UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: November 28, 2007

CBCA 646

BUTTE TIMBERLANDS, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Todd R. Johnston of Hershner Hunter, LLP, Eugene, OR, counsel for Appellant.

Michael E. Trow, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **VERGILIO**, **POLLACK**, and **SHERIDAN**.

Opinion for the Board by Board Judge **SHERIDAN**. Board Judge **VERGILIO** dissents.

SHERIDAN, Board Judge.

This appeal involves a claim by the appellant, Butte Timberlands, LLC (Butte), seeking $134,879.23 from the respondent, the Department of Agriculture (USDA), Forest Service (FS). The claim arises out of timber sale contract 003050 at the Umpqua National Forest in Douglas County, Oregon. As part of the contract, the parties agreed that certain timber harvesting methods were to be used by the appellant. Butte alleges that the FS breached the contract and its duty of good faith by failing to properly consider the appellant's request to modify the contract to use a different harvesting method from the one specified in the contract.

The record before the Board consists of the pleadings and the appeal file, exhibits 1 through 26. Following the pleading process, the respondent filed a motion for summary relief pursuant to Board Rule 8. The filing consists of a motion for summary relief (Motion), statement of uncontested facts (Statement), and memorandum in support of summary relief (Memorandum). The appellant submitted a response opposing the motion (Response), with attached declarations of Mr. Richard Brewer and Mr. Fred Sperry. The respondent has replied to the appellant's response (Reply).

Based on the findings of fact and application of the law set forth below, we deny the respondent's motion for summary relief.

Background

The following findings are made for the purposes of this decision only.

The USDA and FS are tasked with providing regulations, guidance, and plans to, *inter alia*, insure that timber will be harvested from National Forest System lands only where soil conditions will not be irreversibly damaged. National Forest Management Act of 1976, 16 U.S.C. § 1604(g)(3)(E) (2000). The implementing regulations provide that FS approving officials must insure that the harvesting operations required by each timber sale contract are consistent with applicable land and resource management plans and environmental quality standards. 36 CFR 223.30(c) (2004).

This timber sale contract arose out of the July 2003 Kelsay Fire that burned 1200 acres of timber in the Umpqua National Forest, which is administered by the FS' Diamond Lake Ranger District (District). Appeal File, Exhibit 8. In the planning stage, prior to the award of the contract, the FS assessed the area in the Umpqua National Forest to be harvested. Appeal File, Exhibit 2. The FS issued a July 28, 2004, "decision memo" describing the area and making recommendations on best management practices to ensure proper harvesting.[1] *Id*. A "timber sale report and logging premise" (timber sale report), dated August 24, 2004, indicated that the purchaser should expect to use three logging systems: skyline, loader, and mechanical. Appeal File, Exhibit 3. In pertinent part, the timber sale report provided that approximately 182 acres of timber, units 2, 4, 6, 8, 10, 12, 20, 21, 22, 24, 25, 25a, 26, 27,

[1] A "decision memo" as used by the FS appears to be equivalent to a "decision notice" as referenced by FS regulation: "a concise written record of a responsible official's decision based on an environmental assessment and a finding of no significant impact (FONSI)." 36 CFR 215.2.

27a, 27b, 29, 30, 31, and portions of unit 7, were to be mechanically logged, with the report stating:

> Mechanical logging is planned for 20 units: 2,741 MBF [one thousand board feet]. The system is comprised of a feller buncher, log loader, grapple skidder and delimber. Designated skid roads will be spaced at an average distance of 100 feet apart. Some hand felling will be required to reach the area between designated trails th[at] cannot be reached by the feller buncher.

Appeal File, Exhibit 3 at 2. The appraisal portion of the report showed the mechanical logging estimated costs as being allocated to a feller buncher (identified as a "Timbco T430 FB [feller buncher]") as well as estimated costs for hand-felling (identified as "Felling & Bucking ($[10]/MBF)").[2] *Id*. at 11-12. According to a popular encyclopedic website, "[a] feller buncher is a large logging machine with an attachment that cuts trees in place."[3]

---

[2] The following definitions contained in 29 CFR 1910.266 (2007) may be helpful in understanding the timber harvesting terms used in this decision:

> *Buck*. To cut a felled tree into logs.
> . . . .
> *Fell (fall)*. To cut down trees.
> . . . .
> *Limbing*. To cut branches off felled trees.
> . . . .
> *Machine*. A piece of stationary or mobile equipment having a self-contained powerplant, that is operated off-road and used for the movement of material. Machines include, but are not limited to, tractors, skidders, front-end loaders, scrapers, graders, bulldozers, swing yarders, log stackers, log loaders, and mechanical felling devices, such as tree shears and feller bunchers.
> . . . .
> *Skidding*. The yarding of trees or logs by pulling or towing them across the ground.
> . . . .
> *Yarding*. The movement of logs from the place they are felled to a landing. . . .

[3] A feller buncher "consists of a standard heavy equipment base with a tree-grabbing device furnished with a circular saw or a shear -- a pinching device designed to cut small trees off at the base. The machine then places the cut tree on a stack suitable for a skidder or forwarder, or other means of transport (yarding) for further processing (e.g., delimbing, bucking, loading, or chipping). Wikipedia, Feller buncher,

Wikipedia, Feller buncher, http://en.wikipedia.org/wiki/Feller_buncher (last visited Nov. 27, 2007). "A skidder is any type of heavy vehicle used in a logging operation for pulling cut trees out of a forest in a process called 'skidding', in which the logs are transported from the cutting site to a landing." *Id*., Skidder, http://en.wikipedia.org/wiki/Skidder (last visited Nov. 27, 2007).

On August 27, 2004, the timber sale prospectus was furnished to prospective bidders and the sale was advertised. Appeal File, Exhibits 4, 5. The prospectus provided a map of the sale area showing notations of where mechanical logging was specified (also where skyline and loader logging were specified). *Id*., Exhibit 4 at 6.

Butte was awarded the contract on September 10, 2004. Appeal File, Exhibit 8. The yarding and skidding requirements of the contract were set forth in paragraph C.6.42# -- Yarding/Skidding Requirements, and provided:

> Purchaser shall submit for Forest Service approval a yarding/skidding plan prior to the start of felling operations. *Requirements other than those specified in the following table may be approved.* When appropriate, such approval shall include adjustments in current contract rates and revision of the sale area map. In no such case shall the adjustments result in current contract rates less than base rates.
>
> Location of all skid roads and trails, tractor roads, skyline corridors, mechanized harvester trails, forwarder roads, and other log skidding facilities, shall be approved prior to their use or construction.
>
> **See attached table for requirements.**

Id. at 155 (emphasis added by italics). The referenced table provided the yarding and skidding requirements for the units being mechanically logged:

> **Mechanical Logging:**
>
> *All equipment will be restricted to designated skid trails. Location for skid trails will be agreed to prior to felling at a minimum of 100 feet apart. Existing skid trails will be used where feasible.* All trails will be subsoiled to

---

http://en.wikipedia.org/wiki/Feller_buncher (last visited Nov. 27. 24, 2007).

> twenty (20) inch depth and covered with slash and large down wood following logging.

Id. at 155-56 (emphasis added by italics).

The contract also contained the following special provision used in USDA timber sale contracts:

> C8.3 - Contract Modification. The conditions of this timber sale are completely set forth in this contract. *This contract can be modified only by written agreement of the parties . . . contract modifications, redetermination of rates and termination shall be made on behalf of the Forest Service by the Contracting Officer*.

Appeal File, Exhibit 8 at 137 (emphasis added).

Mr. Wayne Kleckner was the contracting officer assigned to administer the contract and Mr. Dale Anderson was designated the FS representative (FSR). Appeal File, Exhibit 10 at 5, 10. As the FSR, Mr. Anderson was available on site and authorized to "take action under this contract." *Id*. at 5. Landings and skid trails were located by agreement prior to logging a given unit and were shown by drawings in various timber sale inspection reports dated October 1, 4, 11, 25, and 28, 2004. Statement at 5 n.3 (citing Appeal File, Exhibit 11 at 2, 4, 6, 13, 14).

On October 7, 2004, Mr. Rick Brewer, the vice-president of Butte, approached Mr. Anderson with a "proposal for modification of the felling" to widen the main skid trail spacing, "[m]ove the main skid roads to 125 to 150 feet apart, and achieve felling with a buncher on laterals from the main corridor."[4] Appeal File, Exhibit 10 at 8. Mr. Brewer represented that "the use of a buncher to achieve all felling and pack trees back to the main corridor is required by the [FS] on east side timber sales." *Id*. With the request, Mr. Brewer provided a list of several problems Butte was encountering with the felling process, and argued that the area would not be adversely impacted by additional compaction if the modification was granted. *Id*. at 9. Allowing the proposed method of felling would have given Butte's feller buncher increased access in units that would, essentially, have let Butte use the feller buncher to fell all the trees in the contract. The need for hand-felling would have been obviated. *Id*. at 12.

---

[4] The appellant appears to use the term "skid road" as synonymous with "skid trail."

Mr. Anderson contacted Mr. Jim Archuleta, the District's soil scientist, to address the soils related topics raised by Butte's requested modification. Mr. Archuleta referenced "numerous conversations" he had with the FS's regional soil scientist, Mr. Steve Howes, about the use of equipment on the District's pumice soils and associated compaction, as well as "a false belief that pumice (pummy) does not compact." Appeal File, Exhibit 10 at 6. He noted that "individual monitoring we have done on this district showed that equipment with a PSI [pounds per square inch] of 7 can create a >20% change in soil bulk density with a minimum of three passes." *Id*. Mr. Archuleta went on to provide rebuttal comments for each of the soils related arguments Butte made in favor of being allowed to take the feller buncher off the skid roads, noting that aerial photos taken in 1998 of units harvested in the 1960s and 1970s "within feet" of the units to be harvested in this contract show "legacy skid trails" which periods of freeze and thaw had not restored to original condition. Mr. Archuleta also noted that Mr. Brewer's contentions that the "east side" soils are "pummy" and that "extensive research and experimentation have led to all sales requiring bunching and packing to 125-150 [foot] corridors" may be contradicted by District specific monitoring and a 1999 study on compaction. *Id*. at 7. By letter dated October 12, 2004, Mr. Anderson denied Butte's request to change the yarding and skidding plan to allow felling with a buncher on laterals from the main corridor. Mr. Anderson concluded that the contract's yarding and skidding requirements "specify that all equipment must stay on designated trails at least 100 feet apart." *Id*. at 12. Mr. Anderson also drew from the report that Mr. Archuleta's "recommendation . . . [was] to stay within [the] contract requirement of only allowing designated trails 100 feet apart. Allowing the feller buncher off the designated trails and authorizing lateral trails would increase compaction." *Id*.

Mr. Brewer wrote back to Mr. Anderson on October 14, 2004, expressing Butte's disagreement with the decision and stating that he believed that the FS' decision failed to calculate the "overall impact" of requiring the feller buncher to remain on the skid trails:

> We will now have much more entry into the soils by the machine piling shovel, which has a 5 PSI footprint. This machine is now going to intrude upon nearly every square foot of unit ground, although we will try to minimize it to the best of our ability. The human footprints left by the hand cutters will tread heavily upon the soil also. By my calculation, a 200 [pound] human has up to a 12.5 PSI impact as you step down heel to toe on one foot when walking. *By contrast, our feller buncher has less than a 7.0 PSI impact.*
>
> The method of shovel logging, while becoming more commonplace in recent years, has a much heavier PSI rating than a tractor. Our yarding shovel has a 9.6 PSI rating, compared to a tracked skidder which usually falls into a 4-5 PSI rating. Bunch piles translate to lower cycle counts, and less compaction.

> I appreciate the waiving of subsoil requirements when shovel logging in place of tractor skidding, but I fear that we are actually compacting and impacting the ground more with this method.
>
> I'm not a soils scientist, therefore, I am not qualified to comment on the arguments given to substantiate the decision. . . . I believe that we sometimes fail to properly weigh the positives and negatives in the final overall analysis. In my humble opinion, I assert that the overall benefits of less intrusion, less timber breakage, fewer passes on the main skidding corridor, fewer corridors, speed of harvest therefore high recovery, residual stand retention, higher quality slash disposal, lower PSI impact on the main skidding corridor and safety outweigh the one PSI over C6.42# spec. bunching off the main corridor.
>
> . . . .
>
> That being said, I appreciate your attention to this proposal, and my take is that you and your staff have the best interest of the land as your primary concern, but just haven't properly weighed all the criteria in the decision.

Appeal File, Exhibit 10 at 13 (emphasis added). In that same October 14, 2004, letter, Butte asked Mr. Anderson if the FS sales administrator and soils scientist had established whether "off corridor cutting" would be allowed "when the ground freezes up, or the snow cover comes to sufficiently protect the soils." *Id*. at 14.

On November 4, 2004, Mr. Brewer wrote Mr. Jim Akers, the District Sales Administrator, complaining about "a pattern of operational delays, delays of decision, lack of cooperation, and poor attitude from the administration of this contract" and representing, "I am still waiting for an answer to my question regarding cutting [timber] off the main corridor with a feller buncher on a sufficient snow pack to prevent compaction." Appeal File, Exhibit 10 at 18. Several District personnel, including Messrs. Akers and Archuleta, the District planner, Mr. Stu Carlson, and the District silviculturist, Mr. Rick Abbott, discussed the fact that the District had very little experience with logging over snow and that reports about it were anecdotal. Concluding that because the District could not test whether using a feller buncher over frozen ground and snow pack would not cause detrimental compaction until the next spring after the snow had melted, the District personnel decided to deny Butte's request. *Id*. at 35-37. However, the District personnel determined that Butte should be given a [two] acre plot to fell in the manner requested "as a test for future logging

operations over snow." *Id*. at 37. The record does not indicate when, or whether, the District communicated its decision to deny Butte's request to use the feller buncher over snow.[5]

Work progressed on the contract, a number of time extensions were made, and on July 27, 2006, Butte requested a final inspection on the contract. Appeal File, Exhibit 10 at 56. Mr. Nelson notified Butte on August 1, 2006, that certain work in unit seven was not completed or accepted. He informed Butte that the FS would hold Butte's performance bond and use it to complete the work if the work was not finished by August 11, 2006. *Id*. at 57. The record does not contain documentary evidence showing the actual date of completion or final acceptance, however; on September 5, 2006, Butte notified individuals at the District that "all contract obligations have been completed and accepted as of August 11, 2006, therefore, I am requesting a refund of the cash performance deposit." *Id*. at 58. The FS processed a refund of Butte's $15,000 performance deposit on October 5, 2006. *Id*. at 59.

Pursuant to contract paragraph B9.2 - Disputes, on October 23, 2006, Butte submitted a claim to the contracting officer, then Mr. Steven Nelson, seeking "direct costs" of "at least $134,879.23." Appeal File, Exhibit 20. As reasons for the claim, Butte gave the following:

1. We were not allowed to log the ground base units with "mechanized yarding" as referenced in the prospectus and the contractual map.[6]

2. Written requests regarding this issue went unanswered in violation of B6.36.[7]

---

[5] "There is no evidence in the Appeal File that the 2 acre plot was actually offered to appellant or that appellant ever raised the issue again." Statement at 9 n.6.

[6] This allegation relates to the FS' refusal to grant Butte's requested modification to change the main skid roads to 125 to 150 feet apart and achieve felling with a feller buncher on "laterals from the main corridor." It also appears to relate to Butte's request to take the feller buncher off trails and over frozen ground or snow pack.

[7] Paragraph B6.36 - Acceptance of Work provides that "upon purchaser's written request and assurance that work has been completed, Forest Service shall perform an inspection promptly so as not to delay unnecessarily the progress of purchaser's operations. . . . In the event that Forest Service is unable to make such inspection within 10 days of purchaser's request, purchaser shall be notified in writing of necessity of postponement and time when inspection can be made." Appeal File, Exhibit 8 at 129.

> 3. The District soil scientist, Jim Archuleta, appears to have a personal stake in promoting the increased use of subsoilers,[8] as he has applied for at least two patents on them . . . and may be in violation of B6.01 subparagraph b of the contract.[9]
>
> 4. Completed work was not accepted in writing as provided in B6.36.[10]

Id.

Mr. Nelson denied the claim via a final decision dated January 30, 2007. Appeal File, Exhibit 15. In his final decision, the contracting officer addressed the allegations proffered by Butte as the bases of its claim. Regarding Butte's allegation that it was "not allowed to widen the main skid [road] spacing to 125 to 150 feet" and "not allowed to log the ground based units with 'mechanized yarding,'" Mr. Nelson replied that the FS had properly evaluated Butte's proposed modification and consulted with a subject matter specialist prior to making its decision. "The decision to deny the requested modification was based on the expectation that more soil compaction would occur by allowing the feller buncher off of wider-spaced designated skid trails. This expectation is the result of monitoring similar requests on the . . . District," and "[Mr.] Anderson made a reasoned decision to deny your proposed change." *Id*. at 4-5. Addressing Butte's allegation that "written requests regarding the modification went unanswered," Mr. Nelson opined that Mr. Anderson had responded

---

[8] A subsoiler is a tractor-mounted implement used to loosen and break up soil at depths below the level of a traditional disk harrow or tiller. Typically, a subsoiler mounted to a compact utility tractor has a thin blade with a sharpened tip, and will reach depths of about twelve inches. Wikipedia, Subsoiler, http://en.wikipedia.gor/wiki/Subsoiler (last visited Nov. 27, 2007). The contract provided that after the contractor had finished using the designated skid trails, it was required to subsoil those skid trails to a depth of 20 inches. Appeal File, Exhibit 8 at 156.

[9] Paragraph B6.01 - Statutory Compliance provides that the "purchaser agrees to conduct operations under this contract" in compliance with Federal, state, and local statutes, standards, orders, permits, regulations and environmental quality laws, and that "a conviction of, or civil judgment for," among other things, "(b) Fraud, criminal offenses, or violation of Federal or State antitrust laws, any of which occurred in connection with obtaining, attempting to obtain, or performing a public contract or subcontract," shall be considered a breach of the section and may result in termination of the contract. Appeal File, Exhibit 8 at 125.

[10] *See supra* note 7.

to the request for a modification in writing on October 12, 2004, within seven days of FS' receipt of the request. Further, he noted that Butte had moved its equipment into the area and had begun operations as of October 1, 2004, so the seven days the FS took to research and respond to the request did not unduly delay Butte's operations. *Id*. at 5. As to Butte's allegation that Mr. Archuleta appeared to have "a personal stake in promoting the use of subsoilers," Mr. Nelson pointed out that Mr. Archuleta was not a party to the contract and did not speak for the FS or make decisions related to the operation of the contract. "[Mr. Archuleta] was properly asked to review [Butte's] proposal, since he is the subject matter specialist in soils for the . . . District. Mr. Archuleta properly limited his review and recommendations to areas of his professional expertise."[11] *Id*. at 5-6.

Butte timely appealed the final decision to the Civilian Board of Contract Appeals (CBCA), where, on February 16, 2007, the appeal was docketed as CBCA 646.

Positions of the Parties

The crux of this dispute appears to be the appellant's dissatisfaction with the FS' refusal to allow Butte to take its feller buncher off the designated skid trails and to mechanically fell timber on laterals from the main corridor, or from frozen ground, or from on top of snow pack. Butte's proposal would have entailed modifying the mechanical logging yarding and skidding requirements set forth in the contract. The appellant posits that none of the changes it proposed in its requested modifications would have adversely impacted the soil more than using the feller buncher from the designated skid trails and hand-felling with chainsaws the timber the feller buncher could not reach from the skid trails.

The respondent avers that the contract clearly indicated the requirements with regard to mechanical logging, including the yarding and skidding requirements; the FS had "unilateral authority" to approve requirements different from those set forth in the contract; and there is no evidence that the FS was "less than reasonable" in evaluating Butte's proposed modification. Memorandum at 13-15. The respondent argues it is entitled to judgment as a matter of law because Butte did no more than use the yarding and skidding requirements specified in the contract.

The appellant responds that there are "disputed facts relating to the reasonableness of respondent's actions and decisions" regarding the mechanical logging methods and its requested modifications. Butte avers that the respondent's rejections of the alternative

[11] The contracting officer discussed several other bases for his decision that do not need to be discussed to decide this motion.

logging methods it proposed were unreasonable and a breach of the contract. The appellant argues that "unless the Board finds that there is no conflicting evidence as to whether the respondent "acted reasonably or in accordance with the parties' reasonable expectations," the respondent's motion must be denied.

The respondent replies that the decision to reject Butte's alternative harvesting methods was reasonable and that the "appellant adduces no competent evidence to create a material fact which undermines the contracting officer's decision."

Discussion

The question presented by this appeal is whether under the terms of this contract the FS acted reasonably in denying Butte's requests to modify the mechanical logging requirements to allow it to use its feller buncher to fell timber from laterals off the main corridor, from frozen ground, and from snow pack.

Pure contract interpretation is a question of law that may be resolved by summary judgment. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984). However, the question of interpretation of language, the conduct, and the intent of the parties, i.e., the question of what is the meaning that should be given by a court or board to the words of a contract, may sometimes involve questions of material fact and not present a pure question of law. If there is a genuine dispute of material fact, summary judgment is inappropriate. *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988).

For summary judgment to be granted, there can be no genuine issue of material fact, and the moving party must be entitled to judgment as a matter of law. A fact is material if it is necessary and relevant to the proceeding, or might significantly affect the outcome of the case. A genuine issue exists concerning a fact if the evidence presented is sufficient to enable a reasonable fact finder to decide the question in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

As stated in *Darwin Construction Co. v. United States*, 31 Fed. C1. 453, 456 (1994):

> Although contract interpretation is generally a question of law, questions of fact can arise as part of the analysis. What is most reasonable in a given set of circumstances is an issue of fact. *D & S Universal Mining Co. v. United States*, 4 C1. Ct. 94, 97 (1983). Moreover, the existence of industry or trade practice is a question of fact, *John McShain, Inc. v. United States*, 199 Ct. Cl. 364, 370, 462 F.2d 489 (1972), evidence of which "may always *explain* or

> *define*, as distinguished from *vary* or *contradict*, contract language." *W.G. Cornell Co. v. United States*, 179 Ct. C1. 651, 670, 376 F.2d 299 (1967) (emphasis in original).

In deciding a motion for summary relief, the Board's role is not to resolve factual questions, or to weigh the evidence and determine the truth of the matter. Rather, our role is to ascertain whether there are material facts in dispute and whether there exists any genuine issue for trial. The burden is on the moving party to establish it is entitled to summary relief by proving first that there is no genuine issue of material fact. Further, the reasonably disputed evidence offered by the non-moving party is to be believed for purposes of the motion, and we must resolve any doubts over whether factual issues are in dispute in favor of the party opposing summary relief. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson*; *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984); *Saturn Construction Co.*, VABCA 3229, 91-3 BCA ¶ 24,15, *aff'd*, 991 F.2d 810 (Fed. Cir. 1993) (table); *DJM/REZA, Joint Venture,* VABCA 6917 et al., 05-1 BCA ¶ 32,943.

To combat a motion for summary relief, the non-movant must set out in an affidavit, or otherwise, what specific evidence could be offered at trial. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984). Its evidence is to be believed and all reasonable factual inferences must be drawn in its favor. *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1541 (Fed. Cir. 1993). In granting a motion for summary relief the Board must be sure that the criteria for granting the motion are fully satisfied. There must be no genuine issue of material fact separating the parties that the Board must decide, and, because the respondent is the moving party here, the respondent must be entitled to decision as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987).

Butte requested that the mechanical logging requirements of the contract be modified to allow it to use its feller buncher off the skid trails and to fell timber on "laterals" from the main corridor. The FSR denied this request. Subsequently, Butte asked the FSR if it could take its feller buncher off the skid trails and fell timber from frozen ground or snow pack. The FS decided to deny this request also, but the record is unclear as to when the FS told Butte its requested modification had been denied. Butte's proposed modifications would have allowed its feller buncher greater access to timber, increasing the amount of timber that was able to be mechanically logged as opposed to hand-felled. Hand-felling using chainsaws was necessary if the feller buncher was limited to felling only from the designated skid trails.

By declaration, Mr. Brewer has stated that he would testify at hearing that he has been in the timber industry for thirty-one years and allowing Butte to use the feller buncher machine, as per the requested modification, "would not [exceed] . . . the 20% regional

productivity standard and guideline for detrimental impacts in the activity area." Response (Declaration of Richard Brewer (July 11, 2007) at 1). Mr. Brewer declares:

> Allowing Butte Timberlands' proposed plan would have: (1) reduced the area of detrimental compaction; (2) increased the quantity of merchantable timber harvested; (3) increased revenue for the respondent and Butte Timberlands; (4) resulted in earlier completion date; (5) resulted in less residual tree damage; (6) prevented slash and piling of slash in the unit; and (7) improved natural regeneration of the forest.

Response (Brewer Declaration at 2). Mr. Fred Sperry, a 1981 graduate of Oregon State University who has a degree in forest management, provides a declaration that essentially mirrors Mr. Brewer's declaration, adding that "equipment with a PSI of seven pounds is unlikely to create a change in soil bulk density in excess of 20%." Response (Declaration of Fred Sperry (undated) at 2).

The FS contends in its motion that the FS has "unilateral authority to 'approve' requirements different than . . . [those set forth] in the contract," and "the parties did not bargain for a reasonableness standard." Memorandum at 13-14. Alternatively, the FS asserts that it acted reasonably in refusing to allow Butte to mechanically fell timber from off the designated skid roads, and that Butte has failed to "adduce competent evidence to create a material fact which undermines the [contracting officer's] determination." Reply at 1. As indicia of its reasonableness in refusing to allow the feller buncher to fell on laterals from the main corridor, the FS relies on its vetting the request with the District soils scientist. Also, the facts reveal that, in considering Butte's request to fell from frozen ground and from snow pack, several FS personnel were consulted and involved in making the decision to deny the request.

The respondent is incorrect in its conclusion that a reasonableness standard does not apply to the FS' consideration of the appellant's request. An implied covenant of good faith and fair dealing imposes an obligation on the part of each party to a contract to act reasonably. In *Maxima Corp. v. United States*, 847 F.2d 1549, 1556 (Fed. Cir. 1988), our appellate authority, the Court of Appeals for the Federal Circuit, stated that "[t]he need for mutual fair dealing is no less required in contracts to which the Government is a party, than in any other commercial arrangement." *See also Norman v. General Services Administration*, GSBCA 15070, et al., 02-2 BCA ¶ 32,042 (closely allied to the Government's duty to cooperate with the contractor and, to a limited extent overlapping with it, is the Government's continuing duty to deal fairly and in good faith with the contractor); Restatement (Second) of Contracts § 205 (1981) (every contract imposes upon each party a duty of good faith and fair dealing in its performance and subterfuges and evasions violate

that obligation, as do lack of diligence and interference with or failure to cooperate in the other party's performance). Based on the covenant of good faith and fair dealing inherent in every contract, all parties to a contract are charged with acting reasonably. One of our predecessor boards, the Department of Agriculture Board of Contract Appeals, in an analogous situation, discussed a similar contract provision where tractors were restricted to approved skid trails no less than 100 feet apart. *Thorco, Inc.*, AGBCA 2001-136-1, 03-1 BCA ¶ 32,164. In *Thorco*, the Agriculture Board applied a reasonableness standard in assessing whether the FS sales administrator subsequently improperly refused to allow "dispersed skidding." *Id*. at 159,038. However, what are considered reasonable actions and decision-making can differ based on the terms of the contract, as well as the particular facts and circumstances. Although the respondent has made this motion, we note that determinations as to the reasonableness of a party's actions under all the circumstances involve questions of fact that are generally not appropriate for summary relief. *McKenzie Engineering Co.*, ASBCA 53374, 02-2 BCA ¶ 31,972; *Coastal Government Services, Inc.*, ASBCA 50283, 99-1 BCA ¶ 30,348.

In pertinent part, paragraph C.6.42# of the contract provided that Butte was required to submit for approval a yarding and skidding plan showing its intended locations for, among other things, skid trails. The plan was to establish how Butte intended to move the timber from where it was felled to a landing. Paragraph C.6.42# referenced certain requirements that were set forth in a table that immediately followed the paragraph, identifying the requirements for, among other things, the mechanical logging at issue here. As to the mechanical logging, the purchaser was required to use the existing skid trails where feasible. The locations for the skid trails were to be agreed upon by the parties prior to the start of felling operations, and the skid trails were required to be a minimum of 100 feet apart. The contract also specifically required that for the mechanical logging "all equipment was restricted to the designated skid trails," and following logging all the trails were required to be subsoiled to a twenty inch depth. However, that being said, paragraph C.6.42# also provided that "requirements other than those specified . . . may be approved." A plain reading of paragraph C.6.42# appears to provide for modification of the mechanical logging requirements set forth in the contract - provided the parties are able to come to a written agreement as to what those logging requirements are to be. As such, the FS was obligated to give Butte's requested modifications good faith consideration.

To grant the respondent's motion, we must decide that there are no material facts in dispute and that the respondent is entitled to judgment as a matter of law. The FS has pointed to facts supporting its contention that the method of felling proposed by the appellant would have been more disruptive to the area than the method specified. The appellant has declared that its proposed method of felling would not cause any greater damage that the method in the contract and that its feller buncher did not exceed the 7 PSI cautioned against by the FS

soils engineer. For purposes of deciding this motion we are required to resolve any doubts over whether factual issues are in dispute in favor of the appellant. The appellant's declarations place in dispute, albeit with minimal evidence, certain material facts which we believe are pertinent to the reasonableness of the FS' actions.

The facts as they are currently set forth by the parties also raise several unanswered factual questions which may be pertinent to what we will ultimately resolve here - the reasonableness of the FS' actions. The record does not explain and we are unclear as to what "felling with a buncher on laterals from the main corridor" entails or why this method would (or would not) cause more damage to the area than would hand-felling using chainsaws. So, too, it would be helpful to learn more about the "designated skid trails" and how they were selected and located. The "east-side practice," both what it was and why (or why not) it should apply to the sale area, is also an issue that seems to be relevant. These are a few of the many questions of fact we have, the answers to which we anticipate will be provided as the record is further developed. These questions, and the answers that flow from them, all go to whether the FS acted reasonably in considering Butte's requested modifications. In the absence of facts in the record necessary and material to our determination of a party's entitlement to judgment as a matter of law, we cannot grant the moving party's motion. *See generally J.W. Bateson* Co., VABCA 3482, 93-3 BCA ¶ 26,115, at 129,801 (citing *Young Enterprises, Inc. v. United States*, 26 C1. Ct. 858, 863 (1992)). This appeal appears to present opposing opinions on a variety of issues. It is apparent from the record currently before us that the Board will likely be required to assess the credibility of the witnesses and determine the weight to be given conflicting evidence. Until we have a more complete record, the Board cannot fully assess the reasonableness of the FS' actions.

Decision

The respondent's motion for summary relief is **DENIED**.

_____
PATRICIA J. SHERIDAN
Board Judge

I concur:

HOWARD A. POLLACK
Board Judge

VERGILIO, Board Judge, dissenting.

I respectfully dissent from the decision of the majority. I would grant the Government's motion for summary relief, as I find no material fact to be in dispute.

The contract required the purchaser to keep equipment on designated skid trails, with the trails to be a minimum of 100 feet apart. Exhibit 8 at 155-56 (exhibits are in the appeal file). The purchaser made two requests to deviate from the requirement, as it initially sought to bring equipment off the skid trails and onto lateral trails into the landscape, and thereafter sought permission to bring equipment off the skid trails if the ground was frozen or there was sufficient snow pack. Exhibit 10 at 8-9, 13-14. Its requests did not contain information that convincingly suggested that its proposed methodologies would not irreversibly damage the soil conditions. For example, the request referenced experience and research without providing specific support. The writer of the request also acknowledged that he is not a soils scientist and that he is not qualified to comment on the arguments given to substantiate the Government's decision to not permit equipment off the skid trails. Based upon the submissions, experience, and responses to inquiries, a Forest Service representative determined that the proposed modifications would not ensure a suitable methodology of tree removal. The representative did not approve altering the contract requirements and did not permit equipment off the skid trails. The Government is permitted to enforce the specific terms of the contract. The suggestions by the purchaser to alter the requirements did not merit a greater response by the Government. The Government acted reasonably. Moreover, the purchaser presented neither request specifically to the contracting officer until its post-completion claim. At such a time, the proposed deviations or contract modifications were moot and appropriately denied.

With a review of each item of the claim and the related facts (as determined when resolving a Government motion for summary relief) I provide further particulars as to why I would grant the Government's motion. The purchaser's claim of October 23, 2006, raises four items in support of its request for money:

1. We were not allowed to log the ground base units with "mechanized yarding" as referenced in the prospectus and the contractual map.

2. Written requests regarding this issue went unanswered in violation of B6.36.

3. The District Soil Scientist, [name], appears to have a personal stake in promoting the increased use of subsoilers, as he has applied for at least two patents on them . . . and may be in violation of B6.01 subparagraph b of the contract.

4. Completed work was not accepted in writing as provided in B6.36.

Exhibit 20.

Item one

The contract required the purchaser to keep equipment on designated skid trails at a minimum of 100 feet apart. Exhibit 8 at 155-56. The contract could be modified by a bilateral written agreement between the purchaser and the contracting officer. Exhibit 8 at 137.

In its October 7, 2004, "Logging Proposal" the purchaser sought a modification to the contract. The request to the Forest Service representative sought to move the main skid roads to 125 to 150 feet apart and to permit equipment off the skid corridor. The request contained a comment: "As to the negative, the additional travel of the buncher, research has proven that this method has the least overall negative impact upon an east side site such as this one." No research or support was submitted. Rather, the purchaser identified problems it was encountering, and an explanation of how its proposed method would be mutually beneficial. Exhibit 10 at 8-9.

In a response, dated October 12, 2004, the Forest Service representative referenced the contract requirement, paragraph C6.42#, Exhibit 8 at 155, that all equipment must stay on designated trails at least 100 feet apart. He noted that the proposal is not consistent with this requirement. Further, he explained that he contacted a soils "expert," who submitted a "recommendation" upon which the representative relied. The analysis of the soils scientist disputed the statements of the purchaser, and specified: "The NEPA [National Environmental Policy Act] process for this project took these potential impacts into account when defining acceptable impacts and mitigations for this project." Exhibit 10 at 6-7. The determination by the representative indicated a reasoned basis for keeping equipment on designated trails and serves as a basis to deny the request for a variance.

As indicated in a letter of reply dated October 14, 2004, the purchaser read the soils scientist's analysis as a recommendation "against any use of the buncher off of the skid roads." The letter specified: "I'm not a soils scientist, therefore, I am not qualified to comment on the arguments given to substantiate the decision." Exhibit 10 at 13-14. Although the letter suggested that overall soil compaction would be less using the proposed method compared to a strict enforcement of the contract, the submission did not indicate that the compaction by equipment off the skid roads would be acceptable. Nothing in the letter convincingly demonstrates that the Government made the incorrect decision, much less an unreasoned decision. Catalog cuts attached are similarly unhelpful, as there was not an explanation of the actual impact that would occur on given areas with the different methodologies.

In this letter of October 14, the purchaser also inquired if the Government would permit equipment off the designated skid trails when the ground was frozen or when there existed snow cover to protect the soil. Exhibit 10 at 14. The Government explored the use of equipment during freezes and with snow pack, but concluded that it could not ensure that such actions would sufficiently preserve the soil. Exhibit 10 at 35-37. Even assuming (as required when resolving the present motion) that the conclusion was not conveyed to the purchaser, the purchaser placed nothing before the contracting officials that would compel a contrary conclusion.

The purchaser maintains in the first item of the claim that the Government did not permit it to log the area using mechanized yarding as described in the prospectus and the contractual map. The purchaser has identified no such instance when the Government required a deviation from the terms of the contract to the detriment of the purchaser.

Viewing the claim favorably for the purchaser, the purchaser contends that its proposed use of equipment off skid trails was acceptable under the contract because the soil would not be impacted adversely. However, as the purchaser acknowledged in its letters during performance, its proposed methodologies would entail a deviation because the equipment would leave the skid trails. The Government acted reasonably in obtaining information on the issues and in declining to approve deviations, as there were no assurances that the proposed methodologies would leave the area in an acceptable condition. The contracting officer correctly denied this claim.

Item two

The purchaser claims that written requests to permit a deviation went unanswered in violation of contract paragraph B6.36. The Acceptance of Work clause of the contract, B6.36, discusses acceptance by the Government upon the purchaser's written request and

assurance that work has been completed. "Within 5 days of said inspection, Forest Service shall furnish Purchaser with written notice either of acceptance or of work remaining to be done." Exhibit 8 at 129. The submissions referenced in this item, those discussed in item one, are not related to this paragraph. Acceptance of work is not at issue. Even if one views the submissions as requests for modifications, the purchaser did not pursue the matter after the initial denial by the representative and here assumed lack of a response until after performance was complete. At that time the request was moot.

Item three

The purchaser alleges that the views of the soil scientist who was asked for input may be tainted and may be in violation of paragraph B6.01(b) of the contract.

The Government cannot be in breach for violation of B6.01 because the contract expressly makes that clause inapplicable to the contract. Exhibit 8 at 9. However, both paragraphs B6.01 and C6.01 (the actual, parallel clause in the contract) detail purchaser obligations, not obligations of the Government. Exhibit 8 at 149. In any event, the views of the soils scientist are not controlling. As explained above, the purchaser did not provide more than anecdotal information that either of its proposed methodologies would not adversely impact the soil. If viewed as a post-award protest over the terms and conditions of the solicitation and contract that equipment remain on the skid trails, the purchaser raises the matter in an untimely fashion and at the wrong forum.

Item four

The purchaser alleges that its work was not accepted in writing, as required by the contract: "Within 5 days of said inspection, Forest Service shall furnish Purchaser with written notice either of acceptance or of work remaining to be done." Exhibit 8 at 129 (¶ B6.36).

On July 27, 2006, the purchaser requested final inspection of the timber sale. Exhibit 10 at 56. On August 1, 2006, the Forest Service replied that based upon an inspection, unit 7 was not complete; it gave the purchaser through August 11 to complete performance. The reply also specifies: "This slash work is all that remains to be accomplished on the contract. All other work has been inspected and accepted as complete." Exhibit 10 at 57. A Timber Sale Inspection Report, with a date of inspection of August 11, notes that "final inspection" has occurred with Government acceptance. Referencing paragraphs B.6.36 and B9.6, the report states: "All units have been compl[e]ted and all contract requirements are in compliance. All work has been compl[e]ted & accepted, [sale administrator] recommends that this sale be closed." The document bears the signatures of a sale administrator and a

Forest Service representative with dates of August 11, 2006, and the signature of a purchaser representative with the date of August 16, 2006. Exhibit 11 at 110.

The Government complied with the contract. Within five days of the request for a final inspection, the Government provided a written notice of acceptance and work remaining to be done. Thereafter, the Government provided written notice of acceptance on August 11, 2006, which a purchaser representative acknowledged by signature and a date of August 16, 2006. The purchaser fails to place a material fact in dispute to support any violation and does not suggest that any damages flow from this alleged violation. This aspect of the claim can be denied.

_____
JOSEPH A. VERGILIO
Board Judge