

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-186534

DATE: August 10, 1976

MATTER OF: Mountain Fir Lumber Co., Inc.

cel 13320

98705

DIGEST:

1. Purchaser, who removed timber from forest by more expensive route than contemplated in sales contract because of closure of specified road by third party in accordance with terms of Declaration of Taking and Complaint in Condemnation filed by Government, is entitled to adjustment for increased cost, since Government's representation that specific roads are available carries implied promise that, if they are not, the Government will stand the resulting increased cost.
2. Where timber purchaser is entitled to adjustment for increased cost because of additional expense of hauling timber as result of closure of road specified in sales contract, in absence of agreement between Forest Service and purchaser as to expense for increased hauling, there would be no objection to settlement on basis of Forest Service estimate instead of purchaser's unsupported amount.
3. In settlement of timber purchaser's claim for increased cost because of additional expense of hauling timber as result of closure of road specified in sales contract, Forest Service should explore with purchaser monetary benefit purchaser may have received on road maintenance in utilizing alternate route, since increased expense of performance has been reduced to the extent of purchaser's monetary benefit.
4. In settlement of timber purchaser's claim for increased cost because of additional expense of hauling timber as result of closure of road specified in sales contract, road maintenance cost which would have been included in Forest Service timber appraisal if made originally for alternate route, but which purchaser did not incur, should not be allowed, since it was not actual increase in performance cost which purchaser incurred.

A Forest Service certifying officer has presented for our consideration a claim of Mountain Fir Lumber Co., Inc., in the amount of \$12,588.95 for increased costs incurred in removing and hauling timber under sale contract 01352-2 awarded on April 2, 1970.

The least expensive route for hauling the timber from the forest was determined by the Forest Service to be the Elliott Creek Road and the Forest Service appraisal of the value of the timber prior to its being offered for sale was based upon the utilization of that route. Further, the contract contemplated use of the Elliott Creek Road. Clause C5.31 provided in pertinent part:

"Purchaser is authorized to use the Elliott Creek road which is shown on Sale Area Map for log hauling and other purposes related to this contract * * *"

However, during performance of the contract, Elliott Creek Road was closed to timber hauling by a third party, Mr. E. T. Cobb, to facilitate his mining operations. The closure was in accordance with the terms of a Declaration of Taking and Complaint in Condemnation filed by the Government in 1961. As a result of the closure, the major portion of the timber was removed by the purchaser over the Beaver Creek Road system which the Forest Service admits was a more expensive operation.

This case is similar to Gerhardt F. Meyne Co. v. United States, 76 F. Supp. 811 (Ct. Cl. 1948), wherein it was held that the Government's representation that specific roads are available carries an implied promise that, if they are not, the Government will stand the resulting increased cost. See also D & L Construction Co. & Associates v. United States, 402 F.2d 990 (Ct. Cl. 1968).

Accordingly, the purchaser is entitled to an adjustment for the increased cost of operation caused by the closure of the Elliott Creek Road. In that regard, the Forest Service questions certain aspects of the purchaser's claim. First, the purchaser has claimed \$3.50 per thousand board feet (MBF) for 1,987.60 MBF for increased hauling cost during the 1973 and 1974 seasons. However, the purchaser has not supported the claim with actual cost records. The Forest Service estimate for the increased hauling is \$1.25 per MBF. We suggest that the Forest Service and the purchaser attempt to arrive at an agreement as to the rate. In the absence of an agreement that some other rate is appropriate, our Office would have no

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objection to a settlement on the basis of \$1.25 per MBF. Second, the Forest Service has stated that the purchaser has agreed to a reduction of \$3.03 per MBF in the purchaser's road maintenance rate beginning September 23, 1973. The Forest Service suggests, therefore, that the purchaser may have received a benefit of \$3.03 per MBF totaling \$4,183.55 on the 1,380.71 MBF hauled over the alternate route before that date. This is a matter which the Forest Service should explore with the purchaser, since to the extent that the purchaser has had a monetary benefit in utilizing the alternate route the increased expense of performance has been reduced. Third, the Forest Service has indicated that the purchaser's claim for hauling per acre material (PAM) over the alternate route includes road maintenance cost which the purchaser did not incur although the Forest Service states that if the sale had been appraised originally over the alternate route the road maintenance cost for PAM would have been increased by \$0.75 per MBF. Since the \$0.75 was not actually an increase in performance cost which the purchaser incurred, it should not be allowed.

The Forest Service also questions whether the amount of the settlement should be limited to \$10,684.98, the additional amount the Forest Service indicates it would have deducted from the timber appraisal originally if it would have been based on the alternate route. In view of the foregoing, it is not apparent that the amount of the adjustment will exceed \$10,684.98. Therefore, it is unnecessary to consider the last question.

The claim submitted by the Forest Service is being returned to the certifying officer with this decision for settlement in accordance with the foregoing.


Deputy Comptroller General
of the United States