



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 5089 GRANTED IN PART; CBCA 5619 GRANTED:
July 30, 2021

CBCA 5089, 5619

MICHAEL JOHNSON LOGGING,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Joseph Scuderi, Jeremy Dobbins, and Andrew Friese of Scuderi Law Offices, P.S., Olympia, WA, counsel for Appellant.

Kate Z. Schneider, 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.

Appellant, Michael Johnson Logging (Johnson or purchaser), claimed damages for breach of contract by respondent, the Department of Agriculture (USDA or agency), related to Johnson's performance of a timber sale contract. In CBCA 5089, Johnson claimed damages in the amount of \$1,112,417, which was later amended in its post-hearing brief to \$700,000, arising from USDA's administration of the contract. In CBCA 5619, Johnson appealed USDA's decision to withhold a cash performance bond of \$6000 and the cash balance remaining on the contract of \$15,551.86, a total of \$21,551.86, representing the cost to complete post-termination contract work.

Based on the contract's clear terms, as well as the substantial evidentiary record, we find that Johnson failed to establish USDA breached the implied duty of good faith and fair

dealing in its administration of the contract, precluding any recovery for lost productivity, performance suspensions, use of inadequate skid trails, and equipment damage. We conclude, however, that USDA did breach certain express terms of the contract and, therefore, grant in part Johnson's claim in CBCA 5089 and award damages in the amount of \$89,425. We grant Johnson's appeal in CBCA 5619.

Findings of Fact

Solicitation, Bid, and Contract Award

On September 1, 2007, USDA sent a letter and timber sale prospectus to potential bidders, notifying them of the upcoming Big Shrew South timber sale in Olympia, Washington. Attached to the prospectus were a map of the sale area and a sample contract that contained the relevant terms and conditions of the sale and encouraged bidders to "inspect the sale area and sample contract before submitting a bid." The sale was limited to small businesses, and bidders could expect to harvest about 25,397 tons of timber. The minimum acceptable bid for the advertised timber was \$56,635.31, and the minimum acceptable bid rate for the biddable species was \$2.23 per ton. The contract identified December 23, 2010, as the termination date.

On September 18, 2007, Johnson submitted a certified bid in response to the solicitation. Section 22 of the bid form, entitled "Terms of Bidder's Offer," stated:

Bidder certifies and represents that the Bidder has read and understands each and every provision of this bid form (together with any attachments thereto) and the sample sale contract. The Bidder agrees that it assumes the responsibility to clarify any questions before signing this form. The Bidder agrees that the written provisions of this bid form (together with any attachments) and the sample contract constitute the entire agreement of the parties until a written contract is executed and neither the bid form (and any attachments) nor the sample contract, can be orally modified. The Bidder expressly adopts the terms of this bid form and the sample contract as material parts of the Bidder's offer for the advertised timber or forest product.^[1]

On September 25, 2007, USDA awarded Johnson the contract for a bid price of \$58,413.10. USDA received no other bids.

¹ The requirements for Big Shrew South were based on a habitat study conducted by the agency. Although bidders were not informed about the study, the contract requirements were developed with the study in mind.

Relevant Contract Terms

The contract contained both standard provisions for scaled timber sales and special provisions related to the Big Shrew South timber sale. Detailed timber specifications identified in sections B2 and C2.35 of the contract included: a description of trees designated for harvesting, exceptions to individual tree designations, procedures for managing damaged or unintentionally cut timber, marking of individual trees, spacing distance requirements between cut trees, and minor adjustments to the boundaries of cutting units.

Sections B6.31, "Operation Schedule," and B6.311, "Plan of Operations," required the purchaser to provide an annual operations schedule and a general plan of operations containing information about major activities, such as logging, scaling, road construction, timber harvesting, debris disposal, erosion control measures, and other contractual requirements. Changes to the schedule or plan were permitted due to weather, markets, or other unpredictable circumstances, but were subject to the approval of the contracting officer.

Section B6.33, "Safety," stated, "Purchaser's operations shall facilitate USDA's safe and practical inspection of Purchaser's operations and conduct of other official duties on sale area. Purchaser has all responsibility for compliance with safety requirements for its employees."

Section B6.422, "Landings and Skid Trails," stated, "Location of all landings, tractor roads and skid trails shall be agreed upon prior to their construction. The cleared or excavated size of landings shall not exceed that needed for efficient skidding and loading operations."

Section C6.42, "Yarding/Skidding Requirements," required the purchaser to submit a yarding and skidding operations plan to USDA for approval prior to the start of felling operations and stated, "Location of all skid roads and trails, tractor roads, skyline corridors, mechanized harvester trails, forwarder roads, and other log skidding facilities shall be approved prior to their use and construction. See attached table for requirements." The table specified eighteen requirements for yarding and skidding. Relevant provisions included:

Dedicated skid trails shall be no closer than 100 feet apart center to center and will not exceed 12 feet in width.

Skid trails shall minimize disturbance to existing large down logs and felled hazard trees. If such logs are removed, they will be replaced as directed by the USDA.

Skid trails shall impact less than 20% of the area.

The location of all skid trails and skyline corridors shall be approved prior to felling operations.

Skid trail junctions shall be set back from landings to minimize the landing openings. No more than 2 skid trails coming into the landing unless otherwise agreed to by the USDA.

Use existing skid trails where they meet spacing guidelines as stated above.

Section C6.422, "Constructed Landings," stated, "In an effort to avoid irreparable soil and watershed damage in areas on Sale Area Map designated 'landing construction critical,' Purchaser shall construct landings in accordance with the following plans and specifications." Those relevant to this decision included:

Clearing: Stumps and other vegetative material shall not be left hanging over the top of the excavated area. Clearing limits shall be marked on the ground and be approved by the USDA.

Debris Disposal: All vegetative material at least 3 inches [in] diameter and 3 feet long, which does not meet utilization standards in A2, shall be disposed of in accordance with [section] C6.74#. This material may be scattered in the unit when agreed to by USDA.

Protection of Permanent Roads: When landings are located on system roads, Purchaser's landing construction activity will be designed to minimize damage to the road. After the landing has served purchaser's purpose, the road will be returned to its original condition as soon as weather conditions permit.

Section B6.5, "Streamcourse Protection," stated, in paragraph (a):

Purchaser's operations shall be conducted to prevent debris from entering Streamcourses In the event Purchaser causes debris to enter Streamcourses in an amount that may adversely affect the natural flow of the stream, water quality, or fishery resource, Purchaser shall remove such debris as soon as practicable, but not to exceed 2 days, and in an agreed manner that will cause the least disturbance to Streamcourses.

Section B6.6, "Erosion Prevention and Control," stated:

Purchaser's operations shall be conducted reasonably to minimize soil erosion. Equipment shall not be operated when ground conditions are such that excessive damage will result. Purchaser shall adjust the kinds and intensity of erosion control work done to ground and weather conditions and the need for controlling runoff. Erosion control work shall be kept current immediately preceding expected seasonal periods of precipitation or runoff.

If Purchaser fails to do seasonal erosion control work prior to any seasonal period of precipitation or runoff, USDA may temporarily assume responsibility for the work and any unencumbered deposits hereunder may be used by USDA to do the work.

Section B6.64, "Landings," stated, "After landings have served Purchaser's purpose, Purchaser shall ditch and slope them to permit water to drain or spread. Unless agreed otherwise, cut and fill banks around landings shall be sloped to remove overhangs and otherwise minimize erosion."

Section B 6.66, "Current Operating Areas," stated:

Where logging or road construction is in progress but not completed, unless agreed otherwise, Purchaser shall, before operations cease annually, remove all temporary log culverts and construct temporary cross drains, drainage ditches, dips, berms, culverts, or other facilities needed to control erosion. Such protection shall be provided, prior to end of a Normal Operating Season, for all disturbed, unprotected ground that is not to be disturbed further prior to end of operations each year, including roads and associated fills, tractor roads, skid trails and fire lines. When weather permits operations after normal operating season, Purchaser shall keep such work on any additional disturbed areas as up to date as practicable.

Section C6.6, "Erosion Control and Soil Treatment By Purchaser," contained detailed specifications pertaining to erosion prevention and control, as well as soil treatment. It stated, "Erosion prevention and control work required by B6.6, shall be completed within 15 calendar days after yarding/skidding operations related to each landing are substantially completed." It also required erosion control measures in locations "[w]here soil has been disturbed or displaced on Sale Area by Purchaser's operations, and where measures described in B6.6 will not result in satisfactory erosion control." The purchaser was authorized to use "alternate methods of erosion control" when agreed to by USDA. Detailed scarification and subsoiling requirements were also outlined in this section.

Section B8.21, “Contract Term Adjustment,” provided for adjustments to the contract term. Adjustments could be made for the following reasons: delays in the beginning of operations due to causes beyond the purchaser’s control, poor market conditions for timber, emergency fire closure, or delays in reconstructing processing facilities for timber.

Section B8.23, “Contract Term Extension,” addressed extensions to the contract term at the request of the purchaser. These provisions identified requirements that the purchaser must have met to receive an extension, such as the purchaser’s progress at the time of the request, payment of consideration in exchange for the extension, and compliance with operational requirements during performance to date.

Section B8.3, “Contract Modification,” stated, “The conditions of this timber sale are completely set forth in this contract. Except as provided for in B8.32 and B8.33, this contract can be modified only by written agreement between the parties.”

Section B8.33, “Contract Suspension and Modification,” authorized the contracting officer to delay or interrupt the purchaser’s operations or modify the contract in whole or in part “[to] prevent environmental degradation or resource damage, including but not limited to harm to habitat, plants, animals, cultural resources, or cave resources; or to ensure consistency with land or resource management plans.”

Section B9.3, “Breach,” stated:

In [the] event Purchaser breaches any of the material provisions of this contract, USDA shall give Purchaser notice of such breach and, allowing reasonable time for remedy of such breach and of USDA’s election to suspend, may give notice to suspend all or any part of Purchaser’s operations. Such notice of breach and notice to suspend Purchaser’s operations shall be written, except oral notices may be given if such breach constitutes an immediate threat to human life or a threat of immediate and irreparable damage to National Forest resources. . . . Such suspension shall be lifted as early as conditions permit.

Section B9.4, “Damages for Failure to Cut or Termination for Breach,” stated that if the purchaser failed to cut the required timber by the termination date of the contract, USDA “shall appraise the remaining Included Timber” and determine the appropriate damages in accordance with the calculations described therein.

Section B9.5, “Settlement,” stated:

If obligations of Purchaser have not been fully discharged by Termination Date, any money advanced or deposited hereunder shall be retained and applied toward unfulfilled obligations of Purchaser without prejudice to any other rights or remedies of USDA. Such funds may be treated as cooperative deposits . . . for uncompleted work 30 days after receipt of written notice from Contracting Officer to Purchaser of work to be done and Purchaser's failure to deny the obligation or to do the work.

Contract Performance

During calendar year 2008, USDA issued quarterly letters to Johnson regarding low values for the softwood lumber index. Each of the four letters stated that "prices have declined sufficiently to activate Market Related Contract Term Addition (MRCTA)," in accordance with section B8.212 of the contract, and extension requests had to be submitted by the purchaser in writing. Johnson submitted an undated written request for an extension to the contract under the MRCTA provision. The contracting officer granted the request on January 26, 2009. Johnson received an extension of one year and six months based on the first three MRCTA letters. A fourth extension was issued on February 2, 2009, extending the termination date of the contract to February 1, 2013.

On May 8, 2009, a pre-operations meeting was held between USDA and Johnson, where they signed an operational tree agreement, authorizing Johnson to cut trees that were not included in the timber sale as long as the trees were "cut for operational or safety reasons, within the sale area, and not painted orange or specifically reserved by the Timber Sale Contract." The agreement required Johnson to "notify the USDA within 24 hours giving the location, description, and painted number of tree or trees cut under this authorization." Trees were included in the sale at the discretion of the contracting officer.

On November 10, 2009, Johnson submitted its general plan of operations for the contract and its operating schedule for calendar year 2009, both of which were approved by USDA. On December 2, 2009, USDA approved the first set of skid trails and landings proposed by Johnson in the sale area. In February 2010, Johnson hauled its first loads of timber from Big Shrew South.

During performance, USDA employees visited the sale site to observe and inspect logging operations, assess contract compliance, document and map completed activities, annotate acceptance of work, review and approve proposed skid trails and landings, comment on weather and ground conditions, and rate progress. USDA documented this information on a form entitled "timber sale inspection report" (TSIR). The form contained signature blocks for both parties, followed by the statement: "I agree on behalf of Purchaser (*delete if inapplicable*)," and "I acknowledge receipt of this document." Approximately

265 TSIRs were completed during performance of the contract. Johnson signed most of them, but made no comments, objections, or reservations directly on the reports. Nor did it delete on any of the TSIRs the phrase "I agree on behalf of Purchaser." On some of the TSIRs, USDA documented comments or requests made by Johnson during performance. When Johnson was not on site, USDA mailed the TSIR to Johnson for review, comment, and signature.

On April 6, 2010, cutting was suspended on the site for breach of the following sections of the contract: B2.2 "Utilization," B2.3 "Timber Designations," C2.35# (Option 1) "Individual Tree Designation," B6.1 "Representatives," B6.3 "Control of Operations," B6.41 "Felling and Bucking," and B6.412 "Stump Heights." Although cutting was suspended, skidding and hauling activities were permitted to continue. A TSIR, signed by both parties, documented the alleged violations, but contained no comments, reservations, or objections by Johnson, nor did Johnson delete the phrase "I agree on behalf of Purchaser." The contracting officer issued a formal suspension letter, which also identified conditions for remedying the breach. On April 13, 2010, the contracting officer lifted the suspension after verifying that Johnson had remedied the breach.

On August 2, 2010, cutting was suspended on the site for breach of the following contract provisions: B2.3 "Timber Designations," C2.35# (Option 1) "Individual Tree Designation," B6.1 "Representatives," and B6.3 "Control of Operations." Twenty-nine undesignated trees were cut. Johnson self-reported the incident after realizing its error. Although cutting was suspended, skidding and hauling operations were permitted to continue. The violations were documented on a TSIR, which contained no comments, reservations, or objections by Johnson nor did Johnson delete the phrase "I agree on behalf of Purchaser." On August 12, 2010, the contracting officer lifted the suspension after verifying that Johnson had remedied the breach.

On October 27, 2010, a harvest inspector observed "significant ponding and rutting occurring on the main skid trails due to wet conditions." The contracting officer suspended logging operations for the following breaches: B6.1 "Representatives," B6.3 "Control of Operations," and B6.6 "Erosion Prevention and Control." No further operations were permitted in the southeast lobe of the subdivision until most of the water dispersed from the landing or the ground froze. Johnson was told to find a different subdivision to work in with conditions more suitable for wet weather operations. Johnson was required to install silt fencing and submit a wet weather operations plan to remedy the breach. The violations were documented on a TSIR, which contained no comments, reservations, or objections by Johnson nor did Johnson delete the phrase "I agree on behalf of Purchaser." Johnson verbally complained to USDA about being shut down because Johnson planned on returning to the site the next day to continue working.

On November 2, 2010, Johnson submitted a letter to the contracting officer stating that the fencing was installed and operations were moved to a different subdivision. The letter also outlined Johnson's plan for avoiding damage to the forest during and after periods of heavy rainfall. On November 8, 2010, the contracting officer notified Johnson that the breach had been remedied and the suspension was lifted.

Multiple TSIRs documented incidents where Johnson mistakenly cut one or two undesignated trees. On those occasions, USDA representatives discussed the circumstances with Johnson, reviewed the "Designation by Description" to ensure it was understood by Johnson, and recommended that the contracting officer include those few cut trees in the sale. On those occasions, USDA did not place Johnson in breach or suspend operations, but simply noted the non-compliance on a TSIR.

USDA made adjustments to Johnson's proposed skid trails and landings to comply with the terms of the contract and avoid cutting trees outside the contract and to minimize damage to the forest. A TSIR was used to document the parties' agreement regarding location and layout of skid trails and landings. Most of the TSIRs addressing the issue simply conveyed USDA's approval of the proposed locations and layouts without comment from Johnson.

Multiple TSIRs documented verbal requests by Johnson to extend or expand skid trails and landings and USDA's approval of those requests. For example:

A TSIR, dated December 1, 2010, contained the following comment by the harvest inspector: "Spoke with Mike Johnson today (PR) as he was leaving the sale area. His feller has not been available and no volume has been cut on the NE lobe of this unit. He asked if I could look at the landing location again and mark a few more trees as he didn't feel it was large enough. I revisited the site and marked about 8 more trees w/ green tracer paint (X0469)."

A TSIR, dated February 28, 2011, referenced contract provision B6.422 and contained the following statement by the harvest inspector: "[M]arked additional trees for landing clearing with green tracer paint (X0611)."

A TSIR, dated June 2, 2011, contained the following comment by the timber sale administrator: "Mike informed me of one skid trail that needed to be extended. This is approved and was painted with green tracer paint (X0611)."

A TSIR, dated July 18, 2011, contained the following comment by the timber sale administrator: "Approved [and] marked with green tracer paint (X0611) an extension to the NW most skid trail in 15-3 to provide access to subdivision

corner [and] skid trails as shown below in 15-6.” The timber sale administrator illustrated the extension on the TSIR.

A TSIR, dated November 20, 2012, documented Johnson’s request for authorization to use USDA Road 2257 as a landing to log two small areas in unit 12-1. The contracting officer approved the request.

A TSIR, dated September 28, 2012, contained the following comment by the timber sale administrator: “Approved requested deviation from original skid trail location.”

A TSIR, dated May 22, 2013, contained the following comment by the timber sale administrator: “Approved and marked with green tracer paint skid trails as shown along with additional trees needed for landing clearing.”

A TSIR, dated June 13, 2013, contained the following comment by the timber sale administrator: “Walked last skid trail with Mike Johnson and agreed to move part of the last skid away from road. Approved and marked with green tracer paint (B0437).”

A TSIR, dated September 8, 2014, contained the following comment by the timber sale administrator: “Approved and marked with green tracer paint (D0294) 400’ extension of main skid road going SW [and] 3 short skid trails off of it.”

A TSIR, dated July 2, 2015, contained the following comment by the timber sale administrator: “Approved and marked with green tracer [paint] (D0570) main skid road (old road) [and] landing as shown below.” The administrator also noted that he “planned on marking additional skid roads, but after Mike looked at a couple of the ones laid out by the contract crew, [Mike] determined that they were not suitable to his needs [and] needed to be redone. Layout crew made the skid roads on straight compass bearings which caused the skid roads to go through skips [and] large old growth stumps.”

Throughout performance, Johnson cut numerous trees in accordance with the operational tree agreement and requested they be included in the sale. The requests were documented on TSIRs. Nearly every request was granted by USDA.

On March 15, 2011, USDA informed Johnson that it may qualify for more time under MRCTA and to submit any requests for an adjustment in writing. Johnson issued a written request the same day. On March 31, 2011, the contracting officer granted the

request, entitling Johnson to three months of additional time. The contract termination date was adjusted to May 1, 2013, and additionally to August 12, 2013, after the contracting officer approved additional MRCTA requests.

During performance of the contract, Johnson was also responsible for the High Math Complex timber sale (High Math). USDA awarded Johnson the High Math contract on August 14, 2007, about five weeks before USDA awarded Johnson the Big Shrew South contract. High Math required harvesting 49,920 tons of timber, nearly twice the amount required for Big Shrew South. Prior to both of these awards, Johnson had only ever completed one USDA contract, with an estimated harvest of 7800 tons. In late 2013, Johnson subcontracted out the remaining work on High Math.

Johnson had financial and staffing challenges at various times during the contract, which were known to USDA. Johnson occasionally worked other jobs, especially when lumber prices were extremely low. During the contract term, Johnson and USDA maintained a cooperative working relationship despite these challenges.

On July 18, 2013, Johnson requested a contract term adjustment (CTA) for sixty-five days due to bad weather. The contracting officer substantiated and granted a forty-two-day CTA on July 30, 2013, in accordance with contract section B8.21, "Contract Term Adjustment." The termination date was amended to September 23, 2013.

In September 2013, about a week prior to the termination of the contract, Johnson requested a one-year contract term extension (CTE). The contracting officer granted the request in accordance with section B8.23 of the contract after determining that Johnson met all of the qualifying conditions for the extension. The terms and conditions of the one-year CTE were captured in a modification to the contract. The new contract termination date was September 23, 2014, and, as required under the CTE provision of the contract, Johnson had to pay for the extension.² The contracting officer established a monthly extension deposit of \$10,328.93, which was based on a bid rate of \$11.91 per ton. Pursuant to the modification, deposits were due for each of the six months remaining in the normal operating season, as follows: October 31, 2013; November 30, 2013; December 31, 2013; January 31, 2014; February 28, 2014; and August 31, 2014. The contracting officer waived the first deposit since Johnson already had sufficient funds in its timber account to cover that

² Adjustments to the contract term under the MRCTA and CTA provisions extended the contract's term, but required no payment since they were for reasons such as bad weather and poor market conditions for timber. A CTE also extended the contract term, but required payment since it was solely at the purchaser's request.

payment.³ The modification was not signed by appellant or the required witnesses, but neither party claimed it was not bound by its terms. The modification did not contain a release of claims. Johnson was eager to continue working the sale, but expressed concern about the deposit amount being too high and worried that it would not be able to complete the contract as a result. The contracting officer explained the contractual consequences if Johnson walked off of the job. Johnson asked the contracting officer to check the amount. USDA made no changes to the deposit amount in response to Johnson's concerns.

Scale reports in the record showed that during the one-year CTE period (September 2013–September 2014), Johnson hauled fourteen loads of timber. Scale reports covering each calendar year of performance reflected the following load totals:

YEAR	# LOADS HAULED
2010	109
2011	322
2012	159
2013	91
2014	21
2015	26

Over the remaining course of the Big Shrew South contract, Johnson received additional time (under the CTA provision of the contract) due to bad weather, lack of government appropriations, a government shutdown, and other matters. The final adjusted termination date for the contract was February 13, 2016.

Johnson's Certified Claim and USDA's Refund to Johnson

On June 26, 2015, while harvest operations continued, Johnson submitted a certified claim for \$1,112,417, alleging that unreasonable management decisions by USDA restricted Johnson's ability to productively log the sale. Johnson claimed \$741,837 for lost productivity; \$22,000 for equipment damage; \$54,000 for mandating the use of inadequate skid trails; \$52,600 for unreasonable suspensions of work; lost profits in the amount of

³ The record shows different amounts for the same figure. The lowest amount was \$61,000, the highest was \$75,000. The total figure included the five deposit payments, funds in the account, and a stumpage payment of \$10,599.

\$91,980 for unharvested timber;⁴ and business devastation damages in the amount of \$150,000.

On August 24, 2015, the contracting officer documented the substance of a phone call she had with Johnson about the claim. The document stated, in relevant part:

I told [Mike] that I had been working on my [final decision] in response to his claim and in the process, discovered that the CTE appraisal was done using an incorrect date and the stumpage rate should not have changed. He said he was very frustrated, as those payments broke him I told him that I would put together a modification to change the rates back, refund him He asked if . . . he [could] get more time added on so he [could] finish the contract. . . . I reminded him that I already asked [the regional office] and they said nothing was coming. He asked if an exception could be made due to the local conditions, with mills shutting down. I told him he could submit a written request and I'll pass it up.

On August 26, 2015, Johnson signed a second modification to the contract correcting the rates for the one-year CTE. The modification reflected the correct rate of \$2.30 per ton, versus the charged rate of \$11.91 per ton, and the correct monthly deposit of \$159.95 per month, rather than the assessed amount of \$10,328.93 per month. Johnson again requested more time due to the error. USDA issued Johnson a refund, but did not respond to the request for additional time.

The Contracting Officer's Final Decision and Johnson's Appeal

On November 6, 2015, the contracting officer issued a final decision denying Johnson's claim in its entirety and asserting a counterclaim of \$2424.02 for costs resulting from the purchaser's failure to cut and remove timber prior to the CTE. The decision acknowledged that USDA owed Johnson \$2162.16 in interest for excess CTE deposits, but maintained that this amount was offset by USDA's counterclaim and that Johnson actually owed USDA \$261.86.

On December 4, 2015, Johnson timely appealed the contracting officer's final decision to the Board. Johnson's appeal was docketed as CBCA 5089. In February 2016, while the appeal was pending before the Board, the Big Shrew South contract expired.

⁴ For the lost profits portion of the claim, Johnson contended that USDA breached the contract when it required Johnson to pre-pay unharvested timber at \$12 per ton, instead of its original bid price of \$4 per ton.

Approximately 6102 tons of timber remained unharvested. Johnson's total timber harvest was 20,647 tons.

USDA's Claim Against Johnson, Johnson's Appeal, and USDA's Summary Judgment Motion

By letter dated November 2, 2016, the contracting officer asserted a claim against Johnson, stating that USDA would retain \$21,551.86 of Johnson's money to complete post-termination work. The letter identified itself as a contracting officer's final decision. On January 31, 2017, Johnson appealed the decision to the Board. The appeal was docketed as CBCA 5619 and consolidated with CBCA 5089.

USDA filed a motion for summary judgment on Johnson's entire claim. The Board granted the motion as to the business devastation claim and denied the motion on the remaining claims. *Michael Johnson Logging v. Department of Agriculture*, CBCA 5089, 18-1 BCA ¶ 36,938 (2017). After informal attempts to resolve the disputes were unsuccessful, the Board heard testimonial evidence on the remaining claims.

Discussion

We evaluate claims that allege a violation of the duty of good faith and fair dealing consistent with the principles articulated in the Restatement of Contracts, relevant case law, and the terms of the underlying contract. The principles and precedent regarding this duty are well established. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." Restatement (Second) of Contracts § 205 (1981), *quoted in Alabama v. North Carolina*, 560 U.S. 330, 351 (2010). Failure to fulfill that duty constitutes a breach of contract, as does failure to fulfill a duty "imposed by a promise stated in the agreement." Restatement (Second) of Contracts § 235. "The covenant of good faith and fair dealing . . . include[s] the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). These principles have been applied to contracts with the Federal Government. *E.g., Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 828 (Fed. Cir. 2010); *Malone v. United States*, 849 F.2d 1441, 1445-46 (Fed. Cir. 1988).

Johnson alleges that USDA breached the implied duty of good faith and fair dealing through its administration of the contract, which interfered with its ability to productively log the sale. Johnson also alleges a breach of the contract's terms when USDA erroneously calculated deposit amounts for a one-year extension to the contract. As the party seeking damages for these breaches, Johnson has the burden of proving both the fact of its loss and

the amount. *Native American Construction Services, LLC v. Department of the Interior*, CBCA 5232, 16-1 BCA ¶ 36,512.

Skid Trails and Equipment Damage

Johnson claimed USDA did not permit it to construct straight corridors consistent with industry standards, but instead required Johnson to “zig-zag” around saved trees, felled trees, and other forest growths, hindering its operations and damaging its equipment in violation of certain implied duties. To decide this claim, we first look to the terms of the contract. *Airclaims, Inc. v. Department of the Interior*, CBCA 2554, 12-2 BCA ¶ 36,156 (citing *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009)). If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract’s plain language controls. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002).

Here, the contract clearly delineated the requirements for skid trails. The contract specified the width of each trail, the minimum spacing between trails, how to handle fallen trees in the trails, and how much of the surrounding area could be disturbed by the trails. The contract also required USDA’s approval for the location of skid trails and their layout prior to their construction. Johnson accepted the contract’s requirements when it bid on the contract without seeking clarification of its terms or requesting changes to them. Although USDA admitted to making some adjustments to the skid trails laid out by Johnson, the record does not support a finding of contract interference. On the contrary, contemporaneous inspection reports show that Johnson did not object to these adjustments when they were made or oppose them as inconsistent with industry standards. The reports also show that where Johnson sought deviations or extensions to skid trails, or asked that additional trees be cut from them, the requests were almost always granted. A single report refers to a statement by Johnson that certain skid trails were unsuitable because the layout crew made the skid trails on straight compass bearings, causing them to go right through skips and large growth stumps. During this exchange, Johnson merely stated that the trails needed to be redone. Johnson made no reference to industry standards.

In addition to the contract’s clear terms, the record contained no corroborating evidence regarding the conditions of skid trails or their impact on performance, as alleged in Johnson’s claim. The Board has held that “a party asserting a claim has met its burden of proof by presenting corroborating evidence in support of that claim.” *Systems Integration & Management, Inc. v. General Services Administration*, CBCA 1512, et al., 13 BCA ¶ 35,417 (citing *Navigant SatoTravel v. General Services Administration*, CBCA 449, 11-1 BCA ¶ 34,765). No photographs were presented showing trees left in the middle of skid trails or bends in the trails that allegedly impeded performance. Not a single member of Johnson’s crew testified about having to operate around standing trees. None of the other

contemporaneous documents contained comments referring to delays caused by irregular skid trails or complaints about the wear and tear on equipment from having to “zig-zag” around trees. All we have are Johnson’s general statements about the layout of the skid trails and their impact on productivity—issues which were raised for the first time in Johnson’s claim to the contracting officer. Assertions without corroboration are insufficient to prove contract interference, especially since we find the contracting officer’s explanation reasonable (i.e., that the adjustments to skid trails were slight and were made to avoid cutting reserved trees).

We also note that before harvesting began, Johnson signed an operational tree agreement which authorized it to cut trees that were not included in the timber sale, as long as they were cut for operational or safety reasons and not specifically reserved by the contract. Multiple inspection reports reflected Johnson’s understanding of its authority under that agreement and its effective use of the same during performance. Johnson did not explain why this agreement was inadequate to address its operational needs in skid trails, but we presume, based on information in the record, it was due to the prescription which prevented the cutting of certain trees. The prescription was a contract requirement, with which Johnson was required to comply. Nonetheless, Johnson’s expert testified that a different contract provision authorized the removal of *all* trees within a constructed area, which included skid trails. The contracting officer disagreed with this interpretation, as do we.

“In interpreting the language of a contract, reasonable meaning must be given to all parts of the agreement so as not to render any portion meaningless, or to interpret any provision so as to create a conflict with other provisions of the contract.” *Serco, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 1695, 11-1 BCA ¶ 34,662 (citing *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983)). An interpretation that gives a reasonable meaning to all provisions of a contract is favored over one that renders a particular provision “useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.” *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978); *see also, e.g., Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). Because Johnson’s interpretation of the construction clearing provision would render the tree prescription meaningless, we reject it. Even if we were to accept it, we are not persuaded that the skid trails were so congested with standing trees that they interfered with Johnson’s ability to harvest the timber consistent with the contract’s terms. Johnson has not offered a specific example of operations that were adversely impacted due to trees left standing in skid trails. On the contrary, the record is replete with examples of cooperation between the parties when laying out skid trails.

In light of the contract's clear terms and the substantial, performance-related information in the record, we cannot accept Johnson's assertions of interference related to the construction and approval of skid trails. Expert testimony that industry standards required straight skid trails does not prevail over the clear terms of the contract. *Sam's Electric*, GSBICA 8497, 89-3 BCA ¶ 22,166. Johnson's argument that USDA permitted straight skid trails on other timber sales fails for the same reasons. Adjudicating the merits of Johnson's claims under *this* contract requires us to interpret the same. We see no reason to entertain extrinsic evidence when the terms of this contract were clear.⁵ *Douglas P. Fleming, LLC v. Department of Veterans Affairs*, CBCA 3655, 16-1 BCA ¶ 36,509 (citing *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996); *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993)).

Since we find that the planning and administration of skid trails were consistent with the terms of the contract, we need not address Johnson's claims for equipment damage purportedly caused by irregular skid trails. Accordingly, we deny all claims attributed to irregular skid trails and equipment damage.

Landing Size

Johnson claimed that landings were too small, making work difficult and dangerous. As with the skid trails, Johnson attributed these conditions to USDA's mismanagement of the contract, but unlike the requirements for skid trails, the contract did not specify dimensions for landings. Instead, the contract based landing size on "efficiency." Even where soil erosion was a significant concern in specified sale units, the contract did not impose any dimensions for constructing landings. In those areas, the contract required the purchaser to mark clearing limits on the ground and to obtain approval by USDA. By establishing operational efficiency as the benchmark for determining landing size, the contract authorized *Johnson* to decide how large or small each one should be. USDA's role was generally limited to approving the location of landings.

⁵ The United States Court of Appeals for the Federal Circuit has held that even where a contract is unambiguous, evidence of trade practice and custom may be useful in interpreting a contract term whose ordinary meaning is different from the accepted industry meaning. *TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006) (citing *Hunt Construction Group, Inc.*, 281 F.3d at 1373). The fact that Johnson's engineer, a former Forest Service employee, laid out skid trails on straight compass bearings lends credibility to this argument. However, since Johnson did not provide sufficient evidence of skid trail conditions as alleged, industry standards are unavailing in these circumstances.

Despite this clear division of responsibilities, Johnson maintains that USDA exceeded its authority by insisting on smaller landings, making the work less efficient and significantly more dangerous. The evidentiary record does not support these assertions. On the contrary, it illustrates a cooperative pattern of planning, approval, and construction. For example, TSIRs dated December 1, 2010, May 22, 2013, August 27, 2013, and July 2, 2015, all showed that Johnson asked USDA to mark additional trees to widen landings, and they were marked as requested. The contracting officer testified that she recalled making one or two adjustments to landings to comply with the requirement that landings adjacent to certain roads had to be “a minimum of 50 feet off the road surface where feasible unless otherwise agreed to in writing by the USDA.” This provision, like several others, impacted the layout of landings without specifically defining their dimensions. Johnson did not dispute this explanation nor did Johnson provide any evidence of specific instances during performance where it was forced to operate in a landing that did not comply with the contract’s terms. Even where serious injuries occurred on a landing, Johnson offered no evidence linking the size of that landing with specific directives or demands by USDA personnel.

Before the hearing, Johnson revisited the sale area to measure the landings. Johnson testified that they ranged in size from 73 feet by 78 feet, to 144 feet by 111 feet. Expert testimony on this issue established the ideal landing size as 128 feet by 128 feet because it allows for safe and efficient operations consistent with industry standards. The fact that many of the landings on Big Shrew South were smaller than the industry standard is not evidence of breach, especially since the contract gave Johnson the discretion to determine landing sizes. Furthermore, had landing sizes been a significant concern during performance, we would have expected Johnson to have measured them at that time and to have communicated those concerns to USDA officials, but Johnson did neither. To explain this evidentiary void, testimony was offered regarding Johnson’s compliant disposition and general reluctance to challenge agency decisions during performance. Explaining a lack of evidence, however, should not be confused with meeting an evidentiary burden.

In reviewing what was offered as evidence of contract interference—testimony about ideal landing sizes, safety violations with no direct connection to agency actions, and adjusting landing sizes to comply with the contract’s terms—we find that such evidence fails to support Johnson’s assertions of mismanagement and interference. Accordingly, we deny Johnson’s claim for lost productivity as it pertained to landing sizes.

The Requirement to Use Pre-Existing Skid Trails

Johnson claimed that the requirement to use pre-existing skid trails caused flooding and halted work. The contract instructed bidders to “[u]se existing skid trails where they meet spacing guidelines.” When Johnson bid on the contract, Johnson signed a bid form certifying and representing that it read and understood the terms of the contract, including

the requirement to use existing skid trails where they met spacing guidelines. Johnson further agreed to assume the responsibility “to clarify any questions before signing this form,” and, by signing, Johnson “expressly adopt[ed] the terms of this bid form and the sample contract as material parts of the Bidder’s offer for the advertised timber or forest product.” *Jonathan Noeldner v. Department of Agriculture*, CBCA 5379, 16-1 BCA ¶ 36,499. Despite Johnson’s significant logging experience, Johnson presented no evidence that it sought clarification of this requirement or a modification of the contract prior to bidding on the contract. Thus, by submission of his bid, Johnson agreed to use existing skid trails where required.

At some point during performance, Johnson expressed a desire to cut trails at higher elevations to avoid standing water, but we found no evidence that any specific requests were submitted to the contracting officer or other officials for approval. Without a contract modification or an approved deviation from the contract’s requirements, Johnson was required to comply with them, including the requirement to use pre-existing skid trails where they met spacing guidelines. The fact that using such trails made performance more difficult during wet weather does not constitute interference. We deny the claim.

Performance Suspensions

“Both the duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing.” *Precision Pine*, 596 F.3d at 820 n.1. Johnson claims that USDA violated these duties when it suspended Johnson’s operations on three separate occasions: in April 2010, August 2010, and October 2010. In its claim for damages, Johnson seeks compensation for idle equipment and labor costs while suspended for a total of twenty-five days. Johnson acknowledges that the contract authorized USDA to suspend performance in the event of a material breach, but maintains that, under the circumstances of each breach, suspension was not warranted. According to Johnson, the breaches were too minor in nature to suspend work. By shutting Johnson down on these occasions, as opposed to simply documenting, warning, and remedying the breach in place, Johnson asserts that USDA hindered Johnson’s performance in violation of USDA’s duty to cooperate and, consequently, deprived Johnson of the fruits of its labor. We disagree.

Based on the covenant of good faith and fair dealing inherent in every contract, all parties to a contract are charged with acting reasonably. *Butte Timberlands, LLC v. Department of Agriculture*, CBCA 646, 08-1 BCA ¶ 33,730. Bearing that standard in mind, we find that USDA acted reasonably when it suspended Johnson’s operations. All three suspensions occurred during the *first* year of performance, which was approximately two-and-a-half years after the contract was awarded. Agency officials explained that at the outset of a timber contract, it is important to ensure the purchaser understands the requirements, especially the tree designation. In suspending Johnson’s operations the first

time, USDA determined that Johnson's inability to distinguish between trees that could be cut and those that could not rendered its continued operations a threat to USDA resources. Johnson illustrated this concern when it progressed from cutting five undesignated trees under the first suspension to mowing down a twenty-nine-tree wind buffer just four months later. The fact that it was twenty-nine trees among thousands, or that Johnson self-reported the violation, does not transform a contractual exercise of authority into an abuse of discretion.

Furthermore, the first two suspensions were partial suspensions—only cutting was suspended. Skidding and hauling operations were permitted to continue. The first suspension was lifted the same day that Johnson remedied the breach, and the second one was lifted two days after Johnson remedied the breach. The third suspension was issued due to erosion damage caused by wet weather operations. Lifting the suspension required the installation of silt fencing to prevent further erosion. Although Johnson installed the fence as directed, USDA halted operations in that subdivision until the water dispersed and the ground froze. In the meantime, however, Johnson was permitted to move its operations to an area more suitable for wet weather work.

In light of the contract's clear terms and the relevant facts, we find no breach of USDA's implied duties based on any of the suspensions. Contrary to Johnson's repeated allegations that USDA "shut it down" and destroyed its momentum, we find that each suspension allowed Johnson to continue working on some aspect of the sale. This is the essence of reasonableness. There was no subterfuge, no lack of cooperation, and no abuse of power to determine compliance—none of that was present here. The election to suspend Johnson's operations was simply a contractual response to a violation of the parties' agreement. We are further reassured that USDA acted reasonably based on the information reflected in multiple TSIRs, which showed that where one or two trees were mistakenly cut, Johnson was able to continue operating. This demonstrated that USDA not only tailored suspensions to remedy specific transgressions, but also acted reasonably in those cases where Johnson had been working for several years on the sale but made an occasional mistake. For these reasons, we find that where suspensions were issued for cutting the wrong trees or for causing erosion damage, the breaches were Johnson's, not USDA's. Accordingly, we deny Johnson's claim for damages based on performance suspensions.

Contract Extension Deposits

In approving Johnson's request for a one-year extension, USDA grossly miscalculated the amount of the required extension deposits. Because the contract's terms established a method for calculating the deposits, and USDA failed to comply with it, Johnson claimed that USDA breached the contract's express terms, depriving Johnson of much-needed capital

to complete performance. In its claim, Johnson seeks lost profits in the amount of \$91,980 for the unharvested timber.

USDA admitted to the miscalculation, but treated it as an administrative error remediable through a simple modification to the contract to correct the rates and refund the excess deposit amounts. In addition to a refund, the contracting officer determined that USDA owed Johnson \$2162.16 in interest for holding the excess deposits. Although the parties do not dispute the facts underlying this issue, they disagree on the legal import of those facts. Here, we must decide whether USDA's actions constituted a breach of contract and, if they did, what the appropriate remedy is for the breach.

To recover for a breach of contract, a party “must allege and establish (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach.” *TAS Group, Inc. v. Department of Justice*, CBCA 52, 08-1 BCA ¶ 33,866. The record readily establishes USDA's breach. First, the Big Shrew South contract at B.8.23 contained a provision for calculating contract extensions. Second, that provision directed USDA to use “appraisal data in effect 45 days prior to the *original* Termination Date” (emphasis added); the contract's original termination date was December 31, 2010. Third, in her final decision, and at the hearing, the contracting officer admitted that USDA used the wrong termination date (September 23, 2013), resulting in a monthly deposit amount of \$10,328.93, rather than the correct amount of \$159.95 per month. Furthermore, the contract contained no disclaimers or remedy-granting clauses that would preclude a finding of breach. *See Cochran Lumber Co. v. Department of Agriculture*, CBCA 895, 09-2 BCA ¶ 34,154 (no finding of breach when USDA failed to comply with the Forest Service Manual in calculating timber estimates since the contract did not expressly require compliance with the manual and because purchaser signed a disclaimer holding USDA harmless from such errors); *cf. Cleereman Forest Products*, AGBCA 2000-101-1, 02-1 BCA ¶ 31,664 (2001), *reconsideration denied*, 02-1 BCA ¶ 31,829 (where a breach of contract was found when USDA did not abide by the Timber Cruising Handbook in developing the cruise, but the contract expressly stated that it did).

USDA advanced several arguments against a finding of breach. These included the fact that the contracting officer identified the error, not Johnson; the understanding that timber sales do not guarantee a profit; and the concern that a finding of breach would dissuade contracting officers from granting CTEs in the future since they are granted at the discretion of the contracting officer. We are not persuaded by these arguments. The contracting officer identified the error in response to Johnson's certified claim and refunded the excess deposits two years after they were assessed. Although the contract did not guarantee that Johnson would make a profit, that principle speaks to the contractor's ability to perform—not to the circumstances here, where the agency's miscalculation was so

substantial that the resulting deposits could not be construed as a routine cost of doing business.

Normally, an overcharge like the one at issue here will not provide a basis for damages, as a contractor is expected to be able to have sufficient financial resources to perform its contracts. *See Litchfield Manufacturing Corp. v. United States*, 338 F.2d 94, 98 (Ct. Cl. 1964) (inadequate financial resources do not excuse non-performance since the financial ability and capacity of a contractor to perform a government contract is a matter within its control); *see also RAK Contractors v. Department of Agriculture*, CBCA 4011, 15-1 BCA ¶ 35,934 (“A lack of working capital is not an excuse for non-performance of a contract when the Government does not contribute to the financial problem of the contractor.”); *Electro Optical Mechanisms, Inc.*, ASBCA 20422, 79-2 BCA ¶ 14,118 (“The financial burden resulting from production and performance disruptions falls upon appellant under the general rule that contractors have the responsibility to provide the necessary financial resources for performance.”). Nevertheless, that rule cannot apply in situations in which the agency’s financial imposition is so overwhelming and outrageous that it would put even the most conservatively and carefully positioned contractor in dire straits. Here, USDA’s demand that, contrary to the actual terms of the contract, the contractor pay a fee that was more than 6000% above what the contract required made it impossible for this particular contractor to harvest the remaining timber. All of the funding that Johnson would have used to perform the logging activities had been taken by USDA. Such a demand would have done the same to virtually any contractor of the size of appellant, given that contractors of that size and nature do not typically possess the type of resources to fulfill the financial demand that USDA incorrectly imposed here. *See Cleereman*, 02-1 BCA ¶ 31,664 (“While every Government failure to follow a procedure . . . is not material and every failure by the Government does not [entitle] a purchaser to relief for breach, this case involves specific overwhelming facts.”).

As to the last argument, regarding the impact that a finding of breach will have on future CTE requests, we decline to speculate on what other contracting officers would do under similar circumstances, but we are generally optimistic that such errors are not routine. USDA’s breach was plain, and we find its arguments to the contrary unavailing. We turn now to the issue of Johnson’s damages.

USDA previously determined that the proper measure of Johnson’s damages was \$2162.16, which represented interest on the overcharged amounts. We disagree with USDA’s determination. Interest is an appropriate remedy in cases that involve a delay in payment or the withholding of a payment owed to a party. *See Ramsey v. United States*, 101 F. Supp. 353, 356 (Ct. Cl. 1951) (“The law is well-settled that as a general rule, special damages, beyond the amount recognized as legal interest, cannot be recovered for a breach of contract to pay money which results only in a delay in payment.” (citing *Loudon v. Taxing*

District, 104 U.S. 771 (1881))). The circumstances here are different. Johnson was not seeking payment of an invoice. Johnson made payments to USDA in exchange for more time to harvest the remaining timber. Any timber left standing in the sale area when the contract expired meant Johnson would not only forfeit what it paid USDA for the unharvested timber, but also that Johnson would lose the opportunity to harvest and sell the timber for a profit.

The common law measure of damages for breach of contract is to place the contractor in as good a position as it would have been had the breach not been committed. *Ardco Inc. v. Department of Agriculture*, AGBCA 2003-183-1, 06-2 BCA ¶ 33,352. “One way the law makes the non-breaching party whole is to give him the benefits he expected to receive had the breach not occurred.” *Glendale Federal Bank v. United States*, 239 F.3d 1374, 1380 (Fed. Cir. 2001) (citing Restatement (Second) of Contracts § 344(a)). “The benefits that were expected from the contract, ‘expectancy damages,’ are often equated with lost profits, although they can include other damage elements as well.” *Id.*; see also *Force 3, LLC v. Department of Health & Human Services*, CBCA 6654 (Apr. 27, 2021). The test for lost profits requires the non-breaching party to establish, by a preponderance of the evidence, that (1) its loss was the proximate result of the breach, (2) the loss of profits caused by the breach was within the contemplation of the parties because the loss was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting, and (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty. *Energy Capital Corp. v. United States*, 303 F.3d 1314, 1325 (Fed. Cir. 2002).

Here, the evidence establishes a clear link between the agency’s breach and Johnson’s critical lack of operating capital. The agency’s own expert witness pointed to insufficient cash flow as a significant factor in Johnson’s failure to complete the sale. The witness observed that, without adequate funds to pay crews, logging operations substantially declined. Agency inspection reports issued during the CTE period documented the lack of activity on the sale, even when the weather was ideal for logging operations. Corresponding scaling records underscored this lack of activity: Johnson hauled a mere fourteen loads during the CTE period, whereas previous annual hauls consisted of 91, 159, 322, and 109 loads.

USDA points to that same performance record to support the theory that Johnson himself—not USDA—was the impediment here. Johnson’s performance at various times was not without its challenges. Those challenges, however, were not an intervening cause of Johnson’s damages during the one-year extension period. At that time, Johnson had subcontracted High Math to another contractor and had completed nearly 80% of the Big Shrew South contract. Without the funds to pay a crew and other operating costs, however, Johnson’s owner self-performed much of the work, which resulted in significantly lower hauls. The consequence of the agency’s breach was clear: without adequate funding, the

CTE was fruitless. Each miscalculated extension deposit constituted a breach of the contract's express terms, compounding Johnson's performance burdens. Despite Johnson's attempts to regain momentum, it was unable to complete the harvest.

The second factor that we must consider is whether Johnson's damages were foreseeable. In *Chain Belt Co. v. United States*, 115 F. Supp. 701 (Ct. Cl. 1953), the Court of Claims established a fact-based standard for foreseeability of lost profits. The Court quoted from the Restatement of Contracts: "If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise it must be shown that the defendant had reason to know the facts and foresee the injury." Restatement of the Law, Contracts § 330. A mathematical error that eviscerates the operating capital of a small business creates a foreseeable loss. Moreover, Johnson raised concerns about the deposit amount at the outset of the CTE period, placing USDA on notice that the deposit amounts were plainly excessive. Based on these facts, there can be no doubt that USDA had reason to anticipate that the breach would cause the type of loss incurred here. See *Nycal Offshore Development Corp. v. United States*, 743 F.3d 837, 840-41 (Fed. Cir. 2014) ("[G]iven the terms of the lease agreements, the government assumed the risk that if it interfered with the oil companies' option to explore, 'it was on the hook for whatever profits could be established with meaningful certainty.'").

Notwithstanding that conclusion, the requirement that damages be foreseeable carries with it a contractor's duty to mitigate its damages. Restatement (Second) of Contracts § 350. "Once an unforeseeable event occurs, the contractor cannot sit back and fail to take reasonable steps in response to it . . . it has an obligation to attempt to mitigate the resulting damage." *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 17-1 BCA ¶ 36,870 (citing *Midwest Industrial Painting of Florida, Inc. v. United States*, 4 Cl. Ct. 124, 133 (1983)). If Johnson could have taken steps to reduce its damages, its recovery is limited by this duty. Here again, we note the unusual circumstances of this case and find that Johnson's hauls during the CTE, meager as they were, were an attempt to mitigate its losses. Furthermore, when the agency finally acknowledged its miscalculation, Johnson implored the contracting officer to grant it additional time, but such requests fell on deaf ears. Returning the deposits without granting Johnson the opportunity to complete the harvest deprived Johnson of its best opportunity to mitigate its damages. Any meaningful argument that an award of lost profits would disproportionately compensate Johnson was stripped away by the agency's own actions.

The Federal Circuit has held that when a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery. *California Federal Bank v. United States*, 245 F.3d 1342, 1350 (Fed. Cir. 2001). On the other hand, the computation of damages must be more than mere speculation. *Bob L. Walker v. Department of Agriculture*, CBCA 2131, et al., 18-1 BCA ¶ 36,921 (citing *Willems*

Industries, Inc. v. United States, 295 F.2d 822, 831 (Ct. Cl. 1961)); see also *Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636. Johnson based its calculation of lost profits on the amount of timber it paid for but left standing, then reduced that amount by its performance costs. This amount was relatively easy to quantify. The volume of unharvested timber at contract expiration was undisputed, and lumber prices and performance costs were readily ascertainable. The record is replete with performance data and financial information, including scaling reports, USDA bills of collection for harvested timber, confirmation of payment receipts, USDA Timber Sale account statements, and timber appraisals, which provided detailed data on performance costs. Johnson based his claim for lost profits, in the amount of \$91,980, on 180 loads of unharvested timber at the time of claim submission, multiplied by \$1400 per load, then multiplied again by a cost factor of .365.

USDA did not dispute these figures at any point from receipt of Johnson's claim through the hearing and post-hearing submissions. USDA's expert witness was an experienced Forest Service auditor who was called for the purpose of rebutting the damages report on lost productivity and other claims produced by Johnson's accounting expert. Notwithstanding the scope of this testimony, the agency was free to address the issue of Johnson's claim for lost profits, but did not. We find no reason to challenge it here. However, because scaling reports show that Johnson hauled five additional loads of timber between submission of its claim and the expiration of the contract, Johnson's load count should be reduced by five. Accordingly, we find \$89,425 to be the appropriate measure of Johnson's damages.

USDA's Counterclaim

In the contracting officer's final decision, the agency asserted a counterclaim against Johnson in the amount of \$2424.02, consisting of \$47.27 in interest on timber left standing at the time of the CTE and \$2376.75 for the costs that USDA incurred to re-establish cutting unit boundaries and re-mark areas requiring protection on the sale area. USDA contended that it incurred these costs due to the purchaser's failure to cut and remove timber prior to the CTE. The latter figure allegedly covered salary costs of USDA employees (\$2081.25) and the costs of flags and tags (\$295.50). The contracting officer stated that these amounts were not known at the time of the CTE, yet the contracting officer previously determined that Johnson met all of the qualifying conditions for the CTE.

In response, Johnson stated that this work fell within the scope of the agency's duties, so USDA, not Johnson, was responsible for funding these costs. The agency did not respond to this assertion nor provide any additional evidence in support of its claim. The Board has found that a party asserting a claim has met its burden of proof by presenting corroborating evidence in support of that claim. *Navigant SatoTravel*. USDA offered no such

corroboration. For these reasons, we conclude that USDA has not met its burden of proof with regard to its counterclaim. The agency's claim against Johnson for \$2424.02 is denied.

USDA's Second Claim Against Johnson (CBCA 5619)

The appeal docketed as CBCA 5619 stemmed from a final decision by the contracting officer to retain a cash performance bond of \$6000 and the cash balance of \$15,551.86 remaining in Johnson's timber account for a total \$21,551.86. The contracting officer stated that these amounts were retained to complete post-termination work on Big Shrew South.

In reviewing the record, we find that USDA's claim was not supported by evidence of actual costs incurred by the agency, but rather by email messages with various estimates and a spreadsheet of proposed costs. We need not address the sufficiency of this evidence, however, since we determined under CBCA 5089 that USDA's breach precluded Johnson from completing the sale. We deny USDA's claim for unfinished restoration work for the same reason. Accordingly, we grant Johnson's appeal of the agency's claim.

Decision

We **GRANT IN PART** the appeal in CBCA 5089. Johnson's claims for lost productivity, equipment damage, use of inadequate skid trails, and suspensions are denied. Johnson's claim for lost profits is granted, but reduced. The agency shall pay Johnson \$89,425, plus interest consistent with 41 U.S.C. § 7109. This award of damages vacates and replaces the agency's previous award of \$2162 in interest for excess deposits.

We **GRANT** the appeal in CBCA 5619. All amounts retained by the agency under this appeal shall be returned to Johnson.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge