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	)	
Appellant	)	
	)	
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**RULING ON MOTION FOR SUMMARY JUDGMENT**

**August 2, 2006**

**BEFORE POLLACK, VERGILIO, and STEEL, Administrative Judges.<sup>1</sup>**

**Opinion for the Board by Administrative Judge POLLACK. Separate concurring opinion by Administrative Judge VERGILIO.**

The Forest Service (FS) seeks partial summary judgment on the matter of Ardco, Inc.’s (Ardco’s or Appellant’s) entitlement to anticipatory profits for the flight hours lost, due to the damage to Appellant’s aircraft caused by the operation of a forklift by a FS employee. The FS takes the position that because the contract had a Termination for Convenience clause (T for C), Appellant cannot legally recover anticipatory profits. There appears to be no material dispute as to the facts, and as such, we have before us a legal question for resolution.

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<sup>1</sup> Administrative Judge Steel of the Interior Board of Contract Appeals, sits by designation.

FACTS

This dispute arises out of the National Airtanker Service Contract No. 53-024B-1-2191, between Ardco, Inc., of Tucson, Arizona, and the FS, Boise, Idaho. The contract was for services of aircraft to drop fire retardants to assist in fighting forest fires in various geographical locations. The solicitation contained 44 line items, each specifying a location. Contracts were awarded to various contractors for various line items. Ardco was awarded line items 27, 28 and 41. Line items 27 and 28 were for Lancaster Field, California, and appear to be essentially the same as to the size of the aircraft required and pay provisions. Line Item 41 was for Fort Huachuca, Arizona, and was generally similar. (Appeal File (AF) 13-24, 27.) The contract was for one year with two option years. (AF 290).

The contract was awarded to Ardco on December 17, 2001, and was an indefinite delivery/indefinite quantity contract. It required Appellant to provide an airplane for each line item (meeting the criteria specified in the contract) for the exclusive use of the Government during the “mandatory availability period” identified in the contract. (AF 27, 289.) In regard to line item 28, Appellant agreed to provide a type DC-4 airtanker to be based at Lancaster, California, with mandatory availability dates beginning July 2, and running through November 15, of each contract year (AF 22). During the mandatory availability period, Appellant was to be paid \$3,177 per day for each day it was scheduled and for which Appellant had its airplane and crew available for airtanker service dispatch (AF 22, 215). There was no assurance that Appellant would be given flight hours, however, the contract did provide that when dispatched for flight the Appellant would receive \$2,273 for each hour of flight (AF 215). There appears to be no dispute that all flight times under line items 27, 28 and 41 were to be procured from Ardco, and not from any other source.

Appellant began performance at Lancaster (line item 28) on March 2002 (AF 292). It performed without incident and flew 105 hours, before the FS action damaged its aircraft (AF 294). The accident occurred on July 14, 2002, when a FS employee ran a forklift into the Appellant’s aircraft and caused the plane to be inoperable. There is no need to go into specifics of the accident other than to note that the parties agree that the damage was extreme. (AF 290.) The aircraft was unavailable for dispatch until February 24, 2003, when, after completion of all repairs, it was re-certified to be airworthy (AF 278). During the time the aircraft was out of service, the Contracting Officer (CO) continued to pay Appellant the daily rate for the “mandatory availability period.” That continued through November 15, 2002. (AF 290.)

The Appellant filed its claim on March 19, 2003. The claim included \$191,361 for revenue Appellant anticipated to receive as a result of flight hours it would have flown during the mandatory availability period for the 2002 fire season (under line item 28), but which it did not, because of the grounding of the aircraft. (AF 268.) The solicitation had listed an estimated 170 flight hours for line item 28 (AF 11, 294). The actual flight hours for line item 28, for the Fire Year 2002, actually totaled 236.66 hours of which 105 hours were flown by Ardco and 131.66 hours were flown by a contractor the Government obtained to fly the hours that Ardco otherwise would have. (AF 294.)

There is no dispute that the contract has been fully performed. There is also no dispute that Ardco sought lost flight hours in its claim. (AF 267-85.) The CO denied the claim for lost flight hours. He did not do so on the basis of the operation of the T for C clause. Instead, he denied the claim on the basis that there was no guarantee that the specified number of flight hours would be flown, and therefore concluded Ardco was not entitled to the claimed damages. The operation of the T for C clause was first raised by FS counsel in this motion.

For purposes of the motion, the FS has stated that while the contract contains no clauses that specifically allocate the risk of loss for damage to the aircraft by the Government, or otherwise would regulate specifically the actions that lead to the accident, every Government contract places an implied duty on the Government not to willfully or negligently interfere with the contractor in the performance of the contract. The FS then stated that the act of the employee negligently operating the forklift such as to strike the plane and make it unairworthy would constitute breach of the implied duty not to interfere with the Appellant's performance of the contract. The FS does not contest the negligence or contest responsibility to pay due to the accident. The FS does contest the dollars claimed.

### **DISCUSSION**

The FS motion asks the Board to conclude that the Appellant is not entitled to anticipatory profits based upon the contention that the FS using FAR clause 52.249-2, could have terminated for convenience the flight portion of Appellant's contract, which work Appellant was prevented from performing because of the FS actions in damaging Appellant's airplane. The FS contends that the T for C clause excludes anticipatory profits, and Appellant cannot recover them, even though the FS breached by damaging the Appellant's airplane and depriving Appellant of its ability to perform flights. The FS takes the position that it can essentially use the T for C clause, at will, and is entitled to liberally invoke the clause to limit damages on breach, regardless of the nature of the breach. According to the FS, the only way Appellant can secure anticipatory profits, when a contract contains a T for C clause is to show that the use of the clause by the FS was exercised in bad faith or was otherwise arbitrary and capricious.

The FS relies on a number of cases. However, those cases do not involve fact situations such as the claim presented here by Ardco. Instead, the cases cited either involve situations where a contract was wrongfully cancelled, but not formally done so under the T for C clause; or cases where the Government issued a T for C but the contractor challenged the use of the clause as being wrongful. In the cases cited, the alleged breach was the act of cancellation. In this case however, the breach was the FS improper action that damaged the aircraft. Therefore, none of the cases cited by the FS present a similar fact situation to the instant matter and as such, provide no basis of authority for the FS position. Krygoski Constr. Co. v. United States, 94 F.3d 1537 (Fed. Cir. 1996); Colonial Metals Co. v. United States, 494 F.2d 1355 (Ct. Cl. 1974); Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982); Salsbury Indus. v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990); Kalvar Corp. Inc. v. United States, 543 F. 2d 1298 (Fed. Cir. 1976); T & M Distributors, Inc. v. United States, 185 F. 3d 1279, 1284 (Fed. Cir. 1999); and Carter Industries, DOTBCA No. 4108, 02-1 BCA ¶ 31,738.

The common thread in the cases cited by the FS is that the Government action for which the T for C clause was invoked, was a cancellation of the contract or significant part thereof. That is in

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stark contrast to the breach in issue in *Ardco*, where the breach action was the damage to the airplane caused by the FS, what the FS has acknowledged is a breach of the duty not to hinder. Additionally, unlike the cases relied upon by the FS, the contract in issue continued, even after the damage. The FS continued to pay the Appellant for standby time under line item 28 and continued to secure the flight time by paying another to do the work (that Appellant was prevented from performing). The FS in its brief, simply ignores those distinctions.

In deciding this motion, we also need to comment upon what we see as an overly broad characterization by the FS. It asserts that the T for C clause has been created to avoid the Government paying anticipatory profits and seems to take the position that the clause can be used to limit damages in any breach situation. There is no question that where the Government properly uses the T for C clause, that clause provides a limitation on anticipatory profits. However, providing a damages shield for breaches of all types is not why the clause was developed, nor consistent with how it has been used. Rather, the clause was developed and has been utilized in Government contract law for taking Government actions out of the common law context, when the Government cancels a contract or portion thereof, that would otherwise have constituted breach in common law. The T for C clause provides that the Government has the contractual right, a right not existing in common law, to cancel a contract or part thereof, without having to take the penalty of standard breach of contract and without having to pay anticipatory profits. That is because the T for C clause specifically provides that cancellation that fits under the clause is not a breach. Since the clause makes the cancellation not a breach, then it follows that anticipatory profits could be and are excluded. The clause, however, was not intended nor is it properly used, when as here, the Government tries to use it to limit damages caused by an independent breach, which was independent of an attempt to cancel the work. The clause is not intended to cover a situation such as that here, where the Government breached by hindering the contractor's ability to perform.

In dealing with the Government, a contractor agrees to accept the risk, that after award, the Government may no longer need the work or may have to or may choose to cancel the contract for some other reason. Contractors understand that if the Government does that, then but for limited situations, the contractor is limited to the damages specified as covered in the T for C clause. Cases have further provided that where the Government acts to cancel, but does not accurately follow procedures, or where a default is determined to be wrongful, then the T for C damage limitation also applies. That is how the Government and contractors understand and apply the clause. Notwithstanding the FS arguments that the clause covers all breaches, the fact is that it does not. Rather, it is intended to give the Government protection in the act of cancellation and not bar anticipatory profits in non-termination breach situations.

This Board has had occasion to deal with the issue of retroactive use of a T for C clause in Poston Logging, AGBCA No. 97-168-1, 99-1 BCA ¶ 30,188; AGBCA No. 99-143-R, 99-145-R, 00-1 BCA ¶ 30,289. There, we rejected the retroactive use of an environmental termination clause that was similar to the T for C clause in issue here, in that it limited recovery of damages to certain types of costs, including excluding anticipatory profits. As here, the FS sought to use the clause to limit damages in the breach claim made in that case. The FS made that attempt even though it had never attempted to cancel or terminate the contract under the

clause and in fact had not raised the clause until after the Board held a hearing on the merits and quantum. The Board found the FS action to be too late.

We pointed out in Poston that there the FS was attempting to reach back in time and exercise a right to cancellation, which it had available at one time (while the contract was still in effect), but which it never acted upon. We stated that the right to terminate does not go on indefinitely. We found that the Appellant in Poston had proven that the disputed matter ripened into a material breach and further showed that it properly elected to declare the contract in breach (in Poston well before the FS even considered application of the clause).

In deciding Poston, we reviewed a number of cases dealing with the retroactive application of the standard T for C clause. Those cases involved instances where recovery of damages has been limited after improper default termination or cancellation. We pointed out that generally the cases allowing post hoc application of the termination for convenience clause have arisen (1) where a cancellation or termination of the contract had been exercised but done for the wrong reason, even though another proper basis existed, (2) where the cancellation or termination was carried out but was either misnamed or procedurally flawed, and (3) where a specific statute defined limitations on Government liability so that there was no requirement for further Government action. None of those situations exist here.

In T & M Distributors, ASBCA No. 51279, 01-2 BCA ¶ 31,442, the ASBCA also addressed the retroactive use of the T for C clause and stated:

We do not accept the Government's effort to limit appellant's recovery to costs incurred plus reasonable profit by retroactive application of the theory of constructive termination for convenience . . . . The diversion is not remediable under the termination for convenience clause in a contract after the contract has been performed. In Ace-Federal Reporters, Inc. v. Barram [44 CCF 77,690] 226 F.3d 1329, 1333-34 (Fed. Cir. 2000), where there was a breach of a requirements contract for reporting services, the Court recently stated:

No decision has upheld retroactive application of a termination for convenience clause to a contract that has been fully performed in accordance with its terms. Maxima Corp. v. United States, [34 CCF 75,497] 847 F.2d 1549, 1557 (Fed. Cir. 1988) . We see no reason in law or logic to impose a retroactive constructive termination for convenience here. The concept is a fiction to begin with, but there has been some limit to its elasticity. The contractors stood ready to perform throughout, did perform those orders placed, and the contract ended.

In this instance we have, as was the case in Poston, T & M and Maxima, the attempted use of the T for C clause after the contract has been performed. As in those cases, its use is not proper.

There is no question that in Government contracts with a T for C clause, when that clause is properly used, the measure of damages is limited. However, we have been provided no case

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where the T for C clause was used in an instance such as this, not for cancellation, but instead to act as a shield for limiting breach damages, caused by an event not associated with any attempt to cancel. Notwithstanding the FS contention to the contrary, not all circumstances allow the Government to invoke the T for C clause

The fact that the T for C clause is not an automatic shield for limiting breach damages has been established in several recent cases. Rumsfeld v. Applied Cos. Inc., 325 F.3d 1328 (Fed. Cir. 2003); Hi Shear Technology Corp. v. United States, 356 F.3d 1372 (Fed. Cir. 2004); T& M Distributors, ASBCA No. 51279, 01-2 BCA ¶ 31,442. See also, Howell It Is, AGBCA No. 2003-137-2, 03-1 BCA ¶ 32,244 (non-precedential decision). Each of these cases dealt with claims for anticipatory profits as a consequence of the Government diverting work on a requirements contract to another vendor. All of the cases had contracts with T for C clauses and in each instance, the Court and the ASBCA made it clear that the mere presence of the clause did not serve as a bar to anticipatory profits, if the contractor could show breach and meet the standards for proof of damages.

The cases show that anticipatory profits are available as a remedy when the Government takes work that is earmarked for the claimant contractor and diverts it to another source. That is notwithstanding the fact that those contracts contained a T for C clause and notwithstanding the fact that the Appellant was not required to show bad faith on the part of the Government. While we acknowledge that there is a factual difference in those cases from the one before us, there is also a similarity, in that the work for which the contractor sought anticipatory profits was work that had been made non- available because of an un-excused Government action, in those cases, conscious diversion of the work.

The common law measure of damages in the event of breach is that a contractor is entitled to be placed in as good a position as it would have, had the breach not been committed. That would include anticipatory profits. Northern Helix Co.v. United States, 524 F. 2d 707, 207 Cl. Ct. 862 (1975). The FS has provided no basis for us to not use that measure.

Finally, for the Board to grant the FS motion would create a situation where the T for C clause becomes a tool that can be utilized for defending breach claims against the Government, whether the work is cancelled or not. That is not the purpose or history of the clause. The purpose was to allow the Government to end its obligations to continue to contract with a party, without having to risk breach, where circumstances were found to warrant the ending of the contract or portion thereof. The clause was not created and has not been historically used for the purpose of minimizing the damages due to any and all breaches.

## **THE NATURE OF CONTRACT**

The FS contends that the Appellant cannot recover anticipatory profits because the contract had no set guarantee. We reject the argument that Appellant is not entitled to profits because the contract was of an indefinite quantity. Clearly, if no work had been performed, then the FS would have a legitimate issue that the contractor should not be paid for work that was not required. However, that is not the fact here. Here the FS had the flights performed by someone

else. The Appellant lost the benefit of its bargain, and we can establish what that benefit would have been. Accordingly, we reject the FS alternative argument.

**RULING**

We deny the FS motion.

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**HOWARD A. POLLACK**

Administrative Judge

**Concurring:**

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**CANDIDA S. STEEL**

Administrative Judge

**Opinion by Administrative Judge VERGILIO, concurring separately.**

I concur with the decision of the majority to deny the Government's motion for summary judgment. Disagreeing with various of the assumptions and statements of the majority, I express my view of the contract and rationale separately. Having enjoyed the benefits of the contract for the entire base period (including the unilateral ability to exercise an option), the Government may not now retroactively invoke a termination for convenience. Although the existing record suggests that this was not a requirements contract obligating the Government to utilize this contractor for flight hours, particularly with factual assumptions in favor of the non-moving party, I would not preclude the contractor from attempting to demonstrate that it would have received work under this contract but was precluded from receiving such work because the Government had made the aircraft inoperable.

The Government moves for partial summary judgment regarding the item of damages identified by the contractor as lost flight revenue, but treated and referenced as anticipatory profits by the Government. The motion has two premises. The Government attempts to retroactively apply the termination for convenience clause that it says precludes the recovery of the requested costs. The Government also attempts to foreclose recovery as it identifies the non-requirements nature of the contract, under which the contractor was not guaranteed any flight hours and the Government was not obligated to utilize this contractor.

Retroactive termination for convenience

Regarding this first basis for relief, the Government asserts:

the presence of the termination for convenience clause acts as a bar to the Appellant's claim for anticipatory profits. Although the Appellant is able to demonstrate that the government negligently breached its duty under the contract, the fact that the government could have terminated the Contract for convenience at the time of the accident requires that the consequence of the accident be treated as a constructive termination for convenience. Under a termination for convenience, the Appellant is not entitled to anticipatory profits.

(Government Brief at 12) (emphasis added.) As aptly noted by the contractor, the Government makes its essential arguments without referencing contractual support or other legal authority. Also, the Government has not demonstrated that the lost flight revenues claimed equate to anticipatory profits.

The Government damaged the contractor's aircraft during the base year of an indefinite-delivery/indefinite-quantity contract. The Government did not issue a termination for convenience at the time of the accident or during the base year of the contract. During the base year, without termination, the parties remained bound by the terms and conditions of the contract. If the contractor had completed repairs or provided an acceptable substitute (Exhibit 3 at 54 (¶ C.7.3, Substitution of Aircraft and Pilots)), the bilateral benefits of the contract could have been utilized. Separately, throughout the base year, the Government retained the unilateral option to extend the term of the contract. It would be incongruous to permit the Government to retroactively terminate for convenience after the Government has benefitted by its continued ability to exercise an option and by letting the contract run for its base term. Therefore, I would prohibit the Government from retroactively invoking the termination for convenience clause, and so deny this aspect of the motion for partial summary judgment. Given the existing material facts (with no actual or constructive termination for convenience), one need not here resolve the question of whether the issuance of a termination for convenience at the time of the accident would have altered the damages recoverable by a contractor, particularly one claiming Government breach of contract.

#### Non-requirements contract

As an alternative basis in its motion, the Government touches upon the nature of the contract, (although it muddles the argument with notions of termination for convenience):

There was no expectation of any particular number of flight hours to be ordered, however, thus no anticipatory profits from them are proper. The ID/IQ structure of the contract here reinforces the fact that the contractor is not entitled to lost profits because of the constructive termination: not only could the contract have been terminated for convenience at the time of the accident, but also there was no obligation of the government to order any flight hours. The negligent act of the Forest Service employee, much like the improper termination of a contract for default, does not provide the contractor with any damages beyond those provided for a termination for convenience.

(Government Brief at 13.)

The contractor takes issue with the Government assertion that there was no expectation of any particular number of flight hours to be ordered.

Such an assertion evidences a fundamental misperception on the part of the Government of the Appellant's contractual undertaking. Both the Government and the Appellant expected Appellant to fly all hours that might be necessary under Line Item 28. Indeed, the Schedule of Items included in the Request for Proposals which resulted in the Contract lists the extended flight hours as 170. Rule 4, page 11.

(Contractor Brief at 8-9.) The referenced chart lists the 170 flight hours as estimated, not extended. The contractor has provided no basis to treat the "estimated" hours as anything but an estimate.

The Government awarded the contractor an indefinite-delivery/indefinite-quantity contract for the services of a given aircraft. The Scope of Contract clause contains two, here-pertinent, paragraphs:

- (1) It is the intent of this contract to provide the Government with Airtanker services as described herein. During the Mandatory Availability Period and any extensions thereof, the aircraft will be made available for the exclusive-use of the Government.
- (4) The Forest Service and Department of Interior have cooperative agreements for suppression of wild fires occurring on lands administered by other Federal Agencies, on State lands, and on privately-owned lands. The Airtankers covered by this contract may be used under the terms and conditions herein stated when so ordered by the Contracting Officer for suppression of fires on such lands.

(Exhibit 3 at 27 (¶ C.1).) I have found no language in the contract or the record that indicates that this is a requirements contract, thereby obligating the Government to utilize this contractor during the contract period. The contract requires that the aircraft be available for the exclusive use of the Government during the designated mandatory availability period, for which the Government provides compensation (i.e., consideration). The contract does not explicitly state that the Government must utilize this contractor to satisfy all or any particular needs that arise. The operative language is "may be used" not an implied "must be used."

However, these conclusions at the summary judgment stage do not preclude the contractor from obtaining relief. Government actions made the aircraft unavailable. The Government has not demonstrated that the contracting officer could or would have selected other than this contractor to satisfy Government needs had this contractor's aircraft been available. Although the contractor may have lacked a right to be utilized, it cannot be foreclosed from demonstrating with reasonable certainty that it would have been selected. Such is a factually based matter. The

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record is devoid of information addressing how the contracting officer selected an aircraft to satisfy needs arising during this contract (before or after the accident). That information, which seemingly will include a comparison of price and other factors consistent with the dictates of statute and regulation for the selection of a contractor, should assist in demonstrating any damage suffered by this contractor that accrued under this contract because of the Government-caused damage.

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**JOSEPH A. VERGILIO**

Administrative Judge

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

**August 2, 2006**