



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: March 29, 2012

CBCA 2492

THE TIMBER HARVESTER, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Charles R. Rawls, President, and Anthony R. Rawls, Vice President, of The Timber Harvester, Inc., Jacksonville, NC, appearing for Appellant.

Jay McWhirter, Office of the General Counsel, Department of Agriculture, Atlanta, GA, counsel for Respondent.

Before Board Judges **HYATT**, **VERGILIO**, and **KULLBERG**.

VERGILIO, Board Judge.

On July 13, 2011, the Board received from The Timber Harvester, Inc. (purchaser) a timely-filed notice of appeal concerning a dispute under its scaled salvage timber sale contract with the Forest Service of the Department of Agriculture (agency). 41 U.S.C.A. §§ 7101-7109 (West Supp. 2011). At the expiration of the extended performance period, the agency deemed the purchaser's performance incomplete. In a decision which forms the basis of this appeal, a contracting officer assessed \$30,010.53 in damages and withheld \$18,574.81 (of amounts paid by the purchaser) to partially offset the damages. Upon recalculation of damages, to reflect the total costs of removing uncut trees, the agency deems the damages to be \$53,500.13. The purchaser requests that this Board deny the agency's claims for damages and determination to withhold the \$18,574.81. The parties have submitted the case on the written record, without a hearing.

Central to this dispute, and the Government claim, is a question of contract interpretation. The contract requires the purchaser to cut and remove “included timber”--a phrase that refers to timber that satisfies utilization standards (defined by sawtimber and merchantability descriptions) and is designated for cutting. When interpreting the contract, the agency relies upon a Description by Damage Class clause, instead of the utilization standards. However, that clause alone does not establish the trees to be cut. The clause must be interpreted in light of the utilization standards; the contract must be read as a whole. The purchaser must cut trees satisfying utilization standards, but not trees that do not.

The agency has not demonstrated that included timber remained to be cut at the end date of the contract. An appraisal that considers trees satisfying the Description by Damage Class clause does not demonstrate the tree count or weight of trees satisfying the included timber provision at the time the contract ended. Further, an appraisal that utilizes the weight estimate in the contract as a basis for evaluating and valuing uncut timber is unreliable, because the agency expressly discounted the reliability of the estimate and has not established its accuracy. The agency-proposed costs for cutting an unreliable estimated weight or number of trees do not form a reliable basis for calculating relief.

The agency has not supported its claim. The agency has not established either that the purchaser failed to cut included timber or that the purchaser was in breach of the contract. The Board grants the purchaser’s appeal. The agency is not entitled to retain the money withheld from the purchaser.

Findings of Fact

1. In providing information about the sale (prior to bids and award), the prospectus (specifying that it is not a legally binding document) states: “All trees that meet utilization standards listed in AT2 within Designation by Damage Class Payment Units . . . are designated for cutting when the trees meet the following damage description. All dead pine trees with no needles and dead pine trees with all red needles are available for harvest. Additional trees to be harvested will be marked with Blue Paint[.]” Exhibit 32 at 151 (all exhibits are in the appeal file).

2. On October 14, 2009, the agency awarded a weight scaled timber sale contract, number 101583, to the purchaser. Exhibits 25, 26. At the time of award, the “termination date” or completion date for the contract was October 31, 2010. Exhibit 25 at 71. The contract reflects a salvage sale in a specified area of a single species. Under the contract, the agency sells and the purchaser agrees to cut and remove included timber. Exhibit 25 at 71, 87 (¶ C6.302#, Salvage Removal Requirements (08/2004) clause).

3. Included timber is contractually defined as trees and portions thereof that meet utilization standards. Exhibit 26 at 99 (¶ B2.1). This is consistent with the prospectus, Finding 1. The utilization standards specify southern yellow pine sawtimber, with minimum dimensions for a merchantable tree, the lengths required to be removed, and a merchantability factor of fifty percent. Exhibit 25 at 73 (¶ A2). The contract also contains a Designation by Damage Class (04/2004) clause. The clause identifies criteria used to designate trees and other products for cutting and removal. One such criterion is “All pine trees with no needles or trees with all red needles.” Another is “additional trees to be cut, if any, are designated for cutting if Marked with Blue paint.” Exhibit 25 at 82 (¶ C2.353#).

4. The purchaser would pay for timber removed by weight (on a per ton basis). Exhibits 16, 29 at 132. By a Disclaimer of Estimates and Bidder’s Warranty of Inspection clause, the purchaser:

acknowledges that the Forest Service: (i) expressly disclaims any warranty of fitness of timber or forest product for any purpose; (ii) offers this timber or forest product as is without any warranty of quality (merchantability) or quantity and (iii) expressly disclaims any warranty as to the quantity or quality of timber or forest product sold except as may be expressly warranted in the sample contract.

The Bidder further holds the Forest Service harmless for any error, mistake, or negligence regarding estimates except as expressly warranted against in the sample contract.

Exhibit 29 at 135 (¶ 23). Further, the Volume Estimate clause refers to cutting under the utilization standards and states that volume (in context meaning weight, given the quantity measurement) estimates are not guarantees. Exhibit 26 at 100 (¶ B2.4).

5. The contract contains clauses dealing with title and liability. Of note, all right, title, and interest in and to any included timber shall remain in Forest Service until such timber has been cut, scaled, removed, and paid for, at which time title shall vest in the purchaser. Exhibit 25 at 119 (¶ B8.11, Title Passage).

B8.12 Liability for Loss. If Included Timber is destroyed or damaged by an unexpected event that significantly changes the nature of Included Timber, such as fire, wind, flood, insects, disease, or similar cause, the party holding title shall bear the timber value loss resulting from such destruction or damage; except that such losses after removal of timber from Sale Area, but before Scaling, shall be borne by Purchaser at Current Contract Rates and

Required Deposits. Deterioration or loss of value of salvage timber is not an unexpected event, except for deterioration due to delay or interruption that qualifies for Contract Term Adjustment or under B8.33.

In the event Included Timber to which Forest Service holds title is destroyed, Purchaser will not be obligated to remove and pay for such timber. In the event Included Timber to which Forest Service holds title is damaged, Contracting Officer shall make an appraisal to determine for each species the difference between the appraised unit value of Included Timber immediately prior to the value loss and the appraised unit value of timber after the loss. Current Contract Rates in effect at the time of the value loss shall be adjusted by differences to become the redetermined rates.

Exhibit 25 at 119.

6. The contract provides for the agency to assess damages in the event that the purchaser fails to cut timber or breaches the contract:

(a) In event of Purchaser's failure to cut designated timber on portions of Sale Area by Termination Date or termination for breach under B9.31, Forest Service shall appraise remaining Included Timber, unless termination is under B8.22 or B8.34. Such appraisal shall be made with the standard Forest Service method in use at time of termination.

....

(c) If the contract is not reoffered or there are no responsive bids on the reoffered contract, damages due shall be the amount by which Current Contract Value exceeds the value determined by appraisal, plus costs described in paragraph (d) of this Section.

Exhibit 26 at 127 (§ B9.4, Damages for Failure to Cut or Termination for Breach). The termination date of the contract is subject to adjustment pursuant to the Contract Term Adjustment clause. Exhibit 25 at 119 (§ B8.21).

7. The purchaser commenced operations on November 2, 2009, and ceased operations on December 3, 2009, when the agency's timber sale administrator deemed the sale area inoperable because of wet conditions and prohibited further operations. Exhibit 38 at 1 (§ 2), 2 (§ 7). On February 4, 2010, the contracting officer extended the termination (completion) date to November 29, 2010, due to ground conditions from December 3 through

31, 2009. Exhibit 14 at 29. On November 30, 2010, the contracting officer extended the termination (completion) date to January 3, 2011, due to weather and rain from October 4 through November 7, 2010. Each extension is a contract term adjustment. Exhibits 8, 14.

8. The purchaser cut and removed 2394 tons of included timber. Exhibits 5 at 8, 10 at 21. By the end of July 2010, the purchaser determined that merchantable sawtimber did not remain (saw mills did not want the remaining timber). The purchaser did not resume operations. Exhibits 37 at 2, 41. By September 2010, the condition of the sale trees had deteriorated to the point of being usable perhaps as chips, not sawtimber. Exhibits 8 at 17, 9 at 19.

9. By letters dated April 12 and August 26, 2010, a Forest Service representative informed the purchaser: "This is a designation by damage class sale. In reference to contract provision C2.353# - Designation by Damage Class, you are required to cut and remove all pine trees with no needles or trees with all red needles within the cutting unit boundaries prior to the termination date of 11/29/2010." Further, the letter noted that a failure to cut all included timber by the contract termination date would constitute a breach of contract under B9.4, with the purchaser liable for outlined costs. Exhibit 12 at 26.

10. In response to purchaser protestations against this interpretation, the contracting officer issued a determination dated November 30, 2010, that again specified that the purchaser was required to cut and remove any and all timber that meets the requirements in the Designation by Damage Class clause. Exhibit 8 at 17.

11. After the termination (completion) date passed, the agency put the remaining timber up for resale but received no bids. By decision dated May 11, 2011, the contracting officer determined that the purchaser failed to cut timber included under the Designation by Damage Class clause, Finding 3. Citing the Damages for Failure to Cut or Termination for Breach clause, Finding 6, the contracting officer assessed damages of \$30,010.53, which he offset against an account balance of \$18,574.81, so as to issue a bill for collection of \$11,453.72 (the true difference is \$11,435.72). The contracting officer calculated damages for a weight of uncut timber based upon the difference between the contractual estimate and the actually removed weight. Exhibits 5, 35. The record contains no credible support for the estimated weight of timber (as sawtimber or other material) at the end of the contract period.

12. By decision dated December 9, 2011, the contracting officer increased assessed damages to \$53,500.13, prompting the issuance of a bill for collection of \$34,925.32. In addition to the damages claimed earlier, the contracting officer added costs to cut individual trees. Exhibit 40. The individual trees were determined based upon a survey of random plots and extrapolating data. However, the survey counted trees that did not satisfy the included

timber merchantability requirements; that is, the trees were counted based upon the assumption that the Designation by Damage Class provision dictates the trees to be cut. This individual tree count fails to identify any tree that satisfies the utilization standards of the contract. Exhibit 39.

13. On July 13, 2011, the Board received the purchaser's notice of appeal.

Discussion

The purchaser objects to the agency's assessment of damages and withholding of money. It is undisputed that the purchaser has paid for timber removed, and that the agency retains \$18,574.81 of money in excess of the payments for timber removed. The purchaser maintains that at the conclusion of the performance period there remained to be cut no included timber that met the sawtimber minimums. The agency contends that significant timber remained to be cut. The agency has assessed damages for what it deems to be uncut timber and for other damages under the contract.

The underlying scaled salvage sale contract requires the purchaser to cut and remove included timber. The included timber is identified as southern yellow pine, sawtimber, meeting minimum specifications (identified by merchantable tree size, size of piece to be removed, and net merchantability factor). The contract also designates trees and other products by damage class for cutting and removal. One aspect of the dispute involves contract interpretation. The agency's position is premised upon the Designation by Damage Class clause establishing the requirements for the cutting. The purchaser's position focuses upon the utilization standards, i.e., the sawtimber and merchantability descriptions.

The contract must be read as a whole. The contract requires the purchaser to cut included timber. Included timber must satisfy utilization standards, while falling within the designation by damage classification prescription. The agency reads one clause out of context. The Designation by Damage Class clause must be read with the other requirements. Included timber must meet utilization standards; the damage class designations further limit the trees to be cut. The purchaser must cut trees satisfying utilization requirements, but not trees that fail to meet merchantability minimums. The Forest Service representative and contracting officer espouse an interpretation that is inconsistent with contractual language.

The liability clauses do not alter the contract interpretation. The clauses recognize that the timber would continue to deteriorate with the passage of time. However, the clauses do not require the purchaser to cut other than included timber. The purchaser only pays for timber that it cuts and removes. To the extent that a purchaser removes less included timber than may have been available at the start of the contract, or perhaps any other point in time

until the end of the original completion date, the purchaser bears that consequence. Such a purchaser does not pay more per ton, but removes less timber.

The remainder of the dispute involves the determination that included timber remained uncut and the assessment of damages by the agency. The appeal involves a Government claim. The agency bears the burden of proof. Initially, even assuming that included timber remained uncut, the agency has not demonstrated either the number or the weight of such trees. The agency determined the trees to be cut by including those that satisfy the Designation by Damage Class clause, without regard to the utilization standards. Such an approach does not demonstrate the actual included timber that remained to be cut under the contract at the time performance ceased or on the date set for contract completion. Rather, the record establishes that the deterioration of the trees continued through the contract period and that trees were not merchantable as sawtimber at the time set for contract completion.

The agency also calculates damages utilizing the weight estimate in the contract. The contract expressly discounts the reliability of the estimate. Finding 4. The record does not demonstrate the accuracy of the estimate. Therefore, the estimate does not form a reasonable basis for calculating damages. Damages cannot be calculated based upon such disclaimed estimates. The agency-proposed costs for cutting an unreliable estimated weight or number of trees do not establish a reasonable basis for calculating damages.

The agency has not demonstrated that the purchaser failed to cut or remove included timber by the termination date of the contract. Accordingly, the agency cannot hold the purchaser to be in breach of the contract or assess damages for failure to cut included timber. The agency may not assess the damages against the purchaser. The agency is not entitled to retain the \$18,574.81 withheld from the purchaser.

Decision

Accordingly, the Board **GRANTS** the appeal.

We concur:

JOSEPH A. VERGILIO
Board Judge

CATHERINE B. HYATT
Board Judge

H. CHUCK KULLBERG
Board Judge