UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: June 7, 2007

CBCA 16

FREEMAN CONTRACTING, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Joseph A. Yazbeck, Jr., of Yazbeck, Cloran & Hanson, LLC, Portland, OR, counsel for Appellant.

Michael E. Trow, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **GILMORE**, **BORWICK**, and **POLLACK**.

POLLACK, Board Judge.

Background

The Forest Service (FS) and Freeman Contracting, Inc. (Freeman or appellant) entered into a fixed price contract, contract no. 50-04N7-04-80, dated June 15, 2004. Under the contract, appellant agreed to construct for $89,701 the Pinnacle Creek Fish Passage-Plate Pipe Arch on the Tiller Ranger District of the Umpqua National Forest. Problems were encountered on the project and as a result the contracting officer (CO), pursuant to a unilateral modification and final decision, issued an equitable adjustment of $28,365.79 as compensation for several items. The CO denied an additional $46,625.55 claimed by

appellant, which included, among other items, claims for idle equipment, acceleration, and markups on the hourly rates used by the CO to come up with the issued adjustments.

In the main, the work called for replacing an in-stream pipe culvert with a plate pipe arch. The work was to be completed in two and one-half months. According to the FS, the initial expectation was that the notice to proceed (NTP) would be issued on or about July 15, 2004, and the work would be completed by September 30, 2004. The contract contained standard language, which noted that if the contractor did not receive the NTP by July 15, then the completion date would be extended to reflect the actual date of notice. The contract also contained special requirements relating to when various tasks could be performed. All stream work was restricted to the period of July 15 to September 15. All other construction was restricted to the period between July 15 and September 30. While the contract specified the above time-frame limitation, normal work season for the area was July through October. Work performed in October, however, was subject to restrictions due to heavy precipitation.

In its motion for summary relief, the FS points out that appellant responded to a Request for Quotation question about appellant's ability to accomplish the work within the anticipated time frame. In that answer, appellant acknowledged that the work was time sensitive. Appellant there said that even though its work window started in July, it thought there was adequate time to do the project in August, and intended to start at that time. In a subsequent work plan, appellant showed it would take it four weeks to do the work.

The NTP was issued on July 30, after a pre-work conference. The notice provided that the contract time would begin to run on August 8. At the pre-work conference appellant provided a schedule showing it would mobilize on August 9 and would complete work by September 8. On August 5, appellant advised the FS that due to late pipe delivery, its schedule would be moved back one week.

Appellant began work on August 20, 2004. It encountered unexpected bedrock on September 2. By September 7, the matter had been discussed within the FS and appellant was advised that the bedrock needed to be excavated to the designed elevation. Although excavation was unclassified, the parties in this instance treated the encountering of bedrock as a differing site condition.

According to the FS, appellant worked on bedrock and did so for thirteen calendar days from September 9 to October 6, 2004 (a total of 73.5 hours). The FS accepted the 73.5 hours and allowed additional compensation on them for a laborer, an operator/foreman, a fire trailer, and a foreman's pick-up truck. The FS then used the FS Region 6 Estimating Guide for Road Construction to establish the hourly rates. According to the FS, it believed

that appellant was agreeing that such rates would constitute full hourly compensation and that appellant understood that the rates were inclusive, in that they included overhead, profit, and burden. Appellant has stated that it was unaware that the rates included overhead, profit, and burden and believed that it would be allowed those markups on top of the rates.

The CO then issued a unilateral modification, effective March 29, 2005. This was well after the work was completed. On the bedrock work, the CO allowed $17,419.79 on appellant's claimed entitlement of $34,854.28, as well as granting fourteen days of contract time. The CO disallowed compensation for claimed costs associated with equipment which appellant contended had to be idled during the bedrock excavation. In denying this item, the FS asserts that the equipment was not required by FS to be on-site and that the only equipment that had to be retained by appellant and was idle was fire equipment for which the FS paid $13,300. In arriving at his figure, the CO disallowed appellant's claims for overhead, profit, and labor burden. The CO disallowed those items because the cost guide rates that the CO applied against hours worked included profit, burden, and overhead. As the CO saw it, to allow appellant to add a markup to those rates would have resulted in appellant double dipping. Accordingly, the CO denied $3993.14 for those items.

Appellant said the equipment for which it was denied payment was idled due to the bedrock work and that it could not move the equipment elsewhere due to uncertainty as to how quickly the bedrock operation could be completed. In its motion, the FS claims that it can only be held accountable for idle equipment if the equipment was idled due to government fault. The FS denies fault. Appellant, in contrast, argues that once there is a differing site condition, idle equipment is compensable, provided the idle condition was necessary and reasonable under the circumstances. As to the labor rate issue, Freeman claims it incurred substantially more cost than the hourly rate allowed. Freeman does not appear to dispute that it was using the FS guide for hourly rates; however, it says that it did not know that those rates included profit, overhead, and burden. Further, Freeman claims its accounting records show significantly higher hourly costs than that used by the FS. The FS payment was made through a unilateral modification. No evidence has been provided to us which shows there was a meeting of the minds or an accord and satisfaction.

Part of appellant's responsibility on the project involved de-watering. The FS identifies several notations in the appeal file which it says display the FS's concerns over appellant's operation of the de-watering activities. The FS blames the problems with unsuitable material, in whole or in part, on a lack of proper de-watering by appellant. After excavating the trench to grade, appellant placed bedding material on October 11, 2004. According to the FS, due to appellant's unseasonable performance (it claimed that appellant had stretched work out to a less ideal weather season) and due to appellant's failure to

properly de-water the trench, otherwise suitable material became saturated, necessitating the removal of that saturated material. The FS says that the removal work took substantially one day, covering parts of October 12 and 13.

Pursuant to Work Order 5, appellant removed and hauled the unsuitable material and replaced it with three-inch minus free-draining aggregate, obtained from a commercial source off-site. Appellant sought $10,222.30 for this work, which it claims included standby costs. Using the same cost guide as used for the bedrock, the CO issued a unilateral modification effective March 29, 2005, and allowed $5177, as well as two calendar days of contract time.

Without going into detail, appellant says the water problem was of such a nature that it could not be fully controlled, despite appellant's efforts. The fact that the FS paid appellant for this work is certainly an indication that the FS did not consider the problem to be the fault of appellant. That alone is sufficient to establish a disputed fact as to whether appellant was culpable. Having identified a disputed issue as to entitlement, the remaining dispute over this item centers on the cost. On this item, our analysis will require us to revisit the issues surrounding the use of the estimating guide, albeit here, in the context of the bedding material claim as opposed to bedrock.

On October 27, 2004, the FS had appellant import some special government-furnished backfill material to stabilize a wet area along the southern edge of the culvert. In its motion for summary relief, the FS charges that the need for the material was again due to appellant's unseasonable work performance and failure to properly de-water the trench. In addition, the parties disagree as to the cost of this work. The FS provides an explanation as to the costs to perform the work; however, that explanation is difficult to follow. Given what we have before us, we find that this matter will need to be better explained and developed before we can attempt to resolve it. It is not necessary, however, for purposes of this ruling for us to spend time attempting to reconcile and understand the conflicting numbers. What is clear is that the FS paid less than that claimed by appellant and appellant disputes the number.

On November 11, 2004, the FS issued Work Order 9, changing the location of the source for government-furnished aggregate. This time the CO allowed $2891.94 (rounded by the CO to $2892) against appellant's claim of $4982.40. The parties again disagree as to the actual cost.

Part of appellant's claim for compensation is for acceleration. In its motion, the FS asserts that appellant was provided adequate time for the work, but started late and dawdled

away other days. The FS also asserts that appellant never told the FS that it was accelerating and the FS never ordered appellant to accelerate. The FS also notes that appellant did not raise this claim until after work was completed. Appellant asks for $14,334.64 for this item and the FS denies it in full.

The claim also contains an item for hauling and excavating unsuitable material. In summary, the contract called for 1338 cubic meters of excavation material to be hauled to a disposal site incidental to Item 206A(02). According to the FS, instead of hauling excavated material to the disposal site, appellant choose to stockpile it on-site in order to sort for suitable backfill material, with waste material to be disposed of after sorting. The FS charges that approximately 20% to 40 % of the excavated material was boulders, which appellant chose to sort and use for rip rap. Appellant claims $5130.37 for this work. Appellant claims that it should not have had to haul this material, but rather the material should have been usable on the work site. Appellant claims the FS is responsible for the unsuitable material; however, the basis for that claim is not clear.

Discussion

General Statement of Law

The FS has moved for summary relief. Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986). "Only disputes over facts that might affect the outcome of the case under governing law will preclude the entry of summary judgment." *Id*. at 248. The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, affidavits, admissions, and answers to interrogatories, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). The non-moving party is then required to point to "specific facts showing that there is a genuine issue for trial." *Id*. at 324. In considering summary relief, the court will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249. "All reasonable inferences and presumptions are resolved in favor of the non-moving party." *Id*. at 255.

Differing Site Condition

We start with the differing site condition claim. The appellant has asserted that it encountered bedrock instead of expected conditions. It is undisputed that after the bedrock was encountered, the FS treated the bedrock as a differing site condition and paid appellant

for the hours appellant expended. The FS paid based on the FS estimating guide. The FS now appears to challenge the existence of a differing site condition. The fact the FS paid for the bedrock operation and treated it as a differing site condition is sufficient, taking all inferences in favor of appellant, for us to find that appellant encountered a differing site condition. Therefore, for purposes of defending against summary relief, appellant has met its burden. We need not address the details any further.

Standby Equipment Associated with Differing Site Condition

Appellant has claimed costs for equipment that it says was idled as a result of it having to perform work on the bedrock. The dollar claim here, to the extent it is warranted, arises out of the claimed differing site condition. Appellant says it was forced to leave necessary equipment idle on the project and that it made every effort to mitigate costs by only charging for equipment that was necessary to complete the contract work, once the bedrock activities were completed. Appellant says it could not make further use of the equipment during the bedrock operation, because appellant could not reasonably estimate when the additional work would be completed and when the idle equipment would again be needed for the base contract work. Appellant, thus, asserts that the equipment was not left idle simply for appellant's convenience.

The FS says otherwise. It asserts that the time for completing bedrock work was easily computable and moreover appellant could have mitigated the costs for the idle equipment. For purposes of the motion, however, the FS contentions simply set up disputed facts over material matters. Accepting for now that a differing site condition existed, the issue before us, as to idle equipment, centers on how reasonable appellant was in holding the equipment. If appellant's evidence stands up as to timing of the delay, a lack of alternative uses for the equipment, and the need for the equipment for follow-on work, then that, absent credible FS evidence undercutting it, could be sufficient for appellant to prevail. Thus, appellant has provided enough evidence at this stage to defeat the FS motion. We need go no further as to this portion of the motion, for to do so would be cumulative. The FS motion, asking that we should find no entitlement to standby costs, is denied.

As to the law, we point out that a contractor can recover standby costs for equipment that remains idle as a consequence of the contractor having to deal with the differing site condition. Whether appellant recovers in this appeal will depend and turn on evidence such as, but not limited to, what equipment was idle and under what conditions, whether it was reasonable for appellant to hold the equipment, and whether costs could have been mitigated.

Equipment and Labor Rates Used for Calculation (Profit and Overhead)

It appears from the record before us that the parties agree as to the number of hours of direct bedrock work associated with the differing site condition. Appellant asserts that during negotiations for payment for that work, the CO informed appellant that the contract required the use of the FS estimating guide rates for labor and equipment, and that appellant used those rates to present its claim. Mr. Freeman, appellant's president, said he was unaware that the FS rates included amounts for labor burden, profit, and overhead and considered the rates he submitted to be subject to additional markups. Appellant continues that its labor costs, when including burden, overhead, and profit were well in excess of the FS rates set out in the estimating guide.

Notwithstanding the above, the FS concludes that we should grant summary relief, holding that Freeman cannot get anything more than the estimating guide rates. The FS provides us no legal basis for that position. Furthermore, there is no claim of accord and satisfaction or evidence supporting a meeting of the minds. In fact, the amount granted was granted through a unilateral modification.

Unsuitable Bedding Material

As was the case with the bedrock, the FS issued a unilateral modification paying appellant for unsuitable material. We find that the actions of the FS in paying the unilateral modification establishes for purposes of summary relief a prima facie case that appellant did not cause the problem and is entitled to compensation.

We now turn to the dispute over the amount of compensation here for the bedding material claim. Appellant claims costs for idle equipment caused by delay during bedding operation. It also claims costs associated with labor burden, overhead, and profit, which the FS asserts were included in the payment already made, as derived from the estimating guide. The issues of equipment delay and the effect of the estimating guide calculations associated with the unsuitable material involve the same issues, which we earlier addressed regarding bedrock. We concluded there that the matter was not ripe for summary relief. That is also the case here.

Change in Backfill Requirements

The issue before us here is a dispute over the amount due. To the extent the FS argues, as a defense, poor de-watering by appellant, appellant says otherwise, asserting that it took all reasonable steps to handle the water. The quality of Freeman's performance is

therefore a disputed issue. What Freeman has provided to us is adequate for a tribunal to find in Freeman's favor. Accordingly, the FS cannot prevail on its motion as to this issue.

This is not a proceeding on the record. It was filed as a motion for summary relief, and because of that, summary relief standards, and not on-the-record standards, set out the test for relief. As to the remaining dispute on this item, we have before us a genuine dispute over the costs incurred and whether appellant was reasonable in incurring those costs. Appellant has asserted that its accounting records show its costs. The FS has not claimed otherwise, but instead relies on its own estimates. What we have before us makes summary relief unavailable here.

Change in Surface Aggregate

Freeman asked for $4982.40 for this work and was paid $2892. Freeman says it submitted extra work reports which outlined the actual costs associated with Work Order 9, the work order involving this matter. Freeman's president states in an affidavit that the change in designated source substantially increased the haul time and required additional mobilization of the loader. According to Freeman, the FS costs are estimates, whereas Freeman has a record of actual costs. In the face of this evidence, the FS simply cannot prevail as to this matter. It has provided us neither a factual or legal basis for its position.

Acceleration

The FS spends several pages of argument on the issue of acceleration. FS counsel asserts that Freeman delayed commencing work on the project and further charges that Freeman was behind schedule at the time the bedrock was encountered. Freeman, however, asserts that it started work on August 17, 2004, in accordance with provisions of the contract, and moreover asserts that changes as to bedrock and unsuitable material delayed its ability to perform and complete as intended. It points out that it was running behind its anticipated schedule because of excusable delays, including a need for flatter slopes at the trenches, which required added excavation, and because of an error in the original design quantity for the trench. Clearly the parties disagree as to why the job was late. Resolving that matter will require additional evidence and require us to resolve disputed material matters.

The FS also argues in its motion that to the extent Freeman accelerated, it did so as a volunteer and without notice to the FS. However, Freeman says that it requested extensions by means of extra work reports which it filed with the FS. It points out that it set out the overtime in its work reports and believes this was adequate to put the FS on

notice. In addition, Freeman also says that the FS extended the in-water work only once. It further claims that work orders 3 and 5 were FS directives and indicated to appellant that it was to accelerate. In those orders, the FS indicated that "every effort should be made to complete the remaining work without unnecessary delay."

Whether the assertions put forth by Freeman will ultimately sustain its claim for acceleration cannot be determined at this point. The test is not whether we think Freeman will ultimately prevail on this matter. Rather, we need to decide whether Freeman has provided enough to us so that, if what it asserts is correct, we could find in its favor. In considering a motion for summary relief, we cannot try issues of fact, i.e., weigh evidence or judge credibility, but instead, only determine whether there are issues to be tried. *Anderson*, 477 U.S. at 249. The time for weighing evidence comes later. Here, we look at the evidence provided to us and see if it could sustain the claim. Freeman has met that for purposes of defending against summary relief on the acceleration issue.

Removal of Unsuitable Excavation

Put simply, we do not follow from the FS motion the exact basis on which the agency believes we should grant summary relief. It is not our role to puzzle out presented arguments. Rather, based on what was presented, we conclude that the details of this portion of the appeal need more development and explanation. That may involve having parties testify or provide affidavits as to their understandings of the contract and specifically why the matter is at issue. Based on what we have, however, we will not grant summary relief.

Interest

The FS states that after receiving the CO's unilateral modification effective March 29, 2005 (but dated April 29, 2005), appellant by letter dated May 12, 2005 stated that it "reserves the right to proceed with a claim for payment for the entire remaining amount of its claim for differing site conditions and extra work." Then, by letter dated January 4, 2006, appellant requested a final decision from the CO on the matters set out in its May 12 letter. The FS argues that because appellant did not specifically ask for a final decision until January 4, 2006, that should be the earliest date for running of interest.

The FS is correct that the referenced May 12, 2005, letter does contain wording that appellant "reserves the right to proceed with a claim for payment." Had this wording been all that the letter said, then we may have concluded that the letter itself was not an interest-triggering claim. Wording stating one reserves a right to proceed with a claim (depending

on context and earlier correspondence) might well be not the same as a demand and therefore not sufficient to trigger the running of interest under the Contract Disputes Act of 1978, 41 U.S.C.A. §§ 601-613 (2006) (CDA or Act). However, appellant's letter of May 12 says significantly more than simply that appellant reserves the right to proceed with a claim. The letter responds specifically to the unilateral modification and says:

> This letter is in regard to your April 29, 2005 letter and payment invoice. I appreciate that we will be getting partial payment for the extra work that was performed last year. In signing your invoice and accepting partial payment in the amount of $28,365.79, Freeman Contracting Inc. releases its claim only in that amount. Freeman Contracting Inc. reserves the right to proceed with a claim for payment for the entire remaining amount of its claim for differing site conditions and extra work performed on the Forest Service project Pinnacle Creek Fish Passage, plus interest, attorneys fees and costs. Freeman Contracting Inc. does not intend to waive any claim regarding any work done on the above-referenced contract.
>
> The enclosed exhibit A; will show the outstanding principal and interest, less the amount being paid. After applying your payment, as per Exhibit A, the principal amount we will claim is $50,744.90. Additionally, we reserve the right to seek attorney fees we have already incurred and will incur, plus interest and any costs we incur.

In addition to the above, appellant had earlier filed a letter dated January 31, 2005. In that letter, which responded to a proposed dollar figure from the FS regarding the extra work, appellant stated that it disagreed with the FS's intended compensation for the differing site condition and other extra work. Appellant attached a breakdown totaling $63,349.18 to that letter, a sum in excess of what had been offered by the FS.

Entitlement to interest on contract claims is set out in Section 12 of the CDA, 41 U.S.C. § 611. Under the Act, in order to receive interest, there must first be an underlying claim for quantum. *Nab-Lord Associates v. United States*, 682 F.2d 940 (Ct. Cl. 1982). Additionally, for the claim to qualify for interest, it has to be submitted to the contracting officer. *Fidelity Construction Co. v. United States*, 700 F.2d 1379 (Fed. Cir. 1983).

The Act does not define the term "claim." During the early years of the Act, the absence of a definition for "claim" served as a basis for substantial litigation. However, the term has now been adequately defined by court and board decisions, so that the parameters are reasonably well set out and established. A routine voucher, invoice, or other similar

request for payment is typically not considered a claim, absent circumstances identifying it as a disputed item for which payment is being sought. In contrast, as set forth by the court in *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1542-43 (Fed. Cir. 1996), for a non-routine submission to be a claim, it must be a written demand or assertion which seeks, as a matter of right, the payment of money in a sum certain. The claim must further be submitted to the CO for decision.

It is that last element, submission to the CO for decision, which appears to be the basis of the FS contention that interest cannot run on appellant's claim until January 4, 2006, the date appellant specifically asked the CO to render a final decision. The FS ties interest to such a specific request. Our analysis, shows that the FS view of the law is too narrow and what constitutes a claim is much broader than that which the FS asks us to accept in this appeal.

The court in *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1578 (Fed. Cir. 1992), made it clear that "magic words" were not necessary for a contractor's claim to qualify for the start of CDA interest. The *Transamerica* court spoke of applying a common sense approach to whether a specific request qualified or did not for the start of interest. As set out by the court in *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987), "All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." A request for a contracting officer's decision "can be implied from the context of the submission." *Heyl & Patterson, Inc. v. O'Keefe*, 986 F.2d 480, 483 (Fed. Cir. 1993). As the Armed Services Board of Contract Appeals stated in *Bared and Co.*, ASBCA 47628, 95-2 BCA ¶ 27,710:

> In order to determine whether a contractor implicitly requested "a contracting officer's decision" we must look to the "totality of the circumstances." J.M.T. *Machine Company, Inc.*, ASBCA No. 29739, 86-1 BCA ¶ 18,684 at 93,944, *recon.denied*, 86-2 BCA ¶ 18,917, *aff'd*, 826 F.2d 1042 (Fed. Cir. 1987).

When we look at the FS motion in light of the above, we find that we cannot grant the relief requested by the FS. For purposes of deciding whether to grant summary relief, we find that giving all reasonably favorable inferences to appellant's letters of January 31, 2005, and March 12, 2005, either or both could be read to constitute a claim qualifying for interest.

We do note here that the law is clear that determination of the status of a submission as a claim will often turn on extrinsic evidence and surrounding circumstances and actions.

The record in this case has not been sufficiently developed to conclude what date is appropriate nor whether there may even be earlier correspondence qualifying as interest-triggering claims.

Extra Unsuitable Excavation

This portion of the appeal turns on differences as to the meaning of the contract. The FS says that appellant was obligated to haul off 1338 cubic yards of excavation material to a disposal site, incidental to its work on Item 206A(02). According to appellant, the contract indicated that it was to:

> [u]tilize all suitable excavated materials as backfill or embankment. . . . Dispose of all surplus material.

There is no question appellant hauled material. At issue is whether the material that was hauled was hauled because it was unsuitable, and but for it being unsuitable, it would not have been surplus. According to appellant, had the material been suitable, it would have been used for backfill and thus not hauled to the disposal site. Appellant blames the FS for the condition of the material. Appellant claims it is entitled to the reasonable cost difference between using the excavated material and being required to haul it. We find that this issue needs more factual development. Accordingly, we do not grant summary relief.

Decision

The **MOTION** of the FS **FOR SUMMARY RELIEF** is **DENIED**.

HOWARD A. POLLACK
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

ANTHONY S. BORWICK
Board Judge