THORCO, INC.,	)	**AGBCA No. 2003-157-R**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
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BOARD RULING ON RECONSIDERATION

June 11, 2003

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Dissenting Opinion by Administrative Judge VERGILIO.

Thorco, Inc., of Kalispell, Montana (Appellant), has filed a Motion for Reconsideration. The Board issued a decision in Thorco, Inc., AGBCA No. 2001-136-1, 03-1 BCA ¶ 32,164. The Board's decision in Thorco denied the Appellant's claims for an equitable adjustment of its contract with the U. S. Department of Agriculture, Forest Service (FS or Government). The Board's jurisdiction here derives from the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended.

Reconsideration is discretionary with the Board and will not be granted in the absence of compelling reasons, *i.e.*, clear error of fact or law, or newly discovered evidence that could not have been discovered at the time of the original proceeding. Reconsideration is not intended to permit a party to reargue its position or to present additional arguments that could have been presented originally. John Blood, AGBCA No. 2002-114-R, 02-1 BCA ¶ 31,830, Thomas B. Prescott, AGBCA No.

2000-108-R, 00-1 BCA ¶ 30,722; Timber Rock Reforestation, AGBCA No. 97-194-R, 98-1 BCA ¶ 29,360; Rain and Hail Insurance Service, Inc., AGBCA No. 97-180-R, 97-2 BCA ¶ 29,121; White Buffalo Construction, Inc., AGBCA No. 95-221-R, 96-1 BCA ¶ 28,050.

While Appellant makes arguments that it made previously, which the Board has considered and rejected, Appellant also points out that the Board either omitted to address or did not address fully enough three contentions which it raises anew.

Appellant argues that there exist valid binding contract modifications allowing Appellant to disperse skid on unit 4 provided that soil moisture was less than 18% and that these modifications were treated by the Board as though they were not in effect after the voluntary shutdown. Appellant cites Appeal File (AF) 177 and 180 as evidence in support of that contention. The former is a Skid Trail and Landing Construction Agreement signed by Mr. Thornton and the Sale Administrator (SA), providing for dispersed skidding on units 3, 4 and 4A. This agreement is not signed by the Contracting Officer (CO) and does not mention the 18% moisture standard. It can only be interpreted as a permission and not a binding contract modification. The other document cited by Appellant is the March 15, 2000 Letter of Agreement signed by the CO permitting Appellant's request to tractor skid unit 4 instead of cabling it, so long as soil moisture content is under 18%. Appellant correctly points out that our decision did not spell out reasoning behind our treating the March 15, 2000 Letter of Agreement as not continuing to be effective after the voluntary shutdown. The Agreement was based on the parties' mistaken belief in the nature of the soils on unit 4. Both parties at that time were under the mistaken belief that the soils were of a nature that would be dry enough to allow operations when they reached a moisture content of 18% or less. It was not until the Soil Scientist (SS) visited the site with the SA on April 28, 2000, that the fact that soils were non-ash cap soils, which required a lower moisture content to allow operations, was discovered (AF 29, 571, Declarations of Dennis Thornton, Tony Willits, Bill Basko, Dennis Menghini). A contract, or modification, entered into under a mutual mistake is not binding and may be modified or set aside. A mutual mistake is an unconscious ignorance by both parties to a contract of a fact material to such contract or an erroneous belief by both parties in the present existence of a thing material to such contract. Morgan v. United States, 80 Ct. CL. 81, 8 F. Supp. 746 (1934). Where parties assumed a certain state of facts to exist, and contracted on the faith of that assumption, they should be relieved from their bargain if the assumption was erroneous. Williston on Contracts, 3d. Ed., § 1544. When they signed the Letter of Agreement, the parties were unaware that the soil was a non-ash cap soil, which, at a soil moisture content of 18%, would not be sufficiently dry to allow operations without damage. The SS's later examination of the soil caused him to conclude that the soil was a non-ash cap soil which would have to reach a lower moisture content of 11% (originally erroneously stated to be 10%). Neither party had been previously aware of this fact. The Letter of Agreement was signed when the parties thought that the soil was a type which would dry out to allow work on it at 18% or less. Because the parties were mutually mistaken at the time they signed the modification, it was not binding on the parties once the true conditions were discovered.

Appellant is incorrect that the Board did not address its argument that it was not allowed to mechanically clip trees. The Board used a heading "Designated Trail Skidding vs. Dispersed

Skidding", which was overly restrictive for its content. Under that heading, other operations were discussed. The Board stated: "Both the CO and the TMO state that during the May 1, 2000 meeting, suggestions were made that there was work other than dispersed skidding which could be performed. The TMO specifically states that he authorized work in cable units, drier units and use of 100 foot spacing intervals for designated skid trails." The burden to prove its claim was Appellant's. Appellant points to Dennis Thornton's declaration, as well as the declarations of the CO and the SA, as evidence that it was prohibited from mechanical clipping. The Board interprets only Mr. Thornton's declaration as so stating. The cited paragraphs from the two FS representatives' declarations record the same meeting, but do not support the assertion that mechanical clipping was prohibited. Appellant did not carry its burden to prove that it had been prohibited from mechanical clipping.

Appellant points to the exchanges in the parties' declarations and briefs regarding whether or not Appellant's skidder had a winch as being an issue the Board should have addressed to make a credibility determination. The Board read and considered those exchanges and did not think they rose to such a level as to impeach testimony of any witness of either party. Dennis Thornton's declaration dated July 25, 2002, contained the statement: "I also noted that, even if these restrictions were required by the contract, Thorco did not have the manpower or equipment available to hand cut trees and cable them out." The CO's declaration of July 29, 2002, states: "Second, Appellant wanted to use his mechanized equipment (tractor) because he has no winch system, which was North Patrick Timber Sale's design." Appellant responded by providing a photograph of its winch. These events are recorded in the Motions to Strike and supplements described in the preamble to the Board's decision. It is clear that Appellant had one or more equipment limitations as asserted in Mr. Thornton's declaration. FS personnel jumped to the conclusion that one such limitation was the lack of a winch and one or more of them included that erroneous deduction as fact in his declaration. Appellant provided evidence to the contrary. Having their erroneous conclusions rebutted in subsequent submissions, the FS declarants retracted those statements. The Board did not find this exchange probative and omitted to outline it in the decision. The Board cautions the FS that declarations submitted to the Board should be prepared carefully with questioning by counsel to confirm that declarants are providing only statements that they know of their own knowledge. However, the Board's reading of the declarations and corrections did not result in a conclusion that there was an intentional deception. The Board still does not find that these errors compel an adverse credibility determination.

Appellant had the burden to prove its claim. The weight of the evidence supports a denial of the claim. The Board declines to reconsider its decision beyond what is here provided.

RULING

Appellant's Motion for Reconsideration is granted to the extent described above. In all other

respects, it is denied.

ANNE W. WESTBROOK
Administrative Judge

Concurring:

HOWARD A. POLLACK
Administrative Judge

Administrative Judge VERGILIO, dissenting.

The requested reconsideration is not pertinent to the material facts and analysis or the result I reached in a separate opinion, Thorco, Inc., AGBCA No. 2001-136-1, 03-1 BCA ¶ 32,164. Consistent with the position of the Government (Respondent's Memorandum at 19-20, 25 (Sept. 16, 2002)) and the assertion by the contractor earlier and here on reconsideration, I concluded that the agreements now referenced by the majority are to be recognized as valid under the contract provisions. On reconsideration, the majority itself raises and relies upon notions of lack of authority and mutual mistake to justify its prior decision, as it now invalidates those agreements. Particularly with neither party subscribing to such theories, I conclude that the majority improperly expands the law in these areas. Therefore, I dissent from the new analysis on reconsideration.

JOSEPH A. VERGILIO
Administrative Judge

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