UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF GRANTED IN PART: December 22, 2017

CBCA 5089

MICHAEL JOHNSON LOGGING,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

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

Deanna J. Chang, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **SHERIDAN**, **ZISCHKAU**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Michael Johnson Logging (Johnson or purchaser) timely appealed from the denial by a United States Forest Service contracting officer of a certified claim for about $1.1 million under a timber sale contract. Johnson seeks damages, including lost profit, for lost productivity, damage to its equipment, unreasonable suspensions of work, and "business devastation." In denying the claim, the contracting officer also asserted a government claim of $261.86. The respondent, Department of Agriculture (USDA), the Forest Service's parent agency, seeks summary relief upon Johnson's damages claims. We grant USDA's motion in part. Johnson cannot recover on its business devastation claim. We otherwise deny the motion.

Background

I. The Contract and the Alleged Breaches

To decide this motion, we rely on contract-related documents submitted by USDA (without objection by Johnson) for the appeal file under Board Rule 4 (48 CFR 6101.4 (2016)), testimony by deposition and affidavit, and applicable law.

A. Relevant Contract Provisions

USDA awarded the Big Shrew South timber sale contract to Johnson, a small business, in September 2007. The Forest Service estimated in the contract that the sale area included approximately 25,397 tons of timber to be cut over a thirty-nine-month period in the Olympic National Forest in Washington State. The contract contained numerous specifications related to the harvesting of timber and the preservation of the forest. Requirements pertinent to this motion included: (1) obtaining approval for the locations of all skid roads and landings prior to their use and construction;[1] (2) using existing skid trails where they met spacing guidelines; (3) constructing landings that did not exceed the size needed for efficient skidding and loading operations; (4) marking and cutting trees; (5) and minimizing damage to the forest. The contract also authorized USDA to "give Purchaser notice of [a] breach" and to suspend purchaser's operations "[i]n the event Purchaser breaches any of the material provisions of the contract."

B. Corridor and Landing Requirements; Equipment Damage

Tensions arose during performance due to the parties' seemingly competing objectives of harvesting timber and preserving the forest. In its certified claim to the contracting officer, Johnson alleged that when preparing for work on the sale, it proposed straight corridors for skid trails, and designed landings that were sufficiently large to ensure efficiency and safety. Johnson further alleged that the Forest Service made adjustments to its skid trails and landings, such that Johnson had to zigzag around saved trees and work in landings that were too small. Johnson claimed that these adjustments made the job more time-consuming and more expensive. Johnson also claimed that the irregular corridors

[1] In their briefs, the parties interpret the contract as requiring *agreement* as to the locations of skid trails and landings. We disagree. The special provisions identified in Division C of the contract supplement the standard provisions listed in Division B. Subsection C6.42 modifies item B6.422, requiring the Forest Service's *approval* of the locations.

caused excess wear and tear on its equipment, resulting in costly damage to the skidder and shovel, in particular.

Although Forest Service personnel admitted to making the adjustments, they stated that they were made on an occasional basis and only when necessary to avoid cutting legacy trees or damaging the forest. They further pointed out that Johnson and the Forest Service entered into an operational tree agreement, which permitted Johnson to cut unmarked trees for operational or safety reasons. USDA records also showed that whenever Johnson asked the Forest Service to mark and cut additional trees in order to widen landings and skid trails, the Forest Service complied in almost every case.

C. Suspensions of Work

During performance of the contract, the Forest Service suspended Johnson's operations three times for a combined total of twenty-seven days. Two of the suspensions were imposed for cutting the wrong trees; the third was for failure to control run-off and prevent erosion. Johnson did not challenge the suspensions at the time they were imposed. Instead, Johnson took all required steps to remedy the alleged breaches. In its certified claim, however, Johnson alleged that the suspensions were unwarranted and unreasonable.

USDA maintained that the suspensions were permitted under the contract, and that they were reasonable since, in each instance, Johnson's operations constituted "a threat of immediate and irreparable damage to National Forest resources." Also, they were only partial suspensions. The contracting officer suspended cutting for the first two breaches, but permitted skidding and hauling to continue. For the third breach, the suspension was limited to all logging activities in a *particular* subdivision due to heavy rains and flooding in that area. Johnson was permitted to move its crew and equipment to an area more suitable for wet weather operations.

D. The Requirement to Use Existing Skid Trails

The contract required Johnson to use existing skid trails where they met spacing guidelines. According to Johnson, existing skid trails were prone to flooding because they were significantly compacted and often located at lower grades. Johnson contends that had it been allowed to cut new skid trails at higher elevations, it would not have been in breach or received a suspension, and operations could have continued. It is unclear whether Johnson raised this issue prior to the suspension. There is evidence, however, that the parties discussed locating new skid trails to higher ground *after* the breach. Johnson claimed it lost four-and-a-half weeks of work due to the third suspension. Johnson claimed damages for the daily rental rate of its idled equipment (the skidder and the shovel) for that period of time.

E. Contract Extensions and Termination

The original period of performance of the contract was a little over three years. Johnson requested and received more than five years of additional time to complete performance. All of the additional time was authorized by USDA under various terms of the contract, such as Market-Related Contract Term Additions (MRCTA), which permitted Johnson to stop work without penalty until the market value of timber increased, or Contract Term Adjustments (CTA) for weather-related delays, which also carried no penalties.

Unlike an MRCTA or a CTA, a Contract Term Extension (CTE) requires financial consideration in the form of an extension deposit, since it is granted at purchaser's request. In September 2013, Johnson requested and received a one-year CTE. Prior to granting the CTE, and in accordance with the requirements of the contract, the Forest Service conducted a re-appraisal of the timber to calculate the extension payments. The Forest Service miscalculated the amounts and substantially overcharged Johnson ($11.90 per ton versus $2.30 per ton). Johnson complained about the rate, but the miscalculation was not acknowledged until nearly two years later, after Johnson filed its claim. Johnson was then refunded $61,013.88 for excess extension deposits and $10,599.44 for excess stumpage. Johnson was also awarded interest in the amount of $2162.16 on the extension deposits.

The contract officially terminated in February 2016. At that time, Johnson had harvested a total of 20,647 tons of timber, approximately 6102 tons less than the contract estimate. In its certified claim, Johnson alleged that the Forest Service's miscalculation of the extension deposits, and imposition of the purportedly unreasonable suspensions, crooked skid trails, too-small landings, and the requirement to use existing skid trails, all caused Johnson to lose revenue, and ultimately devastated its business.

II. The Claim and the Appeal

In June 2015, Johnson submitted a certified claim for damages totaling $1,112,417. Johnson alleged, without citing specific contract provisions, that unreasonable management decisions throughout the course of performing the sale contract restricted its ability to productively log the sale. The claimed damages included $741,837 for lost productivity (due to the need to use crooked skid trails and small landings), $22,000 for damage to Johnson's equipment, $54,000 for inadequate skid trails, $52,600 for unreasonable suspensions of work, lost profit of $91,980 on unharvested timber, and business devastation damages of $150,000. The Forest Service contracting officer denied the claim in November 2015 and asserted a government claim of $261.86, based on the difference between the amount she concluded Johnson was owed in interest on excess extension deposits ($2162.16) and a Forest Service claim of $2376.75 plus interest for rework on flagging and tagging boundaries.

Johnson filed this appeal in November 2015. Its fourteen-paragraph complaint, filed in February 2016, has no separate counts. The complaint echoes the amounts sought in the certified claim and denies that Johnson is liable for the cost of extra work by the Forest Service, as "any remarking done by the [F]orest [S]ervice was within the scope of its obligations and was the result of prior breaches by the Forest Service."

Discussion

I. Summary Relief Standard

USDA filed a motion for summary relief, arguing that Johnson can recover no damages. USDA's motion does not address Johnson's appeal from the government claim of $261.86. We may grant USDA's motion only if USDA is entitled to relief based on the undisputed facts "as a matter of law." Rule 8(g)(1); *JJA Consultants v. Department of the Treasury,* CBCA 432, 07-2 BCA ¶ 33,632, at 166,575. A party opposing summary relief "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288 (1968) (quoting Fed. R. Civ. P. 56(e)); *see Karp v. General Services Administration*, CBCA 1346, 11-1 BCA ¶ 34,716, at 170,934 . We may summarily resolve issues of contract interpretation, provided we need not resolve disputes of fact. *E.g.*, *P.J. Maffei Building Wrecking Corp. v United States*, 732 F.2d 913, 916 (Fed. Cir. 1984).

II. The Forest Service's Contractual Obligations

USDA's primary argument is that Johnson cannot recover because "Johnson fails to allege that the Forest Service in any way breached the terms of the Contract." In particular, USDA argues that Johnson agreed in advance, as the contract required, to the locations of all skid trails and landings, and cannot challenge those locations now, and that the Forest Service "properly exercised [its] discretion [under the contract] when it suspended [Johnson's] operations after [Johnson's] breaches" of the contract. Absent any basis in the contract to award damages pertaining to skid trails, landings, or suspensions of work, USDA argues, we must deny the damages sought in the appeal.

We disagree with USDA. Johnson does not argue that the Forest Service breached an express duty under the contract. Rather, in response to the motion, Johnson argues that the Forest Service abused its discretion and, in doing so, breached the implied duty of good faith and fair dealing. A breach can be found if the Government hinders performance of the other party through "actions that unreasonably cause delay or hindrance to contract performance." *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1542 (Fed. Cir. 1993);

see WRB Corp. v. United States, 183 Ct. Cl. 409, 509 (1968) (where a breach was found when various inspectors inspected the same work, causing conflicting approvals and disapprovals); *see also Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 770 (2005) (citing *Lewis-Nicholson, Inc. v. United States*, 550 F.2d 26 (Ct. Cl. 1977) (where the Government negligently made errors in placing stakes and failed to plan in advance for a project), and *F.H. McGraw & Co. v. United States*, 130 F. Supp. 394 (Ct. Cl. 1955) (where the Government made untimely changes to specifications)).

Neither Johnson's claim nor its complaint alleged a violation of the duty of good faith and fair dealing. Johnson first raises this breach theory in response to USDA's motion. However, because we find that the facts alleged in the claim and the complaint are the same operative facts as those supporting the breach, this claim is not new. Here, Johnson is merely attaching a legal label to the same allegations raised in the claim and the complaint. *VSE Corp. v. Department of Justice,* CBCA 5116 (Dec. 8, 2017); s*ee Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) (permitting adjudication of a claim that arises from the same operative facts and requests the same relief as a claim presented to a contracting officer, even if it alleges a slightly different legal theory); s*ee also Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1578 (Fed. Cir. 1992), ("[C]ertain 'magic words' need not be used and . . . the intent of the 'claim' governs.").

Moreover, Johnson cites evidence upon which a rational fact finder could find that the Forest Service breached the implied duty of good faith and fair dealing by unreasonably hindering Johnson's performance. In particular, Johnson cites deposition testimony in which Forest Service personnel admitted to making adjustments to Johnson's skid trails and landings. Johnson also cites testimony by its proprietor, Mr. Michael Johnson, who testified that the adjustments were unreasonable in that they changed the straight paths to crooked paths, which delayed his operations and damaged his equipment.

Johnson also points to the same deposition testimony, as well as to multiple inspection reports and USDA policies, in arguing that the three suspensions were unreasonable under the circumstances, and that the requirement to use existing skid trails interfered with its performance. Mr. Johnson testified that the first suspension was unnecessary and excessive since only five unmarked trees were cut. With respect to the second suspension, Johnson cut twenty-nine unmarked trees. In his deposition testimony, Mr. Johnson stated that a suspension was also unnecessary in this instance because the error was self-reported. Finally, Mr. Johnson testified that existing skid trails were prone to flooding and resulted in a suspension, which could have been avoided had Johnson been able to cut new skid trails at higher elevations.

In light of the aforementioned evidence, we must reject USDA's argument that Johnson has not put forth any evidence of breaches. As we previously noted, to survive a motion for summary relief, the opposing party need only put sufficient facts in evidence to show that there are material facts in dispute. Johnson has done that here by presenting evidence of a *possible* breach of contract by the Forest Service. The evidence presented is sufficient to get Johnson to a hearing, where we have the opportunity to weigh all of the evidence presented to determine whether the contract was, in fact, breached.

III. Business Devastation

USDA argues that Johnson's $150,000 claim for business devastation has no basis in law or fact.[2] We agree. A claim for damages for business devastation is similar to a consequential damages claim where a contractor asserts that the Government's actions caused the destruction of its business. The concept of consequential damages in contract law involves consideration of the type of loss foreseeable by the contracting parties at the time the contract is executed, not at the time of the breach. *Bohac v. Department of Agriculture*, 239 F.3d 1334, 1340 (Fed. Cir. 2001); *see also Prudential Insurance Co. of America v. United States*, 801 F.2d 1295, 1300 (Fed. Cir. 1986). While contractors may recover damages resulting from "the natural and probable consequences of the breach complained of . . . damages remotely or consequently resulting from the breach are not allowed." *Ramsey v. United States*, 101 F. Supp. 353, 357 (Ct. Cl. 1951).

Although not categorically disallowed, contractor claims for consequential damages premised on the destruction of the entire business or lost business opportunities have been denied where they failed to show a nexus between the damages claimed and the breach alleged. *See, e.g.*, *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741 (1980) (damages denied for contractor's inability to secure bonds necessary to obtain new work); *see also David J. Tierney, Jr., Inc.*, GSBCA 7107, et al., 88-2 BCA ¶ 20,806, *motion for reconsideration denied*, 88-3 BCA ¶ 20,906, (claims denied for the collapse of its business and losses incurred on unrelated jobs). In *Nevada Skylines, Inc.*, AGBCA 92-167-1, 92-3 BCA ¶ 25,089, *motion for reconsideration denied*, 93-1 BCA ¶ 25,352 (1992), a timber contractor sought consequential damages for the Government's alleged failure to timely release its performance bond so that it could bid on other jobs. In that case, the Board denied the requested damages because it found them too remote and speculative to be in the contemplation of the parties at the time the contract was made.

---

[2] The complaint simply states, "Based on a three-year index of annual earnings, the business devastation claim is $150,000."

More recently, we denied consequential damages for the short sales of both a logger's home and timber sorting yard. The denial was based on a lack of evidence linking those transactions to the performance of the contract at issue. *Bob L. Walker v. Department of Agriculture*, CBCA 2131, et al., 18-1 BCA ¶ 36, 921, at 179, 879 (2017) ("[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].") (quoting *Ramsay*, 101 F. Supp. At 357); and ("[L]osses of net worth are generally speculative damages and not recoverable.") (quoting *Data Enterprises of the Northwest v. General Services Administration*, GSBCA 15607, 04-1 BCA ¶ 32,539, at 160,964). In its brief, USDA argues, and we agree, that "[t]he profits Johnson might have earned independent of the contract are not . . . directly related to [this] contract," as Johnson has provided no evidence of such an impact beyond mere speculation. We find the business devastation claim to be too remote and further determine that USDA is entitled to summary relief on this claim as a matter of law.

IV. Damages

Because we deny USDA's motion for summary relief on the basis that Johnson has put forth sufficient evidence of a possible breach of contract by the Forest Service, we need not address in great detail the remaining allegations concerning the validity of Johnson's damages claims. USDA argues that Johnson failed to provide any evidence of lost productivity and lost earnings. We disagree.

At his deposition, Mr. Johnson testified that problems with skid trails interfered with the logging and caused excessive wear and tear on Johnson's equipment. Mr. Johnson also testified that at least one suspension could have been avoided had the Forest Service allowed Johnson to cut new skid trails at higher elevations. While not necessarily persuasive or conclusive, this is enough evidence on which to proceed to a hearing on damages. *See Karp*, 11-1 BCA at 170,934.

V. USDA's Counterclaim

In the final decision of the contracting officer, USDA raised a counterclaim in the amount of $261.86 based on additional costs it absorbed for flagging and re-marking boundaries. Johnson responded to the counterclaim in its complaint, denying any liability for the same. However, USDA's counterclaim is not addressed by either party in this motion, or in any motion currently before the Board, so we need not decide it here.

Decision

The motion for summary relief is **GRANTED IN PART** as to the business devastation claim, and denied as to all remaining claims. Since USDA did not address its claim against Johnson in the motion, we do not decide it here.

KATHLEEN J. O'ROURKE
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

JONATHAN D. ZISCHKAU
Board Judge