MATT ALLEN LOGGING,	)	**AGBCA Nos. 2002-124-1**
	)	**2002-154-1**
Appellant	)	**2002-155-1**
	)	**2003-190-1**
Representing the Appellant:	)	**2003-191-1**
	)	
Matt Allen	)	
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	)	
Representing the Government:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

April 8, 2004

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Separate opinion by Administrative Judge VERGILIO, concurring in part, dissenting in part.

AGBCA Nos. 2002-124-1, 2003-190-1, and 2003-191-1 arise out of timber sale Contract No. 058113, the Mick Hazard Salvage Sale (the Mick contract), awarded to Matt Allen Logging of Auberry, California (Appellant or Matt Allen), by the Kings River Ranger District, Sierra National Forest, California, U. S. Forest Service, an agency of the U. S. Department of Agriculture (Respondent or FS), August 9, 1999. AGBCA Nos. 2002-154-1 and 2002-155-1 arise out of timber sale Contract No. 058147, the Spillway Salvage Sale (the Spillway contract), awarded to Matt Allen by the same ranger district August 31, 1999. The Board held a consolidated hearing on all appeals on November 18 and 19, 2003, in Fresno, California. The appeals are sustained and denied as explained herein.

The Board has jurisdiction to adjudicate the appeals pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended.

FINDINGS OF FACT

The Contracts

1. The Mick Hazard Salvage Timber Sale Prospectus, dated August 2, 1999, required bids to be submitted in terms of total sale value bidding. It was advertised as a premeasured sale. (Mick Appeal File (MAF) 31.) In a premeasured sale, the purchaser pays a lump sum (the bid amount), plus certain deposits. The lump sum paid remains the same whether volume exceeds or falls short of the estimate. The minimum acceptable bid, as advertised, was $31,410.14 (MAF 34). The prospectus notified potential bidders that the sale was designed to remove trees that are potentially capable of falling onto FS roads (MAF 38). The sale was authorized under a Decision Memo dated September 8, 1998 (MAF 259-61). The award date for the sale was August 9, 1999. Termination date as awarded was March 31, 2000. (MAF 44.)

2. Appellant was the only bidder on the sale. Appellant's bid was $22,959.73. With the required deposits added, it totaled $33,150.13. The minimum acceptable bid was $31,410.14. Appellant testified that the fact that he was the sole bidder, and the fact that his bid was only slightly more than the minimum acceptable bid, was indication that there was not a tremendous amount of profit in the job. (MAF 39; Transcript (Tr.) page (p.) 127.)

3. Slash deposits were required by AT5b, Timber Payment Rates For Species and Products to be Paid for at Flat Rates (MAF 47). Road maintenance deposits were required by CT5.415, Surface Replacement Deposits (MAF 85). BT4.4, Payment Not Received, provides that where payment is not received within 15 calendar days of billing, interest shall begin to accrue beginning 30 days after the end of the period allowed for payment. Rate of interest shall be 6% per annum, compounded monthly. (MAF 63.)

4. CT6.01, Interruption or Delay of Operations, provides for interruption or delay of operations to comply, among other things, with a court order. The sole and exclusive remedy shall be (i) a contract term adjustment pursuant to BT8.21, or (ii) when the interruption or delay exceeds 30 days during normal operating season, a contract term adjustment pursuant to BT8.21, plus out-of-pocket expenses incurred as a direct result of interruption or delay of operations. Out-of-pocket expenses do not include lost profits, attorney's fees, replacement cost of timber, or any other anticipatory losses suffered by the purchaser. (MAF 139.)

5. The Spillway Salvage Timber Sale Prospectus, dated August 23, 1999, also required bids to be submitted in terms of total sale value bidding. It was advertised as a scaled sale. (Spillway Appeal File (SAF) 107.) A scaled sale is one where the amount of timber is estimated in advance of the sale but payment is based on the amount of timber as scaled at the mill. The minimum acceptable bid for the advertised sale was $63,127.81 (SAF 110). The prospectus notified potential bidders that the sale was designed to remove trees that are potentially capable of falling onto FS roads (SAF 113). The sale had been authorized under a project decision dated December 18, 1998 (SAF 288-90).

6. The estimated quantity of timber as advertised was 403 CCF (exclusive of cull and other species stated to be nominal). The minimum acceptable bid for advertised timber was $53,927.32, not including deposits. With deposits, it came to $63,127.81 (SAF 110.) Appellant's bid, not including deposits, was $55,797.99 (SAF 115). As on the Mick sale, he was the sole bidder with a bid only slightly above the minimum acceptable bid price (Tr. 127).

7. The Spillway Sale was awarded to Appellant August 31, 1999.[1] The normal operating season was June 1 to November 15. (SAF 116.) Contract completion date was March 31, 2000. The contract contained Standard Provisions (Scaled Sales). Standard Provision 3 requires the purchaser to cut and remove all timber and satisfy the terms of the contract on or before the Termination Date, unless the Contracting Officer (CO) grants an adjustment or extension of time. It also provides for a mandatory contract term adjustment for certain causes beyond the control of the purchaser. Standard Provision 4 identifies the contract as a scaled sale. It further stipulates that the FS makes no representation, warranty or guarantee of the accuracy of the estimate and that the CO shall not be obligated to designate additional quantity based on assertion that the original quantity was overstated. (SAF 118.) Standard Provision 7, Included Timber, required the purchaser to cut all included timber and provided that additional timber designated would become included timber (SAF 120).

8. Standard Provision 16, Suspension, provides as follows:

> The Contracting Officer or designee may suspend all or any part of the Purchaser's operations if the Purchaser breaches any of the material provisions of the contract. The Contracting Officer will provide written notice to the Purchaser of any suspension. Forest Service representatives, delegated the authority by the Contracting Officer under Standard Provision 21, may give oral notices of an immediate suspension if such breach constitutes an immediate threat to human life or a threat of immediate and irreparable damage to National Forest resources. The Contracting Officer or designee will provide a written notice to the Purchaser as soon as practicable for any oral suspensions.

[1] The CO's signature on the Timber Sale Contract is illegible. The first name appears to be Al. (SAF 116.) Documents in the file were authored by or addressed to CO Alan Quan (SAF 191-93), CO Max Younkin (SAF 195), CO James Boynton (SAF 1) and CO Dominic S. Beran (SAF 27, 30 and 82). None of these individuals testified at the hearing.

> The Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of the Contracting Officer: (a) To prevent serious environmental degradation or resource damage that may require contract modification under Standard Provision 25, Standard Provision 26, or Standard Provision 27; (b) To prevent serious environmental degradation or resource damage that may require contract cancellation, in whole or in part, under Standard Provision 25 or Standard Provision 26; (c) To comply with a court order, issued by a court of competent jurisdiction; or (d) Upon determination of the appropriate Regional Forester, Forest Service, that conditions existing on this sale are the same as, or nearly the same as, conditions existing on sale(s) named in such an order as described in (c).
>
> The Purchaser agrees that in event of interruption or delay of operations under this Standard Provision, Standard Provision 25, Standard Provision 26, Standard Provision 27, or Standard Provision 34, that the Purchaser's sole and exclusive remedy shall be: (a) Contract term adjustment pursuant to Standard Provision 3, and (b) When such an interruption or delay exceeds 30 days during Normal Operating Season, contract term adjustment pursuant to Standard Provision 3, out-of-pocket expenses involved in acquiring and holding the contract such as maintaining performance bonds and cash deposits. Out-of-pocket expenses do not include lost profits, attorney's fees, replacement cost of timber, or any other anticipatory losses suffered by the Purchaser. The Purchaser agrees to provide receipts or other documentation to the Contracting Officer which clearly identify and verify actual expenditures.

9. Standard Provision 27 gives the CO the right to make unilateral modifications in the timber specifications on page 1 of the contract, or in related Special Provisions as necessary to make the contract consistent with the Forest and Rangeland Renewable Resources Act of 1974, as amended, and with land management plans developed or revised under it. Where value of the remaining Included Timber changes, such changes are to be reflected in a rate redetermination. (SAF 131.)

Operations

10. Both contracts specified limited operating periods (LOPs) for the protection of particular species of wildlife (SAF 141 and MAF 88). The Spillway LOPs were of more immediate concern at the time of award, however, as the single LOP in the Mick contract expired August 31. On the Spillway contract, an LOP for deer would begin October 1 and run through November 30. The deer LOP was effective for a particular area on the Spillway sale. Hence, it was Appellant's plan to begin harvesting timber on the Spillway sale in the bottom area of the sale as indicated on the sale maps in order to be finished in the deer habitat area by the start of the LOP. Appellant planned to complete the Spillway sale before moving into the Mick sale and progress back to the low land of that sale weather permitting. (Tr. 105-06.) Appellant began work on the Spillway sale on September 14, 1999.

11. The Decision Memo memorializing a decision to sell hazardous timber, including that later known as the Mick sale, was signed by the District Ranger September 8, 1998. The Decision Memo regarding the Spillway sale was signed December 18, 1998. Both cited the categorical exclusion in the Forest Service Handbook 1909.15, 31.2. Reliance on the categorical exclusion meant that the FS did not have to prepare an environmental impact statement (EIS) or an environmental assessment (EA) prior to offering timber for sale. The Decision Memos identified the areas covered by each with reference to acreage and forest roads and not by the sale names which were later applied to the individual sales (MAF 259-61 and SAF 288-90).

12. In September 1999, a United States District Court in Illinois imposed a nationwide injunction on all Forest Service project decisions approved relative to the FS timber harvest categorical exclusion after September 16, 1998. Heartwood, Inc. v. United States, 73 F. Supp. 2d 962, 980 (S.D. Ill. 1999). The FS Associate Chief for Natural Resources informed Regional Foresters of the injunction in a letter dated October 1, 1999 (SAF 159). The effect of the injunction was to require preparation of an EIS or EA before logging could begin or resume on the affected sales.

13. Appellant and his crew continued to work on the Spillway sale until October 4, 1999, when the sale was suspended. Appellant was not present on the job on that date. The Sale Administrator (SA), John Martin, spoke to Appellant's employee (and son), Riley Allen, and provided a copy of Form R5-2400-181 ("181") recording the suspension on the Spillway Salvage Sale. The 181 recited that the suspension was due to the court order. (Tr. 108; SAF 249.) At the time of the suspension, Appellant had logged more than the estimated 403 CCF of timber, perhaps 468 CCF (SAF 33) to 500 CCF (Tr. 59). However, the sale limits totaled about 38 miles of road and only about six miles of road had been logged before the shutdown (Tr. 117, 126). [2] Thus, much of the timber which had been logged was additional marked (or add-on) timber (SAF 33). Mr. Allen testified that he bid the sale expecting additional timber to be marked and that such additions are expected in the industry in hazard sales (Tr. 117-18, 121-22).

14. Evidence regarding the exact sequence of events surrounding the notification to Appellant and the shutdown as it applied to the Mick sale is contradictory. Rick Larson, who prepared the contracts and appraisals on both sales, testified that on October 1, the same day that the letter from FS headquarters was dated, he notified Mr. Allen by telephone that the sales were suspended. He testified that he first heard of the injunction by e-mail and personal contact, and that the e-mail was a letter from the Washington office. (Tr. 190-91.) The CO, Mr. Ray Porter, also testified to his recollection of receiving notice of the decision and the need to suspend some contracts, but he did not testify to the date (Tr. 180-81).

[2] Appellant's May 17, 2002 claim letter says that 3 of 14.9 miles had been logged (SAF 33).

15. John Martin, the SA, testified that he took the form 181 (which is dated October 4, 1999) to the Spillway sale site to inform Appellant that the sale was suspended. Mr. Martin testified that he explained to Mr. Allen that the court order suspended his activities. He testified that he talked about Appellant going over to the Mick sale but that Mr. Allen responded that he had other obligations. (Tr. 66.) Mr. Allen, however, testified that he was not present on the sale on October 4, having been involved off-site with repair of a skidder. Mr. Allen testified that the employees operating the sale that day told him of the suspension. (Tr. 108.) Mr. Allen's recollection is confirmed by the fact that the form 181 was signed by Riley Allen, rather than Matt Allen. On cross-examination, Mr. Martin agreed that Mr. Allen was correct about not being present on the sale on October 4 (Tr. 71-72). That is also confirmed by Mr. Allen's daily diary (diary), which describes going to John Deere due to part problems (diary entry for Monday 4 October 1999). The evidence is clear that Mr. Allen and Mr. Larson spoke by telephone. Mr. Allen's daily diary confirms a telephone conversation on October 4. Mr. Larson testified that on October 4, while in the process of drafting notices of suspensions for the enjoined sales, he discovered that the Mick sale was not subject to the court order. Therefore, he sent a notice of suspension on the Spillway and not on the Mick. He testified that to the best of his recollection he called Mr. Allen once he discovered his mistake about the Mick being enjoined and that "it would have been the day I discovered the error, October 4th." (Tr. 191-93.) Mr. Allen, however, testified that October 4 was the first day he learned of any suspension.

16. To summarize, Mr. Larson testified that he notified Mr. Allen of the suspensions on October 1, and that he notified Mr. Allen that the Mick sale was not suspended on October 4. Mr. Allen testified that he learned of the suspension of the Spillway sale on October 4, first from his employees, and later that day from Mr. Larson. He testified that he questioned Mr. Larson on that evening about the Mick and Mr. Larson said, "you can't go there either." (Tr. 109). Later that evening, Mr. Allen met with Mr. Tim Emmert, who was his prospective purchaser for the timber to be cut on these sales as well as some timber sales on private land. At that time they signed a purchase agreement on some private timber and discussed a change in operations due to the inability to continue on the Spillway sale or move to the Mick sale. Together Mr. Allen and Mr. Emmert decided to move to private property and log the timber there. The following day, October 5, 1999, Appellant began logging on non-FS property. A few days later, according to Mr. Allen, he was told by Mr. Larson that the Mick sale was not enjoined and that he needed to go back and finish that year. Mr. Allen responded that her would finish the private work that he had begun before starting to harvest the Mick sale. (Tr. 108-11.)

17. By letter to John Exline, FS Representative, dated October 15, 1999, Appellant requested two payment units on the Mick sale and made reference to the recent problems of the shutdown (MAF 121). The record contains no evidence of a written response to this letter. Mr. Allen's daily diary indicates that on November 3, 1999, he made telephone calls to the FS and his bonding company (diary, November 3, 1999). The pre-operations meeting on the Mick sale was held on Thursday, November 4, 1999 (MAF 124). Appellant began logging the Mick sale on Friday November 5 or Monday, November 8 (Tr. 11; diary, November 8, 1999). Mr. Allen testified that work progressed through November 29 (Tr. 112). However, his diary indicates that he finished shipping timber from

the Mick sale on November 26 and moved to Cressmons that day (diary, November 26, 1999). The timber sale administration report for November 29, 1999, stated that the purchaser stopped work on the sale on November 24, 1999, at which time ground conditions allowed for further logging. Slash work was not complete. Damaged small trees remained to be felled. Included products remained to be felled and removed. (MAF 157.) Appellant worked the following week on another job (diary, November 29 - December 3).

18. By an agreement to modify contract dated February 16, 2000, the termination date on the Mick sale was changed to July 1, 2000 (MAF 114-15). Work resumed on the Mick sale in June 2000 (MAF 161; Tr. 112). On June 28, 2000, Appellant requested a contract term extension which was granted the following day, extending the term of the sale to November 15, 2000 (AF 116-19, 141-42). During this season, Appellant had to discontinue operations from the middle of July until after August 31, due to a limited operating season for goshawk or owl nesting sites (Tr. 113). By letter dated December 13, 2000, the FS Representative put Appellant on notice of contractual requirements remaining on the Mick sale. The November 15 termination date had passed and Appellant was granted a waiver of time limits to complete the remaining work. Because of the current weather conditions, Appellant was granted 15 calendar days after the start of the 2001 normal operating season to complete the remaining work. (AF 144.) The pre-operations meeting for the 2001 season was held June 1. According to the minutes of that meeting signed by both parties, the work remaining to be accomplished was clean-up. All references to falling, skidding and hauling were indicated by the symbol "N/A" to be inapplicable (MAF 145-49).

19. During the course of the Mick sale operations, the FS resource assistant, Ms. Linda Haines, had the responsibility for keeping the financial records of the sale, including billing for any timber added to the sale after award and for slash and road deposits when cull (rotten timber) was removed from the sale (Tr. 158, 164-65). During the month of November 1999, Appellant removed 275.40 cull logs from the sale (MAF 246; Tr. 167). Ms. Haines, however, had neglected to bill for the deposits when Appellant entered the unit worked during that period and also failed to pick up the omission when she prepared the timber sale statement of account for November 1999 (MAF 243-46; Tr. 167). The next bill was issued for the month of June 2000. Ms. Haines billed for cull removed during that month but did not catch her error on the previous bill. All subsequent bills during the sale included cull and road deposits and were paid (Tr. 168, 170). In March 2002, Ms. Haines conducted a routine post-operations audit of the sale. At that time, she discovered that she had failed to bill for the deposits required for the cull removed in November 1999. On March 15, 2002, a bill was issued in the amount of $3,635.28 (275.4 CCF of cull X $11.50 for slash + 275.4 CCF of cull X $1.70 road maintenance or surface replacement). (MAF 248-51.) Follow-up bills were issued May 16, 2002, and July 5, 2002. Interest and administrative costs were added to each bill for a total of $3,742.12 on the July 5, 2002 bill. (MAF 276-78.)

20. Mr. Allen testified to his recollection that at the pre-operations meeting, the FS Representative, John Exline, told him that he would not be charged slash deposits or road deposits on material that was not going to be treated (Tr. 106-07). Mr. Exline had no recollection of an oral agreement to waive deposits nor had he found any record of having made such an agreement (Tr.

201, 220-21). The usual practice where deposits are waived is to modify the contract (Tr. 205). In the case of the Mick sale, the contract was not modified (Tr. 206-07).

21. During the suspension of the Spillway sale, the FS was required to prepare an EA. Government witnesses testified that the minimum period of time to prepare an EA is in excess of 105 days as the Code of Federal Regulations (CFR) requires a 30-day scoping period, a 30-day comment period and a 45-day appeal period (Tr. 151, 193-94). Mr. Rick Larson, who was tasked with preparing the EA, testified that considering the legal requirements, he thought the environmental document was out fairly timely (Tr. 150). However, in response to the presiding judge's subsequent request for citation to the regulations setting those time limits, the Government clarified that testimony. There is no regulatory requirement for a specific scoping period. Title 36, CFR 215.6(a)(1)(i) provides that comments on a proposed action regarding an EA shall be accepted for 30 days following the date of publication of the legal notice. Regarding the EA itself, 36 CFR 215.15(a) provides a 45-day period for appeals following the publication date of the legal notice of the decision. (Letter from Government counsel to the Board, dated February 4, 2004.)

22. The Decision Notice and Finding of No Significant Impact for Hazard Tree Removal Program describes the chronology of the EA preparation in this case. The suspension took place October 4, 1999. The Legal Notice, with reference to conducting the EA, was published in the newspaper 75 days later on December 18, 1999. According to the Decision Notice, the period for interest groups to express concern expired January 14, 2000. Because no responses had been received, letters were sent to "key groups" 6 days later on January 20, 2000. This was done because "the District felt an obligation to ensure that adequate information on the proposed project was disseminated." The EA, which is not in the record but which Mr. Larson testified was "not thick" (Tr. 151), was completed by May 22, 2000, when it was sent out to the public for a 30-day comment period. Responses to comments were initially addressed on June 15, 2000, and were not completed until September 5, 2000. The Decision Notice was signed by the Forest Supervisor on September 13, 2000. (Appellant's Supplement to Mick Appeal File (ASMAF) 68-72.) During this time, Mr. Larson was away from his usual post during forest fires for two periods, July 23 to August 12 and August 16 to September 9 (Tr. 151). Mr. Larson testified that he had signed up for a 5-year commitment on a National Incident Management Team; that he was not directed to go to the fires but it was an obligation on his part (Tr. 195).

23. In a letter dated December 1, 2000, CO Max C. Younkin granted a contract term adjustment for a period of 42 days starting at the beginning of the Normal Operating Season, June 1, 2001. Therein, he stated that the EA had been completed; the Decision Notice was published September 18, 2000; and the appeal period had expired with no appeals. (SAF 195.) Forty-five days from September 18 was November 2, 2000, almost a month before the notification and 13 days before the end of the normal operating season. Appellant was not notified until after the expiration of the 2000 normal operating season. However, it appears that by the time the appeal period expired, it was too late in the season to operate due to snow (SAF 33). Nonetheless, from suspension on October 4, 1999, until the earliest time work could begin again (June 1, 2001), 605 days elapsed.

24. The pre-operations meeting for the Spillway Sale was conducted Friday, June 1, 2001 (SAF

196). Appellant moved his equipment to the Spillway sale Wednesday, June 6, 2001 (diary, June 6, 2001). During this period, the SA had changed from John Martin to Thobe Oestreich (Tr. 52, 91). When Appellant went back to the Spillway Sale, he observed that the harvest conditions of the sale had changed considerably. Upon his return to the sale, he observed individual trees that he remembered from 1999, which had deteriorated. He was concerned because he had to cut a lot of trees which had lost value. (Tr. 115-17, 126.) Mr. Allen provided, as an example of the deterioration of trees during the period of suspension, his notes from June 11 and June 13, 2001. His notes indicated that 90% of the 20 trees cut on June 11 were cull. Of the 20 cut on June 13, 80% were cull. (SAF 69.) In testimony, he stated that about 70% of the total trees cut on the 2 days were cull; some had been cull when he bought the sale, but about 30% of the total cut on those 2 days had deteriorated to cull from October 1999 to June 2001 (Tr. 276-77).

25. By letter dated June 14, 2001, the CO, James L. Boynton, referenced the previous contract term extension to July 12, 2001, and stated that since there would not be a waiver of the prohibition against operations in certain areas during periods relative to protection of heritage resources and protected species, he was granting a contract term adjustment to modify the termination date to September 30, 2001. (SAF 214.) Timber sale administration notices reflect that Appellant was working through September. The report for September 28 stated that a waiver of the limit of 15 working days past September 30 was granted to do slash and erosion work only. (SAF 261-77.) The report for October 10 stated that all volume had been removed prior to the termination date (SAF 279).

26. Appellant's original log purchase agreement for the sale of the timber from the Spillway sale, dated September 7, 1999, anticipated that the timber would be hauled to his purchaser's mill at Dinuba. The unit price for fir, the predominant specie in the sale, was $400. In September 2000, during the period that the Spillway sale was suspended, the mill at Dinuba closed. The subsequent log purchase agreements required haul to the purchaser's mill at Terra Bella, located a greater distance from the Spillway sale site. That agreement expired December 31, 1999. (Tr. 257-58, SAF 6-8.) A second agreement was signed in 2000 in anticipation of a possible lifting of the suspension. It provided for the purchase of fir at $425 per unit. That agreement contained the notation, "haul differential reflected in F.O.B. price." That agreement expired December 31, 2000. The third agreement was dated June 6, 2002. The price for fir was $408. The 2002 agreement stated "haul differential included in F.O.B. prices." (SAF 6-8.) Mr. Allen testified that in 2000 and 2001, the mill was offering a haul differential but that he rejected the differential because it was based on a load size which he thought he could beat by carrying more timber on each load than the mill's differential anticipated. Thus, he explained the notations on the 2000 and 2001 agreements as meaning that any additional cost of haul was reflected in the price. We conclude that it means that the additional cost of hauling would not be paid separately based on the number of loads, but had been considered in the agreement as to the unit price. Further, Mr. Allen testified that "four and a quarter delivered to Terra Bella is still not as good as 400 to Dinuba." (Tr. 269.) Nonetheless, if he had been able to log during the 2000 season, after what he would have considered to be a reasonable delay, "there would have been no issues" (Tr. 266).

The Claims

The Mick Sale

27. In a letter dated August 3, 2001, Appellant presented a claim to CO James Boynton, relating to the fact that he was erroneously informed that the Mick sale, as well as the Spillway sale, was subject to the Heartwood injunction. He claimed that, but for this erroneous instruction, he would have begun operations on the Mick sale and completed prior to the termination date of March 31, 2000. He claimed $300 per move for each of four move-in and move-out operations during the course of the sale for a total of $1,200. He also claimed $4,386.63 for timber value lost due to delay in harvesting estimated at 10% of original value. Using a weighted average of $116.63 per CCF for an original volume of 372 CCF sawlog total volume, he calculated the original value at $43,386.36 and showed his claimed amount as $4,386.63. His calculation was off by $48, as 10% of $43,386.36 is $4,338.63. Appellant also claimed $800 for "performance bond maintenance, payment bond allocations, and administrative costs associated with scheduling equipment, personnel, and operations." (MAF 3.) Appellant provided additional information in a letter dated November 8, 2001 (MAF 4).

28. By letter dated November 9, 2001, the CO, Ray Porter, responded to Appellant's claim. [3] After reviewing the claim and history, he stated that he was granting the claim in part and required submission of all scaling summaries from the sale. He would make a final determination of the amount to be allowed by November 30, 2001. (MAF 7-9.) By letter of November 14, 2001, Appellant provided volume information by species, original contract volume, revised volume, bid rate, scale volume, and destination. He also identified by load number the destination of the timber cut. Destination was either "SFI, Dinuba, TB" [4] or "MALL, Auberry"[5] or cull logs sold to Hackett. While the total volume exceeded the original contract volume, Appellant contended that he had

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[3] The CO's letter refers to Appellant's claim by its date of postmark September 11, 2001, rather than by the date on its face (August, 3, 2001). The Board assumes that the letters are one and the same.

[4] SFI, Dinuba, TB is Sierra Forest Industries, Dinuba, Terra Bella.

[5] MALL, Auberry is the yard of Matt Allen Logging.

intended to log and sell merchantable timber to SFI, Dinuba. He stated that the wood which went to other locations, either MALL or private individuals, was cull, required to be removed. He also stated that according to his records, after removing 2.8 times the original volume, he was still 10% short of what he paid for. He adjusted his claim downwards to a total of $5,129.18. The claimed costs for move-in and move-out ($1,200) and bond and administrative costs ($800) remained the same. The lost timber volume cost was reduced to $3,129.18. Appellant reached that amount by finding that he was short 8 mbf of PP (ponderosa pine) 33.75% ($1,265.28); 4 mbf of SP (sugar pine) 35.70% ($668.40); and
10 mbf of WF (white fir) 6.1% ($847.50). Quantities of lodgepole pine and incense cedar were OK. (MAF 13.)

29. The CO issued his final decision in a letter dated January 8, 2002. He responded to the earlier $6,386.63 claim. The CO allowed the claim of $1,200 for move-in and move-out costs. The CO denied the claim for $800 because the performance bond had been made in cash and no data was presented to quantify the alleged bond maintenance costs. The CO denied the claim for lost timber value because Appellant had originally planned to move to the Mick sale only after the Spillway was complete and if Appellant had, instead, started on the Mick sale on the date of execution of the contract, using his estimated production rate, he could have completed the sale within 23 days and have been finished prior to the suspension of the Spillway sale. He also noted that the FS Representative had allowed Appellant to leave some cull on the sale, saving hauling costs. Finally, the CO stated that the sale was a tree measurement sale and even though Appellant submitted scaling records from the Sierra Forest Products' sawmill, the FS could not ascertain that the total volume removed from the sale was shipped to that mill. He also noted that other factors could have affected the underrun including improper scaling methods and normal deterioration as a result of the extended contract. (MAF 14-19.) Appellant timely appealed this decision to the Board, where it was docketed as AGBCA No. 2002-124-1.

30. In an undated letter, Appellant made a claim for a refund of slash disposal and road maintenance fee allegedly paid in error on Contract No. 058113 (the Mick sale). He claimed to be due a refund of $4,904.52 for slash disposal and $725.03 for road maintenance. Appellant alleged that he had an agreement with Mr. Exline, the FS Representative, that all slash and road fees on cull logs would be waived. He claimed that the facts that fees were "waived for the first unit and government regulations will not allow operations to begin until all fees are paid" meant that Mr. Exline honored the agreement so long as he was the representative on the sale. Appellant claims $5,629.54 for slash and road maintenance deposits asserted to have been paid in error. Conversely, the FS claims $3,888.56 for slash and road maintenance deposits for November 1999, which were never paid. The CO issued his decision July 30, 2004, denying the claim for return of slash deposits allegedly paid in error and asserting the affirmative Government claim for the unpaid November 1999 deposits. These additional claims on the Mick sale were docketed as AGBCA No. 2003-190-1 and 2003-191-1.

The Spillway Sale

31. Appellant's initial claim on the Spillway sale was presented to the CO in a letter dated February 5, 2002. He claimed lost timber value of $10,030 as a result of changes in the timber market from the time the sale was suspended until 2001. He reached the claim amount by multiplying $17 per mbf times 590 mbf. At the hearing, Mr. Allen testified regarding the three contracts he had to sell the Spillway timber. His original 1999 contract was to sell the fir (the predominant species on the sale) for $400 net delivered to Dinuba. In 2000, when he expected to be able to harvest timber, he entered into another contract. This one was for $425 net delivered to Terra Bella as prices had risen and the closer Dinuba mill had closed in the interim. The final 2001 contract was for $408 delivered to Terra Bella. Mr. Allen derived the $17 per mbf claimed by subtracting the 2001 price from the 2000 price based on an expectation that a reasonable period of suspension would have allowed him to harvest and sell the timber in 2000. (SAF 4, Tr. 266-71.)

32. He also claimed out-of-pocket costs for increased haul difference, due to the fact that the Dinuba mill, where he originally planned to take the timber, had closed during the period of suspension and he had to haul to the Terra Bella mill which took an additional 2-plus- hours per load. He claimed a haul differential of $120 per load. In testimony, Mr. Allen explained the driving time to Terra Bella is usually 2 to 2 1/2 hours longer than to Dinuba. He used the more conservative 2- hour duration and priced each hour at $60, for a trip cost of $120. With an average load of 5.5 mbf, he calculated the haul differential cost at $21.80 mbf for a total of $12,862 for the 590 mbf hauled to the more distant mill. (SAF 4, Tr. 270-71.)

33. He also claimed $1,750 for 5 mandays of labor at $350 per day required to fall trees that had deteriorated to non-merchantable due to the suspension. The claim also included the amount of $1,040 for 16 hours of equipment time at $65 per hour for the same clearing of non-merchantable timber. Removal of the non-merchantable timber also resulted in a claim of $400 for 16 hours of flagmen at $25 per hour. Regarding the $350 per day rate for falling non-merchantable trees, Mr. Allen testified that he considered $50 an hour a reasonable rate for a good tree faller; he had just contracted on a job where the rate was $75 per hour (Tr. 273-74). The claim included $1,500 for "administrative" costs described as being associated with maintenance of bonds, lost interest in down payments, etc. (SAF 1-5.) In response to an April 10, 2002 request from the CO for additional information explaining the calculation of the $1,500 administrative costs claim (SAF 21), Appellant cited to the FS addition of a scaling overhead of approximately 35% on Spillway scaling bills and the statement that delays would result in an unspecified additional cost. He explained his cost as follows: 6% of the $6,000 bond = $360, resulting in $720 for the 2-year period. He priced his overhead costs at $25 per hour for 40 days for a total of $1,000 for that item. Combined costs totaled $1,720. (SAF 25.) The CO responded to that with a request for receipts or other documentation as required by Contract clause 16, Suspension (SAF 30).

34. By letter dated May 17, 2002, Appellant provided documentation. Using his cost of borrowing of 10.75% in 1999 and 10.5% in 2000 (as supported by his bank statements), he calculated the cost of maintaining his $6,000 cash bond at $645 for 1999 and $630 for 2000, for a total of $1,275. He also enumerated his trips to meet with the FS in Prather, California, and to the Spillway site as amounting to mileage in excess of 470 miles, which he costed at $.36 per mile for a

total of $169.20 in mileage. He listed 15 meetings or trips taking a total of 36 hours of his time at $20 per hour for $760 of management time. Finally, he estimated $139 in office time, cell and land line phone calls. These items (mileage; management time; and office overhead) totaled $2,343, an increase of $843.20 over the original claim of $1,500 for administrative costs. This increased the total claim from $27,582 to $28,425.20. (SAF 33-69.) The Government cross-examined Mr. Allen

regarding his claimed costs for the out-of-pocket expenses (Tr. 272-74), but provided no rebuttal evidence that the rates used by Appellant were inflated or unreasonable.

35. The CO's decision was issued June 18, 2002; it responded to the original $27,582 claim without reference to the amendment which increased it to $28,425.20. The CO denied the claim for lost timber value citing the exclusion in the Suspension clause of lost profits, attorney's fees, replacement cost of timber, or other anticipatory losses from out-of-pocket expenses. He granted the claim for longer haul to Terra Bella to the extent of $1,648.82. His basis was as follows. The original volume remaining was 101 CCF, of which 15 trees (21 CCF) became non-merchantable and were not hauled to Terra Bella, leaving 80 CCF to be hauled at a cost of $15.55 per CCF or $1,244. For costs of falling and skidding unmerchantable trees, he allowed $404.82, based on the SA's estimate that only 15 trees became unmerchantable and six fell down and did not have to be falled or skidded. The remaining nine trees were multiplied by $44.98 per tree (an amount taken from the sale appraisal).

36. At the hearing, however, the SA's testimony did not support the estimate that only 15 trees became non-merchantable in the 600-plus-day period. He did not testify to these numbers. He testified generally in support of the premise that not much deterioration of green material would have taken place and that cull material would not have changed significantly from a merchantability standpoint. But he also stated that recently dead timber delayed 600 days would be significantly impacted depending on species and size, and that fir (the predominant species on the sale) decays at a more rapid rate when left in the elements when it is dead. (Tr. 94-96.)

37. The CO's decision also denied the claim for traffic control. The claim for administrative cost (apart from bond cost) was denied. He granted $1,062.60 of the claim for bond costs, using Appellant's claimed costs to arrive at a monthly rate, but allowing for 20 months rather than 24 months as the sale was suspended from October 4, 1999 to June 5, 2001. The total amount granted was $2,711.42 ($1,244 for the longer haul; $408.82 for falling and skidding non-merchantable trees; and $1,062.60 performance bond maintenance). (SAF 72-82.) While Appellant's written claims were delineated as described above, Appellant has also indicated a desire that the FS perform a rate redetermination as provided for in Standard Provision 27. Following a timely appeal, these claims were docketed as AGBCA Nos. 2003-190-1 and 2003-191-1.

DISCUSSION

The Mick Sale - AGBCA No. 2002-124-1

The CO granted and paid one of the three Mick sale claims that docketed as AGBCA No. 2002-124-1. We are now concerned with only the lost timber value claim and the bond maintenance claim.

The nationwide injunction issued in the Heartwood case did not affect the Mick sale as the Decision Memo authorizing it was signed prior to September 16, 1998. However, FS personnel did not realize that it was unaffected when Appellant was originally notified on October 4, 1999, to suspend operations on the Spillway sale. Appellant had begun work on the two sales according to a plan which would log both in a single operation beginning with the Spillway. The parties provided different versions of the events. According to the Government's version, the erroneous notification that the Mick sale was also suspended was corrected on October 4, 1999, the same day that notification of suspension was delivered to the work site. Appellant testified that he was told that the Mick sale was not suspended until a few days after October 5, when he had moved his equipment to private property to log there in lieu of continuing on the FS sales. (Findings of Fact (FF) 13-15.). While the testimony is inexact from both parties, we conclude that the FS did prevent Appellant from operating on the Mick for a period of about three days. We find this period of time to be reasonable given the nationwide injunction and the FS need to determine which contracts were or were not impacted. Based on the evidence presented, lost time after 3 days is the result of Mr. Allen's business decisions (FF 15). Appellant has not shown that the claimed impact could not have been mitigated given the short duration of the suspension. In the case of a short suspension, such as the one here, a purchaser needs to show that the costs could not have been reasonably avoided or overcome. Appellant's claims for lost timber value and bond maintenance in excess of what has already been acknowledged and paid by the CO are denied.

The Mick Sale - AGBCA Nos. 2003-190-1 and 2003-191-1

Appellant also claims the right to a refund of slash and road deposits for periods after November 1999, which he claims he paid in error on the Mick contract. Conversely, the FS claims entitlement to the same deposits which were not billed and paid in November 1999. The contract clearly required the payment of such deposits. Deletion of the deposits would require a modification to the contract. No such modification to the contract was executed. Appellant's appeal of the July 30, 2003 decision is denied. Appellant is not entitled to a refund of the $5,629.54, which he claims was erroneously paid. The FS is entitled to payment of the $3,635.28 not billed in November 1999, along with interest as specified in clause CT4.41, Other Payments Not Received.

The Spillway Sale - AGBCA Nos. 2002-154-1 and 2002-155-1

Standard Provision 16, Suspension, gives the FS the right to suspend a timber sale contract under certain conditions including to comply with a court order. That contractual right, however, must be exercised reasonably. Scott Timber Co. v. United States, 333 F.3d 1358 (Fed. Cir. 2003). The contract at issue there contained CT6.01, which while not identical to Standard Provision 16 in the Spillway contract (a later clause), does not contain differences relevant to the issues before us here. In Scott Timber, the Federal Circuit held that clause CT6.01 does not provide authority allowing the FS to indefinitely or permanently suspend a contract. Where there are prolonged suspensions, such as

in the instant case, a court or board must determine whether the suspensions were reasonable. As the Federal Circuit pointed out, the reasonableness issue is an intensely factual one. Clearly in this case, the FS was entitled to a reasonable period of time in which to comply with the Heartwood court order. Our task is to determine whether the FS reasonably exercised that right when it prepared the EA required by the Heartwood court's action. Evidence indicates that regulation required a scoping period of some length, a 30-day comment period and a 45-day appeal period. In addition, some period of time would be required to write the EA. Even if we allow the 30-day scoping period, which the FS now says is its policy, and a period of 90 days for actual writing, the maximum time needed to complete the entire process would total only 195 days. We have no evidence to determine whether the 90 days we allow here for writing would be a reasonable period for writing in this case. However, the testimony indicated that the EA itself was "not thick." (FF 19, 20.) The record reveals that the FS delayed 75 days before even taking the initial step of placing a legal notice in the newspaper. Then, when no comments were received from the public after this scoping advertisement, the FS decided to go further and contact "key groups" to give them another opportunity to participate in scoping, prior even to the regulatory comment period. This was not required by law but rather was an additional procedure elected by the FS. The FS presented no testimony or other evidence establishing the need for this enlargement of the scoping period. In addition, in the midst of the period when the FS was responding to comments, the individual charged with writing the EA left for a total of 44 days of fire duty. No progress was made on the EA during this time. These delays combined to prevent operations from beginning until June 1, 2001, 605 days after the suspension began. (FF 21, 22.)

It is critical to our decision here that the time taken by the FS, and decisions affecting that time, were largely in the sole control of the FS. This is not a situation where time was being controlled by court orders or ongoing litigation. Given that, and in the absence of convincing evidence from the FS explaining and justifying the expenditure of what appear to be excessive periods of time, we conclude that FS acts and omissions in failing to expedite the EA exceeded the exercise of a reasonable right to suspend under Standard Provision 16.

The record before us indicates that the FS was dilatory in initiating the advertisement period and put other interests ahead of its contractual obligations to Appellant. Using 195 days, the FS should have completed the process by the third week in April, 2000, well before the operating season which began in June, 2000. Instead, the FS did not complete the process and so notify Appellant until December 1, 2000, thereby causing Appellant to lose the entire 2000 operating season. Without evidence to the contrary, we conclude that by exceeding its responsibility to the public, which had not responded to the legal advertisement for scoping the EA and by giving higher priority to Mr. Larson's commitment to the National Incident Management Team, the FS neglected its contractual obligations to mitigate delay to Appellant. We do not suggest that the FS cannot use its judgment to extend a comment period or seek additional data. However, when that is done during a period when a contractor is suspended, FS actions need to reflect recognition of a responsibility to mitigate the length of the suspension. In this case, we find an absence of strong reasons justifying prolonging the suspension period. Here we balance the needs of the FS in meeting its environmental obligations (time which, in this case, the FS controlled) against the risk of loss to the contractor. These cases are very fact specific. In this case, we conclude that the acts resulted in, not a reasonable exercise of the

Government's suspension rights, but a breach of contract. The Government has an implied obligation not to unreasonably delay performance of its obligations under a contract. The Government breaches this obligation when delays occur because of the Government's foreseeable or excessive unpreparedness in the performance of its contractual obligations. Nevada Skylines, Inc., AGBCA No. 92-167-1, 92-3 BCA ¶ 25,089, citing Mega Constr. Co. v. United States, 25 Ct. Cl. 735 (1992). See Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35 (2001) (suspension clause is not reasonably interpreted to permit the suspension of contracts when the Government unjustifiably and unreasonably failed to comply with its pre-existing duties that relate directly to the performance of the contracts at issue); and Superior Timber Co., IBCA No. 3459, 00-2 BCA ¶ 31,070 (CO's 2-month delay in signing contract after injunction; immediate suspension of contract; and 7-month continuance of suspension after injunction was lifted for a total of almost three years held to be breach where delay was caused by Government's failure to submit Forest Plans, a matter solely within the control of the Government).

The FS points out that Appellant had removed timber in excess of the estimated volume prior to the suspension. Implicit in this assertion seems to be an argument that Appellant had therefore already covered his expenses and earned a profit under the contract. However, many miles of included timber remained to be felled and hauled at the time of suspension (FF 12). Appellant was contractually obligated under the contract to continue performance. Further, in sales contracts such as this, pricing is often based on an expectation that more than the estimated volume will be removed. Also, the contract provides that when additional timber is added to the sale, it becomes "included timber." The FS has pointed to no authority that allows or requires us to consider the add-on timber in any different manner than originally estimated timber once it is marked and becomes "included timber."

The Government breached the Spillway timber sale contract. Appellant is entitled to breach damages. The Board must consider the question of damages. Appellant claims $10,030 in lost timber value as a result of changes in market conditions during the 602-day period of suspension. He calculated that amount by multiplying 590 mbf, the amount of timber removed in 2001, by $17 per mbf which was the decrease in value from 2000 to 2001. He uses the 2000 price based on his contention that a reasonable suspension would have allowed him to remove and sell timber in 2000. Appellant also claims $12,862 in additional costs of hauling timber to the Terra Bella mill after the Dinuba mill closed during the suspension. These costs are quantified based on Mr. Allen's knowledge of the distances involved, the length of time required to drive those distances and the local costs of labor. He also makes claims for costs related to removal of unmerchantable timber and to bond maintenance. (FF 31-33.)

The largest items in Appellant's claim are the claims for lost timber value ($10,030) and increased haul costs resulting from the closure of the Dinuba mill during the suspension period ($12,862). The FS denies liability for both citing the limitations on recovery set out in Standard Provision 16, Suspension. Because we have determined that a breach occurred, recovery is outside those limitations. The purpose of breach damages is to restore a party to the position it would have occupied, absent the breach. Our analysis of the damages to which Appellant is entitled follows that

dictate.

On September 7, 1999, Appellant contracted to sell the timber to be harvested from the Spillway sale from $400 for each scaled MBF delivered to the Dinuba mill. The Dinuba mill was close to the Spillway sale site. Transport to that site did not entail as high haul costs as transport to the Terra Bella mill did (FF). As a result of the FS suspension of the contract, Appellant was unable to complete the logging as planned and thus lost the opportunity for the $400 unit price for the timber harvested after the suspension was lifted. As we have stated, the initial period of suspension was a reasonable exercise of the FS rights under Standard Provision 16. We have found that a period of 195 days would represent a reasonable period for the FS to perform its statutory and regulatory duties under the factual record as it has been developed here. [6] FS actions and inactions, however, increased the period of suspension beyond that number of days and, in so doing, caused Appellant to be unable to exercise a significant amount of his rights and obligations until the normal operating season which began June 1, 2001. These FS acts and omissions negatively impacted Appellant's recovery on the sale.

Appellant ultimately received $408 for each unit of timber scaled at the mill after the suspension was lifted. Had the FS not have made decisions which increased the period of time in which he was unable to harvest timber from a reasonable exercise of its rights under the Suspension clause to a breach, Appellant could have resumed logging on the Spillway sale at the start of the normal operating season in 2000 and would have been paid $425 for each unit of fir sold to its purchaser. That is a difference of $17 per mbf. Appellant seeks that amount in lost timber value. According to Appellant's testimony, that figure includes a differential for the longer haul. Thus, if we accept Appellant's testimony while he received $425 per unit for the fir, he did not net that amount for as he had to absorb the cost of hauling the timber which he estimated at $21.08 per mbf. We have reviewed the testimony and conclude that figures of $425 and $408 include any compensation that he would receive for the longer haul. He was not paid separately for the longer haul. Support for that conclusion is found in Appellant's statement that even the $425 price was actually less than the original $400 price once the increased cost of hauling was taken into account. (FF 26.)

For his lost timber value claim, Appellant seeks $17 per mbf for the difference between the 2000 unit price ($425) he could have received if work had resumed then and the $408 unit price he did receive in 2001. Using this his theory of recovery, however, would compensate Appellant for an interim lost opportunity and is not an appropriate measure of recovery. Instead, Appellant's recovery should be

[6] This decision is limited to the facts of this case as this record has been developed. We repeat that we understand (and agree with) the principle that each such case must be analyzed on is own facts.

measured by comparing performance against the original contract. In light of additional haul costs as discussed below, recovering the $17 figure per unit would result in a windfall to Appellant. Had Appellant been paid $425 per mbf for the fir harvested (and assuming his costs of hauling to be $21.08 as claimed), his net per mbf in 2000 would be $403.92. Thus, he would have earned more per unit than he originally contracted to earn, even taking into account the increased haul costs, and would not have been damaged. We interpret his testimony that if he had been able to operate in 2000, there would be no issues to mean that he would not have filed a claim and would not be prosecuting these appeals before the Board. (FF 26.) However, Appellant could not proceed until 2001. The price he earned for the fir harvested was $408 with hauling costs included. He, therefore, netted $386.92 (again using his $21.08 figure for haul costs to Terra Bella per mbf). He earned $13.08 per mbf less than he would have had he been able to harvest, sell and haul to Dinuba in 1999. Multiplying this per unit loss by the 590 mbf harvested in 2001, we calculate his damage a loss in timber value of $7,717.20. Because our calculations give Appellant credit for the increased cost of haul in reaching the net he earned for the timber sold, it is unnecessary for us to come up with a recovery for his haul costs claim. To do so would result in a duplicate recovery. We, therefore, find Appellant entitled to $7,717.20 in lost timber value and to zero in increased haul costs.

AGBCA No. 2002-155-1 is the appeal of Appellant's claim for various out-of-pocket costs. The weight of the evidence supports Appellant's contention that a significant amount of timber deteriorated to the point of being unmerchantable during the period of suspension. (FF 24, 36). Appellant has claimed $1,750 for labor costs and $1,040 for equipment costs for removal of worthless timber. These amounts are unrebutted in the record and we find them reasonable.

While we agree with the Government's assertion that providing flagmen or other safeguard for traffic control during timber harvesting is an item that should be included in the bid rate for timber, here we find that the lengthy suspension so changed the ratio of merchantable timber to cull that Appellant's ability to absorb these costs in the price he could obtain for the lesser amount of merchantable timber was decreased. Appellant's claim cost of $400 is unrebutted and appear to be reasonable.

Appellant claims $2,343 in administrative costs. This figure was derived by adding claimed cost of maintaining bond as $645 in 1999 and $630 in 2000; $169.29 in mileage for trips to meet with the CO and to the site (470 miles @ $.36); 36 hours for 15 meetings or trip totaling 36 hours @ $20 per hour for $760 of management time; and $139 in office time, cell and land line phone calls. (FF 31). Other than the calculation of bond maintenance costs, we find these costs reasonable and unrebutted in the record. For bond costs, we find the CO's calculation of bond costs in the amount of $1,062.60 based on 21 months of suspension, rather than 24 months, to be more accurate than Appellant's calculation. Thus we find Appellant entitled to $2,130.80 in bond maintenance and administrative costs.

In summary, we find Appellant entitled to $7,717.20 in lost timber value for AGBCA No. 2002-154-1. Of the claim docketed as AGBCA No. 2002-155-1, we find Appellant entitled to no recovery for the increased haul cost claim. We find Appellant entitled to recover a total of $5,320.80 for out-of-pocket costs. Recovery for lost timber value and out-of-pocket costs total $13,038. The CO has previously granted and paid $2,711.42 of these costs. Appellant is entitled to the balance with CDA

interest.

Comments on the dissent

The dissent posits that our conclusion that the Government spent an unreasonable amount of time completing the EA is based on adverse inferences rather than on supporting proof in the record. To the contrary, we relied not on inferences against the Government, but on record evidence which indicate that on three occasions the Government made decisions which granted priority to other interests over the rights and obligations of the parties to the Spillway contract. The Decision Notice and Finding of No Significant Impact for Hazard Tree Removal Program and Mr. Larson's testimony concerning his fire duty provide that evidence. (FF 21, 22.) We weighed that evidence against Mr. Larson's general statement ("I got on it rather quickly and tried not to delay it anymore than it needed to be delayed") relied on by the dissent. The dissent asserts that the fact that this testimony was elicited in a colloquy initiated by the pro se Appellant means "the purchaser did not pursue relief on a theory that the Government breached the contract by utilizing an unreasonable amount of time." We strongly disagree. The fact that the Appellant asked the question indicates that he was pursuing a theory that Government delay in preparing the EA adversely affected his contract rights. This questioning was not an ineffective manner for a pro se (or a lawyer, for that matter) to elicit testimony regarding a reasonable length of time for preparation of such a document. It's no surprise that he did not get an admission, as he perhaps had hoped, but it is clear that the Government was not misled as to his intentions. In fact, the Government's Post-Hearing Brief acknowledges that argument (Government Brief at p. 20). That the Government addresses this issue without mention of the Scott Timber decision is not a failing to be charged to the account of Appellant as the dissent suggests. Scott Timber is the current law of our appellate authority relative to timber sale suspensions and breaches. That the Board might consider its applicability should not have been unexpected regardless of how a pro se appellant might frame his case. We hold a pro se to no lower standards of proof than an attorney, but we do take into account his lack of legal training. The dissent seems to want us to hold the Government to a reduced standard because it was faced with a pro se who, while raising the right issues, did not always apply the accepted labels to them. As stated above, we disagree that we have decided the reasonableness of the suspension issue based on inferences rather than evidence. To the contrary, our reading of the dissent is that it has drawn inferences in favor of the Government. The record here provides evidence to make that unnecessary in either case.

Finally, in regard to the dissent's conclusion that the fact that much of the timber felled was marked after the suspension, and that the purchaser knowingly purchased it at the contract price, defeats Appellant's claim for damages, we reiterate our conclusion above that it became "included timber" subject to be treated the same as all other timber. At the time that the timber was marked, the Government was aware that the longer haul was the case and Appellant had a claim. Had the Government intended to treat it differently from all other included timber, the Government would no doubt have initiated a modification to the contract tying Appellant to the original price.

DECISION

Appellant's appeals docketed as AGBCA Nos. 2002-124-1, 2003-190-1 (appeal of denial of Appellant's claim for $5,629.54 for slash deposits paid) and 2003-191-1 (appeal of decision assessing slash deposits of $3,635.28 plus interest and administrative costs) are denied. Our denial of AGBCA No. 2003-191-1 entitles the Government to $3,635.28 plus interest as provided in BT4.4. The appeals docketed as AGBCA Nos. 2002-154-1 and 155-1 are granted in part as explained above. Appellant is entitled to $10,326.58 plus CDA interest.

_____
ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____
HOWARD A. POLLACK
Administrative Judge

VERGILIO, Administrative Judge, concurring in part, dissenting in part.

I concur with the conclusion of the majority that the appeals of Matt Allen regarding the Mick sale contract must be denied. However, I reach this result because I find that the suspension period preceded that found by the majority, and the purchaser knew that the Mick sale was not suspended under the court order at the time the purchaser opted not to commence work on the Mick sale.

I dissent from the conclusion of the majority that Matt Allen is entitled to relief under the Spillway sale contract. As explained below, I reach some factual conclusions at variance with those of the majority. My legal analysis varies from that of the majority, in part because of the differing views of the facts and issues presented. I conclude that the Government properly invoked the Suspension clause, and has properly reimbursed the purchaser and limited relief to proven out-of-pocket expenses. The purchaser is not entitled to relief under the Conduct of Operations clause, or the Unilateral Contract Modification to Protect Natural Resources clause. Unlike the majority, I conclude that the purchaser has not demonstrated that the Government breached the Suspension clause; that is, I find that the purchaser has not proven that the length of the suspension was unreasonable. Further, even with a finding of breach, I would not provide relief for the volume of timber and cull added after the suspension; the purchaser sought and agreed to remove the additional volume of materials at the contract price. Any Government breach does not extend to what ultimately became included timber added after the suspension was over.

Mick sale

AGBCA No. 2002-124-1

I reach different factual conclusions than does the majority regarding the events following the court order of September 28, 1999, which enjoined action under a voided categorical exclusion, Heartwood, Inc. v. United States, 73 F. Supp. 2d 962, 980 (S.D. Ill. 1999).

A Forest Service letter, dated October 1, 1999, from the Associate Chief for Natural Resources in Washington, D.C., informs regional foresters of the court-ordered suspension, and directs:

> You should take steps immediately to notify any permit or contract holder whose authorization is based on use of the timber harvest CE [categorical exclusion] provisions to assure that the permit or contract is suspended. Notification should be made by phone or personal contact and followed up by letter. Copies of the court's Order will be made available shortly.

(Spillway contract Appeal File (SAF) at 159, 160). An accompanying e-mail to Messrs. Porter and Larson, among others, informs of the court order and the need to shut down contract activity. There is no date on the message, but from its context, it was sent on October 1, 1999, a Friday. (SAF at 162; Transcript at 190-91.)

On October 4, a suspension order was presented to the purchaser only for the Spillway sale, not the

Mick sale. The purchaser (through his son, an authorized representative) received the notice of suspension (the Timber Sale Administration Report, or "181", with signatures and dates of October 4, 1999, by the Government and purchaser) on October 4 for the Spillway sale, but not one for the Mick sale. As indicated on the report, the suspension of tree falling occurred at 9 am. (SAF at 249.) There is no such report for the Mick sale.

Consistent with the directions in the letter dated October 1, on October 4, Mr. Larson prepared a follow-up letter regarding the suspension, with the letter signed by the District Ranger (Mr. Porter). That letter, dated October 5, 1999, to the purchaser specifies that the Spillway sale is affected "since the Decision for this project was signed on December 18, 1998"; the letter is silent regarding the Mick sale. At the time the letter was drafted, the Government had explored the date that the pertinent decision letter had been drafted, and had concluded that court order applied to the Spillway sale. (SAF at 190; Transcript at 192-3)

Mr. Larson testified that on October 1 he both received the letter and e-mail directions of that date and notified (by telephone) the purchaser of the injunction, and that performance under the Spillway and Mick sales would be affected. Further, he testified that on October 4, when reviewing the contract records, he confirmed that the Spillway sale was affected by the court order but determined that the Mick sale was not. He testified that he notified the purchaser accordingly, on October 4, through a telephone call. (Transcript at 190-93, 197-98).

The purchaser, Mr. Allen, testified that he first learned of the suspension of the Spillway sale on the evening of October 4, and "when I was informed of the shutdown, I did talk to Rick Larson. I asked him about the Mick [sale]. He said, you can't go there either. They're both tied up on this decision." He testified that on the evening of October 4 he entered into a contract to log timber at a site other than the Mick sale. He testified that he did not learn that performance could begin on the Mick sale until a few days after October 5. On October 5, he personally visited the sale locations and the purchaser began logging at a different location. (Transcript at 108-11.)

In a letter, dated October 15, 1999, to the Government, the purchaser wrote, in part:

> My operation[s] on the Spillway were suspended on 10/4/99 as per 181 citing contract clause 16.C. At that time I requested to move to the "MIC[K]" timber sale, which I was informed was also affected by this same problem. I delayed moving for days as I was told to "just wait a few days, and we'll try to figure this out;" so I made phone calls to some private timber sales out at Cressmans, as a result I have suffered losses of that I am claiming as follows[.]

(SAF at 191.) The purchaser moved operations on October 5. The statement in the letter that purchaser "delayed moving for days" is inaccurate if October 4 is the reference for time; it is accurate, however, if October 1, is the date that he was told that the Mick sale was affected by the injunction. I find that on October 1 the Government did notify the purchaser of the court order and indicated that work on the Mick sale (and the Spillway sale) was affected. At that time, the purchaser had not

commenced performance on the Mick sale and had not anticipated beginning work on the Mick sale in the immediate future. On October 4, the Government formally issued a suspension order affecting the Spillway sale; no suspension was issued for the Mick sale. On October 4, Mr. Larson drafted a letter regarding the Spillway sale suspension, but no letter regarding the Mick sale. I find that on October 4 the Government both determined that the court order did not affect the Mick sale and notified the purchaser accordingly. By the evening of October 4, when the purchaser states that it entered into a contract to remove timber from a non-Government site, the purchaser knew that performance on the Mick sale was not affected by the injunction. The decision to move from the Spillway sale to other than the Mick sale was a business decision of the purchaser, not affected by the oral suspension relayed on October 1 and orally withdrawn on October 4. Because the purchaser has not demonstrated that it reasonably and detrimentally relied upon the oral suspension, given that on October 4 the purchaser was informed that the Mick sale was not suspended, the purchaser cannot recover. Accordingly, I deny this claim of the purchaser.

The majority concludes that the Government prevented the purchaser from operating on the Mick sale for a period of about three days. The majority concludes that the three days began on October 4. I find that any suspension period began on October 1, but that the purchaser was not prevented from operating on the Mick sale. The purchaser has not demonstrated that it was in a position to work on the Mick sale prior to October 4. By the time the purchaser states that it made the decision to operate on other land, I conclude that the purchaser knew that the Mick sale had not been and would not be suspended under the court order. Accordingly, I conclude that the purchaser was not delayed in its operations on the Mick sale because of Government action or inaction. Although the majority holds that a three-day suspension is reasonable, I find nothing in the contract that supports such a conclusion; rather, I find that itemized bases to suspend under clause CT6.01 are specific and permit the Government to suspend only for the reasons stated. However, the Government does not rely upon that clause under the Mick sale contract. In short, no written direction was provided to the purchaser that altered its ability to perform on the Mick sale.

AGBCA Nos. 2003-190-1 and 2003-191-1

The signed, initial contract required the purchaser to pay slash disposal deposits and surface replacement deposits at fixed unit rates for sawtimber and cull. Although identified as deposits, no amount is refunded to the purchaser; the charges are payable by the purchaser in addition to the unit rates bid by the purchaser. (Mick contract Appeal File (MAF) at 47-49, 85 (¶ CT5.415).) Bilateral contract modifications signed on November 4, 1999, and June 30, 2000, expressly indicate that slash deposits are required for sawtimber and cull; no amendment suggests that either slash disposal or surface replacement deposits are not required (MAF at 112-13, 116-19). These amendments belie the assertions by the purchaser that there existed a contrary agreement between the parties.

The specific language of the contract permits a single interpretation; namely, the purchaser is obligated to pay the stated deposits. The failure by the Government to collect the deposits initially and the alleged oral modification (disputed by the Government employee said to be involved) do not

demonstrate that the parties contracted based upon other than the written terms of the agreement. Accordingly, the Government is entitled to recover the deposits due and owing under the terms and conditions of the contract; the purchaser is not entitled to a refund of amounts paid under the terms and conditions of the contract.

The Government has correctly calculated the amount of the deposits that the purchaser owes under the contract. Therefore, I deny the purchaser's claim for relief and the appeal in AGBCA No. 2003-190-1, and deny the purchaser's appeal in AGBCA No. 2003-191-1, as the Government has supported its claim.

Spillway sale

Regarding the Spillway sale appeals, I reach some factual conclusions from the record that differ from those of the majority, and view the claims before the Board and the applicable law as dictating a different analysis and result. In summary, given the court order, I find that the Government properly relied upon the Suspension clause to suspend operations and as the basis for relief. The purchaser has not demonstrated that the Government breached the contract by not publishing the environmental assessment until September 18, 2000, or by lifting the suspension on December 1, 2000 (nearly one month after the appeal period to contest the assessment had expired). The purchaser seeks, but is not entitled to, a rate redetermination under clause 27, or relief under clause 21. Factually, the record does not support the conclusion that the Government suspended the purchaser for an unreasonable length of time. Further, assuming that the majority's finding of a breach is correct, I would calculate the recovery differently, because much of the sawtimber and cull removed became "included timber" after the suspension at the request of the purchaser at the contract price. It is inappropriate to compensate the purchaser at other than the contract price for such material.

The initial issue to be addressed is the purchaser's assertion that the Government improperly invoked the Suspension clause (provision16). Under the clause, the purchaser agrees to interrupt or delay operations under the contract upon the written request of a contracting officer, in order to comply with a court order issued by a court of competent jurisdiction (SAF at 125). This clause places certain risks of delay upon the purchaser.

The claim of February 5, 2002, regarding the Spillway sales states: "This CLAIM specifically believes that the Heartwood decision did not represent a court order specifically requiring the suspension of the Spillway Salvage Sale. . . . There were no factors on the sale area that related to the Heartwood decision." Also, the purchaser maintains that the Government breached the contract by suspending performance because of its failure to properly complete an environmental assessment prior to award.

The court order in Heartwood required the suspension of operations under this contract. The court declared null and void the Forest Service project decisions approved relative to the timber harvest categorical exclusion since September 16, 1998. This project decision post-dates September 16, 1998

(SAF at 288-90). The Government properly suspended performance under provision 16. The purchaser has not identified any contract provision that requires the Government to have completed the environmental assessment before the award; such a contract provision is required in order to conclude that the failure to complete the assessment constitutes a breach. Scott Timber Co. v. United States, 333 F.3d 1358 (Fed. Cir. 2003) (the violation of statutory obligations does not establish a breach of contract unless those statutory obligations are incorporated into the contract at issue); Shawn Montee Timber Co., AGBCA Nos. 2003-132-1 et al. (Mar. 10, 2004); Tamarack Mills, AGBCA Nos. 2003-115-1 et al. (Mar. 31, 2004).

In its post-hearing brief, the purchaser elaborates on its theory of breach, when it states that with regard to provision 21 of the contract (the Conduct of Operations clause), the Forest Service

> broke the law, breached the contract, resulting in the requiring E.A. No E.A. -- No contract. Contract provision #27 "timber shall be reflected in a rate re-determination." Failure to follow this Provision is also a breach. Government counsel points to Contract provision #16 as the remedy. This provision states "Anticipatory losses suffered." Unlawful breach and unreasonable delays are not anticipatory.

(Post-hearing Brief at 4.)

The provisions referenced by the purchaser do not demonstrate that the suspension constituted a breach of the contract by the Government. Provision 21 largely addresses the conduct required of the purchaser; it obligates the Government to designate individuals (a Forest Service Representative and other on-the-ground representatives) and to mutually agree to adjust the plan of operations in the event of delays (SAF at 128-29). The purchaser has not identified any breach of contract by the Forest Service, which would relate to this clause and make inapplicable the Suspension clause.

The other basis underlying a claim of breach is provision 27, the Unilateral Contract Modification to Protect Natural Resources clause, which provides:

> The Contracting Officer may make unilateral modifications in timber specifications on Page 1, or in related Special Provisions, if and to the extent that such changes are reasonably necessary to make the contract consistent with guidelines and standards developed to implement Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended, and with land management plans, developed or revised thereunder. Resulting changes in the value of remaining Included Timber shall be reflected in a rate redetermination conducted by the Contracting Officer in accordance with the standard Forest Service rate redetermination methods and appraisal data in effect at the time of agreed change and shall be in the form of a reduction in Bid Rates unless the Contracting Officer agrees in writing otherwise. Rates so redetermined shall apply to timber released for cutting after the effective date of the modification.

(SAF at 131). The purchaser has not demonstrated that the Government altered the timber specifications or related special provisions, after the suspension because of the results of the environmental assessment. Accordingly, I conclude that the purchaser has not demonstrated that the Government breached the contract, or that the purchaser is entitled to relief, under this provision.

In resolving the claim, the contracting officer relied upon the Suspension clause. The contracting officer concluded that the suspension occurred in order to comply with a court order and that the purchaser is entitled to out-of-pocket expenses as detailed in the clause. The Government granted in part the purchaser's claim, awarding a total of $2,711.42. This amount is the sum of $1,244.00 for the longer haul to the lumber mill for 80 CCF, $404.82 for falling and skidding non-merchantable material, and $1,062.60 for maintaining performance bonds and cash deposits. The decision denies relief for claimed losses in timber value, because such losses do not reflect out-of-pocket expenses, and for the longer haul costs for materials added after the suspension. The decision also denied further compensation for falling and skidding, or related traffic control, because the decision made an allowance for the supported volumes and related actions, but the purchaser had not supported entitlement to different figures. (SAF at 72-82.) The record does not demonstrate by a preponderance of the evidence that the purchaser is entitled to a greater amount. The record does not contain specific information demonstrating that the purchaser incurred out-of-pocket costs greater than those reimbursed. Anecdotal information regarding observations over a few days of tree removal does not establish particular costs incurred because of the suspension. Given the volumes of material removed prior to and after the suspension (SAF at 284, 286), and the fact that much volume was added after the suspension, the purchaser has not demonstrated its entitlement to additional relief.

The reasonableness of the suspension period

The majority states at page 15: "This is not a situation where time was being controlled by court orders or ongoing litigation. Given that, and in the absence of convincing evidence from the FS explaining and justifying the expenditure of what appear[s] to be excessive periods of time, we conclude that FS acts and omissions in failing to expedite the EA exceeded the exercise of a reasonable right to suspend under Standard Provision 16."

I do not find that the length of time expended by the Government in completing this one environmental assessment is per se unreasonable, or unreasonable given the record developed. Given the purchaser's statement and presentation of the claim, I do not fault the Government for not providing further explanation or justifications for its actions. I do not draw an inference adverse to the Government, given that the purchaser did not pursue relief on a theory that the Government breached the contract by utilizing an unreasonable amount of time. For example, the purchaser

engaged the Forest Service employee who prepared the environmental assessment in the following colloquy during the hearing:

> Q. This environmental document, how thick is it?

A. It wasn't thick, but, you know, I -- to be honest, when I was advised that we had to write an environmental document for these sales, I got on it rather quickly and tried not to delay it anymore than it needed to be delayed.

Q. And I'm not questioning that at all. I know that – were there other items or other work that needed to be done in the meantime?

A. There's a period of time between July 23rd and August 12th and then from August 16th to September 9th. I was on fires during those periods.

(Transcript at 151-52.) In the opening statement, the purchaser identified the claim as seeking relief under provision 27--that is, the environmental assessment was a unilateral contract modification which under provision 27 entitled the purchaser to a rate redetermination. Also, as the purchaser states with the initial witness: "it is my contention that the environmental analysis was an addendum to the contract and therefore, under Section 27, a unilateral contract modification to protect the natural resources, that that provision in the contract would apply. That's what I'm trying to establish here." (Transcript at 26.)

In summary, a conclusion that the Government spent an unreasonable amount of time in completing the environmental assessment is based on adverse inferences drawn against the Government without supporting proof in the record of improper delay. I do not expect the Government to present a defense to a purchaser claim that is not asserted or addressed during the proceedings. Although the Government's post-hearing brief addresses the reasonableness of the suspension period, it does so in less than one and one-half pages, and without a reference to Scott, as it correctly contends that the purchaser presented no evidence demonstrating that the Government took an unreasonably long time drafting the environmental assessment. The purchaser's post-hearing brief does not focus upon the alleged unreasonableness of the suspension period, as it offers no specific factual or legal support for such a proposition. I find it telling that the record does not contain most of the pertinent information regarding the environmental assessment, and that the significant testimony came from Mr. Larson, quoted above, when the purchaser chose not to question him about the time spent. The purchaser seeks to recover; it bears the burden of proof.

Apart from the preceeding observations, based upon the fully developed record, I conclude that the purchaser has not met its burden of proof to alter the outcome in a de novo review. Nothing suggests that the Government delayed publishing, or could have more readily published, the initial draft, reviewed comments, or completed the final version. The testimony of Mr. Larson, which is not contradicted, indicates that he proceeded "rather quickly" and without unnecessary delay. Nothing in the record suggests that this contract merited priority over other matters of the Forest Service.

Further, I note that performance in the 2000 cutting season would not have continued through October. In a letter to the contracting officer, the purchaser states that as of October 23, 2000, the

conditions did not permit performance: "No can do again, this was too late in the season, the snow was the problem, we were snowed out, we would have to wait until spring." (SAF at 33). Lifting the suspension immediately after the appeal period had passed, in early November 2000, would not have altered performance under this contract. Similarly, even had the Government published a completed environmental assessment during mid-August, when Mr. Larson had returned briefly from other duties, the appeal period would not have expired until early October. At best, little performance would have occurred given the conditions on the site. An intensely factual assessment of the developed record demonstrates that the suspension in this case was for a reasonable period of time. This conclusion serves as another basis to deny the requested claim.

Compensation for a breach

Assuming that a breach occurred, because the suspension was unreasonable, the record does not support the calculation of compensation awarded by the majority. Unlike the majority, I would not provide relief for the volume of timber added after the suspension period had ended, because the purchaser contracted to remove that timber at the contract price.

As specified on page one of the contract, the Spillway sale was a marked tree sale: "Designation for cutting (7): **All trees marked in "ORANGE" tree marking paint above and below stump height.**" (SAF at 116.) The contract contains an Included Timber clause:

> Forest Service agrees to sell and the Purchaser agrees to purchase, cut and remove all Included Timber as located and described on Page 1, including all pieces that meet minimum piece specifications, and as shown on Sale Area map. Designation(s) for cutting are shown on Page 1 or in the Special Provisions.
>
> . . . .
>
> The Purchaser shall cut and remove Included Timber in strict accordance with the requirements on Page 1, the following Standard Provisions, and with all conditions and requirements in the attached Special Provisions, which are hereby made a part of this contract, and with the regulations governing timber sales prescribed by the Secretary of Agriculture.
>
> The Contracting Officer or designee may designate additional timber not included in the original volume estimate for cutting within the Sale Area as needed to utilize damaged trees, trees to be removed in authorized clearings, or trees unnecessarily damaged or cut by the Purchaser. Such additional timber meeting minimum specifications shall be paid for at Bid Rates and Required Deposits, in addition to any payments for liquidated damages under Standard Provision 14 and/or in the Special Provisions. The additional trees will become Included Timber when designated by the Contracting Officer or designee.

(SAF at 120.) The Government was not obligated to mark additional trees after the suspension.

Much of the timber felled was marked after the suspension; such material was not included timber under the contract or by unilateral Government action. The purchaser requested and agreed to mark, cut and harvest additional timber after the suspension was over. At that time, the purchaser knew that felled timber would go to the more distant mill for a set unit price (Transcript at 258-59). The purchaser has not suggested and the record does not demonstrate that there was an agreement between the purchaser and Government for the purchaser to perform the additional work at other than the prices identified in the contract.

The Government is correct, in maintaining that the purchaser requested that additional material be designated as included timber under the contract after performance resumed. When the purchaser agreed to an increase in the amount of included timber, it did not put the Government on notice that there was a basis to alter the agreed-upon unit prices or to make an adjustment for hauling distances. The contract for the additional included timber must be enforced as written, that is, at the stated prices.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
April 8, 2004