

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

FILE: B-186113

DATE: August 27, 1976

MATTER OF: San Juan Lumber Company, Inc.

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DIGEST:

1. Regardless of whether Forest Service breached timber sale contract, this Office cannot grant relief to purchaser asking reimbursement for cost of construction of cross-drains, because such construction was required by sale contract.
2. Whether or not Forest Service breached timber sale contract due to improper suspension of timber cutting operations, this Office cannot grant relief to claim asking compensation for idled machinery and lost profits during suspension period, because claimant has not established amount of damages with reasonable certainty.
3. Where Government contractor asserts breach of contract/claim on behalf of subcontractor, and subcontract contains no clause exculpating contractor of liability to subcontractor for Government-caused damages, GAO will treat subcontractor's claim as if it were contractor's own.

Mr. George D. Breitmeier, an authorized certifying officer of the United States Forest Service, Department of Agriculture, has submitted to our Office a request for an advance decision concerning a voucher representing a claim for \$3,318.39 against the Forest Service for alleged breach of contract, filed by the San Juan Lumber Company, Inc. (San Juan), John Day, Oregon. The alleged breach arose in connection with the East Round Top timber sale contract No. 01218-3, Long Creek Ranger District, Malheur National Forest. The sale contract was awarded to San Juan on December 28, 1970, and the sale was closed on June 20, 1975.

Clause B6.32 of the contract, entitled "Progress of Logging," required that:

"Purchaser shall conduct all operations under this contract in a workmanlike and orderly manner, and shall not unnecessarily damage young growth or trees left standing. The timing of log removal and preparatory work shall not unnecessarily delay slash disposal. Cross-drainage or other measures shall be taken where necessary to minimize soil movement on roads, skid trails, and fire lines prior to onset of seasons of heavy precipitation or runoff."

Clause B6.62 provided in pertinent part as follows:

"Erosion Control by Purchaser. Currently as weather and soil conditions permit, purchaser shall perform the following erosion control work on portions of Sale Area where logging or road construction is in progress or has been completed:

"Measures to attain road bed and cut and fill slope stabilization, such as drainage dips, water-spreading ditches, cross-ditches, water bars, outsloping and removal of temporary culverts, shall be applied as needed to temporary roads. On skid trails and fire lines, Purchaser shall construct cross-ditches and water-spreading ditches where staked or otherwise marked on the ground by Forest Service. * * *"

On November 27, 1974, upon inspection of the work in progress under the contract, the Forest Service representative concluded that San Juan had breached clauses B6.32 and B6.62, because cross-drains had not been constructed across the skid trails left by the cut timber as the logs were dragged out of the timber harvesting area. Accordingly, as provided by clause B8.25 of the contract, the Forest Service gave written notice of breach to San Juan and ordered suspension of operations immediately. Later the same day, the suspension was partly lifted in order to allow log hauling out of the harvesting area. No other operations were allowed. On December 2, 1974, after a Forest Service critique of its suspension action, the suspension was lifted because the Forest Service had not specified locations for the cross-drains, as required by clause B6.62. The cross-drain locations were

marked the same day; and construction of the cross-drains was begun and full logging operations were resumed the next morning, December 3, 1974. On December 2, 1974, San Juan formally notified the Forest Service that it regarded the suspension as a breach of contract by the Forest Service, and stated that the expenses accrued during the 2 days of suspension, plus the cost of constructing the cross-drains, would be presented to the Forest Service with a claim for monetary reimbursement. On November 17, 1975, the itemized claim, as calculated by San Juan, was submitted to the Forest Service, and was later forwarded to our Office for resolution.

Clause B8.22 seems to contemplate that the Forest Service may "request" an interruption or delay in operations and that compliance with such a request entitles the purchaser to an extension in the termination date. Although the contractor may have been entitled to a time extension, we do not find that any was requested or demanded. If the suspension--even if it could properly be described as a demand or order--was pursuant to the terms of the contract, it could not have constituted a breach.

However, even if the suspension did constitute a breach, we can grant no relief. The first portion of San Juan's claim stems from the unreimbursed construction of cross-drains, including labor cost and use of equipment, for a total of \$168.39. We agree with the Forest Service that no compensation may be allowed for this construction, because it was required by clause B6.62 of the contract, once the locations had been marked by the Forest Service. We must therefore deny this portion of San Juan's claim despite San Juan's assertion that the regional average appraisal allowance for cable skidding, the type of log removal practiced here, did not consider the cost of erosion control methods such as the construction of cross-drains. As the Forest Service has noted, the appraisal is used to determine the minimum acceptable bid price for timber offered for sale. The cost allowances are not estimates of a purchaser's own costs and are not a part of the timber sale contract. This is noted specifically in paragraph 16 of the timber sale prospectus, which also notes that in the case of a contradiction between a prospectus and the resulting contract, the contract governs. Whatever the contents of the appraisal, the terms of this contract require cross-drain construction at purchaser's expense, and consequently, compensation to San Juan would be improper.

The remainder of San Juan's claim derives from the operation of its subcontractor, E. & K. Wise Logging Co. (Wise), which did the actual logging and hauling of the cut timber to San Juan's mill. Because San Juan has lodged the claim on behalf of its

subcontractor, and because San Juan's contract with Wise contains no clause exculpating San Juan from liability to Wise for damages caused by Government action, we may treat Wise's claim as if it were San Juan's own. See, e.g., Merritt-Chapman & Scott Corp. v. United States, 458 F.2d 42, 43, 198 Ct. Cl. 223, 225 (1972); Morrison-Knudsen Company Inc. v. United States, 397 F.2d 826, 852, 184 Ct. Cl. 661, 703 (1968); Warren Bros. Roads Co. v. United States, 105 F.Supp. 826, 831, 123 Ct. Cl. 48, 83 (1952); California Structures, Inc., 68-1 BCA 6884, ASBCA No. 11693 (1968); Cf. B-160335, December 2, 1966.

The second portion of the claim totaled \$3,150 and was computed as follows:

Two days lost log-skidding production at 35 thousand board feet (MBF) per day = 70 MBF

$$70 \text{ MBF} \times \$45 \text{ per MBF} = \$3,150$$

San Juan explains that the daily volume of board feet used in computing lost production "* * *" is a rounded average daily production determined by the total volume delivered to the mill, divided by the total number of days worked under the contract "* * *." San Juan supplies no further details in support of this computation.

As to the total number of days worked, in the absence of actual time records, the Forest Service disputes the 35-day working period which it believes San Juan used as a basis for computing the volume of board feet. Using a different number of days, it arrives at probable total lost production of 50.6 MBF in place of San Juan's estimated 70 MBF.

San Juan's claim of \$45 per MBF in damages is also uncertain. As explained by San Juan and Wise, this is an estimate of the cost suffered by Wise in the form of lost profit and capital outlay. According to the record, San Juan paid Wise \$60 per delivered MBF. In an affidavit attached to San Juan's claim, Wise indicates that equipment worth more than \$250,000 was idled for 2 days as a result of the suspension.

The \$45 figure remains unsupported, however. To the extent it is based on Wise's lost profit, there are no figures to substantiate Wise's operating costs, which in turn would allow computation of its profits. To the extent the figure

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is based on compensation for idled machinery, merely supplying an estimate of the original cost of the equipment does not demonstrate the amount of daily losses when it is idle. Moreover, we question whether losses claimed due to idled equipment should be computed by reference to the number of board feet unharvested due to the improper suspension.

Therefore, regarding the second portion of San Juan's claim, there is considerable doubt as to the amount of Wise's damages. Because we may compensate for Government breaches of contract only when the claimant has demonstrated the amount of his damages with reasonable certainty, see 44 Comp. Gen. 353, 358 (1964); B-179702, October 10, 1973; B-174345, October 3, 1973, id. June 13, 1973, we cannot permit payment of this portion of San Juan's claim. The voucher will be retained in our Office.


Acting Comptroller General
of the United States