THORCO, INC.,	)	**AGBCA No. 2001-136-1**
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Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Marc R. Stimpert, Esquire	)	
Budd-Falen Law Offices, P.C.	)	
P. O. Box 346	)	
Cheyenne, Wyoming 82003-0346	)	
	)	
Representing the Government:	)	
	)	
Marcus R. Wah, Esquire	)	
U. S. Department of Agriculture	)	
Office of the General Counsel	)	
P. O. Box 7669	)	
Missoula, Montana 59807-7669	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

January 28, 2003

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

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

This appeal arose out of Contract No. 01-04229-8 (the contract), the North Patrick Boundary timber sale between the U. S. Department of Agriculture, Forest Service (the Government or FS), Flathead National Forest (FNF), Kalispell, Montana, and Thorco, Inc. (Appellant or Thorco), also of Kalispell. This appeal is from the Contracting Officer=s (CO=s) decision of December 6, 2000, denying Appellant=s claim for (1) $24,994.50 in lost income for 10 days of down time; (2) $517.50 in paralegal costs for research; (3) a 15-day extension to the term of the contract; and, (4) a 15-day extension to the periodic payment schedule. Appellant filed a timely appeal. The parties filed pleadings and thereafter requested that the appeal be decided on the record pursuant to Board Rule 11. The Board set a schedule for supplementing the record and filing briefs. The parties jointly stipulated an extension of time for supplementation of the record and requested a Board Order approving it. The Board granted that request. Thereafter, the parties were to file sequential briefs. Both parties supplemented the record. The Government submitted declarations of the CO, Dennis

Menghini (CO or Menghini); the Sale Administrator, Tony Willits (SA or Willits); the FNF Soil Scientist, Bill Basko (SS or Basko); and Gary Dahlgren, the FNF Timber Management Officer (TMO or Dahlgren). Along with its opening brief, Appellant filed a motion to strike portions of the supplemental record filed by the Government. Alternatively, Appellant moved to further supplement the record to respond to affidavit evidence which it claimed not to have been previously raised. Documentary and affidavit evidence to be filed in the event the alternate motion were granted were attached as exhibits to Appellant=s opening brief. The Board granted Appellant=s alternate motion and set an extended briefing schedule. Both parties then submitted reply briefs. With its Reply Brief, the FS submitted a Supplemental Declaration of the CO. Appellant filed a second Motion to Strike, or in the Alternate, Motion to Supplement the Record. The parties proposed an extended schedule to supplement the record. The Board granted their joint requests. Both parties then supplemented the record and the Board allowed additional supplementation on the part of Appellant to respond to declaration testimony which Appellant contended was being asserted for the first time. The record was closed except for those matters addressed in the Appellant=s First Motion to Strike and the supplements to the record previously allowed by the Board. The second Motion to Strike is granted. The Board will not consider the supplemental declaration of the CO.

The Board has jurisdiction to decide the appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. ' ' 601-613.

FINDINGS OF FACT

1. The FS awarded the contract to Appellant November 24, 1999. The original contract termination date was September 30, 2001. (Appeal File (AF) 48.) The termination date was twice adjusted, initially to October 26, 2002 (AF 211) and then to July 26, 2003 (AF 214). The normal operating season was identified as May 1 to October 31, inclusive. The contract made the normal operating season applicable to clauses BT6.31, BT6.65, BT8.21 and BT9.3 of the contract. (AF 56.)

2. Clause BT6.31, Operating Schedule, allows operations outside the normal operating season subject to BT6.6 (AF 72). Clause BT6.6, Erosion Prevention and Control, provides that operations shall be conducted reasonably to minimize soil erosion. It prohibits operation of equipment when ground conditions are such that excessive damage will result. The clause contains no standard to measure ground conditions which would result in excessive damage. (AF 74.) Clause BT8.21, Contract Term Adjustment, provides for adjustment of the contract term in three described circumstances only for delays in operations during the normal operating season (AF 76). Clause BT9.3, Breach, requires the FS to give the purchaser notice of breach and a reasonable time to remedy the breach. All provisions regarding time to remedy a breach relate to days within the normal operating season. (AF 78.)

3. Clause CT6.7, HAZARD REDUCTION AND SITE PREPARATION, provides that piling and scarification activities shall occur only when soil moisture is 18% or less (AF 125). Piling is the

gathering into piles or stacks of slash timber or debris (AF 123-24). Scarification is the roughening of soil preparatory to seeding (AF 122).

4. Clause CT6.4, CONDUCT OF LOGGING, sets out requirements, methods and procedures by which silvicultural prescriptions and land management objectives were to be conducted and accomplished unless otherwise agreed to in writing. For units designated as Atractor units@ (units 1, 2A, 3, 4A, 5, 6, 7, 8, 10, 11, 13, 14, 15A, 16, 18, and 20), it provided that tractor skid roads and skid trails were to be located and approved in advance of falling; tractors were to be restricted to approved skid trails; and tractor skid roads were to be no less than 100 feet apart except where converging. (AF 121.)

5. A purpose in designating skid trails is to minimize the area covered with skid trails thereby reducing soil compaction and disturbance problems. Soil compaction can reduce the soil=s productivity to grow trees and excessive soil disturbance from skid trails may result in erosion and degraded water quality. (AThe Woodland Workbook, Logging, Designated Skid Trails Minimize Soil Compaction@, Oregon State University Extension Service, Exhibit (Ex.) B, to the Declaration of Tony Willits.)

6. The sale area consisted of units 1, 2, 2A, 3, 4, 4A, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 15A, 16, 17, 18, 19 and 20 (AF 80-81; 162).

7. Appellant began work in unit 5 in December 1999, outside the normal operating season (AF 347, 524). The parties executed a Construction Agreement relating to unit 5 in December 1999 and January 2000. The agreement contained no entries locating skid trails. Where the form provided spaces to describe agreed upon criteria in several categories under the heading ASkid Trail(s)@, no entries were made. Instead, the following notation was made: Adispersed on frozen ground.@ The following special requirement was indicated: ADispersed skidding will be allowed unless skid trails are needed between system rd & lower landing. This will be determined by SA.@ (AF 165-66.)

8. The contract contains no definition for the term Adispersed skidding.@ The parties use of the term indicates that it means tractor skidding outside of designated skid trails (AF 19-20; Appellant=s Opening Brief, page (p.) 4; Declaration of Tony Willits, pp. 3, 4; Declaration of Dennis Thornton, p. 2 (AF 1220).)

9. A Construction Agreement, dated January 24, 2000, allowed dispersed skidding over snow for units 6 and 7 in lieu of designating skid trails (AF 170-71). Dispersed skidding was also allowed on units 2A, 3, 4, and 4A (AF 174, 177). On March 15, 2000, the parties executed a Letter of Agreement permitting tractor skidding on unit 4. Permission was granted so long as soil moisture content was below 18%. (AF 180.) The previous agreements to disperse skid had contained no mention of soil moisture content. Appellant conducted logging operations from January 2000 until March 22, 2000 including clipping (cutting of trees) and dispersed skidding (Declaration of Dennis Thornton, p. 2 (AF 1220).)

10. On March 22, 2000, Appellant voluntarily ceased operations as the spring thaw was beginning. Appellant=s President, Dennis Thornton, informed the SA that he was shutting down operations until the ground dried up. The SA noted that the voluntary shutdown was outside the normal operating period. He replied to Dennis Thornton that since the snow was leaving, the parties would have to wait until the soil dried. He stated that Athe standard is [less than] 18% for soil moisture content.@ (AF 25.) At the time Appellant shut down operations, all operations had been by use of the dispersed skidding method.

11. On April 4, 2000, Dennis Thornton called the SA to inquire if soils were dry enough for operations to restart. The SA made a check on April 7 and concluded that soils were still on the wet side. His inspection notes indicated that the soils were probably around 22% in the area yet to be skidded and 18% to 20% in the area yet to be clipped. He called Dennis Thornton and said he would check again the following Friday, April 14. (AF 23, 26.) By April 14, the area had received a heavy wet snow requiring additional time to dry out (AF 23, 27). The SA checked moisture again on April 27 and concluded that soils were still on the wet side. He asked the SS to accompany him to the site the next day. (AF 23, 28.)

12. The SA and the SS visited the unit 4 site on April 28, 2000. The SS=s declaration states that Dennis Thornton was present on that occasion. (Declaration of Bill Basko, p. 11). The SA=s inspection report for April 28 and Appellant=s claim indicate that contacts with Dennis Thornton or Donna Thornton on that date were by telephone (AF 23, 29). The various accounts of the visit to unit 4 differ in some detail. The most contemporaneous account is the SA=s inspection report which reads as follows:

> Checked soil moisture content on soils in Unit 4 with Bill Basko FNF Soil Scientist. We dug several holes and tested with Athe bomb@ (soil moisture gauge). Bill informed me that the soils on Unit 4 were a non ash cap soil and a till and needed to be at 10% before skidding would cause compaction. I had not realized that this was the case and and [sic] told Dennis that 18% was the soil moisture that we were targeting for skidding to occur on unit 4. Bill explained to me the differences. I called Dennis but got Donna instead. She was not happy to hear this information and asked me to call Dennis at the shop. Dennis appeared to accept the news without argument. Apparently the more Dennis thought about it he did not accept it and went into the office to discuss with Dennis Menghini. I was not contacted by Dennis Thornton=s [sic] about the meeting w/ Dennis Menghini but was informed by Dennis Menghini at home on Friday night. I called Dennis Thornton and discussed with him again. His main point was he wanted to see the scientific data that supported the 10% soil moisture and how it was used in the EA. I told him that I would get it and call him on Monday to come and pick it up.

(AF 29.)

13. The AF contains an undated account by the CO of events of April 28 and May 1. The introductory sentences are a second hand account of the site visit by the SA and the SS to unit 4. Thereafter, the CO recorded a visit by Dennis and Donna Thornton to his office later that day. The CO reported that the Thorntons asked to see the Environmental Assessment for the sale in order to determine whether it contained information about soil conditions and made reference to a moisture standard of 10%. The Thorntons expressed their view that because the normal operating season was May 1 to October 31, they were entitled to operate during that entire period. The CO=s report indicates that he explained to them that the normal operating season was a protection for the purchaser based on an expectation of the period during which weather would be expected to be such that a purchaser could operate. Thus, if conditions prevented operations during that period, additional time could be added to the end of the contract to compensate for the delay. He quoted the Thorntons as saying that because the season to date had been unusually dry, there was no reason why they should not be able to operate and if they did not operate then, they probably would not be able to operate until Alater summer.@ The CO quoted Dennis Thornton as saying that he intended to start logging on Monday, May 1. The CO said that he was not aware of the full results of the SA=s and SS=s review and that he did not know if there were other areas where Appellant might operate. The CO would talk to the SA and ask him to call the Thorntons. The CO=s account made reference to other topics not relevant to this appeal. (AF 571.)

14. Appellant=s claim letter of June 26, 2000, states that on April 28, 2000, after an on-ground inspection with the SS, the SA called to relay the information that soil moisture where clipped was around 18% and soil moisture where not clipped was around 16% (within allowable tolerances), but that Appellant would not be allowed to commence operations on May 1 where the SS had discovered that soil types were Asensitive@ and a 10% moisture level would be imposed. The letter indicates that a series of meetings followed but does not provide any description of the visit to the CO=s office that day. (AF 23.)

15 Dennis Thornton=s declaration dated July 25, 2002, states that Tony Willits, the SA, told him by telephone on April 28 that soil moisture was less than 18%. He quotes the SA as informing him that due to non-ash cap soil types found on the site that day, no logging would be permitted by the FS until the soil moisture was 10% or less. The declaration also provides Dennis Thornton=s account of his visit to the CO=s office. He told the CO that the contract did not mention non-ash cap soil types and that the only soil moisture standard in the contract was 18%. The declaration also states that Dennis Thornton expressed to the CO that the 18% standard was only for dispersed skidding in unit 4 outside of the normal operating season and that once the normal operating season began on May 1, Appellant could log the whole sale area Aaccording to the terms of my contract.@ He declares that he told the CO that he challenged the assertion that the sale area should have a 10% soil moisture because, in his opinion as a logger, logging on the sale area at that time would not cause any apparent damage to the soil. (Declaration of Dennis Thornton, p. 5.).

16. The SA=s declaration dated July 29, 2002, states:

> 53. . . . On April 28, soil scientist Basko went to unit 4 with me and he brought along the bomb (AF 537). It was this field visit with soil scientist Basko that I learned there was a distinction between ash cap and non-ash cap soils and the 18% and 10% soil moisture should be applied, respectively. Nevertheless, I learned that despite the soil moisture content levels and soil characteristics, the hand squeeze test still took into account both factors and that I should continue to apply this test. I initially used the bomb with the hand test to reinforce that concept and it was proven many times over from May 16th until July 5th.
>
> 54. I informed Appellant of the results of April 28 field visit as well as using a 10% moisture level because unit 4 was actually a non-ash cap soil condition. Appellant was upset about my information and expressed his dissatisfaction to CO Menghini (AF 537). Appellant disagreed with the 10% figure and demanded scientific data/support for soil scientist Basko=s conclusions. I informed Appellant such information existed and asked that he meet with me, along with soil scientist Basko, to review this information on Monday, May 1 (AF 537).

The SA=s declaration goes on to dispute the allegation that on April 28, soil moisture was less than 18% on unit 4. He states that he neglected to document the sampling results but that he recalled the figures to be between 18% and 22%. He recalled the SS recording the content levels as such. The declaration continued:

> 55. . . . Because Appellant was so adamant to dispersed skid, if soil conditions had warranted I would have certainly given Appellant the green light to proceed with dispersed skidding operations as there would be no reason for me to deny dispersed skidding. Soil monitoring beginning March 22 was for the sole purpose of monitoring when those levels dropped below 18% which would allow Appellant to resume dispersed skidding. Appellant=s allegation that the soil moisture content was less than 18% in unit 4 is incorrect and unsupported by the record.

(Declaration of Tony Willits, p. 55.)

17. The SS=s declaration provides his version of the April 28 events:

> 43. I only met with Appellant on two (2) occasions. The first was on April 28, 2000, followed shortly with a meeting on May 1, 2000.
>
> 44. The April 28 meeting was preceded by a call from sale administrator Tony Willits (SA Willits). SA Willits had called and asked that I accompany him to unit 4 of the North Patrick Timber sale. The purpose of the visit was to take soil moisture tests because Appellant had requested dispersed skidding and SA Willits was

concerned that the soil moisture levels were not sufficiently low to allow dispersed skidding.

45. On April 28, I accompanied SA Willits to unit 4 and met Appellant. We all walked through unit 4 taking soil samples for soil moisture content. We used both the hand squeeze test as well as the bomb. I demonstrated the squeeze test and had everyone perform the squeeze test as well.

46. The purpose of using both the hand squeeze test and bomb was simply to validate the results of the hand squeeze test. I also explained to Appellant that the Flathead NF has been monitoring and mitigating soil compaction since the mid-1980's by requiring skidding on designated trails, or agreeing to dispersed skidding when dry conditions existed, or harvesting during winter months.

47. Unfortunately, the focus of our discussion was on the numeric soil moisture level as determined by the bomb. I say unfortunately, because in hindsight the focus should have been on our usual and customary practice of using the hand squeeze method in determining the soil moisture content. By focusing on the hand squeeze test, Appellant=s concerns over soil moisture would have been better understood. However, Appellant was interested in the numeric results of the bomb and I could sense he wanted to establish some fixed number to apply across the entire North Patrick Timber sale.

48. I took approximately 10 soil samples throughout unit 4, looking at skid trails, the harvest area itself, areas having logging slash, bare ground and unharvested areas in an effort to get a representative sample throughout the unit. I found soil moisture levels ranging from 18-22% (AF 575). These levels certainly would cause detrimental soil compaction. My testing found nothing below 18%.

49. While doing my testing, I discovered that most of the soils in unit 4 had a surface layer lacking volcanic ash. This discovery was totally unexpected as I expected an ash cap top soil layer, more commonly found on the Flathead NF. The surface layer in unit 4 was derived from glacial till, a non-ash cap soil. Volcanic ash and glacial till are two entirely different materials with different characteristics. I informed everyone that glacial till soils were not considered dry until soil moisture drops below 11% level about the same time the soils with a volcanic ash would reach 18% (AF 575).

(Declaration of Bill Basko, p. 11.)

18. On Monday, May 1, 2000, the CO, the SA, the SS and the TMO met in the FNF supervisor=s office to discuss soil moisture content as it related to the sale. According to the SA=s inspection report for that date, the SS explained the standard to be applied for measuring moisture content in

soils found on the sale. He clarified that the appropriate standard was 11%, rather than the 10% that had been discussed the previous Friday, April 28, and showed the others studies that supported the use of the moisture content standards. The FS personnel then called Dennis Thornton and told him that they had the information he had requested, i.e., the data supporting use of a moisture content standard of 11% on unit 4. Dennis Thornton came to the supervisor=s office and met with the FS personnel. The SS explained to Dennis Thornton about the studies which underlay the moisture content standards and the relationship. Dennis Thornton stated that he had checked around and been told by some people that the soils in question would never dry to 10%. The SS assured him that these soils would dry to 10%. Dennis Thornton suggested the parties visit a sale on private ground that he had conducted the spring before. The TMO agreed to do so. The TMO told Dennis Thornton that he could operate but that the parties would adhere to the dry soils condition and keep the units within the +/- 15% compaction standard. After discussion, Dennis Thornton agreed to wait until Friday, May 5 when the SA and the SS would check the soil moisture again. (AF 538.) The CO=s undated memo of the May 1, 2000 meeting with Dennis Thornton states that the FS did not indicate to Dennis Thornton that he could not operate but that personnel suggested to him that he might want to start in a cable unit, or look at other units that might be drier (AF 574). In his declaration, the TMO stated that during the meeting he personally authorized Appellant to begin work on cable units, drier units and use 100 feet spacing intervals for designated skid trails (Declaration of Gary Dahlgren, p. 8). The CO, in his declaration, states that it was suggested to Appellant that he might consider resuming operations in a cable unit, as opposed to a tractor unit, like unit 4, or in a unit that was drier than unit 4, or on designated trails. He does not say by whom the suggestion was made. He also states that at no time was Appellant told that he could not resume operations; the only question was whether the resumption of his operations would allow or disallow dispersed skidding. The CO=s declaration continues to state that only issue addressed by him, the SA or the SS was whether dispersed skidding operations would be allowed in unit 4 given the soil moisture content and the detrimental effects of compaction, which is directly a result of moisture content of 11% or greater. (Declaration of Dennis Menghini.)

19. Dennis Thornton=s declaration contains his description of the discussions during the May 1 meeting and indicates that he was told the FS would not permit any type of logging in the sale area requiring the use of heavy equipment until soil moisture reached 11% or less. Prohibited activities included both clipping (cutting of trees with a mechanical clipping machine) and skidding (dragging of trees with a tractor). He states that he was told that the FS would permit him to cut down trees by hand and pull them out with cables on designated trails. He told FS personnel that he felt the terms of his contract were being changed. He reiterated that his Acontract didn=t require hand falling or any of these other things.@ He said that prior to bidding he had contacted FS personnel on the Swan Lake District and specifically asked if the sale could be mechanically clipped. He was told that no hand sawing was required and that he could mechanically clip the entire sale. The declaration further states: AI also noted that, even if these restrictions were required by the contract, Thorco did not have the manpower or equipment available to hand cut trees and cable them out.@ Later that day, the Thorntons visited the Swan Lake District Office and asked to see the project file. They spoke with personnel who had been involved in the NEPA process prior to advertisement of the sale. He

declared that these individuals expressed their opinion that the documentation furnished by the SS was not the same Ascience@ used when the sale was set up. (AF 1222-23, Declaration of Dennis Thornton, pp., 4, 5.)

20. On May 5, 2000, the SA, the SS and Dennis and Donna Thornton met on unit 4. As reported in the inspection report for that date, they took several soil samples for soil moisture. The samples indicated a soil moisture content of around 15% in the trees and 18% in the area yet to be skidded. They also discussed several issues, including dispersed skidding as opposed to designated trail skidding. Dennis Thornton indicated that he intended to begin operations. The SA informed him that he could skid on forty-foot trail spacing. He allowed that because of the slope percent and the Letter of Agreement of March 15, 2000. The SA also stated that if rutting occurred, Appellant=s operation would be shut down. In addition, the SA informed Dennis Thornton that if the soils in other units were not dry, operations would be conducted using designated trails according to CT6.4. With the Thorntons still present, samples were taken in unit 4A. Moisture ranged from 15% to 22% in three holes. Samples were taken in units 1, 2, and 5 to determine whether the soils were ash cap or non-ash cap. There was a mix in unit 1 but it seemed to have more non-ash cap soil. Unit 2 was non-ash cap. The inspection report indicates that Appellant intended to start clipping on Saturday, May 6 (AF 539). In Dennis Thornton=s declaration, he states that he was allowed to clip and dispersed skid in unit 4 only. He says that this activity was allowed because of previous representations by the FS that he could resume operation in unit 4 at 18% soil moisture. As to the other units, he indicates that the FS position was that soil moisture content would have to reach 11% before he could clip or skid at all. (AF 1224, Declaration of Dennis Thornton, p. 6).

21. Appellant did not begin operations immediately after May 5. Dennis Thornton telephoned the SA on May 8 and May 10 to say that he had not begun because of weather and because he was looking for a skidder operator. When the SA returned the May 10 call, Appellant had located a skidder operator. (AF 540-41.) Clipping began on May 16 and skidding the following day (AF 542-43).

22. By letter dated June 26, 2000, Appellant claimed $24,994.50 ($2,499.45 daily for 10 days) in lost income and $517.50 for 11.5 hours of paralegal research necessitated due to contractual interference from FNF employees. The claim letter makes a number of assertions. Appellant claims that on April 28, the SA called to report that the soil moisture in the area which had been clipped was 18% and in the areas not yet clipped was 16%. According to Appellant=s claim, these were within allowable tolerances, but Appellant would nonetheless not be allowed to commence operations because the SS had discovered that soil types were Asensitive@ and a 10% moisture level would be imposed. The claim letter goes on to state that Appellant was provided a copy of ASoil Moisture and Temperature Summary for Swan Lake and Tally Lake Districts,@ but was provided no documentation to support a 10% moisture level nor any documentation regarding18% moisture levels. Appellant cites CT6.7, Hazard Reduction and Site Preparation, for the proposition that the soil moisture standard for commencement of operations on the sale was 18% or less. Appellant also contends that the documentation provided by the SS was not Athe science@ used when soil profiles were made on the

sale, and that nowhere in the prospectus, the environmental assessment, the project file or the contract are sensitive soil areas identified. In addition, Appellant cites the soil analysis from another sale (Good Creek) stating that when harvesting on sensitive soils, conventional fellers and skidders would be allowed to disperse skid if the soil moisture is less than 18% in the top 12 inches of the soil profile and at moisture levels above 18%, ground-based equipment would be restricted to dedicated trails. The claim letter asserts that Dennis Thornton asked for and was denied the opportunity to operate on dedicated trails and that, by the standards in the Good Creek sale, Appellant should have been allowed to disperse skid on May 1 but was denied even the option of using dedicated trails. Appellant contends that it was ready to go to work on May 1 and had the contractual right to do so, but was held up and lost part of its crew due to contractual interference on the part of FNF. Also, Appellant seeks a 15-day contract term adjustment as allowed in CT8.231 Conditions for Contract Term Extension and CT8.3 Contract Modification as well as a 15-day extension of the periodic payment schedule. (AF 23-24.)

23. During a meeting on August 3, 2000, the parties discussed, among other matters, the soil moisture problem. The TMO provided copies of a writeup by the SS, old and new FS Manual direction and portions of the Environmental Assessment relating to soil compaction. The documents referred to dry conditions rather than to a percent of moisture. The CO memorialized this meeting in an August 8, 2000, letter to Appellant. Therein, he reiterated the FS position that the FS would not allow dispersed skidding unless soils are dry enough to avoid compaction. He commented that references to a percent of soil moisture had led to discussions and disagreement between the parties; that Dennis Thornton had stated that he disagreed with the use of an 11% standard on non-ash cap soils; and wanted to see the studies on which this standard was based. Each party agreed to furnish the other the data on which its opinion was based. Because soils were then dry and dispersed skidding was not causing compaction, the CO agreed to issue a letter allowing dispersed skidding on dry soils. At the meeting the parties also discussed the issue whether the FS had denied Appellant the opportunity to operate on designated skid trails during the May 1 meeting. The CO, the SA and the TMO all stated during the August 3 meeting that at the May 1 meeting, that subject had been discussed but Dennis Thornton was unwilling to begin operations. Rather, according to these three individuals, Dennis Thornton was unwilling to operate on designated trails but was willing to wait until the FS checked soil moisture again on May 5. During the August 3 meeting, Dennis Thornton was emphatic that he had not been allowed the option to operate on designated trails. The parties did not resolve their difference of opinion on this issue. (AF 387-88.)

24. Prior to the August 3, 2000 meeting, Appellant had written a letter to the Regional Forester raising concerns with what Appellant felt were recurring problems with the FNF timber program. As a result, FNF asked the Regional Office to review the timber program on the FNF. (AF 387.) The review took place in September 2000. The review team consisted of two employees of the FS Region 1 office, one of whom was a measurements specialist and a timber management specialist from the Idaho Panhandle NF. The primary issue reviewed was timber cruising. The team did, however, also address soil resource standards. The team interviewed two of the three sale administrators on the FNF. They were asked how they assured that soil standards were being met. The response was that

both had worked closely with the SS over the years and had developed quick methods to determine whether soil moisture content would be of concern to cause unacceptable compaction. The method being used to determine whether skidding could occur off designated skid trails was the hand test method by which a handful of soil is taken and rolled in the palm of the hand. If the soil starts to ball together, it is too wet to allow dispersed skidding. Skidding would still be allowed through the use of designated skid trails until unacceptable damage would begin to occur including rutting, puddling of water, excessive soil movement and the like. The sale administrators took the approach that once soil started to ball together, skidding off designated skid trails was no longer acceptable under any soil type. It appeared to the team that sale administrators were trying to relate the hand test results to actual soil moisture content in some cases. The team recommended that the hand test method should be used to determine when unacceptable damage begins to occur on the ground. According to the team, soil moisture content is a precise measurement and should be done by qualified soil scientists. (AF 419.)

25. The record includes a lengthy declaration of the SS, containing a detailed scientific discussion of soil compaction, the evolution of the hand squeeze test and volcanic ash cap soils and non-ash cap soils. While the data is instructive, much of it is unnecessary to our analysis which must center on the contract and its requirements. A A4-bars moisture level@ is a scientific term describing soil conditions that are well entering a drying condition expected to continue until more precipitation occurs. The 4-bars measurement can be converted to a practical application by selection of a percent moisture level that represents the 4-bars measurement. On the FNF, ash cap soils that are at 4-bars moisture contain 18% moisture. Non-ash cap soils, which include all other surface soil material, contain 11% moisture at 4-bars (Declaration of Bill Basko (Basko declaration), p. 6). The 4-bar moisture contents of 11% and 18% is indicated in technical material included in the record (AF 603, 633, 653). For practical use in the field, an evolution has taken place from use of first the 4-bar measurement to next, the percent moisture which requires use of a pressure bomb or microwave oven to finally, the hand squeeze test. The FS settled on use of the hand squeeze test because of its ease of use and the fact that field personnel, both FS and loggers, could relate to it. (Basko declaration, p. 6.)

26. The SS=s declaration continued, stating that testing moisture by means of the hand squeeze test can be determined visually. Both FS personnel and the logger can observe whether a soil ball breaks apart or remains intact when squeezed. Also, this test works regardless of the soil characteristics such as texture, organic matter, or soil origin (parent material of ash cap or non-ash cap). Regardless of whether soil is ash cap or non-ash cap, a soil ball breaking up and leaving the hand relatively dry indicates a sufficient dryness to allow for dispersed skidding. According to the SS, it would be erroneous to conclude that a single moisture level would apply to a sale. One must consider the parent material. Soil compatibility is determined by both its parent material and the soil moisture contained within the parent material. (Declaration of Bill Basko, pp. 7, 8.) When testing on this sale, the SS unexpectedly discovered that most of the soils in unit 4 had a surface layer lacking volcanic ash. Ash cap top soil layers are more commonly found on the FNF. The surface layer in unit 4 was derived from glacial till, a non-ash cap soil. Glacial till soils are not considered dry until soil moisture drops below 11%. However, these soils reach the 11% level about the same time the soils

with volcanic ash cap reach 18%. (Declaration of Bill Basko, p. 11.) Finally, the SS denies ever having used the term Asensitive@ to describe the soils on this sale. He points out that the inspection report that Appellant cites for this proposition does not contain the word Asensitive@ (AF 369). The SS states that what he said was that the soils were susceptible to soil compaction because they were wet when he was looking at them. (Declaration of Bill Basko, p. 10).

27. Appellant=s claim is for a total of $25,512 ($24,994.50 in lost income for 10 days of down time (the 10 days are undefined but presumably some portion of the period May 1 to May 15) and $517.50 for paralegal time in doing research). The declaration of Donna Thornton claims a total of $201,952.91. This total is comprised of $89,980.20 lost profit on logging saw logs and peelers; $15,288 lost revenue (all profit) on pulp; $42,300 lost profit on pulp that would be accumulated at a rate of 2 load per day for 100 days (100 days being the estimated time to remove the remaining 15,000 MBF of timber); and, $50,469.71 expense to pile tops and brush on the sale (3/4 of the FS original estimate for piling of brush). The increased quantum amount was neither presented to the CO nor certified.

DISCUSSION

Contentions of the Parties

Appellant contends that the FS prohibited it from all logging in April and May of 2000 thereby breaching express contract language. Appellant does not explicitly identify the Aexpress language@ allegedly breached. However, this contention follows quotes from BT8.3 (stating that the conditions of the sale are completely set forth in the contract and can only be modified by written agreement of the parties) and BT6.3 (providing that the timing of required FS designation of work on the ground and the performance of other FS work shall not be such as to cause unnecessary delay to the purchaser). Appellant bases its claim of breach on the contention that it was entitled to operate according to the contract at all times within the normal operating season (including dispersed skidding) and that the FS denied Appellant the opportunity to perform any operations at all until soil moisture was less than 18%. This prohibition, Appellant asserts, applied to operating on designated trails as well as to dispersed skidding.

The FS relies on clause CT6.4 to argue that the sale was designed, advertised and sold as one requiring use of heavy equipment on designated skid trails except where the parties agree in writing that dispersed skidding may take place. The FS also points out that the contract provides for soil protection through clause BT6.6, Erosion Prevention and Control, prohibiting operation of equipment where ground conditions are such that excessive damage will result. The FS disputes Appellant=s interpretation as expressed in paragraph 13 of Dennis Thornton=s declaration that the only moisture standard in the contract was 18% applicable only to dispersed skidding in unit 4 outside the normal operating season and that during the normal operating season Appellant could log the whole sale area without restriction.

Issues

The parties= contentions raise a number of contractual and factual issues. One is whether Appellant had a contractual right to dispersed skid, and if so under what conditions. If there were a right to disperse skid under certain conditions, what those conditions were and how they were to be measured is yet another issue. We must also address the factual question whether Appellant was prohibited from performing operations at all for a period of time or if the prohibition extended only to dispersed skidding. In addition, Appellant has raised the issue whether a purchaser is guaranteed the right to operate during the normal operating season.

Designated Trail Skidding vs. Dispersed Skidding

The evidence demonstrates that Appellant had a strong preference for dispersed skidding (Finding of Fact (FF) 10, 16, 19). It also shows that the FS had no objection to operations being conducted by that method so long as conditions allowed. The FS executed agreements allowing dispersed skidding in the winter months when ground was frozen and no excess moisture was present (FF 7, 9). The dispute arose after a voluntary shutdown during the spring thaw. Thereafter, when Appellant wished to resume operations, the FS considered the soil too moist for dispersed skidding and refused to sign another letter of agreement allowing dispersed skidding.

The contract is clear that, with the exception of situations where the parties agree otherwise in writing, skidding operations are to be conducted on designated trails located and approved in advance (FF 4). Thus, Appellant had no contractual right to dispersed skid at any time. The contract sets no standard to measure when dispersed skidding might take place. The language of the contract is that both parties must agree in writing. Thus, either party may block the use of dispersed skidding methods. The evidence certainly leads to the conclusion that, in this case at least, there would be little likelihood that the timber purchaser would be the one to oppose dispersed skidding. Nonetheless, the contract gives that option to either party without providing a requirement that the party acting to bar dispersed skidding operations must demonstrate the presence of any measurable condition.

We find the FS within its contractual rights in refusing to allow dispersed skidding. Given that the contract contained no objective standard for determining when the moisture content was low enough to allow dispersed skidding operations, at best (for Appellant) the test would be that of a reasonable man. We find that the FS exercised reason when it determined whether the soil was dry enough to allow dispersed skidding. The SA who was the FS representative on the site sought the advice of the SS, an individual whose training and responsibilities equipped and authorized him to make such determinations. When Appellant sought to restart operations, the SS and SA made field visits to inspect and test the soil. On each occasion, two methods of measurement (the hand squeeze test and the Abomb@ test) were used. In addition, the soil was examined to determine its type and, therefore, to learn to what percent moisture content would need to drop before operations could resume without damage to the soil. (FF 16, 17, 20.) On their face these efforts appear reasonable and Appellant has presented no evidence to show that they were not. Similarly Appellant has presented only the unsubstantiated opinions of its principals, Dennis and Donna Thornton, to show that a different conclusion regarding moisture content might be reached.

Because Appellant contends the FS refused to allow any operations during the period in question, we must address the factual question of whether Appellant ever sought permission to operate on designated trails and was prohibited from doing so by FS personnel. Appellant=s claim and the declaration of Dennis Thornton assert that during the time in dispute, the FS refused to allow Appellant to log either on designated trails or by means of dispersed skidding (FF 19, 22). Declarations of FS personnel state that Appellant was not denied the opportunity to log on designated trails. Both the CO and the TMO state that during the May 1, 2000 meeting, suggestions were made to Dennis

Thornton that there was work other than dispersed skidding that could be performed. The TMO specifically states that he authorized work in cable units, drier units and use of 100 foot spacing intervals for designated skid trails. (FF 18.) Appellant=s evidence to the contrary is less specific and contradicted in statements by him that he did not have the manpower and equipment to hand cut trees and cable them out. In addition, Appellant=s methods throughout the sale demonstrated its preference for dispersed skidding. (FF 10, 19, 22.) That demonstrated preference alone would be insufficient to prove that Appellant did not ask to operate on designated trails. However, it is a factor to be considered along with the lack of specificity in Appellant=s assertions claiming a denial by the FS and with Appellant=s statements regarding its manpower and equipment.

Significantly, if at the time these events were taking place, Appellant felt that he was being prohibited from any contractual activity, he had the obligation to put the FS on written notice thereof. There is no evidence Appellant did so. Instead, Appellant asks us to find that the FS prohibited all operations on the basis of language from FS personnel, which the FS says was not intended to prohibit all work and which on its face, even taken in a light most favorable to Appellant, is at best ambiguous and of a nature to require clarification before acting upon. If Appellant interpreted any oral communication as a direction not to conduct any operations at all, he had an obligation to put the FS on written notice of his interpretation that was being wrongfully denied the opportunity to proceed with work under the contract. In this case, Appellant did not even provide verbal notice. The weight of the evidence is that while the FS did not allow dispersed skidding during the period May 1-May 5, 2000, that prohibition did not extend to all activity under the contract.[1]

The record and the parties= briefs contain a great deal of discussion regarding measurement of soil content during performance of the contract and of the underlying science. This issue is not dispositive, however. The original contract contained only one reference to measurement of moisture by a percent of content. Clause CT6.7 provides that piling and scarification activities are to take place only when

[1] We note that Appellant=s claim is for the period May 1- May 16 which includes 11 days after dispersed skidding was allowed. Appellant claims that FS delay caused it to lose the availability of a previously scheduled skidder. Having found that the FS was justified in not permitting Appellant to disperse skid during the initial days of this period (when dispersed skidding was disallowed and activity on designated trails and cable work permitted), we do not hold the FS responsible for the days after it had allowed work to resume.

moisture content is at 18% or less (FF 3). In addition, one of the construction agreements by which the parties agreed that Appellant could disperse skid in a particular unit limited that deviation to conditions where soil moisture was below 18% (FF 9). Neither of those references are controlling on the activities at issue here. At best, they provide some evidence of a customary standard. The SS declared that the hand squeeze test is the best field measurement to determine whether soil is so wet that it will cause undesirable compaction. He stated that the way to measure percent moisture is by use of the Abomb,@ and that the reason the percent moisture took on the importance it did in this case was (1) the inexperience of the SA who wanted a method to check his own use of the hand squeeze test and (2) the insistence of Dennis Thornton who wanted a clear reference to a numeric standard. (FF 17.) An issue also arose regarding the presence of non-ash cap soils which do not dry out enough to avoid compaction until they reach 11% moisture (earlier mistakenly referred to as 10%) (FF 12, 16, 18). Appellant contends that on May 5, 2000, when the FS allowed dispersed skidding operations to resume in unit 4, the FS position was that moisture content would have to reach 11% before he could clip or skid at all in the other units. The FS has acknowledged that it identified the 11% figure as the standard for glacial till soils. However, the FS also points out that while glacial till soils are not considered dry until soil moisture drops below 11%, glacial till soils reach the 11% level at about the same time that soils in the volcanic ash cap reach 18%. Ash cap soils are more commonly found on the FNF and thus from a time standpoint of drying out, the 18% and 11% appear comparable (FF 26).

Clause CT6.4 of the contract required tractor operations on approved designated trails except where the parties agreed to operate in some other manner. The CO agreed to allow operations outside designated trails in a number of units, when FS personnel determined that conditions allowed. Appellant has not shown that the CO was unreasonable in disallowing dispersed operations at other times. In addition, the contract in BT6.6 prohibited use of machinery where ground conditions are such that excessive damage to the soil would result (FF 3). Admittedly, this provision also lacks a standard of measurement. However, that lack of a standard does not read the requirement for skidding on approved designated trails (except when otherwise agreed to by both parties) out of the contract. The FS has shown it made legitimate efforts to test the soil for excess moisture and Appellant has presented only unsupported allegations that these efforts were not reasonable. Appellant has failed to provide anything other than allegations that the FS was less than reasonable in its determination that the soil was too wet to operate equipment other than on designated trails without danger of compaction. Again, it is significant that Appellant made no contemporaneous written record putting the FS on notice that he had received a direction prohibiting work on designated trails and disagreed with it.

Meaning of Normal Operating Season

The contract describes the normal operating season as May 1 to October 31, inclusive (FF 1). The contract does not provide a clear definition of what is meant by normal operating season other than what is gleaned from the meaning of the phrase itself. Appellant contends that he is guaranteed the right to operate during that period Aaccording to the terms of [its] contract.@ However, Appellant does not explain what he means by the phrase Aaccording to the terms of its contract.@ Examination of

other contract clauses which make reference to the normal operating season refute any contention that a purchaser is guaranteed the ability to operate at all times during the normal operating season. Clause BT8.21 provides for adjustment in the contract term for delays in operations during the normal operating season (FF 2). This provision in and of itself indicates the possibility that a purchaser may be prohibited from operating during a normal operating season. The CO defined the normal operating season as that period of time in which a purchaser might be expected to be able to log. He described it as a protection to the purchaser because the purchaser would be granted additional time if he was unable to operate for any part of that season. (FF 13). We find this definition to be reasonable. Appellant has provided no authority for its assertion that it should be able to operate without exception during the defined season. We find that interpretation unreasonable and inconsistent with BT8.21.

Quantum

We found no entitlement to recovery and thus need not decide the issue of quantum. Appellant=s claim to the CO is for a total of $25,512 and 15 day time extensions to both the term of the contract and to the periodic payment schedule. Appellant provided no documentation to support these amounts. In addition, while neither the claim nor the complaint was amended to change this amount, the declaration of Donna Thornton claims a total of $201,952.91, much of it in lost profit. These amounts are speculative and even had Appellant prevailed on the issue of entitlement and certification were perfected, the record before us contains scant, if any, support for such a recovery.

DECISION

For the foregoing reasons, the appeal is denied.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____

HOWARD A. POLLACK
Administrative Judge

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

I write separately from the majority, because I disagree with many of the factual conclusions and the legal analysis. While I find that the moisture content of the area prevented work during the normal operating season, I find that the purchaser has not demonstrated a breach of the contract by the Government or a contractual basis to recover money. Accordingly, I conclude that the purchaser has not demonstrated entitlement to alleged lost income or paralegal costs, but that the purchaser is entitled to a contract term adjustment of fifteen calendar days.

The purchaser submitted a claim to recover $25,512.00, comprised of $24.994.50 in lost income ($2,499.45/day x 10 days) and $517.50 for 11.5 hours of research by a paralegal, and to obtain a 15-day contract term adjustment. The alleged Aclaim@ for $201,952.91 raised by a principal of the purchaser

in her declaration does not rise to the level of a claim submitted to the contracting officer with a certification required under the Contract Disputes Act of 1978, as amended, 41 U.S.C. ' 605. Hence, the Board lacks jurisdiction to consider the Aclaim@ for lost profits and expenses.

Material facts

1. Under the timber sale contract, the purchaser was to cut and remove timber in twenty-three cutting units; piling, slashing, clearing, and other activities were also required (Exhibit E at 123-25, 162) (Exhibits are in the Appeal File).

2. The contract defines the Anormal operating season@ as May 1 to October 31, inclusive (Exhibit E at 56). The contract requires the purchaser to discharge all of its contractual obligations no later than the termination date, unless adjusted under various provisions (Exhibit E at 76 (& BT8.2, Period of Contract)). One identified mechanism or provision is a Acontract term adjustment,@ under which Athe contract term shall be adjusted in writing to include additional calendar days in one or more Normal Operating Seasons equal to the actual time lost,@ with some exceptions (Exhibit E at 76 (& BT8.21, Contract Term Adjustment)). One of the identified circumstances qualifying for a contract term adjustment is:

> Purchaser experiences delay in starting scheduled operations or interruptions in active operations either of which stops removal of Included Timber from Sale Area through curtailment in felling and bucking, yarding, skidding and loading, hauling or road construction, as scheduled under BT6.31, for 10 or more consecutive calendar days during a Normal Operating Season due to causes beyond Purchaser=s control, including but not limited to acts of God, acts of the public enemy, acts of Government, labor disputes, fires, insurrections or floods.

(Exhibit E at 76 (& BT8.21(a)).) This clause expressly alters a purchaser=s payment obligations only regarding scheduled rate redeterminations (not applicable here) or for appraisals for extensions (which the record does not demonstrate to be applicable here); it does not require the Government to reimburse any amount to the purchaser in the event of a contract term adjustment.

3. The Conduct of Logging clause specifies: AUnless otherwise agreed in writing, silvicultural prescriptions and land management objectives shall be conducted and accomplished by the following requirements, methods and procedures[.]@ The clause identifies sixteen of the cutting units as Atractor units@ with the explanation: ATractor skid roads and skid trails will be located and approved in advance of falling. Tractors shall be restricted to approved skid trails. Tractors skid roads shall be no less than 100 feet apart except where converging.@ The clause identifies seven of the cutting units as Acable units@; cutting unit 4 is a cable unit. (Exhibit E at 121 (& CT6.4, Conduct of Logging (3/83)).)

4. A Skid Trail and Landing Construction Agreement, signed in February 2000, relates to cutting unit 4. Instead of designating skid trails the agreement permits dispersed skidding; the agreement

contains no express limitations and no annotations under the Aspecial requirements@ paragraph. (Exhibit F at 177-78.) A subsequent Letter of Agreement signed by the parties on March 15, 2000, was entered into

> in response to the purchaser[=]s request to tractor skid unit 4 instead of cabling the unit. . . . This request is permitted as long as soil moisture content is under 18%. In addition that portion of this unit that is favorably skidded to road # 2962 would require (BT6.423 Skidding On Roads) that road # 2962 have snowpack or an ice layer to prevent damage to the graveled road surface[.] In the event skidding is done when a snowpack or ice are not present only a partial amount of gravel will be removed from the road surface and new gravel will be required to be put down over the crossing areas.

(Exhibit F at 180.) Under the agreement, the purchaser was to reimburse the Government for the difference in logging costs between cable yarding and tractor skidding; that is, the sale price increased to reflect the appraised amount of purchaser savings to result from the change in operations.

5. The Forest Service Sale Administrator noted in his inspection report dated March 22, 2000, the day the purchaser shut down operations: AThis voluntary shut down is outside of the normal operating period. I replied that since the snow was leaving we would have to wait till the soil dried. The standard is < 18% for soil moisture content.@ (Exhibit L at 533, Timber Sale Inspection Report.) On April 4, the purchaser inquired if the soils were ready to start operations. The Sale Administrator inspected the soil on Friday, April 7, and concluded that more time was needed because the moisture levels were 18 to 22%. The Sale Administrator notified the purchaser that the next inspection would occur on the following Friday, April 14. (Exhibit L at 534, Timber Sale Inspection Report.) The Inspection Report for April 14 specifies that the sale area received a heavy snow with a high water content, requiring a delay until the snow melts and the soils dry (Exhibit L at 535, Timber Sale Inspection Report). On Thursday, April 27, the Sale Administrator checked the soil moisture content in cutting unit 4. He concluded that soil was on the wet side; the report includes no percentages. He informed the purchaser that he would check the soil on Friday, April 28, with a Forest Service Soil Scientist, and call the purchaser on that day (Exhibit L at 536, Timber Sale Inspection Report.)

6. The Sale Administrator=s Inspection Report dated April 28, 2000, contains the following remark:

> Checked soil moisture content on soils in Unit 4 with [Forest Service] Soil Scientist . . . [who] informed me that the soils on Unit 4 were a non ash cap soil and a till and needed to be at 10% before [sic, because] skidding would cause compaction. I had not realized that this was the case and and [sic, had] told [the purchaser] that 18% was the soil moisture that we were targeting for skidding to occur on unit 4.

(Exhibit L at 537, Timber Sale Inspection Report.) The report does not specify the actual moisture content level in the unit.

7. The report for May 1 (Monday) remarks upon conversations between various individuals; it does not state that a soil inspection occurred. The report specifies that the Government informed the purchaser that the soil would be checked again on May 5. (Exhibit L at 538, Timber Sale Inspection Report.) The report for May 5 (Friday) states the Government took several soil samples on unit 4. The results are reported as 15% moisture in the area with trees and 18% in the area yet to be skidded. The Government permitted the purchaser to resume operations: AI told him that he could skid on 40' trail spacing due to slope % and [letter of agreement] dated 3/15/00. I said that if we did get any rutting that he would be shut down.@ (Exhibit L at 539, Timber Sale Inspection Report.)

8. The Government=s report of a telephone message from the purchaser states that the purchaser did not resume operations on Saturday, May 6, due to weather and the lack of a skidder operator (Exhibit L at 540, Timber Sale Inspection Report). The Government=s report of a telephone message from the purchaser on May 10 (Wednesday) states that operations did not resume on Tuesday due to the weather and because the purchaser was still looking for a skidder operator. In a telephone conversation between the Sale Administrator and a principal of the purchaser on that day, the purchaser stated that he would call when he intended to start; he had located a skidder operator. (Exhibit L at 541, Timber Sale Inspection Report). The purchaser does not dispute the content of these reports. On May 16, the purchaser resumed operations on the sale; that is, clipping (the cutting of trees) began. (Exhibit L at 543, Timber Sale Inspection Report). A principal of the purchaser credibly asserts in an affidavit that a skidder operator was ready to work on May 1, but that the individual found other work because operations could not resume under this contract; despite diligent effort a skidder operator was not obtained to work before May 16 (Appeal File at 1223-24).

Discussion

The parties focus on tangential arguments, when a different analysis is called for given the contractual language, the facts, and the claim of the purchaser. In the dispute properly before the Board, the purchaser maintains that the Government breached the contract by imposing soil moisture limitations on tractor skidding and mechanical clipping when such limitations are not found in the contract. The purchaser further asserts that the Government breached its contractual obligation not to interfere with the execution of the contract, violated the Administrative Procedures Act, and was negligent in its duties to administer the contract.

As signed, the contract designated cutting unit 4 as a Acable unit.@ A written agreement signed in February 2000, permits dispersed skidding on cutting unit 4 instead of specifying skid trails to be utilized. A contract amendment, with consideration expressly provided by the purchaser, in a subsequent Letter of Agreement signed in March 2000, states that the purchaser could tractor skid cutting unit 4 Aas long as soil moisture content is under 18%.@ This authorization recognized that the activity may occur when snow or frozen ground was absent. This reflects an agreement by the parties that the purchaser could tractor skid with dispersed skidding on cutting unit 4, if the soil moisture content is under 18%. Contemporaneous documentation by the Government supports this

conclusion; the Forest Service Sale Administrator writes in an inspection report dated March 22, 2000, the day the purchaser shut down operations: AI replied that since the snow was leaving we would have to wait [to resume operations] till the soil dried. The standard is < 18% for soil moisture content.@

The moisture content of the soil in cutting unit 4 was in excess of 18% on Fridays, April 7 and 14. On Thursday, April 27, the soil was Aon the wet side.@ The record does not specify a moisture content for the soil on April 27 or 28. However, on Friday, May 5, the moisture content was 15% in tree areas and 18% in areas to be skidded. Given the drying that was occurring in the area over the weeks in question, without credible contradictory information in the record, I conclude that on Thursday, April 27, and Friday, April 28, the moisture level of cutting unit 4 was not at or below 18%.

The purchaser is correct that the Government may incur liability if it imposes limitations on the purchaser=s activities when such limitations are not identified explicitly or implicitly in the contract. This purchaser maintains that it should have been able to perform during the normal operating season (and earlier). It asserts that the Government breached the contract and interfered by imposing a more stringent acceptable moisture content level. The facts do not indicate any impropriety.

For cutting unit 4, the unit in question, when the soil moisture levels were at or below 18%, the Government authorized the resumption of operations. This occurred on May 5, five days into the normal operating season. The dialogue and activities concerning a possible different-than-expected soil and lower levels for an acceptable moisture content are not material. The Government acted in accordance with the terms and conditions of the contract, as amended, by permitting operations to resume on May 5, but not earlier. The purchaser was permitted to resume operations when the moisture content of cutting unit 4 was within the agreed-upon levels. Thus, the theories of relief (breach or other improprieties) underlying the monetary claim for lost income are not borne out by the record.

What remains is the theory of relief under the Contract Term Adjustment clause. The relevant basis for relief in that clause states:

> Purchaser experiences delay in starting scheduled operations or interruptions in active operations either of which stops removal of Included Timber from Sale Area through curtailment in felling and bucking, yarding, skidding and loading, hauling or road construction, as scheduled under BT6.31, for 10 or more consecutive calendar days during a Normal Operating Season due to causes beyond Purchaser=s control, including but not limited to acts of God, acts of the public enemy, acts of Government, labor disputes, fires, insurrections or floods.

(Exhibit E at 76 (& BT8.21(a)).) This clause anticipates the situation that here occurred. This clause provides solely for a time extension; it does not alter this purchaser=s payment obligations or obligate the Government to pay the purchaser for lost profits or other costs. Therefore, this clause does not serve as a basis for the claimed monetary relief.

The purchaser was delayed in the start of scheduled operations. Five consecutive calendar days of delay are apparent given the soil moisture levels. The lack of a skidder operator arose due to a cause beyond the control of the purchaser; the resulting lack of skidding work at the start of the normal operating season curtailed skidding operations. Therefore, under the contract, the purchaser is entitled to the requested time extension of fifteen calendar days, the actual time lost.

Conclusion

Because the purchaser has not supported a basis for monetary relief, there is no entitlement to receive money from the Government. The question of the sufficiency of the record to support the quantum sought need not be addressed. The contract term should be adjusted for fifteen calendar days, representing the period from May 1 to 15, when timber removal was stopped because of the curtailment of skidding operations.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
January 28, 2003