



**BOARD OF CONTRACT APPEALS**

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_____	)	March 21, 2023
	)	
ANGELA PUGLIESE,	)	
Appellant	)	
	)	
v.	)	
	)	
UNITED STATES POSTAL SERVICE,	)	
Respondent	)	PSBCA No. 6856
_____	)	

APPEARANCE FOR APPELLANT: Amy K. Welch, Esq.  
Law Office of Amy K. Welch, LLC

APPEARANCE FOR RESPONDENT: Robert J. Dietz, Esq.  
United States Postal Service Law Department

**OPINION OF THE BOARD**

A former Postal Service contractor, Angela Pugliese, appealed a contracting officer’s final decision assessing her excess procurement costs after her contract was terminated for default. The Postal Service seeks \$34,081.71, but it did not provide sufficient evidence of its damages.

The appeal is granted.

**FINDINGS OF FACT**

**Ms. Pugliese’s Contract**

Ms. Pugliese and the Postal Service were parties to Contract No. 99756, which required her to deliver and collect mail along a route based out of the North Pole Branch

Post Office in Alaska. The contract term was April 1, 2018 to September 30, 2023. (Appeal File, Exhibit 1).<sup>1</sup>

The parties expressed the contract price as an annual rate. The annual rate at contract award was \$80,220.15, but it changed nearly monthly because of automatic fuel adjustments, which sometimes increased, but more often decreased, the annual rate (Exhibit 1 at 1, 3, 59-60; Exhibit 12; Tr. 1 at 43-46).<sup>2</sup> The annual rate was also modified twice owing to insignificant minor service changes, with the last such modification resulting in an annual rate of \$83,310.39, effective December 12, 2019. That rate was the contract's highest. (Exhibits 12, 18). Because of subsequent fuel adjustments, the annual rate was \$81,039.85 as of June 8, 2020, the date of contract termination. (Exhibit 12 at 189).

The contract required Ms. Pugliese to carry all mail with "certainty, celerity, and security" and "protect the mail from loss, depredation, or damage." Mail had to be "transported in an enclosed, water-proof compartment, equipped with secure locking devices," and locked at all times except when access was required for contract performance. (Exhibit 18 at 408).

The contract gave the Postal Service the right to terminate Ms. Pugliese's contract for default and stated that she would be liable to the Postal Service "for any and all rights and remedies provided by law." (Exhibit 1 at 46-47, 53-55).

On March 18, 2020, Ms. Pugliese was involved in an off-duty motor vehicle accident after completing her delivery route. At the time of the accident, Ms. Pugliese

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<sup>1</sup> All exhibits are in the appeal file.

<sup>2</sup> "Tr. 1" refers to volume 1 of the hearing transcript, and "Tr. 2" refers to volume 2.

was operating a vehicle that she used to perform the contract. Undelivered mail, some dating back to 2019, was recovered from her vehicle. (Exhibits 2, 4).

In a letter signed on March 20 and delivered on March 21, 2020, the Postal Service denied Ms. Pugliese's access to the mail and Postal Service premises (Exhibit 2). Several individuals were willing to jointly perform the contract for her indefinitely, and one was willing to work the entire route starting on March 20. They all had clearances and experience working for the Postal Service and were familiar with her route. But the Postal Service did not allow any of them to do so for her. (Tr. 1 at 127-31; Tr. 2 at 14-17, 41-49).

Ms. Pugliese appealed the denial of access, but her appeal was denied in a decision dated May 26, 2020. In its response, the Postal Service instructed Ms. Pugliese to provide service using a hired driver. (Exhibit 4). Ms. Pugliese did not do so (Tr. 1 at 88-89, 138). She thought that her route had been "taken from" her after her March 20, 2020 receipt of a solicitation for an emergency contract covering her route. (Tr. 1 at 138, 144).

On June 8, 2020, the Postal Service terminated Ms. Pugliese's contract for default (Exhibit 5).

In a decision dated March 10, 2022, we found the termination to be proper. *Angela Pugliese v. United States Postal Service*, PSBCA Nos. 6826, 6856, 6857, 22-1 BCA ¶ 38,128.<sup>3</sup>

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<sup>3</sup> Contrary to what is stated in the decision, the docket number for the Postal Service's claim for procurement costs is PSBCA No. 6856.

## Postal Service's Reprocurements

The Postal Service reprocured the services covered under Ms. Pugliese's contract using three short-term emergency contracts, followed by a contract for temporary service, and then a contract for regular service (Exhibits 9, 14, and 16). The three emergency contracts covered time periods before the termination for default. The Postal Service is not seeking damages based on those contracts. (Respondent's Supplemental Pre-Hearing Brief at 2; Exhibit 19).

On May 8, 2020, as the term of the second emergency contract was ending, the Postal Service issued a solicitation for the temporary service replacement contract. The Postal Service emailed the solicitation to many post offices in Alaska for further posting and to about 100 potential offerors. It allowed four days for the receipt of offers and received four offers. It then awarded the temporary service contract to the lowest-priced offeror, Brittnae Tolliver. (Exhibit 13 at 192-93; Exhibit 14 at 203; Tr. 1 at 47-56).

Ms. Tolliver's offer of \$93,600 was within the range of market comparable prices. It was also more than \$35,000 lower than the next lowest offer. (Exhibit 14 at 203, 207). The Postal Service did not conduct negotiations with Ms. Tolliver. It was difficult to find interested contractors, and the Postal Service did not want to risk losing the offer by trying to negotiate. (Exhibit 14 at 205; Tr. 1 at 102-03).

On May 26, 2020, the Postal Service awarded the temporary service replacement contract to Ms. Tolliver. The annual rate was \$93,600, and the contract term was May 13, 2020, to September 30, 2021. (Exhibit 14 at 210-11).

On July 13, 2021, the Postal Service issued the solicitation for the regular service replacement contract. The Postal Service posted the solicitation in the governmentwide

system used to provide the public with electronic access to government business opportunities (SAM.gov). It also sent many administrative officials a link to the solicitation for further posting and emailed a link to the solicitation to several hundred potential offerors. Three offers, including one from Ms. Tolliver, were received by the July 27, 2021 due date. (Exhibit 15; Tr. 1 at 60-63).

The offers were evaluated based on best value. The Postal Service awarded the contract to Ms. Tolliver on August 26, 2021, even though her offer was a little over \$7,000 higher than the next lowest offer and about \$12,500 higher than the high range of market comparable prices. The annual rate was \$110,700, and the contract term was October 1, 2021, to September 30, 2027. (Exhibit 16; Tr. 1 at 62-64).

#### Ms. Pugliese's and Ms. Tolliver's Scope of Work and Clauses

The scope of work for Ms. Pugliese's contract, as modified effective December 12, 2019, and Ms. Tolliver's contracts required the delivery and collection of mail between the North Pole Branch, Alaska, Post Office and H017, Alaska,<sup>4</sup> daily except Sundays and holidays, equating to 303.07 annual trips. The length of the route was 30.8 miles, the annual hours were 3,283, and the scheduled annual mileage was 9,334.6. In addition, the contractor had to use, at a minimum, one 120-cubic-foot vehicle. The number of boxes was 836 under Ms. Pugliese's contract and Ms. Tolliver's first contract and 834 under Ms. Tolliver's second contract.<sup>5</sup> (Exhibit 14 at 221-25; Exhibit 16 at 344-48; Exhibit 18 at 403-07; Tr. 1 at 66-68).

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<sup>4</sup> It is not clear what H017 is, but it is the destination in all three contracts.

<sup>5</sup> Ms. Tolliver's first contract was the temporary service replacement contract, and her second contract was the regular service replacement contract.

Ms. Pugliese's contract and Ms. Tolliver's contracts were fixed price with economic price adjustment. All stated that price adjustments would be made in accordance with Postal Service Management Instruction PM-4.4.1-2005-1, Economic Pay Adjustments for Highway and Inland Domestic Water Contracts.<sup>6</sup> (Exhibit 1 at 31, 41; Exhibit 14 at 241, 251; Exhibit 16 at 365, 379; see *also* Tr. 1 at 37). The contracts also included a clause stating that the contracts may be adjusted by mutual agreement in accordance with any Postal Service Management Instruction governing adjustments in effect on the date of the adjustment. (Exhibit 1 at 45; Exhibit 14 at 255; Exhibit 16 at 375).

The carrier delivery type for the three contracts was contract delivery service, which is also called box delivery (Exhibits 1, 14, 16; Tr. 2 at 55; Publication 32, Glossary of Postal Terms (July 2013)). Each contract included the Postal Service's standard terms and conditions for contract delivery service, but with different dates of issue (Exhibit 1 at 26; Exhibit 14 at 236; Exhibit 16 at 358).

Ms. Pugliese's contract and Ms. Tolliver's first contract set forth the following order of precedence for inconsistencies: (1) the statement of work, (2) the provisions, (3) the clauses, (4) attachments to the contract, and (5) documents incorporated by reference. Ms. Tolliver's second contract differed only in that the Postal Service added PS Form 7405, Transportation Services Proposal and Contract, to this list and gave it the highest precedence. (Exhibit 1 at 55; Exhibit 14 at 265; Exhibit 16 at 388-89).

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<sup>6</sup> Neither party provided the management instruction, but the contracts provided a web address where it could be located: <http://about.usps.com/management-instructions/p441051.pdf>. Also, Postal Service management instructions are regulatory to the extent they "state binding rules of future effect beyond those stated in other regulations of the Postal Service then in effect." 39 C.F.R. § 211.2.

Like Ms. Pugliese's contract, Ms. Tolliver's contracts gave the Postal Service the right to terminate for default. The three contracts also gave both parties the right to unilaterally terminate upon 90 days written notice. (Exhibit 1 at 46-47, 53-55; Exhibit 14 at 256-57, 264; Exhibit 16 at 377-78, 388).

The contracts provided that payment would occur at the end of each month and be computed generally by dividing the annual rate by the number of calendar days per year and multiplying that result by the number of days in the month. (Exhibit 1 at 48; Exhibit 14 at 257-58; Exhibit 16 at 378).

The contracts allowed for automated monthly fuel rate adjustments if certain criteria based on government fuel indices were met. Ms. Pugliese's contract and Ms. Tolliver's first contract also set forth how the threshold fuel price per gallon would be set. (Exhibit 1 at 59-60; Exhibit 14 at 270-271; Exhibit 16 at 380).

The contracts included clauses that required Ms. Pugliese and Ms. Tolliver to perform extra trips, if ordered, along with the right to request reimbursement. An extra trip was defined as "an additional trip of service operated on an infrequent time basis from the contract point of origin." (Exhibit 1 at 16, 45-46; Exhibit 14 at 226, 255-56; Exhibit 16 at 344, 376; Exhibit 18 at 408). Ms. Pugliese's contract did not have a rate for extra trips, but Ms. Tolliver's contracts had a rate of \$6 per mile (Exhibit 14 at 221; Exhibit 16 at 344; Exhibit 18).

The contracts included a payment rate for late slips (Exhibit 18 at 398; Exhibit 14 at 197; Exhibit 16 at 321). Late slips are used to compensate contractors if the Postal Service delays a contractor and prevents it from meeting the contract schedule (Tr. 1 at 74). The late slip rates differed among the three contracts: Ms. Pugliese's rate was

\$20.19099; Ms. Tolliver's temporary service contract rate was \$18.27597; and Ms. Tolliver's regular service contract rate was \$22.00000 (Exhibit 1 at 2, 5; Exhibit 14 at 197, 199; Exhibit 16 at 321).

Payments for extra trips and late slips may have been processed differently than other contract payments. They may not necessarily be reflected in contract activity logs, which show changes to a contract from renewal or award, including changes in the annual rate. (Tr. 1 at 35-37, 104-07).

The contracts required the replacement, at the contractor's expense, of vehicles more than nine years old. (Exhibit 14 at 225; Exhibit 16 at 348; Exhibit 18 at 407).

#### Postal Service's Claim for Excess Reprocurement Costs

In a final decision dated February 28, 2021, the contracting officer claimed \$50,875.75 in excess reprocurement costs. The amount was based on costs from April 8, 2020, which was the start date of the first emergency contract, through September 30, 2023, which was the end date of Ms. Pugliese's contract, even though the Postal Service had yet to incur costs through that time. (Exhibit 9 at 104-05).

Ms. Pugliese appealed the final decision to us, which we accepted as timely and docketed as PSBCA No. 6856. Ms. Pugliese elected to proceed under the accelerated procedure set forth in 39 C.F.R. § 955.13(b) and requested a hearing.

Before the hearing, the Postal Service reduced its damages to \$34,081.71. In calculating that reduced amount, the contracting officer performed a point-in-time comparison to derive what he thought were the most conservative numbers. He compared Ms. Pugliese's highest contract annual rate (\$83,310.39) with Ms. Tolliver's original annual rate of her first contract (\$93,600). He used the latter because it was

lower than the original annual rate of Ms. Tolliver's second contract (\$110,700). (Tr. 1 at 64, 70-73). After determining the daily difference in those rates, rounded to the nearest cent, he multiplied that difference by the number of days from the date of the termination for default, June 8, 2020, to the last date of Ms. Pugliese's contract, September 30, 2023. As he did with the final decision, the contracting officer included future costs. Even though Ms. Tolliver's second contract was at a higher rate, the contracting officer used the rate of her first contract for the entire period of damages. (Exhibit 19). In calculating the revised claim amount, the contracting officer did not consider the effect of fuel adjustments or the actual payments to Ms. Tolliver (Tr. 1 at 77-78).

#### Payments to Ms. Tolliver

The Postal Service provided evidence of payments to Ms. Tolliver only through July 31, 2022. Her payments from June 8, 2020 to July 31, 2022 totaled \$216,265.25.<sup>7</sup> The payments differed each month, with none corresponding with the two annual rates provided for in Ms. Tolliver's contracts. (Exhibit 17). Ms. Tolliver was paid less in June 2020 than called for based on the initial annual rate of her first contract, the one then in effect (*Id.*).

To show its payments to Ms. Tolliver, the Postal Service relied on a payment log that consisted of a one-page pivot table generated using its payment system. The table listed Ms. Tolliver's name, an account description consisting of unexplained acronyms

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<sup>7</sup> The Postal Service included Ms. Tolliver's payments for May and all of June 2020 (Exhibit 17). We deducted the excess amounts.

with no contract numbers, the year, month, and monthly payment amount. There was no description of any of the payments. (*Id.*).

Line-item data for the payments was available and formed the basis of the pivot table, but that data was not included as part of any exhibit. Without it, the contracting officer could not determine whether the payment log included extra trips or late slips. (Tr. 1 at 75-78).

### Hearing and Exhibits

A hearing was held by videoconference on October 11-12, 2022. All exhibits were admitted into the record without objection (Tr. 1 at 6).

The Postal Service's exhibits included a contract activity log for Ms. Pugliese's contract, but not one for either of Ms. Tolliver's contracts, even though they could have been produced (Exhibit 12; Tr. 1 at 104-05; Tr. 2 at 58-59). The only annual rates provided for Ms. Tolliver's contracts were the initial ones of \$93,600 and \$110,700. Conversely, the Postal Service included as an exhibit a payment log for Ms. Tolliver's contracts, but no record of payments for Ms. Pugliese's contract (Exhibit 17; Tr. 1 at 37).

### **DECISION**

Following a default termination, the Postal Service may recover any "additional costs associated with its reprocurement efforts to replace the terminated service." *Scott Steckler*, PSBCA No. 6302, 10-2 BCA ¶ 34,604. To recover such costs, the Postal Service must meet its "burden of demonstrating that: (1) the reprocured services are the same as or similar to those involved in the terminated contract; (2) the Postal Service actually incurred excess reprocurement costs; and [ ] (3) the Postal Service acted reasonably to mitigate the excess costs incurred." *Werner Lembke d/b/a Lembke*

*Trucking*, PSBCA No. 3875, 98-2 BCA ¶ 29,999 (citing *Cascade Pac. Int'l v. United States*, 773 F.2d 287, 293-94 (Fed. Cir. 1985); *Arthur Johnson*, PSBCA No. 3894, 97-1 BCA ¶ 28,773; *Jim Lovett*, PSBCA Nos. 3633, et al., 95-1 BCA ¶ 27,516).

The first element is proved by comparing the item reprocured with the item specified in the original contract. *Cascade Pac. Int'l v. United States*, 773 F.2d 287, 294 (Fed. Cir. 1985). Ms. Pugliese's contract, as modified, and Ms. Tolliver's two contracts all contained the same or similar scope of work (Exhibit 14 at 221-35; Exhibit 16 at 344-57; Exhibit 18 at 403-19). The standard terms and conditions of the contracts differed slightly because of updates, but not meaningfully. Ms. Pugliese offered no proof for her assertion that the reprocured services were not the same (Appellant's Post-Hearing Brief at 2). The Postal Service therefore has met its burden of demonstrating that the reprocured services were the same or similar to those involved in the terminated contract.

Skipping the second element momentarily, we move to the third element, which requires that the Postal Service prove that it acted within a reasonable time of the default, used the most efficient method of reprocurement, obtained a reasonable price, and mitigated its losses. *Cascade Pac. Int'l*, 773 F.2d at 294.

The Postal Service awarded both of Ms. Tolliver's contracts after a solicitation that resulted in adequate competition. Her first contract was solicited as the term of the second emergency contract was ending. The Postal Service emailed the solicitation to many post offices in Alaska for further posting and to about 100 other potential offerors. It allowed four days for the receipt of offers and received four offers. While those offers were higher than Ms. Pugliese's modified contract price, Ms. Tolliver's offer of \$93,600

was more than \$35,000 lower than the next lowest offer and was within the range of market comparable prices. (Exhibit 13 at 192; Exhibit 14 at 203-04).

For the second contract, the Postal Service posted the solicitation in SAM.gov. It also sent many administrative officials a link to the solicitation for further posting and emailed a link to the solicitation to several hundred potential offerors. It allowed 14 days for the receipt of offers and received three offers. This time, Ms. Tolliver's offer of \$110,700 was the highest-priced offer by a little over \$7,000. Ms. Tolliver's offer was higher than the high range of market comparable prices by about \$12,500. (Exhibit 15 at 279, 284; Exhibit 16; Tr. 1 at 60-64). None of the three offers was as low as Ms. Pugliese's contract price, original or modified. Notably the Postal Service does not seek damages based on the pricing of that contract; instead, it calculated its damages through September 30, 2023, based on the difference between the original annual rate of Ms. Tolliver's first contract and the highest value of Ms. Pugliese's contract.

The Postal Service allowed only four days (two of which fell on a weekend) for the receipt of offers on the first contract. While that timeframe was short, the Postal Service engaged in adequate competition as evidenced by its submission of the solicitation to many potential offerors and its receipt of multiple offers. See Postal Service's Supplying Principles and Practices § 2-10.2 ("Adequate competition means the solicitation of a sufficient number of the best qualified suppliers to ensure that the required quality and quantity of goods and services are obtained when needed and that the price is fair and reasonable.").

The Postal Service has met its prima facie case that it acted reasonably to mitigate the excess costs incurred.

Ms. Pugliese argues that the Postal Service did not act reasonably because it (1) did not conduct negotiations with Ms. Tolliver on the first contract and (2) obstructed any reasonable analysis of Ms. Tolliver's costs by (a) redacting Exhibit 14 and (b) failing to produce any economic fluctuation analysis of the route, such as the contract activity logs for Ms. Tolliver's contracts.

"The duty the Government owes the defaulted contractor in reprocurring for its account is not one of perfection, but one of reasonableness and prudence under the circumstances. . . . Further, it is not the contracting officer's obligation to do everything that he or she might to secure a lower price for a defaulted contractor, and in the process subordinate the Government's own best interests." *Barrett Ref. Corp.*, ASBCA No. 36590, 91-1 BCA ¶ 23,566. An award to the lowest-priced offeror after seeking competitive offers amounts to reasonable mitigation efforts. *Scott Steckler*, 10-2 BCA ¶ 34,604. The Postal Service did not conduct negotiations with Ms. Tolliver for her first contract, but it sought competitive offers and selected the offer that was the lowest-priced and within the market comparable range (Exhibit 14 at 205; Tr. 1 at 101). Considering its difficulty finding interested offerors and the price of the next lowest offeror, the Postal Service's decision not to conduct negotiations was reasonable (Tr. 1 at 102-03).

Ms. Pugliese also complains that the Postal Service improperly redacted Exhibit 14, which includes the cost worksheet for Ms. Tolliver's first contract. Ms. Pugliese failed to object to those redactions before the hearing, even when given the opportunity to object to the admission of exhibits, and her counsel failed to request access to an unredacted copy under a protective order (Tr. 1 at 6). Ms. Pugliese cannot now

belatedly claim that she did not have the opportunity for a meaningful analysis of Exhibit 14.

The Postal Service has therefore met its burden on the first and third elements necessary to recover, leaving only the second element for further analysis. The second element requires the Postal Service to show what it spent in reprocurement. *Cascade Pac. Int'l*, 773 F.2d at 294; *Jim Lovett*, PSBCA Nos. 3633, et al., 95-1 BCA ¶ 27,516. Even where the first element is met, there can be costs paid to the replacement contractor that should not be borne by the defaulted contractor. See, e.g., *Datronics Eng'gs, Inc. v. United States*, 418 F.2d 1371 (Ct. Cl. 1969) (finding that certain repair work was not properly chargeable to the defaulted contractor); *Lee Mfg. & Eng'g Co., Inc.*, ASBCA No. 22188, et al., 1969 WL 454 (finding that the costs of units provided for destructive testing under the reprocurement contract should not be borne by the defaulted contractor).

First, the Postal Service's claim includes costs it has not yet incurred. In claiming such costs unconditionally, the Postal Service ignored a long line of our cases holding that recovery of future excess reprocurement costs must be contingent upon a showing that performance was completed and payment was made. *Roger W. Holcombe*, PSBCA No. 5365, 11-1 BCA ¶ 34,725; *Scott Steckler*, 10-2 BCA ¶ 34,604; *Rellen H. Clark*, PSBCA No. 4096, 99-1 BCA ¶ 30,210; *Arthur L. Johnson*, PSBCA No. 3894, 97-1 BCA ¶ 28,773.

Second, the Postal Service has not demonstrated entitlement for the payments already made to Ms. Tolliver. In presenting its case, the Postal Service ignored the

complexities resulting from the contract type, the allowable contract adjustments, and the variable payments made to Ms. Tolliver.

All the relevant contracts—one for Ms. Pugliese and two for Ms. Tolliver—were fixed priced contracts with economic price adjustment. The contracts all stated that adjustments would be made in accordance with Postal Service Management Instruction PM-4.4.1-2005-1. (Exhibit 1 at 31, 41; Exhibit 14 at 241, 251; Exhibit 16 at 365, 379; see *also* Tr. 1 at 37). This management instruction allowed contractors providing box delivery services under non-emergency contracts to request price adjustments based on changed economic conditions or operational requirements.<sup>8</sup> Examples of allowable adjustments included cost increases based on vehicle replacement, personal property taxes for a vehicle, vehicle registration fees, insurance, miscellaneous road taxes, fuel costs, and wage determinations. (Postal Service Management Instruction PM-4.4.1-2005-1).

The contracts also included clauses that allowed for automatic monthly price adjustments for changes in fuel costs and additional compensation for late slips and extra trips. While Postal Service Management Instruction PM-4.4.1-2005-1 allowed for cost increases based on vehicle replacement, the contracts required vehicles more than nine years old to be replaced at the contractor's expense. (Exhibit 14 at 225; Exhibit 16 at 348; Exhibit 18 at 407).

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<sup>8</sup> Ms. Tolliver met the eligibility requirement for an economic adjustment under this management instruction, based on her submittal, before her contract awards, of a completed PS Form 7468-A, Highway Transportation Contract Bid or Renewal Worksheet. (Postal Service Management Instruction PM-4.4.1-2005-1 at 4; Exhibit 14 at 201; Exhibit 16 at 324). Further, the Postal Service did not contend that there was any other management instruction governing adjustments to Ms. Tolliver's contracts.

While some price adjustments would have applied regardless of the contractor, the same cannot be said for all the adjustments allowable under Postal Service Management Instruction PM-4.4.1-2005-1. Some of the price adjustments could be contractor-specific.<sup>9</sup> Those costs should not be passed on to Ms. Pugliese. The Postal Service needed to show what it spent in reprocurement, *Cascade Pac. Int'l*, 773 F.2d at 294, but none of the variable monthly payments to Ms. Tolliver corresponded with the only two annual rates provided by the Postal Service for her contracts. It was, therefore, crucial for the Postal Service, as the party with the initial burden, to explain the basis for those payments and show that they were for services or costs that would have applied to either contractor.<sup>10</sup>

The only evidence the Postal Service provided to show its payments to Ms. Tolliver was a one-page pivot table. This table lacked the information necessary for the Postal Service to meet its burden; it listed Ms. Tolliver's name, an account description consisting of unexplained acronyms with no contract numbers, the year, month, and payment amount. The payments, totaling \$216,265.25 from June 8, 2020 through July 31, 2022, differed each month and none corresponded with the only two annual rates provided for Ms. Tolliver's contracts. There was no description of any of the payments, and the Postal Service failed to explain the reasons for those differences.

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<sup>9</sup> For instance, the Postal Service could have increased Ms. Tolliver's annual rate because she replaced a vehicle under nine years old.

<sup>10</sup> The Postal Service did not argue that the burden of proof on damages was ever shifted to Ms. Pugliese, and it was not. See *Datronics Eng'rs, Inc.*, 190 Ct. Cl. at 209 (finding that the burden on mitigation of reprocurement costs was not shifted to the terminated contractor). The Postal Service simply failed to meet its initial burden.

The Postal Service's only witness was the contracting officer, who could not explain the specifics of Ms. Tolliver's variable monthly payments. Instead, he testified generally that annual rate contracts could be adjusted monthly based on fuel costs, extraordinary trips, and late slips. When questioned specifically about the variable monthly payments to Ms. Tolliver, he testified that he would need to review the line-item data that formed the basis of the pivot table. But the Postal Service failed to provide that data even though it was available. (Tr. 1 at 69, 73-77).

Contract activity logs might have explained the payment amounts, but the Postal Service did not produce those logs for Ms. Tolliver's contracts, even though it provided them for Ms. Pugliese's contract. And the Postal Service conceded that they, along with more detailed payment data, could have been produced (Tr. 1 at 37, 105-07; Tr. 2 at 56-59).

Instead of using Ms. Tolliver's payments as the basis for damages, the contracting officer calculated damages using a point-in-time comparison of one of Ms. Pugliese's annual rates with one of Ms. Tolliver's annual rates. To his credit, he tried to calculate the damages conservatively by comparing Ms. Pugliese's highest annual rate with the original annual rate of Ms. Tolliver's first contract rather than the higher amount of her second contract. (Tr. 1 at 64, 70-73). But the Postal Service provided no cases in support of this methodology, alleging instead that it was fair and reasonable (Respondent's Initial Post-Hearing Brief at 9-10).

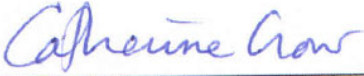
Even if the contracting officer's methodology was legally supportable, the Postal Service did not prove that his aim was achieved. While the Postal Service provided Ms. Pugliese's contract activity log, which showed that \$83,310.39 was her highest annual

rate, it did not provide proof, such as Ms. Tolliver's contract activity logs, to show that \$93,600 was the lowest annual rate for Ms. Tolliver's contracts (Tr. 2 at 58-59). In fact, Ms. Tolliver's payment log shows that she was paid less than that in June 2020 (Exhibit 17). More importantly, the annual rate does not prove what the Postal Service spent on the reprocurement. The basis for damages must be what is spent on reprocurement, not what the new contract amount is. *Cascade Pac. Int'l*, 773 F.2d at 294.

In sum, the Postal Service did not provide sufficient evidence of its damages. To award any amount here would require us to speculate about evidence that was not produced, and we will not do that. While the Postal Service presented evidence of payments made to the replacement contractor for part of the period it seeks, it failed to explain why the payments differed each month and why none of those payments corresponded with either of the only two annual rates provided for the replacement contracts. This explanation was critical because the contracts, which were fixed price with economic price adjustment, permitted certain increased price adjustments that cannot be fairly placed on Ms. Pugliese. To show what it spent in reprocurement, the Postal Service needed to explain the variable payments to Ms. Tolliver and show that they were for services or costs that would have applied to either contractor. The Postal Service's failure to do so is fatal to its case.

**ORDER**


For the foregoing reasons, the appeal is granted.



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Catherine Crow  
Administrative Judge  
Board Member

I concur:



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Alan R. Caramella  
Administrative Judge  
Chairman