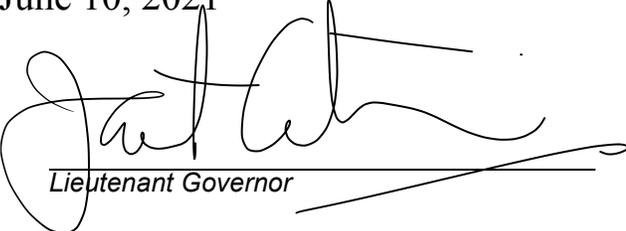


PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 334

, Approved and Ordered June 10, 2021



Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96, is amended as set out in the attached Appendix.



Minister of Lands, Forests, Natural Resource
Operations and Rural Development



Presiding Member of the Executive Council

(This part is for administrative purposes only and is not part of the Order.)

Authority under which Order is made:

Act and section: *Forest Act*, R.S.B.C. 1996, c. 157, ss. 155, 157, 157.2, 159 and 161

Other: O.C. 86/96

R10478524

APPENDIX

- 1 **Section 1 of the Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96, is amended**
 - (a) **in the definition of “peer” by striking out “timber harvesting operations” and substituting “timber harvesting services” and by striking out “section 25 (5)” and substituting “section 25.01 (4)”, and**
 - (b) **by repealing the definition of “rate proposal”.**
- 2 **Section 6 is amended**
 - (a) **in subsection (1) by repealing paragraphs (c) and (d),**
 - (b) **in subsection (2) by striking out “the Commercial Arbitration Act” in both places and substituting “the Arbitration Act”, by striking out “sections 23, 25, 25.2, 32, 33.1, 33.43, 33.5 and 33.51” and substituting “sections 23, 25.02, 25.2, 32, 33.1, 33.43, 33.5 and 33.51”, and by striking out “this Part 4” and substituting “this Part”, and**
 - (c) **in subsection (3) by striking out “sections 23, 25, 25.2, 32, 33.1, 33.43, 33.5 and 33.51” and substituting “sections 23, 25.01, 25.02, 25.2, 32, 33.1, 33.43, 33.5 and 33.51”.**
- 3 **Sections 8 (1), (2), (5) and (6), 11 (1) and 33.1 (8) (e) are amended by striking out “the Deputy Minister of Forests and Range” and substituting “the minister”.**
- 4 **Sections 8 (3) and (7) and 33.1 (8) (f) are amended by striking out “the Deputy Minister of Forests and Range or a person designated by the deputy minister” and substituting “the minister”.**
- 5 **Section 8 is amended**
 - (a) **in subsection (12)**
 - (i) **in paragraph (a) by striking out “, unless the parties to the arbitration otherwise agree”, and**
 - (ii) **in paragraph (b) by striking out “, unless the parties to the arbitration agree otherwise”, and**
 - (b) **in subsection (14) by adding “in writing” after “all parties agree”.**

6 *Sections 9 and 10 are repealed and the following substituted:*

Fees and expenses of mediator shared

- 9** (1) The fees and expenses of the mediator in a mediation, or of a clerk, secretary or reporter assisting in a mediation, must be shared equally between the parties to the dispute, whether or not the mediation leads, without arbitration, to a settlement of the dispute.
- (2) Despite subsection (1), at any time after a mediator is agreed on by the parties or appointed, the mediator may direct either party, including the successful party, to pay up to 100% of the fees and expenses of the mediator, if the mediator considers that
- (a) the party failed to provide in a timely manner information that was reasonably requested by the mediator or by the other party,
 - (b) the party took a position in the mediation that was unreasonable in the circumstances, or, in the mediation of a rate dispute, a position that was unreasonable in light of the rate test set out in section 26.01, or
 - (c) the party acted in bad faith or with the intent to circumvent the provisions of this regulation.

Parties bear own costs of mediation

- 10** (1) Each party to a mediation must bear the party's own costs of the mediation, except the fees and expenses described in section 9.
- (2) Despite subsection (1), at any time after the mediator is agreed on by the parties or appointed, the mediator may direct either party to pay up to 100% of the other party's costs of the mediation, if the mediator considers that any of the circumstances described in section 9 (2) (a) to (c) exist.

7 *The following sections are added to Division 2 of Part 4:*

Fees and expenses of arbitrator shared

- 10.1** (1) The fees and expenses of the arbitrator in an arbitration, or of a clerk, secretary or reporter assisting in an arbitration, must be shared equally between the parties to the dispute.
- (2) Despite subsection (1), at any time after an arbitrator is agreed on by the parties or appointed, the arbitrator may direct either party, including the successful party, to pay up to 100% of the fees and expenses of the arbitrator, if the arbitrator considers that
- (a) the party failed to provide in at timely manner information that was reasonably requested by the arbitrator or by the other party,
 - (b) the party took a position in the arbitration that was unreasonable in the circumstances, or, in the arbitration of a rate dispute, a position that was unreasonable in light of the rate test set out in section 26.01 [*rate test*], or
 - (c) the party acted in bad faith or with the intent to circumvent the provisions of this regulation.

Parties bear own costs of arbitration

- 10.2** (1) Each party to an arbitration must bear the party's own costs of the arbitration, except the fees and expenses described in section 10.1.
- (2) Despite subsection (1), at any time after an arbitrator is agreed on by the parties or appointed, the arbitrator may direct a party to pay up to 100% of the other party's costs of the arbitration, if the arbitrator considers that any of the circumstances described in section 10.1 (2) (a) to (c) exist.
- 8** *Section 11 (2) and (3) is amended by striking out "The Deputy Minister of Forests and Range or person designated by the deputy minister" and substituting "The minister".*
- 9** *The following section is added before Division 1 of Part 5:*

Definition for this Part

- 11.1** In this Part, "**productivity**" means the estimated quantity of work, associated with each phase of the timber harvesting operation in respect of which services are provided under a contract, that a contractor can complete per unit of time that is used for the services that are provided under the contract.
- 10** *Section 14 is repealed and the following substituted:*

Flexibility to address change

- 14** (1) A replaceable contract must provide that, upon reasonable notice to the contractor, the licence holder may, for bona fide business and operational reasons, make changes to the information provided under section 19.1 by requiring that the contractor
- (a) use different timber harvesting methods, technology or silvicultural systems,
 - (b) move into a new operating area,
 - (c) comply with different specifications, or
 - (d) undertake any other operating change necessary to comply with a direction made by a government agency or lawful obligation imposed by any federal, provincial or municipal government.
- (2) A replaceable contract must provide that,
- (a) if any of the following events occurs, either party may, by written notice provided to the other party within 30 days of the event occurring, request a review of the rate to be paid for the timber harvesting services:
 - (i) the licence holder gives notice under subsection (1) of a change that results in a material change in the timber harvesting services to be provided by the contractor;
 - (ii) after the start of timber harvesting operations, the licence holder discovers and advises the contractor of a material error or omission in the information provided under section 19.1;

- (iii) after the start of timber harvesting operations, the contractor discovers and advises the licence holder of a material error or omission in the information provided under section 19.1 that could not have reasonably been discovered on a diligent review of the location where the work is to be performed and of that information,
 - (b) if the contractor discovers that the licence holder has failed to provide to the contractor all the information required under section 19.1, the contractor may, by written notice provided to the licence holder within 30 days of the discovery, request a review of the rate to be paid for the timber harvesting services, and
 - (c) if an event described in paragraph (a) or (b) occurs, the contractor may, by written notice provided to the licence holder within 15 days of the event occurring, elect not to perform the work described under section 19.1 without incurring any liability to the licence holder.
- (3) If a change in law, natural disaster, interference by a person who is not a party to the contract or any other event beyond the reasonable control of a contractor has a material effect on the productivity or operating costs of the contractor,
- (a) either party may, by written notice provided to the other party within 30 days of the event occurring, request a review of the rate to be paid for the timber harvesting services, and
 - (b) the contractor may, by written notice provided to the licence holder within 15 days of the event occurring, elect not to perform the work described under section 19.1 without incurring any liability to the licence holder.
- (4) If a review is requested under subsection (2) or (3) and the parties are unable to agree on the rate to be paid for timber harvesting services, a rate dispute is deemed to exist and must be resolved in accordance with Division 4 of Part 5.

11 The following section is added to Division 1 of Part 5:

Replaceable contract report to minister

16.1 A licence holder must report the following to the minister in the form and manner and at the times required by the minister:

- (a) the number of replaceable contracts the licence holder is a party to;
- (b) the parties to each contract;
- (c) the amount of work specified in each contract;
- (d) the scope of each contract.

12 Section 17 is amended by adding the following subsections:

- (5) At the request of a contractor, a licence holder must provide information to confirm that the amount of work that is specified in the replaceable contract under subsection (1) meets the requirements of section 18 or 19.
- (6) A contractor must keep confidential any information received under subsection (5), except to the extent that disclosure is required in the mediation or arbitration of an amount of work dispute.

13 *The following sections are added:*

Work specifications

- 19.1** (1) Before rate negotiations are initiated, a licence holder must provide to a contractor the following information:
- (a) the replaceable contract to which the information pertains;
 - (b) the timber harvesting services the licence holder requires the contractor to perform under the replaceable contract;
 - (c) the estimated quantity of work the licence holder requires the contractor to perform;
 - (d) the location of the cutblock or road, or both, where the timber harvesting services are to be provided;
 - (e) the proposed start date and completion date for the timber harvesting services;
 - (f) any other information that is not otherwise available to the contractor, that is in the possession of the licence holder and that is reasonably necessary for the contractor in order to
 - (i) estimate the productivity and operating costs of the work to be performed under the contract, and
 - (ii) assess the rate to be proposed for the services to be provided under the contract.
- (2) At any time before a rate dispute is deemed to exist under section 14 (4) or 25 (4),
- (a) the contractor may request that the licence holder provide any clarification of the information provided under subsection (1) that the contractor reasonably requires to negotiate the rate to be paid for the timber harvesting services, and
 - (b) the licence holder must provide the requested clarification.

Contractor knowledge deemed

- 19.2** Effective at the time the contract is made, a contractor is deemed to have knowledge of all matters related to the work to be performed under the contract that could affect the productivity or operating costs of the work, if those matters can reasonably be known on a diligent review of either or both of the following:
- (a) the location where the work is to be performed;
 - (b) the information provided under section 19.1.

14 *The following section is added to Division 4 of Part 5:*

Definitions for this division

24.01 In this Division:

“**administrative and overhead costs**” means fixed costs that

- (a) are not equipment costs, labour costs or costs of extras, and
- (b) include the following:
 - (i) wages and salary of supervisors and staff, excluding labour costs;

- (ii) office and operating costs, including costs associated with office equipment, insurance, bookkeeping and accounting services, legal services and other professional services;

“costs of extras” means fixed costs that

- (a) are not equipment costs, labour costs or administrative and overhead costs,
- (b) are incurred for things that are required by law or in the work specifications provided under section 19.1, and
- (c) include the following:
 - (i) fire protection costs;
 - (ii) mobilization and demobilization costs;
 - (iii) costs associated with safety training or certification training;
 - (iv) costs associated with safety or environmental audits;
 - (v) costs associated with the role of prime contractor, as defined in section 13 of the *Workers Compensation Act*;

“equipment costs” means the operating costs associated with each piece of equipment required in each phase of a contractor’s timber harvesting services,

- (a) including depreciation costs and repair and maintenance costs, and
- (b) excluding the capital costs of the initial investment in the equipment;

“labour costs” means the costs of labour in each phase of a contractor’s timber harvesting services.

15 Section 25 is repealed and the following substituted:

Rate proposals

- 25**
- (1) A contractor must deliver a rate proposal in writing to the licence holder within 15 days of the later of the following:
 - (a) the date the contractor receives the information provided under section 19.1 (1);
 - (b) the date the contractor receives the clarification provided under section 19.1 (2), if requested.
 - (2) A licence holder who receives a rate proposal from a contractor under subsection (1) must, within 15 days of receiving the rate proposal, deliver a notice in writing to the contractor either
 - (a) accepting the rate proposed in the rate proposal, or
 - (b) rejecting the rate proposed in the rate proposal and offering a rate that the licence holder believes to meet the rate test set out in section 26.01 for the work described under section 19.1.
 - (3) A licence holder who fails to deliver a notice under subsection (2) is deemed to have accepted the rate proposed in the rate proposal.
 - (4) If a contractor does not accept the rate offered by a licence holder in a notice delivered under subsection (2) (b) within 7 days of receiving the notice, a rate dispute is deemed to exist.

Rate dispute mediations

- 25.01** (1) Sections 7 and 8 apply to the mediation of a rate dispute to the extent that they do not conflict with this section.
- (2) If the parties to a rate dispute have not agreed on a mediator in writing within 7 days of a dispute being deemed to exist under section 14 (4) or 25 (4),
- (a) a party may by written notice to the other party and to the minister request that the minister appoint a mediator, and
 - (b) within 7 days of receiving a notice under paragraph (a), the minister must appoint a registered mediator as mediator.
- (3) Within 7 days of a mediator being agreed on by the parties or appointed, each party may deliver to the mediator and to the other party a mediation proposal that outlines
- (a) a rate for the work described under section 19.1, and
 - (b) the basis on which the party believes that the rate meets the rate test set out in section 26.01.
- (4) If requested by the mediator, or if agreed on by the parties, each party must appoint one peer to assist the mediator during the mediation process.
- (5) If a party does not appoint a peer under subsection (4) within 7 days of the request by the mediator, the mediator may
- (a) proceed without the appointment of the peer, or
 - (b) appoint a peer.

Rate dispute arbitrations

- 25.02** (1) Sections 6 to 8 apply to the arbitration of a rate dispute to the extent that they do not conflict with this section.
- (2) If a rate dispute is not resolved within 14 days of a mediator being agreed on by the parties or appointed, a party may commence arbitration proceedings by delivering a notice of arbitration to the other party and to the mediator.
- (3) If the parties have not agreed on an arbitrator in writing within 7 days of a notice of arbitration being delivered under subsection (2),
- (a) a party may by written notice to the other party and to the minister request that the minister appoint an arbitrator, and
 - (b) within 7 days of receiving a notice under paragraph (a), the minister must appoint a registered arbitrator as arbitrator.
- (4) Despite section 8 (5) (b), the arbitration of a rate dispute may not be conducted by a 3 person arbitration panel.
- (5) In addition to the matters set out in sections 6 and 8, an arbitrator may determine the following:
- (a) whether the hearing will be conducted orally or in writing;
 - (b) how evidence is to be admitted;
 - (c) whether expert evidence may be tendered;

- (d) whether the parties may cross-examine witnesses.
- (6) Within 7 days of an arbitrator being agreed on by the parties or appointed under subsection (3), each party must deliver to the other and to the arbitrator a final offer in writing that outlines
 - (a) a rate for the work described under section 19.1, and
 - (b) the basis on which the party believes that the rate meets the rate test set out in section 26.01.
- (7) If a party has requested from the other party information that is reasonably necessary to make a final offer under subsection (6) and has not received the information, the arbitrator may
 - (a) extend the time for delivery of a final offer, or
 - (b) deliver an arbitration award.
- (8) Unless otherwise directed by an arbitrator, the arbitration hearing must be completed within 14 days of the delivery by each party of a final offer to the arbitrator and to the other party.
- (9) Within 7 days of an arbitration hearing being completed, the arbitrator must deliver an arbitration award in which the arbitrator selects the final offer that, in the opinion of the arbitrator, best meets the rate test set out in section 26.01.

Performance when rate is set

25.03 If a rate has been accepted, deemed to have been accepted, agreed on or determined by arbitration, the licence holder must make the work described in the rate proposal available to the contractor to perform and the contractor must perform that work at the rate that was accepted, deemed to have been accepted, agreed on or determined.

16 Section 25.1 is amended

- (a) in paragraph (a) by striking out “all rates known to it” and substituting “all information known to it” and by striking out “section 26.01 (2) (a), (b), (c) and (d)” and substituting “section 26.02 (1) (a), (b), (c), (d) and (e)”, and**
- (b) in paragraph (b) by striking out “section 26.01 (2) (e)” and substituting “section 26.02 (1) (f)”.**

17 Section 25.2 is amended

- (a) by striking out “section 25 (5)” and substituting “section 25.01 (4)”,**
- (b) in paragraph (a) by striking out “with respect to the comparability of any rate as a fair market rate” and substituting “with respect to whether any rate meets the rate test set out in section 26.01 [rate test]”, and**
- (c) in paragraph (b) by striking out “with respect to the comparability of a rate as a fair market rate” and substituting “with respect to whether a rate meets the rate test set out in section 26.01”.**

18 Section 26 (a) is amended by striking out “unless both parties agree otherwise”.

19 Sections 26.01 and 26.02 are repealed and the following substituted:

Rate test

26.01 The rate for the timber harvesting services to be provided by a contractor must be a rate that a willing licence holder and a willing contractor acting reasonably and at arm's length from each other in similar circumstances would agree

- (a) is competitive by industry standards, and
- (b) would permit a contractor operating in a manner that is reasonably efficient in the circumstances, in terms of costs and productivity, to earn a reasonable profit.

Rate test considerations

26.02 (1) In applying the rate test set out in section 26.01, an arbitrator may consider the following:

- (a) the fixed and variable costs incurred by the contractor, including
 - (i) equipment costs,
 - (ii) labour costs,
 - (iii) costs of extras, and
 - (iv) administrative and overhead costs;
- (b) any rates agreed on by the licence holder and the contractor for prior timber harvesting services;
- (c) the costs incurred by and the productivity of the contractor in providing prior timber harvesting services;
- (d) the costs incurred by and the productivity of other persons in the forest industry in each phase or component of similar timber harvesting services;
- (e) the rates agreed on by other persons in the forest industry for similar timber harvesting services;
- (f) if necessary to make meaningful comparisons with any of the rates described in paragraphs (b) and (e) and with any of the costs and productivity described in paragraphs (c) and (d), the differences between the timber harvesting services that pertain to the rate in dispute and the timber harvesting services that pertain to the rates described in paragraphs (b) and (e) or to the costs and productivity described in paragraphs (c) and (d), including
 - (i) differences in operating conditions including differences in terrain, yarding, distances, hauling distances and volume of timber per hectare,
 - (ii) differences in the total amount of timber processed,
 - (iii) differences in the required equipment configuration,
 - (iv) differences in required phases,
 - (v) differences in operating specifications,
 - (vi) differences in law,
 - (vii) differences in contractual obligations,

- (viii) differences in the underlying costs of timber harvesting services in the forest industry generally that would affect rates, including changes in the cost of labour, fuel, parts and supplies, and
 - (ix) differences in the cost of moving to a new operating area, if any;
 - (g) any other similar data or criteria that the arbitrator considers relevant.
- (2) In applying the rate test set out in section 26.01, an arbitrator must not consider any rates that do not allow for meaningful comparisons with the rate in dispute, including the following:
- (a) rates for which there is insufficient information available in order to make meaningful comparisons;
 - (b) rates that differ significantly from most of the rates agreed on for similar timber harvesting services in similar circumstances;
 - (c) rates for incremental work that exceeds the amount of work under a contract;
 - (d) rates for which negotiations involved non-monetary consideration;
 - (e) rates established by arbitration;
 - (f) rates agreed on under replaceable and non-replaceable contracts before the date this section comes into force;
 - (g) rates agreed on under contracts for timber harvesting services on land other than Crown land.
- (3) In applying the rate test set out in section 26.01, an arbitrator must not consider any goodwill or other intangible asset associated with purchasing a replaceable contract or otherwise acquiring the right to provide timber harvesting services under a replaceable contract.

20 *The following section is added before Division 5 of Part 5:*

Transition

26.03 If a notice of dispute in respect of a rate dispute was delivered under section 8 (1) *[mediation and arbitration proceedings]* before the date this section comes into force, the resolution of that rate dispute will be governed by sections 25 to 26.02 as they were immediately before that date.

21 *Section 33.1 (8) (e) is amended by striking out “the deputy minister” and substituting “the minister”.*

22 *Section 38 is amended by striking out “Sections 22, 24.1, 25, 25.1, 25.2, 26 and 26.01” and substituting “Sections 22, 24.01, 24.1, 25, 25.01, 25.02, 25.1, 25.2, 26, 26.01 and 26.02”.*

23 *Section 42 is amended by adding “or for the coast area” after “for the interior area”.*

24 *Section 49 (b) is amended by striking out “the Commercial Arbitration Act” and substituting “the Arbitration Act”.*

- 25 *Section 52 is amended by striking out “8 to 10, 12 to 15, 17 to 26.02” and substituting “8 to 10.2, 12 to 15, 17 to 26.03”.*
- 26 *Schedule 5 is repealed and the following substituted:*

SCHEDULE 5

(Section 14)

STANDARD PROVISION – CHANGES

- 1 The licence holder may, for bona fide business and operational reasons and on reasonable notice to the contractor, make changes to the information provided under section 19.1 of the regulation by requiring the contractor to do one or more of the following:
 - (a) use different timber harvesting methods, technology or silvicultural systems;
 - (b) move into a new operating area;
 - (c) comply with different specifications;
 - (d) undertake any other operating change necessary to comply with a direction made by a government agency or lawful obligation imposed by any federal, provincial or municipal government,and the contractor will comply with the requirements.
- 2 Despite section 1, if any of the following events occurs, either party may, by written notice provided to the other party within 30 days of the event occurring, request a review of the rate to be paid for the timber harvesting services:
 - (a) the licence holder gives notice under section 1 of a change that results in a material change in the timber harvesting services to be provided by the contractor;
 - (b) after the start of timber harvesting operations, the licence holder discovers and advises the contractor of a material error or omission in the information provided under section 19.1 of the regulation;
 - (c) after the start of timber harvesting operations, the contractor discovers and advises the licence holder of a material error or omission in the information provided under section 19.1 of the regulation that could not have reasonably been discovered on a diligent review of the location where the work is to be performed and of the information provided under section 19.1.
- 3 Despite section 1, if the contractor discovers that the licence holder has failed to provide to the contractor all the information required under section 19.1 of the regulation, the contractor may, by written notice provided to the licence holder within 30 days of the discovery, request a review of the rate to be paid for the timber harvesting services.
- 4 If an event described in section 2 or 3 occurs, the contractor may, by written notice provided to the licence holder within 15 days of the event occurring, elect not to perform the work described under section 19.1 of the regulation without incurring any liability to the licence holder.

- 5 If a change in law, natural disaster, interference by a person who is not a party to the contract or any other event beyond the reasonable control of a contractor has a material effect on the productivity or operating costs of the contractor,
 - (a) either party may, by written notice provided to the other party within 30 days of the event occurring, request a review of the rate to be paid for the timber harvesting services, and
 - (b) the contractor may, by written notice provided to the licence holder within 15 days of the event occurring, elect not to perform the work described under section 19.1 of the regulation without incurring any liability to the licence holder.
- 6 If a review is requested under section 2, 3 or 5 and the parties are unable to agree on the rate to be paid for timber harvesting services, a rate dispute is deemed to exist and must be resolved in accordance with Division 4 of Part 5 of the regulation.