UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 2397 GRANTED AS TO ENTITLEMENT; CBCA 2427 DENIED: June 18, 2013

CBCA 2397, 2427

EM LOGGING,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Tonn K. Petersen and Robert A. Maynard of Perkins Coie LLP, Boise, ID, counsel for Appellant.

Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

Before Board Judges **VERGILIO**, **McCANN** (presiding), and **STEEL**.

Opinion for the Board by Board Judge **VERGILIO**. Board Judge **McCANN** dissents in part.

VERGILIO, Board Judge.

This opinion addresses entitlement under two docketed appeals. On April 19, 2011, the Board received a notice of appeal, docketed as CBCA 2397, from EM Logging (purchaser) concerning its timber sale contract, 01-14-01-612773, with the respondent, the United States Department of Agriculture, Forest Service (agency). This dispute involves the purchaser's request for payment of $1050, said to be its costs related to the additional transportation (out of and back to the forest) and cleaning of a piece of equipment, incurred after an authorized agency inspector initially deemed the equipment to be acceptably clean. The Board concludes that the initial inspection was inaccurate and that the equipment was not acceptably clean; the agency's errors caused the purchaser to waste efforts in retransporting the equipment. Accordingly, the additional transportation costs should be

reimbursed to the purchaser. The costs of cleaning, however, are not to be reimbursed as the purchaser was obligated to adequately clean equipment.

On May 19, 2011, the Board received a notice of appeal, docketed as CBCA 2427, from the purchaser disputing the agency's termination for breach of the underlying contract. The Termination for Breach clause of the contract permits the contracting officer, with the concurrence of the Regional Forester, to terminate the contract for breach in the event that the purchaser has engaged in a pattern of activity that demonstrates flagrant disregard for the terms and conditions of the contract. The record demonstrates the purchaser's breach of various material provisions of the contract: the purchaser used overweight vehicles on a restricted road, failed to utilize approved haul routes, left vehicles with logs at unapproved locations while failing to provide notice required under the contract, and hauled materials over unacceptably plowed roads. Although the purchaser corrected shortcomings related to plowing, the purchaser continued to violate other contractual provisions despite its assurances that it would correct the other failings. These violations, not single occurrences, are material, pertain to the safety and security of the personnel of the purchaser and agency, as well as the public, and exhibit a flagrant disregard of contractual provisions. The Board upholds the termination for breach and denies this appeal.

Findings of Fact

1. With an award date of August 31, 2010, the parties entered into a scaled timber sale contract (with timber to be weighed upon removal and paid for at contract rates), under which the purchaser was to construct roads and remove included timber, with an estimated quantity in excess of 67,000 tons. This Big Steep timber sale was in the Kootenai National Forest, Rexford Ranger District, Montana. Appeal File at 527, 529.

Unclean Equipment

2. The contract specifies that the purchaser shall remove all soil, plant parts, seeds, vegetative matter, or other debris that could contain or hold seeds from off-road equipment prior to entry on to the sale area. Appeal File at 599 (¶ C6.351#). The purchaser received approval from an authorized agency inspector that equipment was acceptably clean, i.e., seed and debris free. Appeal File Supplement, Exhibit 1 at 29. The purchaser transported the equipment to the sale site. At the sale location, the contracting officer deemed one piece of equipment not to be acceptable (because of plant debris) and required the purchaser to remove and clean the equipment. The equipment was not acceptably clean. Transcript at 28, 42, 69, 270-76, 480-81. The record does not demonstrate that the purchaser knew at the time the equipment first was delivered to the site that the cleaning had been inadequate.

3. The purchaser transported the equipment out of the forest, cleaned it, and transported it back. The contractor maintains that it expended six hours total in the round-trip transportation and five hours rewashing the equipment. Appeal File Supplement, Exhibit 8 at 2. This five hours approximately doubles the time expended in the initial cleaning, which took between two and three hours. Transcript at 468-70. This amount of time further supports the conclusion that the initial cleaning was inadequate.

4. The agency maintains that the initial inspection was performed on other than that piece of equipment taken to the site. The purchaser contends otherwise, with a supporting affidavit and testimony from the individual who cleaned the vehicle and loaded it for transport, and the explanation that the agency inspector never left her vehicle in performing the inspection (a point not contradicted). The affidavit and testimony of the individual who washed the equipment and witnessed the inspection are more credible than that of the inspector regarding whether or not the given piece of equipment had been inspected. Appeal File Supplement, Exhibit 1 at 57; Transcript at 481, 487, 539-40. The purchaser brought to the site the equipment that had been inspected and approved as clean, not a different piece of equipment.

Restricted road and maximum gross vehicle weight

5. In a general clause, the contract specifies that the purchaser is authorized to use existing national forest system roads when the Forest Service determines that such use will not cause damage to the roads or forest resources. Appeal File at 545 (¶ B5.12). The contract expressly identifies relevant portions of Road 336 Big Creek (a Forest Service development road) as a road with restrictive limitations: "All vehicles shall comply with statutory load limits unless a permit from the Forest Service and any necessary State permits are obtained prior to overload vehicle use." Appeal File at 510 (amended restrictive road list), 572 (¶ C5.12#, Use of Roads by Purchaser (6/99), with restricted road list) (clause C5.12), 701 (map).

6. The contract does not specify the referenced statutory load limits. Federal statute generally imposes an 80,000 pound gross vehicle weight limit for vehicles on interstate roads. 23 U.S.C. § 127 (2006). While the Bridge Gross Weight Formula (with maximum gross weight dependent upon wheel base and number and configuration of axles) is a recognized method of calculating maximum weights, as found in the statute and detailed in regulation, the bridge formula does not increase the 80,000 pound total gross weight maximum, inclusive of all tolerances. 23 U.S.C. § 127; 23 CFR 658.17(b), (c), (g) (2010).

7. Statute directs the Secretary of Agriculture to establish provisions relating to the use of the national forests. 16 U.S.C. § 551 (2006). Pursuant to the statute, and implementing regulation, 36 CFR 261.50, .54, an order dated February 24, 1986, issued by the Forest Supervisor, identifies as a prohibited act on all forest development roads within the Kootenai National Forest the operation of a vehicle weighing in excess of 80,000 pounds, gross vehicle weight. Exempt from the order are those with a permit, written agreement, or contract specifically authorizing the otherwise prohibited act. Appeal File at RE-151. This purchaser did not possess a permit or written agreement permitting a greater weight; the contract did not specifically authorize a greater weight. The record contains no superseding order or indication that this order was no longer in effect. Appeal File at RE-107.

8. Montana permits trucks to be operated on highways under its jurisdiction with gross vehicle weights in excess of 80,000 pounds, with the maximum weight determined by the bridge formula. Montana Code Annotated (MCA) §§ 61-10-107, 61-10-110 (2011). Montana law recognizes the 80,000 federal gross weight limit, but requires particular additional fees for vehicles with capacities in excess thereof. MCA § 61-10-201.

9. By letter dated November 30, 2010, the contracting officer informed the purchaser of its obligations to comply with statutory load limits and clause C5.12. A truck and truck and trailer with gross weights of 94,300 and 95,000 pounds, respectively, were noted as being 14,300 and 15,000 pounds above the legal weight limit. "These weights exceed the legal allowable weights for the bridges accessing the Big Steep timber sale." Appeal File at 738. In letters dated November 30, and December 1 and 2, 2010, the contracting officer asked the purchaser to explain how it would guarantee that log truck weights will be at 80,000 pounds or less in accordance with gross vehicle weight requirements. Appeal File at RE-423, RE-430-31, RE-436-38.

10. In response, the purchaser indicated that it could legally haul 80,000 pounds with its trucks, and 84,500 pounds with its trucks and trailers. Further, the purchaser stated that it could legally haul an additional 10% of these figures because of a state tolerance. Appeal File at RE-426, RE-445. The record and Montana code do not support the assertion that the purchaser legally could violate weight maximums, which are inclusive of tolerances.

11. In a responding letter dated December 1, 2010, the contracting officer provided direction:

> You are required to keep your truck load weights at 80,000 lbs or less for a normal log truck and at 84,500 lbs (based on ax[le] spacing) for a truck and mule trail (pup). Exceeding these weights violates the legal load limits for the

> two bridges on the route accessing the Steep Creek timber sale. There is no 10% tolerance above these weights.

Appeal File at 750. The letter also noted that the purchaser had failed to explain how it would guarantee that the truck log weights will be at 80,000 pounds or less; the purchaser simply had stated that it would work harder to maintain loads at given weights. The contracting officer specified: "You either do it, or do not haul. Please explain how you will guarantee that weights will comply with the contract[.]" Appeal File at 751. A letter dated December 2, 2010, from the contracting officer to the purchaser is of similar effect with respect to the weight issue. Appeal File at RE-437.

12. In a letter dated December 14, 2010, to the purchaser, the contracting officer specified that he had earlier instructed the purchaser:

> "You are required to keep your truck load weights at 80,000 lbs or less for a normal log truck and at 84,500 lbs (based on ax[le] spacing) for a truck and mule train (pup). Exceeding these weights violates the legal load limits for the two bridges on the route accessing the Steep Creek timber sale." You were told that you would haul legal loads or your hauling would be suspended.

Appeal File at 132.

13. In December 2010, the purchaser sought to obtain permits to exceed gross vehicle weight limits for its log hauling. Appeal File at RE-484. By letter dated December 22, 2010, the contracting officer denied the request: "The load limits are there to protect the public's investment in the roads and bridges that are improvements on the National Forest. The roads and bridges were designed to handle legal GVWs [gross vehicle weights]." Appeal File at RE-487.

14. In a notification of breach dated January 14, 2011, to the purchaser, the contracting officer identified three trucks and three trucks with trailers with hauls between December 20, 2010, and January 6, 2011, with gross vehicle weights in excess of 80,000 and 84,500 pounds, respectively. In identifying these instances of breach of the contract, the letter also stated: "Hauling overweight loads across Forest Service roads and bridges from the Big Steep Timber Sale area is also in non-compliance with of [sic] Standard Provision **B6.22 Protection of Improvements**, due to its impact on National Forest System resources (bridges) that are rated for legal highway loads." Also, "Because of the risk of damage to National Forest bridges and safety concerns related to overweight trucks, you are to provide the information in Item 1 [including vehicle identities and legal gross vehicle weights as designated by the Montana Department of Transportation] by January 20, 2011, and trucks

are to be within legal limits immediately. Failure to comply will result in suspension of hauling activities immediately." Appeal File at 182-83.

15. Between November 15, 2010, and January 21, 2011, the purchaser hauled over the restricted road, at least 31 times (7 for truck; 24 for truck with trailer) with gross vehicle weights in excess of 80,000 pounds (all of these truck with trailer weights were also greater than 84,500 pounds); of these truck with trailer weights, 6 times the weight was in excess of 100,000 pounds. Appeal File at RE-108-11.

16. On January 20, 2011, a driver hauling logs for the purchaser was charged by the state with violating the bridge formula in the Montana code (specifically by exceeding the maximum gross weight allowed for any group of axles). This violation occurred on a state road, with the purchaser's truck-trailer combination having a gross vehicle weight of 102,820 pounds. Appeal File at RE-128-29, RE-133. For this violation, the driver was sentenced and fined. Appeal File at RE-132. An agency incident report, prepared by a Forest Service law enforcement officer (LEO), related to this occurrence (the haul route included the restricted Forest Service road) identifies three offenses based on his contemporaneous observation: under state laws the truck was overweight; hauling overweight load of logs across Forest Service bridges with weight limits of 80,000 pounds violated regulation (36 CFR 261.54(d)); and use of a nylon strap wrapper when a cable or chain wrapper was required under regulation. Appeal File at RE-119-20. The purchaser's explanation, that had it lengthened this truck it would have complied with Montana code and the bridge formula, is not borne out by the facts in the record, as the purchaser has not demonstrated the potential length of the truck and trailer used in the hauling.

17. The purchaser's vehicle registrations, provided to the agency on January 27, 2011, indicate a declared maximum gross vehicle weight for its standard trucks of 100,000 pounds (valid through January 31, 2011 or 2012) and for its trailers of zero pounds. Without permits, the purchaser was not to haul additional weight on Montana roads. Appeal File at RE-544-51; MCA § 61-10-233.

Haul route and overnighting trucks

18. The Route of Haul (10/04) clause of the contract required the purchaser to provide a map and written explanation of the haul routes it would use to remove timber from the sale area. Further,

> Upon advance written agreement, other haul routes may be approved. All products removed from Sale Area shall be transported over the designated routes of haul. Purchaser shall notify Forest Service when a load of products,

> after leaving Sale Area, will be delayed for more than 12 hours in reaching weighing location.

Appeal File at 608 (¶ C6.849). Use of approved haul routes enabled the agency to better ensure the accountability of the timber and the safety of the logging operation.

19. Initially, the purchaser provided with its plan of operations a map highlighting basically all roads off the site as potential haul routes, as it desired never to be found in violation of this clause; the purchaser provided no written explanation or plan. The agency received the plan and map on September 27, 2010. Appeal File at 48-53; Transcript at 602 (the president of the purchaser testified that, because of an incident under a different contract, "I've highlighted all these roads on this map so that wherever I am, I'm never off my haul route"). The contracting officer rejected such an approach and required a written plan that was in accordance with the contract requirements. Appeal File at 56 (letter dated Sept. 30, 2010).

20. Thereafter, by letter dated October 24, 2010, the purchaser provided a written haul route plan, with a request to be allowed twenty-four, instead of the twelve, hours to present loads for scaling, so as to keep drivers within regulatory requirements of logging no more than eleven hours in any twenty-four hour period. Appeal File at 80. By letter dated November 3, 2010, the contracting officer accepted the proposed haul routes, with a specific limitation; the contracting officer did not approve hauling to the purchaser's site in Eureka. In the letter, the contracting officer also expressly refused to waive the requirement for notification for delivery of loads beyond twelve hours. Appeal File at 82. Although credited by the dissent and given dispositive weight, the testimony of the purchaser's president, in response to often leading questions as to the dates and sequence of events surrounding the haul map and written plan, Transcript at 600-02, is contravened by the written record as noted in these findings.

21. On December 7, 2010, the purchaser wrote to the contracting officer, stating that it planned on loading logs so that it would get them to the mill in time (weighing stations were at mills, which closed in the late afternoon, such that any delay in arrival one day meant at least a twelve hour delay until the mill reopened) and that it would provide notice in the event of a delay. Appeal File at 801.

22. During performance, the purchaser deviated from the designated haul routes and violated the twelve-hour limitation. The purchaser overnighted trucks at locations not approved by the agency. Appeal File at 134, 151-52, 218. The purchaser's testimony that hauling did not deviate from the haul map is not relevant, given that hauling deviated from the approved written plan by hauling on a road expressly not approved. Transcript at 607;

Appeal File at 82. In reference to one incident of overnighting a truck at a location off the sale site before being weighed, without prior notification and without an approved location, an agency employee expressed concerns in an agency-internal email message:

> This is another example that purchaser is pushing us and expects no action on our part. We're way too early in this sale to continue allowing these situations to continue to occur. With all the warnings purchaser has received regarding various situations on this sale, he should expect to be breached! Also, [the sale administrator] and I spoke this a.m. because the Resource Tech at D-1 is out until Thurs and we need to get trucks input for December statements which we will run next week, he checked tickets received within the last day or so and we are still seeing overweight tickets--also breachable.

Appeal File at 151.

Snow plowing

23. Inspection reports indicate few incidents of unacceptable plowing at the time hauling was occurring. Appeal File at 326 (November 20, a Saturday, no hauling; some plowing had been done, but plowing not satisfactory at that time) 325 (November 24, fifteen to twenty inches of snow; haul route plowed), 327 (November 29, hauling on roads before plowed; some roads plowed, others not); 329 (December 9, holes not punched in snow berms along haul route). On December 2, 2010, the purchaser had not adequately plowed roads. Appeal File at 758, 765. An inspection report dated December 13 notes that a haul route was properly plowed, with berms plowed off, but that a grader had made only one pass above a given area on another road. Thereafter, the agency's inspection reports from December 17 through January 21 indicate that roads were properly plowed (either by expressly so stating or by silence concerning road conditions). The instances of inadequate plowing or hauling over unplowed roads are few, but significant as unplowed roads pose a safety hazard. By mid-December at the latest, the purchaser was properly plowing roads.

Breach of contract clause

24. The contract contains a standard Termination for Breach clause:

> Contracting Officer, with the concurrence of the Regional Forester, may terminate this contract for breach in the event Purchaser: . . .

> (c) Has engaged in a pattern of activity that demonstrates flagrant disregard for the terms of this contract, such as, but not limited to, repeated suspensions for breach pursuant to B9.3 . . . .
>
> Damages due the United States for termination under this Subsection shall be determined pursuant to B9.4.

Appeal File at 566-67 (¶ B9.31). The referenced clause B9.3 discusses a purchaser's breach of any material provisions of the contract, with the agency providing notice thereof and an opportunity to remedy the breach, and the agency's suspension of the purchaser's operations under the contract. Appeal File at 566.

25. By letter dated March 11, 2011, to the purchaser, the contracting officer issued a notification of termination for breach. The notification specifies that the termination is a result of repeated and ongoing disregard for the terms of the contract almost from the start of logging and hauling operations. The termination identifies earlier notifications under the contract of breach and suspension relating to sanitation and servicing, use of roads, route of haul, snow removal, and payments not received. Appeal File at 1. The Regional Forester had concurred in the determination. Appeal File at 6.

26. The purchaser largely blames the contracting officer and sale administrator for their insistence that the purchaser comply with contract requirements. The tension between the parties arose early, as described in an agency-internal email message by the sale administrator (SA):

> [U]nless I can feel safe on this sale, along with knowing the public is safe too, I will not be the Sale Administrator. Yesterday I had overweight trucks hauling on half ass plowed roads with their tires falling off. Yes [the purchaser] is shutdown at this time. But to let him start back up and have myself as the SA there will need to be actual changes from [the purchaser] and his crew. He was giv[en] many chances to perform. I will not be a lab rat to [the purchaser].

Appeal File at 773.

Discussion

CBCA 2397

The contracting officer acted appropriately in inspecting the equipment at the sale area; such was in keeping with the contractual direction to prevent the spread of weeds. The record, which includes photographs of the equipment taken on site at the time of the inspection by the agency and testimony of those viewing the equipment (including the contractor's employee who did the washing), supports the contracting officer's conclusion that the equipment was unacceptable. Given the contractor's unclean equipment, the contracting officer appropriately issued a notification of breach and did not permit further performance until the equipment was acceptably cleaned. However, the record does not demonstrate that the purchaser knew at the time the equipment was delivered to the site that the cleaning had been inadequate. Contrary to the agency's assertion, the record fails to demonstrate that the purchaser's delivery of the unclean equipment at the start of performance was a flagrant violation of the contract.

The purchaser's expenses associated with the transportation to and from the contractor's facility for cleaning were caused by the agency's inappropriate initial acceptance of the equipment; the costs of cleaning the equipment to an acceptable level were simply in fulfillment of contractual requirements. The purchaser attributes five hours of time to the rewash of the machine, which approximately doubles the time spent on the initial cleaning. This amount of time expended further supports the conclusion that additional cleaning was required.

CBCA 2427

Factually, the record establishes that the purchaser repeatedly violated contractual requirements with respect to weight limits (both over the restricted forest service road and on Montana roads), haul routes, and providing notice of delays in getting to weigh stations. These amount to blatant and flagrant violations of material contractual provisions, given that the purchaser had sought, but was denied, deviations, and often was reminded of the requirements. The purchaser did not carry out its promises of compliance and did not correct problems over a thirty working day period of notice of breach. The removal of the volume of timber here at issue would require several hauls over the routes in question. The agency reasonably sought to enforce compliance with contractual provisions that affected the safety of the purchaser, agency, and public, and the integrity of the roads and bridges over which hauling occurred.

The record establishes weight limits for the roads in question. The purchaser and dissent fail to recognize the import of the explicit road restriction in the contract, the order applicable to the roads in the forest, and the various references in the record to the weight limitation of bridges used on the traveled route. While a better focused presentation and developed record by the parties would have addressed these portions of the record, the documents do merit weight as they support the agency's actions throughout performance. The contemporaneous incident report by a Forest Service law enforcement officer notes the 80,000 pound weight limit applicable to the route in question, covering a given Forest Service road and bridges. Although, as the purchaser argues, Montana allows greater weights, within bridge formula limitations, to travel over its roads, that law does not control the limitations on the forest development road in question. The purchaser violated Montana law, as evidenced by the sentence and fine to the driver, and suggested by the hauls with weights over the 100,000 pound weight identified in the purchaser's registrations.

The agency bears the burden of proof to support the termination for default. The agency has more than met its burden of proof. The contracting officer and sale administrator acted within the terms and conditions of the contract in requiring compliance. The purchaser's actions with respect to violating the requirements for load limits, notice of delays, and haul routes, each independently establish a basis that alone supports the termination for breach. The Board upholds the termination for breach.

The dissent

Having considered and rejected the views of the dissent as not supported by the record, a few words are in order, without going into point-by-point details and rebuttals. First, regarding the maximum weight of vehicles on roads, the contract identifies the road in question as a restricted road. An agency order establishes the maximum weight at 80,000 pounds. A Forest Service law enforcement officer issued an incident report specific to performance under this contract; the report reflects this weight limit as being applicable to the road and bridges in question. The purchaser did not comply with this limit for its trucks or the slightly greater weight for a truck and trailer specified by the contracting officer. The purchaser's views are not determinative in establishing the weight limit on Forest Service roads and bridges. Second, the permissible haul routes were established by a written plan that provided specifics as to the purchaser's highlighted map. The purchaser acknowledges that it deviated from its written plan; it is not relevant that the purchaser remained on routes highlighted on its map, given that the map did not establish acceptable routes. Finally, the testimony of those who observed the equipment at the site and the photographs demonstrate that the equipment was not acceptably clean. The contracting officer acted appropriately under the contract in requiring the purchaser to remove the equipment and have it properly cleaned.

Decision

The Board **GRANTS AS TO ENTITLEMENT** the appeal in CBCA 2397; the record has not closed with respect to quantum. The Board **DENIES** the appeal in CBCA 2427.

JOSEPH A. VERGILIO
Board Judge

I concur:

CANDIDA S. STEEL
Board Judge

McCANN, Board Judge, dissenting in part.

I respectfully dissent. The contacting officer terminated the purchaser's contract under clause B9.31, indicating that the purchaser "[h]as engaged in a pattern of activity that demonstrates a flagrant disregard for the terms of the contract . . . ." No such pattern exists.

The Forest Service bears the burden of proof on the issue of the correctness of the termination. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). The Forest Service has not met this burden.

Equipment Cleaning

The majority first addresses the cleaning of the equipment. It finds the purchaser at fault for bringing dirty equipment to the site, after the contracting officer's representative had found it to be clean. The majority finds no fault with the Forest Service for a faulty inspection, or an incorrect finding of breach, or for shutting down the purchaser's operations. It does seem to come close, however, as it states that the Forest Service is liable for the extra transportation costs for the equipment (back and forth to the site) that must far exceed the cost of the additional cleaning.

The majority's holding that the equipment was not clean is incorrect. Under the contract clause C6.351, "Purchaser shall employ whatever cleaning methods are necessary to ensure that Off-Road Equipment is free of noxious weeds. Equipment shall be considered free of soil, seed and other such debris when visual inspection does not disclose such material." The contract requires the Forest Service to make this decision, which it did before the equipment was transported to the site. Thus, under the contract the equipment was clean. The Forest Service can re-inspect the equipment. However, if it does, and requires additional cleaning, that is a change to the contract and the Forest Service must bear all costs.

Restricted road and maximum gross vehicle weight

The Forest Service has consistently asserted in its filings that Montana statute applied to the hauling of the logs. During the hearing, the contracting officer testified, "A standard log truck with a five-axle combination under state law is – is 80,000 pounds of gross vehicle weight." Transcript at 296. During performance of the contract, the contracting officer never drew a distinction between gross vehicle weight limits for Forest Service roads and state roads. They were treated as one and the same. The contracting officer indicated, "All loads leaving your landings must comply with statutory load limits as determined by the Montana Department of Transportation." Appeal File at 183.

Enos Miller, sole proprietor of EM Logging, testified that the Montana Gross Vehicle Weight (GVW) Chart, Appeal File at 221-23, applied to all roads traveled on this contract. He further stated that he has referred to this chart for the past twenty-five years of logging and that he disagreed with the contracting officer's position, "[b]ecause this chart obviously proves him wrong." Transcript at 627. The contracting officer never disputed this statement at trial, although he was afforded the opportunity. Further, the Forest Service has never refuted, contradicted, or attempted to modify this statement in its briefing. The Montana chart shows that there is no blanket 80,000 pound weight limit for log trucks. The Forest Service has never indicated where it came up with this 80,000 pound limit. It is unclear at this point whether the Forest Service continues to maintain that an 80,000 pound weight limits exists.

In its reply brief, the Forest Service indicates, "The notifications of breach for overweight trucks were based upon the Agency's reasonable belief that the maximum GVW for Appellant's conventional trucks was 80,000 pounds." Respondent's Reply Brief at 10. This is insufficient. Purchaser's have the right to know what the requirements of a contract are, not only after trial and briefing, but during performance. That did not happen in this case. The Forest Service has failed to sustain its burden of proof.

The purchaser pointed out to the Forest Service that its interpretation of the load limits was incorrect. In an email message dated January 25, 2011, Enos Miller states:

> I received your certified mail on Saturday, January 22, breaching contract clause C5.12# and requesting information on our trucks and trailers. However, we are in compliance with contract clause C5.12#. In December we acquired additional equipment that gives us more axles so the loads you referred to in your letter do comply with state load limits. I dropped a communication log off at your office today so you can see my efforts to ascertain what exactly we are allowed to haul on this configuration. We are legal for up to 99,000 pounds stretched out. We are not in breach of the C5.12#.

Appeal File at 210.

Again on January 26, 2011, Enos Miller writes:

> Acquired a three axle pup trailer from TA Trucking in December and in an effort to determine the legal weight we are allowed to haul, I called the DOT [Department of Transportation] in Helena and asked for an analysis form to get the legal weight we are allowed to haul with our six axle configuration. . . . I received an email back from [DOT officer] Joe [Labrodar] stating we can haul up to 93,000 pounds, however after a visual inspection, he told driver Dave Butts we can haul up to 102,000 pounds if we are stretched out.

Appeal File at 215.[1]

Once again, on January 27, 2011, Enos Miller writes to the contracting officer:

> I received your letter dated January 26, 2011 and this email is to correct your wrong assumption. In paragraph three, you refer to the maximum legal weight allowed, as our "mule train" that is legal for up to 99,000. The truck that was ticketed is a log truck, pulling two trailers, for a total of seven axles. According to the Gross Vehicle Weight Chart I left for you with Pat Potter, a seven axle combination can haul up to a maximum of 130,580.

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[1] This appears to be a text message from Enos Miller to the Forest Service, probably the contracting officer, as that is the individual to whom his email messages were sent. It is date/time stamped 10-26-11 06:13 RCVD. This document was in the Forest Service records and made part of the appeal file by the Forest Service.

Appeal File at 918.

The majority has found other bases, not previously asserted by either party, which it relies upon to conclude that the purchaser was hauling overweight trucks, either on Forest Service roads, Montana state roads, or both. How the weight limits contained in these bases apply is unclear. Under these various bases the parties would be unable to determine when a truck was or was not "overweight."

As support for its conclusion that the purchaser was hauling overweight trucks, the majority points to the contract clause B5.12, which states: "All vehicles shall comply with statutory load limits. . . ." The majority then states, "Federal Statute generally imposes an 80,000 pound gross vehicle weight limit on interstate roads. 23 U.S.C. § 127 (2006)" This statute is inapplicable as purchaser did not haul over interstate roads. The reference to statutory load limits is to those limits imposed by the State of Montana, not the Federal Government. In any event, 23 U.S.C. § 127 does not prohibit states from allowing trucks in excess of 80,000 pounds from traveling on interstate highways within its borders. (It does deprive them of funds, however, if they do. 23 U.S.C. § 127(a)(1).)

Even if 23 U.S.C. § 127 were applicable to the situation before us, there are exceptions to the 80,000 pound limit on interstate roads in Montana for vehicles with trailers, called longer combination vehicles.[2]

> General continuation rule. - A longer combination vehicle may continue to operate only if the longer combination vehicle configuration type was authorized by State officials pursuant to State statute or regulation conforming to this section and in actual lawful operation on a regular or periodic basis (including seasonal operations) on or before June 1, 1991, or pursuant to section 335 of the Department of Transportation and Related Agencies Appropriations Act, 1991 (104 Stat. 2186).

23 U.S.C. § 127 (d)(1)(A). Accordingly, 23 U.S.C. § 127 does not limit all trucks with trailers to 80,000 pounds. Furthermore, the 80,000 pound limit contained in 23 U.S.C. § 127 is meant to apply to five-axle configurations, not six or seven-axle configurations, which the purchaser was using.

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[2] "Longer combination vehicle defined.— For purposes of this section, the term 'longer combination vehicle' means any combination of a truck tractor and 2 or more trailers or semitrailer which operates on the Interstate System at a gross vehicle weight greater than 80,000 pounds." 23 U.S.C. § 127(d)(4).

The majority next points to an order issued by the Kootenai National Forest supervisor on February 24, 1986, over twenty-seven years ago. Appeal File at RE-107. This order states that vehicles operating on Forest Service roads in the Kootenai National Forest are limited to a GVW of 80,000 pounds. The majority then states that "the record contains no superseding order or indication that this order was no longer in effect."

This order has no applicability. The contracting officer never relied on it or cited to it. In fact, in at least two directives issued by the contracting officer to the purchaser, and cited in the majority's decision, the contracting officer cites to a limit of 84,500 pounds for a vehicle truck (tractor and trailer) plus a pup trailer. This order was not being enforced in the Kootenai Forest, even if it had not been specifically rescinded by the Forest Supervisor. Since this order was in the record, but not brought to the attention of the Board or relied upon by the Forest Service, the only logical interpretation is that the Forest Service was aware that the order was not in effect. Certainly, it does not apply to this contract since the purchaser was never informed of its existence or applicability. It is incorrect for the majority to raise the applicability of this order in this case after the trial and briefing, when the Forest Service specifically declined to do so. Since we have no idea why this order is in the record, we have no reason to expect or not expect a superseding order, and its absence has no meaning.

The majority next looks to the vehicle registrations found in the record. Again, neither the contracting officer prior to the appeal, nor the Forest Service in any of its filings at this Board including its two briefs, ever referred to the vehicle registrations as a reason that vehicles were overweight. In any event, the majority states, "The purchaser's vehicle registrations provided to the agency on January 27, 2011, indicate a declared maximum gross vehicle weight for its standard trucks of 100,000 pounds . . . and for its trailers of zero pounds." The majority continues on to conclude, "Without permits, the purchaser was not to haul additional weight (over 100,000 pounds) on Montana roads. . . . Montana Code 61-10-233."

This argument is flawed. The registrations appear in the Appeal File at RE-544-51. The registrations for the trucks do say that their maximum weights are 100,000 pounds and the pup trailers' maximum weights are zero pounds. However, what the majority fails to include in its decision is that the trucks have yearly registrations with beginning dates (1/27/2011) and ending dates (1/31/2012), and include the declared GVW (100,000), and the GVW class (Class 1). On the other hand, the trailers have permanent registrations that do not include the beginning or ending dates, or the GVW, or the class. The majority's conclusion then that the total legal weight that can be carried by the trailer is zero pounds and by a truck (tractor and trailer) plus a pup trailer is 100,000 pounds is wrong.

The purpose of the trailer is to carry cargo. The statute dealing with the permanent registration of trailers divides trailers into two classes, one above 6000 pounds and one below 6000 pounds. Montana Code 61-3-321(3). Obviously, the permanent registration of these trailers is substantially more than zero and the combined registration weight of the truck and pup trailer substantially exceeds 100,000 pounds.

In arguing that vehicles were overweight, the majority states that the purchaser between November 15, 2010, and January 21, 2011:

> hauled over the restricted road at least 31 times (7 for truck; 24 for truck with trailer) with gross vehicle weights in excess of 80,000 (all of these truck with trailer weights were also greater than 84,500 pounds); of these truck with trailer weights, 6 times the weight was in excess of 100,000 pounds. Appeal File at RE-108-11.

What the majority implies here is that these weights exceeded limits of 80,000 pounds, 84,500 pounds, and 100,000 pounds. However, as explained above, such limits do not exist, and the parties were not aware of them. There is no evidence in the record that any of the loads referred to were anything other than legal. The Forest Service has demonstrated nothing to the contrary. The Montana chart, which both parties agree applies, shows that the five-axle truck weight limit is 91,750 pounds for a truck that is stretched out to seventy feet. A seven-axle vehicle stretched out to 90 feet reaches its limit at 112,500 pounds.[3]

The majority focuses on the one time that an EM Logging driver received a ticket for being overweight. EM Logging does not dispute that this incident did happen.[4] The driver,

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[3] In November 2010, EM Logging owned three fifty-foot long trucks. These trucks could be stretched out to 70 feet. EM Logging also had five trailers that could be attached to the trucks, increasing the overall length and number of axles. The overall length could be stretched out to about ninety feet. Transcript at 622-26.

[4] The majority's facts relating to the Forest Service incident report of January 20, 2011, written by Law Enforcement Officer Helmrick, are misleading, or at least incomplete. The majority states that the Forest Service's report relating to this occurrence indicates that purchaser had been cited for "hauling overweight loads of logs over Forest Service bridges with weight limits of 80,000 pounds (violating regulation 36 CFR 261.54(d))." This is true. However, there is no 80,000 pound weight limit, or any weight limits at all for trucks traveling on Forest Service roads in 36 CFR 261.54(d). Accordingly, we do not know where Officer Helmrick came up with his stated 80,000 pound limit.

Laverne Miller, testified that he forgot to lengthen the trailer and could have avoided the ticket had he done so. Transcript at 494. The majority states: "The purchaser's explanation, that had it lengthened this truck it would have complied with Montana code and the bridge formula, is not borne out by the facts in the record, as the purchaser has not demonstrated the potential length of the truck and trailer used in the hauling." This is incorrect. The testimony of the driver is more than sufficient to support the conclusion that the truck and trailer could have been stretched out. There is no requirement for him to put into the record the actual potential length of the truck and trailer. The purchaser's president has testified that all three of his trucks stretched out to seventy feet.

In summation, the majority's position that the purchaser violated any load weight limitation lacks merit. The majority even admits that "Montana permits trucks to be operated on highways under its jurisdiction with gross vehicle weights in excess of 80,000 pounds, with the maximum weight determined by the bridge formula." So, the majority admits that the contracting officer's asserted 80,000 pound limit for trucks (tractor and one trailer) is erroneous. In the same paragraph, the majority makes the statement, "Montana law recognizes the 80,000 federal gross weight limit, but requires particular additional fees for vehicles with capacities in excess thereof. MCA § 61-10-201." It is unclear what point the majority is trying to make here. In any event, the fact that Montana requires particular additional fees for vehicles weighing over 80,000 pounds is irrelevant. Montana imposes increasing fees every 2000 pounds on trucks from 16,000 pounds through 80,000 pounds. MCA § 61-10- 201.

The purchaser claimed that there existed a ten percent tolerance relating to weight limitations. In response, the majority states, "The record and Montana code do not support the assertion that the purchaser legally could violate weight maximums, which are inclusive of tolerances." This statement is misleading. Montana statute using the term tolerance indicates:

61-10-144 Violation of standards – tolerance.

We do know, however, that Officer Helmrick's report indicates that in December 2010, he had received information from the contracting officer, Philip Emery, that weight slips for the Big Steep timber sale showed that loads were as much as 14,000 pounds overweight for Forest Service roads and for county and state roads. We do not know whether Mr. Emery told Officer Helmrick that the weight limit for these roads was 80,000 pounds, but it certainly seems possible.

. . . .

> (2) The operator of a vehicle or combination of vehicles may move over the highways to the first open stationary scale or portable scale on an engineered site, as defined in 61-10-141(4), without incurring the excess weight penalties set forth in 61-10-145 if the total gross weight of the vehicle or combination of vehicles does not exceed allowable total gross weight limitations by more than 10% and if the weight carried by any axle or combination of axles does not exceed the allowable axle weight limitations by more than 10%. If the vehicle or combination of vehicles is not in excess of the allowable total gross or axle weight limitations by more than 10%, the department may issue a single trip permit for the fee of $10, allowing the vehicle or combination of vehicles to move over the highways to the first facility where its load can be safely adjusted or to its destination.

MCA § 61-10-144(2). Thus, Montana does provide special, reduced penalties for weight overages of ten percent or less. When the weight is less than ten percent over a limit, there are no excess weight penalties, and for ten dollars an operator can move on to the first facility, where its load can be safely adjusted. With such treatment placed in the state code, it would seem that the Forest Service should not be overly concerned when a purchaser's truck is less than ten percent overweight.[5] The contracting officer indicated in his letter of December 1, 2010, that he checked with the Montana Department of Transportation and was told that there was no tolerance. Appeal File at 753-54.

It seems that the majority may be faulting the purchaser for seemingly agreeing that an 80,000 pound weight limit existed initially, or of not objecting to it quickly enough. Such faulting would be improper. The contracting officer cannot make up a contract requirement and have it become binding, just because the purchaser initially agrees with it or does not immediately dispute it. The requirement must have an independent contractual basis or it is invalid.

The Forest Service's and the majority's position on overweight trucks and trucks with trailers is incorrect. Under these circumstances, where the parties have agreed that the Montana GVW chart applies to both Forest Service and Montana state roads, it is inappropriate for this Board to find otherwise. It is questionable for the majority to impose

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[5] The majority's reference to tolerances in this case is misplaced. The unknown tolerances that the majority is referring to do not include the ten percent tolerance covered in MCA § 61-10-144.

load limits on the roads traveled by the purchaser, limits that were never provided to the purchaser during performance, and never asserted at trial or in briefing.

Haul route and overnighting trucks

As required by the contract, provision C.849, the purchaser submitted a haul map and a written general plan for hauling. The majority states that the purchaser initially submitted a haul map and the contracting officer rejected it, requiring a written plan. This is not so. The haul map was submitted on September 30, 2010, or just prior to this date. Appeal File at 56. At this point the contracting officer asked for clarification and a written haul route plan. *Id*. The written haul route plan was submitted by letter dated October 24, 2010. The written haul plan was accepted by the contracting officer by letter of November 3, 2010. Appeal File at 82. The contracting officer testified that he never rejected the route haul map. Transcript at 429. The purchaser testified that, since he did not hear anything from the contracting officer, he believed that the haul map had been approved. Transcript 607. Highway 93 to Eureka was on the haul map and the purchaser believed that he was authorized to haul on it. Transcript at 606-07. He did not become aware that he was not so authorized until he received a notice of breach dated January 14, 2011. Transcript at 606-07; Appeal File at 185. The actual routes were never finally approved or clarified, and they were not clarified at trial or in briefing. Accordingly, the Forest Service cannot establish that the purchaser ever violated the haul routes. The Forest Service has the burden of proof and it has not satisfied that burden.

The majority cites to the purchaser's overnighting trucks at locations not approved by the agency. Initially, the purchaser had requested that it be allowed to overnight trucks, and the contracting officer refused without stating a reason. As it turned out, it was very difficult for the purchaser to drive to the mills in one day. Accordingly, he was forced to overnight trucks on occasion. Obviously, he could not drive back to the site. What was he to do? Have his drivers drive all night? The Forest Service finally began to realize this. By letter dated January 15, 2011, Ms. Pat Potter, a supervisory resource specialist and contracting officer, stated: "If it is so difficult for purchaser to get a load off the sale area and into TRL mill in 1 day, I believe we need to immediately set up an overnight agreement which is specific to, for example, Libby where FS and purchaser agree, too as to secure location . . . ." Appeal File at 151. In fact, the contracting officer did finally propose an overnighting agreement that was put in registered mail and which the purchaser did not receive until after it was terminated. Thus, the overnighting of trucks should not be used as a reason to terminate the purchaser.

Snow plowing

The majority refers only to inspection reports and concludes that they indicate few incidents of unacceptable plowing at the time hauling was occurring. It concludes that "[t]he instances of inadequate plowing or hauling over unplowed roads are few, but significant as unplowed roads pose a safety hazard." The majority here recognizes that the plowing of snow was done relatively well by the purchaser. However, the majority's statement that hauling over unplowed roads is a safety hazzard *per se* is incorrect. The contract places no restriction on "hauling over unplowed roads" and the conclusion that all hauling over unplowed roads is a safety hazzard is incorrect.

In the November 30, 2010, notification for breach and suspension, the contracting officer indicated that the purchaser had violated provisions C5.316 - Snow Removal, and B6.33 Safety. The basis for this notice of breach was in part that a road had not been plowed. Appeal File at 738. Again, there is no requirement in the contract that the roads be kept plowed at all times regardless of the amount of snow that has fallen, and the purchaser was in the process of plowing the roads. Transcript at 557-58. Accordingly, there was no violation of provision C5.316.

Subsequently, the sale administrator inspected the roads for adequacy of plowing a number of times and found roads unsatisfactory. However, he did not conduct these inspections soon after the purchaser had notified him that the roads were ready for inspection. Transcript at 572-75. The contracting officer admitted that the purchaser had been plowing the roads, but that by the time the Forest Service inspected them, new snow had fallen. Transcript at 408. The roads are in the snow belt and heavy snow had been falling regularly. The purchaser's operations remained suspended until the Forest Service inspected the roads after they were plowed and before a new snowfall. The Forest Service suspension of the contract on November 30, 2010, Appeal File at 738, based upon improper snow removal was improper.

Conclusion

CBCA 2397

I disagree with the majority's finding that the purchaser was at fault. As required by the contract, the purchaser cleaned the equipment and notified the Forest Service to come and inspect it. A representative of the contracting officer inspected the equipment and found it to be clean. Therefore, under the contract the equipment was clean, and the purchaser complied with all contract requirements. Subsequently, at the work-site, the contracting officer found the equipment to be unclean. If the Forest Service inspector did a poor job

inspecting the equipment at the initial inspection, it is the Forest Service's problem, for which the purchaser should not be penalized. If the Forest Service wanted the equipment re-cleaned, it must bear all costs.

CBCA 2427

The Forest Service's actions in this case are puzzling. It found purchaser's equipment clean and approved transport to the site. Then it found the equipment dirty and blamed the purchaser for bringing "unclean" equipment to the site. It imposed an 80,000 pound vehicle weight limit upon purchaser based upon Montana statute that has no 80,000 pound weight limit. The contracting officer never has explained where he came up with the 80,000 pound weight limit. The parties agreed during performance, trial, and briefing that the Montana GVW chart applied here to Forest Service and state roads. Accordingly, the Forest Service has waived any argument that any other weight limits apply.

The Forest Service did not establish what the haul routes were, yet it found the purchaser in violation. Also, it refused to agree to allow the purchaser to overnight trucks off-site, when the purchaser could not effectively conduct operations without such an agreement. The Forest Service found the purchaser in violation of clause C5.316 - Snow Removal when the purchaser was in the middle of plowing snow. It prohibited the purchaser from conducting operations until the roads were plowed to its satisfaction, without contractual authority to do so.

The Forest Service has not established that the purchaser "[h]as engaged in a pattern of activity that demonstrates a flagrant disregard for the terms of the contract" or sustained its burden of proving that the termination was proper.

R. ANTHONY MCCANN
Board Judge