SANTEE DOCK BUILDERS,	)	**AGBCA No. 96-161-1**
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	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

December 17, 1998

OPINION BY ADMINISTRATIVE JUDGE HOWARD A. POLLACK

This appeal arises out of a default termination of Contract No. 50-4310-6-237 between Santee Dock Builders (Santee or Appellant) and the Natural Resources Conservation Service (NRCS or Government) of the U. S. Department of Agriculture. This emergency watershed project was for the sum of $41,686 and called for Santee to perform various tasks at the Mossy Creek, in Houston County, Georgia, to remedy and repair natural resource damage caused by tropical storm Alberto in 1994. Santee was terminated for default on the contract and contests the propriety of that termination. A hearing was held on the matter in Atlanta, Georgia, on September 25, 1997.

The Board has jurisdiction of this appeal under the Contract Disputes Act (CDA) of 1978 (41 U.S.C. §§ 601-613).

FINDINGS OF FACT

1. On February 21, 1996, NRCS awarded Contract No. 50-4310-6-237, in the sum of $41,686 to Santee, to remove debris and sediment and place loose rock riprap along the Mossy Creek in Houston County, Georgia. Mossy Creek is a perennial stream that ranges in width from 18 to 20 feet. The project covered in excess of 9,000 feet of shoreline and in addition to involving removing debris accumulated within the creek, also included other cleanup work on the flood plain adjacent to the creek. Work was to be conducted from private property along the shoreline, as the contract prohibited operating equipment in the creek. In some instances, the contractor had to remove trees on the private property to get access to perform the work. The contract included several clauses dealing with protecting the private property, as well as protecting the structures and vegetation on the private property. Once the contractor removed the debris from the stream, the debris was to be burned and the ashes buried on site. (Appeal File (AF) 161-170; Transcript (Tr.) 58-60, 67, 137-138.)

2. The contract called for Appellant to complete work within 30 days after issuance of the Notice to Proceed (NTP). NTP was issued on February 28, 1996, and established March 29, 1996, as the contract completion date (AF 48, 157-159, 162; Tr. 20, 67-68). Santee first came on site on the third day after receiving the NTP (Tr. 68).

3. The contract specified maximum work of 10 hours a day, six days per week. The contractor was to propose to NRCS its intended hours of work and was to include daily starting and stopping times. If the contractor wished to work more hours, Appellant had to make a request to the Contracting Officer (CO). There were some limited instances during the contract when Appellant requested time outside the contract-hour envelope. Those requests, however, normally occurred in situations where Santee had started late or had a problem with its equipment. (AF 165; Tr. 185, 190.)

4. The contract contained Default (Fixed Price Construction) clause I.68, Federal Acquisition Regulations (FAR) 52.249-10 (APR 1984), which provided in part:

> that if the Contractor refused or failed to prosecute the work or any separable part with the diligence that would insure its completion within the time specified in the contract, including any extension, or failed to complete the work within that time, the Government could, by written notice to the contractor, terminate the right to proceed with the work (or the separable part of the work) that had been delayed.

(AF 352.)

5. The contract also contained clause H.10, TIME EXTENSIONS FOR UNUSUALLY SEVERE WEATHER (SCS, AMB) (JUL 1993). This clause set forth a monthly schedule of anticipated adverse weather delays and required that the contractor's progress schedule reflect those anticipated adverse weather delays in all weather-dependent activities. The contract showed that using a 6-day work week, the contractor should anticipate 5 adverse days during March and 4 adverse days for April. (AF 167-167(a).)

6. Clause I.56 FAR 52.236-9, PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (APR 1984), called for Appellant to protect vegetation such as trees on or adjacent to the work site, that were not to be removed and which did not unreasonably interfere with the work required. The clause called for remediation where leaves or branches were damaged by carelessness. It also required the contractor to protect existing improvements and utilities at or near the work site, to repair them, and gave the CO the right to charge costs back if the contractor failed or refused to perform the remediation. (AF 336-337.)

7. Construction Specification 400, Debris & Sediment Removal, set out guidelines regarding which trees, stumps and brush to remove and specified that only downed, undermined or storm-damaged trees could be removed. This section also directed the contractor as to disposal and burning of debris and required that all material designated for burning would be burned to a state of loose ash. (AF 167(i), 170.)

8. The contract also contained the standard Material and Workmanship clause, which provided that "all work under the contract shall be performed in a skillful and workmanlike manner" (AF 336).

9. Santee's home office was located in Vance, South Carolina, a substantial distance from the job site in southern Georgia. Santee's sole witness at the hearing was its President, Mr. Thomas Whetsell, who did not supervise the project on site and made only two visits to the site during the project. (Tr. 16, 33-34, 37.) None of Santee's workers nor its job superintendent appeared to testify.

10. At the start of the project, Santee's job superintendent was James Griffin (Tr. 16). He is not to be confused with his father, also James Griffin (at times during testimony and in job logs, the senior Mr. Griffin was referred to as Jeff Griffin). The senior Mr. Griffin signed the contract for Santee as Vice President (AF 159; Tr. 49, 72.) For purposes of this decision, reference to James Griffin, unless otherwise noted, is to the superintendent and not his father. In addition, two other key employees who performed on site for Santee were Hugh Griffin, the superintendent's uncle (who as discussed later was the designated superintendent at the time of the termination for default) and Andy Mills, who at times is referred to in the inspector's diaries as a laborer and at other times as an operator. (Tr. 17, 74-75.)

11. All personnel on the project worked as employees of Santee. However, James Griffin operated a separate company of his own, Biomass, which was performing a cleanup contract in Taylor County, Georgia, at the same time that Griffin was working for Santee. At various times during the Mossy Creek project, James Griffin and other "Santee" employees worked on the Taylor County project. (AF 101, 103, 104, 106, 108, 109, 111, 113, 115; Tr. 16-17, 23, 75; Government Exhibit (Gov't. Ex.) G-6.).

12. There was a pre-bid site showing on this project. It was attended by James Griffin, who thereafter spoke with Mr. Whetsell, by telephone. In that conversation, they discussed the scope of the project. (Tr. 33.) At the time of the showing, conditions on site were typical for February, March

and April in central south Georgia, with water flowing in the stream. The area adjacent to the stream was wet but not flooded. (Tr. 68.) While Mr. Whetsell was not at the pre-bid visit, he knew that the job was in a flood plain and said the water line was just above the creek. Although he expected a flood plain, he said conditions were a bit different then expected, because the work area was more of a swampy flood plain rather than just an area that would flood with excessive water. He said that the area was muddier than expected at the lower end and said that when the area would flood, Santee's machinery would not stand up on it, unless Santee utilized some of the logs, trees and limbs that had to be removed as a base to walk its equipment. (Tr. 18, 35-36.)

13. When Santee initially came on site, it brought only one piece of equipment and one operator. Almost immediately, that piece of equipment became stuck far outside the work limits. This was the result of Appellant driving it into a wooded area where it got stuck because of trees being too close. The equipment then did not operate for several days, until finally, on the fifth day of the contract, Santee was able to extricate it by means of a large wrecker. By the fifth day, Santee had brought on an additional excavator. (Tr. 69, 146.) Ultimately, and as work progressed, Santee, at various times, had a CAT 312 excavator, trackhoes and a dozer. (Tr. 18.) The dozer belonged to James Griffin. (Tr. 54-55.)

14. From virtually the beginning of the project, Santee experienced difficulties with contract performance. (Tr. 18-19.) Work started on a haphazard basis. Appellant ignored standing trees, hardwood trees and large trees in order to gain access to the debris. (Tr. 69.) Appellant was cutting trees that should not have been cut (trees not damaged by the flood), swinging into standing trees and knocking bark off of trees. Some trees were just snapped out of the way and some dug up by the roots to gain access. (Tr. 68-70.)

15. As a consequence, on March 6, 1996, the Government issued a Suspension of Work, citing lack of adequate personnel and damage to the private landowner's property on which the project was located. At that time, the only person who had been on the job was James Griffin, who performed some work on March 4 and 5 and was acting as both operator and superintendent. He was also the safety officer, which served little purpose, given he was alone on the site. (AF 71-72; Tr. 71.)

16. On March 7, a meeting was held between NRCS and the Appellant for purposes of addressing the stop order. NRCS was represented by the CO, the CO's Technical Representative (COTR) and the NRCS job inspector. The Appellant was represented by James Griffin and his father (identified in inspector diary as Jeff Griffin). The parties walked the site, discussed what had been damaged and what could be done to correct matters and avoid problems in the future. NRCS pointed out that one person working alone on the job constituted a safety violation. Both Griffins acknowledged that there had been some unnecessary damage and said they would take corrective action to stop it. The CO was satisfied that they would comply and issued a start work order at the close of the meeting. (AF 35-36, 72-73.)

17. Notwithstanding the lifting of the order, Santee did not resume work until Wednesday, March 13. It did rain heavily on March 6 and 7, with 3.7 inches falling on March 6 and 1.5 inches falling

on March 7. (AF 73-74.) While there had been significant rain on March 6 and 7, the rain did not create a flood condition. The water fluctuated in the channel, but the creek never left its boundary or flooded the work site. The COTR believed that most of the work could have been done while it was raining. While some areas may have been boggy, there were other areas that were high ground. (Tr. 74.) The NRCS inspector also testified that she considered the days to be workable (Tr. 147).

18. It is not uncommon to have intense thunderstorms in the area in March. The 10-year frequency of storm is 3.8 inches in any 24-hour period. (Tr. 107.) There were 8.7 inches of rain for the entire month of March 1996. That compared with the historical low of 2.5 inches and historical high of 9.5 inches. (Tr. 107.) The contract specifically provided that the contractor should anticipate 5 adverse weather days for March (AF 227; Tr. 132).

19. Although the rain would have an effect on burning debris, the COTR stated that it should not have been a problem, given the 30 days to perform the work. Debris could have been taken to the upper limits of the work area and allowed to dry before proper disposal or burning. (Tr. 108.) In addition, one does not just light a match. Rather, once a pile is built for burning, it falls in on itself and the pile has to be restructured while in the process of burning. The burning process and drying out could take 5 to 7 days after a soaking rain. (Tr. 139-140.)

20. On March 13 Santee resumed work with James Griffin and Andy Mills on site. However, James Griffin left that day at approximately 11:00 a.m. to work on his own contract and did not return. (AF 80, 125.) No one showed up the next day. Then, on March 15, the senior Mr. Griffin showed up and worked for a short while along with Mr. Mills. Then Mr. Griffin left by lunchtime, not to return, again reportedly going to the Griffin's other job. (Tr. 82.) On Saturday, March 16, Mr. Mills was the only person on the site (Tr. 83).

21. On March 20 the CO issued a cure notice pointing out that as of that date, only 20 percent of the work had been completed (AF 30). The CO addressed the earlier March 6 suspension and what the CO characterized as continuing lack of progress and failure to have adequate personnel. The Appellant responded in letters of March 21 and 22, laying blame for the delays on weather and muddy conditions and asking that Santee be given credit for almost 9 inches of rain delay in March, which Santee claimed left it only 6 productive days of work as of March 22. (AF 27, 28; Tr. 20.) The rain in March was not on a daily basis, but rather it rained on 4 or 5 days and, therefore, in the COTR's view, the piles had adequate time to burn (Tr. 114).

22. As a result of the cure notice, the parties held a meeting on March 21. The Appellant was represented by James Griffin (superintendent) and his father. NRCS was represented by the NRCS inspector, the CO and the COTR. (AF 28; Tr. 79.) The parties reviewed the problems discussed at the prior meeting and emphasized that only 20 percent progress had been made up to that point. Again the Griffins promised to take care of matters. (Tr. 79-80.)

23. In general, work thereafter continued on a sporadic basis up until April 1. During this time, there was virtually never a full day of work when Appellant had employees on site, generally there

was no superintendent present. The norm during this period was that only one of the two personnel would be on site for a full day and the equipment was regularly breaking down and being repaired. (AF 88-99; Tr. 74.) On some days, two people would appear for work, with one leaving around lunch and not returning. Often one of the workers would arrive late. When a hose burst or anything went wrong with equipment, Santee would leave the one worker on site while the other would be gone for quite awhile. (Tr. 151.)

24. In addition to the sporadic work, Appellant was not complying with other contract requirements. It was repeatedly warned not to run its equipment on a dam located on the site, but nevertheless continued to use the dam for access, thereby causing damage. (AF 88; Tr. 77, 150.) For example, on March 21, the NRCS inspector observed that Appellant had gotten the trackhoe at the back side of the dam, had turned it on its side, and had called a wrecker service to pull it out (Tr. 150).

25. Landowner complaints continued to persist and involved Appellant's cutting of non-storm damaged trees, damage to standing trees by removing bark, snapping of healthy trees with heavy equipment, digging up trees to obtain access and causing damage to the landowner's driveway. (Tr. 69, 76-77, 149.) On March 23, Appellant was to put soil back on the damaged area and seed and mulch to keep it from eroding. That was not done. Instead, it placed sand which would not compact. (Tr. 152.)

26. While some work was conducted on April 1, no work was performed on April 2 and 3. Appellant performed 4 hours of work on April 4 and then virtually no work again took place from April 5 through the afternoon of April 15. (AF 20, 103-115.) Seeing no overall improvement, the CO again contacted Mr. Whetsell. On April 16, Mr. Whetsell met at the site with the COTR and NRCS inspector to discuss overall concerns about progress, resource damages, and other measures Santee could take to "get the job back on track." (AF 114; Tr. 21, 81-85, 153-154.) It was 48 days into the contract and Appellant appeared to understand the gravity of the situation (Tr. 118). On that day Appellant had two pieces of equipment operating; however, that was not the norm. There were very few days when both machines were in full operation. (AF 114; Tr. 81.)

27. The parties discussed a number of issues, including James Griffin's role as superintendent (Tr. 22). As Mr. Whetsell stated, "Not having privy of being on site to hear conversations between them, I don't know whether James didn't do what he promised to do — I think sometimes he did not." Mr. Whetsell also acknowledged, later in testimony, that it appeared that unbeknownst to him, Mr. Griffin had not been truthful to him on a number of matters involving this contract. NRCS clearly was not willing to allow James Griffin to remain as the superintendent, noting that he was not generally responsive or available on the project during the time he was supposed to be in charge. In response, Mr. Whetsell stated he was prepared to send someone from his home office who had experience in clean-up work, to take over the project. The conversation then turned to Hugh Griffin, who the COTR described as having been easy to work with. The COTR also reportedly stated words to the effect that he would not have a problem if Appellant wanted to use Hugh Griffin as superintendent. (Tr. 23.) According to Mr. Whetsell, he continued to offer to send his man down

to the site, but if the COTR felt comfortable with Hugh Griffin, he would use him. The parties then mutually agreed to Hugh Griffin. Appellant characterized the Hugh Griffin decision as being with the full encouragement and knowledge of the Government. (Tr. 23, 83, 117.)

28. The parties also discussed the level of equipment and manpower needed to complete the project. On April 16, Santee had two trackhoes running properly. Mr. Whetsell stated that everyone was satisfied with them and he further stated that if he needed to bring in a farm tractor to get the road in proper condition, he would do so. Also, he acknowledged the need to use the dozer, which had been sitting but not used. (Tr. 24, 38.) According to Mr. Whetsell, he agreed to bring on more equipment if needed, but did not at that time see the need for it (Tr. 24). When asked how much time Santee needed to finish as of April 16, he told NRCS that he felt he could easily finish it within the guidelines and that the job would be completed by April 29 or 30 and could be completed without adding personnel or equipment. (Tr. 22, 32, 37, 83-84.)

29. The COTR and inspector had a different recollection of the discussion as to equipment. There was some contradiction in the inspector's recollection in that she said that Mr. Whetsell agreed to more personnel and equipment (which was reflected in her diary notes by the notation that Appellant was to notify the CO when more equipment would come on site), but later said on cross-examination, that "we discussed more equipment and personnel, if necessary, but if everyone worked that had been on the job site[,] three or four or whatever, and with the superintendent -- you know if they were there all the time, but if they weren't, then other equipment and personnel would be needed." The inspector recollected that in discussing more people and equipment if necessary, the discussion was in the context of everyone working and with a superintendent on site all the time. The inspector said that if Appellant had used its existing equipment and personnel at 100 percent, it would have been enough to get the job completed by April 30. (AF 114, 123; Tr. 83-84, 154, 185-186.)

30. The COTR understood that Appellant was going to bring on additional equipment and workers and said, "that was the only way that I could make an agreement, because he did not have adequate equipment on site, with two weeks to go with the new ending date. . . I mean, he still had 60 percent of the work to do that he had not done, you know, the 50 some-odd days prior to that with the same equipment and the same operators. So I emphatically stressed to him that more equipment and personnel was needed." (Tr. 84.)

31. After the meeting on-site with Mr. Whetsell, the participants telephoned the CO. (AF 17-18; Tr. 82-83.) After the COTR reviewed for the CO what had been discussed, the CO asked Mr. Whetsell how much time Santee would need to finish and was told that Santee could finish by the end of the month. The CO then agreed to the items and to an increase in the workdays to April 30. Mr. Whetsell was asked to confirm the conversation in writing. (AF 17-18; Tr. 82-84.)

32. By letter of April 17, Mr. Whetsell confirmed the agreement for more time. In that letter, he set out his plan of completion and agreed: (1) Hugh Griffin was appointed superintendent, (2) the two trackhoes with support equipment (saws, etc.) and men were noted as sufficient to complete the

project by April 30, 1996, with the dozer being used as needed, (3) every effort would be made to complete the project by April 30, and (4) Mr. Whetsell would be monitoring progress closely. (AF 17; Tr. 24.) It appears that Mr. Whetsell did not receive a response back from NRCS, and in fact, the COTR testified that he had not seen Mr. Whetsell's April 17 letter prior to termination. The COTR stated that, had he seen the April 17 letter, he would have challenged the statement as to there being no need for additional workers and equipment. (Tr. 26, 124.)

33. In order to complete the project, Appellant anticipated using three personnel plus James Griffin. As far as Mr. Whetsell saw it and knew, James Griffin was at the site during those 2 weeks after the April 16 meeting. Mr. Whetsell did note that Griffin did spend some time running back and forth getting fuel and performing maintenance and other matters. (Tr. 37-38.)

34. The CO made handwritten notes of the conference call. The notes reflect that NRCS had estimated that as of April 16, the job was 40 percent complete, with time expired on March 29 and that the parties had agreed in the April 16 telephone conference that James Griffin would be replaced as superintendent, more equipment would be brought in to complete the job, Mr. Whetsell would submit a scheduled plan of operations, and Mr. Whetsell would designate a new superintendent in writing by April 17, 1996. The CO continued in his notes that Santee would be allowed to complete the job in default and pay appropriate damages. (AF 18.)

35. As of the April 16 meeting, the only item on the contract that had been completed in full was the placement of the rock riprap at a bridge. Appellant had not yet disposed of any debris nor had any burn permits been issued. (Tr. 82.) Work then resumed. On April 17 and 18, Wednesday and Thursday, one of the trackhoes (excavator) was idle due to a broken hydraulic line. (AF 115; Tr. 85-86.) On April 17, when the inspector arrived in the afternoon, Andy Mills was on the CAT, Hugh Griffin was waiting for a part for the trackhoe, and James Griffin had already left with the dozer to go to his other job. Then Hugh Griffin left for an hour to get fuel and thereafter left at about 4:00 p.m., leaving Mr. Mills alone at the site. (AF 115.)

36. On April 18, the inspector arrived in the morning, Hugh Griffin was not on site and the only person working was Mr. Mills on the CAT. Hugh Griffin did not arrive until about 2:30 p.m. but even then, was there for only a short time and he performed no productive work. Only one piece of equipment was operational. On that date, the inspector called Mr. Whetsell, who returned the call but was unable to reach the inspector. (AF 116; Tr. 27.)

37. On Friday, April 19, Appellant replaced the broken line and had the second trackhoe operable. There were two personnel on site; however, work was not continuous for a full day. Contrary to the contract, Appellant had been burying debris without burning it. As of April 19, no debris had been burned. The inspector's diary reflects that the contractor was reminded that the debris needed to be properly disposed of in order to comply with contract specifications. (AF 117; Tr. 87.)

38. On Saturday, April 20, when the Government inspector arrived at 8:30 a.m., no one was present. Soon thereafter, Hugh Griffin arrived; however, the next person, Mr. Mills, did not arrive until approximately 10:40 a.m. and then left for lunch for an hour at 11:45 a.m. Again there was no support crew. At approximately 1:00 p.m. the inspector met James Griffin and another worker leaving the lower part of the site, and at that time was advised of Santee's intention to conduct some burning, starting that afternoon. James Griffin represented that he had a valid burn permit for the day and provided the inspector with the permit number. (AF 118.)

39. The inspector did not observe the start of the burning. Once she was advised of the burning, she contacted the COTR at home. Santee had four personnel on site. The COTR stated that four people was inadequate to carry out a burn, given how the burn was scattered along the 8,000-foot area. The Appellant could not have one worker at each specific burn site. Rather, a worker would have to go from site to site, with another site left at an uncontrolled burning rate. (Tr. 89.)

40. At the time the Appellant intended to commence burning, there were windy conditions. Before the burning started, the NRCS inspector discussed those conditions with the Appellant. She, however, did not prohibit burning but rather left it to the Appellant to coordinate with the State Forester. She then left for awhile. When she came back, the piles were burning and further, the fire had gotten into the wooded area outside the work limits. The wind had shifted and ignited the woods adjacent to the burn. There were at least five piles burning. The Appellant was fighting the fires, hauling water from the creek, using the trackhoe to put them out, tapping on trees trying to knock the fire out of the top of them. One pile was burning near a large diesel tank. Some of the piles were contained to themselves and away from other trees, but there were other piles against or in between trees, and not pulled away from live trees, with buried debris smouldering. (AF 118, 121, 361-363; Tr. 92-96, 128, 159-160.)

41. Also, it appeared that James Griffin did not obtain a proper burn permit from the State Forester. The Government, at some time before the hearing in this appeal, obtained a copy of burn permit 4487 (the number Griffin gave the NRCS inspector on April 20), and discovered that permit number 4487 was issued to an unrelated party in February 1996. (Tr. 161; Gov't Ex. G-8.) The lack of a proper permit was not, however, a basis for the default.

42. Santee said that NRCS's characterization of the fire was overblown and points out that while there was evidence of landowner complaints about tree damage in March, there was no similar evidence of complaints about the April 20 fire. The Government acknowledged that the landowner made no complaint or claim for damages for the trees damaged by fire on April 20 or for other matters. (Tr. 111, 125-126.)

43. The COTR first saw the result of the Saturday burning on Monday morning. He found that at least one pile was still on fire and the fire was smouldering. He saw debris that was still burning and embers that had been buried. Smoke was coming out of the ground. (Tr. 90.) He saw this in an area that was within 50 feet or so of a thousand-gallon tank that had recently been filled with diesel fuel (Tr. 90). On that Monday morning, April 22, Santee had two personnel on-site, Hugh

Griffin and another worker who was operating a chainsaw (AF 120; Tr. 90.) Primarily as a result of the fire and the damage to the trees, the COTR recommended to the CO that the work be suspended. There was, however, some discussion of concerns over progress. (Tr. 125.)

44. The COTR issued a stop-work order on the morning of April 22, as a result of an alleged safety violation and the potential excessive damage from the uncontrolled burning and the fact that burning that was still going on with a lack of personnel. (AF 120; Tr. 90.) At that time, still less than 50 percent of the contract had been completed. (Tr. 91.) When the COTR was asked why the Government did not just let the job run out rather than stopping it on April 22, the COTR referred to the large area that had been burned, excessive damage to the landowner's property and to the natural resources on the site and continued that if he had allowed Santee to continue, the landowner's property would have been destroyed by Santee. Added to this was potential damage to the creek from trees which were being destroyed and the fire within 50 feet of a fuel tank. Under the circumstances, he felt the job had to be stopped. (Tr. 100-101.) The CO suspended work on the morning of Monday, April 22 (AF 120).

45. During the period between April 16 and April 20, Appellant continued to inflict resource damage to the landowner's property, including snapping off trees and removing trees unnecessarily for access purposes. (Tr. 86-87.) The Appellant's scant workforce continued to work hastily, burying debris without burning it (AF 361-362; Tr. 70, 87, 93-95.)

46. In defense of burying of debris without burning, Mr. Whetsell explained that the crew was spreading the debris on the ground to support the equipment in the mud, and that the plan was to dig this debris up at the end of the project and burn it (Tr. 55-56). Santee argues in brief, that what Mr. Whetsell described is what it was doing on April 20. The Government strongly disagreed pointing to a photograph which shows debris including a log and other material in a pit. (AF 363; Tr. 97.)

47. On the morning of April 22, after stopping the project, the COTR telephoned Mr. Whetsell to inform him that the job had been shut down. The two then spoke later in the day and discussed the fire in depth and discussed that it was obvious that Hugh Griffin was not working out. Mr. Whetsell said he would send his home office worker down and thought the job could be done. According to Mr. Whetsell, the COTR stated that it was out of his hands. (Tr. 27-28.)

48. On that same day, April 22, the CO issued a show cause letter to Appellant, in which he cited as evidence for Santee's failure to prosecute the work Santee's "maintain[ing] an inadequate crew of personnel and equipment" (AF 12). The letter said that Santee continued to maintain an inadequate crew of personnel and equipment as of 9:00 a.m. on April 22. It noted Santee had appointed a new superintendent but he had to clear everything through James Griffin. Stockpiled debris, specified to be burned and buried, had been buried with no attempt to burn it. Additional damage had been done to owner's marketable timber. The CO cited little progress since the March 20 cure notice and noted the plan Appellant had outlined on April 17 has not materialized into production on the site. No additional equipment or personnel had arrived and now 24 days after the

original completion date 50 percent of the work remained. Appellant was invited to respond. (AF 12.)

49. Also on the morning of April 22, James Griffin telephoned Mr. Whetsell to notify him that the job was shut down (Tr. 28). He told Mr. Whetsell that the wind had been blowing and that it did some damage to some tree limbs and that Santee had to put the fire out, using trackhoes to get it under control (Tr. 43).

50. Mr. Whetsell soon thereafter received the show cause letter and prepared an April 23 response. In the letter, he stated he was at a loss to understand why the Government had issued a stop work order that morning. He said that Hugh Griffin was operating a trackhoe, that James Griffin had gone to get the proper burn permit and that the other workers had arrived late (at 9:20 a.m.) because of personal problems. He continued that it was evident that the COTR had not received a copy of the April 17 letter and plan for completion and reiterated that he did not think that additional trackhoes were needed to complete by April 30. He stated that if he was allowed to complete, he would send Ray Mabry (out of his home office) to act as his superintendent, pointing out that Mr. Mabry had supervised similar jobs. The Appellant also mentioned adding another individual. Finally, he noted that he had provided the Government with his mobile telephone and office numbers and that the matters as to the burning were only brought to his attention on Monday. He asked that he be allowed to complete and would bring on an additional trackhoe and worker. (AF 9-10.)

51. Appellant also wrote a letter dated April 24, 1996, which again responded to the Show Cause. In this letter he said that he was initially going to send Mr. Mabry as superintendent but the COTR suggested that he appoint Hugh Griffin, which he did. He said he could see no fault or neglect for that decision. He reiterated that his letter of April 17 noted that "the two trackhoes with support equipment (saws, etc.) and men should be sufficient to complete the project by April 30. The dozer will be used as needed." He concluded that there was no fault or neglect in doing what he said he would do in his April 17 letter. (AF 45-46.)

52. On April 24, the CO issued a termination for default letter (AF 7-11). In that letter, the CO asserted that Santee had "failed to prosecute the work with the diligence that would ensure its completion." The CO continued that performance time had expired on March 29, and that as of April 22 approximately half of the work remained incomplete. The CO stated that no additional personnel or equipment had been brought to the site as agreed between Santee and the COTR on April 16 and progress was not at an acceptable level to insure completion of the project. Further, the letter noted that excessive damage had been done to the landowner's property including but not limited to marketable timber and the crew had shown a complete disregard for specifications and the property by burying debris without attempting to burn it first. The letter acknowledged that Appellant had appointed Hugh Griffin as a new superintendent, however, Hugh Griffin still had to clear all decisions through James Griffin, the previous superintendent. The Government also considered that a breach of the April 16 agreement. (AF 7; Tr. 99.)

53. A number of instances buttressed the Government contention that Hugh Griffin was not actually the supervisor. For example, after the COTR posted the stop order, Hugh Griffin did not want to talk to him. According to the COTR, Hugh Griffin just jumped in his truck and left, "his words were, I'm out of here." Then, after the termination letter, James Griffin came and wanted to discuss matters, at which point the COTR refused to discuss it with him since James Griffin was not the superintendent. (AF 120; Tr. 127, 167.)

54. While Hugh Griffin was the titular superintendent, this was a matter of form and not substance. Hugh Griffin would make no decision to address problems without first consulting James Griffin. (Tr. 100.) Although Mr. Whetsell initially said in his testimony that Hugh Griffin had authority to hire additional workers, the inspector's diary says that Hugh Griffin indicated that he had no control over the only other worker on the job and that he did not know whether the worker would show up. (AF 118; Tr. 44.) Hugh Griffin also did not have authority to get more equipment on the site if he found it necessary. While Mr. Whetsell testified that regardless of who was superintendent, a decision as to more equipment and personnel would have had to be cleared first with him, the fact was that Mr. Whetsell was not in the field and thus could and did not exercise control over the project nor could he testify to many events with first hand knowledge. Moreover, the record shows that in order for Mr. Whetsell to contact Hugh Griffin by telephone, he had to go through James Griffin. (Tr. 44, 56, 57.)

55. Further, it is noteworthy that when Mr. Whetsell described events after the April 16 meeting, he stated that he spoke with James Griffin almost every day. (Tr. 42, 45.) In contrast, he testified that he did not speak to Hugh Griffin (the superintendent) from April 17 through April 27. Thus, he had no contact with his new superintendent after Hugh Griffin was named. (Tr. 45.)

56. According to the COTR, at the time of the termination, Appellant had completed less than 50 percent of the work under the project. (Tr. 91.) The inspector had an even lower estimate, noting that 35 to 40 percent of the work was completed but that the work was not in any specified area and was spread out up and down the channel. The only thing completed at the time was rock riprap. (Tr. 168.) Appellant challenged the above, noting that he showed 40 percent complete on March 26 and that, therefore, any estimate of work completed on April 16 would have shown virtually nothing done in the interim period. He contended that such a conclusion was inconsistent with the logs which reflected workmen at the site on various dates. The COTR replied that while some work was done at the site it was not productive or constructive work. They were not consistently there, they did not consistently run the equipment, and they were in and out of the access area a lot. Performance was very unworkmanlike. (Tr. 120-121.)

57. In describing the state of progress as of April 22, the COTR pointed out that some progress had been made between April 16 and 22 but not at the rate of urgency that was agreed to on April 16. (Tr. 122.) Looking at the stage of work on April 22, in the COTR's opinion, there was not a likelihood that the job would be completed by April 30, particularly in light of the past history and work performed after the April 16 meeting. (Tr. 133.)

58. Santee claimed that the Government offered no objective evidence that Santee could not have completed by April 30. NRCS countered Santee's assertions and pointed out that Mr. Whetsell had no real knowledge as to what happened on the job. For example, Mr. Whetsell acknowledged that he was under the impression that James Griffin had been working on matters involving this project after the April 16 meeting. (Tr. 46.) The diaries and payroll records establish otherwise. Payroll records from an NRCS contract in Taylor County, Georgia, listed James Griffin as an equipment operator for Biomass Tech., for 30 hours covering April 17, 18, and 19. (Gov't Ex. G-6; Tr. 46, 47.) Job diaries for the contract here at issue regularly reflected his absence (AF 114-117). Mr. Whetsell candidly acknowledged that at a prior time it would have come as a shock to find James Griffin was not on this contract. However, at this time he noted he would not be so shocked because "[James Griffin] was not necessarily being 100 percent truthful with me as to what was occurring." (Tr. 48.)

59. At no time after April 16 did the Appellant actually have three people working on debris removal. Only on the afternoon of April 20, did Appellant have four personnel on site for the purpose of burning debris. (AF 114-120.)

60. At some time after the termination, NRCS hired a reprocurement contractor. The matter of damages due to the reprocurement was stayed, pending a determination on the propriety of the default.

61. Santee timely appealed the termination on or about May 6, 1996. In its brief, counsel for the Government noted that while it was not evident from the face of the CO's decision, the default was only a partial default termination since Appellant was given credit of $8,625 for completing the placement of the loose riprap.

62. At the hearing the Government introduced a document to show Appellant had once before been defaulted. The default, however, involved a failure to submit a bond. We find that default to have no probative value as to the issues in this appeal. (Gov't Ex. G-7; Tr. 52.)

63. Appellant has never received a payment by NRCS on this project (Tr. 33).

DISCUSSION

The record is clear that Appellant missed the initial contract completion date and thereafter, on April 16, the parties held a meeting at which time NRCS agreed to extend the contract to April 30, 1996 (Findings of Fact (FF) 26-32). While there is some disagreement as to the exact terms of the agreement and specifically whether Appellant agreed or did not agree to add personnel and equipment, there is no dispute that Appellant agreed to finish by April 30. Thus, that is the completion date we will look at in evaluating whether NRCS can legally sustain the burden of establishing that its default of Santee was proper.

On April 24, 1996, 6 days prior to the April 30 completion date, the CO, by letter issued the default termination of Santee's contract. In that letter, the CO cited as the basis the failure of Santee to make sufficient progress and noted that the CO believed the project could not be completed by the new completion date of April 30. The CO additionally cited damage Appellant was continuing to cause to private property and further asserted that Appellant had failed to comply with that portion of the April 16 agreement that called for replacing James Griffin as Santee's superintendent, as well as failed to bring on additional equipment and workers. (FF 52.)

Under its contract with Santee, NRCS had the authority under the Default clause to terminate Santee's contract where the contractor "refused or failed to prosecute the work or any separable part, with the diligence that would assure its completion within the time specified in the contract, including any extension, or failed to complete the work within that time." (FF 4.) The applicability of that clause and the standards under which we are to apply it are set forth in Discount Co. v. United States, 213 Ct. Cl. 567, 554 F.2d 435 (1977) and in Lisbon Contractors Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987). In Lisbon, the court said:

> We agree that the contractual language found in General Provision 5 does not require absolute impossibility of performance by the contractor before the government may declare the contract in default. See Discount Co. v. United States, 554 F.2d 435, 441 (Ct. Cl.) cert. denied, 434 U.S. 938 (1977). Nor does it permit default termination merely on the ground that performance is less than absolutely certain. Rather, we construe the contract, as did the Claims Court, to require a reasonable belief on the part of the contracting officer that there was "no reasonable likelihood that the [contractor] could perform the entire contract effort within the time frame remaining for contract performance. [citations omitted]"

As set forth by the Corps of Engineers Board in Dozie I. Rienne, ENG BCA No. 5711, 91-1 BCA ¶ 23,432, "To terminate for lack of diligent prosecution of the work, the Government must show that the contractor's performance was so lacking as to establish either an intention not to complete the work or lack of ability timely to complete the work. This may be demonstrated by showing a failure to provide quality work consistent with acceptable standards of skill and workmanship for the performance of specific contract requirements. See G.A. Karnavas Painting Co., ASBCA No. 19569, 76-1 BCA ¶ 11,837, Emsco Screen Pipe Co. ASBCA Nos. 11917, 12184, 69-1 BCA ¶ 7710. See also Remco Hydraulics, Inc., 209 Ct. Cl. 717 (1976), Herlo Corp., ASBCA No. 19198, 19419-19426, 77-2 BCA ¶ 12,820, Two State Construction, DOTCAB Nos. 78-31, 1006, 1070, 1081, 81-1 BCA ¶ 15,149." A CO may look at whether the contractor has shown a demonstrated lack of diligence as an indication that the Government could not be assured of timely completion. While the Government must present convincing proof that timely performance is beyond the contractor's reach, the case law does not require the Government to prove impossibility. Hillebrand Construction of the Midwest, Inc., ASBCA No. 45853, 95-1 BCA ¶ 27,464; Michigan Joint Sealing, Inc., ASBCA No. 41477, 93-3 BCA ¶ 26,011, aff'd, 22 F.3d 1104 (Fed. Cir. 1994) (Table) (non-precedential).

Looking at the record in this case, it is clear from the NRCS inspector diary entries, the observations to which the inspector testified at trial, and the observations of the COTR, that throughout virtually all of this project, Appellant's progress was less than diligent and Appellant had inadequate workers, inadequate equipment (given the frequency of breakdown), failed to comply with contract provisions, and had inadequate supervision. (FF 13-16, 20-26.) These were the primary causes for Appellant missing the initial completion date and clearly were the causes for the job being at 40 to 50 percent completion on April 16 (FF 48, 56). Certainly up until April 16, NRCS had shown a willingness to let the contractor complete (FF 16, 21, 26). This was not a situation where NRCS was looking to quickly pull the trigger.

In fact, the April 16 meeting was called to give the Appellant another opportunity to correct the contract problems and avert termination. Mr. Whetsell must have recognized the seriousness of the situation at that time and recognized that NRCS had reached a point where Santee had to meet the April 30 date or otherwise face termination. Santee, on April 16, was given an opportunity to avert termination. However, to do that it had to perform so as to properly complete the work by April 30. That was not an unreasonable expectation and one that Santee agreed to. (FF 32.)

There is no question that between March 29 and April 16, the job was technically in default. NRCS was forbearing and was allowing Appellant to proceed based on Appellant agreeing and committing to complete by April 30. (FF 34.) At the time Appellant agreed to complete by April 30, the project was between 40 and 50 percent complete (FF 48, 56). For purposes of this decision, we give Appellant the benefit of the doubt and find that as of April 16, Appellant still had 50 percent of the work to get done. Putting that into perspective, what it meant was that had Appellant started on the morning of April 17, Appellant had 12 work days to complete by the due date.

There is a dispute over whether the work could reasonably have been completed with the use of only the existing manpower and equipment, or whether Appellant needed to bring on additional resources. (FF 28-34.) While we do not doubt that NRCS officials believed that Appellant was agreeing to bring on additional resources, similarly, we must find that Appellant believed (as was reflected in its April 17 letter, agreeing to the April 30 date) that it could meet the date without additional help by fully utilizing the existing workers and equipment. (FF 32.) For purposes of deciding the propriety of the termination, we resolve the manpower and equipment issue in favor of Appellant and find that the work could have been completed without added resources. However, we also find that in order for Appellant to have met the April 30 due date, Appellant had to have virtually full utilization of its crew and equipment, had to have adequate supervision and had to perform the work in accordance with the contract requirements. (FF 28-29, 33.)

What happened here, however, is that Appellant failed to meet those criteria and notwithstanding the urgency of the situation as discussed at the April 16 meeting and Appellant's assurances it could finish, Appellant's operation reverted back to the same type of problems and lack of progress that had caused the job to be in disarray prior to and on April 16. (FF 36-42.)

On April 17, Appellant had only one piece of equipment operational and only one worker who actually worked a full day. (FF 35.) On April 18, there was only one worker and one piece of equipment. (FF 35-36.) On April 19, Appellant finally had two pieces of equipment at work but again only one piece worked all day and there was no supervisor on site (FF 37). Thus, for the 3 days directly after the meeting, Appellant (which at a minimum (even under its standard) needed to have a crew of at least four personnel) was operating without adequate manpower and without fully operational equipment. It was not until Saturday, April 20, that Appellant finally increased the crew to four people. But that was not until the afternoon and involved the burning operation. (FF 35-39.) Even then, the work Appellant performed was not in compliance with the contract, was not properly supervised, and came very close to creating a significant fire hazard condition. (FF 39-43.)

Appellant had let the burning get out of control on April 20. Photographs taken on the following Monday show smouldering smoke coming from the ground, which was clear evidence that material was still burning. This constituted a violation of the contract (FF 7, 43). NRCS clearly acted reasonably when it stopped the job on Monday, April 22, due to the burning problems of April 20-22. Two days later, on April 24, NRCS defaulted the project. (FF 44, 52.) At that point, Appellant had but 6 calendar days and 5 work days left to complete what remained. Looking at the time left to complete the work and looking at what had been performed on the days since April 16, we find that it was very reasonable for the CO to have reached the conclusion that there was no reasonable likelihood of Appellant meeting the April 30 date. For the week prior to the default Appellant had not fully staffed the job, did not have adequate supervision, did not have enough running equipment and at least the work performed on April 20, which buried still-burning debris, was virtually useless and had to be redone. (FF 35-46.)

While one could argue that it was remotely possible that Appellant could have brought on additional crews and personnel and possibly finished, the likelihood of that, given the past track record was simply not reasonable. Accordingly, the default was proper.

In deciding this appeal, we must note that while we found Mr. Whetsell to be sincere and clearly an individual who wanted to complete the job, his actions on this project did not mirror his words. Whether it was misplaced confidence in the Griffins or some other reason, the fact remains that even after being given an opportunity on April 16 to save the project, Appellant evidently did not appreciate the resources and changes necessary to make that happen. As Mr. Whetsell candidly noted during his testimony, James Griffin was not providing him with accurate and true information. (FF 27, 58.) While Mr. Whetsell may thus have been the victim of the Griffin's non-performance, Mr. Whetsell's company, Santee, had the contract with NRCS and thus must bear the responsibility for the failure to meet the due date.

While we sustain this termination on the bases stated above, we will address several other points raised by Appellant. First, NRCS's role in the appointment of Hugh Griffin does not excuse Hugh Griffin or Santee's failure to properly supervise the project. NRCS did not force Appellant to appoint Hugh Griffin, and more importantly, did nothing to prevent Appellant from bringing in help from its home office. (FF 27.) At the time of the agreement on April 16, Appellant knew the history

of the job and certainly was in a better position than NRCS to know the capability and interplay among "its workers" and between the former superintendent, James Griffin, and his uncle, Hugh. While the Griffins operated as Santee workers, during this project the workers and efforts were not always dedicated exclusively to this job. Each of the "Santee" workers, at one time or another worked on the other Griffin job. (FF 11.) Given the circumstances present as of April 16 and the history of this job, it was up to Santee to decide and determine to what extent, if any, Hugh Griffin could do what was necessary to properly supervise the project and correct the job problems. The fact that NRCS may have subjectively believed that Hugh Griffin could perform and the fact they approved him as the substitute, did not shift risk of his and Santee's non-performance to NRCS.

Additionally, we note that while Hugh Griffin was named superintendent, the evidence shows that at best that was an appointment of form and not one of substance. The record shows that Hugh Griffin not only refused to make decisions, but that decisions were still being made by James Griffin. Particularly telling in this regard is testimony of Mr. Whetsell that after April 16 he did not speak with Hugh Griffin but rather was in regular contact with James Griffin. Also, it appeared clear that on April 20, when the fire got out of control and Appellant was burying and burning debris, James Griffin was again running the project, as was the case on April 22, when James and not Hugh Griffin urged the COTR not to stop the work. (FF 52-55.)

Finally, as noted above, this appeal is controlled by Government contract law and not the law of the State of Georgia as contended in Appellant's brief. Notwithstanding that, we point out that two critical components of the April 16 agreement, which extended the project and which allowed Appellant additional time, were (1) Appellant would staff the project so as to assure completion by April 30 and (2) Appellant would remove James Griffin as superintendent. (FF 32.) As we set forth earlier, we do not find that the agreement required as a condition that Appellant add workers and equipment in order to finish. It did, however, implicitly require Appellant to use sufficient workers to get it done and that clearly was full utilization of its crew and equipment. That was not done. As to the removal of James Griffin, that has been addressed above and as noted we find that Appellant did not effectively meet that requirement of the April 16 agreement. Thus, even were we not to find that NRCS acted inappropriately under the Termination clause, we would find that Appellant materially breached the April 16 agreement and thus, NRCS would have had a right to end the contract on that basis. Similarly, while we have not addressed the legal effect of Appellant's numerous failures to follow contract specifications, and particularly its failure as to burning, that and many of the Appellant's other operations may very well have also justified a finding of breach.

Appellant in this case was given more than reasonable opportunities to complete the project. As of April 24, the date of termination, the CO was reasonable in concluding that there was no reasonable likelihood of Appellant completing by April 30. Therefore, the default was proper.

DECISION

The appeal is denied.

_____
HOWARD A. POLLACK
Administrative Judge

Concurring:

_____ _____
EDWARD HOURY **JOSEPH A. VERGILIO**
Administrative Judge Administrative Judge

Issued at Washington, D. C.
December 17, 1998