



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 7, 2017

CBCA 2131, 2778

BOB L. WALKER,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Robert C. Myers of Montana Resource & Asset Protection, Hamilton, MT, counsel for Appellant.

Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **ZISCHKAU**, and **CHADWICK**.

CHADWICK, Board Judge.

Bob L. Walker timely appealed from two decisions of a United States Forest Service contracting officer, one issued in June 2010 and the other issued in February 2012, denying two certified claims seeking damages totaling about \$3 million under a timber sale contract. The two appeals were consolidated and are before us for decision after a four-day hearing in June 2017. We deny both appeals.

Facts

Because, as we explain, we lack sufficient evidence in the record to award any damages, we organize our findings, after a brief overview of the contract, primarily around

the grounds for relief that Mr. Walker asserted in his certified claims, and the evidence that he and the respondent, Department of Agriculture (USDA), the Forest Service's parent agency, introduced into the record regarding those grounds for relief.

I. The Contract

The Forest Service awarded Mr. Walker the Kerleebert Stewardship Project Contract in January 2007. The timber sale area was within the Bitterroot National Forest in Montana. Mr. Walker agreed to pay \$8.16 per ton of harvested sawlog (the most marketable timber) and less for other timber. The Forest Service estimated in the contract that the trees marked for cutting in the project area included 24,558 tons of sawlog, but the contract stated that "estimated volumes . . . are not to be construed as guarantees or limitations of the timber volumes to be designated for cutting under the terms of the contract." The prospectus had further advised potential bidders that the designated trees were rapidly deteriorating from beetle damage, as testimony at the hearing confirmed. The standard form on which Mr. Walker submitted his bid for the contract included a three-paragraph "Disclaimer of Estimates and Bidder's Warranty of Inspection." It said that the bidder "warrant[ed] that this bid [wa]s submitted solely on the basis of its examination and inspection" of the sale area, and concluded, "The bidder further holds the Forest Service harmless for any error, mistake, or negligence regarding estimates, except as expressly warranted against in the sample contract." Mr. Walker did not fully inspect the sale area before bidding, however. He testified that he visited the sale area four times, but saw only "10 or 15 percent" of the trees due to icy conditions. He added that he "trust[ed] the volume would be there, from my past, my history, with the Bitterroot National Forest. It's always been there."

As Mr. Walker also testified, however, the project "was in a degrading process from when it was first analyzed to when it was sold and completed. It was beetle killed, it was rotting every day." Although Mr. Walker had estimated in his bid that he would begin logging operations in February 2007, due to a delay in obtaining a performance bond and other issues attributable to him, he began work in September 2007. In September 2008, the parties signed a bilateral modification to delete from the contract nine of the sixteen marked logging areas, or units. The parties call the nine deleted units "helicopter units" because, under the contract, Mr. Walker was supposed to have harvested them on an expedited basis by the end of October 2007, by helicopter. The September 2008 modification deleting the "helicopter units" reduced the contract volume estimate to 11,268 tons of sawlog. (In the contract as awarded, the Forest Service had estimated that there were 8373 tons of sawlog in the seven "non-helicopter" units. Neither party tried to explain this discrepancy.) The September 2008 modification also increased the price of sawlog from \$8.16 to \$15.15 per ton. (Although there was no testimony on this point, we infer that the price went up because the units left in the sale were less costly to log than the deleted units.) The modification

stated that “Bob Walker fully and forever releases and discharges the USDA-FOREST SERVICE . . . from any and all actions, claims, causes of action[], demands, [and] expenses for damages [sic], whether asserted or unasserted, known or unknown, foreseen or unforeseen, arising out of or related to the” deletion of the “helicopter units,” “except those specifically provided for under the contract.”

It took Mr. Walker about three years in total, to 2010, to complete the contract as modified. Neither party cited evidence or proposed a finding of fact as to when the logging ended, and we decline to search the record for that fact. Project records, based on the weight slips that Mr. Walker submitted to the Forest Service, indicate that he ultimately harvested 6756 tons of timber from the Kerleebert Project, of which 5675 tons (84%) were sawlog. Mr. Walker disputes the sawlog tonnage. He testified that it is overstated because he sometimes had to weigh and pay for non-sawlog as sawlog when Forest Service personnel on site refused to provide him weighing tickets (to take to a commercial weighing station outside the forest) for non-sawlog. Mr. Walker cites no evidence that he objected to the contracting officer about this alleged practice at the time. Mr. Walker and other witnesses who testified in his case at the hearing estimated that timber harvested from the sale included between 30% and 40% sawlog. We place little weight on these rough estimates, which are based on memories of impressions formed seven to nine years prior to the hearing.

II. Mr. Walker’s 2010 Certified Claim (CBCA 2131)

Mr. Walker submitted his first certified claim under the contract in May 2010. It was denied on June 10, 2010. The Board docketed the appeal from this denial (CBCA 2131) ninety-one days later, in the morning of September 9, 2010. (We find that the notice of appeal was mailed to the Board at least one day earlier.) This claim sought \$306,549.57 for the Forest Service’s alleged refusal to allow Mr. Walker to haul timber over weigh scales using a “truck and pup” combination, which means a long truck pulling a shorter trailer. Mr. Walker testified that this restriction, which the Forest Service agrees is not in the contract, was stated orally to him by a Forest Service employee in the field, and that he did not complain about it to the contracting officer during performance. He asserted in this first certified claim that his “inability” to use trailers reduced his profit on the contract because he could have cut about 13,000 tons more timber in 2008 (about twice what he harvested under the entire contract) using trucks and pups instead of trucks alone. By the time of the hearing, Mr. Walker had reduced this claim by 85%, to \$44,814. He alleged in a required prehearing statement of damages that he lost that amount *on a different timber sale* due to “the inability to use pups” on this sale. He introduced no evidence about the other timber sale, however. Mr. Walker’s post-hearing brief does not mention “truck and pup” damages.

III. Mr. Walker's 2011 Certified Claim (CBCA 2778)

Mr. Walker submitted his second certified claim in September 2011. He increased and recertified this claim in December 2011. The contracting officer denied the claim on February 17, 2012. The Board docketed the appeal from that denial (CBCA 2778) on March 12, 2012. As adjusted in December 2011, this claim reduced the “truck and pup” claim (which was already in litigation) to \$44,814 and sought another \$2,957,348.32 in lost profit and “consequential damages” on two overlapping grounds. One theory of relief was that the Forest Service violated either the written contract or the implied warranty of good faith and fair dealing, in that “[t]he volume estimates [i]n the prospectus and the contract differ[ed] dramatically from the actual volumes as found in harvesting.” The claim alleged that “[a] volume discrepancy” of the size that Mr. Walker allegedly encountered “is [a] breach” resulting from “presenting estimates that are factually erroneous[.]” Mr. Walker did not allege in the claim that the Forest Service developed the volume estimate negligently, nor did he introduce evidence of negligence at the hearing or elsewhere in the appeal record.

Mr. Walker's other new theory of relief in the 2011 claim was that the Forest Service breached the contract by allowing the operators of the timber weighing facility nearest to the sale area, R&R Conner Certified Scalers (R&R Conner), to interfere with Mr. Walker's operations by overcharging his truck drivers for weighing services and even outright refusing to let them use the scales. The contract (section G.8.1.4) provided that “[w]eighing services for stumpage payment purposes may be provided by either public or privately owned and operated weighing services” meeting certain requirements, and that “Contractor shall bear all charges or fees for weighing services.”

The Board has no doubt, based on the hearing testimony, that the proprietors of R&R Conner harbored ill will toward Mr. Walker and actively discriminated against him. As Mr. Walker emphasizes in his post-hearing brief, Mr. Walker, two truck drivers who worked for him on this sale, and a former R&R Conner employee testified consistently that, beginning in late 2007, the R&R Conner proprietors tried either not to serve, or to greatly overcharge any driver that they knew or suspected was hauling timber for Mr. Walker. Mr. Walker also suspected the proprietors of tampering with the weight tickets that were stored at R&R Conner for the Forest Service to retrieve. Mr. Walker testified that, because it was impractical to send timber to be weighed at stations farther away, he sold the timber from this sale for a while to two “intermediaries” who were friends of the owners of R&R Conner and who could use the scales there without interference. Later (the dates are all vague), the Forest Service agreed to let Mr. Walker use a different method to estimate the weights of truckloads of timber, and it installed a locked “weight ticket box” at his timber sorting yard, where it would not be interfered with. Mr. Walker testified that he began

complaining to the Forest Service about incidents at R&R Conner in “the middle of [20]08.” He faults the Forest Service for not taking corrective action sooner.

Mr. Walker raised another argument at the hearing that has a tenuous relationship to his 2011 certified claim. In the September 2011 claim, Mr. Walker alleged that the September 2008 modification deleting the “helicopter units” from the sale was “brought on by the breaches of the Forest Service and but for the breaches of the Forest Service would never have existed.” He argued in the claim that the “helicopter units” should be included in the total contract value for purposes of calculating his lost profit, because he “felt compelled to sign the [modification] under duress of the circumstances created by the Forest Service.” He also asserted that he should recover the “higher stumpage fee” (which we understand to mean timber price) “due to the [September 2008] contract modification that would not have occurred but for the breach of the Forest Service and . . . charges that did not correctly identify the logs by their correct classification.” In a “Narrative of Actionable Events” in the September 2011 claim, Mr. Walker alleged that he failed to meet the October 2007 deadline for harvesting the “helicopter units” due to interference by R&R Conner, and because “[a] truck and pup combination is required for helicopter logging as many of the logs must be cut to shorter lengths to pull them by helicopter.” In the recertified version of the claim that he submitted in December 2011, Mr. Walker reiterated, “Pups are required to do any helicopter logging due to short logs.”

At the hearing, however, Mr. Walker told a fundamentally different story about the “helicopter units.” He now blames his cash flow, not logistical difficulties related to the breaches of contract that he alleged in his 2011 claim, for his failure to harvest those units. Specifically, Mr. Walker testified in considerable detail that he brought representatives of two helicopter companies to the sale area during the spring thaw in April 2007, but the companies refused to bid for the job because they doubted that Mr. Walker could pay them. The companies’ concern, as he described it, was that harvesting those units by helicopter did not appear to be cost-effective, as there was not enough timber marked for cutting to allow a helicopter to collect a full load in a single “turn,” or flight in one direction and back. In this situation, it could cost more to fly a turn than the timber harvested in the turn would sell for. “[T]here was nothing I could do,” Mr. Walker testified, as “the helicopter wouldn’t even show up on the job without . . . guarantees” of adequate timber volume. Asked whether the problem was “economics,” Mr. Walker answered affirmatively and added, “If the helicopter [company] knows . . . the sale won’t be able to support their price they’d have to charge . . . they will not even attempt to do it. Because they know it’s putting the [sale contractor] between a rock and a hard spot and [they] will never get paid.”

Mr. Walker approached the Forest Service in 2008 about marking additional timber to harvest in the “helicopter units” to improve the economics, but the agency refused. For

reasons discussed below, as Mr. Walker did not allege in a certified claim that this refusal breached the contract (or even acknowledge in a certified claim that the timber volumes in the “helicopter units” affected his performance), we need not discuss the agency’s reasons for not marking additional timber.

IV. Damages Evidence

A prehearing order issued in April 2016 required Mr. Walker to “file as a trial exhibit a complete and detailed Statement of Costs” itemizing his damages. That statement was to show “how [each element of damages was] computed, identify the specific books, records, or other documents supporting the [computation], summarize the basis or theory of recovery . . . , and identify each witness who will be called to testify on behalf of Appellant with respect to the computation.” Mr. Walker filed the statement in September 2016. It indicated that he would seek “net anticipatory profit of \$1,566,267.94 from the nonhelicopter units and \$170,088.12 from the helicopter units of the sale”; “\$294,851.12 in stumpage fees [allegedly overcharged] by the Forest Service when it applied a sawlog stumpage fee to all harvesting”; \$44,814 for the “truck and pup” claim; “\$88,414.32 for the [loss of his timber] sort yard and \$399,131.62 [for the loss of his residence],” a total of \$2,563,567.

Mr. Walker further indicated in his prehearing damages statement that he would rely at the hearing solely on the documentation that accompanied his December 2011 recertified claim. That documentation consisted of (1) an affidavit by Mr. Walker stating his opinion that the harvested timber consisted of 37.3% sawlog; (2) an affidavit by him explaining how he quantified the “truck and pup” claim for a loss under a different contract; (3) an affidavit by him stating that he incurred \$65,779.20 in “overhead costs” in performing this contract; (4) unsigned and unsworn tables purporting to list his costs and profit margins for different types of logs harvested from the project; (5) unsworn letters to the contracting officer from two subcontractors (both of whom later testified); (6) Schedule C of Mr. Walker’s income tax returns for 2007 through 2009, showing business profit or loss; and (7) records and an affidavit relating to the purchase and sale of his home and timber sorting yard. This evidence did not include any subcontracts, private timber sale contracts, other evidence of timber market prices, records of fuel or weighing costs, or other documents from which one could determine, for example, whether Mr. Walker made more or less money on this contract than he would have made, had he harvested more timber, or performed the contract faster. Mr. Walker’s prehearing damages statement also did not identify, as ordered, any “witness who w[ould] be called to testify . . . with respect to” his damages.

Only Mr. Walker testified at the hearing about his damages. (USDA objected to some of his testimony, but not to his testimony about damages generally.) On the stand, Mr. Walker thoroughly revised the elements of his lost-profit calculation. Over USDA’s

objection, he marked up by hand the summary “anticipatory profit” table from his December 2011 recertified claim. Mr. Walker revised the estimated logging expenses, harvested tons, and profit for each of three types of timber—sawlog, firewood, and specialty log—both for the units that he logged and for the deleted “helicopter units.” Mr. Walker’s marked-up table assumed harvested timber volumes (including non-sawlog) of 12,900 tons in the “non-helicopter” or “ground” units, and 15,200 tons in the “helicopter units,” a total of 28,100 tons. (In the original table in the 2011 claim, the estimated timber volumes totaled 61,391 tons.) Mr. Walker testified that he realized after taking the stand at the hearing that the numbers in the 2011 claim table were incorrect due to “a miscommunication with [his] attorney,” and that he needed to provide new figures based on revised estimates of volumes of firewood and specialty log, and of his hauling and sorting costs. After these changes, the anticipatory profit claim increased from \$1,736,356 to \$1,827,730. We need not describe either Mr. Walker’s original or his revised anticipatory profit calculation in detail, as there is no objective evidence in the record to support either of them.

Discussion

I. Jurisdiction

Both appeals were timely filed. *See* 41 U.S.C. § 7104(a) (2012); Board Rule 1(b)(5) (48 CFR 6101.1(b)(5) (2016)) (“A notice of appeal . . . is filed upon . . . the date on which it is mailed to the Board.”). We have jurisdiction to decide the claims that were presented to the contracting officer and denied. *See* 41 U.S.C. § 7103; *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004).

II. The 2010 Claim (CBCA 2131)

We have no evidentiary basis to award damages for Mr. Walker’s 2010 “truck and pup” claim, regardless of whether the Forest Service could be liable under the contract. In every contract case, “[t]he claimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation.” *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961); *see Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636, at 170,698 (2010). “It is true, of course, that the proof of damages need not be exact. A reasonable basis is enough—but some convincing basis must be advanced.” *Twigg Corp. v. General Services Administration*, GSBCA 14386, et al., 00-1 BCA ¶ 30,772, at 151,976. Mr. Walker presented ample testimony about the advantages of using “pup” trailers, and about the direction he allegedly got from a Forest Service employee not to use them, but he cites no evidence to support the \$44,814 damages figure set forth in the 2011 recalculated version of

his 2010 “truck and pup” claim, or any other damages amount tied to this claim. We therefore deny relief in CBCA 2131.

III. The 2011 Claim (CBCA 2778)

We find that Mr. Walker effectively abandoned the allegation in his 2011 certified claim and in his prehearing damages statement that he overpaid “stumpage fees” by \$294,851.12. Mr. Walker never pointed us to documentation for this claim or explained how he calculated the alleged overpayment. Mr. Walker cites no evidence to support the allegation in his prehearing damages statement that the Forest Service “applied a sawlog stumpage fee to all harvesting.”

The other allegations before us from the 2011 claim are that the Forest Service breached the contract by including an erroneous volume estimate, and by not intervening to stop R&R Conner from discriminating against Mr. Walker at the scales. We could grant relief relating to the volume estimate only upon finding, at a minimum, that the estimate was “grossly erroneous or negligently prepared.” *Carr Forest Products, Inc. v. Department of Agriculture*, CBCA 588, 08-2 BCA ¶ 33,883, at 167,697. Mr. Walker did not present evidence of a negligent estimate, nor does he discuss the estimate in his post-hearing brief. On this muddled record, we cannot find that the estimate was grossly erroneous, either. Weight records suggest that Mr. Walker harvested 68% of the 8373 tons of sawlog that the Forest Service originally estimated were in the “non-helicopter” units, although he and other witnesses testified that the actual tonnage of sawlog was much lower. We have no way to guess how much sawlog was actually in the total sale area for Mr. Walker to harvest, starting in 2007, had he proceeded without a six-month delay or used other workers, equipment, or methods. Therefore, we cannot find that the estimate in the contract of 24,558 tons of sawlog was grossly wrong. Moreover, Mr. Walker’s complaint about the volume estimate is at cross purposes with his argument that the Forest Service should pay damages for interfering with his contract performance. To the extent we believed that either R&R Conner’s antics (which Mr. Walker blames the Forest Service for not curtailing) or the alleged “inability” to use “trucks and pups” caused Mr. Walker to harvest less timber than he otherwise could have (because the trees were deteriorating in the forest from beetle damage while his operations were delayed), we would have less reason to believe that the Forest Service underestimated the harvestable volume to begin with.

This leaves us with the allegation in Mr. Walker’s 2011 certified claim that the Forest Service breached the express contract or the implied duty of good faith and fair dealing by tolerating R&R Conner’s bad behavior. We need not decide whether the agency could be liable under the contract for the actions of a third-party provider of weighing services, as we have no basis in the record to award damages for this claim. In his 2011 claim, which he

incorporated in his prehearing damages statement, Mr. Walker sought “anticipatory profit” on the entire sale, including the deleted “helicopter units,” plus “consequential damages” for the short sales of his house and timber sorting yard. As Mr. Walker provided us no evidence of the circumstances surrounding the latter transactions, and no evidence that the short sales related directly to his performance of this contract, we deny the consequential damages claim as speculative. *See Ramsey v. United States*, 121 Ct. Cl. 426, 434 (1951) (“[T]he lost profits of . . . collateral undertakings, which the [claimant] was unable to carry out, are too remote to be classified as a natural result of the Government’s [breach].”); *Data Enterprises of the Northwest v. General Services Administration*, GSBCA 15607, 04-1 BCA ¶ 32,539, at 160,964 (“[L]osses of net worth are generally speculative damages and not recoverable.”).

Mr. Walker’s request for anticipatory profit fares no better. It piles speculation on speculation. Mr. Walker seeks hypothetical profit, based on wholly unsupported estimates of uncut timber volumes, timber market prices, and performance costs (estimates that Mr. Walker revised wholesale, apparently from memory, years after the fact, on the witness stand), and an unspecified logging timetable—a major omission, given Mr. Walker’s delay at the start of the contract and the ongoing beetle damage. To highlight only one flaw in Mr. Walker’s lost-profit calculus, he asks us to find that he should have been able to log the deleted “helicopter units” at a profit. He argued in his 2011 certified claim and at the hearing that the “helicopter units” should be included in the sale value for purposes of calculating lost profit, because he allegedly signed the modification to remove the “helicopter units” from the contract in 2008 under duress brought on by breaches by the Forest Service. Setting aside the issue of whether Mr. Walker proved the stringent elements of duress, *see Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329-30 (Fed. Cir. 2003), we could not, in any case, award damages based on the premise that he should have been able to log the “helicopter units,” since he explained at the hearing why he could not. He could not find a helicopter subcontractor. This was not the Forest Service’s fault. We know from the same testimony that, had Mr. Walker harvested the “helicopter units,” he probably would have done so at a loss (with each helicopter “turn” costing more than the harvested timber was worth). Perhaps this loss would have been offset by profit on the other seven units, perhaps not. To provide a remotely credible estimate of lost profit under the contract as awarded, Mr. Walker would have had to explain how the challenging economics of the “helicopter units” would have affected his bottom line. *Cf. Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831-34 (Fed. Cir. 2010) (sustaining award of lost profit under timber contract after “a six-week bench trial on damages, [at which] the trial court received extensive documentary evidence and heard testimony from numerous witnesses,” including a “damages expert”). Even had Mr. Walker done this much, however, we would deny relief based on the absence of hard evidence to support his hypothetical logging costs and resale revenues. Even assuming, without deciding, that the Forest Service could be liable for the actions of R&R Conner, and for resulting delays in Mr. Walker’s work, we have no convincing basis in this

record to find that Mr. Walker incurred damages of any reasonably determinable amount, much less the amount he seeks. *See Twigg*, 00-1 BCA at 151,976.

At the hearing, Mr. Walker seemed to advance a different claim about the “helicopter units,” namely, that the Forest Service breached the contract by not adding timber volume to them, to facilitate cost-effective helicopter “turns.” To the extent that Mr. Walker intended to pursue this alternative theory (which he does not mention in his post-hearing brief), it lies outside our jurisdiction, as it was not the subject of a certified claim to the contracting officer. *See Lee’s Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) (noting that boards of contract appeals lack jurisdiction under the Contract Disputes Act to consider “new” claims based on “operative facts” that were not presented to the contracting officer); *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990).

We therefore deny relief in CBCA 2778.

Decision

The appeals are **DENIED**.

KYLE CHADWICK
Board Judge

We concur:

ERICA S. BEARDSLEY
Board Judge

JONATHAN D. ZISCHKAU
Board Judge