BERT THOMAS,	)	**AGBCA No. 2001-138-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

October 1, 2002

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Separate Dissenting Opinion by Administrative Judge VERGILIO.

This appeal arises out of a December 18, 2000 final decision of the Contracting Officer (CO) on a claim arising out of the Anderson Creek timber sale Contract No. 016476 between Bert Thomas of Morganton, Georgia (Appellant or Athe purchaser@) and the U. S. Department of Agriculture, Forest Service (FS or Government), Chattahoochee-Oconee National Forests, Gainesville, Georgia. The appeal concerns Appellant=s claim that via a wire transfer he repaid the FS for earlier overpayments to his timber sale account via a wire transfer but that the FS nonetheless sight-drafted his bank account to recoup the same payment. Appellant claims a total of $15,344.11 which includes a bank loan fee, interest and damages, as well as repayment of the amount of the sight draft. The original bill of collection was in the amount of $6,025.06. The sight draft was for $6,413.58 which included interest, administrative charges and penalties.

The Board has jurisdiction to decide the appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. ' ' 601-613, as amended.

The appeal was received at the Board March 13, 2001. Appellant appealed the CO=s denial of his claim for $15,344.11. The appeal was originally scheduled for hearing January 24, 2002. That hearing was postponed at the request of the Government. It was rescheduled for March 14, 2002. That scheduled hearing was canceled when the parties informed the Board that their attempts to settle the case had revealed that the issue was not what the Government had previously understood it to be and was prepared to try. The Government had understood previously that Appellant disputed the debt for which the sight draft had been issued. Negotiations between the parties disclosed that Appellant did not dispute the debt but that he contended he had made payment prior to the sight draft. The hearing was canceled to allow the parties the opportunity to research their respective bank records.

Subsequently, by letter of May 4, 2002, Appellant notified the Board that he had decided to dismiss the appeal with prejudice. He based this decision on the costs to pursue the appeal, including telephone calls and time away from his work; passage of time during which both involved FS and bank employees had retired; and concerns over the health of his wife who was his bookkeeper and primary witness. The Government opposed dismissal while discovery was ongoing. Later the Government reported that it had been unable to confirm receipt into its account of the wire transfer made by Appellant. The Government therefore asked that the appeal be dismissed without prejudice to Appellant in the event Appellant were later able to locate additional proof. The presiding judge declined to dismiss the appeal and informed the parties that the Board would decide the appeal on the written record. Both parties were given the opportunity to file additional evidence which the Government did and briefs which both parties did. Neither party requested that a hearing be scheduled.

FINDINGS OF FACT

1. The parties entered into the Anderson Creek Timber Sale contract May 2, 1994, under which the purchaser was to remove timber on a flat rate basis. The original contract termination date was October 31, 1996. (Appeal File (AF) B2-30). The termination date was subsequently modified to April 30, 1998 (AF B2-5). The original CO was Ray Ellis (AF B2-30).

2. Contract clause BT4.3 provides for the purchaser furnishing and maintaining an acceptable surety bond to guarantee payment (AF B2-50). Clause WO-CT4.3 allows use of approved letters of credit in lieu of a surety bond for payment bond purposes (AF B2-65). Appellant provided letters of credit from the First National Bank of Polk County, Copperhill, Tennessee (AF B2-26-28). Clause CT4.4 provides that when payment is not received at the location designated by the FS the FS will suspend operations until payment is received. It also provides for the assessment of interest, administrative costs and penalties on payments due the FS for which payment is not received within 15 days of the date of issue of a Bill of Collection. (AF B2-65-66.)

3. Appellant requested, and the FS consented to, Appellant=s performing erosion control under contract clause R8-CT6.601 (AF B3-61-63). In cases where the FS performs the work, the

purchaser is required to make a deposit at per unit of volume rates set out in the clause. In this case, the rate was $6.76 per unit of measure each thousand board feet (MBF)). (AF B2-82-83.) Appellant asserts that at the June 21, 1994, pre-work conference he made a written request to perform erosion control on the contract, but that nonetheless as the contract began he was charged as though the FS were responsible for erosion control. Appellant wrote a letter dated December 13, 1994 requesting a modification to reflect the option Aas discussed during the pre-work conference@ (AF B3-63). The contract was then modified to delete the required deposits for erosion control (AF B2-12).

4. During the course of the contract, the FS used the Automated Timber Sales Accounting System to track the purchaser=s timber sale account. It is undisputed between the parties that the FS made four errors in allocating funds to and from Appellant=s account. Three of these concerned the removal of the erosion control deposit from Appellant=s account to reflect the agreement that he, rather than the FS, perform erosion control. The automated system could not perform this function and manual corrections were required throughout the life of the sale. In one case, a cash refund of $2,658.71 was made to Appellant for cash deposited in the erosion control account and at the same time a credit was made to his stumpage account in the same amount. This resulted in an over-credit of $2,658.71 in the stumpage account. In the three other cases, the FS made cash transfers into the Anderson Creek timber sale account intended as corrections for cash deposited in the erosion control account but corrections had already been made by cash deposits in the stumpage account. The total amount of the over-credits was $6,802.59. (AF A-7-8.) The result was that when the sale was completed, Timber Sale Statement of Account No. 34 for the month of February 1998 showed an unencumbered balance of $777.53 (AF C4-52).[1]

5. In the process of closing out the account, a timber sale closure audit was performed. It was during that audit that the errors made by the FS in Appellant=s timber sale purchase account were discovered. The audit concluded that instead of having a positive balance of $777.53, the account had a negative balance of $6,025.06. (AF A-8.) The accuracy of these numbers is not at issue in the case now before us. The issue now before us is solely whether Appellant, by a wire transfer, paid the amount owed prior to the FS presenting the sight draft for payment. However, because the FS defends arguing that (1) Appellant did not timely raise the issue of his having paid the debt before

[1] The FS made another error in Appellant=s account. In one month, it credited to Appellant=s account the sum of $141,163.05 which should have been credited to the account of another purchaser. This FS error was corrected by a cash correction of -$141,163.05 the next month.

the sight draft and (2) Appellant did not prove that the payment reached the FS lock box account, we make findings regarding the events surrounding the discovery of the incorrect account balance and the subsequent actions of the parties.

6. The audit which revealed the negative balance is not in the record. The FS states that the timber sale closure audit performed on the Anderson Creek timber sale did not produce any contemporaneous written records or reports (August 29, 2002 letter from Government counsel to the Board). The record does contain a page entitled ATimber Sale Closure Audit Checklist.@ This is signed by Charles L. Jackson III as having recommended it on February 18, 1998. The CO signed it January 15, 1999. This document contains ongoing entries. For example it contains a handwritten notation Asight draft drawn - cancellation sent to bank 12/21 (presumably 1998 - year cut off on copy in AF). The following page is a copy of two undated adding machine tapes which also appear to reflect final activities interest, penalties and interest. Thus, the calculations represented by this tape were made later than February of 1998. (AF B2-2 and B2-3.) In his August 29, 2002 letter, Government counsel also referenced an August 31, 2000 letter from the CO to Appellant and two page attachment as Arecords that reproduce the timber sale closure audit.@ These documents are discussed in Findings of Fact (FF) 11 and 12 below.

7. The record does not disclose exactly when and how the FS made Appellant aware of the discrepancy in the account. In e-mails dated March 17, 1998, the CO informed the FS Representative on the sale of the discovery of the negative balance in the account (unnumbered page in Appellant=s Pre-Hearing Submission entitled AMessage Display for R.E. Vann@.) A meeting was held April 28, 1998, in the Toccoa Ranger District Office to discuss the account. No minutes of that meeting are in the record. The meeting is described in a letter of July 10, 1998 from the CO to the Appellant. According to that letter, it was the impression of FS personnel that Appellant was Ain agreement@ and understood that a bill for collection for the outstanding amount would be issued. The CO=s letter states that the FS agreed to delay issuing the bill of collection to allow Appellant time to discuss the matter with his wife and contact the FS with any other questions he might have. (AF B-3-16-17.)

8. A Bill for Collection in the amount of $6,025.05 was issued May 19, 1998 (AF C3-4). On June 18, 1998, after receiving the bill for collection, Appellant wrote Mr. Vann, the Forest Service Representative on the sale. Appellant stated that he had reviewed his records of the sale. He cited clause BT4.0 requiring timber purchasers to pay prior to the cutting trees. He contended that he had done just that and had been notified of his successful completion of each unit on dates from December 12, 1994, to February 18, 1998. Each notification included the statement that he had no further obligation on the relevant unit. He also noted that over the life of the sale from May 2, 1994 to June 18, 1998, there had been numerous FS employees handling the bookkeeping on the sale. In his review of the records he noted several errors. He asked the FS to recheck its bookkeeping and make adjustments accordingly. (AF B3-19.)

9. After receipt of Appellant=s letter, the CO wrote the July 10 letter referenced in FF 7 above. That letter described the April 28 meeting and acknowledged receipt of Appellant=s June 18, 1998 letter. The CO disputed that Appellant had Apaid in full before any tree was cut.@ He stated that an unencumbered balance made it appear that Appellant had sufficient funds needed to release each unit when the amount actually paid into the sale was a total of $6,025.06 less than the full value of the sale. He also asserted that the letters stating that no further obligation on a unit referred to Acontractual work associated with that particular Payment Unit@ and not to the purchaser=s financial obligations. The CO further notified Appellant that he was in breach of the sale. He reiterated that the amount billed remained due and stated that interest would begin to accrue and administrative charges would be assessed. He expressed regret that errors were made. The CO also confirmed that the review of the financial records requested by Appellant had been made and showed that the May 19, 1998 Bill for Collection was correct. (AF B3-16-17.) A Postal Service form 3811 indicates that Appellant personally signed accepting delivery of the letter on July 11, 1998 (AF B3-18).

10 The record contains a copy of a Wire/Funds Transfer Activity Record for the Bank of Polk County, dated July 17, 1998 originating a wire transfer of funds in the amount of $6,025.06 from the account of Bert Thomas (with a stated account number) to Beneficiary Bank, Bank of America, San Francisco (With a specfic routing number). The Beneficiary=s name was shown as Forest Service USDA and its account number was given. Special instructions were: A Ref. H Anderson Creek Unit HTT03, Contract # 02-016476.@ The instructions were received in person and the Debit Transaction Form was prepared by Carolyn Thomas. (Attachment A to Government Brief.) The statement for purchasers account (Bert Thomas dba Bert Thomas Logging and Carolyn Thomas) for July 1998, shows a wire transfer in the amount of $6,025.06 on July 17, 1998 (Attachment C to Government Brief).

11. On October 26, 1998, the FS made a sight draft on Appellant=s letter of credit in the amount of $6,413.58. This figure was the sum of the original $6,025.06 underpayment plus $159.06 in interest, a $64.50 administrative charge and a penalty in the amount of $164.96. (AF B3-8-9.) The record contains three documents regarding the sight draft: (1) an undated signed statement of the CO describing events from approximately October 15, 1998 to October 23,1998; (2) an undated sheet explaining the above stated calculation and (3) a handwritten memorandum dated October 30, 1998, describing a telephone conversation between an officer of the Bank of Polk County and the CO. (AF B3-13-15.)

12. The first memo described conversations between the CO and Appellant or Appellant=s wife. In the first, on or about October 15, the CO told Appellant that he had no option but to send a sight draft to Appellant=s bank if Appellant did not pay his bill. He also asked if Appellant would like to request transfer of cash on two other sales released when letters of credit were substituted for cash performance bonds. As reported by the CO, Appellant asked if the CO were still holding cash on the two other sales. The CO responded that he was, since the FS was waiting to hear from Appellant on the possible transfer of cash into the Anderson Creek sale to cover the debt. Appellant

told the CO that he would get back to the CO by the end of the week. Appellant called the CO on October 19 and left a message that one of the people he wanted to talk to was not in and he would call back. On October 21, the CO left a message for Appellant to call. He said that he would have to send the bank a sight draft soon unless payment was made. According to the memo, Appellant called and said that he did not intend to pay as he had been Aharmed.@ The CO expressed his intent to send the sight draft on October 23. On October 23, 1998, Appellant=s wife called. When the CO returned her call, she asked that the FS send her a copy of the package being sent the bank. (AF B3-15). The handwritten memo of October 31 recorded a telephone conversation between an officer of the bank and the CO. The bank officer reported that purchaser said the matter was in dispute. The CO replied that the purchaser might not agree but that the FS had no doubt of the amount owed. The bank office offered to extend the letter of credit an additional year. The CO responded that the matter had been discussed. He explained that accounting errors of double crediting and not showing a refund caused the account to appear to have more money in it than it actually did. The CO said he wanted to proceed with the sight draft and the bank officer replied that he would pay it. (AF B3-13.)

13. By letter dated April 6, 1999, Appellant filed a claim with the CO. Therein, he described some of the errors made on his account during the life of the sale. He demanded that the $6,413.58 be returned to the Bank of Polk County and that he be paid $8,777.53 in damages and interest plus a $150 loan fee. (AF E-34.) The CO sought additional information in a letter dated April 6, 1999. Specifically he inquired whether the amounts mentioned in the claim were separate claim items totaling $15,344.11. He also asked for a complete itemization showing how the $8,777.53 figure was derived. (AF E-32.) Appellant responded with an undated letter asking for information which the CO provided by letter of August 31, 2000. He repeated his request for an itemization of the claim. (AF E-30, E-15-16). Appellant responded by letter of October 12, 2000. He agreed that the FS paper work reflected the amounts stated by the CO, but claimed that he had sent paper work to back up his assertion that the sight draft on his letter of credit was an error. He confirmed that the total claim was $15,341.11 which he broke down as follows: $6,413.58 monies taken from the letter of credit; $150 loan fee; $777.53, monies left in the Anderson Creek account; and $8,000 interest and damages imposed by the bank. He enclosed a copy of his November 30, 1998 note in the amount of $6,563.58. Interest on the loan was at the rate of 9.75%. Loan fee of $150 was shown as an additional charge. The stated purpose was to pay the FS letter of credit indicated to be a disputed claim. (AF E-10, 11.)

14. The CO issued his final decision on the claim December 18, 2000. He described most of the events mentioned in FF 8, 9, and 11 above. He also outlined the series of FS errors that resulted in the fact that the stumpage account showed a positive balance of $777.53 when in fact it should have reflected a negative balance of $6,025.06. He pointed out that Appellant could not show any payments not accounted for in those calculations. He denied Appellant=s claim of the $150 loan fee and of $8,000 interest and damages imposed by Appellant=s bank as costs to the purchaser only. The decision did not mention the earlier wire transfer described in FF 10 above. (AF A2-16.)

15. Appellant filed a timely appeal with the Board. The parties filed pleadings and the Government submitted the AF. The Board twice set the appeal for hearing. During the pre-hearing period, discussions between the parties revealed that Appellant=s claim was different from what the FS had previously understood. As Government counsel explained to the Board in a conference call on March 12, 2002, and as Appellant confirmed, Appellant did not dispute the debt for which a sight draft had been issued on his letter of credit. Rather, he claimed that it had been paid by a wire transfer in 1998. The parties asked that the scheduled hearing be canceled while the parties sought additional documentary proof which might result in settlement. Thereafter, by letter dated May 4, 2002 Appellant Anotifie[d] the Board of his decision to dismiss with prejudice.@ He cited litigation cost (including time from work), passage of time, including retirements in the FS and in his bank, and his wife=s health. His wife, who did his bookkeeping and bill paying would have been his chief witness. The FS opposed the motion because discovery was pending and the FS had expended resources in pursuing related information. The FS proposed that action be deferred until June 4, 2002, to allow the Government to complete discovery and determine if further action on its part were warranted.

16. By letter of June 28, 2002, FS counsel wrote the Board stating that the FS had been unable to obtain the information it had sought. The Government=s wire transfer records did not show receipt of the wire transfer. He further stated :

> In addition, Mr. Thomas=s wire transfer records from the Bank of Polk County cannot be located. The Government has engaged in extensive communications with the commercial wire transfer office at BB&T, the successor to the First Bank of Polk County, in an unsuccessful attempt to locate proof of Mr. Thomas=s wire transfer. Without additional proof (in the form of a Federal Reserve wire transfer reference number) that a wire transfer was sent from Mr. Thomas=s bank, the Government is unable to make a unilateral settlement offer to Mr. Thomas.

The Government then withdrew its opposition to Appellant=s request to dismiss the appeal. The Government proposed that the appeal be dismissed Awithout prejudice in the event Mr Thomas is able to locate additional proof in the future.@

17. The presiding judge issued a letter informing the parties that she interpreted the parties= requests as cross motions to dismiss, one with prejudice and one without one. She exercised her discretion to defer both motions. Rather she ruled that the honestly disputed matter should be decided on the merits under Board Rule 11. The parties were given an opportunity to supplement the record and provide written argument. Both parties filed briefs. Appellant=s brief asserted that he had provided the Government with a copy of his wire transfer and bank statement as proof. He failed to say when he provided that evidence. Along with its brief, the FS supplemented the record

with exhibits A through E. Exhibits A and C are the wire transfer form and bank statement described in FF 10 above.

DISCUSSION

Entitlement

The validity of the purchaser=s debt in the amount of $6,025.06 is no longer at issue. Despite apparent earlier arguments that the account, as it stood at the end of February 1998, with a positive balance of $777.53 was correct, Appellant at some point acknowledged the debt. It is uncertain when he expressed that concession to the FS. The July 10, 1998, letter from the CO states that FS employees understood him to be in agreement that it was owed after their explanations during the meeting April 28, 1998. Appellant=s June 18, 1998, letter can be interpreted as expressing the view that he did not agree. (FF 7, 9.) Nonetheless, documents in the record (copies of the wire transfer form and of Appellant=s bank statement) contain evidence that he paid the debt very shortly thereafter on July 17, 1998 (FF 10). In addition, the parties= communication during the appeal process revealed the fact that Appellant=s claim was not that he had not owed the amount in question, but that he had paid it prior to the disputed sight draft.

The fact that repeated FS accounting errors were the cause of the debt is also not at issue. From the outset, the FS has acknowledged its poor bookkeeping and explained the progression of errors that lead to the apparent positive balance when in fact there existed a negative balance discovered only by a routine audit at the close of the sale. (FF 5, 7, 9, 15.)

Appellant=s brief complains of the poor accounting and states that he provided the Government with a copy of the wire transfer and his bank statement proving his payment by wire transfer (Appellant=s Brief, page (p.) 1).

The FS brief supplements the record to provide copies of these documents. The FS argues that Appellant has the burden to prove that all payments related to the Anderson Creek sale have been made. It also asserts that if the Government has any burden, it is to show that payment was not received. The FS asserts that at no time during the period prior to the transmission of the sight draft (nor in his complaint) did Appellant allege that he had already paid the bill for collection by wire transfer. (Government Brief, pp.1-2.)

There is authority that where the Government recoups an erroneous payment, it is pressing a Government claim and, thus, under the normal rules regarding burdens of proof, the Government must prove its entitlement to the refund by a preponderance of the evidence. W. B. & A., Inc., ASBCA No. 32524, 89-2 & 21,736 at 109,335. W. B. & A., Inc. involves a services contract as opposed to the instant case which involves a timber sales contract. The obvious relevant difference between the two is that in a services contract in which the Government pays the contractor for services rendered while in a timber sales contract, the purchaser pays the Government for the right

to cut and remove timber. In the former, it is without doubt that the Government has the right and obligation to recoup an erroneous overpayment. Similarly, in the latter the Government has the right to collect an underpayment. The point here, however, is not whether the Government had the right to collect an underpayment by a sight draft on Appellant=s letter of credit, but which party has the burden to prove that an underpayment existed.

The record contains a copy of the wire transfer record requesting the transmission of the sum in question to the FS account (identified by its number) at the Bank of American in San Francisco. It also contains a copy of Appellant=s bank statement for that month showing a wire transfer debit to his account on that date in the same amount. (FF 10.) The wire transfer predated the sight draft (FF 10, 11). The FS claims the sum did not reach its account. However, it provides no evidence to that effect. We recognize the inherent difficulty in proving a negative, but this record does not even contain affidavits, standard operating procedures or other evidence describing the records that would exist if such a transmission had been received. In addition, we have no affidavit describing the efforts undertaken to determine whether it was received. The FS also makes no attempt to show error by Appellant in his manner of making the wire transfer. For example, it does not challenge the account number on the wire transfer. If the FS cannot prove what it contends should be in its own records, it strains credulity to believe that Appellant should be able to do so. Moreover, we are mindful that these issues are before the Board today only because of repeated erroneous FS accounting during the life of the sale. We reiterate that the record contains evidence that Appellant transmitted the amount owed from his bank account to that of the FS. In the absence of evidence to the contrary, it is both possible and justified in this case to draw an adverse inference to the FS, i.e., that it received the wire transfer, but its bookkeeping practices are such that it cannot prove it.

The FS asks us to give weight to its contention that Appellant disputed the debt rather than arguing that he had, in fact, previously paid it. It is clear in the record that Appellant=s initial reaction to learning that the account had a negative balance in the thousands rather than a positive balance in the hundreds was to rely on the FS notifications at acceptance of each unit that he had no further obligation to dispute the debt entirely (FF 8). However, less than a week after the CO sent the July 10, 1998, letter summarizing the situation, Appellant=s wife (and bookkeeper) visited the Bank of Polk County in person to authorize the wire transfer (FF 9, 10). The CO=s undated memo describing events in October might be interpreted as reporting that Appellant disputed the debt, but it is not conclusive proof that he did. In considering that interpretation we must recognize two factors (1) the memo records what the CO thought he heard which could be different from what Appellant thought he said; and, (2) by that date the wire transfer had been made and thus if Appellant said only that he had paid without specifying the time and method, the CO could have misinterpreted it as meaning that Appellant was saying that he had paid per unit during the life of the sale. While we are also slightly troubled by the fact that until Appellant and Government counsel began dealing with one another in discovery and exploring the possibility of settlement, Appellant does not seem to have clearly explained that the wire transfer had been made, we do not find this break-down in communication adequate to outweigh the undisputed evidence of the wire transfer as reflected in the

wire transfer form and Appellant=s July 1998 bank statement. The preponderance of the evidence is that at the time that the FS made the sight draft on Appellant=s letter of credit, the debt had already been made and he was therefore being charged a second time.

Quantum

The sight draft was for $6,413.58, comprised of the $6,025.06 original debt, and $159.06 interest, $64.50 administrative charges and $164.96 penalties (FF 11). Appellant claims $15,344.11 which is the sum of (1) $6,413.58 drawn by sight draft; (2) $150 loan fee; (3) $777.53 amount left in the stumpage account; and (4) $8,000 interest and damages assessed by Appellant=s bank (FF 13).

The preponderance of the evidence is that the FS made the sight draft after Appellant had paid the debt by wire transfer. Appellant is entitled to refund of the $6,413.58 drawn from his account and to the $150.00 loan fee charged by the bank to pay it. Appellant is not entitled to the claimed amount of $777.53. The total overcredit was $6,802.59 (FF 4). The apparent account balance of $777.53 was used to satisfy that much of the debt. The difference between $6,802.59 and the available $777.53 is the $6,025.06 which Appellant paid by the wire transfer. Had $777.53 not been available to pay part of the debt, the debt would have been the entire $6,802.59. Despite having been asked for evidence to support his claim for $8,000 in interest and damages, Appellant has provided no calculations or documentation, other than a copy of his November 20, 1998 note to the bank. A contractor has the burden to prove the amount of his claim or damages. William Harvey, AGBCA No. 82-152-1, 87-1 BCA & 19,577; Louis M. McMaster, Inc., AGBCA No. 80-159-4, 86-3 BCA & 19,067. Appellant has failed to prove his claim for $8,000.

Comments on the Dissent

The dissent characterizes our decision on the merits as a resolution that the party bringing suit does not want. We disagree.

At the time the Board informed the parties that it would exercise its discretion to decide the appeal on the merits, it had before it a pro se contractor=s request for a dismissal with prejudice and the Government=s motion to dismiss without prejudice. Appellant=s Aexpressed rationale@ was the health of his primary witness, the passage of time which had prejudiced his ability to obtain records, and the cost of pursuing the appeal, even pro se. This rationale portrays nothing more than a pro se contractor frustrated with his inability to extricate himself from the quagmire created by Government error. The Government, to the credit of its counsel, did not seek a dismissal with prejudice but wanted a dismissal without prejudice, allowing for reinstatement in the event Appellant obtained additional records (FF 16). The presiding judge determined that additional time was unlikely to be of assistance to the Appellant in securing evidence under the control of the Government. The Board allowed, but did not require, the parties to supplement the record and to provide written argument. Both parties availed themselves of this opportunity, further illustrating that they were not in agreement for a dismissal with prejudice. It is clear from this record that by the

time the record closed, Appellant was in favor of resolution of the issues. (FF 17.) The Boards of Contracts Appeals are charged to provide informal, expeditious remedies for the parties. By its nature, the Board has the flexibility to depart from procedural strictures to allow for fundamental fairness.

The dissent cites Exhibits B, D and E to the Government brief as evidence that the wire transfer was not completed. Exhibits B and D are March and May 2002 fax messages from the Bank of America (FS bank), one to a Forest Service employee and another to Government counsel confirming that the bank found no record of the 1998 transfer. Exhibit E is the record of the FS account into which the transfer would have been expected to be deposited. While we find this document of greater import than exhibits B and D, we do not find that it tips the evidentiary scale in favor of the Government, given the other evidence presented (FF 10).

DECISION

Appellant=s claim is sustained in the amount of $6,563.58. Claims for additional sums are denied. Pursuant to 41 U.S.C. ' 611, Appellant is entitled to interest on $6,563.58 from April 6, 1999, until paid.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

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HOWARD A. POLLACK
Administrative Judge

VERGILIO, Administrative Judge, dissenting.

Once again, I write in dissent to express a view different from the majority on the role of the Board, the material facts, and the application of law. By proceeding to the merits of this matter and marshaling the facts as it does to provide the timber purchaser relief the majority errs.

The purchaser requested a dismissal with prejudice. The purchaser made that request with an expressed rationale and an understanding of the consequences. The purchaser has not withdrawn its request. I would have granted the purchaser=s request and not required the purchaser, Government, and Board to expend further resources on a dispute the purchaser did not want resolved. After the party bringing suit seeks a dismissal, to require the parties to continue to litigate is unjust not only to the parties, but is wasteful of the resources of the Board. At this time, the request for a dismissal with prejudice is not opposed by the Government. I would not issue a precedential decision when neither party seeks a ruling; the issues before the Board are moot. Accordingly, I dissent from the determination of the majority to reach the merits of issues which the party bringing suit does not want resolved; the proper resolution of this appeal is a dismissal with prejudice.

On the merits, the record demonstrates that the purchaser ordered a wire transfer of $6,025.06 and that the bank debited the purchaser=s account for that amount (Government Brief, Exhibits A, C). The record contains no confirmation that the wire transfer was completed. The Government

maintains that after thoroughly searching its records, its records do not reveal receipt of the amount into its account. This assertion is supported both by statements from bank personnel (albeit unsworn or unverified, but produced in the course of business) and bank records which indicate transactions involving the account into which the funds were to have been transferred (Government Brief, Exhibits B, D, E) and by the efforts of Government counsel to ascertain the key information in question. The purchaser has not disputed this conclusion or attempted to establish that the amount was credited to the Government=s account. For example, the purchaser has not provided documentation from its bank (or successor bank) which confirms that the transfer occurred. Because the evidentiary record demonstrates that the Government did not receive payment for the undisputed amount, the Government acted properly in obtaining payment in October 1998. The majority makes the Government liable for what appears to be an error by the purchaser=s bank, thereby inappropriately shifting the risks of a bank transaction away from the account holder and originating bank to the purported recipient.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
October 1, 2002