

**In re: ADVANTAGE TIMBER CO., INC., RICKY R. JOHNSON, YOLANDA JOHNSON, AND JAMES C. JOHNSON.**  
**DNS-FS Docket No. 01-0003.**  
**Decision and Order.**  
**Filed March 15, 2002.**

**Suspension and debarment, term of, commensurate with seriousness – Breach of Contract.**

The Administrative Law Judge (ALJ) affirmed suspension and debarment, but shortened the term, finding that Respondent Advantage Timber had failed to pay damages for breach of timber contract, but there were mitigating circumstances. The ALJ found that Respondent R. Johnson had “power to control” Advantage Timber whereas Respondents Y. & J. Johnson did not.

Lori Jones, for Complainant.  
Respondents, Pro se.

*Decision and Order issued by Jill S. Clifton, Administrative Law Judge.*

In this Decision and Order, I determine that the U. S. Forest Service Debarring and Suspending Official (U. S. Forest Service) had the authority to suspend and debar Respondents Advantage Timber Co., Inc. (Advantage Timber), and Ricky R. Johnson (Ricky Johnson). I conclude further that the maximum period of suspension and debarment commensurate with the seriousness of their acts or omissions is one year. Neither Respondent Yolanda Johnson nor Respondent James C. Johnson was shown, within the meaning of the term “affiliate,” to have the power to control Advantage Timber or Ricky Johnson. Consequently, I determine that the U. S. Forest Service did not have the authority to suspend or debar either Yolanda Johnson or James C. Johnson.

**Applicable Regulations**

The Government wide Debarment and Suspension (Nonprocurement) regulations are found in Title 7 Part 3017 of the Code of Federal Regulations. Two sections of particular importance to this Decision and Order, 7 C.F.R. §§ 3017.300 and 3017.305, are included here in their entirety:

**Subpart C--Debarment**

**§ 3017.300 General.**

The debarring official may debar a person for any of the causes in § 3017.305, using procedures established in §§ 3017.310 through § 3017.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the

person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

**3017.305 Causes for debarment.**

Debarment may be imposed in accordance with the provisions of §§ 3017.300 through § 3017.314 for:

- (a) Conviction of or civil judgment for:
  - (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
  - (2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
  - (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or
  - (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.
- (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:
  - (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
  - (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
  - (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.
- (c) Any of the following causes:
  - (1) A nonprocurement debarment by any Federal agency taken before March 1, 1989, the effective date of these regulations or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;
  - (2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 3017.215 or § 3017.220;
  - (3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;
  - (4) Violation of a material provision of a voluntary exclusion agreement

entered into under § 3017.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of Subpart F of this part, relating to providing a drug-free workplace, as set forth in § 3017.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[54 FR 4731, Jan. 30, 1989, as amended at 54 FR 4952, Jan. 31, 1989].

### **Procedural History**

The U. S. Forest Service suspended Advantage Timber effective June 26, 2001, and then debarred Advantage Timber for three years, until June 26, 2004. Further, the U. S. Forest Service applied the same sanctions to three individuals that it found to be affiliated with Advantage Timber: Ricky Johnson, Yolanda Johnson, and James C. Johnson.

The U. S. Forest Service decision can be vacated only if I determine that it is (1) Not in accordance with law; (2) Not based on the applicable standard of evidence; or (3) Arbitrary and capricious and an abuse of discretion. *See*, § 3017.515 Appeal of debarment or suspension decisions.

Following a thorough review of the Administrative Record, I find that the preponderance of the evidence supports the U. S. Forest Service decision, except in two regards:

(1) the seriousness of the acts or omissions of Advantage Timber and Ricky Johnson supports debarment for a period not to exceed one year; and

(2) neither Yolanda Johnson nor James C. Johnson was shown to have the power to control Advantage Timber or Ricky Johnson within the meaning of the term “affiliate.”

Consequently, I affirm the suspension and subsequent debarment of Advantage Timber but shorten the period of debarment so that it will end no later than June 26, 2002; I affirm the suspension and subsequent debarment of Ricky Johnson but shorten the period of debarment so that it will end no later than June 26, 2002; I vacate the suspension and debarment of Yolanda Johnson; and I vacate the suspension and debarment of James C. Johnson.

### **Discussion**

On July 15, 1998, the U. S. Forest Service awarded to Advantage Timber, the

Compartment 254G Timber Sale Contract (the 254G Contract), Contract No. 08-06-02-028478. Under the 254G Contract, Advantage Timber bought the right, for \$134,451.64 [\$133,297.64 contract stumpage value, plus \$1,154.00 erosion control cost], to harvest timber within a specified area comprised of approximately 170 acres, on the Kisatchie National Forest, Calcasieu Ranger District, within Vernon Parish, Louisiana. Advantage Timber was required under the 254G Contract “to pay for, cut, and remove all Included Timber within areas shown as the Sale Area Map.” Tab 12. [Tab numbers identify the position of the evidence within the Administrative Record.]

By letter dated May 5, 2000, Advantage Timber President Ricky Johnson wrote to the U. S. Forest Service Contracting Officer, Thomas Marq Webb, Jr. (Contracting Officer), to request that the 254G Contract “be voided, due to the fact of excessive amounts of bullets.” Bullets embedded within timber can cause damage and be dangerous when encountered by a saw blade or other equipment. Ricky Johnson reported that Advantage Timber's customers refused to accept timber from the Compartment 254G location, because of their experience with the bullet-ridden timber that Advantage Timber had sold them from the adjoining Compartment 254F. Tab 11.

Thus, the 254G Contract timber held no value for Advantage Timber. Advantage Timber did not cut or remove any of the 254G Contract timber. Advantage Timber had completed the adjoining Compartment 254F Timber Sale Contract but had stockpiled approximately 500 cords of timber because none of its customers would accept it. Tab 11.

The Administrative Record does not show whether there were bullets in the 254G timber, only that Advantage Timber's customers believed there would be bullets in the timber. It is not clear whether the U. S. Forest Service believed there were bullets in the timber. The U. S. Forest Service did not warn of bullets in the timber, but rather of contamination on or below the surface of the lands. Specifically, the 254G Contract Provision 11.15, at Tab 12, provides:

11.15 - Safety - Contaminated Lands. (3/94) Lands included in this contract were formerly used by the Department of Defense as an impact area of an artillery (bombing, machine gun, mortar, etc.) range, and were contaminated by unexploded and dangerous bombs, shells, rockets, mines, charges, or other explosives on or below the surface thereof.

The United States is unable to certify that these lands are completely decontaminated of dangerous explosives, and is unable to state whether or not the lands are safe for use.

Purchaser assumes full obligation for any and all liabilities for damage to life or property arising from the operations on, and the occupancy or use of

the National Forest lands under this contract; and shall save and hold the United States harmless from any and all claims for damages by third parties resulting from such operations, occupancy or use.

By letter dated May 17, 2000, the Contracting Officer responded to Advantage Timber's request that the 254G Contract be voided, refusing to cancel the 254G Contract, indicating that "cancellation by agreement may be permitted only in those instances where it's in the best interest of the government." Tab 10.

Thereafter Advantage Timber breached the 254G Contract, by failing to pay \$46,700.00 by the August 8, 2000 due date. Based on Advantage Timber's failure to pay and failure to remedy that breach of contract within the specified time limits, the U. S. Forest Service terminated the 254G Contract, by notice letter dated October 24, 2000. Tabs 1, 5, 7-9.

Under Contract Provision 26, "Failure to cut," the U. S. Forest Service calculated the damages due from Advantage Timber under the 254G Contract. First, the U. S. Forest Service gave a credit to Advantage Timber for the "reappraised" value of the remaining 254G Contract timber, all of which was still standing and available to be resold. Credit was given for 3 years' timber growth, which had increased the stumpage from 2,303 CCF to 2,580 CCF. Next, the reappraised or resale value of the 2,580 CCF stumpage was calculated. The U. S. Forest Service multiplied the 2,580 CCF stumpage by only \$29.00 per CCF, roughly half the price Advantage Timber had been required to pay, for a reappraised or resale stumpage value of \$74,820. The price per CCF that Advantage Timber was required to pay under the 254G Contract was \$57.88 per CCF, whereas the resale calculation was based on \$29.00 per CCF. The Administrative Record contains no explanation for the dramatic drop in value. Tabs 2, 12.

To the resale \$74,820.00 stumpage value, the "overbid" of \$16,336.40 was added, for a total of \$91,156.40. This is the credit that Advantage Timber was given for the 254G Contract timber, all of which was still standing. Advantage Timber was also given credit for the money it paid on the contract, a total of \$33,500.00, consisting of the performance guarantee of \$14,000.00 and the downpayment of \$19,500.00. Thus, Advantage Timber received credit for \$124,656.40. Tabs 2, 12.

When Advantage Timber's \$124,656.40 credit was applied to what the U. S. Forest Service expected under the 254G Contract, Advantage Timber still fell short. The U. S. Forest Service calculated it had the right to collect (1) the contract stumpage value; (2) plus interest; (3) plus the costs of resale. Those three components were calculated as follows. The U. S. Forest Service multiplied the 2,303 CCF contract stumpage by the \$57.88 per CCF contract price, for a contract stumpage value of \$133,297.64, owed by Advantage Timber. That figure was then multiplied by 7.25% to arrive at "interest on the uncollected stumpage value" in the

amount of \$9,664.08. [Advantage Timber was charged interest on even the \$33,500.00 it had paid.] Re-[]sale costs of \$771.00 were then added, \$574.00 for “Dawson,” and \$197.00 for “Wagner.” The total, calculated by adding together \$133,297.64 contract stumpage value, plus \$9,664.08 interest, plus \$771.00 costs, is \$143,732.72. The \$143,732.72 total that the U. S. Forest Service calculated it had the right to collect, was \$19,076.32 more than Advantage Timber's \$124,656.40 credit. Thus, the U. S. Forest Service demanded that Advantage Timber pay \$19,076.32 damages. Tabs 2, 6, 12.

On May 9, 2001, the U. S. Forest Service began charging Advantage Timber 6% per year interest on the \$19,076.32. The U. S. Forest Service indicated that it would also add 6% per year penalty charge to the interest charge, plus administrative costs to cover processing and handling of the claim. Tab 2.

As of June 5, 2001, the last calculation in the Administrative Record, Advantage Timber's unpaid obligation totaled \$19,196.70. Tab 1. Advantage Timber failed to pay the \$19,196.70.

Whether, under these circumstances, Advantage Timber and Ricky Johnson proved themselves to be unreliable and not presently responsible to do business with the Federal Government is a matter upon which reasonable minds can differ. Likewise, whether, in the interest of protecting the Federal Government's and the public's interest, suspension and debarment needed to be imposed, is also a matter upon which reasonable minds can differ. Based on Advantage Timber's breach of contract and its failure to pay the damages for breach (\$19,196.70 as of June 5, 2001), the U. S. Forest Service decided that Advantage Timber was not presently responsible to do business with the Federal Government and suspended Advantage Timber effective June 26, 2001, and then debarred Advantage Timber for three years, until June 26, 2004. Further, the U. S. Forest Service applied the same sanction to three individuals that it found to be affiliated with Advantage Timber: Ricky Johnson, Yolanda Johnson, and James C. Johnson.

### **Findings of Fact**

1. Advantage Timber failed to pay to the U. S. Forest Service the balance of damages for breach of the 254G Contract, which, as of June 5, 2001, amounted to \$19,196.70, with interest, penalties, and costs continuing to accrue.

2. The Administrative Record does not establish by a preponderance of the evidence that the integrity of the U. S. Forest Service's timber sale program was threatened by the actions of Advantage Timber and Ricky Johnson.

3. Thus, the Administrative Record does not establish by a preponderance of the evidence that Advantage Timber's breach of the 254G Contract constitutes a “(v)iolation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as: . . . (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions”

as would be required under 7 C.F.R. § 3017.305(b)(2).

4. Ricky Johnson, President of Advantage Timber, made the 254G Contract decisions for Advantage Timber and controlled Advantage Timber's actions with respect to the 254G Contract.

5. The seriousness of Advantage Timber's and Ricky Johnson's failure to pay is lessened and is mitigated by several circumstances concerning the 254G Contract, including:

- (a) their having been unaware when they entered into the 254G contract that "excessive amounts of bullets" would be found embedded in the timber from that area;
- (b) their having taken nothing under the 254G Contract and nothing tangible from the U. S. Forest Service, because they cut no timber, removed no timber, and did not impact the physical environment;
- (c) their safety issues, including their need to avoid exposing their customers' equipment and personnel to the potential dangers of bullets embedded within the timber;
- (d) their having no customers who would accept the 254G timber;
- (e) their inability to cancel the contract, due to the U. S. Forest Service's position that "cancellation by agreement may be permitted only in those instances where it's in the best interest of the government;"
- (f) the damages calculation triggered by the dramatic drop in appraised value from the price they were required to pay, \$57.88 per CCF, to the reappraised or resale price of only \$29.00 per CCF, roughly **half** the price; and
- (g) their \$33,500.00 payment to the U. S. Forest Service [the performance guarantee of \$14,000.00 plus the downpayment of \$19,500.00], for which they derived no benefit.

6. Yolanda Johnson merely certified, as Secretary of Advantage Timber, that Ricky Johnson was President of Advantage Timber and that the corporation's entering into the 254G Contract was authorized. [She was not initially regarded by the U. S. Forest Service as an "affiliate," as only Ricky Johnson was deemed responsible by the officials closest to the contracting. Tabs 4, 6.] Neither her having made a certification, nor her position as an initial director and officer [Secretary-Treasurer] in 1997, nor any other evidence, established that she controlled Advantage Timber's or Ricky Johnson's actions with respect to the 254G Contract.

7. James C. Johnson was an initial director and officer [Vice President] in 1997. [He was not initially regarded by the U. S. Forest Service as an "affiliate," as only Ricky Johnson was deemed responsible by the officials closest to the contracting. Tabs 4, 6.] Neither his positions within the corporation nor any other

evidence, established that he controlled Advantage Timber's or Ricky Johnson's actions with respect to the 254G Contract.

### **Conclusions of Law**

1. Suspension and debarment could not be imposed under 7 C.F.R. § 3017.305(b)(2).

2. Suspension and debarment could be imposed under 7 C.F.R. § 3017.305(c)(3), because the Administrative Record does establish by a preponderance of the evidence that Advantage Timber failed to pay to the U. S. Forest Service a single substantial debt, in the amount of \$19,196.70.

3. The U. S. Forest Service acted within its discretion to suspend and debar Advantage Timber, under 7 C.F.R. § 3017.305(c)(3).

4. Ricky Johnson was an "affiliate" of Advantage Timber within the meaning of 7 C.F.R. § 3017.105, and debarment may include such an affiliate. 7 C.F.R. § 3017.325(a)(2).

5. The U. S. Forest Service acted within its discretion to suspend and debar Ricky Johnson as an affiliate, under 7 C.F.R. § 3017.325(a)(2).

6. Suspension and debarment for a period no longer than one year is commensurate with the seriousness of Advantage Timber's and Ricky Johnson's failure to pay and adequately protects the Federal Government's interest in conducting business only with responsible persons. 7 C.F.R. §§ 3017.115, 3017.320.

7. Yolanda Johnson could not be suspended or debarred as an affiliate, because the Administrative Record does not establish by a preponderance of the evidence that she controlled Advantage Timber's or Ricky Johnson's actions with respect to the 254G Contract. 7 C.F.R. § 3017.105.

8. James C. Johnson could not be suspended or debarred as an affiliate, because the Administrative Record does not establish by a preponderance of the evidence that he controlled Advantage Timber's or Ricky Johnson's actions with respect to the 254G Contract. 7 C.F.R. § 3017.105.

### **Order**

1. The suspension and debarment of Advantage Timber are affirmed, for a period ending no later than June 26, 2002.

2. The suspension and debarment of Ricky Johnson are affirmed, for a period ending no later than June 26, 2002.

3. The suspension and debarment of Yolanda Johnson are hereby vacated.

4. The suspension and debarment of James C. Johnson are hereby vacated.

5. This decision is final and is not appealable within the United States Department of Agriculture. 7 C.F.R. § 3017.515.

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

[This Decision and Order became final March 15, 2002.-Editor]

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