

REIDHEAD BROTHERS LUMBER MILL,)	AGBCA No. 2000-126-1
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Appellant)	
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RULING ON MOTIONS FOR SUMMARY JUDGMENT

October 4, 2000

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO. Separate opinion, concurring in part and dissenting in part, by Administrative Judge WESTBROOK.

VERGILIO, Administrative Judge.

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.”

The purchaser categorizes the costs for which it seeks reimbursement as unamortized fixed and semi-fixed expenses, increased direct labor costs, labor inefficiency, cost of maintaining letter of credit, unamortized general and administrative expenses, idle equipment costs, legal fees, and increased logging and hauling costs. The contracting officer granted one portion of the claim (\$403.78, for maintaining letter of credit) and denied the remainder, concluding that the denied elements were not reimbursable under the clause.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. In a motion for summary judgment on the issue of liability, the purchaser maintains that it is entitled to reimbursement for each category of allegedly incurred costs under the clause. The Government responded in opposition; the purchaser submitted a reply. The Government filed a reply and its own motion for summary judgment, claiming that the items for which the purchaser seeks compensation are not included in the contract because they relate to other than purchaser's operations under the contract. The purchaser submitted a surreply and response in opposition to the motion.

The existing record does not establish that the purchaser is entitled to judgment as a matter of law on the issue of entitlement. As an initial matter, the record does not demonstrate the degree to which the suspension affected the purchaser. The purchaser submitted its plan of operation after the circuit court initially enjoined performance, albeit prior to the purchaser receiving from the contracting officer formal notification of the suspension. At this stage of the proceedings, there is no conclusive proof that the purchaser was able or intended to abide by the plan of operation submitted or that it would have performed as projected in its claim. Moreover, the claim contains unexplained, inconsistent statements and calculations. Alternatively, the support (in terms of causation and amount) for the items to which the purchaser claims entitlement is scant (at best) to non-existent. Lacking in the existing record are receipts or other documentation which clearly identify and verify actual expenditures. Thus, the contracting officer was justified in denying items of the claim. Because the existing record does not demonstrate that the described costs were "out-of-pocket expenses incurred as a direct result of interruption or delay of operations," a prerequisite to reimbursement under the clause, the purchaser's motion for summary judgment must fail.

In a cross-motion for summary judgment, the Government contends that the clause permits only the reimbursement of out-of-pocket expenses incurred in the operations of the contractor in performing the contract. Because, propounds the Government, the purchaser seeks reimbursement for costs allegedly associated with the operations of its sawmill, costs which do not relate to the purchaser's performance under the contract, the purchaser is not entitled to recover under the terms of the clause. In opposition, the purchaser maintains that it is entitled to any out-of-pocket expense incurred as a direct result of the delay, even if that expense is not incurred in performing the contract.

The expenses for operating the sawmill were not incurred as a direct result of the interruption or delay of operations under the contract. Accordingly, the purchaser lacks entitlement to recover such costs under the contract. However, not all requested costs represent expenditures at the sawmill. For some items, with credible proof, the purchaser may be able to demonstrate entitlement and the amount of recoverable expenses. The Board grants in part and denies in part the Government's motion for summary judgment.

FINDINGS OF FACT

The contract

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 subject to escalation and some 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. As awarded, the contract would terminate on December 31, 1996. The normal operating season was stated generally to cover the period between May 31 and October 31, inclusive; however, for specified cutting units, the contract permitted logging during a different period. (Exhibits 4.A at 168, 193 (¶ AT16), 4.C at 252 (¶ CT6.314).)

3. 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).)

4. The contract defines the phrase “purchaser’s operations” to include:

activities of or use of equipment of Purchaser, Purchaser’s employees, agents, contractors, subcontractors, their employees or agents, acting in the course of their employment in operations hereunder on National Forest System lands or within the Forest Service protection boundary (unless acting under the immediate supervision of Forest Service, as in slash disposal).

(Exhibit 4.B at 210 (¶ BT6.3).)

5. The contract specifies, in an Operating Schedule clause, that the purchaser “shall, before commencing operations, provide in writing an annual schedule of anticipated major activities and needs for logging” the timber (Exhibit 4.B at 245 (§ BT6.31)).

6. A Plan of Operation clause (10/77), directs:

Within 60 days of final award of contract, Purchaser shall furnish Forest Service a written general plan of operation which shall be in addition to the annual operating schedule required under BT6.31. The plan shall set forth planned periods for and methods of road construction, timber harvesting, and completion of slash disposal, erosion control measures and other contractual requirements. Forest Service written approval of the plan operation is prerequisite to commencement of Purchaser’s Operations. Purchaser may revise this plan of operations when necessitated by weather, markets or other unpredictable circumstances, subject to the written approval of Forest Service. In the event of delays beyond the control of Purchaser which qualify for Contract Term Adjustment, the plan of operations shall be mutually adjusted as necessary to accommodate the adjusted contract period.

(Exhibit 4.C at 248 (§ CT6.3).)

7. The contract contains a Disputes clause, CT9.2 (7/80), which specifies that the contract is subject to the Contract Disputes Act of 1978. The clause defines “claim” to mean “written demand or assertion by one of the parties seeking, as a legal right, the payment of money, arising under or relating to this contract.” The clause specifies that a

voucher, invoice, or request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a claim pursuant to the Act.

(Exhibit 4.C at 286 (§ CT9.2).) A Submission of Claim clause (8/80), specifies: “Purchaser claims under this contract shall be submitted in writing to the Contracting Officer through the Forest Supervisor of the National Forest on which the sale is located. Date of receipt by Forest Supervisor shall be considered as the beginning date for determining any interest due on claims” (Exhibit 4.C at 287 (§ CT9.21)).

The interruption

8. By letter dated September 4, 1991, the purchaser provided the Government with its logging plan, specifying that it intends to start logging the contract on April 1, 1993, when it plans to move approximately 500 MBF per month (Exhibit 7.A at 454). However, in response to a request for release and payment, the Government released a payment unit for cutting on September 20, 1991 (Exhibit 7.A at 468). The payment unit contained 31 MBF of timber (Exhibit 4.A at 183). The Government concluded that all contractual requirements on that unit were met, and closed that unit, as specified in a letter dated March 31, 1992 (Exhibit 7.A at 472).

9. By letter dated August 25, 1995, the contracting officer notified the purchaser that all timber felling activity on all timber sales in the Apache-Sitgreaves National Forests is suspended as required by a court order of August 24, 1995 (Exhibit 7.A at 524). By letter dated December 5, 1996, the contracting officer informed the purchaser that on December 4, 1996, a court-ordered suspension of harvesting activities had been lifted. Further, the letter immediately authorized the purchaser to initiate harvesting activity under any or all of its timber sale contracts (Exhibit 7.A at 611). As of March 20, 1997, the parties executed contract modification four which altered the midpoint payment date and changed to August 7, 2000, the termination date (Exhibit 5.D at 359-62).

10. The purchaser informed the Government, by letter dated May 12, 1997, that it plans to start logging under the contract in June 1997. In the letter, the purchaser requested the Government to combine payment units and to waive the timing of logging restrictions on two units. (Exhibit 7.A at 625.)

11. On May 30, 1997, the U. S. Court of Appeals for the Ninth Circuit issued an order temporarily enjoining certain activities (all new logging operations) in the Southwest Region, which includes the area of the Draw timber sale (Complaint at 5 (¶ 16); Answer at 5 (¶ 16); Forest Guardians v. Thomas, 967 F. Supp. 1536, 1544 (D. Ariz. 1997)).

12. By modification five, which the Government sent to the purchaser under cover letter dated May 30, 1997, and executed as of June 3, 1997, the parties redelineated and added payment units and dropped the specific timing requirements, as requested by the purchaser (Exhibit 5.E at 363-68).

13. By letter dated June 2, 1997, the purchaser provided the Government with a “logging plan” for three timber sale contracts:

I plan to begin logging work on the Draw Timber Sale, June 1, 1997, and will try to spend the summer there.

Move to Horton in September and October 1997 and complete this sale.

Move to Isabelle Timber Sale in November 1997 and [c]omplete this sale.

(Exhibit 7.A at 628). By a separate letter, dated June 2, 1997, regarding the Draw timber sale, the purchaser requested a release of payment unit two (Exhibit 7.A at 629).

14. On June 2, 1997, the Government and purchaser held a pre-operation meeting, during which it was noted that the start date for payment unit two would be when released (Exhibit 7.A at 630).

15. 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.)

16. By decision dated December 15, 1997, the Ninth Circuit vacated the temporary injunction. Forest Guardians v. Dombek, 131 F.3d 1309, 1313 (9th Cir. 1997). On December 17, the contracting officer received notice of the court ruling (Exhibit 7.A at 636).

17. By letter dated December 19, 1997, to the purchaser, the contracting officer documented the lifting of the suspension on sawtimber harvest, specifying that all operations may resume (Exhibit 7.A at 637).

18. As of January 29, 1998, the parties executed contract modification seven, adjusting the midpoint payment date, and modifying to August 4, 2001, the termination date (Exhibit 5.G at 371-74).

19. By letter dated May 4, 1998, the purchaser requested a release on payment unit six of the timber sale (Exhibit 7.A at 642). By letter dated May 6, 1998, in reference to the logging plan, the purchaser informed the Government that it plans to begin logging on the timber sale approximately May 15, 1998, on payment unit six and that, after completion of that unit, it will request release of payment unit two. It notes, further, that it will move to the Horton timber sale September 1, 1998, and complete the timber sale. (Exhibit 7.A at 643.) On May 15, 1998, the parties met at a pre-operation meeting (Exhibit 7.A at 645-47). On that same date, the contracting officer released payment unit six for harvest (Exhibit 7.A at 648-49).

The request for payment

20. On November 29, 1999, the contracting officer received from the purchaser what is styled a "claim" and a certification.¹ (Exhibits 1.C at 3, 9.B at 1263). Through the submission, the purchaser seeks to recover \$345,232.17, which it characterizes 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 claims entitlement under clause C[T]6.01. (Exhibit 1.C at 3-21.)

¹ The certification states:

I certify that this claim is made in good faith, that the supporting data is accurate and complete to the best of my knowledge and belief, that the amount requested accurately reflects the contract adjustment for which Reidhead Brothers Lumber Mill believes the government is liable, and that I am duly authorized to certify this claim on behalf of Reidhead Brothers Lumber Mill, Inc.

(Exhibit 1.C at 12).

21. The purchaser summarized its request as follows:

\$ 18,480.91	unamortized fixed and semi-fixed expenses [item one]
52,466.92	increased direct labor costs [item two]
106,244.43	labor inefficiency [item three]
403.78	cost of maintaining letter of credit [item four]
124,740.78	unamortized general and administrative expenses [item five]
19,367.24	idle equipment costs [item six]
15,000.00	legal fees [item seven]
8,528.10	increased logging and hauling costs [item eight]
\$345,232.17	TOTAL [although the actual total is \$345,232.16]

(Exhibit 1.C at 13).

22. The purchaser describes the requested costs as including costs relating to its inability to fully utilize its manufacturing facilities, that is, scaling back and then halting operations at its sawmill. The purchaser specifies that it intended the Draw timber sale and the Horton timber sale (both suspended for the period in question) to supply product for its sawmill. (Exhibit 1.C at 7-8.) The purchaser claims to have incurred increased direct labor costs:

[R]ather than layoff certain of our key employees (and thus not have them available to us when the suspension was lifted) we were forced to keep them on at their existing wage level even though they were performing tasks that were much more menial and would otherwise have been accomplished by lower-wage employees.

(Exhibit 1.C at 9.) The request states:

during the period from August 1, 1991 through July 31, 1995, we produced on average[] 12.4 board feet (BF) of lumber for every dollar of direct labor cost expended. During that time, the yearly production per dollar of direct labor figures did not range too widely, i.e., from a low of 10.85 to a high of 13.3. However, during FY '98, when we should have produced 7,300 MMBF of lumber, our production per dollar of direct labor expended ratio (even when adjusted for the costs of keeping our skilled workforce together during the period of mill shutdown) was only 10.1 BF per direct labor dollar. This was some 18.45% less than the corresponding figure for years with similar projected production.

(Exhibit 1.C at 9-10.) The stated variation from 10.85 to 13.3 (board feet per direct labor dollar) represents a difference of 2.45, which is approximately 22.58% of 10.85. The figure for fiscal year 1998, 10.1 (board feet per direct labor dollar) varies from the 1995 figure of 10.85, by .75, which is approximately 6.96% of 10.85 (the figure for the final year of figures before the suspensions provided by the purchaser).

23. The supporting data for the first item, unamortized fixed and semi-fixed expenses, consists of a single page with the following entries:

\$39,436.00	utilities through January 31, 1998
\$3,943.60	
\$43,379.60	
\$4,337.96	
\$47,717.56	
35.21%	Unamortized Portion Attributable to Draw
\$16,800.83	
\$1,680	profit
\$18,480.91	

(Exhibit 1.C at 14). Although the record contains no explanation of the entries, in the second line the purchaser initially seeks an additional 10% of the claimed utility costs, and then in line four, seeks an additional 10% of the sum.

24. Regarding item two, increased direct labor costs, the supporting data consists of a single page with the following entries:

Position	Rate	Hours	Amount Paid	Value at \$5.40/hour	Difference
Trimmer man	\$9.00	460.5	\$14,193.00	\$2,486.70	\$11,706.30
Edger man	\$8.00	192	\$6,939.00	\$1,036.80	\$5,902.20
Sawfiler	\$10.00	486	\$15,460.00	\$2,624.40	\$12,835.60
Drykiln man	\$9.00	474	\$17,754.00	\$2,559.60	\$15,194.40
Millwright	\$9.20	455.5	\$13,113.00	\$2,459.70	\$10,653.30
Debarker					
Operator	\$9.36	480	\$5,765.00	\$2,592.00	\$3,173.00
Laborer	\$8.00	427	\$1,743.00	\$2,305.80	(\$562.80)
Loader operator	\$9.00	430	\$5,052.00	\$2,322.00	\$2,730.00
Millwright	\$10.00	192	\$4,440.00	\$1,036.80	\$3,403.20
			\$84,459.00		\$65,035.20
			labor burden (30%)		\$19,510.56
					\$84,545.76
				overhead	\$8,454.58
					\$93,000.34
				profit	\$9,300.03
					\$102,300.37
			portion attributable to Draw	51.29%	\$52,466.92
			portion attributable to Horton	48.71%	

(Exhibit 1.C at 15). The represented rates multiplied by the hours do not equal the amounts paid. For example, for the trimmer man, $\$9.00 \times 460.5 = \$4,144.50$. The identified amount paid, \$14,193.00, is in excess of 340% of the actual product. There is no indication in the claim to the contracting officer or in this record as to what the stated amount paid includes or how it was calculated. Nor is there any explanation or support as to the viability of hiring individuals for any

particular task at \$5.40 per hour. What remains unexplained, and need not be resolved here, are the bases for the calculations. If the stated "amount paid" includes a labor burden and the \$5.40 rate does not, the true difference to the purchaser is not accurately portrayed, in that the \$5.40 figure should have the labor burden added to it to compare the anticipated costs to the actual costs. It may be that by adding a labor burden on the difference the purchaser is claiming entitlement to labor burden twice.

25. Regarding item three, alleged labor inefficiency resulting from the suspension, the purchaser provided a single page of support, here reproduced in full:

FY	1992	1993	1994	1995	total	1998
MBF (LT) of lumber produced at the mill	7,462.48	6,933.49	6,491.05	6,047.66	26,934.67	4,667.44
total direct labor cost at the mill	\$586,101	\$521,298	\$508,320	\$557,181	\$2,172,900	\$526,780
board foot produced per dollar of direct labor	12.73241	13.30043	12.76961	10.85403	12.39572	8.860321
	Total direct labor cost FY '98			\$526,780		
	less increased amount			\$65,035		
	net direct labor cost			\$461,745		
				8.860321197 bf per dollar of DL in FY 1998		
				12.39572461 bf per dollar of DL average		
inefficiency	28.52%	\$461,745	\$131,694.93			
			\$39,508.48		labor burden (30%)	
			\$171,203.41			
			\$17,120.34		overhead	
			\$188,323.76			
			\$18,832.38		profit	
			\$207,156.13			
portion attributable to Draw	51.29%		\$106,244.43			
portion attributable to Horton	48.71%					

(Exhibit 1.C at 16.)

26. To support the claim for letter of credit costs, the fourth item, the purchaser submitted a single page with the following information:

\$350 per year	
	Suspension and subsequent period when operations were not achievable
0.953427 years	(June 3, 1997 through May 15, 1998)
\$333.70	Cost of Letter of Credit
\$33.37	overhead 10%
\$367.07	
\$36.71	profit 10%
\$403.78	

(Exhibit 1.C at 17).

27. The supporting data for the fifth item, unamortized general and administrative (G&A) expenses, consists of a single page, which by line item lists various dollar amounts under a caption of unamortized G&A, 8/1/97 through 7/31/98. The line items include entries for salaries and wages, advertising, bank charges, depreciation, dues and subscriptions, fuel, insurance, legal and professional, letters of credit, repairs and maintenance, supplies, payroll and other taxes, and utilities. The calculations, which reflect relief for the period of August 1997 through January 1998 (a total of 6 months), are based upon a percentage of volume which should have been (but was not) processed from the Draw timber sale during this 6-month period compared to the overall volume that should have been processed (the sum of the actual volume processed and projected volumes from the Draw and Horton timber sales which were not, but should have been, produced). To the total G&A here sought of \$113,400.71, the request adds 10% profit, for a total of \$124,740.78. (Exhibit 1.C at 18.)

28. The support for item six, idle equipment, consists of a single page, which identifies two pieces of “owned equipment” (a 1991 log loader and a 1985 forklift) and one piece of “leased equipment” (a forklift). For the owned equipment, the page specifies a capital cost of \$110,000 and \$32,000, for the log loader and forklift, respectively, and the total cost for each piece for the period of August 1, 1997, through July 31, 1998, as \$102,080 and \$29,184, respectively. For the owned equipment, the claim seeks to recover \$14,618.11 as representing the portion attributable to this contract, plus a profit of 10%, for a total of \$16,079.92. The per month charge for the leased equipment is identified as \$1,352.94. For the leased equipment, the claim seeks to recover \$2,988.48 as representing the portion attributable to this contract, plus a profit of 10%, for a total of \$3,287.32. In sum, the purchaser claims entitlement to \$19,367.24 for idle equipment expenses. (Exhibit 1.C at 19).

29. Regarding the seventh item, legal fees, the supporting documentation 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).

30. The support for the eighth item, increased logging and hauling costs, consists of a single page which states that the anticipated logging and hauling cost for 1997 was \$85.00 per MBF (LT), that the actual logging and hauling cost for 1998 was \$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.)

31. In a decision dated January 27, 2000, the contracting officer states, in here-pertinent part:

It is my opinion that the only portion of your claim that is valid under the Contract Disputes Act (CDA) and contract provisions CT 6.01, are those costs you incurred in maintaining the letter of credit during the time the sale was delayed from June 3, 1997, through December 20, 1997.

Your claim states that the cost of maintaining the letter of credit on this sale during the period of the injunction was \$403.78.

(Exhibit 1.D at 22.) The contracting officer approved payment of that amount plus interest of \$3.27, for a total of \$407.05. The contracting officer calculated interest running from November 29, 1999, through February 17, 2000 (which included 21 days mailing time), for 81 days at 5% per year, rounded to .0001% per day. (Exhibit 1.D at 22.)

32. By letter to the Board dated February 1, 2000, the purchaser appealed the contracting officer’s decision (Exhibit 1.E at 23).

33. The president of the purchaser, who prepares and submits bids on Forest Service timber sales, declares that he had reviewed a copy of clause CT6.01 prior to bidding on the contract and that his overall interpretation of the clause

was that, in the event that we were requested to interrupt or delay our operations on the sale under the circumstances indicated, we would be reimbursed for any expenditure (irrespective of size), i.e., any “out-of-pocket expense,” so long as we

incurred it as direct result of that interruption or delay and it did not constitute lost profit, replacement cost of timber and other anticipatory loss.

Purchaser's Response (May 9, 2000), Exhibit 1 at 1-2 (¶¶ 1-4).

34. In a declaration executed on March 24, 2000, the contracting officer states that the supporting documentation submitted with the claim "provides insufficient information to determine if these costs may be considered out-of-pocket expenses." "No receipts were provided to support an argument that Reidhead made actual specific 'out-of-pocket' payments as to any of these expenses, nor was there any type of document provided as verifiable proof to the payments Reidhead actually made." Further, the contracting officer declares,

Because I have no actual receipts or payment records as required, I can neither determine if they meet the agency's definition of "out-of-pocket" expenses, nor if they do, whether the amount claimed is correct. Unamortized fixed and semi-fixed expenses, increased direct labor costs, labor inefficiency, unamortized general and administrative expenses, idle equipment costs, and increased logging and hauling costs appear to clearly be either anticipatory losses, costs that represent lost profit or for replacement cost of timber expenses, all of which are not acceptable "out-of-pocket" expenses.

(Exhibit 9.B at 1264 (¶¶ 5, 7, 8).)

DISCUSSION

In its memorandum in support of its motion for summary judgment on the issue of entitlement, the purchaser formulates the issue presented: "Whether Reidhead is entitled under contract clause CT6.01 to certain specific items of out-of-pocket expenses incurred directly as a result of a suspension caused by a court ordered injunction." Purchaser's memorandum at 2.²

² In its reply to the Government's response, the purchaser references two statements in the Government's response (first, the "Government agrees that it is liable for reimbursing certain out-of-pocket expenses but denies that the 'out-of-pocket expenses' currently claimed by the [purchaser] . . . are those types of expenses" and, second, the Government defines the issues as whether or not the items for which the purchaser seeks reimbursement "really are 'out-of-pocket expenses' of a type which is reimbursable") and states at page 2:

These two statements evidence a belief on the part of the government that the items for which appellant seeks reimbursement are in fact "out-of-pocket expenses." (According to the government they are just out-of-pocket expenses of a "type" or "types" not compensable under CT6.01 (6/90)). This admission notwithstanding, a primary basis for Respondent's position that Appellant's claim should be denied is the inconsistent allegation of the existence of a historical custom and usage between timber contractors and the Forest Service as to the very definition of the term "out-of-

The Government asserts, in its motion for summary judgment, at page 2, that the amounts sought by the purchaser are not included in the terms of the contract. The Government contends that the clause permits the reimbursement of costs only if the costs are directly related to the performance of the contract. Because sawmill operations are outside the operations of the contract, the Government maintains that the purchaser lacks entitlement to any of the costs (which the Government characterizes as losses) requested.

A forum may grant a motion for summary judgment when no genuine issue of material fact remains and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Terms of the clause

Central to this dispute is whether particular items of alleged costs are recoverable under the contract (clause CT6.01); that is, whether items represent reimbursable “out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision” (Finding of Fact (FF) 3). The clause allocates risks, as it limits the Government’s potential liability to the relief indicated.

The clause, CT6.01 (FF 3), which dictates the sole and exclusive remedy of the purchaser, specifies that reimbursable expenses must be incurred as a direct result of the interruption or delay. Further, the clause provides guidance on what may and may not constitute recoverable out-of-pocket costs. Because a purchaser agrees to provide receipts or other documentation which clearly identify and verify actual expenditures, recoverable costs must, in fact, have been incurred, and must not be speculative. The clause expressly excludes the recovery of lost profits, the replacement cost of timber, or any other anticipatory losses suffered by purchaser.

Entitlement

The purchaser does not address specifically its entitlement to profit which it claims for most items. The claim for profit is inconsistent with the clause which expressly excludes “lost profits.” The amounts the purchaser seeks for “profit” do not represent an “out-of-pocket” expense, but rather, a hoped for return on expenditures.

The purchaser also does not address specifically its entitlement to overhead for the claimed period. The allocation of overhead suggests that the costs were and would have been incurred without regard to the suspension or delay, such that the costs do not represent costs incurred as a direct result of the suspension or delay. Moreover, the purchaser separately claims entitlement to unamortized G&A expenses (item five), such that even if overhead represents a reimbursable cost, the existing record does not adequately demonstrate a lack of duplication in the relief requested.

pocket expenses.”

Such a reading of the Government’s response is disingenuous, particularly in light of the bases the contracting officer sets forth in support of denying the claim.

The Board may summarily deny the purchaser's motion for summary judgment on the issue of entitlement because the claim and existing record do not provide sufficient support to demonstrate entitlement to relief for any item claimed. Lacking in the record are receipts or other documentation which clearly identify and verify actual expenditures. Moreover, the supporting information supplied does not appear to be consistent in various respects. Although the lack of support in the record provides a basis for the contracting officer reasonably to have denied reimbursement, and causes the purchaser's motion for summary relief to fail, ultimately the Board is required to engage in a de novo review to determine entitlement under the terms of the contract and the facts presented.

As the Government maintains in its motion for summary judgment, the contract exists independent of the purchaser's operation of its sawmill. Had the purchaser closed or sold its sawmill, or had it decided to utilize a different sawmill during performance, its contractual obligations would not have varied. While the Government broadly asserts that the clause restricts reimbursement to increased costs of performance, the clause expressly limits recovery to expenses incurred as a direct result of the interruption or delay of operations. A purchaser's operation of a sawmill is not directly related to the contract.

Contrary to what the purchaser maintains in its claim and what its president declared (FF 33), there can be no reasonable expectation that the Government would reimburse the purchaser for every expense the purchaser incurred as a result of a delay or interruption, no matter how remote from the purchaser fulfilling its contractual obligations. The expenses of operating the sawmill are not connected to the contract. The purchaser did not incur those expenses as a direct result of the interruption or delay. Rather, such costs are the indirect (or consequential) result of the delay.³

³ The interpretation of the clause involves a legal question. The purchaser has not raised a material factual dispute by its submission of declarations from various timber purchasers or forestry consultants (they view the clause as broadly providing entitlement to relief for any expenditure except for the replacement cost of timber, lost profits, or anticipatory losses), a declaration by the Director of Forestry and Forest Health for the USDA, given in the injunction action before the Ninth Circuit ("Because the individual contract delay provisions were not envisioned to be applied to more than one contract at a time, the government could face potentially broad damages for businesses being unable to operate enough of their contracts to avoid loss from mill closings and other losses outside an individual contract"), and an affidavit, dated February 14, 1995, by a timber sales group leader of the USDA, Forest Service (averring that a purchaser would have a valid claim under clause C6.01, the individual expects one element of claims to be for expenses associated with the interruption or shutdown and start-up of the purchaser's sawmill, with the total claim of a purchaser averaging \$16,000 to \$30,000 for a possible delay of up to 18 months) (Purchaser's Response (May 9, 2000), Exhibits 3-8). The statements by the Government individuals indicate that claims will be filed and the Government could be (not will be) liable under the clause; they do not attempt to provide an interpretation for the Government, particularly when the individuals are not specifically connected with this contract and nothing suggests that they are qualified or able to represent an intent of the Government when this contract was signed. The various declarations lack the specificity required to affect the interpretation of the clause required in resolving the issues in dispute. The phrase "direct result" has some meaning, contrary to the views espoused by the various purchasers.

This conclusion, that the sawmill-related expenses are consequential and not direct, and therefore not reimbursable, is borne out by the explicit exclusions found in the clause, as is evident with the following rationale. Had the purchaser obtained replacement timber to keep the sawmill operating at the level the purchaser anticipated, the purchaser would have allocated the various sawmill-related expenses to that timber, and would have incurred no additional expenses but for the costs of the replacement timber. The clause expressly makes the costs of replacement timber non-reimbursable. Hence, under the clause, the purchaser would not have a valid claim for such costs. Expenses do not become reimbursable under the clause because the purchaser opts not to (or, perhaps, is unable to) obtain replacement timber.

Alternatively, the purchaser could have contracted to sell the timber to a sawmill. As a result of a delay, the sawmill may reduce the price it pays for the timber because of the inefficiencies it experienced and the costs it incurred when the timber was not arriving, or the sawmill may opt not to purchase the timber because of the delay. The purchaser would lack a valid claim under the clause for the difference in its selling price of the timber, because the clause makes non-reimbursable lost profits or anticipatory losses suffered by the purchaser. Here, the Government's obligations are not altered and the entitlements of the purchaser are not affected, simply because the purchaser owns the sawmill.

In light of this analysis, the Board reviews each category of cost sought, to determine if it could constitute a recoverable cost.

Item one: unamortized fixed and semi-fixed expenses

The purchaser has failed to demonstrate entitlement to this item, which it characterizes as unamortized fixed and semi-fixed expenses, and which appears to reflect utility costs at the sawmill (FF 22, 23). Two reasons exist to find no entitlement. First, the expenses relate to the sawmill and are not reimbursable, as discussed above. Second, the description and characterization suggest that the costs were incurred and would have been incurred even if no suspension had occurred. As a result, the costs were not incurred as a direct result of the suspension. The purchaser would have expended money on utilities without the suspension; the purchaser has not asserted that its utility costs increased or were incurred because of the suspension. Thus, the clause does not provide a basis for entitlement to relief. To this extent, for this item, the Board grants the Government's motion and denies the purchaser's motion.

Item two: increased direct labor costs

The purchaser attributes the allegedly increased direct labor costs to the operation of its manufacturing facilities (FF 22, 24). As explained above, these alleged out-of-pocket expenses were not incurred as a direct result of the suspension--at best, these sawmill expenses were incurred as a consequential or indirect result of the suspension--and, therefore, are not reimbursable. For this item, the Board grants the Government's motion and denies the purchaser's motion.

Item three: labor inefficiency

As these alleged expenses for labor inefficiency (FF 22, 25) relate to the operations of the sawmill, the clause does not provide a basis for entitlement to relief. To this extent, for this item, the Board grants the Government's motion and denies the purchaser's motion.

Item four: cost of maintaining letter of credit

The contracting officer has found purchaser entitlement to the entire amount requested as a cost of maintaining its letter of credit, in addition to interest on that amount (FF 26, 31). The purchaser does not dispute its recovery of overhead, profit and interest, such that here the Board makes no specific determinations regarding item four. However, for the items remaining in this dispute, the parties should address entitlement (or not) to overhead and profit, and at what rates, and when interest under the CDA begins to run.

Item five: unamortized G&A expenses

Neither the claim nor the existing record support the conclusion necessary to reimbursement under the clause, namely, that the unamortized G&A expenses (FF 27) were incurred as a direct result of the suspension or delay. As suggested by the nature of G&A expenses, as well as the individual entries of expenses, the purchaser would have incurred these expenses during 1997 with or without the suspension. Hence, this item of the claim is not recoverable under the clause. To this extent, for this item, the Board grants the Government's motion and denies the purchaser's motion.

Item six: idle equipment costs

The supporting data in the claim and the existing record do not demonstrate that the claimed idle equipment expenses (FF 28) were incurred as a direct result of the suspension of this contract. This serves as the basis to deny the purchaser's motion for summary judgment regarding this item.

At this stage in the proceedings, it cannot be concluded, however, as argued in the Government motion for summary judgment, that the purchaser did not incur out-of-pocket costs related to the idle equipment (a log loader and two forklifts) as a direct result of the suspension or delay. From the purchaser's characterization of this item, there arises a factual dispute regarding whether these expenses arose in or related to the logging operations or at the sawmill. Thus, the Board denies this aspect of the Government's motion for summary judgment.

Item seven: legal fees

In resolving the cross-motions for summary relief, entitlement to the claimed legal fees (in whole or in part) (FF 29) is not established as a contractual right or as precluded under the clause. The Board denies both motions regarding this item. With proper proof the purchaser may demonstrate that it incurred the legal fees as a direct result of the interruption or delay; that is, but for the suspension of over 30 days, the purchaser would not have had to request reimbursement of out-of-pocket expenses. Thus, such expenses could arise under clause CT6.01, just as a contractor terminated for convenience may recover its reasonable legal expenses incurred in preparing a settlement proposal. Should entitlement be established, the purchaser must establish the reasonableness of the amount.

Item eight: increased logging and hauling costs

Without the supporting data in the claim and the existing record regarding the \$85 and \$90 figures used in the calculations (FF 30), there is no basis to conclude that the claimed expenses were incurred and were incurred as a direct result of the suspension or delay of operations. This serves as the basis to deny the purchaser's motion for summary judgment regarding this item.

However, the purchaser represents these costs as relating to logging and hauling, which suggests that such expenses were incurred as the direct result of the suspension. If the purchaser demonstrates that such was the case, the purchaser would be entitled to recover (in whole or in part) under the contract clause. Accordingly, the Board denies this aspect of the Government's motion for summary judgment.

RULING

The Board denies the purchaser's motion for summary judgment. The Board grants in part the Government's motion for summary judgment, such that the purchaser's claim is denied with respect to items one, two, three and five.

JOSEPH A. VERGILIO

Administrative Judge

I concur:

EDWARD HOURY

Administrative Judge

WESTBROOK, Administrative Judge, concurring in part and dissenting in part.

I concur in the majority ruling denying Appellant's Motion for Summary Judgment.

I concur in the majority ruling granting the Government's Motion for Summary Judgment on item 5 and denying it on claim items 6, 7 and 8.

I respectfully dissent from the majority ruling granting the Government's Motion for Summary Judgment on claim items 1, 2 and 3. In analyzing a case to determine whether there are material facts in dispute, all inferences must be construed in favor of the non-moving party. John R. Wood Trucking, Inc., AGBCA No. 97-158-1, 98-1 BCA ¶ 29,644. I disagree that the affidavits of the Forest Service (FS) Southwestern Region officials do not, when construed in favor of Appellant, raise questions of material fact regarding FS interpretation of damages recoverable under clause CT6.01. I read the declaration of Milo J. Larson, in the language quoted in footnote 14 to the majority opinion, as referring to the FS facing "potentially broad damages" relating to mill closings.

I do not read the word “potentially” as modifying the verb phrase “could face.” In my view, the fact that individuals may read this language differently indicates a question of material fact, making decision on summary judgment inappropriate. The affidavit of Alan Lucas provides a laundry list of claim items that could be expected from a suspended purchaser and estimates a range of costs, the floor of which is \$16,000. The list of claims items includes sawmill expenses and the affiant makes no attempt to segregate the minimum costs he sees as recoverable as pertaining to the costs that are allowable or unallowable under the clause. I disagree that the lack of apparent specific connection of the officials with this contract diminishes the evidentiary value of their statements filed in federal court actions. They are high ranking officials with many years experience being held out to federal courts as responsible and authorized to speak for the FS on contract related matters. I find these two statements, when construed in favor of the non-moving party, sufficient to support a conclusion that summary judgment is inappropriate on the question whether sawmill costs are allowable out-of-pocket expenses under the clause.

ANNE W. WESTBROOK
Administrative Judge

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