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DECISION

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

FILE: B-188548 DATE: November 8, 1979

MATTER OF: Willamette Industries, Inc. — DLG-03305

DIGEST:

Claim for unamortized road contruction costs resulting from 39-percent discrepancy between estimated timber volume and actual timber volume cut, is denied where: (1) record fails to establish that the Forest Service grossly disregarded applicable factors and procedures in preparing estimate; (2) there is no basis upon which to conclude that limited warranty (that road construction costs would be fully amortized) existed; and (3) volume estimate 39 percent under actual volume does not constitute gross error.

The Department of Agriculture, United States Forest Service, requests our decision concerning the claim of Willamette Industries, Inc. (Purchaser), for $58,004.87 to make up a deficit in road credit conversion which resulted from a 39-percent-volume underrun on the Green Mountain Timber Sale, Willamette National Forest.

The gist of the Purchaser's claim is that the underrun on the Green Mountain sale is attributable to the Forest Service's error in computing the net volume of merchantable timber. The Purchaser believes that the Forest Service, in arriving at the estimate included in the sale document, failed to "apply any factor for hidden defect and breakage."

The Forest Service provided the Purchaser a timber sale prospectus which showed 6,600 MBF as the estimated quantity of timber and 35 percent as the estimate of

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stand defect. The prospectus warned purchasers that its estimates were not estimates of the purchaser's own cost or recovery estimates and that, for this reason, the estimates were not part of the timber sale contract. Purchasers were further urged to examine the sale area and make their own cost and recovery estimates. Consistent with the warning in the prospectus the timber sale contract expressly disclaimed any warranty of the timber volume estimates.

The Purchaser reports that, prior to the sale, it conducted its own examination of the Green Mountain sale for the purpose of verifying construction costs, analyzing timber quality and volume, ascertaining log distribution, and the availability of right-of-way volume. After 2 days the Purchaser's cruiser "concluded that the actual volume on the ground was slightly less than that which the Forest Service had indicated, but certainly well within the normal deviation that a purchaser would anticipate."

On December 22, 1970, the timber was purchased. The timber sales contract set a March 31, 1975, termination date for the Green Mountain sale. The Forest Service conducted its final inspection of Green Mountain on December 10, 1974, and certified that the Purchaser had met all contract requirements.

On December 13, 1974, the Purchaser advised the Forest Service that it had logged all units of the Green Mountain sale and that it had only extracted 4,050 MBF of the estimated 6,600 MBF, an underrun of approximately 39 percent. The Purchaser had to build approximately 3 miles of logging road, the specifications of which were set out in the contract, in order to extract the timber. Under Forest Service contracts, purchasers earn credits for the logging roads that they construct. The credits are set off against the sums owed the Forest Service for timber removed from the sale site. Here, however, the value (in credits) of the roads exceeded the value of the timber removed. The Purchaser was left with unused credits in the amount of $58,004.87 due to the underrun.

The Purchaser offers three legal contentions to support its claim: (1) the Forest Service negligently failed to use the best information available in preparing the volume estimate; (2) a limited warranty existed that the Purchaser would fully amortize the cost of road construction; and (3) the volume estimate was so far off as to constitute gross error and justify reformation on the theory that the volume estimate was a material aspect of the contract.

In support of (1) above, the Purchaser refers to certain internal Forest Service memoranda. These memoranda indicate that some Forest Service personnel believed that the 39-percent discrepancy in this sale may have been caused by the failure to adjust the estimate for hidden defect and breakage. In addition, the Purchaser cites a January 31, 1979, affidavit of its resident forester. The forester reports that he was initially unable to ascertain from the cruise data furnished by the Forest Service the reason for the disparity between the estimated volume and the actual volume and that it was only after a 3-week examination of similar data from other sales at approximately the same time that he was able to ascertain that no allowance had been made for hidden defect and breakage. Exactly how this was accomplished is unspecified. He went on to observe that the minimum possible hidden defect and breakage factor would be 10 percent and that a 15- to 25-percent factor would be more common under the circumstances.

The Purchaser also cites a December 21, 1978, affidavit of a former Forest Service Timber Management Assistant which states that there are two possible explanations of the underrun: either (1) the Forest Service failed to make the final adjustments for hidden defect and breakage after the printout was returned to the district office; or (2) incorrect adjustments were made.

In our view, the above does not show that the Forest Service failed to include an allowance for hidden defect and breakage. There is an indication that the factor may have been included. In this regard, the sale report and appraisal--the only contemporaneous document in the record--states that a factor of 10 percent for Douglas

fir was considered, an amount which the Purchaser's resident forester states is "the minimum possible hidden defect and breakage factor which should have been applied to the sale."

The Forest Service has consistently maintained that the estimate was properly prepared and that there was no known error as to this factor. The agency believes that such an underrun is not uncommon given the imprecise nature of these cruises in this type of terrain. In this regard, the Forest Service reports that wide variations occur between Willamette National Forest timber sale estimates and the amounts actually cut. For example, the following statistics are cited:

"YEAR	VARIATION FROM ESTIMATE
1972	35-200 percent
1973	68-130 percent
1974	38-155 percent"

In view of the above, we believe that there is a factual question regarding the reason for the underrun which remains unanswered on this record. Although there is support for the Purchaser's position, there is also support for the Forest Service position. Since we are unable to resolve this factual question, we cannot conclude that the Forest Service negligently prepared this estimate.

The Purchaser's second contention, that a limited warranty existed that the Purchaser would fully amortize the cost of road construction, is premised upon the fact that the Forest Service appraisal indicated a residual value in excess of the base rate. The Purchaser argues that:

> "This meant that in order for a purchaser to get back all of the monies it had expended for road construction, 100% of the volume of Douglas Fir indicated in the contract would have to be cut, or 92% of the estimated total volume of all species.

> This fact amounted to a representation that the government's estimate was, at worst, no greater than 8% off, since certainly the government did not expect the purchaser to build a road with no hope of receiving all of the purchaser road credit for doing so."

We see little merit in this contention since it only serves to protect purchasers who have relied upon a timber volume estimate which the prospectus warns is not part of the contract and which the contract expressly disclaims.

In Brawley v. United States, 96 U.S. 168 (1877), the Supreme Court established three rules governing the materiality of estimates. Essentially, these rules are: Rule I, if the subject matter of the contract is identified by independent circumstancecs (i.e., a given lot of items within a named warehouse) and the contract contains an estimated quantity, then the subject matter and material aspect of the contract is the specific lot and the estimate is not a warranty but only "an estimate of probable amount, in reference to which good faith is all that is required of the party making it," Brawley v. United States, supra, at 171; Rule II, if the subject matter is only identified by the estimated quantity, that estimate is the subject matter and, consequently, a material aspect of the contract and, qualifying words accompanying the contract only provide "against accidental variation," Brawley v. United States, supra, at 172; Rule III, if, however, the situation described in Rule II is further elaborated upon and the qualifying words are supplemented, the qualilfying words as supplemented are the material aspect of the contract and the estimated quantity is no longer material. Brawley v. United States, supra.

The contract provides for the purchase and sale of "[a]ll live trees meeting minimum tree diameter specifications" within the sale area except those specifically designated to be left uncut prior to advertisement of sale. We believe that these provisions exemplify a Rule I situation and, consequently, the estimate is

neither a material amount nor a warranty, but merely an estimate. See Brock v. United States, 84 Ct. Cl. 453 (1937); B-141780, February 1, 1961, affirmed, September 14, 1961; B-150846, April 9, 1963. In view of the above, so long as the estimate is made in good faith and without gross disregard of the facts, we believe it would be prejudicial to the interests of the Government to guarantee the amount of merchantable timber offered for sale either directly, through contractual warranty, or indirectly, through recognition of a limited warranty that purchasers will amortize road construction costs. Moreover, our prior cases in this area indicate that loss of ineffective unused purchaser credit due to an inability to fully amortize road construction costs is not an unknown phenomenon in the timber industry. See B-142627, August 8, 1960; B-153297, March 30, 1964. In this regard, the Forest Service points to Public Law 94-154, 16 U.S.C. § 535 (1976), which provides:

> "'The Secretary is authorized, under such rules and regulations as he shall prescribe, to permit the transfer of unused effective purchaser credit for road construction earned after December 16, 1975, from one timber sale to a purchaser to another timber sale to the same purchaser within the same National Forest.'" (Emphasis added.)

The Forest Service cites the legislative history of that provision in Senate Report at 94-426 (1975) and House Report No. 94-656 (1975) as showing congressional recognition that ineffective purchaser credits are a common occurrence in timber sale contracts and that the timber industry recognizes that no payment is offered for ineffective purchaser credit. We see no reason to disgree.

The Purchaser's contention that the volume estimate was so far off as to constitute gross error must be rejected on the basis of our prior decisions which have held that discrepancies of up to 80 percent were not so gross as to afford a legal basis for Government reimbursement of the purchaser. See B-136117, June 6, 1958.

The Purchaser has cited numerous Court of Claims, Boards of Contract Appeals, and GAO decisions which treat erroneous Government estimates in such diverse areas as construction contracts, requirements contracts and surplus sales contracts. These decisions, which generally permitted reformation because of erroneous contract estimates despite Government disclaimers thereof, fall under Rule II, above, because the estimates constituted material aspects of those contracts.

Underlying our belief that Rule II analysis is inappropriate in the area of timber volume estimates are the folowing considerations: (1) the purchaser is free to initiate its own timber volume estimates; (2) the purchaser is not given a fixed stumpage rate that it must pay, but rather a floor rate which tends to be low, see 105 Cong. Rec. 3870 (1959); (3) the subject matter of the contract is the "included timber" within its confines and usually falls within Rule I; and (4) the purchaser is only required to purchase such merchantable timber as it actually removes from the sale site. Moreover the Purchaser's assertion, that timber cruises are "exact scientific" measurements of timber volume upon which prospective buyers are entitled to rely despite disclaimers of warranty and buyer responsibility, in our opinion, is not supported by the history of this program.

In certain distinguishable circumstances, reformation has been allowed. See Everett Plywood & Door Corp. v. United States, 190 Ct. Cl. 80 (1969); L.Z. Hiser, B-188785, May 23, 1977, 77-1 CPD 357. In the latter case, we allowed reformation of a timber sale contract where the Government's unilateral computer error resulted in the purchaser being overcharged $1,806. The Forest Service advised that notwithstanding the contract's disclaimer of warranty, there was present in the contract a provision CT6.8, "Measuring Methods," which represented that sampling interval of 1:1 had been used to measure red pine, the subject matter of the computer error. It was the Forest Service's view that since a 1:1 sampling frequency meant that every single red pine tree had been measured, a purchaser might reasonably be expected to rely on such a 1:1 estimate notwithstanding

the express disclaimer. We held reformation to be proper in part because such a strong representation of accuracy, unlike here, operated to convert an expressly disclaimed timber sale volume estimate into a material fact. In addition we note that the Hizer contract involved a premeasured timber sale in which payment was made based on the contract estimate of timber, while in this case the purchaser paid only for the timber removed.

The Purchaser also cites our decision in Sierra Pacific Industries--Reconsideration (Sierra) 58 Comp. Gen. 388, 389 (1979), 79-1 CPD 238, which concerned the road construction aspect of a timber sale contract. In Sierra, the specifications describing the amount of road-clearing work were erroneous. This is, in our view, a Rule II situation since a material requirement of the contract was identified erroneously. It is similar to our decisions in Zip-O Log Mills, Inc. (Zip-O), B-188304, July 14, 1977, 77-2 CPD 25, and Zip-O Log Mills--Reconsideration, B-188304, September 8, 1978, 78-2 CPD 178, where the specifications describing the amount of excavation work were erroneous. These cases, where we recommended remedial action, are clearly distinguishable.

Accordingly, the Purchaser's claim is denied.

Milton J. Socolar

For The Comptroller General
of the United States