

**In re: SUN MOUNTAIN LOGGING, L.L.C., SHERMAN G. ANDERSON,
AND BONNIE ANDERSON.
DNS-FS Docket No. 02-0001.
Decision and Order.
Filed November 14, 2002.**

DNS – Suspension (without debarment), causes of.

The Administrative Law Judge (ALJ) vacated the suspension orders against Respondents after finding that the U.S. Forest Service failed to count accurately "additional volume" timber reported by Respondents, with the result that the Forest Service billed the purchaser of the timber inadequately.

Lori Polin-Jones, for Complainant.
Douglas D. Harris, Missoula, Montana, for Respondent.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

Decision Summary

This Decision and Order concerns the Mudd-York Salvage Timber Sale, on the Beaverhead-Deerlodge National Forest, Wise River Ranger District, in Montana. I determine that the U. S. Forest Service Suspending Official, given the knowledge within the U. S. Forest Service, did not have the authority to suspend Sun Mountain Logging, L.L.C., Sherman G. Anderson, or Bonnie Anderson.

Applicable Regulations

The Governmentwide Debarment and Suspension (Nonprocurement) regulations are found in Title 7 Part 3017 of the Code of Federal Regulations. Three sections, 7 C.F.R. §§ 3017.400, 3017.405, and 3017.305, are included here in their entirety:

Subpart D--Suspension

§ 3017.400 General.

- (a) The suspending official may suspend a person from any of the causes in § 3017.405 using procedures established in §§ 3017.410 through 3017.413.
- (b) Suspension is a serious action to be imposed only when:
 - (1) There exists adequate evidence of one or more of the causes set out in § 3017.405, and
 - (2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§ 3017.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 3017.400 through 3017.413 upon adequate evidence:

- (1) To suspect the commission of an offense listed in § 3017.305(a); or
- (2) That a cause for debarment under § 3017.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

Subpart C--Debarment

§ 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 Sun Mountain Logging, L.L.C., Sherman G. Anderson, and Bonnie Anderson, effective July 9, 2001; then extended the suspensions, effective August 13, 2001; and, after a hearing, terminated the suspensions effective June 26, 2002, but failed to vacate them.

The U. S. Forest Service decisions to suspend can be vacated only if I determine that they are (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.

The Administrative Record is contained in three separate binders: a white three-ring binder, containing Administrative Record Exhibits 1-37; a brown hard-back

binder, containing Administrative Record Exhibits 1-11; and a blue two-pocket paper folder containing eight U. S. Forest Service documents bearing dates from July 9, 2001 through July 9, 2002.

Following a thorough review of that Administrative Record, I find that the preponderance of the evidence shows that the U. S. Forest Service decisions to suspend were not based on the applicable standard of evidence and shall be vacated.

Findings of Fact

1. The U. S. Forest Service was not paid adequately by Darby Lumber, Inc. for the "additional volume" timber Respondents' workers were responsible for removing, because the U. S. Forest Service failed to bill adequately for the "additional volume" logs.

2. The U. S. Forest Service Timber Sale Administrator requested that Respondents' workers keep hand-counter tallies of harvested "additional volume" logs and report them to the Timber Sale Administrator, which Respondents' workers did.

3. The Timber Sale Administrator failed to do anything with the hand-counter tallies reported to him by Respondents' workers.

4. The U. S. Forest Service controlled the billing, and failed to bill for the full amount of the "additional volume" timber removed, in large part because the Timber Sale Administrator failed to do anything with the hand-counter tallies.

5. Respondents and their workers complied with the Timber Sale Administrator's instructions and the contract requirements and procedures as they understood them.

Discussion

The Mudd-York Salvage Timber Sale was contracted to Darby Lumber, Inc., which contracted with two logging subcontractors. The Respondents' entity was one of the logging subcontractors; the other logging subcontractor is not a party to this case.

The Respondents' workers were removing more "additional volume" timber, also called "undesignated" timber, than was being billed by the U. S. Forest Service. The Mudd-York Salvage Timber Sale was not a clear-cut project, so the two logging subcontractors for Darby Lumber, Inc. were expected to cut additional timber for "skid roads, landings, and just to get through the woods." The "additional volume" logs were to be billed to Darby Lumber, Inc. by the U. S. Forest Service.

The U. S. Forest Service failed to bill Darby Lumber, Inc. adequately for the

"additional volume" logs, and the fault lay in large part with the failure of U. S. Forest Service personnel to relay accurate counts of "additional volume" timber to the resource clerk for billing. Respondents had no responsibility and no opportunity to review the information being submitted to the resource clerk, which was done electronically by computer within the U. S. Forest Service.

This case does not turn on issues of credibility. Following a two-day in-person hearing, the fact-finding Suspending Official who terminated the suspensions made no credibility findings but found that both the U. S. Forest Service and Respondent Sun Mountain Logging, L.L.C., were responsible for the lack of clear communication and failure to ensure that the government was paid for the amount of additional timber removed.

It may have initially appeared that there was "adequate evidence" of a "cause of so serious or compelling a nature that it affect(ed) the present responsibility" of one or more of Respondents, but that initial appearance was false, as proved by evidence within the knowledge of the U. S. Forest Service. While both the U. S. Forest Service and Respondent Sun Mountain Logging, L.L.C., may have contributed to the problem, it was the U. S. Forest Service that had the opportunity to remedy the problem early on.

Originally, the method of handling the "additional volume" logs was that they would be decked separately to await the Timber Sale Administrator's inspection(s) each week to count them and mark them with paint, prior to their being hauled away. That method of handling the "additional volume" logs was soon modified, however, with the requirement that Respondents' workers keep a hand-counter tally of the additional logs cut, clearing the counter each time the tally was reported to the Timber Sale Administrator.

Whether the modification relieved Respondents' workers from complying with the original method is in dispute. In any event, the Timber Sale Administrator failed to compare the data gathered from counting and painting separately decked logs, with the data provided by Respondents' workers' hand-counter tallies. He failed to report any of the "additional volume" logs revealed by the hand-counter tallies to the resource clerk for billing. He failed to do anything with the hand-counter tallies.

The preponderance of the evidence shows that Respondents' workers accurately kept hand-counter tallies of harvested "additional volume" logs and reported them to the U. S. Forest Service, as requested. The U. S. Forest Service requested those hand-counter tallies and then failed to do anything with them. Since the hand-counter tallies reported by Respondents' workers were part of the evidence known to the U. S. Forest Service, the U. S. Forest Service did not have "adequate evidence" of a "cause of so serious or compelling a nature that it affect(ed) the present responsibility" of one or more of Respondents.

Conclusions of Law

1. Under these circumstances, even if Respondents in some way contributed to the failure to ensure clear communication and understanding of the contract requirements and procedures, that failure would not constitute a "cause of so serious or compelling a nature" that it ever affected "the present responsibility" of Respondents.

2. Given the knowledge within the U. S. Forest Service, the U. S. Forest Service did not have the authority to suspend Respondents, because there was never "adequate evidence" of a "cause of so serious or compelling a nature that it affect(ed) the present responsibility" of any of Respondents. 7 C.F.R. §§ 3017.400, 3017.405, and 3017.305(d).

Order

1. The suspension of Sun Mountain Logging, L.L.C. is hereby vacated.
2. The suspension of Sherman G. Anderson is hereby vacated.
3. The suspension of Bonnie Anderson is hereby vacated.
4. This decision is final and is not appealable within the United States Department of Agriculture. 7 C.F.R. § 3017.515.