REIDHEAD BROTHERS LUMBER MILL,	)	**AGBCA No. 2000-126-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Alan I. Saltman	)	
Saltman & Stevens	)	
1801 K Street, N.W., Suite M-110	)	
Washington, D.C. 20006	)	
	)	
Representing the Government:	)	
	)	
Patricia Leigh Disert	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
4017 Federal Building	)	
517 Gold Avenue, S.W.	)	
Albuquerque, New Mexico 87102-0079	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

June 29, 2001

Before HOURY, VERGILIO (presiding), and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge HOURY. Separate Dissenting opinion by Administrative Judge VERGILIO.

This appeal arose under Contract No. 001517, between the Forest Service, U. S. Department of Agriculture, and Reidhead Brothers Lumber Mill of Nutrioso, Arizona (Appellant) The contract was for the sale of timber in the Alpine Ranger District, in the Apache-Sitgreaves National Forests, Arizona. Appellant filed eight claims totaling $345,232.17 under clause CT6.01, Interruption or Delay of Operations, which allowed reimbursement of out-of-pocket expenses incurred as a direct result of interruption or delay of operations, greater than 30 days. Under the clause out-of-pocket expenses do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered by the purchaser. The Contracting Officer (CO) granted claim 4 in the amount of $403.78 for the cost of maintaining a letter of credit and denied the balance of Appellant's claims. Appellant filed a timely appeal.

The Board issued a ruling resolving a motion and cross-motion for summary judgment. A Board majority denied Appellant's motion and granted the Government's motion for claims 1-3, Appellant's claimed expenses for operating a sawmill, holding that these claims did not arise as a direct result of the interruption or delay of operations under the contract. Thus, claims 1-3 were dismissed. The Board denied Appellant's motion and granted the Government's motion for claim 5, for unamortized G & A expense, holding that it did not directly arise from the suspension. The Board denied both parties' motions for claims 6-8. Appellant does not pursue claim 6 for idle equipment costs. The two remaining claims are claim 7, for increased logging and hauling costs, and claim 8, for legal expenses. Reidhead Brothers Lumber Mill, AGBCA No. 2000-126-1, 00-2 BCA ¶ 31,144. The parties elected to submit claims 7 and 8 on the written record pursuant to Rule 11, 7 CFR 24.21.

FINDINGS OF FACT

1. The parties entered into Contract No. 001517, known as the Draw Timber Sale, with timber located in the Apache-Sitgreaves National Forests, Alpine Ranger District, Arizona (Appeal File (AF) 168). Appellant was to remove 5,910 thousand board feet (MBF) of designated timber from five payment units, as well as construct and maintain roads, construct a rubble paved waterway, install road closure barriers, and perform other related work (AF 183, 187-88, 450-51).

2. The contract contained an Interruption or Delay of Operations clause (6/90), portions of which are quoted below:

> Purchaser agrees that in event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be (1) Contract Term Adjustment pursuant to BT8.21, or (2) when such an interruption or delay exceeds 30 days during Normal Operating Season, Contract Term Adjustment pursuant to BT8.21, plus out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision. Out-of-pocket expenses do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered by Purchaser. Purchaser agrees to provide receipt or other documentation to the Contracting Officer which clearly identify and verify actual expenditures.

(AF 245.)

3. By letter dated June 2, 1997, Appellant provided the Government with a logging plan that indicated that it planned to begin logging June 1, 1997 (AF 628). By a separate letter, dated June 2, 1997, Appellant requested that the Government release payment unit two (AF 629).

4. By letter dated June 4, 1997, the CO suspended the sale, stating:

> This letter is to officially document the suspension of sawtimber harvest on the Isabelle, Draw, Horton, and Burro Timber Sales. This suspension is pursuant to the May 30, 1997, Order of the United States Court of Appeals, the Ninth Circuit for

> Forest Guardians vs. Mike Dombeck, as the Chief of the Forest Service (DC#CV-96-2258-PGR). This suspension applies to all falling operations on the above mentioned sales. Other sale activities such as the removal of previously felled timber, erosion control, and slash work may continue.

(AF 632.) The suspension was lifted December 19, 1997 (Complaint, Answer, paragraph (¶ 21). The normal operating season for the sale was May 31 through October 31. Appellant did not harvest payment unit two until 1998. The suspension of logging operations exceeded 30 days in the normal operating season. (AF 168, 193, 252, 643.)

5. On November 29, 1999, the CO received Appellant's submission dated November 24, 1999, designated a claim. The claim was certified and Appellant requested a CO's decision within 60 days to the extent that the CO disagreed with any aspect of the claim (AF 3-21). Appellant sought to recover $345,232.17, $15,000 for attorney fees, plus $330,232.17 as costs resulting from the Forest Service's suspension under clause CT6.01. By CO's decision dated January 27, 2000, except for the $403.78 cost of maintaining a letter of credit, the CO denied Appellant's claim (AF 22-23).

6. The support for the logging and hauling costs stated that the anticipated costs for 1997 were $85 per MBF, that the actual logging and hauling costs for 1998 were $90 per MBF, with a difference of $5 per MBF. The calculation presented is as follows:

1,409.603	volume of timber from Payment Unit 2
x $5.00	increased logging cost per MBF (LT)
$ 7,048.02	
$ 704.80	overhead
$ 7,752.82	
$ 775.28	profit
$ 8,528.10	

7. In supplementing the record following the Board's ruling of October 4, 2000, Appellant added the following support:

> Reidhead had no written contract with its logging subcontractor, Nutrioso Contractors, Inc. However, this does not mean that Nutrioso had not contracted to harvest the Draw sale for $85/MBF in the summer of 1995 or that the actual cost of logging the sale starting in 1998 was not $90/MBF. Aside from the fact that representatives of Reidhead and Nutrioso are prepared to testify to these facts, enclosed are contemporary payment summaries and copies of canceled checks which indicate that:
>
> 1. In July 1995, Re[i]dhead was paying Nutrioso $85 per MBF to harvest other sales. See summary for July 16-31 which also reflects the fact that payment at the $85 rate was made on 8/8/95; and

2. Nutrioso was actually paid $90 per MBF when the Draw sale was actually harvested.

The total amount which Appellant seeks with regard for its increasing logging costs is $8,528.118 (i.e., $7,048.02 in increased costs plus a 10% markup ($704.80) for overhead and 10% markup ($775.28) for profit on those increased costs[)].

(Appellant's Brief at 6-7.)

8. Thereafter, in reply to the Government's response that the Appellant provided no support that the 1997 costs for hauling and logging on the Draw sale would have been the same as for sales in 1995, Appellant provided additional discussion and exhibits in which Appellant's president declared: "As Reidhead was preparing to harvest the Draw sale in the Spring of 1997, I on behalf of Reidhead had agreed with our logging subcontractor to continue our previous agreement to pay $85/MBF for the logging and hauling of timber on the Draw sale." Further, "In 1998, Reidhead contracted with its logging subcontractor for logging and hauling services at the new rate, increased by $5/MBF. That is, Reidhead agreed to pay, and in fact did pay, a total of $90/M.F. for logging and hauling of timber from the Draw sale area in 1998." (Third (although styled Second) Declaration of Terry D. Reidhead (Jan. 8, 2001) at 2 (¶¶ 5-6).)

9. Regarding the claim for legal fees, the supporting documentation provided to the CO consisted of a letter dated November 22, 1999, on counsel's letterhead, with a reference to the Draw timber sale contract and the description: "Computation of amounts to which client is entitled as a result of the suspension of the Draw timber sale pursuant to Clause C6.01 . . . . $15,000.00" (AF 20). In supplementing the record after the Board's ruling of October 4, 2000, Appellant submitted a letter from counsel dated November 23, 1999, wherein counsel confirmed that Appellant retained the law firm, and that the firm was to "prepare and prosecute a claim for costs incurred as a result relating to the suspension of the Draw sale in the wake of an injunction issued in Forest Guardians v. Dombeck." (Appellant's Brief, Attachment 1 at 1). Specifically:

> Our charges in representing [the purchaser] on this project will be $15,000 for analyzing and computing [the purchaser]'s entitlement to compensation under clause C6.01 and preparing an appropriate letter to the Contracting Officer setting forth [purchaser]'s claim. Subsequent to the submission of the claim to the Contracting Officer, all work shall be performed on a total contingent fee basis and except as noted below [the purchaser] will not be responsible for any additional fees or expenses.
>
> In consideration of the above, [the law firm] shall be entitled to a bonus in an amount equal to (A) thirty percent (30%) of any and all amounts, including interest, to which the [Appellant] is found entitled by decision of the Contracting Officer or any other official(s) of the Forest Service or the Department of Agriculture, final judgment from a court, decision of a Board of Contract Appeals and/or through settlement plus (B) any unreimbursed expenses incurred by [the law firm].[1] [The law

> firm's] entitlement to said bonus shall not be affected in any way by any setoff or counterclaim asserted by the government or any assertion of any right to any funds by any creditor of [the purchaser].
>
> [1] Any subsequent claim under the Equal Access to Justice Act for attorneys' fees in the wake of a successful resolution of the suspension claims, shall be prosecuted on a time basis plus expenses.

(Appellant's Brief, Attachment 1 at 2). The letter also specifies:

> [Appellant] agrees that, after the claims are submitted to the Contracting Officer, it will not terminate the matter that is the subject of this agreement prior to final resolution and thus not resolve it either through a decision of the Contracting Officer or any other official(s) of the Forest Service or the Department of Agriculture, final judgment from a court, decision of a Board of Contract Appeals or through settlement, without first successfully negotiating a revised fee agreement with [counsel].

(Appellant's Brief, Attachment 1 at 3-4).

10. Appellant acknowledged its acceptance of the agreement by signature and payment of $15,000, by check dated November 30, 1999, received by counsel December 3, 1999 (Appellant's Brief, Attachments 1 and 2). The record includes a detailed log of the legal expenses incurred including the date, the time incurred in decimal portions of an hour, who the time was incurred by, and what the time was incurred for. The record indicates that the law firm began work on preparing a memorandum on recovery under clause CT6.01 on October 19, 1999, and attributes $8,720.05 through the time of reviewing the CO's decision (the CO's decision was January 27, 2000; the charges were incurred through January 31, 2000, but prior to the conference on the notice of appeal that took place February 1, 2000). The notice of appeal was dated February 1, 2000. The areas researched included topics of "direct result," interest, unabsorbed overhead, Eichleay recovery, breach damages, contra proferentum, and profit (Appellant's Brief, Attachment).

11. In supplementing the record on the issues of entitlement and quantum, following the Board's ruling of October 4, 2000, Appellant claims entitlement to the $15,000 of fixed legal fees plus $7,058.45 for what it describes as the contingent portion of the legal fees (30% of the claimed logging costs and legal fees (30% x (8,528.18 + 15,000)), plus interest under the Contract Disputes Act, 41 U.S.C. § 611.

12. The suspension, claim, and CO's decision occurred during the pendency of the contract. For example, Modification 7 to the contract, dated January 29, 1998, among other matters, extended the contract completion date to August 4, 2001 (AF 371). Modification 10, dated March 2, 1999, among other matters, extended the contract completion date to July 4, 2003 (AF 381). On November 23, 1999, payment unit 8 was released for cutting (AF Vol. 2, 704). Modification 11, dated November 4, 1999, among other matters deleted the requirement to harvest Aspen in cutting unit 33 on payment unit 1 (AF 384).

DISCUSSION

Increased Logging and Hauling Costs

Clause CT6.01 expressly provides for the recovery of out-of-pocket expenses incurred as a direct result of a suspension. The increased logging expenses are out-of-pocket expenses that directly resulted from the suspension. The suspension of operations pursuant to the clause CT6.01 resulted in a delay in harvesting from 1997 to 1998. (Findings of Fact (FF) 3, 4.) The preponderance of the evidence supports the conclusion that Appellant's logging and hauling expenses were increased by $5 per MBF, from $85 to $90, as a direct result of the suspension (FF 6-8). Therefore, Appellant is entitled to recoup $8,528.10 which includes overhead and profit. In this regard, the overhead and profit recovered as a direct part of the out-of-pocket expenses is not the "lost profits," or "other anticipatory losses" precluded by clause CT6.01.

Legal Expenses

As a threshold matter, Appellant would not have had to incur certain of its legal expenses were it not for the fact that the Government suspended the contract operations for at least 30 days pursuant to the authority of clause CT6.01. Consequently, those legal expenses are out-of-pocket expenses recoverable under the clause, unless recovery is improper for other reasons. The language of the agreement between Appellant and counsel (FF 9) indicates that for the $15,000 fixed amount paid, Appellant obtained more than the preparation of its submission to the CO. That amount also obligated counsel to prosecute the claim for out-of-pocket costs. Given that counsel pursued the claim, for the reasons stated below, only the portion of the legal costs incurred prior to the filing of the notice of appeal is recoverable.

The Federal Acquisition Regulations (FAR) are not applicable to a contract for the sale of timber. However, the Board has recognized and relied upon the FAR as a guide for timber sale appeals.[1] Here, where the allowability of costs in a claim against the Government are at issue, the applicability of the FAR cost principles is particularly relevant, irrespective of the fact that the claim arises under a Government contract for sale, rather than a Government contract for acquisition. Generally, the issues presented by this portion of Appellant's claim are whether the legal expenses can be recovered as a direct expense, rather than an indirect expense such as G & A, and also, the extent to which the proscription against the recovery of legal fees incurred in litigation against the Government, affects recovery.

FAR section 31.205-33(a) defines professional and consultant service costs to include services acquired to enhance legal positions, and generally, under paragraph (b), allows the recovery of these expenses subject to certain limitations, not relevant here. However, FAR section 31.205-47(f)(1) provides that legal costs are not allowable if incurred in connection with the prosecution of claims or appeals against the Federal Government, referring to FAR section 33.201, which includes the

[1] Jeff Holland Logging, AGBCA No. 93-211-1, 94-3 BCA ¶ 27,213.

definition of a claim. FAR section 33.201 provides that a voucher, invoice, or other routine request for payment that is not in dispute when submitted, is not a claim. The submission may be converted to a claim, by written notice to the CO, if it is disputed, or is not acted upon within a reasonable time.

Clause CT6.01 contemplates the submission of a request for payment in the same manner as a request for an equitable adjustment in response to a unilateral change order. Such a submission can be a routine request for payment and need not be a claim within the meaning of FAR section 33.201. However, under the present circumstances, Appellant's submission included a certification of the amount claimed, and a request for a CO's decision within 60 days (FF 5). Appellant's submission left no room for negotiation or disagreement. Thus, the submission was a claim within the meaning of FAR section 33.201. FAR section 31.205-47(f)(1) prohibits the recovery of legal expenses in connection with the prosecution (in comparison with the preparation) of a claim or appeal. Therefore, the legal expenses are recoverable through and for claim preparation, but not for the preparation of the notice of appeal, which would amount to prosecution of the a claim against the Government. In this instance, the legal expenses incurred prior to the preparation of the notice of appeal are $8,720.05 (FF 10).

Regarding recovery of the legal expenses as a direct cost, it is clear that the legal expenses were incurred as a direct response to the Government's suspension under clause CT6.01 under the present contract. No application to any other contract or purpose has been shown. Nor has any contrary past practice been shown. However, the court in Singer Co., Librascope Div. v. United States, 568 F.2d 695 (Ct. Cl. 1977) disallowed legal expenses as a direct expense as a part of an equitable adjustment under a contract on the basis that entitlement was not clear, and the equitable adjustment had not been presented to the CO until all work under the contract had been completed.

Such an approach was modified in Bill Strong Enter., Inc. v. Shannon, 49 F.3d 1541 (Fed. Cir. 1995), overruled in part on other grounds, Reflectone, Inc. v. Dalton, 60 F.3d 1549 (Fed. Cir. 1995), wherein the issue was the recovery of consulting costs as a direct expense. The court noted Singer, but held that in cases involving delay by the Government the contractor cannot calculate the additional expenses until completion of the contract work.

In any event, under the present contract, the Government's liability is clear, since it is not disputed that the Government suspended operations under clause CT6.01 for a period of more than 30 days during the operating season. The question is how much Appellant can prove by way of recoverable out-of-pocket expenses. Further, here, unlike Singer, the legal expenses were incurred and the claim therefor was presented to the CO during the pendency of the contract (FF 5, 10, 12.) Thus, there is no prohibition against granting the legal expenses as a direct expense.

Finally, Appellant cites Blue Cross Ass'n and Blue Shield Ass'n, ASBCA No. 25778, 89-2 BCA ¶ 21,840, asserting that all Appellant's legal expenses, even those incurred prosecuting the claim against the Government, are recoverable. Blue Cross is readily distinguishable from the present facts for a number of reasons. First, the cost principles were specifically found to be inapplicable to the Blue Cross contract. Second, the language of the clause defining the extent of

recovery allowed Blue Cross to determine what was equitable and reasonable. Finally, a contract provision specifically prohibited the contract from being subsidized by the commercial segment of the Blue Cross business. Therefore, failure to recoup the legal expenses under the Government contract would have resulted in a breach of this contract provision.

DECISION

The Board grants in part the appeal. The purchaser recovers $17,245.15 ($8,525.10 for increased logging and hauling costs, and $8,720.05 in attorney fees) under clause CT6.01.

_____

EDWARD HOURY

I CONCUR:

_____

ANNE W. WESTBROOK
Administrative Judge

Separate Dissenting Opinion by Administrative Judge VERGILIO

VERGILIO, Administrative Judge, dissenting.

Reaching different factual and legal conclusions, I write separately from the majority; I conclude that the record does not support recovery of any amount. Disturbingly, the majority looks outside of the contract and treats the Federal Acquisition Regulation (FAR) cost principles as containing controlling guidance, although those principles are not applicable to timber sale contracts. Such an approach to contract interpretation does not bode well.

On February 1, 2000, Reidhead Brothers Lumber Mill (purchaser), of Nutrioso, Arizona, filed this appeal regarding its claim for $345,232.17 under its Draw timber sale contract, No. 001517, with the respondent, the U. S. Department of Agriculture, Forest Service (Government). The sale involves timber in the Alpine Ranger District, in the Apache-Sitgreaves National Forests, Arizona. The purchaser claims entitlement under clause CT6.01, Interruption or Delay of Operations, for a suspension of greater than 30 days. The clause entitles the purchaser to reimbursement of "out-of-pocket expenses incurred as a direct result of interruption or delay of operations. Out-of-pocket expenses do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered by Purchaser."

On October 4, 2000, the Board issued an opinion resolving a motion and cross-motion for summary judgment. The Board held that the purchaser's claimed expenses for operating a sawmill were not incurred as a direct result of the interruption or delay of operations under the contract (such costs were an indirect or consequential result of the interruption or delay). Accordingly, the Board concluded that the purchaser lacks entitlement to recover such costs under the contract. Of the initial eight items for which the purchaser sought recovery (one of which the contracting officer granted in full), two survive the motions: increased logging and hauling costs, and legal fees. Reidhead Brothers Lumber Mill, AGBCA No. 2000-126-1, 00-2 BCA ¶ 31,144 (the purchaser does not here pursue idle equipment costs because those related to costs incurred at the purchaser's mill; such costs are not recoverable under the Board's decision).

By letter dated October 19, 2000, to the Government, the purchaser submitted an explanation and additional information which have become its brief and part of the evidentiary record, respectively. The Government filed a response in opposition, dated December 14, 2000. The purchaser filed a reply with exhibits, dated January 9, 2001. The parties, not opting for a hearing, submitted the matter on the written record.

The purchaser has not demonstrated that it incurred an increase in logging and hauling costs. Specifically, the purchaser seeks to recover for the difference between anticipated costs for 1997 and actual costs for 1998. The record does not reasonably support the presumed costs for 1997. Despite being a critical element of the claim, the sole evidence is a declaration provided after the initial claim and after the Government filed a response in this matter. Coming for the first time in the third declaration by the president of the purchaser, without corroborating evidence, the assertion lacks sufficient credibility. I deny this aspect of the claim.

The purchaser retained the law firm to prepare and prosecute a claim under the Interruption or Delay of Operations clause. But for the interruption and delay, the purchaser would not have had to determine and seek entitlement under the clause. However, based upon the record, I conclude that the costs were incurred principally in litigating against the Government. Because such costs are not recoverable under the clause, and the purchaser has not sought or demonstrated a reasonable basis for recovery of any portion of the fees it incurred, I deny recovery of the attorney fees sought (a fixed amount plus a contingency fee liability).

Accordingly, I deny this appeal.

FINDINGS OF FACT

1. With an award date of August 29, 1991, the Government and purchaser entered into the Draw timber sale contract, No. 001517, with timber located in the Apache-Sitgreaves National Forests, Alpine Ranger District, Greenlee County, Arizona (Exhibit 4 at 168 (all exhibits are in the appeal file, unless otherwise noted)). The purchaser was to remove 5,910 thousand board feet (MBF) of designated timber from five identified payment units (the payment for some timber subject to escalation and some timber to be paid for at flat rates), as well as construct and maintain roads,

construct an ungrouted rubble paved waterway, install road closure barriers, and perform other related work (Exhibits 4.A at 183 (¶ AT5c), 187-88 (¶¶ AT9-11), 7.A at 450-51).

2. The contract contains an Interruption or Delay of Operations clause (6/90) under which the purchaser agrees to interrupt or delay operations under the contract, in whole or in part, upon the written request of the contracting officer in order to comply with a court order. Moreover,

> Purchaser agrees that in event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be (1) Contract Term Adjustment pursuant to BT8.21, or (2) when such an interruption or delay exceeds 30 days during Normal Operating Season, Contract Term Adjustment pursuant to BT8.21, plus out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision. Out-of-pocket expenses do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered by Purchaser. Purchaser agrees to provide receipts or other documentation to the Contracting Officer which clearly identify and verify actual expenditures.

(Exhibit 4.C at 245 (¶ CT6.01).)

3. By letter dated June 2, 1997, the purchaser provided the Government with a "logging plan" which indicates that it plans to begin logging work on the Draw timber sale, June 1, 1997; it intends to spend the summer there, moving on to another sale in October. (Exhibit 7.A at 628). By a separate letter, dated June 2, 1997, the purchaser requested that the Government release payment unit two in the Draw timber sale (Exhibit 7.A at 629).

4. The contracting officer informed the purchaser, by letter dated June 4, 1997:

> This letter is to officially document the suspension of sawtimber harvest on the Isabelle, Draw, Horton, and Burro Timber Sales. This suspension is pursuant to the May 30, 1997, Order of the United States Court of Appeal, the Ninth Circuit for Forest Guardians vs. Mike Dombeck, as the Chief of the Forest Service (DC#-CV-96-2258-PGR). This suspension applies to all falling operations on the above mentioned sales. Other sale activities such as the removal of previously felled timber, erosion control, and slash work may continue.

(Exhibit 7.A at 632.) The record does not resolve the question of when the purchaser first learned of the court-ordered suspension. The purchaser did not harvest payment unit two during 1997. The suspension of logging operations exceeded 30 days in the normal operating season. (Exhibits 4.A at 168, 193 (¶ AT16), 4.C at 252 (¶ CT6.314).)

5. On November 29, 1999, the contracting officer received from the purchaser what is styled a "claim" and a certification, dated November 24, 1999. (Exhibits 1.C at 3, 9.B at 1263). Through the submission, the purchaser sought to recover $345,232.17 ($330,232.17 is for other than attorney fees and $15,000 is for attorney fees), which it characterized as "costs it incurred as a result of the Forest

Service's suspension of the Draw timber sale /contract from June 3, 1997 until December 20, 1997." It claimed entitlement under clause CT6.01. (Exhibit 1.C at 3-21.)

6. By letter dated January 27, 2000, the contracting officer approved payment of the full amount sought for maintaining a letter of credit ($403.78), plus interest ($3.27), but denied all other requested costs (Exhibit 1.D at 22).

Logging and hauling costs

7. The purchaser provided support with its claim to the contracting officer for increased logging and hauling costs. The support consists of a single page which states that the anticipated logging and hauling costs for 1997 were $85.00 per MBF (LT), that the actual logging and hauling costs for 1998 were $90.00 per MBF (LT), with a difference of $5.00 per MBF (LT). The calculation presented is as follows:

1,409.603	volume of lumber from Payment Unit 2
x $5.00	increased logging cost per MBF (LT)
$7,048.02	
$704.80	overhead
$7,752.82	
$775.28	profit
$8,528.10	

(Exhibit 1.C at 21.)

8. In supplementing the record on the issues of entitlement and quantum, following the Board's ruling of October 4, 2000, the purchaser has submitted the following explanation:

> With regard to Reidhead's claim for increased logging costs please be advised that Reidhead had no written contract with its logging subcontractor, Nutrioso Contractors, Inc. However, this does not mean that Nutrioso had not contracted to harvest the Draw sale for $85/MBF in the summer of 1995 or that the actual cost of logging the sale starting in 1998 was not $90/MBF. Aside from the fact that representatives of Reidhead and Nutrioso are prepared to testify to these facts, enclosed are contemporary payment summaries and copies of cancelled checks which indicate that:
>
> 1. In July1995, Re[i]dhead was paying Nutrioso $85 per MBF to harvest other sales. See summary for July 16-31 which also reflects the fact that payment at the $85 rate was made on 8/8/95; and
>
> 2. Nutrioso was actually paid $90 per MBF when the Draw sale was actually harvested.

> The total amount which Appellant seeks with regard for its increased logging costs is $8,528.18 (i.e., $7048.02 in increased costs plus a 10% markup ($704.80) for overhead and 10% markup ($775.28) for profit on those increased costs[)].

Purchaser Brief at 6-7 (footnotes omitted). The submissions support the assertions that the purchaser paid $85 per MBF in 1995 to Nutrioso on the Horton and the Isabelle timber sales (both suspended at the same time as the Draw timber sale in dispute here) and paid $90 per MBF in 1998 and 1999 on the Draw timber sale. The brief and submissions are silent regarding anticipated costs in 1996 or 1997 on the Draw timber sale, when logging was suspended.

9. Thereafter, in reply to the Government's response which specifies that the purchaser "provides no evidence, support or verification that the 1997 costs for hauling and logging on the Draw sale would have been the same as those for [other] sales in 1995," the purchaser provided additional discussion and exhibits. In its reply brief, the purchaser asserts: "As stated in [Purchaser]'s Opening Brief of October 19, 2000, Reidhead stood ready to testify to the 1997 contract price for logging and hauling and now Mr. Reidhead has provided such testimonial evidence demonstrating that the 1997 contract price was to have been $85/MBF." Purchaser Reply Brief at 12-13. (This assertion mischaracterizes what is in the earlier brief, Finding of Fact (FF) 8, which addressed costs in 1995 and 1998 not 1997.) In the referenced exhibit, the president of the purchaser declares: "As Reidhead was preparing to harvest the Draw sale in the Spring of 1997, I on behalf of Reidhead had agreed with our logging subcontractor to continue our previous agreement to pay $85/MBF for the logging and hauling of timber on the Draw sale." Further, "In 1998, Reidhead contracted with its logging subcontractor for logging and hauling services at the new rate, increased by $5/MBF. That is, Reidhead agreed to pay, and in fact did pay, a total of $90/MFB for logging and hauling of timber from the Draw sale area in 1998." (Third (although styled Second) Declaration of Terry D. Reidhead (Jan. 8, 2001) at 2 (¶¶ 5-6).) There is no corroborating evidence that the $85 rate of 1995 (on other sales) was viable in 1997 on this sale, apart from the declaration of the president.

Legal fees

10. Regarding the claim for legal fees, the supporting documentation provided to the contracting officer consists solely of a one page letter dated November 22, 1999, on the letterhead of the law firm, with a reference to the Draw timber sale contract and the description: "Computation of amounts to which client is entitled as a result of the suspension of the Draw timber sale pursuant to Clause C6.01 . . . . . $15,000.00" (Exhibit 1.C at 20).

11. In supplementing the record on the issues of entitlement and quantum, following the Board's ruling of October 4, 2000, the purchaser submitted a letter from the law firm to the purchaser dated November 23, 1999, and a copy of the letter/bill of November 22, 1999 (FF 10), with an annotation "Paid 12/3/99 #10477." In the letter of November 23, the law firm acknowledges that the purchaser has retained the law firm and confirms the agreement that the firm is to "prepare and prosecute a claim for costs incurred as a result relating to the suspension of the Draw sale in the wake of an

injunction issued in Forest Guardians v. Dombeck." (Purchaser Brief, Attachment 1 at 1). Moreover:

> Our charges in representing [the purchaser] on this project will be $15,000 for analyzing and computing [the purchaser]'s entitlement to compensation under clause C6.01 and preparing an appropriate letter to the Contracting Officer setting forth [purchaser]'s claim. Subsequent to the submission of the claim to the Contracting Officer, all work shall be performed on a total contingent fee basis and except as noted below [the purchaser] will not be responsible for any additional fees or expenses.
>
> In consideration of the above, [the law firm] shall be entitled to a bonus in an amount equal to (A) thirty percent (30%) of any and all amounts, including interest, to which the [purchaser] is found entitled by decision of the Contracting Officer or any other official(s) of the Forest Service or the Department of Agriculture, final judgment from a court, decision of a Board of Contract Appeals and/or through settlement plus (B) any unreimbursed expenses incurred by [the law firm].[1] [The law firm's] entitlement to said bonus shall not be affected in any way by any setoff or counterclaim asserted by the government or any assertion of any right to any funds by any creditor of [the purchaser].
>
> [1] Any subsequent claim under the Equal Access to Justice Act for attorneys' fees in the wake of a successful resolution of the suspension claims, shall be prosecuted on a time basis plus expenses.

(Purchaser Brief, Attachment 1 at 2). The letter also specifies:

> [The purchaser] agrees that, after the claims are submitted to the Contracting Officer, it will not terminate the matter that is the subject of this agreement prior to final resolution and thus not resolve it either through a decision of the Contracting Officer or any other official(s) of the Forest Service or the Department of Agriculture, final judgment from a court, decision of a Board of Contract Appeals or through settlement, without first successfully negotiating a revised fee agreement with [the law firm].

(Purchaser Brief, Attachment 1 at 3-4). The purchaser acknowledged its acceptance of the agreement by signature and payment of $15,000 (Purchaser Brief, Attachment 1 at 5, Attachment 2 (Annotation on Letter of Nov. 22, 1999)).

12. The law firm's letter to the purchaser confirming an agreement of representation is dated November 23, 1999 (FF 11), which is after the date on the letter of billing (FF 10). The claim to the contracting officer is dated November 24, 1999 (FF 5). The representation in the purchaser's brief, that the purchaser's check for $15,000, was dated November 30, 1999, and received by the law firm on December 3 along with the signed agreement, is not here in dispute (Purchaser Brief at 2,

Attachment 1 at 1, Attachment 2). The record indicates that the law firm began work on preparing a memorandum on recovery under clause CT6.01on October 19, 1999, and attributes $8,558.80 to the effort through the time of filing the claim; areas researched include topics of "direct result," interest, unabsorbed overhead, Eichleay recovery, breach damages, contra proferentum, and profit (Purchaser Brief, Attachment 3). The entries for time expended after the submission of the claim do not support the finding that the work was for something other than potential litigation.

13. In supplementing the record on the issues of entitlement and quantum, following the Board's ruling of October 4, 2000, the purchaser claims entitlement to the $15,000 of fixed legal fees plus $7,058.45 for what it describes as the contingent portion of the legal fees (thirty percent of the claimed logging costs and legal fees (30% x ($8,528.18 + $15,000)), plus interest under the Contract Disputes Act, 41 U.S.C. § 611.

DISCUSSION

The purchaser seeks to recover, under clause CT6.01, what it describes as increased logging and hauling costs and attorney fees incurred as a direct result of the delay and suspension of logging operation during 1997. The Government maintains that the purchaser has failed to support adequately its claim for increased logging and hauling costs, and has failed to demonstrate entitlement to the legal fees.

Logging and hauling costs

Under clause CT6.01, a purchaser is entitled to recover its out-of-pocket expenses incurred as a direct result of the interruption or delay of operations (FF 2). Regarding logging and hauling costs, the purchaser seeks to recover for the difference between anticipated costs for 1997 and actual costs for 1998. The record does not reasonably support the presumed costs for 1997. Despite being a critical element of the claim, the sole evidence is a declaration provided after the initial claim, after supplementing the evidence in support, and after the Government filed a response in this matter noting the lack of proof. Coming for the first time in the third declaration by the president of the purchaser, without corroborating evidence, the assertion lacks adequate credibility.

I deny this aspect of the claim.

Legal fees

The purchaser seeks to recover its $15,000 initial payment to the law firm and its contingency fee liability. These expenses relate to legal fees incurred in connection with the preparation and documentation of the submissions for relief under clause CT6.01, and for pursuing those claims, all of which the purchaser characterizes as out-of-pocket expenses incurred as a direct result of interruption or delay, and, therefore, recoverable under the contract clause.

The Government maintains that the purchaser has not established entitlement under contract provisions or law, that the attorney fees were not incurred as a direct result of the suspension, and

that the Government has not consented to be sued, or waived its immunity from suit for attorney fees. The Government concludes that the Board must deny relief.

The contract clause at issue here, CT6.01, provides for recovery of out-of-pocket expenses incurred as a direct result of the suspension or delay. The clause is silent regarding costs of attorneys, although it expressly excludes the reimbursement of lost profits, replacement costs of timber, or any other anticipatory losses suffered by the purchaser. This being a sale, not an acquisition, the Federal Acquisition Regulation (FAR) and cost principles contained therein are not applicable to this timber sale. 48 CFR 1.104 (1991). Thus, the express provisions of those regulations dealing with allowable and unallowable costs are not of relevance. Therefore, much of the case law that addresses the recovery of attorney fees, is not directly relevant, because the rationale is grounded on cost principles that do not apply here. E.g., Bill Strong Enterprises, Inc. v. Shannon, 49 F.3d 1541 (Fed. Cir. 1995) (and cases cited therein), overruled in part on other grounds, Reflectone, Inc. v. Dalton, 60 F.3d 1549 (Fed. Cir. 1995).

The purchaser maintains that it is entitled to recover under the contract clause, without regard to whether the attorney fees were incurred in pursuit of litigation. The purchaser references the analysis expressed in Blue Cross Ass'n, ASBCA No. 25778, 89-2 BCA ¶ 21,840, at 109,910:

> that the contractual definition of allowable administrative expenses, while it does not expressly include or exclude legal fees of any type, is broad enough to include the attorneys' fees in dispute, even if they are considered to be costs of prosecuting claims against the Government; that the . . . [regulatory] cost principles (. . . making claim prosecution costs unallowable) do not apply to this contract for the years in issue; that the prohibitions of sovereign immunity, the American rule, and 28 U.S.C. § 2412(a) do not bar the legal fees here, because here they are claimed as contract costs, not by way of a direct Board award of attorneys' fees; that there is no "settled principle of law" barring claim prosecution costs that must be read into this contract and that might make the disputed legal fees unallowable; and finally, that we do not need to decide whether the legal fees in issue here, or for any cost allowability litigation, are in fact the costs of prosecuting claims against the Government.

I do not adopt the analysis or conclusion reached therein. Instead, I rely upon the more recent analysis expressed by this Board's appellate authority:

> In light of Congress' express but limited grant of a right to an award to "certain individuals, partnerships, corporations, businesses, associations, or other organizations," we do not accept [the contractor's] arguments that such a right could be premised instead on those clauses, incorporated into contracts with the government as a matter of course. An award of money damages from the United States must have some concrete, legislatively authorized basis; that basis has not been shown to exist.

Texas Instruments Inc. v. United States, 991 F.2d 760, 768 (Fed. Cir. 1993); Sterling Federal Systems, Inc. v. Golden, 16 F.3d 1177, 1182 (Fed. Cir. 1994) ("Under the principle of sovereign immunity costs or expenses may not be awarded against the United States in the absence of a statute directly authorizing such an award"); Fidelity Constr. Co. v. United States, 700 F.2d 1379, 1387 (Fed. Cir. 1983) (in determining that a board of contract appeals could not award attorney fees under the Equal Access to Justice Act, which at the time did not identify boards as forums which could award such fees, the court stated: "Congress must expressly authorize an award of fees against the United States with specific statutory language. In construing a statute waiving sovereign immunity of the United States, great care must be taken not to expand liability beyond that which was explicitly consented to by Congress.").

A contractor's ability to recover costs of litigation against the Government is expressly limited by statute, 28 U.S.C. § 2412 and 5 U.S.C. § 504, as well as by the American rule and sovereign immunity. The conclusion the purchaser here urges the Board to adopt negates the limitations found in statute. The record does not demonstrate that the broad wording of clause CT6.01 rests upon a concrete, legislatively authorized basis sufficient for recovery of attorney fees incurred in pursuing the claim against the Government. Thus, the entirety of the contingency fee liability, which represents solely costs of litigation against the Government (FF 11), is not recoverable under the clause.

Although the costs of litigating against the Government are not recoverable under the clause, the question remains what, if any, of the attorney costs are recoverable under clause CT6.01. The clause provides for recovery of "out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision" (FF 2). Here, but for the suspension or delay, the purchaser would not have had to prepare and submit a request pursuant to the clause. Thus, the costs are recoverable, to the extent that the record demonstrates that they represent costs incurred as a direct result of the suspension and are other than costs incurred in litigating against the Government. (Also, any recovered costs would have to be reasonable).
In asserting entitlement to the entire fixed amount paid ($15,000), the purchaser has not apportioned its costs between those of preparing the submission under the clause and of litigating against the Government. The purchaser has not attempted to justify the recovery of any lesser amount, despite the Board noting for the parties, before briefs and evidence were prepared, that if the fees reflect payment for all work in pursuing the claim, including expenditures before the Board, there may be a question as to the applicability of the Equal Access to Justice Act for recovery.

I conclude that the record demonstrates that the purchaser incurred the costs principally with regard to litigating against the Government. For the fixed fee, the purchaser obtained more than the preparation and submission of a request or claim under clause CT6.01. This conclusion is based upon the terms of the agreement (committing the purchaser to utilize the law firm through final resolution, unless the law firm agrees to a revised fee arrangement), the timing of the agreement (the purchaser signed the agreement and paid the initial amount after the request for payment had been submitted to the contracting officer, after the law firm had engaged in substantial hours of research regarding recovery under the clause), and the purchaser's liability under the agreement (for $15,000 plus a potential contingency fee; while at the time of the agreement, the law firm had expended

significantly fewer dollars in hours than the fixed portion of the fee), together with the efforts of the law firm (the effort involved much research regarding relief outside of the clause, in contrast to preparing a request for payment) and the substance of the request for payment and ultimate claim (seeking amounts without sufficient factual or legal support; e.g., the submissions until after the Government's response here provided no support for anticipated logging and hauling costs in 1997). The purchaser has opted not to present any analysis or discussion allocating its costs. Given the nature and timing of the attorney fee agreement, it is not appropriate for this Board to undertake such a task to provide for recovery.

The purchaser fares no better under a different theory of relief, if the clause is viewed as permitting recovery as an equitable adjustment (relying upon notions of equity) in contrast to relief based on the express language of it the contract (utilizing principles of contract interpretation). In Singer Co., Librascope Div. v. United States, 568 F.2d 695 (Ct. Cl. 1977), the contractor sought to recover attorney fees incurred in connection with the preparation and documentation of its claim to the contracting officer for an equitable adjustment. The contractor maintained that the fees were incidental to contract performance and were not litigation-connected. The court denied recovery, 568 F.2d at 721:

> Here, the claims for equitable adjustment were not presented to the contracting officer until all work had been completed, they addressed no situation in which Government liability was clear or apparent and, in content, they offered nothing that could reasonably be considered as benefit[t]ing the contract purpose. Judged both from the standpoint of the time of their submission and the purpose of their submission, [the contractor]'s requests for equitable adjustment were not performance-related; they bore no beneficial nexus either to contract production or to contract administration.

In the context of an equitable adjustment, costs are recoverable if they were incurred as part of contract performance or contract administration, and there is a beneficial nexus thereto. In this case, the beneficial nexus is de minimus. The research and analysis, which culminated in a submission to the contracting officer, did not result in a persuasive, well-supported request under the clause. The initial request for relief barely addressed a situation in which Government liability was clear or apparent, and the supporting documentation largely was inadequate. The purchaser recovered slightly over one-tenth of one percent of the initial request; it recovered only its costs of maintaining a letter of credit. The request for relief was not well-nigh conclusive; it has not been supported before this Board. The recovery, obtained with little proof and directly under the clause without litigation, does not justify recovery of the claimed attorney fees.

The purchaser raises other items in support of its position, which merit comment. It is not material to the analysis that (1) a later version (October 1996) of the contract clause explicitly states that out-of-pocket expenses do not include attorney fees; (2) the president of the purchaser declares that he interpreted the clause to mean that, in the event of interruption or delay, the purchaser would be reimbursed for any expenditure (irrespective of size), i.e., any "out-of pocket expense, so long as it was incurred as a direct result of the interruption or delay and it did not constitute lost profits,

replacement costs of timber, or other anticipatory loss; and (3) a Forest Service employee stated, in an affidavit in another matter, that, under the clause, he believes the Government could expect claims for out-of-pocket costs, including legal counsel costs (Purchaser's Reply, Exhibits 2 at 3 (¶¶ 8-10), 3 , 4). As to the first item, the additional languages makes explicit that attorney fees are not recoverable under the clause; this goes further than the clause at issue here, which the Board interprets as permitting the recovery of attorney fees incurred with as a direct result of the suspension or delay but not in litigating against the Government. As to the second item, such a subjective interpretation is not relevant, and, in any event, it is not reasonable, as the Board addressed in its previous opinion dealing with sawmill expenses. As to the third item, the affidavit does not state that the Government will be liable under the clause, it states that claims for legal fees can be expected. Moreover, there is no nexus to this contract, so as to reflect a meeting of the minds which would bind the parties.

The majority overreaches the factual record and the legal arguments of the parties to grant relief. The majority compensates the purchaser on a basis not urged or suggested by the parties. The earlier decision by the Board noted that the purchaser had yet to demonstrate entitlement and quantum; during telephone conferences, the parties were urged to develop the record so as to address the potential application of the Equal Access to Justice Act, which may serve to limit recovery for costs of litigation against the Government under the clause. The purchaser presented its request for quantum on an all or nothing basis; it is that request to which the Government responded.

While I would not compensate the purchaser for any of these attorney fee costs, given the arguments of the purchaser and the developed record, the majority reaches an unsupportable conclusion in awarding $8,720.05. The purchaser did not agree to compensate the law firm on an hourly basis. Rather, for the fixed price of $15,000, the law firm was to prepare the submission and prosecute the claim (with the purchaser to incur a contingent liability if further law firm action were required). The fixed amount could be allocated between the hours and dollars attributable to preparing the submission and to litigating against the Government. The law firm expended approximately one-third of the hours and dollars on the former (preparing the CT6.01 submission) and two-thirds on the latter (litigating). Thus, under a less-faulty analysis the majority should only award the purchaser $5,000.

A request to parties appearing before this Board

Although expressing my views in a dissent, I discourage parties from relying upon an apparent overwhelming generosity of this Board in countenancing a party's failure to provide sufficient and timely proof (to the contracting officer and to this Board) and to make legal arguments for the relief fashioned. I encourage parties to present the factual information and legal argument to be considered. It is possible that in this or another matter, our appellate authority will expressly address (again) what satisfies a burden of proof to recover under a contract. In this instance, the views of this panel are divided as to whether the purchaser has met its burden or not.

_____
JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
June 29, 2001