UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: December 8, 2010

CBCA 94, 102, 106, 137, 138

SHAWN MONTEE, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Richard W. Goeken of Saltman & Stevens, P.C., Washington, DC, counsel for Appellant.

Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT; and Rebecca Harrison, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **VERGILIO**, **POLLACK**, and **STEEL**.

POLLACK, Board Judge.

This matter is before the Board on a motion for summary relief filed by appellant. The Forest Service (FS) opposes the motion, but has not filed a cross-motion.

Appellant sets out the issues presented in its motion for summary relief: First, do the contracts (the Liability for Loss clauses in particular) require the FS to bear the timber value loss in the circumstances of these appeals? Second, if so, what is the appropriate method for valuing that timber value loss? The circumstances surrounding the environmental suspensions of all the contracts are not generally disputed by the parties. However, the parties disagree as to the meaning and operation of the environmental suspension clause,

C6.01, and particularly as to how it relates to the Liability for Loss clause and what recovery is allowed under that clause.

There are five sales involved in this appeal. Four are on the Idaho Panhandle National Forest and the fifth on the Colville National Forest. For purposes of the motion, the clauses at issue are common to all sales. To the extent the clauses differ, those differences are not material to appellant's contentions or our resolution.

The following clauses are relevant to the motion before us.

> C6.01 - INTERRUPTION OR DELAY OF OPERATIONS. (10/96) Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer:
>
> (a) To prevent serious environmental degradation or resource damage that may require contract modification under C8.3 or termination pursuant to C8.2; [or]
>
> (b) To comply with a court order, issued by a court of competent jurisdiction;
>
> . . . .
>
> Purchaser agrees that in the event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be (i) Contract Term Adjustment pursuant to B8.21, or (ii) when such interruption or delay exceeds 30 days during Normal Operating Season, Contract Term Adjustment pursuant to B8.21, 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, attorneys fees, 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 expenses.
>
> B8.12 - Liability for Loss
>
> [If] included Timber is destroyed or damaged by fire, wind, flood, insects, disease or similar cause, the party holding title shall bear the timber-value loss resulting from such destruction or damage, except that such losses after removal of timber from the Sale Area, but before Scaling, shall be borne by Purchaser at Current Contract Rates and Required Deposits.

BT8.12 - Liability for Loss

> If Included Timber is destroyed or damaged by fire, wind, flood, insects, disease or similar cause, the party holding title shall bear the timber-value loss resulting from such destruction or damage, except that such losses caused by insect or disease after felling of timber, shall be borne by Purchaser unless Purchaser is prevented from removing such timber for reasons that would qualify for Contract Term Adjustment. There shall be no obligation for Forest Service to supply, or for Purchaser to accept and pay for, other timber in lieu of that destroyed or damaged. This Subsection shall not be construed to relieve either party of negligence.

Central to resolving this motion is that on all sales in issue, the FS at various times issued environmental suspensions under clause C6.01. At the time of the suspensions, most of the timber on the affected sales was uncut. There was some limited timber that had been cut before the suspensions were issued. At some point (after the suspensions were in place) appellant was allowed to remove that timber.

Appellant claims that the only meaning that appropriately can be given to the contract language is that appellant is entitled to recover a timber value loss under B8.12 or BT8.12. In doing that appellant asserts that the alternative contract meaning, put forth by the FS, cannot be sustained. The FS posits that C6.01 provides the sole and exclusive remedy for costs associated with a delay and interruption for environmental purposes and that clause and not B8.12 (or BT8.12) covers the loss claimed here by appellant. Appellant, in support of its reading, further cites the Board to language in an October 25, 2002, contracting officer decision (which it says confirms its reading), cites to an affidavit in an associated case, and argues that the FS's interpretation of C6.01 reads the Liability of Loss clause out of the contract. Finally, appellant contends that FS actions during the contract show that the FS in practice did not apply C6.01 as claimed and instead applied it in a manner consistent with appellant's position.

Discussion

In order for appellant to prevail on this motion, we must accept its argument that the FS reliance on C6.01 is misplaced and appellant's reading of B8.12, BT8.12, and C6.01 is the only reasonable reading of the contract that can be reached. Appellant argues that C6.01 covers suspension damages only. It asserts that it is not seeking such damages here, but rather is seeking a different class of damages, timber value loss, which it says is covered under B8.12 and is to be applied independent of the suspension clause. Specifically, appellant says:

> (1) appellant does not seek a remedy pursuant to C[T]8.12 for the suspension imposed by the FS and (2) the plain language of clause C[T]6.01 and FS practice during the suspension show that a suspension under C[T]6.01 does not alter the independent obligations set forth elsewhere in the contract, set forth in B[T]8.12 that the FS bear the timber value loss that occurred as a direct result of an insect infestation.

As viewed by the FS, the plain meaning of clause C6.01 is that any monetary remedy sought by appellant due to the interruption and delay of the sale is limited by what is allowed under C6.01. Central to the FS reading of C6.01 is the wording, "sole and exclusive remedy." According to the FS, the words mean what they say. Because the claimed damages occurred during the delay and interruption of the sale (which was ordered under C6.01) any compensation as to that timber is exclusively limited to remedies set out under that clause. Therefore, B8.12 does not apply. While appellant has presented various arguments to the contrary, none justify summary relief.

Contract clause C6.01 limits FS liability during a C6.01 suspension. The wording appears to cover compensation for all damages and deterioration of timber which occurs during an environmental suspension. The fact that C6.01 does not specifically address deteriorating timber or specifically say it excludes "risk of loss" can be argued, but when faced with the wording "sole and exclusive" and "interruption or delay," appellant's reading clearly does not create a basis for summary relief in its favor. That is, appellant has not provided enough to show that its reading must prevail, and on that basis, appellant's motion fails.

Apart from the conclusion that appellant has not demonstrated that it is entitled to relief under the clause at this stage, it is noteworthy that appellant has not established that the liability for loss clauses necessarily would require the Government to pay money to the purchaser. That is, the Government fully may bear the loss through income the Government does not receive, as a result of there being less timber actually cut and removed.

Decision

Appellant's motion for summary relief is **DENIED**.

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HOWARD A. POLLACK
Board Judge

We concur:

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JOSEPH A. VERGILIO
Board Judge

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CANDIDA S. STEEL
Board Judge