



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: February 19, 2008

CBCA 105

HEDLUND CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Jon E. Cushman and Nate J. Cushman of Cushman Law Offices, P.S., Olympia, WA, counsel for Appellant.

Mary E. Sajna, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **GOODMAN**, **McCANN**, and **DRUMMOND**.

McCANN, Board Judge.

_____Appellant, Hedlund Construction, Inc. (Hedlund), seeks an equitable adjustment to the contract price for increased costs of performance caused by changes to the contract made by the United States Forest Service. We grant the appeal in part.

Background

On October 29, 2002, Hedlund was awarded the Helitower Thin Timber Sale, contract number 000225. In this contract the Forest Service agreed to sell timber located in the Gifford Pinchot National Forest to Hedlund, and Hedlund agreed to purchase, cut, and remove the timber. Hedlund performed the contract satisfactorily. Nevertheless, on May 13, 2005, Hedlund submitted a claim to the contracting officer for increased costs of performance in the amount of \$466,825.58. The contracting officer denied this claim in its entirety, and Hedlund appealed to the Department of Agriculture Board of Contract Appeals. That board has been incorporated into the Civilian Board of Contract Appeals and the case has been transferred to us, Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391.95 (2006).

Hedlund's claim was broken down in the following manner:

1. Increase in Performance Bond	\$765.60
2. Changes in Scaling Requirements	\$86,010.20
3. Felling of Hazard Trees	\$16,599.00
4. Inability to Remove Felled Operation Trees	\$94,455.00
5. Delay of Operations	\$214,189.57
6. Additional Logging Costs	<u>\$20,226.54</u>
Total	\$432,245.91
Interest @ 8%	\$34,579.67
Total Claim	<u>\$466,825.58</u>

Appeal File, Exhibit IV at 11.

The following provisions of the timber sale prospectus and contract are relevant to these claims:

Prospectus

7. Performance Bond. A performance bond is required. The penal sum of the bond will be 10 percent of the total bid value of the sale, rounded up to the nearest \$100 when the total bid value is \$10,000 or less; and rounded up to the nearest \$1,000 when the total bid value exceeds \$10,000 or \$31,000.00 whichever is greater. If an irrevocable letter of credit is used to secure the performance bond, the termination of the letter of credit must be at least 6 months past the contract termination date.

Appeal File, Exhibit VI at 291.

Contract

A4 - Dead Trees Required to be Felled, Applicable to B2.12, B2.3 and B6.4

Size Requirements: Not Applicable feet high and Not Applicable inches d.b.h.

Number Limitations Applicable only if Sale Area map indicates there are subdivisions where timber is to be designated after date of sale advertisement. In addition to dead trees felled within Clearcutting Units, construction clearings, and other authorized development clearings, no more than Not Applicable dead trees must be felled within subdivisions, or those portions thereof, where timber is designated after date of sale advertisement. Number limitation does not apply to subdivisions, or portions thereof, designated at time of sale advertisement.

Appeal File, Exhibit VI.

A14 - Scaling Instructions and Specifications, applicable to B6.8

Name and Date of Governing Instructions: FSH-2409.11a. National Forest Cubic Log Scaling Handbook, as amended and supplemented. Purchaser agrees to provide conditions suitable for remote check scaling by the Forest Service. Check scaling will be performed at individual scaling locations.

Scaling Specifications					
Species	Product	Maximum Scaling Length (feet)	Trim Allowances		
			Diameter Range (inches)	Length Range (feet)	Trim Allowances (inches)
All	Sawtimber	40	5-99	8-20	12

Id. at 354.

A22 - Performance Bond Amount, Applicable to B9.1

\$37,000

Id. at 355.C-315 - SALE OPERATIONS SCHEDULE (06/1994)

SCHEDULE PURSUANT TO C6.315# - SALE OPERATION SCHEDULE (06/1994)		
Subdivisions	Operating Conditions	Purpose
20	Felling and yarding must occur between August 1 and March 31	Protect retention/residual trees from damage during high sap flow.
21, 31, 32, 33	Felling and yarding must occur between July 1 and February 28	Protect retention/residual trees from damage during high sap flow.
20, 21, 31, 32, 33 & road reconstruction	All operations must occur between July 1 and March 31	To prevent disturbance to nesting spotted owls and direct impact to dispersing juveniles due to noise

Id. at 419.

On January 31, 2003, the Forest Service changed the operating conditions in the schedule for sections 20, 21, 31, 32, and 33 from “All operations must occur between July 1 and March 31” to “All operations must occur between July 1 and February 28 & 29.” The reason for this change was to prevent disturbance to the nesting spotted owl. Joint Stipulations of Fact 10, 17.

By amendment 2 to the contract, the contracting officer changed the log scaling requirements in clause A14 - Scaling Instructions and Specifications from 40 feet to 20 feet and the trim allowance from 12 inches to 6 inches. Appeal File, Exhibits VI at 354, XIV at 1150.

Discussion**Performance Bond Interest (Claim 2006-108-1)**

This claim is for the increase in interest that Hedlund had to pay because the performance bond amount required by the contract (\$37,000) exceeded the amount (\$31,000) set forth in the timber sale prospectus.

Hedlund has alleged that it properly based its bid on the timber sale prospectus, which indicated that the performance bond would be \$31,000. When it came time to execute the contract, Hedlund was required to place a performance bond in the amount of \$37,000. Hedlund claims that it is entitled to interest on the additional \$6000 that it was required to post. Hedlund claims interest at 5.25 % during the twenty-nine months of performance for a total of \$765.60.

The Forest Service denied Hedlund's claim in the final decision, but admitted at the very conclusion of the hearing that Hedlund was entitled to recover interest on the \$6000 increase in the bond amount. Transcript at 528. In its post-hearing brief the Forest Service affirms its admission to entitlement,¹ but alleges that Hedlund has not proven any damages, and offers no calculation of how much interest it feels that Hedlund is entitled to receive.

The only issue to be decided is the extent of Hedlund's recovery of interest. Hedlund has claimed a total of \$765.60 on this claim based upon 5.25% interest on the additional \$6000 for twenty-nine months. Without any alternative calculation offered by the Forest Service, the Board finds that Hedlund's claimed amount of \$765.60 is reasonable and that Hedlund is so entitled.²

¹ According to the Forest Service, "At the hearing the Government conceded that some interest might be due as a reliance damage because the contract bond amount did in fact differ from that required by the handbook." Appellant's Post-Hearing Brief at 7. At the hearing the contracting officer, Mr. Fred Dorn, stated, "We do feel that he is entitled to that interest." Transcript at 528.

² Even though the Forest Service has admitted that Hedlund is entitled on this claim, it makes additional arguments inconsistent with this admission. In its brief the Forest Service contends that Hedlund agreed to the \$37,000 performance bond prior to entering into the contract. Thus, the Forest Service seems to be arguing that Hedlund is not entitled

Scaling (Claim 2006-109-1)

In this claim, Hedlund asserts that it was charged by the Forest Service for more log volume than it removed from the site. Hedlund claims that the Forest Service's change from forty feet to twenty feet scaling caused this increase in log volume charged to Hedlund. There is no dispute between the parties that a change from forty feet to twenty feet would increase the amount of log volume charged to Hedlund. The Forest Service contends, however, that the forty-foot specification was an obvious error and that Hedlund should have known that the specification really meant for the scaling to be accomplished with twenty-foot scaling, not with forty-foot scaling.

Hedlund claims that the change from forty feet to twenty feet scaling caused it to be billed an estimated twenty percent more in total volume, and that it is entitled to be reimbursed \$86,010.20 for this overcharge. The Forest Service has submitted no calculation regarding the extent of Hedlund's entitlement under this claim, should entitlement be found for Hedlund.

Contract clause A14 - Scaling Instructions and Specifications clearly called for the maximum scaling length to be forty feet and the trim allowance to be twelve inches. Amendment 2 to the contract changed this requirement to a maximum scaling length of twenty feet and a trim allowance of six inches. The Forest Service argues that Hedlund should have known that the specification, as issued, was erroneous.

There is nothing unclear about contract clause A14. By agreeing to this clause, the Forest Service agreed to scale logs using a maximum length of forty feet and a trim allowance of twelve inches. If the Forest Service did not so intend, then, obviously, the Forest Service should not have put these requirements in the contract specification. Contractors are not contractually obligated to peruse the entirety of specifications written and promulgated by the Forest Service and then question the Forest Service regarding whether

to recovery because of Hedlund's alleged agreement to the \$37,000 performance bond. This argument lacks merit as Hedlund never agreed to drop its claim for interest. Further, the Forest Service argues that appellant had a duty to discover that the \$31,000 performance bond amount found in the prospectus was incorrect, and had a duty to make inquiry to the Forest Service about it prior to contract signing. The Forest Service fails to establish any basis for this proposition.

or not the agency really meant to say what it said in the specification. The Forest Service's arguments to the contrary lack merit.

It is plain that Hedlund paid for more timber than it removed from the site. Hedlund sold the timber it purchased from the Forest Service to lumber mills. Hedlund contends that it was paid by the mills for a quantity of timber that was less than the quantity for which Hedlund was billed by the Forest Service. The mills paid Hedlund for 4807.63 MBF³ of timber. Appeal File, Exhibit XVII at 1272. The Forest Service, however, billed Hedlund for the quantity 10,917.47 CCF. *Id.*, Exhibit VI at 812. The Forest Service introduced no evidence regarding the method or accuracy of its CCF (one thousand board feet) calculation.

The contract provides conversion factors for converting CCF to MBF. Appeal File, Exhibit VI at 294. To convert Douglas fir from CCF to MBF the conversion factor is .5471. To convert hemlock from CCF to MBF the conversion factor is .5297. The Forest Service charged Hedlund for removing 9635 CCF of Douglas fir and 1282 CCF of hemlock and other wood.⁴ Appeal File, Exhibit VI at 812. The calculation to convert the timber charged to Hedlund from CCF to MBF is as follows:

$$9635 \text{ CCF} \times .5471 = 5271 \text{ MBF}$$

$$1282 \text{ CCF} \times .5297 = 679 \text{ MBF}$$

5950 MBF - Total

Accordingly, if the Forest Service's calculation of CCF was correct Hedlund should have received payment for 5950 MBF from the mills. However, Hedlund received payment for only 4808 MBF. Appeal File, Exhibit XVII at 1272. The difference (5950 - 4808) is 1142 MBF. This equates to an overcharge of 19.19% ($1142 / 5950 = 19.19\%$) to Hedlund. The total cost of the sale was \$430,051.36. A 19.19% overcharge equates to \$82,526.85.

³ CCF (one hundred cubic feet) and MBF (one thousand board feet) are two different log scaling methods used to determine the log volume. The Forest Service uses the CCF method. Lumber mills use MBF. The Forest Service has not disputed that Hedlund was paid by the mills for 4807.63 MBF of timber.

⁴ Other wood has been included with hemlock. The amount of other wood is considered to be *de minimis*.

The Forest Service has offered little, if anything, as a defense to Hedlund's overpayment claim. It stated in its brief:

Because the Appellant fails to prove entitlement, the Government does not address Appellant's damage calculation, other than to point out that Appellant has not proven its damages. More importantly, the Government expert explained that there is no mathematical "constant" for conversion from CCF to MBF or MBF to CCF the way there is, for example, between meters and yards.

Respondent's Brief at 13.

Apparently, it is the Forest Service's position that CCF cannot be converted to MBF and vice versa. However, the contract contains conversion factors to convert from CCF to MBF. Appeal File, Exhibit VI at 294. We find no merit to the Forest Service's position here.

The Forest Service has offered no evidence that its calculation of the volume of wood charged to Hedlund was correct, and it offers no explanation for why the mills paid Hedlund for such a small volume of wood. Accordingly, we find that Hedlund is entitled to payment in the amount of \$82,526.85 on this claim.

Felling of Hazard Trees (Claim 2006-111-1)

Hedlund claims that it is entitled to be reimbursed for the cost (\$16,599) of cutting 5533 dead trees in the timber sale area. Hedlund points to contract clause A4 - Dead Trees Required to be Felled as support for its position.

Hedlund claims that this clause indicates that there are no dead trees to be felled in the timber sale area. Accordingly, it claims since there were dead trees that needed to be cut, this clause puts the responsibility for the cost of that cutting on the Forest Service. The Forest Service disagrees.

Neither party has explained to the Board's satisfaction the meaning and purpose of this clause. Be that as it may, the Board is unable to find in this clause any statement or representation by the Forest Service that there are no dead trees to be cut in the sale area. Appellant's claim for \$16,599 is denied.

Preventing Removal Of Old Growth Hazard Trees (Claim 2006-112-1)

Hedlund claims that it was prevented from removing and selling nine old growth hazard trees that would have sold for \$94,455.10. Hedlund claims that the Forest Service designated these trees for removal and sale, but then, after Hedlund had directionally felled the trees to facilitate removal, prevented Hedlund from removing them. The Forest Service alleges that these trees were never designated for removal and that therefore Hedlund is not entitled to recovery.

The nine trees in issue were old growth trees that were 80 to 100 feet above the canopy. These trees were a hazard to helicopter logging and had to be cut. The Forest Service's sale administrator, Mr. George Shaefer, admitted in testimony that he had the authority to designate the trees for cutting and removal and for designating them as "included timber" under the contract. Transcript at 442. Mr. Shaefer marked the trees with blue paint. Appeal File, Exhibit VI at 800. This was the same color scheme that was used for designating other trees as included timber. Transcript at 428, 436. Trees to be cut and left on the ground were designated with orange paint. *Id.* at 437. When Mr. Shaefer marked the trees, it was his intent that the trees be cut and removed. *Id.* at 439. Mr. Shaefer then issued a written report, which was signed by Mr. Hedlund, President of Hedlund Construction, Inc., and Mr. Shaefer, authorizing the removal of the trees. Appeal File, Exhibit VI at 800. Mr. Hedlund notified Mr. Shaefer that he intended to remove the trees and took the time and effort to directionally fell the trees to facilitate removal. Transcript at 424, 448-49.

The Forest Service alleges that Hedlund was never given permission to cut and remove the nine old growth trees. It takes the position that Mr. Shaefer did not have the authority to grant such permission even though he testified that he had such authority and the Forest Service has introduced no evidence to the contrary. The Forest Service then states that even if Mr. Shaefer had such authority, he did not grant such permission. The Forest Service makes this statement notwithstanding the fact that the record clearly shows by written documentation that such permission was given. Timber Sale Inspection Report dated December 23, 2002, states as follows:

B2.39 Marked 9 trees with blue paint batch J021. Tree removal is necessary to clear flight path into landing. All trees are 80-100 feet above ordinary canopy.

Appeal File, Exhibit VI at 800. This document was signed by Mr. Shaefer and Mr. Hedlund. Nevertheless, the Forest Service inexplicably alleges that at no time did Hedlund have the right to remove the trees.

The Forest Service's position here lacks merit and is not supported by any evidence in the record. It is beyond dispute that the Forest Service agreed to allow Hedlund to remove the trees, and that Hedlund also agreed to remove the trees and took action in accordance therewith by directionally felling the trees to facilitate removal. This agreement was part of the contract. Accordingly, when the Forest Service subsequently refused to allow Hedlund to remove the trees it breached the contract. Therefore, Hedlund is entitled to damages. The damages that Hedlund is entitled to are the price that it would have received for the trees less its costs.

Pacific Western Timbers did an estimate of the timber in the nine old growth trees and calculated that they contained a net of 62,970 (board feet (62.97 MBF)). Supplement to the Appeal File at 1571-74. It also estimated that it would pay \$1500 per MBF. Accordingly, Pacific Western Timbers estimated that it would pay Hedlund \$94,455 for the nine old growth trees (62.97 MBF x \$1500 = \$94,455). *Id.* Hedlund estimated that it would have paid the Forest Service about \$5500 for these logs. Thus, Hedlund is entitled to recovery of \$88,955 (\$94,455 - \$5500 = \$88,955).⁵

Delay Claim (Claim 2006-113-1)

Hedlund's claim here (\$201,290.83) is for damages caused by the Forest Service's alleged reduction in the operating schedule for all operations from March 31, 2003, to the end of February 2003. The Forest Service alleges that there was no reduction in the operating schedule.

Clause C6.315 - Sale Operation Schedule provides that timber removal shall be accomplished within defined time periods. As can be seen from a perusal of this clause, the

⁵It seems likely that Hedlund would have incurred costs for felling, removing, and transporting trees, in addition to the \$5500 it would have paid to the Forest Service. The Board does not know the extent of these costs and the Forest Service made no effort to ascertain them through cross-examination or otherwise. The Board is loath to speculate as to the existence or extent of these costs, and, since the Forest Service made no attempt to ascertain or quantify them, concludes that they are not significant.

time frames vary from August 1 to March 31, July 1 to February 28, and July 1 to March 31, depending on the subdivision.

On January 31, 2003, the Forest Service reduced the operating schedule for sections 20, 21, 31, 32, and 33, requiring operations to end by the end of February instead of the end of March. It did this to prevent disturbance to the nesting spotted owl. Hedlund contends that it relied on the March 31 end date in planning its operations. It alleges that had it been able to work until March 31, 2003, it would have completed all operations by that date. The Forest Service does not agree that Hedlund could have completed the work by the end of March. In any event, it asserts that clause C6.315 prevents Hedlund from operating during the month of March due to sap flow restrictions. Thus, it contends that the change regarding the spotted owl is irrelevant.

The Forest Service's argument here lacks merit because both Hedlund and the Forest Service knew that operating restrictions due to sap flow are routinely waived by the Forest Service. In fact, the contracting officer testified that had a request for a waiver of the sap flow operating restriction been submitted by Hedlund, it would have been granted. Transcript at 351. Accordingly, it is clear that the sap flow restriction in this case is illusory.

The Forest Service, nevertheless, argues that the contract required Hedlund to submit a written request for a waiver of the sap flow restriction and that Hedlund is being inconsistent in its argument because it did not submit such a written request. Respondent's Brief at 30-31. This argument by the Forest Service borders on disingenuity. Obviously, since the Forest Service was preventing operations from proceeding after the month of February due to the spotted owl restriction, there was no purpose in Hedlund requesting a waiver of the sap flow restriction which also prevented it from operating after the month of February.

The Forest Service also argues that the operation end date of March 31 was an obvious error for the simple reason that there was a conflict between the sap flow restriction date of February 28 and the spotted owl restriction date of March 31. This argument is completely meritless. As Mr. Hedlund testified, he was well aware that the sap flow restriction date was routinely waived by the Forest Service, and he had no reason to believe that it would not be waived in this instance. Transcript at 133-34. Under this correct interpretation no conflict exists with the end dates specified in the contract.

In addition, if the owl restriction date was so obviously wrong, the question arises as to just why it took the Forest Service the better part of two months to correct the "obvious error." The error was discovered in early December 2002. Transcript at 256, 310. The

contract was not amended, however, until January 31, 2003. Joint Stipulation of Fact 17. Apparently then, this discrepancy was not so obvious. Furthermore, it was important that this change be made quickly, as a quick change may have mitigated the damages suffered by Hedlund.

In its argument the Forest Service completely contradicts itself. It argues that Hedlund was informed in December that the owl stop work date was February 28 or 29, but then it argues that it was attempting to find a way to stay with the March 31 date. The Forest Service cannot have it both ways. Obviously, it did not inform Hedlund in December that the cut-off date was February 28 or 29 because in December and January it was still trying to get clearance to stay with the March 31 date. In addition, since the Forest Service spent a considerable amount of time trying to stay with the March 31 date, this date could not have been “obviously” wrong.

The change in the spotted owl restriction depriving Hedlund of its ability to complete the removal of timber from the site during the month of March was a change to the contract entitling Hedlund to an adjustment in the contract price.

Delay Damages

The first issue that must be resolved pertains to whether Hedlund would have completed the work by the end of March 2003. The Forest Service makes a number of arguments that relate to the operating plan submitted by Hedlund indicating that Hedlund was not intending to complete the work by the end of March 2003. Actually, appellant’s operating plan showed that it would be working far longer than that. The problem with the Forest Service argument here is that Hedlund was in no way bound to its plan. It could change the plan at any time by simply submitting another one.

There is no dispute that Hedlund had entered into a contract with the Columbia Helicopter company in December 2002 to remove timber from the site. Appeal File, Exhibit VIII at 932-37. Furthermore, there is no dispute that Hedlund was going to attempt to finish removing the timber by the end of March. There is ample evidence supporting Hedlund’s position that it could have completed the work by the end of March 2003. It completed 29% of the removal working for just nineteen days at the beginning of the year. Transcript at 142. Had Hedlund been able to work through the end of March it would have had forty-two more days to operate. *Id.* The weather during March was exceptional. *Id.* at 143. Furthermore, there is no reason to think that Hedlund could not have hired more men or employed more and bigger helicopters and done whatever was necessary to complete the

work by the end of March. It clearly had the flexibility to do what was required. On the other hand, the Forest Service has not shown that it would have been impossible for Hedlund to complete the work.⁶ The contract did not mandate that the contractor could not deviate from the operating plan. Accordingly, we find that Hedlund could have completed the timber removal had it been able to work during the month of March.

The Forest Service has argued that Hedlund was not injured by being prevented from performing in March 2003 because Hedlund was paid more by the mills after the first quarter. The Forest Service argues that this increase more than offset the increase in price for timber that Hedlund was required to pay to the Forest Service after the first quarter. The Forest Service has introduced no calculations to support this proposition. Hedlund, on the other hand, has introduced evidence and calculations indicating that the price it was paid by the mills after the first quarter did not make up for the increased rates charged by the Forest Service. The Board rejects the Forest Service's argument and proceeds to calculate the damages due Hedlund.

In order to calculate damages we must compare the amount of money that Hedlund paid the Forest Service for the timber that it removed from the site over the course of the contract with the amount that it would have received had it been allowed to remove all the timber by the end of March 2003. We must also consider the price and amount paid to Hedlund for timber by the mills during these differing time periods.

Following this blueprint we proceed to the calculation of damages. Over the life of the contract Hedlund paid the Forest Service \$430,051.36 for the wood that it removed from the site. Appeal File, Exhibit VI at 811. However, if Hedlund had been able to remove all of the wood from the site in the first quarter of 2003, it would have paid only \$278,815.52.⁷ The

⁶ The Forest Service admits that it was possible that Hedlund could have completed the logging on lot 33 in March. Transcript at 346. This lot was 34% of the total sales volume. Appeal File, Exhibit VI at 161. Appellant did not inquire and the Forest Service offered no opinion about its view of the possibility of Hedlund completing the removal of logs on other lots in March.

⁷ Total Douglas fir shipped was 9634.63 MBF (Appeal File, Exhibit VI at 812) x \$28.14 (first quarter rate) (*Id.* at 814) = \$271,118.48. Total hemlock shipped was 1282.84 MBF (*Id.* at 812) x \$6 (first quarter rate) (*Id.* at 903) = \$7697.04. \$271,118.48 + 7697.04 = \$278,815.52. The total hemlock shipped (1282.84 MBF) includes de minimis amounts

difference is \$151,235.84. ($\$430,051.36 - \$278,815.52 = \$151,235.84$) In addition, Hedlund paid a 5% timber tax on this additional \$151,235.84 which equals \$7,561.79. Thus, the total overpayment equals \$158,797.63 ($\$151,235.84 + \$7,561.79 = \$158,797.63$).

After the first quarter of 2003 Hedlund received a higher price from the mills of \$9.90 per MBF than it did in February of 2003.⁸ However, had Hedlund been allowed to sell in March of 2003 it would have received \$15 per MBF more than it did in February 2003. Appeal File, Exhibit XVI at 1234-35; Transcript at 161-66. Thus, Hedlund actually received \$5.10 per MBF less after the first quarter than it would have received had it been allowed to sell to the mills in March 2003. Multiplying 3410.85 (the number of MBF delivered to the mills after the first quarter)⁹ by \$5.10 = \$17,395.33. The loss to Hedlund is therefore $\$158,797.63 + \$17,395.33 = \$176,192.96$. The Board finds that Hedlund is entitled to this amount as damages.¹⁰

of other kinds of lumber, which are included in the hemlock calculation for sake of simplicity.

⁸ In its brief appellant explains how it derived the average increase in price for wood paid by the mills after the first quarter of 2003. The Board accepts this derivation as being reasonably accurate and reliable.

⁹ The 3410.85 MBF number is arrived at by subtracting the number of MBF delivered to the mills in the first quarter (1396.78) from the total MBF (4807.63) delivered. ($4807.63 - 1396.78 = 3410.85$.) Appeal File, Exhibit XVII at 1272.

¹⁰ In Hedlund's loss of premium claim Hedlund claims an additional \$45,960.90 because it could have received a bonus of \$15 per MBF if it had been able to sell logs to the mills in March 2003 instead of February 2003. The price in March 2003 was \$15 more per MBF than it was in February. This claim by Hedlund lacks merit because the proper time period in which to compare the March price is the actual selling time after the first quarter, not the February price. The actual selling price after the first quarter was \$5.10/MBF less than the March 2003 selling price. This \$5.10/MBF loss has been accounted for in the previous calculation.

Extra Road Maintenance (Claim 2006-114-1)

Hedlund claims that it is entitled to \$12,898.74 in additional road maintenance.¹¹ Its itemization of this amount is contained in the Appeal File, Exhibit XXI at 1474. This road maintenance was caused by Hedlund being prevented from completing the work during the first quarter of 2003. Additional road maintenance was required due to the passage of time and erosion of the roads due to weather. The Forest Service disputes this cost and offers no calculation of its own. The Board finds that Hedlund's method of calculating its extra cost was reasonable. However, there are some errors in the calculation. Appellant erroneously included \$1605.83 for water diverters that had to be installed after March 2003 as required by the contract. Also a road expense of \$2026.64 incurred in March 2003 was erroneously added to Hedlund's figure. The correct measure of damages then is \$9266.27 ($\$12,898.74 - 2026.64 - 1605.83 = \9266.27). We find that Hedlund is entitled to recover \$9266.27 on this claim.

Additional Logging Costs (Claim 2006-110-1)

A portion of the work under the prime contract between Hedlund and the Forest Service required the use of helicopters to transport cut logs. Hedlund owned no helicopters and had no alternative but to subcontract this portion of the work. On December 16, 2002, Hedlund entered into a subcontract with Columbia Helicopter for this purpose. Appeal File, Exhibit VI at 932-37. The subcontract required Columbia Helicopter to perform its work during the performance period of the prime contract, when Hedlund was required to perform its work. *Id.*

The Forest Service prevented Hedlund from performing the contract work during March 2003 as allowed by the prime contract. As the result of this government-caused delay, Hedlund and Columbia were forced to perform in a later time frame than originally anticipated. During this later time period, Columbia's fuel price increased, causing its cost to perform the subcontract work to increase. Columbia would not have incurred this cost but for the government-caused delay. Columbia requested, and Hedlund agreed to, a contract modification increasing the logging price by \$3 per ton for work performed in the later performance period, reflecting the increased price of fuel to perform this work. Hedlund paid

¹¹ This claim is part of Hedlund's overall delay claim of \$214,189.57. Delay claim 2006-113-1 is for \$201,290.83 and extra road maintenance claim 2006-14-1 is for \$12,898.74. ($\$201,290.83 + \$12,898.74 = \$214,189.57$.)

Columbia an additional \$20,226.54 pursuant to this modification and seeks to recover this amount from the Forest Service. We have found (claim 2006-113-1) that Hedlund is entitled to recover its increased costs from the Forest Service caused by this delay.

The Forest Service does not contest that Columbia Helicopter incurred these additional costs due to the fact that it was forced to perform after the first quarter of 2003 instead of in March 2003. Further, it does not contest the accuracy of the amount, the existence of a contract modification, or that payment was made by Hedlund. Its sole argument is based upon the contention that Hedlund was not contractually obligated to make such a payment to Columbia Helicopter because the subcontract price for Columbia's services did not change regardless of when Columbia performed. Accordingly, it argues that Hedlund was not liable to Columbia and that the Forest Service is not liable to Hedlund. The Forest Service's argument lacks merit for several reasons.

Had Hedlund owned helicopters and been able to perform the work without subcontracting to Columbia, the Forest Service would clearly have been liable to Hedlund for the increased fuel costs as an element of an equitable adjustment under the prime contract, as the increased costs were the result of government-caused delay. Yet, the Forest Service contends that it is shielded from liability for this government-caused delay because Hedlund subcontracted this portion of the work to a subcontractor, and pursuant to the subcontract Hedlund was not obligated to pay Columbia for the increased costs.

The fact that Hedlund had subcontracted a portion of the work does not shield the Forest Service from liability for a subcontractor's claim for government-caused delay unless the prime contractor is not liable to the subcontractor. While not citing *Severin v. United States*, 99 Ct. Cl. 435 (1943), the Forest Service appears to be relying upon the holding in this case, commonly referred to as the *Severin* doctrine. This doctrine relieves the Government from responsibility for a subcontractor's claim unless the prime contractor is also responsible to pay the subcontractor.

This Board, in *Acquest Government Holdings, OPP, LLC v. General Services Administration*, CBCA 413, 08-1 BCA ¶ 33,720 (2007), has noted that the *Severin* doctrine has been narrowly construed.

In its present state, the doctrine applies only where there is an iron-clad release or contract provision immunizing the prime contractor completely from any liability to the subcontractor. *J.L. Simmons Co. v. United States*, 304 F.2d 886 (Ct. Cl. 1962);

Cross Construction Co. v. United States, 225 Ct. Cl. 616 (1980); *George Hyman Construction Co. v. United States*, 30 Fed. Cl. 170 (1993), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994) (table). Also, the burden is on the Government to establish the existence of an iron-clad release sufficient to trigger application of the *Severin* doctrine. *Metric Constructors, Inc. v. United States*, 314 F.3d 578 (Fed. Cir. 2002).

Id. at 166,969. “If the contract is silent as to the prime’s ultimate liability to the sub, suit by the former will generally be permitted.” *Cross Construction Co. v. United States*, 225 Ct. Cl. 616, 618 (1980) (citing *Blount Bros. Construction Co. v. United States*, 346 F.2d 962, 964-65 (Ct. Cl. 1965)).

In the instant case, the Government has not met its burden of shielding itself from increased costs incurred by Hedlund’s subcontractor as the result of government-caused delay, as there is no language in the subcontract that exculpates Hedlund nor any post-contract release that absolves Hedlund of liability for government-caused delay. In the prime contract Hedlund had the right to choose the time of performance that was most advantageous to it within set limits. Hedlund was deprived of that right and received damages from the Forest Service. Implied in the subcontract was an agreement that Hedlund would choose the most advantageous time for Hedlund and Columbia to perform. Columbia had a right to rely on Hedlund’s right to choose the most advantageous time for performance. That right was taken away from Hedlund by the Government and thus Hedlund took that same right away from Columbia. Hedlund is liable to Columbia for the loss of that right. Accordingly, Hedlund may bring a suit against the Forest Service for Columbia’s increased costs due to the delay caused by the Forest Service. We find the Forest Service liable to Hedlund for these costs in the amount of \$20,226.54.

In summary, we find that Hedlund is entitled to recover the following damages from the Forest Service:

Performance Bond Interest (Claim 2006-108-1)	\$765.60
Scaling (Claim 2006-109-1)	\$82,526.85
Additional Logging Costs (Claim 2006-110-1)	\$20,226.54

Felling of Hazard Trees (Claim 2006-111-1)	0
Preventing Removal of Old Growth Hazard Trees (Claim 2006-112-1)	\$88,955.00
Delay Claim (Claim 2006-113-1)	\$176,192.96
Extra Road Maintenance (Claim 2006-114-1)	\$9226.27
Total	\$377,979.24

DECISION

Appellant's claims are **GRANTED IN PART** as set forth above in the amount of \$377,979.24.

R. ANTHONY McCANN
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

JEROME M. DRUMMOND
Board Judge