POSTON LOGGING,	)	**AGBCA No. 97-168-1**
	)	
Appellant	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

December 15, 1998

OPINION BY ADMINISTRATIVE JUDGE HOWARD A. POLLACK

This dispute arises out of the Fraser Timber Sale, Contract No. 058302, between the U. S. Department of Agriculture, Forest Service (FS) and Poston Logging (Poston or Appellant), in the Mi-Wok Ranger District, Stanislaus National Forest, Sonora, California. At issue is whether trees 30 inches diameter or over were included timber for purposes of harvesting. The FS contends they were not, relying in large measure upon what it describes as general knowledge in the industry that trees of 30 or more inches in diameter at breast height (dbh) could not be harvested for environmental reasons. The FS further asserts that trees over 30 inches had old blue paint markings from a prior sale that should have caused Poston to inquire. Poston disagrees, pointing out that the 30-inch and greater trees were all marked in blue paint as specified in the contract and that it was entitled to rely on the markings irrespective of whether the blue paint was old or new. Poston further notes that the FS has discretion to allow cutting of trees that were 30 inches and greater and therefore, Poston had no reason to question the FS' intentions. Accordingly, Poston concludes the contract was materially breached and seeks damages, including lost profit in the amount of $362,333.63.

In addition to defending on the merits, the FS also contends that even if Poston is correct on the contract interpretation, Poston cannot recover breach damages, but rather, damages must be decided under clause CT8.2, Termination, which allows the FS to terminate the contract for environmental reasons and which limits the amount of cost recovery. The Board has jurisdiction of this appeal under the Contract Disputes Act (CDA) of 1978 (41 U.S.C. §§ 601-613). A hearing was held in San Francisco, California, on October 22-24, 1997.

FINDINGS OF FACT

1. As a precursor to accepting offers, the FS first published an advertisement notifying interested parties of the sale. That was followed by a Prospectus, which provided that the sale area and sample contract should be inspected before submitting a bid and which further noted that appraisal and other information on the timber and conditions of sale and bidding could be obtained at the FS office listed. The Prospectus contained a volume estimate, identified the harvest as a combination tractor and skyline operation and noted that the contract would require roadwork. (Appeal File (AF) 219-224.) Paragraph 4 of the Prospectus stated that quality, size, and age class of the timber were estimates based on detailed cruise information on file and available for inspection at the FS Office listed in the advertisement. It continued in bold print, "**INFORMATION LISTED HEREIN IS MADE AVAILABLE WITH THE UNDERSTANDING THAT VALUES SHOWN ARE NOT ESTIMATES OF A PURCHASER'S OWN RECOVERY AND ARE NOT A PART OF THE TIMBER SALE CONTRACT.**" (AF 221.) Similar language was reiterated in the bid form which stated, "Bidder warrants that this bid/offer is submitted solely on the basis of its examination and inspection of the quality and quantity of timber offered for sale, and is based solely on its opinion of the value thereof and its costs of recovery without reliance on Forest Service estimates of timber quality, quantity or costs of recovery." The bid form went on to note that the FS "expressly disclaims any warranty as to the quantity or quality of timber sold except as may be expressly warranted in the sample contract." (AF 214.)

2. Poston was the only bidder on the sale, bidding $46,671.72, which was one dollar over the advertised minimum acceptable bid (AF 212). The contract, which covered an area of approximately 519 acres (AF 69-77; Transcript (Tr.) 30), was advertised as a deficit sale, a sale where road construction costs were not expected to be recovered, and as such, the FS did not expect a significant number of bidders nor did it expect the sale to be profitable to the purchaser. (AF 222; Tr. 412-414.) The FS expectation was based upon its appraisal of the value of the sale, which did not include harvest of 30-inch and greater trees and which further assumed that the timber sold would have to be hauled to mills outside the area for sale (Tr. 442-444).

3. The Fraser Timber Sale Contract was awarded to Poston on January 24, 1996 (AF 67). Pursuant to the contract, Poston agreed to cut and remove included timber. Included timber was defined in the specifications as trees greater than 10-inch dbh that had been designated by the FS, i.e., marked with blue paint above and below stump height (AF 221). There were a number of provisions that clearly specified that trees to be cut were marked with blue tree

marking paint and no mention or distinction was made in the specifications as to old or fresh paint or the maximum diameter of harvestable timber (AF 149, 221; Tr. 36).

4. There were also several contract clauses that are relevant as to the damage issue (AF 139-140). Specifically, clause CT8.2 provides in pertinent part as follows:

> CT8.2 - Termination. (12/89) The Chief, Forest Service, by written notice, may terminate this contract, in whole or in part, (1) to comply with a court order, regardless of whether the sale is named in the order, upon determination that the order would be applicable to conditions existing on the sale; or (2) upon a determination that the continuation of all or part of this contract would:
>
> > (a) cause serious environmental degradation or resource damage;
> >
> > (b) be significantly inconsistent with land management plans adopted or revised in accordance with Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended;
> >
> > (c) cause serious damage to cultural resources pursuant to CT6.24;
> >
> > (d) jeopardize the continued existence of Federally listed threatened and endangered species or, cause unacceptable adverse impacts on sensitive species, identified by the appropriate Regional Forester.
>
> Compensation for termination under this provision shall be calculated pursuant to CT9.5, except; compensation for termination under (1) shall be calculated pursuant to CT9.51 when included in this contract and compensation for termination under (2)(d) shall be calculated pursuant to CT9.52 when included in this contract.

5. Clause CT9.52 (AF 148) was included in the contract and provided:

> CT9.52 - Settlement (5/3/89) Forest Service may modify or terminate this contract as a result of litigation relating to spotted owls or decisions by the U.S. Fish and Wildlife Service to list this species as a threatened or endangered species either of which affects timber included in this contract.
>
> In the event of modification, changes to the contract shall be limited to those determined by the Contracting Officer to be necessary for correction of deficiencies raised by the lawsuit or required to manage the habitat of the spotted owl as a threatened or endangered species when listed by the U.S.

> Fish and Wildlife Service. Changes to the contract shall be limited to requirements with which Purchaser can reasonably comply.
>
> In the event that this contract is modified or terminated, under this provision, Purchaser agrees that the liability of the United States shall be limited to the sum of (a) the value of the unused effective Purchaser Credit earned on this sale of unamortized ineffective purchaser credit; and (b) the estimated expenditures for felling, bucking, lopping, skidding, and decking any products so processed, but not removed from the sale area. Cost estimates listed in (b) shall be based upon Forest Service appraisal methods in use on the date contract is modified or terminated.

6. Among the guidelines used in preparing the documents for the sale was a FS biological evaluation (BE) for the Fraser Sale, which the FS prepared well prior to and which addressed biological matters affecting the sale. The BE generally called for prohibiting harvest of trees over 30 inches dbh. The BE, however, was not part of the contract. (Tr. 388-393.)

7. There is no dispute that the contract language for the sale called for the harvest of blue-marked trees and that at the time of the advertisement, the FS was aware that the sale area included trees which had been marked previously with blue paint for an earlier, canceled sale (Gay-Crandall Sale). Notwithstanding that earlier marking, the FS also chose to mark trees for the Fraser Sale in blue paint. (Tr. 448-449.) The FS conceded it made a mistake in not using a different color to mark the trees (Tr. 471).

8. Unbeknownst to Poston at the time of bidding, the FS intended to insert wording in the documents to exclude trees that had been painted blue on the prior sale but it did not. At a point prior to advertisement, the FS had markers black out some of the old blue- painted trees but did not complete that operation. The plan to insert wording excluding the trees was probably the reason that the FS stopped the blacking out, but in any event not all the old blue paint trees were marked out with black in the field. (Tr. 188, 418, 420, 449-450, 455, 460; Appellant's Exhibit (App. Ex.) A-11.) The Contracting Officer (CO) acknowledged that an appropriate notice in the Prospectus would have made clear the Government's intention to exclude old paint trees from the sale (Tr. 188.)

9. Notwithstanding the above, the FS claimed Poston should have known that the over-30-inch trees were not included, primarily because of the difference in the age of the blue paint, and also because of common and broad knowledge in the community about environmental concerns and restrictions on cutting trees over 30 inches in dbh. In addition, the FS also claimed that Poston should have been alerted by what it characterized as other indicators in the sale preparation folder that the FS considered inconsistent with inclusion of the 30-inch trees. Among the items cited by the FS were the National Cruise Report information, the timber harvest activity record cards, the value of the appraisal, the environmental assessment (EA) and information as to the board/cubic foot ratio. While, it is undisputed that the documents were available and could have been consulted by Poston,

nothing in the Prospectus or contract required review of those documents as a predicate to bidding. (Tr. 409-410, 412-416, 419, 427, 454-455.) Prospective bidders would regularly and routinely come to the FS District Office to discuss sales and often would pose questions, many relating to matters such as the size of trees. Bidders also frequently consulted the sale preparation folder and at times examined environmental documents and cruise information on volume and species as part of pre-bid preparation. (Tr. 267, 427-429.) EA's, while available, were not routinely mailed out to bidders, absent a specific request (Tr. 442).

10. The National Cruise Report is generated by a computer program that summarizes information from a cruise on a particular sale. A review of the report on the Fraser Sale would have indicated that the largest tree sampled by the FS for this sale was 29.7 dbh. According to the FS, that should have indicated that there was "a great possibility" that this was the largest tree being offered in the sale. (AF 229; Tr. 415-416.) The FS also stated that a study or review of the value used by the FS for each species in the FS sale appraisal could have indicated the size of the material to be sold. That was because different values were applied for different species and the values would have been indicative of the size of the material sold. (Tr. 415-416.) Another document cited by the FS as an indicator of the absence of larger trees was the timber harvest activity record cards, which were records of planned activity on the ground. For this sale, every card showed an upper limit to the size of the tree that was to be painted as part of the silviculture prescription. (Tr. 425, 426.) Finally, the FS contended that the board foot to cubic foot ratio of 5.28, which was noted in the sale folder for this sale, was an indicator that the sale was a small tree thinning sale and should have alerted Poston. Nothing in the specifications or solicitation, however, referred to this sale as a tree thinning sale. (Tr. 195.) The Appellant specifically took exception to the significance of the cruise data and cubic foot ratio. According to Mr. Wayne Knauf, an individual with over 35 years of experience in various aspects of forestry, who testified on behalf of the Appellant, there was nothing from the sample contract, the Prospectus or site investigation that would have caused him to review the FS's cruise (Tr. 300-305, 332). Mr. Knauf also gave little weight to the cubic foot ratio, saying it was basically theoretical (Tr. 332-334). In addition, another Poston witness, Mr. William Dorrell, a registered professional forester with over 15 years of experience, similarly stated that the ratio was not significant as to the size or quality of the trees and would not have raised a red flag (Tr. 217, 332-334; App. Ex. A-3). Mr. Poston noted that the use of such ratio was new to him. He stated that his experience with the FS and the way that he had always bid jobs, had been on a board foot basis. (Tr. 50-51.)

11. In addition to the above, the FS also claimed that information in Sections AT1 and 2 of the sample contract should have alerted purchasers not to expect large trees. Those sections included estimates which indicated a low volume on this sale, both as to species and overall quantity. (Tr. 415.) However, estimates must be read in light of the language in BT2.4, Quantity Estimate, of the contract, which said in pertinent part, "However, the estimated quantities stated in AT2 are not to be construed as guarantees or limitations of the timber quantities to be designated for cutting under the terms of this contract" (AF 84).

12. Before bidding, Poston reviewed the sample contract and the Prospectus, and visited the site (Tr. 34). Poston had previously bid on approximately 100 timber sales; however, this

sale was larger in scope than those on which Poston normally bid (Tr. 29, 104). Poston had not previously bid on a sale requiring skyline or mechanized harvesting or one which included road construction (Tr. 105).

13. Poston interpreted the Prospectus and sample contract to mean that the FS had determined the trees it wanted cut and had individually marked each such tree with blue paint (Tr. 39). Neither the sample contract nor the Prospectus referenced any trees that had been marked on a previous sale or distinguished between old and fresh paint or big and little trees (Tr. 39, 55). Following his site investigation, Poston reviewed the sample contract and Prospectus to insure there were no clauses that excluded trees based upon species or tree diameter, other than the minimum tree specification of 10-inch dbh (Tr. 34, 60).

14. During his site visit Poston observed trees ranging from 10 to over 30 inches in dbh, which were marked with varying shades of blue paint. Poston saw blacked out trees in close proximity to trees with both fresh and older blue paint. In some instances, he saw a blacked out tree within 5 feet of an old blue marked tree. Marked out trees were scattered throughout the sale area, and ranged in size from 10 to over 30 inches. (Tr. 40-41.) The different shades of blue paint did not particularly concern Poston because he knew from experience that the FS did not always freshen up paint where the paint was still visible (Tr. 110). Poston also took into account the presence of the blacked out trees throughout the sale area, concluding that the FS simply chose not to freshen up the older paint markings because the markings were still clearly visible. Poston determined that the FS actions in blacking out trees throughout the sale area meant that the FS had made a conscious decision to exclude some older marked trees, i.e. those blacked out. (Tr. 40-41, 60.) Poston's observations were confirmed by Mr. Dorrell, who independently visited the site, at Poston's request, after Poston learned of a possible difference between how it and the FS saw the contract. (Tr. 220.)

15. This was not the first time that Poston had cut trees on a FS sale which had trees marked in older paint. In addition, Mr. Knauf testified that he too had encountered the use of older paint on various FS sales. (Tr. 110, 342-343.)

16. Prior to bidding this sale, Poston had cut trees greater than 30 inches dbh, including some in the Stanislaus Forest in a road clearing sale (Tr. 114). Poston had been cutting trees greater than 30 inches for years and was continuing to do so, as of the date of the hearing. Thus, the fact that this sale had large trees over 30 inches in dbh did not raise any concerns and he believed he had sufficient information to bid without consulting the FS before bidding. (Tr. 63-66, 144.)

17. As to the FS volume estimate, Poston had independently estimated the sale to overrun the FS estimated quantity by 15 to 20 percent. He relied on that in preparing his bid. It was his experience that sales did not tend to cut close to the FS estimate. Further, the FS does not guarantee its volume estimates and based upon his past experience, he did not view a 15 to 20 percent overrun as being out of the ordinary. (Tr. 33, 49.) Mr. Knauf confirmed that it was customary for bidders to do their own appraisals and cruises and not to rely on FS

estimates; he further stated that the FS frequently sells deficit sales that bidders believe can be harvested profitably. (Tr. 325.)

18. Much of the FS defense rested on its contention that Poston should have known that 30-inch trees could not be included as a result of CASPO (California Spotted Owl) guidelines. In general CASPO places restrictions on the cutting of trees of over 30 inches. Since 1993, the 30-inch restriction of CASPO has become a boilerplate discussion in EAs on projects in the Stanislaus Forest. (Tr. 393.) The three objectives of the CASPO amendment were to protect very large old trees, to promote activities that will prevent large stand replacing fires, and to protect large trees in general (Tr. 383). While CASPO in general prohibits cutting of 30-inch trees, the guidelines contain a number of exceptions among which are cutting at landings and within a road right-of-way, and cutting allowed through adaptive management decisions. Under adaptive management, deviations from the 30-inch limitation are permitted on the basis that a CASPO objective may be better achieved through an alternate cutting prescription. (Tr. 171-173, 380-383.)

19. The FS claimed that the guidelines were virtually universally applicable to the California forests. However, when the CO was asked if CASPO guidelines preclude the cutting of trees over 30 inches in every instance, he replied, "Relatively, yes, Literally, no." (Tr. 171.) He explained that under CASPO, trees over 30 inches can be cut when part of the original sale planning, such as where the trees would be in the way of operations, such as road reconstruction, road construction, landings, skitch rails or where retention of the trees represented a safety hazard. Additionally, he cited cutting under adaptive management, which he described as scientific research led by scientific teams, in instances where a biological evaluation says that cutting trees over 30 inches is equal or better than not cutting. (Tr. 171-172, 382.)

20. In addition, the CASPO interim guidelines pertain only to timber management projects and exclude projects generated by other activities or other needs such as recreation. Among cutting that is immune from CASPO are campground construction, where a special use permit is involved; administration for summer house right-of-ways; and some wildlife projects. Such cutting would still be subject to a BE, and the effects on the spotted owl and mitigation efforts would be considered in the BE review. (Tr. 381.) In this particular sale, the BE (Appendix C of the Draft EA), reflected that 14 trees over 30 inches could be cut and that the FS expected to make a determination on those trees during the project. Five of those trees were associated with roads and nine with landings. Initially the BE had called for removal of 26 trees of over 30 inches. (Tr. 387-392.)

21. The FS acknowledged that it and not the logger has the responsibility to implement the guidelines and that it and not the logger determines whether trees over 30 inches dbh may be cut pursuant to the exceptions (Tr. 401-402, 434-438). According to the FS, between 1993 and 1995, there were but four sales in the Southern Sierra Nevada Forests that did not strictly adhere to the CASPO guidelines and that the scientists involved in adaptive management studies (where a decision to cull large trees could be made) had conducted only one such study on the Sierra forests (Tr. 383, 387).

22. Mr. Poston resided on the outskirts of Sonora, California (a town in the sale area) and at various times read and subscribed to the local newspaper. He had seen articles on spotted owl protection in the forest, said he did not read about them, but did hear about restrictions on cutting 30-inch dbh trees. (Tr. 120.) He however said that 30-inch trees were still being cut (Tr. 126). The record was clear, through numerous newspaper articles, that there was extensive publicity, meetings, and controversy surrounding the CASPO guidelines during the time period in issue in this dispute, with the effects of the guidelines on the social and economic fabric of the county being well known. (Tr. 175, 208, 385, 400; Government Exhibit (Gov't Ex.) G-1, G-2.) While some of the later articles regarding CASPO guidelines did mention a possible relaxation of the rule in the future and referred to some exceptions, none said that the rule had changed (Gov't Ex. G-1, G-2).

23. At about the time that he was awarded the contract in January 1996, Poston purchased additional equipment that it intended to use to harvest the Fraser Sale, specifically an additional skidder, grader and pickup truck (Tr. 51).

24. By letter dated February 20, 1996, Mr. Poston submitted his general plan of operation to the CO, which indicated that he was to begin harvesting within the tractor units in May 1996. He noted that the number and volume of blue marked trees greater than 20 inches in dbh required a two-phase logging operation. First, all timber greater than 20 inches was to be hand felled, limb bucked, skidded and hauled and second, mechanized equipment was to be brought in to remove the remaining sawlogs and other products. The sawlogs would be skidded and hauled followed within 30 days by biomass material. (AF 290.)

25. Poston expected to conduct harvesting of skyline units adjacent to Forest Road 4N01 between November 1, 1996, and March 1, 1997, depending on weather and conditions. The remaining skyline units were to be logged during the normal operating season in 1997, again using a conventional logging system to remove the blue-marked trees greater than 20 inches dbh. (AF 290.)

26. After not hearing a response from the FS approving its plan of operation, Poston contacted the FS. Poston asked what was going on and stated that the following ensued with the CO:

> [H]e said he was going to go out and make sure the trees that were over 30 inches and black them out which surprised me, and I told him that I had based my bid on everything that was marked in blue paint on that sale, I followed the contract and the prospectus, and that's how I based my bid.

(Tr. 55.)

On March 8, 1996, with the FS not approving Poston's plan of operation, Poston met with the FS regarding the operating plan and the status of the blue-marked trees. At the meeting, the FS asserted that it did not consider the large blue-marked trees to be part of the contract and never intended for them to be cut. (Tr. 57, 215, 216.) In his notes of the meeting, the CO

described Mr. Poston as agitated, but not unreasonably, over the large trees. The CO continued that there were two possible solutions, (1) agree to a mutual mistake and void the timber sale, or (2) designate the over-30-inch trees as "no cut." (AF 289.) The FS position on the large trees was significant to Poston, for if those trees were excluded, the sale in Poston's words "was a dog," a deficit and he could not make any money (Tr. 55-56, 70).

27. Soon after learning that the FS intended not to allow it to cut blue-marked trees over 30 inches, Poston asked Mr. Dorrell, its forestry consultant, to look at the sale area and review the contract. Poston had earlier spoken to Mr. Dorrell about providing some assistance to Poston on the contract. (Tr. 56, 215-216.) Mr. Dorrell was familiar with CASPO's interim guidelines and that the guidelines generally called for leaving trees over 30-inches dbh (Tr. 221). He, however, identified several instances where the FS had allowed cutting of over 30-inch trees in the Sierra National Forest. At least two of the sales he identified were sold at or about the same time as the Fraser Sale. One included cutting trees up to 51 inches dbh (Tr. 223-229). Similarly, Mr. Poston identified seven sales, where over 30-inch trees were cut, including a sale at Dodge Ridge, where over a thousand board feet (MBF) of trees over 30 inches were cut (Tr. 64-67). The FS elicted no contradictory testimony addressing the sales identified by Mr. Poston or Mr. Dorrell.

28. In reviewing the contract documents, Mr. Dorrell read the Prospectus and contract and spent half a day walking the sale area. (Tr. 216). He saw that some trees, but not many, had black marks on them and that those trees were scattered throughout the sale. He observed the old and fresh blue paint, but was not concerned that the larger trees had the older blue paint, as he knew the FS could allow larger trees to be cut if the FS "did the proper documentation." (Tr. 216-220, 230-231.) Mr. Knauf, the other consultant who testified for Poston, confirmed that the different age of blue paint on trees was not significant nor should it have alerted Poston that the trees were not included. He said it would not be unusual to find as included timber, trees marked with paint from a prior sale and said that he had cut trees with older markings in the past on FS sales, basing the cutting upon the trees being marked as identified in the contract specifications. (Tr. 328-330.) He would have concluded that all trees with clearly blue marks -- both old and new paint and both large and small trees -- were included timber in this contract. Further, the fact the FS used the same color for marking as used on the prior Gay-Crandell Sale, would have given him greater confidence. Finally, as an experienced bidder, he would have assumed that the markings of the sale had been done consistent with CASPO Interim Guidelines (Tr. 331, 336-338, 343).

29. Mr. Knauf also provided testimony as to what was the standard industry practice in bidding. He asserted that the standard practice was to look at the sample contract, the Prospectus and the sale site. He said that nothing in the Prospectus, sample contract or site visit would have caused him to review the EA for the Fraser Sale before placing a bid. (Tr. 305-306, 332.) He said that it is not standard practice in the industry to review underlying materials such as the cruise information or EA and that for this sale, nothing suggested a need to consult the EA (Tr. 333-336).

30. The FS, in its brief, challenged Mr. Knauf's testimony pointing out that in testimony Mr. Knauf had given in a case involving a claim on another sale, P & M Cedar Products, AGBCA No. 89-167-1, 90-1 BCA ¶ 22,444. Mr. Knauf had stated that before recommending that P & M bid, he had walked the sale, and reviewed the sample contract as well as the environmental analysis and the sale area map. Although the FS raised this earlier case to challenge Mr. Knauf's testimony in this proceeding, the FS conducted no examination on the matter nor was the existence of the P & M case raised at the hearing.

31. Poston planned to sell this harvest to a local mill but had no contracts or other documents to show that a local buyer was prepared to purchase the logs from the sale or what the price would have been. The only direct evidence as to the ultimate buyer and price to be paid was Poston's own testimony (although, as discussed in Quantum, Poston did provide some corroboration). (Tr. 73, 137.) The FS, however, produced no testimony or documents challenging or shedding doubt on Mr. Poston's testimony on these matters, nor was the matter challenged in the FS brief.

32. Notwithstanding that Poston was told that the trees were not included, Poston attempted to press ahead and have the FS allow it to proceed with cutting all of the marked trees. There was then additional communication that ultimately led to a letter from the FS, where the FS reiterated its position on the trees and stated, "we need to resolve this fundamental issue before we can discuss an Annual Operating Plan and pre-operational meeting." (AF 286.) Thus, no work proceeded.

33. By letter of May 3, 1996, Poston asked the FS to review its determination as to the larger trees. Although Poston had not filed a CDA claim, the CO issued a "final decision" expressing the Government's interpretation of the contract by reiterating that the over-30-inch trees were not included. The CO acknowledged that the FS knew prior to the advertisement about the existence on the site of the blue-marked trees that were greater than 30 inches in dbh. The CO continued that the Mi-Wok Ranger District sale preparation crew painted some of these trees with black paint; however, this was never broadly completed throughout the sale area. The district sale preparation forester had advised the CO that he had intended to exclude those trees in the Prospectus; however, the FS failed to make that clear in that document. (AF 26.)

34. In October 1996, Poston filed a pro se appeal of the above "final decision." In November, through newly retained counsel, Appellant asked that the appeal be dismissed because no CDA claim had been filed and the final decision was premature. The appeal was thereafter dismissed without prejudice. (AF 56, 60-61.)

35. On January 6, 1997, Appellant submitted a properly certified claim of $319,842 to the CO, alleging that the FS had materially breached the contract by not allowing Appellant to harvest all blue-marked timber (AF 35). The claim was for the value of Appellant's lost market opportunity in 1996, its inability to amortize its bidding costs, its idle equipment costs, its deposits and interest on them, the costs of professional forestry services it had to incur as a result of the FS position as to the trees, and that portion of its contemplated overhead that it

was not able to absorb as a result of the FS material breach of the contract. Poston also stated that it anticipated that this claim would increase by approximately $95,000 based on lost market opportunity in 1997. (AF 43.)

36. On April 2, 1997, the CO issued a decision denying the claim (AF 5). Poston timely appealed on June 3, 1997. The matter of termination under clause CT8.2 was not raised by the CO in the decision, nor did it come up at the hearing. The matter was only raised after the issuance by the Court of Federal Claims of its decision in late October 1997, in Reservation Ranch v. United States, 39 Fed. Cl. 696 (1997). In addressing the matter in its brief, FS counsel noted that if the Board decided that a breach occurred, the matter would then be considered by the Chief of the Forest Service and if the Chief decided to terminate, the clause would control damages. The record contains no determination by the Chief to terminate the contract in whole or part, in accordance with clause CT8.2 (Finding of Fact (FF) 4).

QUANTUM

37. At the hearing, Poston submitted a revised certified claim dated September 27, 1997, which increased its claim to $362,333.63. (App. Ex. A-5.) The claim was prepared by Mr. Dorrell and Poston's accountant and was separated into seven categories. The calculation for each category of cost was set forth in various charts. (App. Ex. A-5; Tr. 72-73.) The largest segment of the claim involved lost profit and we set out that calculation below as presented by Appellant's Chart 1 addressing lost profits.

38. Chart 1 was broken down into two segments. The top segment covered tractor unit work in 1996 and the bottom segment covered skyline work to be done in 1997. The column on the chart designated as Anticipated Profit, was the difference between market value (alleged price for which Poston would have sold the timber) and the delivered log costs (alleged costs to harvest the logs) for 1996 and for 1997, respectively, had Poston been able to perform pursuant to its interpretation of the contract. Poston's anticipated profit totals were $170,543.52 for tractor units and $30,761.36 for skyline units. (App. Ex. A-5, Chart 1.)

39. In addition, Poston made a separate calculation for each species of trees which it then broke down into 0-to-29-inch trees and greater than 30-inch trees. Depending on species, there was some variation as to cost and market value. In column four of Chart 1, Appellant showed the total anticipated timber volume for each species by size. The volume was determined through a 100 percent cruise by Mr. Dorrell, who thereafter, reduced the cruised quantity to reflect defects in the trees. Poston then multiplied the volume by those items comprising anticipated delivered log cost. The principal components of the delivered log cost were the stumpage rate, deposits, anticipated road construction and hauling and logging costs. The deposits and anticipated road construction were derived by taking the total payment or estimated cost of performance that Poston would have expended for each of the items and dividing that total cost by the total volume established by Mr. Dorrell. The stumpage was a figure set out in the contract and thus was simply repeated. The underlying total for the deposits reflected the actually paid total. The underlying total used for road construction was the sum used by Appellant in its bid for that work. The cost of hauling and logging (discussed below) was then added to complete the costs. The total costs were multiplied by the volume for the respective species and from that Poston came up with a total cost to harvest and log the sale. Appellant's Chart 1 did include a mathematical error. In accumulating its costs for the tractor units, Poston failed to add into the total the engineering deposits. (Tr. 79; App. Ex. A-5, Chart 1.)

40. In a separate column, designated Market Price, Poston set out a market price per MBF for each species of tree. Poston then multiplied the market price by the same MBF. That total was then compared to the anticipated cost of logging and hauling with the difference between the two sums constituting the profit Poston would have had on the job. The FS provided no challenge or alternative figure for any of the above categories. According to Poston's calculations, it would have made a profit of $201,304.88 had it been able to harvest all the trees marked in blue. (App. Ex. A-5, Chart 1.)

41. The largest component of the column designated as Anticipated Delivered Log Cost was the average anticipated logging and hauling cost, which Appellant estimated at $150 per MBF for the tractor units and at a higher figure for the skyline units. At the bottom of Chart 1, Appellant qualified the dollar figure used in the column, noting "Actual logging costs for the under 29" trees would have been much greater than this average while actual logging costs for the 30" and greater trees would have been much less than the average." Appellant used an average of $150 per MBF for all tractor unit trees. It based the $150 on hauling a large segment of the logs to mills in Sonora, a considerably closer location to the forest than the mill that the FS had used for its appraisal and thus, a less costly haul. Appellant stated that

the Sonora location would have caused the project to appraise out as a non- deficit sale and was one element in explaining the difference in how the parties valued the profitability of the project. (Tr. 136-137, 205-206, 326; App. Ex. A-5, Chart 1.)

42. Under cross-examination, Mr. Dorrell was asked about the actual cost of harvesting under-29-inch trees. He said that at least for the tractor units, the average anticipated logging and hauling cost for the 0-to-29 inch trees would have increased to $289 as compared to $150. (Tr. 282.) Mr. Poston confirmed that logging costs for trees under 30 inches would have been substantially more than the average used in Chart 1, while also stating that the costs for the over-30-inch trees would have been significantly less than that average (Tr. 76-77). Poston said he would have lost substantial money in performing that part of the work without having the 30-inch trees (Tr. 59).

43. Appellant said it was going to sell 70 percent of the harvest to a mill in Sonora, and the other 30 percent to Sierra Pacific Industries (SPI), but had no records of these agreements. (Tr. 136-137.) The market price used on Chart 1 came from the local mills and represented the going rates for those type logs at the time (Tr. 78). While the majority of the timber would have been sold in Sonora, Poston expected to sell the cedar it would harvest during 1997 to a mill in Marysville, California, a greater haul distance then Sonora. The haul price for cedar was increased by $110 (from $226 to $336 in the skyline units) in the claim to take into account the longer hauling distance. (Tr. 240.) Also, Appellant presented verification of the market prices it used. Mr. Dorrell checked the prices against the California State Board of Equity Value Pricing, which California publishes bi-yearly. The figures used by Poston for market value were conservative when compared with the California data. (App. Ex. A-8; Tr. 245-249.) The FS provided virtually no challenge to Poston's market prices.

44. In addition to lost profit, Appellant also claimed a number of out-of-pocket costs. On Chart 2, Appellant claimed $560.33 for "Unamortized bidding costs," which was compensation for field review, review of the Prospectus and sample contract, and bid preparation. The cost was based on 16 hours multiplied by Poston's hourly salary, plus markups. (Tr. 83; App. Ex. A-5, Chart 2.)

45. Poston claimed $49,785.45 for Idle Equipment Cost on Chart 3, using the Associated General Contractors Equipment Ownership Book (AGC) and testimony from its accountant (App. Ex. A-5 and 6; Tr. 358-361) to establish its figures. The calculated costs cover a 12-month period. This involved three separate pieces of equipment (1989 Caterpillar 518 Skidder, 1974 Caterpillar 12E Grader, 1995 Dodge 3/4 ton Pickup). First, Poston identified the purchase cost of the equipment, $101,560, then applied the AGC factor and then reduced that by a percentage factor of 50 percent to account for idle rather than active use and then multiplied that last figure by the percentage of time on this job. The FS again produced no evidence on these damages nor did it challenge Poston's figures or methodology. Poston testified that it was too late in the season to pick up extra work so the skidder and grader were 99 percent idle. It had better success with the pickup and thus used 50 percent idle. (Tr. 85; App. Ex. A-5, Chart 3.) Poston did not rent out its equipment and could not find work to use the equipment on. (Tr. 85, 127-128.) Although Poston did not use the equipment in the

summer of 1996, he used it in 1997, using the skidder for part of the season and the grader for approximately 2 days to grade a road. (Tr. 127-128.)

46. Appellant also sought recovery (App. Ex. A-5, Chart 4) for the following deposits: (1) performance guarantee, $5,000, which was a Certificate of Deposit (CD); (2) deposit for Reconstruction Engineering Services $11,357; and (3) down payment $4,688. The three total $21,045. (Tr. 79-80.)

47. Poston, using CDA interest rates, claimed Interest on Deposits of $2,652.46 (App. Ex. A-5, Chart 5), starting January 24, 1996 (date of contract award). It adjusted the interest three times with the last claim covering July 1, 1997, to December 31, 1997. (Tr. 361-362.)

48. Poston claimed $3,176.25, which was the sum it paid Professional Forestry Services for the work performed by Mr. Dorrell (Tr. 86; App. Ex. A-5, Chart 6). The above figure, however, was not broken down into tasks and thus we do not know how much represented the first Dorrell site visit and review of the contract, and how much represented the 100 percent cruise and later assistance with the appeal.

49. Poston claimed $83,809.26 in what it titled Unabsorbed Overhead (App. Ex. A-5, Charts 7, 7A). To arrive at the figure, it first calculated anticipated overhead during the contract period of May 1, 1996, through July 15, 1997. It arrived at $182,667.50 as total anticipated overhead for the company, by taking the overhead of $146,134 shown on Poston's financial statement for 1996, and adding to that an extrapolated figure for 1997 (through applying 1.25 to the prior figure). The 1.25 extrapolation covers the period of May 1, 1996, through July 15, 1997. Poston's salary was among the elements comprising the total. (Tr. 365.)

50. After calculating overhead, Poston then calculated total revenue for the project of $574,680. The figure is taken from the last column on Chart 1 and is the market price of the logs times the anticipated volume of the harvest. Poston also claimed anticipated revenue for the May 1996 through July 1997 time period of $1,377,000, which was the revenue Poston expected to generate over the period of May 1996 through July 1997. (App. Ex. A-5, Charts 1 and 7.) That time frame of 15 months was the time in which Poston expected to be able to complete the contract. The FS provided no challenge to the revenue estimate. (Tr. 81, 364-365.) Poston then calculated a rate of 13.26 percent which it derived by taking the $182,667.50 of anticipated overhead costs and dividing that number by the anticipated revenue of $1,377,000 (Tr. 366). Poston then multiplied that rate against the $574,680 in anticipated revenue from the Fraser Sale. Poston then added profit of 10 percent to that sum of $76,190, to arrive at $83,809 (Tr. 367).

51. The financial statement contains an item for depreciation, while the overhead compilation on Chart 7A does not include depreciation as one of the overhead expenses. According to Poston's accountant, the depreciation on the financial statement would not include the skidder or grader because neither had been placed in service and under the Internal Revenue Service (IRS) rules, you cannot take depreciation expense on an asset until

it is placed into use for a bona fide business purpose. Since no trees were cut, the equipment was not used. (Tr. 373-375; App. Ex. A-5, Chart 7A.)

DISCUSSION

LEGAL ANALYSIS

Contract Interpretation:

Where a contractor relies upon a reasonable interpretation of contract language, that interpretation, absent certain circumstances, will be sustained. Summit Contractors, Inc., AGBCA No. 81-252-1, 86-1 BCA ¶ 18,632. If the language is deemed to be ambiguous, the contractor will nevertheless prevail unless the ambiguity is patent, in which case the contractor had a duty to inquire. Newsom v. United States, 676 F.2d 647, 650 (Ct. Cl. 1982).

Here the FS issued a solicitation that clearly stated that the contractor was to include blue-marked trees and that made no distinction between fresh and old blue paint, even though the FS was aware that both were present in the sale area and intended that trees marked with old paint not be part of the sale. The solicitation also contained no language negating inclusion of trees over a certain size. Moreover, the FS had begun to mark out a number of the old blue- painted trees with black paint but stopped well before that was completed. It offered no explanation in the pre-bid or bidding documents to indicate that the old blue paint markings should be ignored. (FF 3, 7, 8.)

Appellant asserts, and we think reasonably, that it was entitled to and did rely on the language of the solicitation, and as such, properly deemed as included timber, all (old and new) blue-painted trees in the sale (FF 13). While the FS argues otherwise, its arguments essentially relate to a patent ambiguity test and the assertion that various contract and Prospectus data should have alerted the contractor to a potential problem. We find none of those arguments to be sufficient to overcome the otherwise clear contract language, nor do the arguments overcome the logical conclusion drawn by Poston because of the FS marking out some but not all blue-marked trees.

In many instances there was an obvious difference in the age of the paint. However, Poston provided evidence that it is not unusual for the FS or an owner to elect not to repaint trees which have been earlier or otherwise marked. (FF 14, 15.) The FS did not show otherwise. Further, the FS began to mark out the trees but did not complete that task, and the FS intended but did not put in language to exclude the trees marked with old blue paint. Absent an explanation for the marked-out trees, the logical inference follows that the trees which were not marked out in black were purposely included in the contract. Further, the fact that the FS started to mark out trees and intended to put in clarifying language indicates that the FS, itself, was not comfortable with the mere difference in paint age and shading being sufficient to alert a contractor that the old painted trees were not part of the contract. Finally, the FS admits it was aware of a potential "ambiguity" but simply failed to act. The fact is that the FS could have easily avoided any problem by painting the new trees a different color, by blacking out

the markings as had initially been planned, or by inserting language to include only new painted trees. (FF 7, 8, 33.) Under the circumstances, we find no basis to hold Appellant responsible for the consequences of the FS's failure to properly prepare the contract documents.

The CASPO guidelines and environmental concerns as to not cutting trees over 30 inches were widely known in the community. Poston acknowledged general awareness of the concerns over the issue and the disfavoring of cutting trees over 30 inches. (FF 22.) That, however, given the facts present in this case, does not tip the interpretation scale against Appellant, so as to establish a duty to inquire. While the CASPO guidelines clearly disfavor cutting of the trees over 30 inches, the guidelines are also replete with exceptions, which allow cutting should the FS so decide. (FF 18-21.) In short, the guidelines and concerns do not establish a prohibition regarding the cutting of 30-inch or larger trees. When that is combined with the evidence that showed that the FS and others had allowed cutting of 30-inch trees in the Sierras within the general time frame of this dispute (FF 16, 22), Appellant's right to rely on the contract language becomes even more reasonable.

Besides the blue paint and CASPO, the FS raised a number of other matters. The FS claims that information in the sale folder such as the cruise data, volume data, timber cards, cubic foot ratio and EA, should have alerted Appellant that the over 30-inch trees were not included. We have examined the evidence on all of these matters and find that none, either independently or in combination, override the clear language of the specifications and absence of black markings. (FF 9-11.) Moreover, we note that much of the data relied on by the FS relates to quantity and quality estimates. In that regard, the FS provides various disclaimers in the Prospectus and contract, which generally tell a contractor that it should not rely on FS estimates as to quality and quantity and that the contractor is obligated to come to its own conclusions. The Prospectus specifies that the cruise data and BE are not part of the contract. (FF 1, 17.) Simply put, the FS cannot have it both ways. We also find that information in the EA cannot be used to defeat the contractor's claim. The EA is an environmental and not a contract document. To the extent the contract is clear on a matter, it would not be reasonable to require the contractor to go to the EA or into the sale folder to look for possible inconsistencies. Again the Prospectus warned each bidder to rely on its own estimates and not on information which the FS did not warrant to be accurate.

Finally, the FS asserts that this case is controlled by our decision in Summit Contractors, supra, where the Board said,

> that the appellant's right to cut a marked tree does not extend to trees marked in error or trees marked for a prior sale and not intended for the present sale, if Appellant is aware of the circumstances, or if Appellant should have been aware of the circumstances. The law precludes overreaching in circumstances of obvious errors.

We are in full agreement with Summit. However, the facts in this case do not establish that there was overreaching or knowledge by the Appellant. The clear language of the contract and

the circumstances demonstrate that the contractor's reading is reasonable and not the product of overreaching. The FS and not the contractor is responsible for implementing CASPO guidelines and making the application of the guidelines clear. (FF 18-20, 22.) The FS failed to do that in this case.

Termination versus Breach:

The FS next argues that if its interpretation is incorrect, it nevertheless is entitled to retroactively exercise a termination under CT8.2, which allows it to limit Appellant's recovery of damages. The FS claims that the decision of the Court of Federal Claims in Reservation Ranch, supra, allows it to terminate the contract under CT8.2, notwithstanding the time that has passed and the fact that the matter of cancellation or termination was not raised until after the hearing.

Under CT8.2 - Termination (12/89), the Chief, FS, by written notice, may terminate this contract, in whole or in part for a number of enumerated reasons, such as (1) to comply with a court order; (2) upon a determination that the continuation of all or part of this contract would cause serious environmental degradation or resource damage; or (3) the one the FS says is in issue here, where the cutting would jeopardize the continued existence of federally listed threatened and endangered species or, cause unacceptable adverse impacts on sensitive species, identified by the appropriate Regional Forester. CT8.2 requires the FS to use the damage measurement set out in CT9.52, a clause which limits recovery of damages to cutting costs and the value of unpaid purchaser credit and excludes anticipatory profits. (FF 4, 5.)

Reservation Ranch, which is not binding precedent on this Board, is simply not helpful to our fact situation nor the issues before the Board. First and foremost, Reservation Ranch was about curing an infirmity in an exercised cancellation. In this appeal, we have not had a cancellation or termination by the Chief, FS. In fact, there has not even been an official decision to consider exercising termination under clause CT8.2. Instead, counsel for the FS indicates that if the Board decides that breach occurred, the matter will then be considered by the Chief and "if he decides to terminate, the clause will control damages." (FF 36.) The point is that this case is not about upholding a potentially procedurally defective termination as was the case in Reservation Ranch. In the absence of facts supporting a termination pursuant to the clauses of the contract, this Board will not fashion relief upon a simple theory that a termination may be a viable method to end a contract. This contract is specific regarding the determination necessary to support a termination which would invoke the CT9.52 Damages clause. Such a determination has not been made in fact or constructively in this case.

In federal contracts, a material breach may cause a contract to end and allow the injured party to cease performance and sue for damages. That proposition was upheld in Stone Forest Industries, Inc. v. United States, 973 F.2d 1548, 1550 (Fed. Cir. 1992), where the court reiterated the principle, that:

> [u]pon material breach of a contract the non-breaching party has the right to discontinue performance of the contract, and to seek redress in accordance with law. Malone v. United States, 849 F.2d 1441, 1445-1446 (Fed. Cir. 1988), modified 857 F.2d 787 (Fed. Cir. 1988), Cities Serv. Helex, Inc. v. United States, 543 F.2d 1306, 1313, 211 Ct. Cl. 222 (1976), Airco Inc. v. United States, 504 F.2d 1133, 205 Ct. Cl. 493 (1974).

The court in Stone Forest pointed out that not every departure from the literal terms of a contract will constitute a material breach so as to allow a non-breaching party to cease its performance and seek appropriate remedy but rather,

> The standard of materiality for the purposes of deciding whether a contract was breached is necessarily imprecise and flexible, Restatement (Second) of Contracts § 241 cmt. a (1981). . . . The determination depends on the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties. See generally, Restatement (Second) of Contracts § 241 cmts. a & b.

973 F.2d at 1550-1551.

Appellant was awarded this contract in late January 1996 (FF 3). It soon after filed its plan of operation with the FS, indicating that it intended to begin in May. It was evident by March 1996 that the Appellant had bid the contract to include all blue-painted trees, whether large or small. Various FS officials knew at that time that the FS had failed to clearly state the FS's intent not to include large trees, yet, the FS refused to approve Appellant's plan and instead insisted that Appellant could not remove the large trees. The FS took no action to terminate the contract in either whole or part and instead insisted that Poston would be required to harvest only small trees. Months went by, and finally, the matter culminated in Appellant's filing of a certified claim in January 1997, at which point it declared the contract to be in breach. From that time through the hearing on this appeal in October 1997, the FS continued to assert that its interpretation and not that of the Appellant was correct and did not make the arguments as to termination until the start of briefing.

The large trees were crucial to Appellant's bidding and profitability on the contract. Given the significance of the large trees, we find that the overall circumstances and Government actions in this case ripened into a material breach, which existed as of January 1997, when Appellant submitted its certified claim and declared the contract in breach.

What the FS has attempted to do here with the environmental termination clause is to reach back in time to exercise a right of cancellation which it had available at one time (while the contract was still in effect), but which it never acted upon. The right to terminate under the environmental clause does not go on indefinitely. Here, Appellant has proven that the disputed matter ripened into a material breach and it has further shown that it properly elected to declare the contract in breach (in this case, well before the FS even considered application of the termination clause). Under the facts here, we have decided to limit the use of the

termination clause. We note, however, as a caveat, that determining when and if a material breach occurs, depends on the overall circumstances and facts surrounding the parties' actions. Thus, a mere declaration by a contractor that a contract is in material breach and that it elects to exercise its breach rights, may not, absent significant other circumstances (such as those that existed here), limit the FS right to use the clause.

In limiting the application of the FS termination clause in this case, we find support in both Freedman v. United States, 320 F.2d 359, 366-367 (Ct. Cl. 1963) and in G. D'Alesion S.A.S., ASBCA No. 31149, 86-1 BCA ¶ 18,732. In each instance, the Government was not permitted to use an exculpatory damage clause in situations where the Government actions caused the breach and where there was evidence of negligence in the government's preparation of the documents. While we do not specifically find negligence in this case, the Government's actions in putting together and reviewing this solicitation and attempting to hold the contractor to a standard not conveyed in the contract, clearly approached that standard.

We have found no case, similar to the one here, in which the Government refused to allow performance on the basis of a wrongful contract interpretation and then; after the matter ripened into a material breach, and after the contractor advised the Government that the contract had ceased, the Government asserts that at some future time it may attempt to exercise the clause so as to limit the contractor's potential recovery. In this case, unlike other cases applying an alternate basis to justify a termination, no termination or cancellation action has ever been exercised. Further, while the Court of Federal Claims, in Reservation Ranch, stated a general proposition that it is settled law that a cancellation based upon an erroneous ground may be sustained, if there is another adequate ground for cancellation, the settled law on the issue involves application of the standard termination for convenience clause, a clause which (but for bad faith) the Government can use virtually without any justification.

In deciding this case as we do, we also considered the various cases dealing with the retroactive application of the standard termination for convenience clause in supply and construction contracts (not the clause in issue in this appeal) where recovery of damages has been limited after improper default termination or cancellation. We find those cases readily distinguishable and not applicable here. Generally the cases allowing post hoc application of the termination for convenience clause have arisen in the following contexts: (1) where a cancellation or termination of the contract had been exercised but done for the wrong reason, even though another proper basis existed (which was the case in Reservation Ranch), G.C. Casebolt Co. v. United States, 421 F.2d 710, 712, 190 Ct. Cl. 783 (1970); (2) where the cancellation or termination was carried out but was either misnamed or procedurally flawed, see, John Reiner & Co. v. United States, 325 F. 2d 438, 163 Ct. Cl. 381 (1963), cert. denied, 377 U.S. 931, 84 S. Ct. 1332, 12 L. Ed. 2d 295 (1964); and (3) finally, as was the case in College Point Boat v. United States, 267 U.S. 12, 45 S. Ct. 199, 69 L. Ed. 490 (1925), where a specific statute defined limitations on Government liability so that there was no requirement for further Government action.

QUANTUM

Appellant has claimed that it is entitled to $362,333.63 in damages. The damages are broken down into seven categories, with the largest element of damages being lost profit of $201,304.88, which Appellant explains by using Chart 1 of App. Ex. A-5. Generally, Appellant calculates its alleged lost profit for each species of timber by subtracting its expenses and stumpage per MBF for each species from the selling price for each MBF. The chart is based on Poston harvesting both large and small trees. (FF 37-40.) We find the methodology and backup on Chart 1 and the other App. Ex. A-5 charts generally to be reasonable for determining profit, with two important exceptions. One exception relates to the anticipated hauling and logging costs. The FS both at the hearing and in its brief made no significant challenge to much of Appellant's quantum evidence. Rather, the FS relied on the legal theory that the Appellant could only recover what was set out in clause CT9.52. As noted earlier, we have rejected that defense. The other exception relates to Poston's totals for anticipated delivered log costs in Chart 1 for tractor units -- the figure does not include the engineering deposit cost of $8.46 per MBF.

Appellant derived the quantities for each species through the 100 percent cruise by its consultant, Mr. Dorrell. We find his testimony as to how he conducted the cruise and how he reduced the quantities to account for defects in the trees to be credible and note no substantive challenge by the FS. (FF 40.) As to the market price (the sum for which it could have sold the timber), Appellant produced testimony from Mr. Poston as to the local market price and also corroborative evidence from state data (FF 43). While Poston did not produce any contracts, firm agreements or evidence from the buyers, we find that the testimony and state data are sufficient to establish price. Once again, the FS did not provide any challenge to the market price. We accept Appellant's evidence.

Although the FS provided virtually no evidence to challenge Appellant's quantum, the Board is not bound to deem credible the evidence presented, where evidence indicates significant inconsistencies. The logging and hauling costs are one such area. When we use Appellant's own figures to run calculations to logging and hauling costs, it is evident that the logging and hauling costs used by Appellant on Chart 1, for both tractor and skyline units, creates an illogical result.

The illogical result is best illustrated as follows. For this calculation, we use as a baseline, Mr. Dorrell's estimate of $289 per MBF to harvest (that is, log and haul) the trees if Appellant had only been permitted to harvest small tractor unit trees. Chart 1 shows that there were 610 MBF of under 30-inch tractor unit trees. If we multiply those 610 MBF by Mr. Dorrell's $289, the cost to harvest just the small tractor unit trees is $176,290. When we compare that with Appellant's claimed cost, as set forth on Chart 1, for both large and small tractor unit trees, it is apparent that the $150 is not a proper number. If we multiply 914 MBF (total of both larger and small tractor unit trees) by the $150 per MBF offered by Appellant on Chart 1, the product is $137,100. Thus, if we take these two figures together, Appellant is saying that its total (not per MBF) costs to log and haul both the large and small trees would be less than the total costs to log and haul just the small trees alone. That does not make sense. Appellant, who has the burden of proof, has not demonstrated or suggested a consistent interpretation of its figures and calculations. Thus, while the record does not permit the Board to calculate

damages with absolute support, the overall result and various steps in the process are sufficiently justified by the existing record.

Clearly, the $150 is an understatement. However, while we do not accept the $150 figure, we do find that Appellant has given us other evidence from which we can adjust Appellant's hauling and logging figure and thereby arrive at a reasonably accurate profit calculation. In instances, such as here, where we have been provided no specific figures from which to calculate exact costs, where entitlement to an adjustment is clear, but the contractor's cost presentation is erroneous or incomplete, Boards have calculated damages predicated on the Board having sufficient, reliable data in the record to calculate the costs with some reasonable precision. Fletcher & Sons, Inc., VABCA No. 3248, 92-1 BCA ¶ 24,726. See also Triad Mechanical, Inc., IBCA Nos. 3393-3397, 97-1 BCA ¶ 28,771. In making the necessary adjustments, in this case, we separately discuss the tractor units and skyline units.

In arriving at an appropriate hauling and logging cost, we proceed, just as Appellant has done on its Chart 1, with using an average to calculate hauling and logging costs for both the small and large trees. In averaging the two sizes, we recognize and have taken into account that the cost of harvesting small trees alone would be greater than harvesting the same amount of volume from a large tree harvest. We also however recognize that in this case, the small trees ranged in size up to almost 29 inches and as such, as the size of under-30-inch trees become closer to that of the over 30-inch trees, the economies of scale become less of a factor. (FF 37, 42.)

When Appellant's consultant, Mr. Dorrell, was asked what it would have cost if Appellant had only been permitted to cut the under 30-inch tractor unit trees, he said that the costs for hauling and logging would have been approximately $289 per MBF rather than the $150 average set out on Chart 1 (FF 37, 42). We recognize that Mr. Dorrell based his estimate of $289 on a sale which would have included only the volume of the small trees. Thus, the $289, would by definition, have the smaller trees absorbing all of Appellant's fixed and variable costs including overhead and equipment costs, as well as items such as labor, trucking, mobilization, etc. (FF 42.) It follows that when one increases the volume of timber on this or any contract by adding in additional volume, in this case the volume of large trees, the result is that fixed hauling and logging costs are distributed over a larger base or volume. Thus, as volume increased, the per MBF cost for fixed hauling and logging costs generally would be reduced accordingly.

To adjust Mr. Dorrell's figure to take into account the effect of a greater volume, we have used Appellant's own figures. Hauling and logging encompass the costs of cutting the trees, getting them to the mill and supervising the contract. Among costs needed to harvest and log are labor, supervision, overhead, supplies, equipment and trucking. Some of the needed hauling and logging costs are fixed, while others are variable; some are direct, other indirect. Although we were not provided a dollar breakdown for the myriad of items which constitute logging and hauling costs, we were provided some costs for equipment in Chart 3 and for overhead in Chart 7. Each is an element of hauling and logging. More specifically, Chart 3

addressed the costs for three pieces of equipment, and Chart 7 addressed the costs for overhead to be recovered through this project.

While both Charts 3 and 7 were submitted by Appellant to establish costs during the time when its work on the project was idle, there can be no question that had the Appellant been able to proceed with harvesting, then part of its costs for hauling and logging would have included overhead and equipment. Further, it logically follows that the costs for equipment and overhead during actual work would, if anything, be greater than the idle costs. In that regard, we recognize that Appellant would use equipment, not only for hauling and logging but also for road construction and thus the grader and pickup on Chart 3 could have had multiple uses. However, we balance that against the fact that Appellant would have needed considerably more equipment than simply the three pieces listed to perform this job, and thus, we conclude that our use in calculations of the equipment costs in Chart 3 is clearly not an overstatement of costs.

The Appellant has provided scant information to determine the correct amount for logging and hauling costs. As a starting point, we use the $289 per MBF figure provided by Mr. Dorrell for small-tree tractor units (610 MBF), and make a downward adjustment to reflect a distribution of direct and indirect costs over the entire tractor unit (914 MBF). For the entire project, the Appellant allocates $76,190 of indirect overhead. This results in a figure of $56 per MBF ($76,190 ÷ 1,342 MBF). Similarly, the Appellant allocates idle equipment costs of $45,259 to this project. This results in a figure of $34 per MBF ($45,259 ÷ 1,342 MBF). The sum of these figures, $90 per MBF, when multiplied by the 914 MBF of the tractor units, results in costs of $82,260. If distributed only over the small-tree tractor units (610 MBF) (the basis for Mr. Dorrell's figure), the amount is $134 per MBF. This shows a reduction of $44 per MBF when the overhead and equipment costs for the tractor units are distributed between just the small trees and the total trees. We adjust downward the $289 per MBF of Mr. Dorrell to reflect this economy.

Since that difference of $44 is directly related to adding in the volume of larger trees, we find that the $44 figure is an appropriate amount to use to adjust Mr. Dorrell's $289 cost downward so as to take into account the added volume. We therefore use $245 per MBF ($289 - $44) as the hauling and logging costs for the smaller tractor unit trees. (FF 37.)

When we substitute $245 for $150 under anticipated logging and hauling costs, the total profit for the under-30-inch tractor unit trees (610 MBF) becomes $36,452 rather than the $94,402.35 claimed by Appellant for this item. This figure needs to be further reduced by $5,160 (610 MBF x $8.46/MBF), the engineering deposit costs not included in Appellant's calculations. Thus, the lost anticipated profit is $31,292.

Turning next to the larger tractor unit trees, we find that a cost of $150 per MBF for hauling and logging the larger trees in the tractor units is also inadequate and too low an estimate of costs for these larger trees. While we recognize that there was testimony that larger trees could be logged and hauled for a lesser unit price, we were given no benchmark from which to quantify the difference. What is clear however, is that the $245 per MBF, which we used

for the cost of hauling the smaller trees, is derived by using a volume of both large and small trees. As such, and in a manner similar to what Appellant did in preparing Chart 1, we find that using the $245 as an average for both large and small trees is an appropriate measure of costs which would have been incurred.

In using the dollar figure of $245 per MBF for both the larger and smaller tractor unit trees, Mr. Dorrell's baseline gives us adequate data from which to calculate the proper adjustment in this case. Accordingly, we find that Appellant's total cost for the over-30-inch tractor units increases by $28,880 ($245 - $150 x 304 MBF), which reduces its claimed profit for the over-30-inch tractor unit trees to $47,261. This figure needs to be further reduced by $2,572 (309 MBF x $8.46/MBF), the engineering deposit costs. The anticipated lost profit is $44,689.

We now turn to the skyline units, a total of 428 MBF. Unlike the tractor units, where we had an estimate from Mr. Dorrell of the cost for small trees, neither party provided an estimate of actual costs for either the large or small trees in the skyline units. Once again, Appellant used for its calculation an average, which it applied to both large and small trees. That average reflected higher costs for conducting a skyline operation and further, also reflected a higher figure for harvesting incense cedars than what Appellant used for the other species.

In the absence of better evidence, in arriving at a profit figure for the skyline units, we apply the same increase to the skyline unit costs as we did for the tractor units. Thus, we add $95 ($245 - $150) to the costs per unit of each MBF of tractor unit. To the extent we have found that Appellant understated the costs of hauling and logging for the tractor units, it is reasonable to conclude that Appellant similarly understated the skyline unit costs. Moreover, since we have adjusted the tractor unit costs to $245, and skyline unit work is more expensive than work in the tractor units, unless we adjust the skyline unit costs, we would be left with having the small tractor unit work priced at $245 and the small skyline work priced at a lower figure of $226. That would be an illogical result. Thus, taking all species, both the large and small, of the skyline trees, the Appellant's cost for the skyline units is increased by $40,660 (428 MBF x $95 per MBF), which results in a projected loss of $9,899 for this operation.

We now turn to Appellant's out-of-pocket cost claims. We deny Appellant's unamortized bidding costs. These are costs incurred in preparing the bid. Appellant has included these costs in its overhead calculations such that the costs are not allowable as a separate direct cost. (FF 44.)

Appellant has claimed $49,785.45 for idle equipment costs. We find that Appellant did incur idle equipment costs prior to the breach, during which time it had equipment on site but could not operate it. As such, Appellant could not generate corresponding revenue to absorb that cost. We find Appellant was not compensated for these costs and will not be compensated for them as part of the award for anticipated profit. In that regard, this item should not be confused with the cost of equipment which would have been used to perform the hauling and logging, which Appellant has accounted for and deducted as part of costs on Chart 1. Accordingly, there is no double recovery. Finally, Appellant made the appropriate reductions

in percentage for idle equipment by reducing the working rates by one-half during the period of shutdown. Luria Bros. & Co. v. United States, 369 F.2d 701 (Ct. Cl. 1966).

Appellant's evidence for its underlying costs on idle equipment was derived through testimony with no documentary backup (FF 45). However, the FS mounted no real challenge to the figures and provided no countervailing information or testimony which causes us to doubt Appellant's numbers. That said however, there is one adjustment which must be made. We have decided this appeal as a breach case. As such, once Appellant filed its certified claim in January 1997, and breach damages attached, the contract ceased and thus recovery of costs for idle equipment after that date is not appropriate.

Therefore, in calculating the early recovery for the three pieces of equipment, we use early-May through early-January or 8 months of entitlement. Accordingly, we take Appellant's annualized claim figure of $49,785 and apply 8 months rather than a year to yield recovery of $33,355.95. (FF 45.)

Appellant's claim for $83,809.26 is labeled as unabsorbed overhead plus profit of 10 percent. However, in calculating its overhead, Appellant calculates it on the basis of overhead which would have been incurred and recovered had it fully performed the contract. To arrive at its figure, Appellant applies a markup of 13.6 percent against the revenue to be generated on the sale. The evidence adequately supports the 13.6 percent overhead and in this case we believe that applying the markup in this breach case is a fair method of finding out-of-pocket costs. However, for reasons explained below, Appellant's overhead calculation must be readjusted.

The claimed pre-profit overhead of $76,190.23 is the total overhead which Appellant claims it would have recovered had it fully performed. Appellant in its operating plan and in its claim has stated it was planning to begin in May 1996 and not finish until July 1997. That contemplates 15 months of overhead. (FF 28-29; App. Ex. A-5.) The breach here occurred in January. Thus, starting with May and ending with the breach in January, this contract existed over an 8-month period. Thus, if $76,190.23 represents overhead Appellant would have recovered had it worked for the expected 15 months, then 8 months of effort entitles Appellant to $40,635.

Appellant's claims for $5,000 for performance guarantee, $11,357 for deposit for reconstruction engineering services, and $4,688 for down payment are all granted. Appellant has deducted each of these items as a cost and as such they reduce the profit accordingly. The FS has provided no analysis or argument to dispute payment of these figures. (FF 46.)

Appellant claims $3,176.25 for costs paid to its consultant, Professional Forestry Services (Mr. Dorrell). A contractor can recover the costs paid to a consultant where the costs are properly for contract administration. That is true even where Federal Acquisition Regulations (FAR) § 31-205 is applicable. The FAR, however, is not applicable to this timber sale contract. We find that Mr. Dorrell's review of the contract and initial site visit were administration costs attempting to assist Poston in understanding its contract obligations. We

find that in contrast, the 100 percent cruise was conducted to establish quantity and further find that additional services were provided for preparation of the dollar claim, and as such were in furtherance of litigation. We have no specific breakdown of time for the above referenced tasks, however, again believe that Appellant has established some entitlement. Based on the nature of the three tasks, we conclude that the contract review and site visit for purposes of interpreting the contract and follow up by Mr. Dorrell for helping Poston understand its obligation, constitutes 25 percent of Professional Forestry's billings to Poston. Accordingly, we allow $656.25 plus overhead and profit of 10 percent claimed by Appellant for a total of $793.65. (FF 48.) See Plano Builders Corp. v. United States, 40 Fed. Cl. 635 (1998), 17 FPD 36.

Finally, we deny Appellant's interest on deposits. (FF 47.) Had the job been performed, these costs would have been paid out and not necessarily immediately reimbursed. This has no bearing, however, on CDA interest on its claim, which would begin from the date the Government received Appellant's certified claim.

Summarized below is Appellant's recovery:

$31,292.00	Profit tractor units <30 inches
44,689.00	Profit tractor units >30 inches
-9,899.00	Profit skyline units (all sizes)
33,355.95	Idle equipment
46,635.00	Overhead
5,000.00	Bid guarantee
11,357.00	Deposit for engineering services
4,688.00	Down payment
793.65	Professional Forestry Services
$167,911.60	Total

DECISION

Accordingly, we grant Appellant's appeal and award the sum reflected in the above summary.

/s/
_____
HOWARD A. POLLACK
Administrative Judge

Concurring:

/s/
_____
EDWARD HOURY
Administrative Judge

/s/
_____
JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D. C.
December 15, 1998