JOHN BLOOD,	)	**AGBCA Nos. 2000-102-1**
	)	**2000-103-1**
Appellant	)	**2000-104-1**
	)	**2000-127-1**
Representing the Appellant:	)	
	)	
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	)	
Representing the Government:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

December 21, 2001

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

These appeals arose under Contract No. 43-8508-9-0507 (Whiskey Park Thinning) awarded on May 21, 1999, to John Blood (Appellant) of Flagstaff, Arizona, by the Medicine Bow-Routt National Forest, Wyoming, U. S. Forest Service, an agency of the U. S. Department of Agriculture (FS or Respondent). The appeals docketed as AGBCA Nos. 2000-102-1, 2000-103-1 and 2000-104-1 were received at the Board October 28, 1999. AGBCA No. 2000-127-1 was received February 4, 2000. A hearing was held July 10-12, 2001, in Flagstaff, Arizona. By the time of the hearing, AGBCA Nos. 2000-102-1 and 2000-103-1 were both moot. AGBCA No. 2000-102-1 concerned a rescinded termination notice and 2000-103-1 concerned a claim which Appellant subsequently withdrew.

Evidence was taken on the remaining two appeals: AGBCA Nos. 2000-104-1 and 2000-127-1. At issue in AGBCA No. 2000-104-1 is a payment deduction in the amount of $133.63. AGBCA No. 2000-127-1 involves the appeal of the Contracting Officer's (CO's) January 11, 2000 decision on Appellant's September 17, 1999 claim submission containing claims numbered 1.1, 1.2, 1.3A, 1.3B,

1.4, 1.5 and 1.6. Claim 1.1 was Appellant's assertion of a contract time acceleration of 14% for which he claimed an equitable adjustment of $4,500. Appellant's claim 1.2 in the amount of $3,000 concerned a change in species preference dependent upon species and size of competing trees. Claim 1.3A for $5,000 is that the CO, in contravention of contract terms, made payment pursuant to a non-contractual formula handwritten at the bottom of inspection forms. Appellant also claims damages in the amount of $500 for alleged lost access to a portion of the work site, CC #4 (claim 1.4). Claim 1.5 is that an alleged agreement of the parties that Appellant would not leave any trees described as category "C" (correctable) constituted a new contract for which Appellant was entitled to consideration in the amount of $4,000. Appellant also claims $5,000 for alleging acting as a consultant to the FS by finding and correcting errors in the specifications as a benefit to the FS (claim 1.6). AGBCA No. 2000-104-1 is sustained. AGBCA No. 2000-127-1 is denied.

FINDINGS OF FACT

1. The U. S. Forest Service, Medicine Bow-Routt National Forest, an agency of the U. S. Department of Agriculture (FS or Respondent) entered into Contract No. 43-8508-9-0507 for Whiskey Park Thinning with John Blood of Flagstaff, Arizona (Appellant or Blood), on May 21, 1999. The original contract amount was $13,450.17, reflecting a unit price of $69.69 per acre for the 193 acres to be thinned (Appeal File (AF) 50.) Modification No. 01 increased the unit price to $74.92 per acre (AF 48).

2. Contract clause 12., PRE-WORK MEETING, specified that a pre-work meeting would be conducted before any work began (AF 71). Clause 13., CONTRACT TIME, required that the work be completed within 44 calendar days following the effective date of the Notice to Proceed (NTP). The contractor was required to begin work no later than 10 days after the effective date of the NTP. Count of contract time was to start on the effective date of the NTP, if hand delivered, or the third day after the Post Office issued a notice of certified mail to the contractor, or when work commenced, whichever was sooner. Failure of the contractor to pick up certified mail was not to be considered excusable delay. The estimated start work date was June 21, 1999. (AF 71.)

3. In a telephone conversation on May 21, 1999, Appellant told the CO that he could start work on the estimated start date of June 21, 1999 (AF 44). The same date the CO informed the CO's Representative (COR) that he would be on annual leave through June 28, 1999, and that Sue Janzen or another co-worker would act as CO until his return (AF 45). In a telephone conversation on June 8, 1999, Appellant told the COR that he was thinking of a pre-work conference on June 28 or 29 (AF 99). During the week of June 21, the FS tried unsuccessfully to reach Appellant several times. On Friday of that week, the parties apparently spoke and Appellant informed the FS that he had with him his ill mother. He asked for a pre-work meeting the following Monday morning, June 28, as Wednesday would not work for him. (AF 101.) Attempts to reach Appellant on Monday the 28th were unsuccessful (AF 102). The same day the COR e-mailed the CO that he thought he had a pre-work set up for the 30th but was uncertain. He was also uncertain whether the CO would be back

by then. (AF 103.) The CO noted that Appellant neither called nor appeared on Wednesday, June 30 (AF 102).

4. On July 2, 1999, the CO sent the COR an e-mail message discussing contract requirements regarding time. He solicited the COR's thoughts on whether the FS would be prepared if Appellant showed up to work on the 9th of July. (AF 105.) The CO sent the NTP by certified mail July 8, 1999. The NTP recited that time on the contract would start at the beginning of business on July 20, 1999. (AF 106.) Also on July 8, the CO talked to John Blood whose mother had died the previous Sunday (July 4). The CO made a note that he and Mr. Blood agreed to "an effective date of the Notice to Proceed of July 20" (AF 105). Appellant received and signed the return receipt July 22, 1999 (AF 108). The pre-work meeting was held by telephone on July 22, 1999 (AF 110). Appellant contends that the pre-work meeting continued through an on-site meeting July 26, 1999, which ended at 2:30 p.m. (Transcript (Tr.) 45). The contract daily diary for July 26 prepared by the COR stated that 7 days (15.9%) of the performance period had been used and that 0% of the work had been completed (AF 118-19).

5. At the hearing, the CO testified that he and Appellant had agreed to an effective NTP date of July 20, 2001 (Tr. 440). He also testified, however, that while Appellant seemed to contend that a start date must be negotiated between a contractor and the Government, that was not necessarily the case (Tr. 425). Appellant denied an agreement as to start date (Tr. 46, 127). At 8:00 a.m., on Thursday, July 22, the CO and Appellant spoke by telephone and Appellant asked for a pre-work conference the next day, but the CO was unavailable as he was to be out of town. (AF 102.) The pre-work conference was initiated by telephone later that day.

6. Respondent used a form entitled "Prework Conference Guide (Small Purchases)" as a record of the telephonic conference. It stated that NTP "was/will be issued effective July 20, 1999." Handwritten was the notation "September 1 is last day of performance." (AF 110-17).

7. Appellant testified that the pre-work conference began on July 22, but did not end until July 26, 1999 (Tr. 143-44). While the record does not expressly state that the meeting would or did continue on July 26, some notations on the record are dated July 22 and others are dated July 26 (AF 110, 113, 115-17). The attendees initialed the final page of the record on July 26, 1999 (AF 117-18). The CO characterized Appellant's contention that the meeting continued on July 26 as being an allegation of a second pre-work meeting which the CO denied (Tr. 440). The COR also testified that there was one pre-work conference on July 22 (Tr. 713).

8. The COR wrote daily diaries for every day that he was on the site or talked to Appellant (Tr. 694). The first such diary was dated July 26, 1999, when the CO and the COR spoke with Appellant at the site from 1145 until 1315 hours. The COR recorded that 7 days or 15.9% of the 44 day contract performance period had been used and that 0% of the work had been completed. He marked the blank indicating that the work was not on schedule. (AF 118.) On July 28, 1999, the CO also filled out a daily diary calling it documentation for July 26, 1999. He indicated that as of July 26 16% of the time had been used and 0% of the work completed. He, however, marked the block showing work was on schedule with the notation that the contractor has 10 days to start from

effective date of NTP. (AF 120.) The parties' disagreement as to the start time and, hence, Appellant's rate of progress continued throughout the project. On August 26, 1999, the CO declared Appellant in default "for failing to meet the required minimum acceptable rate of progress as defined in the contract." He stated that he would not terminate the contractor's right to proceed provided progress "continues" at a rate to insure timely completion and work meets contract specifications. (AF 199.) Appellant's claim 1.1 is that the setting of July 20, 1999, as the effective start date for performance accelerated contract time by 14% entitling him to an equitable adjustment of $4,500 (AF 291). He testified that he calculated the claimed damages of $4,500 by taking 14% of his total claim of $35,000. He derived the $35,000 amount from an application of what he considered market value of contracts which had been awarded for amounts higher than he had bid. (Tr. 58-59.)

9. As defined in clause 1., SCOPE OF WORK, the purpose of the contract was to secure services for thinning trees. Designated areas were to be thinned to specific intervals and defective trees removed for the purpose of increasing stand vigor and establishing a thrifty and healthy residual stand. Only those trees showing the most desirable characteristics were to be left for future growth (AF 66). Work to be performed consisted of six units, CC Nos. 1, 4, 19, 20, 21, and 25. These units contained 39, 36, 43, 24, 16, and 35 acres, respectively (AF 67).

10. Specification section 7., DESCRIPTION OF UNITS, described and located the six units to be thinned under the contract. The desired stocking level of each was 396 leave trees per acre. The section indicated that a stocking level of 396 derives from a 10' x 11' spacing. (AF 11.)

11. The contract specifications described alternatives for leave tree selection. Because leave trees had not been marked with blue paint as specified in section 9.B., Tree Selection by the Government, section 9.C., Tree Selection by the Contractor, applied. Section 9.C.1. provided that the contractor would select the trees to be left according to guidelines that followed. Trees other than dominant trees were allowed to be selected if less diseased or containing less defect due to forking or crook than adjacent dominants. In section 9.C.2., lists of characteristics of acceptable leave trees and characteristics of cut trees were provided. One characteristic was that the leave tree be dominant. Dominant was defined as trees that are taller than others of the same class and species. Among the listed characteristics of cut trees were those that show damage or disease and those that are spaced less than 7 feet from other acceptable leave trees. (AF 68-69.)

12. Section 9.D., Spacing and Stocking Level, stated that the desired spacing of leave trees and stocking level required for satisfactory completion of the work is shown in the specifications. Spacing is a guide only and must be adjusted to leave the best trees. A minimum spacing of 7 feet between leave trees shall be maintained in all units. A variance of plus or minus 10% in the number of leave trees shall be maintained in all units. (AF 69.)

13. Section 9.E., Leave Trees, provided several directions regarding leave trees. All well-formed damage-free Engelmann spruce were to be saved. Lodgepole and subalpine fir 6 inches D.B.H. (diameter at breast height) and over were to be saved. All aspen trees were to be saved. Adjustments were not to be made in spacing requirements for aspen trees. Lodgepole and subalpine fir trees under 6 inches D.B.H. were to be considered in spacing requirements and for selection of

acceptable leave trees. The desirable leave tree species, the order of their priority to be left as acceptable leave trees and any exceptions to this priority list were stated to be under the specifications. Snags were not to be cut. Trees less than 12 inches in height did not need to be cut to achieve spacing requirements. Care was to be taken to minimize damage to leave trees. No hang-ups were to be permitted. Trees were to be cut below the bottom green branches. All branches with live green foliage were to be completely severed from the stump. Stump height was not to exceed 6 inches above the ground on the uphill side. Trees were to be completely severed from the stump. (AF 68-69.)

14. During the on-site meeting on July 26, 1999, the CO, COR, and Appellant discussed the specification section 9.E., Leave Trees. The COR recorded that conversation in the contract daily dairy for that date as follows:

> John had a question about sec. 9.E. Leave Trees, about leaving all damage free Englemann Spruce. That is what the contract says. But I explained that we wanted the spruce worked in to the 10'X11' spacing - and we didn't want to leave all the spruce as is. He said that if he was to work the spruce that he would want a 7.5% increase in his bid price. Both Loren [the CO] and I were agreeable to this increase in price to get this additional work done that was not included in the contract.

15. Modification No. 01, to the contract changed section 9.E.1. to read: "The leave tree species priority is (1) Englemann Spruce, (2) Lodgepole pine, (3) Subalpine fir. Contractor shall comply with spacing requirements identified elsewhere herein. All Englemann Spruce, Lodgepole pine, and Subalpine fir 6 inches DBH and over shall be saved. All Aspen Trees shall be saved. Adjustments will not be made in spacing requirements for Aspen Trees." The first sentence of section 9.E.2. was modified to read as follows: "Englemann Spruce, Lodgepole pine, and Sub-Alpine fir trees under 6" D.B.H. shall be considered in spacing requirements." In consideration of these changes in contract requirements, the parties agreed to an increase in contract price per acre from $69.69 to $74.92. Contract time was not changed. The effective date of the modification was July 26, 1999. (AF 48.)

16. Specification section 11., <u>INSPECTION AND ACCEPTANCE</u>, read as follows:

> 11.A. Inspection
>
> 11.A.1. Sample Plots
>
> Unless otherwise specified in the Special Project Specifications, the Government will determine the stocking per acre after thinning, by taking 1/50 acre sample plots. (A 1/50 acre sample plot has a radius of 16.7 feet.) These plots will be distributed over the contract area. A minimum sample of one percent will be taken. For example, a unit thinned to the 396 trees per acre specification consisting of 100 acres will have a 1-acre sample (50, 1/50th acre sample plots) inspected to determine the stocking per acre.

11.A.2. Inspection Time

Inspection for payment will be made within ten calendar days after the date on which the contractor requests in writing an inspection on a completed unit.

11.B. Acceptance

11.B.1. Percent Acceptable Trees

A unit will be considered satisfactorily thinned when the number of acceptable trees left is within plus or minus 10 percent of the desired number of acceptable trees to be left.

11.B.2. Rework

If the number of trees left per acre is greater than 110 percent of the desired number of acceptable trees to be left, the Contractor shall rework the area to reduce the number of trees per acre to the allowable limit.

11.B.3. Percent Unacceptable Trees

A unit will be considered unsatisfactorily thinned when the number of acceptable trees left is less than 80 percent of the number of acceptable trees desired to be left.

11.B.4. Deficiencies

Specific deficiencies detected as a result of Government inspections shall be corrected so that the work complies with the contract specifications.

(AF 70-71.)

17. Specification section 14., PAYMENT PROCEDURES, provided that payment would be made at the unit price per acre listed in the contract for each acre thinned in accordance with the specifications LESS any deductions provided for in the sub-paragraphs of the section. Section 14.A.1. provided for full payment to be made when the number of acceptable trees left is between 90 and 110% of the desired number of trees to be left. Section 14.A.2. provided a formula for calculation of payment reduction if the number of acceptable trees left were between 80 and 90% of the desired number of acceptable trees to be left. Section 14.A.3. provided that no payment would be made if the number of acceptable trees actually left in a unit were less than 80% of the desired number of trees to be left. (AF 71-72.)

18. The solicitation and contract contained USDA-Forest Service Form R2-2400-4 (1/99), Thinning Inspection Plot Form expressly referenced as an attachment as “Thinning Inspection

Record and Instructions (AF 17, 21-22, 73, 77-78). Although neither specification section 11., INSPECTION AND ACCEPTANCE, nor section 14., PAYMENT PROCEDURES, make reference to this form or its intended use (AF 14-16), the form provides a chart for the inspector to record the evaluation of trees left; the number of trees left including satisfactory trees but excluding species of trees ignored in thinning activity; credit for non-stocked spots; surplus trees meeting maximum d.b.h. cut limit;[1] improper leave tree selection (uncorrectable);[2] excess trees (correctable);[3] and correctable trees.[4] The bottom of the form contains a formula for calculating percent quality thinning. The formula is "1.00 - [a fraction of the sum of columns 'improper leave tree selection (uncorrectable)' and the amount in the column 'excess trees (correctable)' over the sum of trees left and credit for non-stocked spots." A second formula, called "Total Per Acre Calculations" is also present on the bottom of the form. This formula is "Trees Per Acre = 'Total All Plots' in column divided by total of plots, then multiplied by reciprocal of plot size." (AF 77-78.)

19. The COR used Form R2-2400-4 (1/99) to record his findings during inspections on this project. His calculations using the percent quality thinning formula appear at the bottom of the first page of each inspection form. (AF 171, 187, 200, 209, 217, 229, 232, 243, 251, and 254.) The COR testified that he calculated the percent quality as a very rough rule of thumb for his knowledge and his purposes only, that it was never used for payment, acceptance or to direct rework (Tr. 719). Some contract daily diaries for the days on which he performed inspections reported both the trees per acre and the percent quality (AF 205, 239 and 250).

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[1] Specification section 8.F. defines d.b.h. as diameter of the stem measured at a point 4-1/2 feet above ground level on the uphill side of the tree (AF 68).

[2] As defined on the form, these include trees with improper spacing relationships or where too many were cut and here a tree exceeding the maximum d.b.h. cut limit was cut; leave trees damaged excessively by salvage or felling operations; improper tree selection (does not meet specifications); and wrong tree cut (AF 78).

[3] These include improper spacing or too few trees cut and stumps with live limbs (AF 78).

[4] These include trees not completely severed from the stump; "hand-up trees"; high stump; trees left with excess damage; trees left with excess disease; trees not girdled; and, trees improperly girdled (AF 78).

20. On August 13, 1999, by certified mail, the CO sent Appellant a letter stating that his progress was endangering completion within the specified contract time. The CO stated that 48% of the contract time had elapsed and 19% of the work had been performed. Appellant was informed that unless progress reached an acceptable level within 10 days of receipt of the notice his right to proceed under the contract might be terminated. (AF 138.) A copy was also taped to the door of Appellant's work site trailer (AF 144).

21. The contract daily diary for August 16, 1999, indicates that the COR visited the work site on that afternoon. He and Appellant had discussions on several subjects. The COR reported that Appellant asked about prioritizing shorter spruce over taller lodgepole pines. He asked whether he should leave a spruce that was 50% shorter that an adjacent lodgepole pine. The COR noted that he told Appellant that he would go down to 50% less in height for spruce and still leave the spruce. (AF 148.)

22. Appellant testified spruce trees grow more slowly than lodgepole pine trees. After he got into the stand and realized that the FS's desire was that spruce be considered the best species to leave,
he told the COR that it would be better if the FS gave the spruce a 50% differentiation. Cutting a 12-foot tall lodgepole and leaving a six-foot tall spruce tree would benefit the FS because more of the primary desired species, i.e., spruce, would remain. If the stands were dominated by the lodgepole, few spruce would remain. He stated that the COR agreed with this "constructive change." According to Appellant, the COR said to go ahead and do it. Per Appellant, he and the COR subsequently told the CO that the contract had been performed that way with the COR's agreement. He said that later the CO stated that the contract was meant to be performed in that manner. (Tr. 50-52.) The CO testified that the "change" benefitted the contractor because it allowed him to cut smaller trees in some cases (Tr. 460). Other than questioning whether he was being paid to "treat spruce" in an on-site meeting August 24, 1999, the record contains no indication that Appellant proposed an equitable adjustment for this change. (AF 183). Appellant's claim 1.2 is that this change entitled him to an equitable adjustment of $3,000 (AF 291-92). His testimony regarding how he derived this claim amount was general and in some cases contradictory (Tr. 54-58). He has not demonstrated that he incurred any additional costs because of the change.

23. During the COR's visit to the work site on August 16, 1999, Appellant questioned whether the formula in specification section 14., PAYMENT PROCEDURES, or the formula on the Thinning Inspection Plot Form would be used to calculate payment. The COR recorded the conversation on this subject as follows:

> John then asked which formula would be used to come up with his payment. The formula on page 7 of the contract specs or the formula on the inspection report. He said depending on which formula was used he could cut differently and still receive full payment. He said that with the amount of openings in the unit he could thin where it was thick to only 7' X 7' (the minimum spacing) and we would still have to make full payment. He said the part of the contract that states he must be within +/- 10% of 396 trees per acre is vague. He also said that depending on which formula

> we used he would not have to meet the 7' spacing requirement if his trees per acre came out to +/- 10% of 396 trees per acre.

(AF 149.)

24. The COR relayed to the CO Appellant's questions regarding inspection methods and the CO responded in a letter dated August 19, 1999, that the Government would inspect the work under the contract for compliance with all contract requirements including but not limited to specifications relating to leave tree species priority, the characteristics of acceptable leave trees, the characteristics of cut trees, slash height and disposal, stump height and spacing and stocking level. He pointed out that these requirements included but were not limited to the contract requirement for minimum spacing of 7 feet between leave trees as set out in paragraphs 9.C.2. and 9.D. and as referenced in Modification No. 01 dated July 26, 1999. He advised Appellant to explain in writing if he did not believe he needed to meet the contract requirements. He then stated the Government's intent to inspect the units using random, 1/50th acre plots. The Government intended to inspect a minimum sample of one percent of the acreage in each unit, but did not waive its right to inspect more than that one percent in each. (AF 154.) Appellant did not reply in writing. During an on-site conversation with the COR on August 21, 1999, as recorded by the COR in the contract daily diary for that date, he acknowledged receipt of the CO's letter but expressed his view that it did not clarify how inspections would be conducted. Appellant said that all the letter did was to refer him back to the contract. The COR replied that such was the intent of the letter. Appellant stated that the contract asks him to do two different things and that he had only to do the lesser of the two, i.e., meeting the requirement of +/- 396 trees per acre. The COR told Appellant that he (the COR) and the CO interpreted the contract as providing for payment based on the number of acceptable trees per acre as set out in specification section 14. Appellant stated that one could not expect that the specifications would be met 100% of the time. Appellant asked about the formula in paragraph 14.A.2. and the COR stated that paragraph was only to be used in the case of a reduced payment, i.e., where the number of acceptable trees was 80-90% of the desired number. That formula only comes into play after final inspection and only if there is over cutting. (AF 169-70.)

25. Claim 1.3B is that inclusion of credits for non-stocked trees and/or excess trees (correctable) in the "trees per acre" formula on some of the thinning inspection plot forms[5] resulted in increased numbers of trees per acre causing excess rework (AF 294). Appellant testified that there are two types of thinning contracts, density-based and space-based. He stated that non-stocking pertains only to spaced-based thinning. (Tr. 64-65.) Appellant testified that he interpreted the specifications as providing inspection based on density of remaining trees as opposed to spacing of trees. He based that interpretation on the indication in specification section 7., DESCRIPTION OF UNITS, indicating that the desired stocking level in each of the seven units to be thinned was 396 trees per acre attained with 10' x 11' spacing. He asserted that no credit should be given for non-stocked areas because the specification section pertaining to leave trees made no reference to non-stocking. (Tr. 74-75.) Appellant testified that spacing is measured by use of a percent quality thinning formula

[5] The claim used the forms dated August 25, 1999 (AF 187), and August 26, 1999 (AF 200) as examples.

and total number of stems per acre is measured by a different formula (Tr. 162). Appellant's claim 1.3A is that he was paid pursuant to the percent quality thinning formula on the bottom of Form 2409 rather than the formula in specification section 14 (AF 292-93). The record does not support Appellant's contention regarding the payments.

26. The FS regional silviculturist, testifying as an expert on silviculture, agreed that the contract was density-based. He, however, testified that notwithstanding that primary basis, the contract could properly specify the minimum acceptable spacing around the residual trees, in this case the 7-foot minimum spacing. The purpose of the minimum spacing is to gain the silvicultural effect of thinning to increase the amount of growing space around the remaining trees. (Tr. 639.) Appellant's expert also agreed that it was possible to have a density-based contract with minimum spacing requirements (Tr. 308-09).

27. On cross-examination, Appellant explained his view of the interplay between the desired stocking requirement and the minimum 7-foot spacing requirement during testimony:

> Q. Right. So then how do we characterize contractor work by saying Contractor -- being John Blood – which appears to be deliberately leaving trees in many plots closer than seven feet? Do we say that the work is non-conforming, do we say that it's appropriately work that needs to be reworked, or do we say we -
>
> A. Well, you have to mathematically manipulate the numbers, okay, and if it's determined that even though there are trees out there closer than seven feet, there aren't that many to denote non-compliance. In other words, you can have trees out there that are closer than seven foot; it's an error but errors are allowed. And it's just like you're spacing your density requirement, 396, well, you say it's 10 percent either way it's not that I've got to leave 396 on this acre, I can leave 10 percent less or I can leave as many as 10 percent more. So long as all of the acres of the unit have approximately, give or take 10 percent, 396 stems per acre, it passes.

(Tr. 182-83.)

28. The COR testified that, although rework was required because initial inspections did not pass Appellant's work, the matter of providing credit for non-stocked spots did not affect Appellant's work. The major reason for those inspection failures was Appellant's failure to adhere to the 7-foot minimum spacing requirement. (Tr. 743.) The CO testified that if Appellant had met the 7-foot minimum spacing requirement he would have passed all thinning units on the first inspection (Tr. 414-15). Appellant conceded that it was possible to, and he did, meet both the desired density requirement of 396 trees per acre and the 7-foot minimum spacing requirement (Tr. 159-60). The COR testified that the contractor eventually met the 7-foot minimum spacing requirement and the desired density requirement (Tr. 699).

29. Specification section 4., ACCESS TO UNITS, provides that CC #4 can be accessed through a gate on FDR 415.1. It further provides that vehicles will be permitted up to and through thinning

unit CC #4, but no motor vehicles will be allowed on the FDR 415 road system north of CC #4. (AF 66.) Specification section 5., USE OF ROADS BY THE CONTRACTOR, states an intent that the contractor perform work with the present system of existing roads. An existing road is defined as one with a distinguishable roadbed permitting vehicle travel without major improvements to the road. It also provides that limited improvement of existing roads is permitted to allow for safe vehicle access (e.g., filling or smoothing ruts, removing roadside trees or obstacles and removing trees less than 3 feet tall or obstacles from the roadbed). (AF 67.)

30. On August 24, 1999, the CO and COR visited the work site to confirm whether work was complete in unit CC #4 as reported by Appellant. It had been entirely worked and looked pretty good although the COR reported he thought too many trees remained. The COR's Contract Daily Diary for that date contained the following reference to access to unit CC #4:

> John then said that there was no access to unit 4. Loren and I looked puzzled. We had just driven up the edge of the unit. John had not mentioned this before nor did he request that the Government remove the deadfall blocking the road.

(AF 182.)

31. The record contains no other contemporaneous evidence regarding this claim issue prior to the September 9, 1999 claim submission. At the hearing, Appellant testified that the road "prior" to the unit had trees down on it and that he had no right or responsibility to cut the trees. He further testified that he would be breaking the law by hacking any of those trees. Appellant and his subcontractors walked in and walked out of the unit. (Tr. 101-02.) The CO described blockage as two or three small trees lying across the road going through the unit. He did not see the trees as denying access by the Government to the contractor. (Tr. 459.) Appellant claims $500 for lost access (AF 295).

32. During a telephone conversation on August 24, 1999, among Appellant, the CO and the COR, the CO verbally suspended work in units 20, 21, and 25. He was uncertain whether Appellant would be able to finish the contract. (AF 181, 190.) Following that conversation, the CO and COR drove to the Whiskey Park Thinning area to view the work in unit 4 that Appellant had reported his subcontractors had completed in the previous two days. Upon observation, they concluded that spacing was too close (nearer 7' x 7' than 10' x 11'), but that otherwise the work appeared to have met specifications. Following that inspection, they met with Appellant on-site. As recorded by the COR, a number of topics were discussed during this meeting including the matter of treating spruce and access to unit # 4 reported above. Appellant raised the matter of 10' x 11' spacing, desired stocking level and the 7-foot minimum spacing specification and stated his view that these provisions require him to do two separate and different things. The CO and COR disagreed with Appellant. The COR expressed his view that the desired stocking level of +/- 10% of 396 trees per acre and other specification provisions, including the 7-foot minimum spacing requirements were reasonable. The CO asked Appellant for assurances that his subcontractors would remain on the job until completion. Appellant agreed that they would. (AF 181-84.) Appellant claims that after discussing his contention that the formulas on form 2409 "were diametrical," the CO made Appellant

promise not to leave any of the trees meeting the descriptions for column 9 on the form. (AF 295.) Column 9 is the space for recording category "C" (correctable) trees. These are defined as those not completely severed trunk, hand-up trees, high stumps, trees with excess damage, trees left with excess damage, trees not girdled and trees improperly girdled. (AF 78.) The contract daily diary recording this meeting made no mention of this promise regarding correctable trees (AF 181-84). Appellant's claim 1.5 is that when the suspension was revoked and this promise asked and agreed to, the CO changed the contract for which consideration in the amount of $4,000 is due (AF 295-96).

33. Appellant's claim 1.6 is that he is entitled to an equitable adjustment in the amount of $5,000 for acting as a consultant to the Government in explaining the contract and the inspection formulas on the thinning inspection plot form (AF 296-97). Appellant's testimony on this claim is that the CO and COR did not understand the contract which "cost [him] a lot of time and a lot of anguish trying to convince them they were wrong in conversations when [he] should have been cutting trees" (AF 108). The documentary record reveals no agreement for consultant fees and the COR testified that none was executed. He also testified that Appellant asked for no such cost. (Tr. 708.) The CO testified that the Government did not hire Appellant (Tr. 468).

34. Inspections were conducted on August 23 (initial CC #1); August 25 (initial CC #4); August 26 (initial CC #19); August 27 (reinspection CC #4 and only inspection CC #20); August 28 (second inspection CC #19); August 30 (only inspection CC #25 and third inspection CC #19); August 31 (initial inspection CC #21 and second inspection CC #1) and September 1 (fourth inspection CC #19) and second inspection CC #21) (AF 267). As of September 1, 1999, all units were accepted and Appellant signed a release form on which he indicated a claim reservation (AF 258-65). Immediately following the September 1, 1999 inspections, Appellant inquired whether there would be charges for reinspection work. The COR responded that he and the CO had discussed the subject but no decision had been made. (AF 259.) The following day the COR informed the CO that Appellant planned to file a claim. In his contract daily diary, the CO recorded this conversation and noted that the Government also had claims against the contractor for "excess inspection costs that are not reasonable." He stated that he would review the contract to determine whether there were "other excess costs that [Appellant] is liable for." (AF 266.) Appellant submitted an invoice for the contract work dated September 1, 1999, and resubmitted it September 7, 1999 (AF 264, 270). By letter of September 23, 1999, the CO informed Appellant that final payment was being processed with $133.63 being withheld "to cover the excess administrative costs incurred by the Government as a result of additional Government inspections necessitated by the Contractor's performance." He explained that not all costs of reinspection were included, only those for the third and fourth inspections of CC #19 "since these costs are unreasonable costs that the government is unwilling to bear." (AF 284.) AGBCA No. 2000-104-1 is Appellant's appeal of the CO's failure to issue a decision on his claim for reimbursement of the deduction. The Government has cited no authority or contract provision to support the withholding.

DISCUSSION

Claim 1.1 - Contract Time

The contract provided that count of contract time was to start on the effective date of the NTP if hand delivered, or on the third day after the Post Office issued a notice of certified mail to the contractor. It also provided that no work was to be performed until a pre-work meeting had been held. Failure of the contractor to pick up certified mail was not to be an excuse. (Findings of Fact (FF) 2.) The NTP was not hand delivered which neutralized the recitation of effective date. Appellant received and signed the certified mail return receipt on July 22, 1999 (FF 4). The telephonic pre-work meeting was at least begun the same day. The parties are in disagreement whether it was concluded that day or not although it is clear that all parties signed the record of that meeting including record of additional discussions held July 22, 1999, or July 26 (FF 7). The Government's primary contention is that contract time began July 20, 1999. It is clear that the contract time began some time after the original estimated start time, each party holding the other responsible. However, the contract clearly provides that count of work time does not commence until the third day after notice of certified mail to the contractor. The third day after July 22 was July 25, a Sunday. While Appellant had no obligation to begin work until 10 days after July 22, count of contract time properly should have begun on the third day. Since in this case it was a Sunday, Monday, July 26, 1999, should have been used as the start day for count of contract time. The COR's notations on contract daily dairies of time used in days and percentages were therefore erroneous throughout the job. The CO's declaration that Appellant was in default based on progress was also in error. The contractor, nonetheless, completed performance on the 44th day as calculated by the Government and in advance of the correctly calculated date (FF 34). Appellant, therefore, has not demonstrated that it was prevented from timely completion by the improper calculation of the performance period. Nor has Appellant shown that he added incurred costs for acceleration, i.e., he did not add resources or take other unplanned measures to complete by September 1, 1999. We find no entitlement to recovery on claim 1.1.

Claim 1.2 - Species Preference

Appellant claims $3,000 for giving a 50% size differential to spruce over lodgepole pine. The preference resulted in Appellant cutting lodgepole pine rather than a spruce only when the pine exceeded the size of the slower growing spruce by 50%. The Government's defense has been either that the contract was intended to be performed in that manner all along or that the change benefitted the contractor. The contractor suggested this variation on the species preference as in keeping with the FS overall aim of encouraging growth of spruce trees in the area to be thinned. He did not submit a cost proposal at the time, nor has he presented any evidence other than conclusory statements as to the increase, if any, in effort or resources to provide this differential preference to the spruce. (FF 22.) Here the change was suggested by the contractor. For recovery on the basis of constructive change, not only must a change have occurred, it must also have been directed by a Government official with the requisite authority, and must have resulted in additional costs to the contractor. Wilson Construction, Inc., AGBCA No. 89-178-1, 92-2 BCA ¶ 24,798. The evidence does not demonstrate that Appellant incurred additional costs when removing pine as opposed to spruce.

Claims 1.3A and 1.3B - Inspection and Payment Issues

Appellant claims $5,000 for what he terms the CO's failure to follow specification section 14., PAYMENT PROCEDURES, and $15,000 for allegedly cutting more trees than the contract dictated. These claims are intertwined factually. The essence of Appellant's argument related to both of these is that the contract provision stating the desired stocking level of 396 trees per acre (derived from a spacing of 10' x 11') (FF 10) and the requirement that a minium spacing of between leave trees shall be maintained in all units (FF 11, 12) each pertained to a different type of thinning contract. He maintains that the contract was a density-based contract only and so long as he met the requirement for average stocking of 396 trees per acre he was not required to strictly maintain a minimum 7-foot spacing between leave trees (FF 23, 27). Much of the hearing time was taken up with testimony regarding the COR's use of the thinning inspection plot form and the practice of giving credit for non-stocked spots when calculating stocking levels during inspection (FF 18, 19, 23-27). However, when reduced to their essence, both claims 1.3A and 1.3B turn on Appellant's interpretation of the specifications as requiring an average density of 396 trees per acre without regard to the 7-foot minimum spacing requirement. Black letter Government contracts law requires that a contract must be interpreted in such a manner as to give meaning to all its parts. HolGar Manufacturing Corp. v. United States, 169 Ct. Cl. 384, 351 F.2d 972 (1965). Contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible, and all the terms of the contract must be considered, read together and harmonized if possible. The Work Force, AGBCA No. 80-112 CDA, 80-2 BCA ¶ 14,581; Greenwood Construction Co., AGBCA No. 75-127, 78-1 BCA ¶ 12,893. The requirement to leave a minimum spacing of 7 feet between trees must be given meaning. It is achievable in conjunction with the density requirement of the contract. Appellant eventually achieved it. (FF 26, 28.) Appellant is not entitled to recover for these claims.

Claim 1.4 - Lost Access

The record does not demonstrate that Appellant was denied access. Moreover, Appellant failed to inform the FS of the conditions which he now complains denied access until after he had worked that unit. This failure to notify precluded the possibility of mitigation. Appellant's contention that any action on his part to remove the fallen trees would have been an illegal act is expressly defeated by the specifications which allows removal of trees and obstacles to facilitate use of roads. (FF 29-31.) Appellant failed to acknowledge this provision and to offer any evidence that the downfall in question exceeded the size limits described in the contract. Appellant is not entitled to recover for the alleged loss of access to unit CC #4.

Claim 1.5 - The New Contract

The alleged promise relied upon by Appellant as creating a new contract was that Appellant not leave category 9 trees. However, a promise not to leave trees with those characteristics was unnecessary as the existing contract required such trees be cut (FF 9, 11, 32). Neither the evidence nor the law supports Appellant's claim for an equitable adjustment for having agreed to a new contract.

Claim 1.6 - Claim for Consulting

Appellant's claim for consulting rests on his view that he understood the contract better than the FS representatives and provided a service to the FS in explaining his views. The evidence falls far short of that necessary to prove a constructive change to the contract. (FF 33.)

AGBCA No. 2000-104-1

The contract provides that the Government will make payments at the contractual unit prices less any deductions provided for in the contract. The contract does not contain a specific provision setting out reinspection costs as a deductible cost. The FS could have included in the contract a provision requiring the contractor to pay for inspections necessitated by rework. Hilltop Gun & Saw Shop, AGBCA No. 81-183-1, 85-2 BCA ¶ 18,107; Pacific Reforestation, Inc., AGBCA No. 86-166-3, 86-2 BCA ¶ 19,004. The record and arguments do not demonstrate that the Government incurred sufficient unanticipated reinspection costs as to be recoverable absent an explicit provision. This appeal is sustained. Appellant is entitled to a refund in the amount of $133.63.

DECISION

AGBCA Nos. 2000-102-1 and 2000-103-1 are dismissed as moot. AGBCA No. 2000-104-1 is sustained. AGBCA No. 2000-127-1 is denied.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____ _____

HOWARD A. POLLACK
Administrative Judge

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
December 21, 2001