

PRECISION PINE & TIMBER, INC.,)	AGBCA No. 99-160-1
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Appellant)	
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Representing the Appellant:)	
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Alan I. Saltman)	
Saltman & Stevens)	
1801 K Street, N.W.)	
Washington, D.C. 20006)	
)	
Representing the Government:)	
)	
Patricia Leigh Disert)	
Office of the General Counsel)	
U. S. Department of Agriculture)	
Federal Building, Room 4017)	
517 Gold Avenue, S.W.)	
Albuquerque, New Mexico 87102)	

DECISION DENYING PURCHASER’S MOTION FOR SUMMARY RELIEF

May 22, 2000

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by VERGILIO, Administrative Judge.

On April 21, 1999, Precision Pine & Timber, Inc. (purchaser), of Heber, Arizona, filed this appeal regarding a contracting officer’s assessment of \$442,921.20 as damages for failure to cut under its Salt Timber Sale contract, No. 005937, with the respondent, the U. S. Department of Agriculture (Government). The sale was for timber in the Pleasant Valley Ranger District, in the Tonto National Forest, Gila County, Arizona.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended.

Contending that the Government could not assess damages under clause CT9.4 because the resale was under terms and conditions differing from the original sale, and because the Government improperly prohibited the purchaser from participating in the resale, the purchaser seeks summary judgment. The Government filed an opposition to the motion; the purchaser filed a reply.

The existing record does not establish that the purchaser is entitled to judgment as a matter of law. Although the resale utilized terms and conditions different than the original sale, the changed terms and conditions have not been shown to be other than the Government's attempt to mitigate damages. In particular, this purchaser assumed risks of purchasing sawlogs and roundwood for the term of the contract (as mutually extended by the agreement of the parties). At the time of resale, the market for that roundwood was considerably reduced, such that the Government made a portion of the quantity optional and, after reevaluating the price of the roundwood, reduced the base price for both the mandatory and optional quantities. Such actions are not inconsistent with the clause which permits the assessment of damages. Similarly, variations in the time to cut and in base prices do not make the assessment of damages inconsistent with the clause.

Regulation dictates that the Government not accept a bid from the original purchaser for the resale offering absent a determination that the acceptance of a bid is in the public interest. The Government did not determine that the acceptance of a bid from the purchaser was in the public interest; hence, no impropriety has been established. Moreover, the record does not suggest that the purchaser submitted a bid on the resale, or protested or otherwise objected to the Government's conduct of the resale.

Through the existing record, the purchaser has not established a *prima facie* case of the Government's unreasonableness in its attempt to mitigate damages. Thus, the Board is compelled to deny the purchaser's request for summary judgment which would preclude the Government from assessing any damages under an express term of the contract, clause CT9.4.

FINDINGS OF FACT

1. With an award date of February 28, 1994, the Government and purchaser entered into a timber sale contract. Exhibit 1 (all exhibits are in the appeal file). The contract identifies estimated quantities for live and dead sawlogs totalling 4,460 CCF (hundred cubic feet), and for roundwood totalling 1,835 CCF. The price of sawlogs was subject to escalation, the price of roundwood was not (it was priced at a flat rate). Exhibit 1.A at 5, 9. The purchaser was to construct two roads, with a total purchaser credit limit of \$2,564. Exhibit 1.A at 11, 14-16.
2. The contract specifies the termination date as December 31, 1996, and the normal operating season as May 1 to July 15, and August 15 to November 30, inclusive. Exhibit 1.A at 13 (¶¶ AT16, AT17). The purchaser's initial plan of operation, dated May 10, 1994, specifies that the purchaser did not intend to begin cutting until May 1, 1995, Exhibit 7 at 532; thus, the purchaser would complete cutting within two operating seasons.
3. Prior to the purchaser beginning to cut timber, the Government, relying upon a contract provision, suspended tree cutting operations during the initial period of performance, and reduced the down payment on deposit (\$71,733.52) to 5 percent of that amount. Exhibit 1.C at 49 (¶ CT4.220), 51 (¶ CT4.222), 110 (¶ CT6.01). The contract also specifies:

Upon receipt of written notification by the Contracting Officer that operations may resume, Purchaser shall have 30 calendar days excluding the day notice is received to

return the downpayment to the full amount. Harvesting operations on the contract shall not be allowed until the downpayment amount is restored to the full amount. Failure to provide the full downpayment amount will be considered a material breach of contract. Purchaser will have 30 calendar days to remedy the breach or the contract shall terminate.

Exhibit 1.C at 51 (¶ CT4.222). Following mutual agreements to extend the contract termination date, Exhibit 2 at 188, 190, the Government lifted the suspension, Exhibit 7 at 618. Thereafter, the parties entered into a bilateral contract modification further extending the contract termination date, altering the estimated quantities of live and dead sawlogs (from 4, 460 to 4,463 CCF) and of roundwood (from 1,835 to 1,832 CCF). The agreement, executed as of June 3, 1998, set the contract termination date as September 6, 1999. The purchaser expressly agreed to cut and remove timber in strict accordance with the terms and conditions of the contract as modified. Exhibit 2 at 192. The purchaser thus committed to cut and remove the timber in less than two full operating seasons. Thereafter, purchaser failed to restore the down payment.

4. By letter dated August 21, 1998, the Government informed the purchaser:

You have not restored the downpayment as required by contract provision CT4.222. You have also indicated that you do not intend to perform the contract, and that you consider the contract “to be at an end.” Your decision not to perform the contract is a material breach of the contract. Failure to provide the full downpayment is a material breach.

Therefore at this time, the Salt Timber Sale contract has terminated for failure to remedy the breach (BT9.3 and CT9.3 - Breach) and for failing to refund the down payment as required by CT4.222 - Temporary Reduction of Down Payment (7/93). Default damage procedures will be initiated as required by CT9.4 - Failure to Cut (4/82). A Contracting Officer’s decision will be forthcoming which will set forth any damages owing the government.

Exhibit 7 at 694-96.

5. The referenced “failure to cut” provision specifies:

In event of (a) termination for breach or (b) Purchaser’s failure to cut designated timber on portions of Sale Area by Termination Date, Forest Service shall appraise remaining Included Timber, unless termination is under CT8.2 or BT8.22. Such appraisal shall be made with the standard Forest Service method in use at time of termination.

Damages due the United States for Purchaser’s failure to cut and remove Included Timber meeting Utilization Standards shall be the amount by which Current Contract Value, plus costs described below, less any Effective Purchaser Credit remaining at time of termination, exceeds the resale value at new Bid Rates. If there is no resale,

damages due shall be determined by subtracting the value established by said appraisal from the difference between Current Contract Value and unused Effective Purchaser Credit, plus any of the following applicable costs:

- (1) The cost of resale or reoffering[.]

Exhibit 1.C at 166 (¶ CT9.4).

6. The purchaser had not cut timber at the time of termination, although it had constructed the roads. Exhibit 7 at 702, 713. The Government made preparation for re-offering the timber for sale, aware that the conditions affecting the resale were changed from those existing at the time of the initial sale. By memorandum dated October 6, 1998, a Forest Supervisor informed the Regional Forester on the subject of re-offering the Salt Timber Sale:

The Salt Timber Sale must be re-offered to determine if there are any damages due the government because of this sale terminating for material breach. When possible the sale should be re-offered under the original conditions. This sale contains roundwood (pulpwood) that is 29% of the total sale volume. Since the sale was sold, the sole local company buying roundwood has stopped purchasing roundwood and has converted its roundwood processing facility to a paper recycling facility. Without a roundwood market within the local area, any prospective purchasers are highly unlikely to purchase any sales containing roundwood volume. Because of this situation the Forest request[s] permission to re-offer the sale under changed conditions. The changed conditions involve re-offering the sale with the original sawtimber volumes (9" dbh [diameter at breast height] and larger material) and includes the 8" to 8.9" size class of the roundwood, using the sawtimber utilization standards. The 5" to 7.9" material will be offered as optional material during bidding.

Exhibit 7 at 702. On October 27, 1998, the Deputy Regional Forester approved the request to re-offer the sale under the changed conditions. Exhibit 7 at 703.

7. In re-offering the timber for sale, the prospectus specifies that regulation prohibits the Government from considering a bid from the original purchaser or an affiliate. Exhibit 6.A at 375 (Timber Sale Prospectus, ¶ 2). The Government referenced a regulation which dictates restrictions in the resale of a non-completed contract:

(a) Except as otherwise provided in this section, no bid will be considered in the resale of timber remaining from any uncompleted timber sale contract from any person, or from an affiliate of such person, who failed to complete the original contract:

- (1) Because of termination for purchaser's br[each]; or

(2) Through failure to cut designated timber on portions of the sale areas by the termination date, unless acceptance of such bid is determined to be in the public interest.

36 C.F.R. § 223.86(a) (1994). The remainder of the section does not make the provision inapplicable to this failure to cut situation. 36 C.F.R. § 223.86(b) - (d). The Government did not determine that its acceptance of a bid by the purchaser would be in the public interest. The record does not indicate that the purchaser submitted a bid in the resale, sought a “public interest” determination, or protested or otherwise timely objected to its exclusion from the resale.

8. In the re-offering, the Government sought sealed bids by January 8, 1999, based upon estimated volumes of timber: ponderosa pine and other sawtimber totalling 4,463 CCF (subject to rate escalation); ponderosa pine and other roundwood (8" to 8.9" diameter) totalling 861 CCF (to be paid at a flat rate; that is, not subject to escalation), and, as an optional item, ponderosa pine and other roundwood (5" to 7.9" diameter) totalling 971 CCF. Exhibit 6.A at 376 (¶ 4), 382; Exhibit 6.B at 401 (¶¶ AT5a, AT5b). The advertised rates for the resale, said to be derived from an appraisal at the time of the resale, are considerably less than the advertised rate of the original sale (e.g., \$.73 per CCF for roundwood (resale) compared with \$9.40 per CCF (original). Exhibit 5.D at 8 (¶ III.A.6); Exhibit 1.A at 7). The re-offering and contract specify an operating season of May 1 to July 15, and August 15 to November 30, inclusive, and a termination date of December 31, 2000. Exhibit 6.A at 376 (¶ 5); Exhibit 6.B at 8 (¶¶ AT16, AT17). With an award date of April 16, 1999, Exhibit 6.B at 398, the new purchaser had two operating seasons to complete performance. The new purchaser did not bid on the optional quantity of roundwood and was not required to construct the two roads which the initial purchaser had completed. Exhibit 6.B at 400-04.

9. By letter dated April 15, 1999, the Government informed the purchaser that it owes the Government \$442,921.20 for its default on the sale:

The Government determined the maximum potential damages for this default. The estimated maximum potential damages for the Salt Timber Sale is \$480,246.62. The Salt Timber Sale was reoffered to determine if the resale value plus any cash on account would offset the maximum potential damage amount. The sale was re-offered and San Carlos Apache Timber Products Co. is the apparent high bidder with a sale value of \$33,738.74.

Exhibit 7 at 707-08.

10. By letter to the Board dated April 21, 1999, the purchaser appeals the contracting officer's decision assessing default damages of \$442,921.20 for failure to cut. Exhibit 7 at 718.

DISCUSSION

In its memorandum in support of its motion for summary judgment, the purchaser formulates the issue presented as whether it “is liable for damages pursuant to CT9.4 even though (1) the Salt timber sale

was resold under relaxed specifications; and (2) the Forest Service failed to mitigate damages by excluding [the purchaser] from bidding on the resale contract.” Purchaser’s memorandum at 2.

A forum may grant a motion for summary judgment when no genuine issue of material fact remains and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Terms and conditions of the resale

The purchaser posits that the terms and conditions of the resale are materially different from the those of its contract, such that the Government is precluded from assessing damages under the contract.

Clause CT9.4 dictates the procedure and methodology for determining damages due the Government. (Finding of Fact (FF) 5). The appraised value of timber remaining at the time of termination is a component of the calculation. Any resale value may serve to lessen the purchaser’s liability. Had the Government not engaged in a resale, the clause specifies the manner of calculating the damages recoverable by the Government. As discussed below, the conduct of the resale is relevant to the Government’s mitigation of damages, and should not serve as an automatic preclusion of recoverable damages. The purchaser’s interpretation is inconsistent with the contract, in that it fully shifts what are purchaser risks and obligations under the contract to the Government.

The analysis contained in Engle Investors v. United States, 21 Cl. Ct. 543 (1989), is sound and applicable to this situation. There, in considering motions for summary judgment, the court stated:

Plaintiff [the purchaser] argues that since defendant failed to compute the damages properly, it failed to mitigate damages and, thus, waived or forfeited its right to be awarded any damages. The court does not agree. The court agrees that the Forest Service was under a duty to mitigate damages. This means, in the case at bar, that plaintiff, who breached the contract, is not to be charged with damages which the Forest Service could have avoided with reasonable effort and without undue risk or expense since such damages are not caused by plaintiff’s breach of contract.

Accepting at face value plaintiff’s contention that the Forest Service failed to mitigate damages does not mean in this case that the Forest Service cannot collect any damages. . . . The holding asked by plaintiff, that its entire liability for its breach of contract be expunged, would be, under the circumstances, inequitable.

21 Cl. Ct. at 549 (citations omitted). The court went on to observe that what was in dispute was the reasonableness of the price of the resale contract. 21 Cl. Ct. at 550. Recognizing that clause CT9.4 dictates the methodology for calculating damages, the court concluded that the purchaser bears the initial burden of showing that the Forest Service failed to mitigate damages, and the purchaser must show that it was prejudiced in some way by the presence of changed conditions in the resale contract. 21 Cl. Ct. at 552. Resolution of these matters involved disputed material facts, such that the court denied the motions for summary judgment.

In the present appeal, the purchaser was obligated both to restore the full amount of the down payment and to cut and remove timber at contract specified prices by the contract termination date. The purchaser failed to restore the down payment and failed to cut and remove the timber before the contract was terminated. Clause CT9.4 dictates the liabilities of the purchaser and obligations of the parties. That clause does not insulate a purchaser from damages when the terms and conditions of the resale vary from the original contract.

The existing record on the purchaser's motion for summary judgment does not demonstrate that the terms and conditions of the original and resale contract are so different as to preclude the assessment of damages, even if different facts could make the assessment of damages inappropriate. United States v. Axman, 234 U.S. 36 (1914);¹ Seaboard Lumber Co. v. United States, 44 Cl. Ct. 215 (1999); Manke Lumber Co. v. United States, 44 Cl. Ct. 219 (1999); Seaboard Lumber Co. v. United States, 41 Cl. Ct. 401 (1998).

The resale offering makes a portion of the roundwood optional, with roundwood at a lower advertised rate (FF 8). Various conditions at the time of the resale are said to have necessitated this change (FF 6). The record does not suggest (or demonstrate) that the Government assumed all (or any) risks for such changed conditions. The record does not demonstrate the purchaser's entitlement to relief as a matter of law.

The purchaser also relies upon the difference in the period to perform as support for its motion. The initial contract permitted three cutting seasons to perform (FF 2); the resale contract permitted two cutting seasons (FF 8). However, under its initial plan of operations, the purchaser proposed performance to be completed in no more than two cutting seasons (FF 2). At the time of termination, through a bilateral contract modification, the purchaser had committed itself to perform in less than two full cutting seasons (FF 3). Such facts do not demonstrate the purchaser's entitlement to relief as a matter of law.

As further support for its contention that it is entitled to relief as a matter of law, the purchaser asserts that it has "clearly demonstrated its willingness to harvest the sale at the established contract price under terms virtually identical to the resale contract during negotiations with the Forest Service prior to the default termination." Purchaser's motion at 15. Even assuming the correctness of the assertion (because the existing record does not support the allegation), the purchaser has not demonstrated that such a situation excuses it from paying damages. The contract obligated the purchaser to cut and remove saw timber and roundwood at the contract prices, and to pay damages under CT9.4 for a

¹ The purchaser here misconstrues the law, when it asserts that "without a bargained for agreement in the contract to resell on 'similar terms,' the government may not recover default damages where the terms of the resale differ from the original contract." Purchaser's surreply at 1. Clause CT9.4 does not require the Government to conduct the resale on the same or similar terms. Differences in terms and conditions may affect the reasonableness of the mitigation, and, therefore, the assessment of damages. Differences in terms and conditions, or inadequate mitigation, do not automatically preclude the assessment of damages.

termination thereunder. The purchaser's argument suggests that it was entitled to contract reformation--altering what had to be cut and/or the prices--even though the contract established the obligations of the parties. The purchaser has not established the merits of its legal position.

After the final suspension was lifted, the purchaser agreed to an extended contract termination date, while aware that the Government required the restoration of the down payment. The purchaser did not restore the down payment and informed the Government that it viewed the contract to be at an end. Under such circumstances, the Board does not conclude that the Government is legally precluded from assessing damages.

Exclusion of the purchaser from the resale

The purchaser maintains that the assessment of damages is improper because the Government excluded the purchaser from participating in the resale.

Applicable regulation specifies that the Government is not to consider a bid from the purchaser absent a determination that the acceptance of such a bid is in the public interest (FF 7). The Government did not determine that the acceptance of a bid by the purchaser would be in the public interest. Hence, in its request for summary judgment, the purchaser has not demonstrated a basis to overturn the assessment of damages. Siller Brothers, Inc. v. United States, 228 Ct. Cl. 76, 655 F.2d 1039 (1981).

As support for its position, the purchaser's reliance on Big Valley Lumber Co., B-236982, 89-2 CPD ¶ 566 (Dec. 19, 1989) is curious. In resolving a contract formation (not contract administration) issue, the Comptroller General found the public interest exception applicable when the Government awarded the resale contract to the original purchaser. The Comptroller General denied the protest of the unsuccessful bidder. This situation is different. This purchaser did not submit a bid, did not request the Government to make a "public interest" determination before consummating the resale, and did not challenge through a protest or other action its exclusion from the resale. As specified in the regulation, without a "public interest" determination, the Government was not to consider a bid. The protest case, which recognized that the Government may consider and make an award to the original purchaser as permitted by the clause, does not assist the purchaser.

DECISION

The Board denies the purchaser's motion for summary relief.

JOSEPH A. VERGILIO

Administrative Judge

We concur:

EDWARD HOURY

ANNE W. WESTBROOK

Administrative Judge

Administrative Judge

Issued at Washington, D.C.

May 22, 2000