UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: January 31, 2019

CBCA 6031

WOOLERY TIMBER MANAGEMENT INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Charlotte Woolery, President of Woolery Timber Management Inc., Tuolumne, CA, appearing for Appellant.

Elisabeth L. Esposito, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

LESTER, Board Judge.

Appellant, Woolery Timber Management Inc. (WTM), elected to proceed in this appeal under the small claims procedure set forth in Board Rule 52 (48 CFR 6101.52 (2018)), which is authorized by section 7106(b) of the Contract Disputes Act (CDA), 41 U.S.C. § 7106(b) (2012). The Board's decision in this appeal is based upon a thorough review of the documents in the appeal file, extensive briefing that the parties filed, and the testimony presented during a two-day hearing in San Francisco, California. Under the small claims procedure, the Board's decision here "is final and conclusive, shall not be set aside except for fraud, and is not precedential." Rule 52(c). For the reasons set forth below, we grant WTM's appeal in part.

Findings of Fact

On February 9, 2015, the United States Forest Service (USFS) issued a solicitation under the auspices of the Historically Underutilized Business Zone program, seeking offers for a contract for the mastication – that is, chipping, shredding, and/or mulching of woody material – of brush and small trees across 591.1 acres within the Cypress Plantation area of Northern California's Lassen National Forest. Paragraph 2 of the solicitation indicated that the contract's period of performance would be from June 1, 2015, to May 31, 2017, although, at paragraph 21 of the solicitation, the USFS stated that "[a]ll work shall be completed by June 1, 2017"; that the June 1, 2015, commencement date was an estimate, dependent upon weather conditions; and that work would have to begin within ten calendar days after the USFS issued a notice to proceed (NTP):

> All work shall be completed by June 1, 2017. Estimated start work date is June 1, 2015; however the actual date to begin is dependent upon weather conditions. Work shall begin no later than 10 calendar days after the effective date of the Notice to Proceed.

Exhibit 1 at 17. At paragraph 29 of the solicitation, the USFS urged offerors to visit the site to identify conditions that they believed might affect contract performance and represented that a failure to inspect the site would not constitute grounds for a post-award claim.

On February 23, 2015, WTM submitted a written proposal for the project indicating that, following a site visit by its vice president and project manager, Ed Woolery, it had determined that, although the rocky conditions, previously built windrows, and tight tree spacing created difficulties, WTM could work around them. WTM represented that it would use two or three Feller Bunchers, a type of motorized vehicle harvester, with a Fecon Bullhog BH80 moving head attached to them to perform the mastication work, adding an ASV Skid Steer with a blade or brushing head as needed for tighter areas and fire protection.

WTM indicated in its proposal that, because of other commitments for the 2015 season, its estimated start date would be April 2016, although, if weather conditions permitted, an earlier start date could be feasible. WTM represented that, despite the delayed anticipated start, it could still complete the project by June 1, 2017. It anticipated working 374 acres over forty-four working days, using three Feller Bunchers, from April 1 to May 31, 2016, and another 217.1 acres over forty working days, using two Feller Bunchers, from June 1 to July 31, 2016. It stated that, if fire restrictions precluded work in June and July, it could be feasible for it to stop work at the end of May 2016 and return in the fall of 2016 or the spring of 2017 to complete the work prior to the June 1, 2017, completion deadline.

On March 5, 2015, the USFS awarded contract no. AG-9AC7-C-15-0035 to WTM for the 591.1-acre Cypress Plantation mastication, with WTM to be paid at a rate of $474 per acre, for a total award of $280,181.40. Like the solicitation, the contract identified a period of performance from June 1, 2015, to May 31, 2017, with a delivery date of May 31, 2017, but contained the same language identified above indicating a June 1, 2017, completion date, the estimated nature of the June 1, 2015, commencement date, and the requirement to begin work no later than ten calendar days after the USFS issued a NTP. The contract required WTM to "maintain progress at a rate that will ensure quality and completion within contract time," but did not specifically incorporate by reference the proposal that WTM had submitted or WTM's representations in the proposal about performance timing or level of equipment support. WTM was to be paid on a periodic basis for the number of acres completed during a period of time, in response to submitted invoices. The contract also incorporated by reference the Commercial Items contract terms and conditions provision at Federal Acquisition Regulation (FAR) 52.212-4, 48 CFR 52.212-4 (2015).

The same day as the contract award, the USFS contracting officer forwarded the contract to WTM for its signature along with a letter postponing a standard pre-work meeting because WTM did not anticipate starting work until the next season. She also indicated as follows: "Please note that no work shall start prior to issuance of the Notice to Proceed which is normally issued at the pre-work meeting."

Knowing that WTM did not plan to commence mastication operations until April 2016, the USFS made virtually no contact with WTM until March 22, 2016, when the USFS contracting officer's representative (COR), Paul White, contacted WTM's president, Charlotte Woolery, by email to check on an operating schedule for the project. In response, Ms. Woolery indicated that, because bad weather had delayed WTM's continuing work on another project and because WTM was in negotiations for yet another contract that would require immediate performance, WTM might not be able to begin the Cypress Plantation project until the spring of 2017. Mr. White expressed concern that, with such a delay, the May 31, 2017, completion deadline for the 591.1-acre project would be at risk and pushed for a spring 2016 start. By email on March 28, 2016, Ms. Woolery asked for a couple of weeks to develop a more complete picture of how WTM would perform. By the time that Mr. White went on a several-month detail on May 15, 2016, WTM had not yet responded, and the USFS had not issued an NTP.

By August 2016, WTM had still not begun work on the Cypress Plantation project. By email dated August 15, 2016, Ms. Woolery asked the USFS contracting officer for an extension of the project deadline, to and including December 2017, citing as her justification an emergency contract that WTM had entered with the State of California, but involving the USFS, for removing dead and hazardous trees in Tuolumne County, California. On

September 8, 2016, PJ Vilhauer, who had just been assigned to replace the prior contracting officer, indicated to Ms. Woolery that she was disinclined to extend the project based, in part, upon the lack of communication from WTM between March and August 2016. On September 13, 2016, Ms. Woolery again asked for an extension with a new start date in the spring of 2017. The contracting officer denied that request and, on October 3, 2016, issued a cure notice, finding WTM's failure to begin operations in the 2016 season to be a condition endangering performance of the contract.

Ms. Woolery indicated her October 5, 2016, response to the cure notice that WTM would begin mastication work the following week. Subsequently, on October 11, 2016, the contracting officer for the first time issued an NTP, indicating that "time on this contract will start at the beginning of business on October 12, 2016." WTM subsequently began work and, by November 2016, completed mastication of 42.79 acres in the project area before stopping because of winter weather. As is typical in the area being worked, mastication could not proceed during the remainder of the winter because of weather conditions.

On April 5, 2017, before WTM had returned to work for the spring season, the USFS notified WTM that, because nesting pairs of northern goshawks and California spotted owls had settled into an area adjacent to the project, the USFS was required pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq. (2012), to suspend operations in a 74.5-acre section of the Cypress Plantation project through at least June 1, 2017, after which time there might be a limited operating period (LOP) during which mastication work in that area might be performed. As the contracting officer saw it, though, the contract was supposed to end on June 1, making it impossible for Woolery to work that area during the contract performance period. On April 10, 2017, the USFS contracting officer sent WTM an unsigned draft bilateral contract modification, no. 0002, that, if executed, would eliminate those acres from the contract, with a corresponding $35,313 contract price reduction.[1] At the same time, the contracting officer expressed concern about WTM's ability to complete the remaining portions of the project within the short time remaining for contract performance and again sought a cure within the following ten days.

WTM did not sign modification no. 0002, but returned to work the project site on April 19, 2017. A week or so following its return, WTM was blocked from using an access road at one edge of the project that it needed to get its service vehicles into the portion of the project area that it was masticating. A ribbon demarcating the section in which Woolery could not work was slightly misplaced, Mr. Woolery testified, in a manner that affected

[1] The draft modification clearly envisioned bilateral execution prior to becoming effective, stating that the modification was to be "[b]y mutual agreement of both parties."

access to a service road that tied into the 340333 spur, and, for a period of two weeks, WTM was required to take its service vehicles through a roundabout and slow route to access the work area. The road access issue added approximately thirty-two hours of travel time (twenty to forty minutes per day for each of three pieces of equipment) to WTM's work over the course of those two weeks, time that Mr. Woolery contemporaneously tracked on a daily calendar that was admitted into the record. Once WTM was able to pound a path through another area off of the main road following additional mastication work on May 12, 2017, its access issues ended.

By April 20, 2017, WTM had hired a consultant, Robert J. Malyszek of Malyszek Consulting, to assist it in responding to the April 10, 2017, cure notice. Mr. Malyszek viewed the unsigned draft modification deleting the 74.5 LOP acres as "really a constructive termination for convenience" that failed properly to compensate WTM for the monetary loss. He represented that, in preparing its offer, WTM had allocated fixed costs across the total 591.1 acres to be masticated under the original contract and that taking 74.5 acres out of the contract impacted that fixed cost allocation. He also asserted that, under the contract, WTM was supposed to have two years to complete performance and that, because the USFS did not issue the NTP until October 12, 2016, WTM should have until October 11, 2018, to complete performance. Nevertheless, he indicated that WTM was working hard to complete all work by the end of May 2017.

The USFS contracting officer responded by letter dated April 25, 2017, blaming WTM for endangering performance by having failed to undertake work activities in a timely manner. She indicated that "the delay in the issuance of the [NTP] is due to your failure to begin work"; that, once she was assigned as the successor contracting officer, she issued the NTP "to get you motivated to begin this project"; and that WTM was not entitled to a day-by-day extension, through October 2018, because of an alleged delay in issuance of the NTP. She reiterated that contract completion was required by May 31, 2017, and again requested a submission regarding the impact of the deletion of the 74.5 LOP acres from the contract.

WTM and Ms. Vilhauer, the USFS contracting officer, continued their communications during May 2017, while WTM simultaneously was continuing its mastication work in the Cypress Plantation area, but never came to an agreement on the 74.5 LOP acres. Neither party ever executed modification no. 0002, either bilaterally or unilaterally. By the end of May, the USFS contracting officer had decided that there was no valid basis for allowing WTM to continue its mastication work after the May 31, 2017, contract completion deadline.

On May 30, 2017, Mr. White visited the project site and showed WTM's on-site representative a stop work order that Mr. White had prepared and executed. That order

directed WTM to cease all operations at the site at the close of business on May 31, 2017, and to remove all equipment by the close of business on June 5, 2017. After WTM's on-site representative signed the stop work order, acknowledging receipt, Mr. White took the stop work order back and did not have a copy to leave with WTM. Apparently through inadvertence, WTM management was never provided a copy of the stop work order, and WTM's on-site representative, although having signed the document when it was presented to him, did not sufficiently understand what was in it to report accurately to WTM management.

On June 6, 2017, Mr. White returned to the project site to discover Mr. Woolery continuing to perform mastication operations. He directed Mr. Woolery to stop, issued a notice of noncompliance with his prior stop work order, and, by email on June 7, 2017, informed WTM that he was measuring the number of acres masticated, a number that he would provide WTM to allow it to submit a final invoice. WTM ended its on-site work at that time. Ultimately, WTM billed for and was paid for masticating 339.8 acres of the Cypress Plantation area.

On or about August 29, 2017, Ms. Vilhauer sent a new draft contract modification to Ms. Woolery, containing the words "[b]y mutual agreement of both parties," that would have eliminated the remaining 251.3 acres from the contract and reduced the contract price from $280,181.40 to $161,065.40. After receiving no response from WTM, she executed and issued the modification unilaterally on September 7, 2017, terminating the unperformed portions of the contract for convenience and making the termination retroactive to June 1, 2017. In doing so, she reduced the number of acres covered by the contract from 591.1 to 339.8 acres, decreased the contract price to $161,065.40, and stated in the modification that "[t]his termination is at no cost to either party."

On October 27, 2017, WTM submitted a certified claim to the USFS contracting officer, which had been prepared by Malyszek Consulting, seeking an additional payment of $81,324.04, later amended to $86,674.04. In that claim, WTM did not seek to recover termination settlement costs arising from the September 7, 2017, convenience termination. Instead, it focused exclusively on the draft modification (no. 0002) that Ms. Vilhauer sent WTM in April 2017, through which she had sought to deduct the 74.5 LOP acres from the contract, and it also claimed that another 34.55 acres of the Cypress Plantation area were unworkable because of tree size and slope grade. WTM, misdescribing the April 2017 draft modification as one that the USFS had unilaterally executed, alleged that the USFS had changed the contract as a result of differing site conditions by partially terminating the contract for convenience, but without accounting for the need to reallocate WTM's fixed costs (originally allocated based upon the contract award of 591.1 acres) across the reduced total of 482.05 acres. It also sought an equitable adjustment to account for delays caused by

the road access issue that occurred in late April 2017, as well as overhead and administrative costs, a profit mark-up, consulting fees, and what it called in-house administrative change order costs.

The USFS contracting officer denied WTM's claim in its entirety by decision dated November 9, 2017, which WTM received by certified mail on November 14, 2017. On February 12, 2018, WTM timely appealed the contracting officer's decision to the Board. WTM subsequently elected to proceed under the Board's small claims procedure. After that election was made, the parties filed cross-motions for summary judgment, but the Board deferred consideration of them pending resolution of factual disputes at a hearing, which the Board conducted in San Francisco, California, in November 2018.

Discussion

WTM's Claim

I. Issues Not Properly Before The Board

Although everyone associated with this contract seems to have been acting with the best of intentions, both parties share blame for the fact that the project was never completed. As for WTM, it unilaterally decided to defer its contract work to a much later date than originally planned so that it could take on other contracts, without first asking the USFS contracting officer whether a delay here would be acceptable. WTM waited so long to begin performance on this contract that its completion by the original deadline became virtually impossible. Although WTM believes that it was acting for the USFS's benefit by taking on other USFS-related contracts involving emergency circumstances, WTM never contacted Ms. Vilhauer, her predecessor contracting officer, or Mr. White to work out an action plan in advance. Instead, WTM simply assumed that it would be allowed to delay the Cypress Plantation project, without regard to the specific deadlines written into the contract. Ultimately, WTM overextended itself and was unable to meet this contract's deadlines.

For its part, the USFS office responsible for administering this contract was able to provide only periodic oversight until the last two months of the contract period, allowing long periods of time to pass without contact with WTM. The USFS originally told WTM that contract performance could not begin until the contracting officer had issued the NTP, but then over a year later complained that WTM was not working, even though it had never issued the NTP. As other fire emergencies and situations necessitated that the USFS employees assigned to oversee this contract be detailed to assist in other areas, USFS management's absences allowed WTM to defer performance and to believe that time was not of the essence. Further, in deciding to enforce a hard deadline of May 31, 2017, the USFS

created an unfortunate situation for itself: by refusing to allow WTM to continue working past that date, more than 250 of the original 591.1 acres that needed to be masticated remain untouched to this day. The USFS terminated WTM's work even though it recognizes that the mastication work that WTM was performing, once it got started, was very good. Although the USFS contracting officer's decision not to permit an extension was based upon an honest belief that WTM did not deserve one, the USFS is now left with a need for mastication services, but without any appropriation to fund them.

All that being said, the only thing for us to decide here is the extent to which WTM is entitled to the money that it is requesting. Nevertheless, we start by addressing things that WTM is *not* requesting, that we need not decide, or that are not properly before us:

First, WTM focuses much of its appeal on the length of time that it should have been allowed to perform this contract. Although the contract provided for a two-year performance period beginning on or about June 1, 2015, and ending May 31 or June 1, 2017, it also indicated that the USFS would issue an NTP, and the USFS contracting officer, immediately after contract award, notified WTM not to begin performance until the NTP was issued, something that did not occur until October 11, 2016. Yet, prior to the NTP's issuance, the USFS periodically pushed WTM to perform. Despite all of the emphasis placed on this issue during briefing and the hearing, whether the two-year contract performance should have run from June 1, 2015, or from October 11, 2016, is ultimately irrelevant to WTM's monetary claim. Although the USFS was insisting throughout the spring of 2017 that WTM complete performance by May 31, 2017, WTM has not asserted any kind of constructive acceleration claim that would entitle it to money for having to start late and meet an early deadline. Further, the USFS contracting officer has not issued a decision demanding the payment of any liquidated damages for delayed performance, but instead terminated this contract for convenience after the COR on May 31, 2017, issued a stop work order. In these circumstances, we need not resolve when contract performance actually should have begun.

Second, as detailed above, the USFS contracting officer unilaterally terminated WTM's contract for convenience on September 7, 2017, purportedly retroactive to June 1, 2017. In its October 2017 claim, WTM does not mention that convenience termination, and it seeks no compensation or termination settlement costs relating to it. As we will discuss below, its claim refers only to a purported partial contract termination in April 2017. Without a claim for settlement costs or damages arising from the September 7, 2017, termination, we have no jurisdiction to provide any relief to which WTM might be entitled as a result of it. *See Aurora, LLC v. Department of State*, CBCA 2872, 16-1 BCA ¶ 36,198, at 176,649 n.2 (2015) (to seek convenience termination settlement costs, the contractor must submit a termination settlement proposal to the agency that then ripens into a claim).

II. Damages for the Alleged April 2017 Partial Termination

WTM's main focus in its certified claim is the USFS's actions in April and May 2017, with the monies that it seeks purportedly tied to those spring 2017 actions. It asserts that the USFS's action in terminating the 74.5 LOP acres in April 2017 effectively constituted a termination for convenience of that portion of its contract. Had the USFS terminated the LOP area from its contract in April 2017, the convenience termination provisions within FAR 52.212-4, the commercial items contract clause incorporated into this contract, would likely permit WTM to claim as "reasonable charges" resulting from the termination the increased costs to the acres not terminated necessitated by having to reallocate across a smaller number of acres the fixed equipment, overhead, and other costs that WTM in preparing its proposal had spread across the 591.1 acres originally awarded. *See, e.g.*, *H.L. Yoh Co. v. United States*, 288 F.2d 493, 494-95 (Ct. Cl. 1961); *Deval Corp.*, ASBCA 47132, et al., 95-1 BCA ¶ 27,537, at 137,223-24; *Steelcare, Inc.*, GSBCA 5491, 81-1 BCA ¶ 15,143, at 74,902. Here, though, there was no termination of the LOP acres in April 2017. The USFS contracting officer sent WTM a draft bilateral modification that WTM declined to execute, and she never issued the modification unilaterally. The premise underlying WTM's claim is flawed. We cannot reallocate WTM's fixed costs and overhead based upon a termination that never happened.

We questioned at the hearing, and still do not understand, why WTM, in its October 2017 claim, focused on an April 2017 termination that did not happen instead of the September 7, 2017, termination for convenience that the USFS contracting officer actually issued. Because WTM's October 2017 claim does not encompass the September 2017 unilateral termination for convenience, we cannot entertain it here. During the hearing of this appeal, the USFS suggested that it is now too late for WTM to submit a settlement proposal or claim seeking such damages because more than a year has passed since the September 2017 convenience termination.[2] For the benefit of the parties, we note that, although the FAR's standard termination for convenience clause requires the contractor to submit its

[2] The USFS has also suggested that the termination for convenience is of no realistic effect because the contract, by its written terms, ended on May 31, 2017, leaving nothing for the contracting officer to terminate. Yet, the mastication work that the contract envisioned was far from complete by that date. We disagree with the USFS's view that, in the type of circumstances here, a contract simply "ends" if the contractor has not completed its work by the contract completion date, without any need for the Government to terminate the unperformed part of the contract. *See, e.g.*, *Environmental Data Consultants, Inc. v. General Services Administration*, GSBCA 12951, et al., 97-2 BCA ¶ 29,208, at 145,372; *M.H. Colvin & Co.*, GSBCA 5209, 79-2 BCA ¶ 13,981, at 68,614.

settlement proposal "no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer," 48 CFR 52.249-2(e), WTM's contract contains the commercial items termination for convenience clause at FAR 52.212-4(l), not the standard clause. The termination for convenience provision in the commercial items clause contains no one-year time limit. *See* Paul J. Seidman & David J. Seidman, *Maximizing Termination for Convenience Settlements/Edition II–Part I*, 08-3 Briefing Papers 10 (Feb. 2008) (commercial items clause "does not set a time limit on the submission of a termination settlement proposal after a termination for convenience"). Accordingly, it appears that WTM can still pursue a remedy for any increased costs resulting from the September 2017 convenience termination. It simply cannot do it here and now.

III. Other Cost Claims

In addition to its concern about the "termination" of the 74.5 LOP acres, WTM also complained in its certified claim about another 34.55 acres within the 591.1-acre Cypress Plantation area that it asserts were unworkable because of tree size and slope grade. It had included those 34.55 acres in its allocation of fixed costs and overhead in preparing its proposal, and it believes that, because they could not actually be worked, there was a constructive change to the contract or a differing site condition. Yet, paragraph 29 of the solicitation required WTM to conduct a site visit prior to submitting its bid to identify conditions that might affect its work. "It is well-settled that a contractor is charged with knowledge of the conditions that a pre-bid site visit would have revealed." *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1346 (Fed. Cir. 1998). The defects that WTM alleges should have been recognizable during its site visit. WTM cannot recover for those lost acres.

WTM has questioned the accuracy of Mr. White's measurements of the acreage that it actually masticated, suggesting that it masticated more acreage than his actual measurements show and that WTM would be entitled to an additional payment of $474 for each acre not accounted for. WTM, however, acknowledges that it conducted no independent measurements of the number of completed acres. We have no evidentiary basis for questioning the accuracy of Mr. White's measurements or for awarding WTM any additional payments for acres masticated beyond what the USFS has already paid.

To the extent that WTM alleges that abnormally bad winter weather delayed its work, the evidence in the record is insufficient to establish that winter conditions at the Cypress Plantation project area were abnormal during the winter of 2016.

WTM seeks to recover more than $33,000 in consulting fees for Malyszek Consulting. Most of those fees relate to that firm's preparation of the certified claim that WTM submitted in October 2017 and for services rendered since that time in prosecuting the claim before the

USFS and the Board. Claim prosecution costs are not recoverable against the Government. *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1550 (Fed. Cir. 1995) (citing FAR 31.205-33), *overruled in part on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 & n.10 (Fed. Cir. 1995) (en banc). To the extent that the firm was providing consulting services prior to or outside the context of claim prosecution, the USFS did not cause any type of change to the contract that necessitated such costs. Accordingly, WTM cannot recover them as something beyond or in addition to its regular contract price.

WTM also challenges the accuracy of the interim report about WTM that the USFS contracting officer placed in the Contractor Performance Assessment Reporting System (CPARS). That issue was not a part of WTM's October 27, 2017, claim, and we therefore have no jurisdiction to entertain it.

The only part of WTM's claim upon which we grant relief relates to its complaint about blocked access to a road in late April and early May 2017. We find it more likely than not, based upon a preponderance of the evidence, that WTM had been relying on a service road for access to the portion of the project area that it was working, that the area was accidentally blocked, and that WTM lost thirty-two hours of work time having to take an alternative route to that project area. Although the USFS disputes that there was even a service road where WTM says there was one, the record contains significant evidence showing that Mr. Woolery was complaining about blocked access during this period of time, and the COR testified that he never actually went to the disputed area to check. WTM seeks to recover hourly salary costs that it paid for those thirty-two hours and the value of its idle equipment. Although it owned the equipment on site, WTM has submitted invoices from other companies to create a rental value of $250.52 for each hour of its idle on-site equipment. Boards have permitted this type of evidence to establish idle equipment damages, but typically cut the rental rate in half (to account for lack of wear and tear during the idle period) in a form of jury verdict award. *See Cyrus Contracting, Inc.*, IBCA 3233, 98-2 BCA ¶ 30,036, at 148,620-22 (discussing cases). Here, half of WTM's thirty-two hours of equipment idleness results in an award of $4008.32.

The Government's Request for Reprocurement Costs

In its answer to WTM's complaint, the USFS requested that it be allowed to set off any damages owed to WTM by damages that the USFS suffered as a result of WTM's failure to complete all of the required contract work, other than the 74.5 acres subject to the seasonal LOP, by May 31, 2017. The requested costs include administrative costs in terminating the contract, deobligating and reobligating funds, administering a new procurement process for substitute performance (work that has not yet happened), administering substitute performance, and covering higher costs that may result from having to hire substitute

performance. Essentially, the USFS is asking us to allow it to recover reprocurement costs or, at the very least, to offset any damages awarded to WTM.

We reject the USFS's request for two reasons. *First*, we lack jurisdiction to entertain any such request because the contracting officer has never issued a final decision seeking such monies, as required by the CDA. *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993); 41 U.S.C. § 7103(a)(4) (2012). That the USFS is seeking recovery through setoff from WTM's award rather than through an affirmative outlay of cash does not alter the nature of the request: it remains a demand for money. *Union Chemical Co.*, GSBCA 7392, 85-3 BCA ¶ 18,489, at 92,860; *see Volmar Construction, Inc. v. United States*, 32 Fed. Cl. 746, 752 (1995) (government request for setoff is a government claim (citing *Placeway Construction Corp. v. United States*, 929 F.2d 903, 906 (Fed. Cir. 1990))). *Second*, even if we possessed jurisdiction to entertain the request, it would fail because the USFS terminated this contract for convenience. In appropriate circumstances, the Government may recover excess reprocurement or replacement costs, a form of expectation damages, from a contractor following a termination for default. *MLJ Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935, at 175,626. Here, though, although the USFS contracting officer complained about WTM's performance, she elected to terminate the contract for convenience. Excess reprocurement costs are not recoverable following a convenience termination. *Gary Aircraft Corp.*, ASBCA 21055, 86-2 BCA ¶ 18,750, at 94,423.

Decision

For the foregoing reasons, WTM's appeal is **GRANTED IN PART**. WTM may recover $4008.32, plus interest under the CDA running from October 27, 2017, the date that the USFS contracting officer received WTM's certified claim. WTM's claim is otherwise denied. The USFS's request for an excess reprocurement costs offset is dismissed for lack of jurisdiction.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge