which included increased fuel and labor costs and increased dump fees. (*Id.*; Hr'g Tr. vol. 1, 133:16-134:15.) The Appellant then added another 10% mark-up to reflect the poor condition of the trees. (Appellant's Hr'g Ex. 1 at 10.) Altogether, the Appellant determined that it was entitled to an additional $635,688.82 in additional compensation. (*Id.*) The Appellant, however, only requested an equitable adjustment in the amount of $613,500.00 consistent with the $150.00 per tree price increase in its September 4, 2007, request to the District for an increase in unit pricing under the contract. (*Id.*; Hr'g Tr. vol. 1, 137:8-138:21.)

27. CO Carter denied the Appellant's REA in a May 8, 2008, Contracting Officer's Final Decision. (AF Ex. D.1; UMF ¶ 12.) The CO determined that no constructive change had occurred because the contract specifications did not dictate the manner in which the District

[13] The Appellant testified at the hearing that it was its understanding that the District was planning to renegotiate unit prices with the Appellant for this extension period. (Hr'g Tr. vol. 1, 98:1-9.)

[14] The District did not respond to this and subsequent inquiries regarding the price adjustment requested by the Appellant. (Hr'g Tr. vol. 1, 120:20-123:22.)

[15] The Appellant made adjustments to reflect the increased size of the trees and a 30 percent decrease in costs related to a change in C&D's operations. (Hr'g Tr. vol. 1, 129:3-132:15.)

[16] In calculating the REA, the Appellant used 10 months as the extension period. (Hr'g Tr. vol. 2, 245:12-17; Appellant's Hr'g Ex. 1 at 10.) In its complaint, the Appellant states that the amount claimed in the REA is based on work that was performed "during the six-month extension period." (Compl. ¶ 22.) Similarly, the parties stipulated that the period in dispute is "the six-month extension period." (UMF ¶ 9.) (Appellant's Post Hr'g Br. 27.) Addressing this discrepancy, Nelson testified that he used 10 months because the District continued to order work under the contract though no formal extension was issued. (Hr'g Tr. vol. 1, 127:4-11.)

would order tree trimming work to be performed on either an individual tree basis or a block-by-block basis. (AF Ex. D.1 at 4.) The CO further determined that the Appellant had failed to adequately support its claim with cost and price data. (*Id.* at 4-5.)

28. The Appellant filed its Notice of Appeal with the Board on July 16, 2008, which appealed the CO's May 8, 2008, final decision denying its REA. The Board conducted a four-day hearing on the merits in this matter from May 29, 2012 through May 31, 2012, and on June 22, 2012.

Contentions of the Parties

29. The Appellant claims entitlement to an equitable adjustment because the District allegedly constructively changed the contract when it shifted from ordering on a block-by-block basis to a tree-by-tree basis based upon the manner in which the District historically ordered tree trimming services from the Appellant. (Appellant's Post Hr'g Br. 15-18.)

30. The Appellant, therefore, asserts that it is entitled to recover an equitable adjustment in the amount of $613,500.00 because of the District's alleged constructive change to the contract when it switched from ordering tree trimming services on a block-by-block basis to a tree-by-tree basis. (Appellant's Post Hr'g Br. 21-23.) Alternatively, the Appellant claims $387,548.00 based on the report of its expert, Ernest Agresto.[17] (*Id.* at 23-26.) In arriving at his damages figure, Agresto first determined the Appellant's lost revenue during the extension period by essentially comparing the monthly average revenue before the change in ordering methodology and then separately during the extension period.[18] (Hr'g Tr. vol. 4, 664:19-668:18, June 22, 2013; Appellant's Hr'g Ex. 3 at 9.) Agresto's analysis also incorporated an assessment of additional labor and other fixed costs allocable to the contract based upon revenue amounts in ultimately determining that the Appellant was owed an additional $352,316.00. (Appellant's Hr'g Ex. 3 at 6-11; Hr'g Tr. vol. 4, 667:3-687:13.) Lastly, Agresto added a 10% mark-up for profit to arrive at the $387,548.00 figure. (Appellant's Hr'g Ex. 3 at 6.)

31. The District denies the Appellant's right to any additional compensation under the contract. The District maintains that its obligation under this IDIQ contract, which it satisfied, was to order the contract minimum of $40,000.00 in services from the Appellant. (Dist. Post Hr'g Br. 17-18.)

32. Further, the District also argues that its shift in the manner in which it ordered tree trimming services—from block-by-block to tree-by-tree—did not constitute a constructive change to the contract because the contract is silent as to the manner in which the District would order tree trimming services. (*Id.* at 19-20.) The District further contends that the contract itself prohibits constructive changes because changes were required to be in writing and signed by the

[17] Agresto testified that his calculations were limited to considering C&D's accounting data and that he did not consider technical issues that would be outside his accounting expertise. (Hr'g Tr. vol. 4, 652:4-16, June 22, 2013.) Agresto also testified that this limitation on accounting data led to differences from the REA's damages calculation because Nelson was able to use his technical expertise and rely on more contract specific data. (Hr'g Tr. vol. 4, 696:19-698:17.)

[18] Agresto also used a 10 month extension period in his calculations. (Appellant's Hr'g Ex. 3 at 9.)

CO. (*Id.* at 20.) The District also maintains that the Appellant has provided no data to support its claimed damages.[19] (Dist. Post Hr'g Br. 22-24, 28-30.)

DISCUSSION

We exercise jurisdiction over this matter pursuant to D.C. Code § 2-360.03(a)(2) (2011).[20]

The central issue in this case is whether the District constructively changed the contract when it began ordering tree trimming on a tree-by-tree basis thereby entitling the Appellant to an equitable adjustment under the contract. Equitable adjustments are corrective measures to make a contractor whole when the government modifies a contract. *Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007) (citing *Ets-Hokin Corp. v. United States*, 420 F.2d 716, 720 (Ct. Cl. 1970)). An equitable adjustment is due under both formal changes and constructive changes. *District of Columbia v. Org. for Envtl. Growth, Inc.*, 700 A.2d 185, 203 (D.C. 1997), *on remand*, CAB No. D-850, 49 D.C. Reg. 3353 (Apr. 13, 2001), *rev'd on other grounds sub nom. Abadie v. Org. for Envtl. Growth, Inc.*, 806 A.2d 1225 (D.C. 2002); *see also Aydin Corp. v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995) ("Where [the Government] requires a constructive change in a contract, the Government must fairly compensate the contractor for the costs of the change.").

"A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order, either by an informal change order or due to the fault of the government." *Weigel Hochdrucktechnik GmbH & Co. KG*, ASBCA No. 57207, 12-1 BCA ¶ 34,975 at *4 (Mar. 15, 2012); *Advanced Eng'g & Planning Corp.*, ASBCA Nos. 53366, 54044, 05-1 BCA ¶ 32,806 at *23 (Nov. 19, 2004); *see also Org. for Envtl. Growth*, 700 A.2d at 203 (defining constructive changes as those "informally ordered by the government or required by government fault despite the absence of a formal change order.").

To prove entitlement under a constructive change theory, a contractor must show a bona fide "change" and the issuance of an "order" under the relevant contract. *Org. for Envtl. Growth*, 700 A.2d at 203. To meet the "change" component, the contractor must have performed work in addition to, or different from, that required under the contract. *Id.*; *LB&B Assocs., Inc. v. United States*, 91 Fed. Cl. 142, 154 (2010).

Additionally, to establish the "order" component under a constructive change theory, the added work must not have been volunteered by the contractor, but rather directed by a government official with the requisite authority. *See LB&B Assocs.*, 91 Fed. Cl. at 154; *Northrop Grumman Sys. Corp. Space Sys. Div.*, ASBCA No. 54774, 10-2 BCA ¶ 34,517 at *73 (July 22, 2010); *Intercontinental Mfg. Co.*, ASBCA No. 48506, 03-1 BCA ¶ 32,131 at *50 (Jan. 3, 2003). The contractor must also demonstrate that the constructive change increased its costs

[19] Along these lines, the District also faults the Appellant's damage calculations for using a 10 month period instead of the stipulated 6 months. (Dist. Post Hr'g Br. 26-27.)

[20] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. Code § 2-309.03(a)(2) (2001). The Procurement Practices Reform Act of 2010 repealed and replaced the District's procurement statutes, including the Board's previous jurisdictional statute. D.C. Law No. 18-371, 58 D.C. Reg. 1185 (Feb. 11, 2011). This appeal was filed on July 16, 2008, under our previous jurisdictional statute. (*See* Notice of Appeal.)

of performance. *See Intercontinental Mfg. Co.*, ASBCA No. 48506, 03-1 BCA ¶ 32,131 at *50; *Blood*, AGBCA Nos. 2000-102-1 et al., 02-1 BCA ¶ 31,726 at *13 (Dec. 21, 2001).

A. Appellant Has Failed to Establish a Prior Course of Dealing that Required the District to Order Tree Trimming Services on a Block-by-Block Basis Under the Disputed Contract.

The parties agree that the contract was silent as to any particular methodology that would be used by the District to order services under the contract. (Finding 5.) Nevertheless, the Appellant argues that its prior course of dealing with the District—under its earlier 1997 tree trimming contract—established that the District would continue to order tree trimming on a block-by-block basis under the instant (2002) contract. (Appellant's Post Hr'g Br. 17-19.) As such, the Appellant essentially argues that the District's block-by-block ordering methodology under its prior contract(s) effectively became a term of the present contract. (*Id.* at 17-18.) Accordingly, the Appellant contends that the District constructively changed the instant contract when it switched from ordering tree trimming services from the Appellant on a block-by-block basis to a tree-by-tree basis. (*Id.* at 16.)

A prior course of dealing is defined as "a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."[21] *DeLeon Indus., LLC v. Dep't of Veterans Affairs*, CBCA No. 986, 12-1 BCA ¶ 34,904 at *11 (July 12, 2011) (citations omitted); *C.R. Pittman Constr. Co.*, ASBCA No. 54901, 08-1 BCA ¶ 33,777 at *11 (Jan. 22, 2008) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 223(1) (1981)). A prior course of dealing may "establish the intent of the parties with respect to the proper interpretation of contract language." *Prods. Eng'g Corp. v. Gen. Servs. Admin.*, GSBCA Nos. 12503, 13051, 98-2 BCA ¶ 29,851 (June 30, 1988). However, to establish an enforceable term of a contract, the conduct establishing the course of dealings must reflect the joint or common understanding of the parties. *Sperry Flight Sys. v. United States*, 548 F.2d 915, 922 (Ct. Cl. 1977). If the prior course of dealing cannot "reasonably be construed as indicative of the parties' intentions," then that course of dealings will not establish an enforceable contract term. *Id.* Accordingly, the proponent of a prior course of dealing argument must demonstrate "actual knowledge by both parties of the prior course of dealings *and its significance to the contract*." *Anchor/Darling Valve Co.*, ASBCA No. 46109, 95-1 BCA ¶ 27,595 at *5 (Mar. 20, 1995) (emphasis added); *Yamin*, ASBCA No. 35373, 90-2 BCA ¶ 22,657 at *10 (Jan. 31, 1990).

Thus, under this foregoing jurisprudence, federal courts and boards of contract appeals have extensively considered the evidence which is required to establish that there was a prior

[21] The Board has addressed a prior course of dealing legal theory only once before in *Jet Blast, Inc.*, CAB No. D-1039, 52 D.C. Reg. 4217 (Aug. 3, 2004). However, in that case, we summarily rejected the appellant's argument, holding that a prior course of dealing consistent with the express terms of the contract could not modify the contract. *Id.* at 4222. Because the Board has not extensively dealt with this legal theory in prior decisions, we look to the jurisprudence of the federal courts and boards of contract appeals for guidance, as we have traditionally done. *See, e.g., Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443 at *7-*8 (Jan. 27, 2012) (citing multiple federal cases); *K.B. Hom & Assocs.*, CAB No. P-154, 38 D.C. Reg. 3237, 3239 (Mar. 5, 1991) (stating that the Board looks to federal case law for guidance); *see also Abadie v. D.C. Contract Appeals Bd.*, 916 A.2d 913, 919 (D.C. 2007) ("Because District contracting practice parallels federal government contract law, we also look to the relevant decisions of federal tribunals with particular expertise in this area." (internal quotation marks omitted)).

course of dealing between contractual parties which altered or defined the contract terms. For instance, in *Products Engineering Corp.*, the contractor argued that the government's previous approval of its quality control system and methods of testing for compliance with specifications barred the government's use of a different method during the contract. GSBCA Nos. 12,503, 13,051, 98-2 BCA ¶ 29,851. In this regard, much like the Appellant in the present case, the contractor argued that there was an established prior course of dealing under previous contracts with the government, lasting several years, whereby the government had repeatedly accepted the contractor's same equipment and quality control procedures. *Id.* For these reasons, the contractor argued that the government was later precluded from imposing its own independent quality control measures which found the contractor's parts to be nonconforming. *Id.* Ultimately, the General Services Board of Contract Appeals found that the circumstances did not warrant extending the prior course of dealing doctrine to bar the government from using different test instruments from those used by the contractor without notification so long as the government's standards were not contrary to the contract provisions. *Id.* Moreover, in effectively underscoring the requirement that both parties have knowledge of the significance of a prior course of dealing, the board found that there was insignificant evidence in that case to establish that the government knowingly accepted nonconforming equipment or indicated its willingness to waive the equipment specification requirements. *Id.*

Similarly, in *DCX-CHOL Enterprises*, the Armed Service Board of Contract Appeals considered a contractor's claim that it had a prior course of dealing with the government whereby the contractor was permitted to supply its shipments without the complete traceability documentation required under the contract. ASBCA No. 54,707, 08-2 BCA ¶ 33,889 at *11 (June 18, 2008). However, the board rejected this argument finding that the missing element in the contractor's claim of prior course of dealing was "mutuality" which requires evidence of "actual knowledge by both parties of the prior course of dealing and its significance to the contract." *Id.*

Additionally, in *Sperry Flight Systems*, the United States Court of Federal Claims dealt with a situation somewhat analogous to the present case where the contractor argued that, by virtue of its prior course of dealing with the agency where its higher catalogue prices had been accepted by the government without requiring cost and pricing data, a practice was established between the parties that the government would continue to accept these same catalogue prices in the future. 548 F.2d 915, 922-23 (Ct. Cl. 1977). Specifically, in that case, while the government had previously paid the contractor for certain parts based upon its catalogue prices and without requiring cost and pricing data, it was later required to submit cost and pricing data to the contracting officer to substantiate its catalogue prices before they would be accepted by the government. *Id*. at 917. Ultimately, the government determined that the contractor's catalog prices for the parts at issue were not substantiated and reduced the amount that it would agree to pay for them below the contractor's catalogue prices. *Id.* at 917-18. In ultimately rejecting the contractor's argument of a prior course of dealing with the government in accepting its higher catalogue prices, the court stated that the factual record did not "even allow an inference that the Government, by having accepted plaintiff's catalog prices on past occasions, thereby intended to commit itself to continue such a practice into the future." *Id.* at 923. Rather, the contractor's argument amounted to "only a statement of its own unilateral assumptions concerning the Navy's expected future conduct" in accepting a higher priced product. *Id.*

In the instant case, the Appellant alleges that a prior course of dealing was established between the parties by virtue of the fact that, under earlier contracts between these same parties, the District always ordered block-by-block tree trimming services from the Appellant and thus was essentially required to continue to do so under the disputed contract. Only one prior 1997 tree trimming contract between the parties was introduced by the Appellant at trial but, nonetheless, the Appellant seemingly argues that this one contract established an understanding between the parties that future tree trimming contracts would implicitly include a requirement that the District order tree trimming services from the Appellant on a block-by-block basis.

The facts elicited at trial, however, evidence that the District's methodology for ordering tree trimming service from the Appellant under the 1997 contract, as well as the disputed 2002 contract, was primarily based upon the internal ordering technology that was available to the District. Initially, under the 1997 contract relied upon by the Appellant, the District's somewhat basic mechanism for identifying trees in need of service was to simply have its inspectors drive around the city and visually inspect blocks where multiple trees were in need of service, take hand written notes on the trees needing service, and then enter those notes into an Excel spreadsheet. (Finding 11). The District would identify trees in need of service according to its prior MISTRE electronic inventory system, which assigned a unique 16-digit identifier to each tree, helping to identify its location within the District. (*Id.*) In turn, the District would notify the Appellant of trees in need of service on specific city blocks leading to block-by-block tree trimming orders being issued by the District. (Finding 10.)

However, there was no evidence introduced at the hearing which showed that the parties both mutually acknowledged, or understood, that the District intended to always order tree trimming service on a block-by-block basis in this manner. In fact, the evidence seems to suggest, to the contrary, that the District had intended for some time to improve the efficiency of its tree ordering process by virtue of the fact that it had procured the City Works software a few years in advance of its actual implementation in Year 2006. (*See* Finding 14.)

Moreover, while the Appellant argues that the change in the ordering methodology was, in fact, a "change" admitted by the District to have occurred, the facts establish that this change was essentially a byproduct of the City Works software implementation by the District that allowed the city to overall more efficiently manage its workload and tree inventory. (Findings 14-15.) There is simply no evidence that the District understood, or even implicitly agreed, that it would not seek to improve upon the efficiency of its tree inventory management process by making no alterations in its ordering methodology with the Appellant for tree trimming services after the 1997 contract was performed. The fact that block-by-block ordering may have allowed the Appellant to presumably perform its services in a more efficient manner did not commit the District to always utilize this ordering process on future contracts.

Thus, the Board finds that the facts underlying this case do not show that there was "mutuality" between the parties to agree to bind themselves to a block-by-block ordering requirement over the entire term of the disputed contract based upon a prior course of dealing under an earlier contract. In short, similar to facts in *Sperry Flight Systems*, *supra*, the Appellant's reliance on a prior course of dealing theory in the instant case is based upon its "unilateral assumption" that the District would continue to order services using a block-by-block ordering process as it had before. Accordingly, the Appellant has also failed to establish that the District's shift in ordering methodology constructively changed the contract's terms.

B. The District Met Its Ordering Obligations Under the Contract.

Having found that the Appellant is not entitled to damages arising from an alleged constructive change to the contract ordering process as discussed above, the Board must also consider whether the District otherwise met, or altered, its overall ordering requirements under the disputed contract, as this issue was raised by the District. In this regard, the parties agree that the contract was an IDIQ contract with a minimum purchase obligation of either $10,000.00 (the plain language of the contract) or $40,000.00 (the parties' stipulation). (Finding 3.) The parties also agree that the District ordered at least $40,000.00 in services under the contract. (Finding 19.)

An IDIQ contract only requires that the government order a stated minimum quantity of supplies or services. *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed Cir. 2001); *see also DynCorp*, ASBCA No. 38862, 91-2 BCA ¶ 24,044 at *4 (May 1, 1991) ("Under an indefinite quantity contract, the Government is only obligated to order the minimum quantity stated."). Once the government purchases the minimum stated in the contract its purchasing obligation under the contract is satisfied. *Travel Ctr.*, 236 F.3d at 1319.

The Appellant's measure of its alleged monetary damages in this case appears to be based upon its contention that it received less revenue after the District switched to individual tree ordering. For example, the Appellant argues that the switch to individual tree ordering "resulted in a severe 87% decrease in the amount of tree locations serviced by C&D." (Appellant's Post Hr'g Br. 18-19.) Similarly, both the Appellant's REA and the Appellant's expert report begin their damage calculations by determining the Appellant's lost revenue during the extension period. (Findings 26, 30.)

Appellant's lost revenue claim, however, is without basis as the District was not obligated to procure services from the Appellant "beyond the minimum contract price." *See Travel Ctr.*, 236 F.3d at 1319. Indeed, even if the Appellant anticipated that ultimately the District would order a greater amount of work under the contract, that did not alter the fact that the District was only obligated to purchase the specified contract dollar minimum. *Varilease Tech. Grp., Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2003). As stated above, it is not disputed that the District ordered more than the required minimum $40,000.00 in tree trimming services under the contract. (Finding 19.) Because the District satisfied its purchasing obligations under the contract, the Appellant is not entitled to any relief from the Board beyond the requirements previously ordered and paid for by the District.[22] *See Travel Ctr.*, 236 F.3d at 1319.

CONCLUSION

[22] By way of analogy, the Armed Services Board of Contract Appeals addressed a similar constructive change argument under a requirements contract for mowing services. *See Maggie's Landscaping, Inc.*, ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647 (June 2, 2004). In *Maggie's Landscaping*, the government ordered less mowing than its monthly estimates due to dry and wet conditions that affected the growth and health of the grass. *Id.* at *5-6. The board held that even if the variance in ordering from the estimated amounts was significant, such variance did not constitute a constructive change because "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 *16.

Based upon the matters discussed herein, the Board finds that Appellant has not established that the District constructively changed the disputed contract by modifying its ordering methodology for tree trimming services and, therefore, Appellant is not entitled to an equitable adjustment to the contract. Further, the Board finds that the District met the minimum ordering requirements under the contract as it relates to the service amounts which it procured from the Appellant. The appeal is denied.

SO ORDERED.

DATED: August 8, 2013

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge