

<b>JANTZER &amp; SONS LOGGING, INC.,</b>	)	<b>AGBCA Nos. 2004-132-2</b>
	)	<b>2004-133-2</b>
Appellant	)	<b>2004-134-2</b>
	)	
<b>Representing the Appellant:</b>	)	
	)	
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	)	
<b>Representing the Government:</b>	)	
	)	
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**DECISION OF THE BOARD OF CONTRACT APPEALS**

February 17, 2005

**Before POLLACK, Administrative Judge.**

**Opinion for the Board by Administrative Judge POLLACK.**

These appeals arise out of Contract No. 53-04-3-1-0026, Elk Creek Fuels Project, between Jantzer & Sons Logging, Inc., (Jantzer) of Grants Pass, Oregon, and the United States Department of Agriculture, Forest Service (FS), Wallowa-Whitman National Forest, Baker City, Oregon. The appeals involve three separate issues:

- (1) Claim that the FS required additional work when it required the removal of essentially all of the 3-inch to 6.99-inch material, rather than allowing Appellant to leave 10 to 15%, prior to lop and scatter. (\$43,378.00)
- (2) Claim that Appellant should not be bound to reduce the contract by \$50 per acre, because lop and scatter was not required. (\$12,900)
- (3) Claim that FS should not be allowed to make a deduction to cover additional costs of a helicopter manager. (\$8,822.39)

Appellant filed its claim with the FS on August 11, 2003. The Contracting Officer (CO) addressed the disputes in a decision dated October 29, 2003. The Appellant filed a timely appeal. The board has jurisdiction pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended.

Appellant elected to utilize the Board's expedited procedure, which calls for a single-judge decision. The time constraints were extended to allow the parties to engage in settlement discussions and to give Appellant time to consider if it wished to engage an attorney. Appellant elected to proceed without securing counsel and settlement discussions proved fruitless. During processing, the Board discussed concerns that the appeal involved disputed facts, stated to the parties that credibility could be in issue and suggested that a hearing might create a more complete record. The parties, however, elected to submit on the record pursuant to Board Rule 11. Since this matter is being handled on an expedited basis under Board Rule 12.2, the decision of the Board is not appealable and cannot be cited for precedent.

On June 27, 2001, the FS released a Request for Proposals (RFP) on the project which called for material to be removed from a designated area in order to lessen the potential for fire and to leave units in a condition where they could be safely under-burned. Because of the project's remote location, logs and other material were to be removed through helicopter operations. The material would be taken to landings and from there either distributed or burned. Material that remained after the helicopter removal operation needed to be lopped and scattered in a manner prescribed by the FS. The RFP called for work to start by October 2001 and be completed by June 2004. It had no requirement that activities be completed within a specified number of days. It specified that in order for the helicopter operation to proceed, a qualified helicopter manager was required on the project and the RFP indicated that the FS would provide the helicopter manager.

Appellant submitted a contract proposal of \$559,975.22 on or about August 1, 2001, which contained a chronological narrative that described what Appellant expected to do. There, Appellant said that it expected to start helicopter yarding of material on June 1, 2001 and that the helicopter will yard all merch (meaning merchantable) material and attempt to yard all 3-inch to 6.99-inch material. It said that this is the only acceptable way to reduce the fire risk in the units. Appellant said a small amount of 3-inch to 6.99-inch material may remain. It would provide lop and scatter for this minimal amount of slash. Appellant continued that it would remove approximately 364 tons per day and the helicopter would land the material on the designated landing site where a track mounted log loader would sort out the 3-inch to 6.99-inch material from the 7-inch and larger. The larger material (logs) would go for processing into saw logs and fire chip logs, while the 3-inch to 6.99-inch material would be placed in a designated pile, for possible chipping into biomass material. Appellant continued that final slash treatment consisting of lop and scatter to an 18 inch height. Pull back from leave trees and boundaries would begin once yarding in units 32 and 30 were completed and would proceed continuously through all the completed units. In the proposal, Appellant provided a schedule, which showed the start of falling of the 7-inch and 3-inch to 6.99-inch material on May 2, 2002, and helicopter yarding starting on June 1 and ending on June 30. The last date for work on the project was July 15, 2002.

Appellant and other offerors submitted proposals. The FS did not accept any original proposals, but, instead negotiated with offerors in the "competitive range." The record does not contain documents

regarding negotiations or alternative offers. In a letter dated August 8, 2001, the CO asked Appellant to respond to a set of questions, including the following: "How much of the material in the 3 to 6.99" range do you really plan to fly to the landings?"

Appellant responded by letter of August 10, 2001. There, Appellant stated it was revising its proposal and was providing two price proposals to choose from, depending on how the 3-inch to 6.99-inch material was to be handled. It then laid out 10 bullet items, two of which I address below.

In the fifth bullet, Appellant addressed the FS question as to the removal of the 3-inch to 6.99- inch material. Its response essentially paralleled what it said in the original proposal.

We will put forth our best effort to fly all 3 inch to 6.99 inch material. The possibility exists that a piece could slip out of a choker. Also some pieces are so scattered that it would take stringing out to [sic] many chokers to get a productive load for the helicopter and it would cause damage to residual trees. Yarding this type of material is very uncommon with helicopter logging operations so there is some uncertainty regarding the amount of this small material that may be left. After completing a unit, if the USFS is satisfied with the small amount of slash that may be left and as a result forego the lop and scatter, and pullback, Jantzer & Sons will reduce the price of Proposal 1 or 2 by \$50.00 an acre.

In the sixth bullet of the same letter, Appellant said that in its first proposal, it considered pullback to be any unflown 3-inch to 6.99- inch (if any) material left in the units. During lop and scatter, it was to pullback material from leave trees approximately 15 feet. It would also pullback the 3-inch to 6.99-inch material 15 feet from unit boundaries. Appellant continued, stating, "Once again if the USFS feels that a small amount of left over slash is satisfactory and after inspection it is determined that no further treatment is needed, we would reduce our price by \$50.00 an acre."

On September 26, 2001, the FS accepted Appellant's offer, as revised, at the contract price of \$607,486.22. That price was computed by adding its bid on the initial proposal (as revised) of \$575,455.22 and adding to that \$32,031, which involved the treatment of the biomass. Between the date when it accepted the proposal and when the FS issued Notice to Proceed (NTP) in May 2002, the FS engaged in a number of internal discussions relating to the helicopter operation. In those conversations, the FS expressed internal concerns over what type of helicopter was going to be used by Appellant, based on the fact that Appellant had changed to a smaller helicopter.

On or about May 9, 2002, Appellant submitted a revised proposal. There is no explanation as to why. This proposal again set out a narrative of how the work was expected to be performed. It did not extend the end date for work that had been included in the awarded contract, however, it did change the schedule for helicopter operations, showing helicopter yarding and processing of 7- inch and larger material starting May 15, with the last yarding activity being completed on July 12, 2002. It showed lop and scatter and pullback to be completed by July 15, 2002.

The FS issued NTP on May 10, 2002. The notice did not cover helicopter operations. Thereafter, Appellant commenced helicopter operations on May 15, 2002, 16 days earlier than had originally been anticipated in its earlier proposal. The May 15, 2002 start conformed to the Appellant's May 9, 2002 revised proposal. As of May 15, the FS had not issued any document regarding the revised proposal, although work was proceeding on that basis.

At the time it issued the NTP and at the time the Appellant began its helicopter operations, the FS knew Appellant's helicopter operation was scheduled from May 15 to July 12. The FS said nothing about an increase in the costs due to having to provide a helicopter manager for additional days. Also, in June, the FS had internal communications as to concerns over the use of a helicopter manager. Because of an active fire season, the furnishing of the manager had become an unanticipated problem.

On or about June 12, 2002, the FS determined that it would be unable to continue to provide a helicopter manager, without going to an outside source. Without the presence of a helicopter manager, the FS would have had to suspend work under the contract, as flying required the presence of the manager.

On or about June 18, 2002, the FS presented the Appellant with Modification 2. The record does not show when this was first prepared by the FS. In the modification, the FS said it was accepting Appellant's revised proposal. It also included language that provided that the contract payments would be offset by the government's cost of providing a helicopter manager if the Appellant's helicopter operations exceeded 30 days. In the cover letter, the FS also advised Appellant that it was falling behind its schedule and the FS wanted to know what Appellant would do about that.

Appellant alleges that until it received the modification, it was unaware that the FS was planning to charge it for the helicopter manager. The CO says otherwise in her final decision where she states that the matter was discussed by the parties prior to the signing. Appellant also contends that once Appellant received the modification, its officials had immediate concerns about the charges and Bill Jantzer, an official of the Appellant, had internal discussions with others, within the company, as to what to do. The record however contains no evidence that Appellant brought these concerns to the attention of the CO, and Appellant has not produced any contemporaneous communication from Appellant to any government official challenging this matter. The CO, in her decision, states that Appellant made no protest and she describes the process of the modification as being essentially without problems. She also produces no notes of meetings, so we are left with competing versions of events. As best can be determined from the record, Bill Jantzer did not agree that Appellant had the responsibility to pay the manager, he was worried however that if Jantzer did not sign the modification, then the FS would shut the job down and he would lose the helicopter to fire fighting or another job. Based on these business concerns, the Appellant made the decision to sign. The record does not show that Appellant informed the FS that it was signing the modification under protest nor that it was signing under duress.

On June 20, 2002, before it signed the modification, Appellant responded to the CO letter of June 18 and specifically to the CO concerns over meeting the schedule. Appellant told the CO that it had sent a letter to the helicopter subcontractor as to the FS concerns and that the subcontractor has repeatedly confirmed that it intended to finish by July 15. The letter said that Jantzer would update the FS as

soon as it got a response. Nothing in the letter addressed the language as to the helicopter manager or protested its inclusion.

On June 24, 2002, the parties executed Contract Modification 2. The modification accepted and incorporated the revised proposal of May 10, 2002 into the contract; addressed the payment offset for the helicopter manager; and, also addressed changes as to the piling of slash. On June 25, 2002, Appellant submitted a revised operating schedule from its helicopter subcontractor (Croman). It called for the subcontractor to likely complete between July 8 and 12. The FS accepted the revised schedule on the same day.

Helicopter operations were completed at approximately 8 a.m. on July 13, 2002. By letter of August 26, 2002, the FS notified Appellant that final contract payment would be reduced by \$8,822.39, the costs incurred by the FS in providing a helicopter manager for the days Appellant exceeded its original proposal, in accordance with Contract Modification 2. In addition, the FS further reduced the contract payments by \$12,900, or \$50 per acre, for 258 acres, pursuant to the contract. This was on the basis that the FS had determined that the amount of slash left on the ground did not need further treatment, that is, lop and scatter and pullback. At this point the FS had no claim for additional work.

The overall record indicates that the FS generally required the Appellant to remove "all" 3-inch to 6.99-inch material during the removal process and because the area was essentially cleared of the material, there was no need to have the FS order Appellant to lop and scatter. I do not use "all" in an absolute sense, but rather use it to mean essentially all of the material.

Appellant failed to present a claim to the FS during the actual prosecution of the contract. In fact, it appears that the first letter to the CO asking for compensation for the items in issue, was not sent to the FS until June 19, 2003. The letter had been incorrectly dated 2002, but no one disputes the error. In the letter, Appellant laid out its position on the three issues. It repeated various provisions in its proposal, which it said indicated that it was never Jantzer's intention to remove all 3-inch to 6.99-inch material. It repeated that it intended to leave 10 to 15% of the material, which would be treated with lop and scatter. Appellant said that Mr. Kelsey, the Contracting Officer's Representative (COR), would not let Appellant leave the 10 to 15%, and that early in the sale Bill Jantzer talked to Mr. Kelsey about the amount of 3-inch to 6.99-inch material which could be left. Appellant said that Mr. Kelsey told him that all had to be removed. Appellant said that the contract and technical proposal were vague on how much slash must be removed versus lop and scatter. Appellant then said that once the sale began, it became clear that significant additional work was required, it continued, "At that point, . . . alternatives were either complying with the additional expectations or have Chris Kelsey shut the sale down." Appellant continued that if it had been shut down then it would have lost the helicopter until September 2002, and that was not acceptable to either the government or Jantzer. "We felt our only alternative was to complete the extra work and request additional compensation commensurate with the work involved."

In the June 19, 2003 letter, Appellant also addressed the \$50 credit. Appellant stated the offer was based on economics and on the basis that if there was a reasonable basis to lop and scatter, but the government elected to forgo the requirement, then Appellant would give the credit. According to the

Appellant, once it had to essentially clean sweep the area, Appellant was in a no-win situation as it had to spend money to take out the extra material, but then because the area was so clean, the lop and scatter was not used and the FS took a credit.

Finally, as to the helicopter manager issue, Appellant stated, "Our contract representative, Bill Jantzer did sign Modification 2 on June 24, 2002, however this was done under duress and threat of shutting the sale down. To request us to pay for the government heli manager when the sale is half complete with a threat of shutting the sale down if we don't sign is unfair and unreasonable. Realistically, we had no choice. As pointed out above, we could not allow the sale to be shut down or the helicopter would leave the job." Appellant also pointed out that the matter of the Appellant paying for the helicopter manager was never disclosed in the contract or technical proposal.

The CO responded to Appellant by letter of July 25, 2003. She specifically addressed the duress matter. She stated that in order to prove duress to her, Jantzer had to show wrongful conduct by the Government. She stated that pressure or mere threats of financial loss were not considered duress. She said one is required to show the government's action was illegal, a breach of an express provision of the contract, without a good-faith belief that the action was permissible under the contract, or a breach of the implied covenant of good faith and fair dealing.

Appellant replied by letter of July 29, 2003. Appellant took exception to the CO's definition of duress but then said, "we did not freely and openly want to sign the modification. The government held the power position with the threat of shutting down the sale. We were not forced in a physical sense, but in a mental and emotional sense, to sign modification 2 under the threat of shutting us down." He said he was continuing to assert his claim that the Government did not act in good faith and that there was wrongful conduct by the Government. He pointed out that there was no mention in the contract of contractor paying for a helicopter manager and that costs of the helicopter manager were unknown to Appellant until Modification 2 was presented to it, several weeks after the operation had begun.

Appellant also filed several additional documents, after the appeal, where it recited its position. What is noteworthy is that nowhere in the filings of September 24 and October 14, 2005 does Appellant point out any communication putting the CO on notice of its contention that it was being required to perform additional work or that it was unwilling to voluntarily sign the modification. Rather, it appears as to both of those matters, that Appellant signed the modification for business reasons, intending to argue the point later. In the filings, Appellant also commented on the \$50 credit and helicopter matter, essentially repeating its earlier arguments. As to the helicopter, Appellant pointed out that the revised technical proposal was accepted by the government with new dates. Appellant said the dates were Appellant's best estimates and never intended to be guaranteed. Appellant reiterated that the modification had been signed under duress.

### **DISCUSSION**

The Appellant's first claim is for the costs of having to remove more material than it believes was called for by in the contract. Appellant claims that it was required to essentially remove "all" 3-inch to 6.99-inch" material during its removal operation. The FS asserts that Appellant was only held to

what it had offered in its proposal, relying on Appellant's language that it would "remove all 3 to 6.99 inch material." In addition, the CO states that Appellant never put her on notice during the removal operations that it believed it was being required to perform work beyond its contract obligation. As such, she contends that Appellant cannot now charge the FS for extra work that the FS did not know Appellant considered a change to the contract.

Appellant says that the word "all" could not reasonably be read as broadly as claimed by the FS, given other language in the proposal. Appellant further says that under its proposal, it planned to leave 10 to 15% of the material after cutting. It claims it is entitled to be compensated for having to remove 10% more material than required on this project.

I find that neither party has interpreted the contract reasonably. First, the FS cannot read the word "all" in isolation, as it has chosen to do. Rather, it has to read the wording in conjunction with other statements in the proposal that in my view reasonably show that the Appellant did not expect to remove "all material." At various points in the proposal Appellant used conditional wording, e.g., that "it will put forth our best efforts," "the possibility exists," "some pieces are so scattered. . . . to get a productive load," "yarding this type . . . . is very uncommon," "there is some uncertainty," "minimal amount of slash." That and other wording clearly indicate to me that the Appellant's proposal did not contemplate Appellant taking out all material. A contract must be read as a whole, and find that the FS did not do that.

In addition to the above, any reasonable reading of Appellant's obligations as to removal needs to take into account that Appellant's proposal contemplated having to lop and scatter material that was left, as part of the removal operation. While that was not quantified in the proposal, Appellant did offer to provide the FS with a credit, if the FS agreed to forego that operation. To me, that indicates that Appellant intended to leave a sufficient amount of material, so that it would justify a lop and scatter operation. That clearly indicates that all material would therefore not be removed. Rather, in reading the proposal, the FS should have contemplated material in line with that removal operation.

Appellant contends that the Board should find that its proposal reflected that it would leave 10 to 15% of the material. I cannot make that conclusion based on the language in the proposal. But for its own statements, the Appellant has provided no other support as to why the FS should have read its proposal to call for leaving 10% or more material. Appellant has provided no corroboration through affidavits or industry literature. Certainly, the language contains no percentages and Appellant wrote its own proposal. Further, Appellant's contention that the 10% can be verified based on the productive load of a helicopter is also not supported. Moreover, Appellant has not shown why or how the FS would have been expected to draw that conclusion from the proposal. Appellant's claim for removal, loading, hauling, and burning costs of \$43,378 is not insignificant. Appellant chose to use words, such as "all," "minimal," and "small pieces will be left." I find that just as the FS could not focus on "all" to the exclusion of the other language, Appellant similarly cannot expect the FS to have ignored the indications that the material left would not similarly reflect Appellant's choice of words. Those words did not indicate the number claimed by Appellant. If the Appellant intended to limit its removal obligation, then it needed to make that clear by its choice of language in its proposal or alternatively of

establishing that the industry practice was so well settled that anyone engaging in this type of contract would know that 10% of the material would be left. Appellant has failed in both instances.

The Appellant wrote the proposal and carries the burden of demonstrating not only the reasonableness of its interpretation, but also the reasonableness of its damages. While the Appellant appears to have removed more material than what was called for in its contract, it has given me no specific way to calculate a number. If I had to come up with a figure, by jury verdict, it would be substantially less than the 10% claimed by Appellant, and as such, far less than the \$43,378 claimed.

However, this claim has one more fundamental flaw. It is axiomatic, that in order for a party to recover for changed work, the party must provide the other party with timely notice of its claim. Notice gives the party charged with requiring the extra work an opportunity to assess its decision. Once a party is given notice, it may choose to change its interpretation, take steps to mitigate its damages, or at a minimum set up a tracking of costs. When a party is not given notice, it is denied those options. Notice does not have to be direct, it can be constructive, but the party claiming additional work has to put the opposite party on notice that the work is being done under protest. The record in this appeal does not demonstrate that the Appellant provided either actual or constructive notice.

The record shows that the Appellant did not bring its claim to the CO's attention until a year after the work was completed. In addition, I cannot conclude from the record that the COR, Mr. Kelsey, was aware of the Appellant's position that it expected to leave 10 to 15% of the material. Appellant may have complained but the complaints have to be more than general. There has to be some evidence by which I can conclude that the CO knew or should have known of Appellant's objections. Appellant has not made that case. If a party wants compensation, it cannot wait, as here, until well after the work is done to claim additional costs. When a party does that, it is performing the work at its own risk. Accordingly, I deny Appellant's claim for removing additional material.

Appellant's second claim involves the FS taking a credit of \$50 for not having the Appellant lop and scatter the 3-inch to 6.99-inch material. On this matter, I find for the Appellant. Once again, the FS claims an interpretation that does not consider the language in the overall context of the proposal. It is clear, as pointed out by Mr. Jantzer, that the credit would have been an economic decision, based upon the Appellant not having to lop and scatter material that otherwise could have been demanded by the FS. The credit was contingent on there being lop and scatter material left at the site. Otherwise, there was no reason to offer a credit for omitting the requirement to lop and scatter.

With that as a backdrop, it is evident that once the FS interpreted the contract to require removal of "all" material, it also effectively eliminated any need to lop and scatter in those areas. Put another way, the FS dealt with lop and scatter by having Appellant remove the material, rather than lop and scatter it. Fairness dictates that the FS cannot now take a credit for work not performed by Appellant, when the reason Appellant did not perform the task (lop and scatter) was because the FS required it to clean the site beyond what was required by the contract agreement. On this issue, the FS's position is unreasonable and to allow the credit to stand would be unfair. Accordingly, Appellant is entitled to be reimbursed for the deduction.

I note here for clarification, that had I awarded the Appellant a sum for removing more material than required, that decision would have negated Appellant's claim for the return of the credit. I so conclude because any award to Appellant would have been based on its having the right to leave enough material to justify a lop and scatter operation. Had there been enough material to justify lop and scatter, then the FS would have had the right to require the Appellant to do that work or otherwise, take the credit. Accordingly, under no circumstances, could the Appellant prevail as to both its claim for extra work and its claim for return of the credit. Here, I have allowed the return of the credit.

The last appeal is the helicopter manager claim. Again, the notice issue is central to my decision. This time it comes up in the context of a signed modification, where Appellant agreed that to the extent a helicopter manager was needed for more than 30 days, it would pay up to certain charges. This claim raises matters of accord and satisfaction and corollary matters of contract interpretation, claimed duress and consideration. If this were a contract interpretation case, I would find that the Appellant had no obligation to pay for the manager. The record had a number of instances where the FS treated the matter as its responsibility and that was the case even when it was evident that the contractor would be using the helicopter for more than 30 days. The FS only sought the additional money, when it realized it would have difficulty securing a manager and would have to go outside for those services. If this were a constructive change case, I would also find that the FS accepted the contractor's interpretation, when the FS issued the NTP and when it remained silent, once the contractor began its helicopter operation. However, once Appellant entered into the modification, those matters are no longer at play. When it signed the modification, the Appellant entered into a new agreement and absent Appellant establishing duress or a lack of consideration, it is bound by its agreement. I find, for the reasons set out below, that Appellant here has not established either duress or lack of consideration.

I am bound by decisions of the Court of Appeals for the Federal Circuit. That court has laid out in Rumsfeld v. Freedom NY Inc., 329 F. 3d 1320 (Fed. Cir. 2003) what a contractor must prove to establish duress. It must establish (1) it involuntarily accepted the other party's terms, (2) circumstances permitted no other alternative and (3) such circumstances were the result of the other party's coercive acts. Coercion has to be caused by an action of the government, not necessarily an illegal act. An allegation of coercion can be supported by an Appellant's showing of a lack of good faith and lack of fair dealing by the government. An attempt by the government to enforce a contract interpretation, even where the government is proven wrong, is not evidence of lack of good faith or fair dealing. A finding of duress requires more.

Turning to the specifics in this appeal, I do not find that Appellant established a lack of good faith, so as to establish duress. Moreover, and equally fatal to Appellant's claim, the Appellant here has failed to prove the other elements. It has failed to prove that it involuntarily signed the modification or that it had no other alternative. In this appeal, there is no evidence that Appellant put the FS on contemporary notice that it objected to the modification. Rather, all the record shows is that the Appellant engaged in internal company discussions and internally decided it needed to sign the modification or otherwise the job would be shut down. I have no doubt that the Appellant may have felt economically or, even as Mr. Jantzer says, emotionally threatened; however, that does not allow a party to sign an agreement without evidencing protest to the other party. It does not justify Appellant

waiting almost a year before claiming that it signed the document under duress. At a minimum, duress requires some direct action by the FS or action that the FS should have known would be perceived as coercive. Here, the FS did not have any reason to know that Appellant believed it was signing involuntarily or that it had no other alternative. The CO says that the parties discussed the matter of the helicopter manager and the Appellant raised no problems. Duress cannot be charged and proven by stealth. Appellant may have made a bad bargain, it may have felt pressured; however, it has not established the necessary elements for me to find duress. Correspondence at the time may have led to a different result; however, no such correspondence has been presented.

Finally, the Appellant has raised the matter of lack of consideration. Appellant's problem here is that this was a bilateral modification and, as part of the modification, the FS provided a helicopter manager rather than suspending the contract or taking other action. Appellant has acknowledged that it made a business decision to sign the modification (even though it did not want to), in exchange for assuring that the FS would not suspend the sale. Such a trade-off constitutes consideration.

While I sympathize with Appellant, in that it agreed to pay for a manager that I do not believe was contractually its responsibility, that does not change the fact that Appellant signed the modification and sat on its rights when it did not object to the modification at the time. If the Appellant is to draw any lesson from these appeals, it is that it must put the government on notice if it disagrees with a direction and objects to a modification. It must make those objections clear at the time and preferably in writing. Accordingly, the claim for the helicopter manager is denied.

### **DECISION**

The Appellant's appeal as to having to perform additional removal (AGBCA No. 2004-132-2) and its appeal as to payment for the costs of the helicopter operator in accordance with Modification 2 (AGBCA No. 2004-134-2) are denied. The Appellant's appeal for return of the credit, AGBCA No. 2004-133-2 is granted in full. That sum is subject to interest under the CDA.

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**HOWARD A. POLLACK**

Administrative Judge

**Issued at Washington, D.C.**

**February 17, 2005**