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| <b>QUALITY FORESTS, INC.,</b>        | ) | <b>AGBCA No. 2004-185-1</b> |
|                                      | ) |                             |
| Appellant                            | ) |                             |
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| <b>Representing the Appellant:</b>   | ) |                             |
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**ORDER OF THE BOARD OF CONTRACT APPEALS**

May 5, 2005

**VERGILIO, Administrative Judge.**

On May 4, 2005, the Board received from Quality Forest, Inc. (the contractor) a Motion to File Out of Time Due to New Evidence, as well as documents to be included in the appeal file, and what is styled a brief. The motion, dated May 3, 2005, was sent by facsimile and received well after the working hours at the Board that night. In pertinent part, the contractor states in the motion:

Appellant's counsel found new evidence very late last week concerning the amount of rainfall affecting vegetation growth. The brief was due on Friday, the 29<sup>th</sup> of April, 2005, and until the new evidence on rainfall was found, had intended to submit the brief on the 29<sup>th</sup>. On the 29<sup>th</sup>, Appellant[ 's] counsel tried to refurbish the brief and include the evidence in the brief, and hoped to submit it at least by fax on the 29<sup>th</sup>. However, the entire brief needed to be changed based on the new evidence, and late that night, the appellant's counsel emailed opposing counsel and told her the situation and asked if she would agree for submittal by Tuesday, the 3<sup>rd</sup> of May. Opposing counsel returned an emailed [sic] and vehemently disagreed.

The assertions of counsel regarding when it found new evidence are belied by the documents submitted, which are pages from internet searches, with a website and date printed on the bottom of each page. Of the eleven pages submitted, three pages (293-95) have a query date of May 2, 2005; three pages (299, 301, 301A) have a query date of April 26, 2005; two pages have a query date of April 21, 2005 (300, 300A); and three pages (296-98) have a query date of April 19, 2005.

The contractor provided the underlying submission in response to the dictates of the presiding judge and agreement of the parties, as detailed during a telephone conference:

The complaint provides insufficient details and few references to the record in support of the underlying contention that the contractor is entitled to relief because of a differing site condition and changes. So as to be received no later than Friday, April 29, the contractor will file and serve a written statement, with supporting documentation and references to the existing record. The submission will address both the merits and the quantum of the relief sought.

(Memorandum of Telephone Conference Held on Mar. 31, 2005.)

Counsel for the contractor permitted the April 29 submission date to lapse, without contacting the Board to seek an enlargement of time. This failure to seek additional time prior to the submission of May 3 occurred while counsel was aware of the Government's opposition to the request.

This motion by the contractor represents the most recent late submission by counsel for the contractor, and comes while a Government motion for dismissal or sanctions for previous, similar late conduct is pending and being held in abeyance (with the Government's agreement) as the contractor articulates its position and support regarding the substance of the dispute. The unacceptability of the tardiness of action has been addressed previously. Counsel for the contractor apologized for missing a telephone conference set for November 23, and other deadlines, with the explanation that the failures were due to the law office experiencing several problems. (Memorandum of Telephone Conference Held on Dec. 7, 2004). On January 18, 2005, counsel for the contractor was not available for a previously scheduled telephone conference; as of that date the Government had not received any discovery requests from the contractor despite the December 20, 2004, date established for the submission (Order, Jan. 19, 2005). The conduct by counsel for the contractor was discussed during a telephone conference in February 2005:

The letter from the contractor does not address the failure to contact the Government and the Board, seeking an extension of time when it was clear that dates for service of discovery requests and responses would not be met. Government counsel is not to fault for these failures of the contractor's counsel.

(Memorandum of Telephone Conference Held on Feb. 7, 2005). On February 14, 2005, the Government filed and served a motion asking the Board to dismiss this appeal for failure to prosecute (pursuant to Rule 31), and alternatively, to treat the contractor's failure to respond to discovery requests as admissions that responses to interrogatories would not support the position of

the contractor and that documents exist that do not support the position of the contractor. The event precipitating the motion was the contractor's failure to provide the Government with discovery responses by the established date. In particular, "The contractor has had the discovery requests since approximately November 19, 2004, and has already repeatedly missed deadlines for responding, without requesting extensions of time." (Order, Feb. 16, 2005.) On March 1, 2005, the Board received from the contractor a request for a time extension; the Board granted the request (Order, Mar. 1, 2005). As noted above, on March 31, with the agreement of the parties, the Board established the deadline for the submission here at issue.

The contractor's contention that it found new evidence, thereby requiring the revision of its submission, fails to demonstrate a reasonable basis for the requested extension, a request that comes after the submission was due. Apart from the principal fact that the documentation does not support the assertion that the information was "new found" so as to interfere with a timely submission, counsel's actions demonstrate a continued disregard for Board orders and directives, represent unprofessional conduct toward the Board and the Government, and do a disservice to the client (the contractor). Counsel filed this appeal on behalf of the contractor on June 24, 2004. As with the earlier missed deadlines, counsel's latest failure to make a timely submission or to seek an extension in a timely manner cannot be attributed to the Government. The unexcused and unacceptable conduct of counsel hinders the resolution of this and other matters at the Board. Contractor's counsel continues to act without regard to the just and expeditious resolution of this appeal.

Counsel for the contractor has failed to establish good cause for the requested permission to file out of time, under the given facts and the circumstances of continued disregard of Board orders. The Board denies the request.

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**JOSEPH A. VERGILIO**  
Administrative Judge

**Issued at Washington, D.C.**  
**May 5, 2005**