



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: June 2, 2009

CBCA 895

COCHRAN LUMBER COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Keith L. Baker of Barton, Baker, McMahon & Tolle LLP, McLean, VA, counsel for Appellant.

Ronald Mulach, Office of the General Counsel, Department of Agriculture, Milwaukee, WI, counsel for Respondent.

Before Board Judges **VERGILIO**, **McCANN**, and **SHERIDAN**.

Opinion for the Board by Board Judge **SHERIDAN**. Board Judge **McCANN** concurs.

**SHERIDAN**, Board Judge.

This appeal arises out of a timber sale contract between the Department of Agriculture, Forest Service (FS) and the purchaser, Cochran Lumber Company, Inc. (Cochran). Cochran purchased timber under the Silver Fox timber sale in the Allegheny National Forest (ANF) in Pennsylvania, paying a lump sum for all marked trees located within a designated area of approximately 2440 acres. Cochran agreed to pay \$1,030,307.30 to harvest an estimated total quantity of 2959 hundred cubic feet (CCF) of timber. Under the contract, the Government expressly did not guarantee the quantity and quality of timber

estimated in the sale, and made other disclaimers and limitations upon its liabilities. Cochran contends that during performance it determined that it was recovering less timber volume than the estimates provided in the contract. It stopped harvesting and did not complete performance. Cochran proposes alternative theories for relief, all premised upon alleged FS erroneous estimates: (1) a contract adjustment pursuant to the Adjustment for Quantity Error clause; (2) breach damages; and (3) reformation of the contract based on mutual mistake.

In summary, the record does not contractually or factually support appellant's claim. While the detailed findings of fact and legal discussion fully resolve each of the particular issues related to alleged faulty FS volume estimates raised by appellant, to assist the reader in understanding this case for future application, the rationale is concisely stated here. Under the terms of the contract the purchaser assumed certain risks associated with the volume estimates. The purchaser expressly held the Government harmless for any error, mistake, or negligence relating to the volume estimates, except as otherwise provided in the contract. The only contractual exception to the hold harmless provision is found in the Adjustment for Quantity Errors clause, which provides that estimated quantities are to be revised when the error is caused by computer malfunction or an error in calculations, area determination, or computer input. Apart from this clause, the allegations of error, breach, and mistake argued by appellant provide no basis for relief. Appellant failed to demonstrate either element required for relief under the Adjustment for Quantity Errors clause; that is, the record does not show (1) an error in the total estimate for the sale, or (2) a computer malfunction or an error in calculations, area determination, or computer input.

The record does not demonstrate that the estimates were erroneous or that any compensable error occurred when the FS formulated these estimates. Any possible shortfalls could be readily attributable to timber quality and defects, for which the contract expressly provides no adjustment will occur. Similarly, appellant has not established that the FS acted, or failed to act, in some way so as to breach the contract. The FS employees who cruised the sale area were qualified and certified, and there is no evidence that the problems associated with the check cruise were material or adversely impacted the timber volume estimates.<sup>1</sup> Cruise data, as well as subsequent reviews, support a finding that the timber volume estimates used in the contract were reasonably accurate. Appellant assumed significant risks

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<sup>1</sup> Cruising is the process by which the amount of merchantable timber in a given area is estimated. The process involves selection of sample areas or units, counting and measurement of trees in areas or units, estimates of defects and breakage, and extension of the sample results to the whole area. *Caffall Bros. Forest Products, Inc. v. United States*, 678 F.2d 1071, 1073 (Ct. Cl. 1982). The FS uses check cruises to evaluate and verify the accuracy of the cruise data.

in this contract. Appellant has failed to demonstrate that an error in the FS estimates occurred for which it is entitled to relief, that the FS in some way breached the contract, that a mutual mistake occurred, or that any basis exists for reformation of the contract.

The appeal was submitted for decision on the written record pursuant to Board Rule 19 (48 CFR 6101.19 (2008)). The record considered by the Board consists of the pleadings; appeal file (exhibits 1 through 89); appellant's appeal file supplement (exhibits 1 through 24); Board Exhibit 1; Appellant's Rule 19 Submission (with Attachments A through D); Respondent's Rule 19 Submission (with Attachments A through E); Appellant's Rule 19 Reply (with Attachments A through C); Respondent's Notice of Supplemental Authority; Appellant's Response to Respondent's Notice of Supplemental Authority; and the transcript of the oral argument held on November 4, 2008.

### Findings of Fact

#### The timber and cruise

A severe weather event struck northwestern Pennsylvania on July 21 and 22, 2003. Appeal File, Exhibit 1. Randall Durner, a timber sale contracting officer in ANF's forest supervisor's office, developed a general timber sale cruise plan for cruising and marking the blown down timber using the appropriate FS Timber Cruising Handbook, which provided agency-wide guidance and methodology for conducting and evaluating FS timber sale cruises. Appeal File, Exhibits 3, 16; Appeal File Supplement, Exhibit 22 (Deposition of Randall Durner (Feb. 28-29, 2008)) at 54; Respondent's Rule 19 Submission, Attachment A (Declaration of Randall Durner (Apr. 19, 2008)) ¶ 1.<sup>2</sup> In November 2004, the ANF and the FS regional office tailored the general cruise plan into a more detailed timber cruise plan specifically for the sale area that became known as the Silver Fox timber sale. Appeal File, Exhibits 4, 5.

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<sup>2</sup> The FS Timber Cruising Handbook is part of the FS directive system that consists of the FS manuals and various handbooks. This system contains FS policy, practice, and procedures; serves as the primary basis for the internal management and control of FS programs; and provides the primary source of administrative direction to FS employees. Of pertinence to this decision are the National Forest Log Scaling Handbook, FSH 2409.11; the Cubic Scaling Handbook, FSH 2409.11a; the Timber Cruising Handbook, FSH 2409.12; and the Timber Sale Preparation Handbook, FSH 2409.18. Handbook updates in the form of amendments are issued as the FS sees fit.

The cruising for the Silver Fox timber sale began in November 2004 and was completed in May 2005. Appeal File, Exhibit 8. FS employees Kit Adams, Fred Swartzbeck, and Robert Fish were the cruisers for the sale, and Justin Weyant assisted them as a cruiser-in-training. *Id.*; Durner Declaration ¶ 17. Messrs. Adams, Swartzbeck, and Fish each had several years of forest and cruise experience, were experienced in ANF timber conditions, and were qualified timber cruisers. Appeal File, Exhibits 66, 68-70, 72-74; Appeal File Supplement, Exhibit 13; Respondent's Rule 19 Submission, Attachment B (Declaration of Kit Adams (Apr. 17, 2008)) ¶¶ 2-6.<sup>3</sup> The record establishes that all three cruisers received sufficient training preceding the cruise to meet the quality control objectives of the FS Timber Cruising Handbook. Appeal File, Exhibit 16 at 276-82; Appeal File Supplement, Exhibit 13. Mr. Durner declared that he was "personally aware" that the three men "were active, certified cruisers at the time of the Silver Fox timber sale cruise." Durner Declaration ¶ 17. This declaration of cruiser certification was not successfully rebutted in the record. *See* Adams Declaration ¶ 1; Appeal File, Exhibits 66, 68-70, 72-74; Appeal File Supplement, Exhibit 13. The record supports, and the Board so finds, that at the time of the Silver Fox sale, Messrs. Adams, Swartzbeck, and Fish were certified cruisers.

The sale area was cruised and the area marked into payment units. Appeal File Supplement, Exhibit 13; Appeal File, Exhibit 26 at 451. Using the sample tree methodology dictated by the cruise plan, the cruisers counted each tree meeting the sale's merchantability requirements. Appeal File, Exhibit 8.<sup>4</sup> As they were counting the trees, the cruisers marked each tree so it would not be double counted and recorded the count by species on dot tally sheets. *Id.* The cruisers, in pre-determined intervals, designated sample trees for measurement of diameter and height, measured the sample trees, and visually estimated the amount of defect. *Id.* The measurements and estimated amount of defect for each sample tree were also recorded on the dot tally sheets. *Id.*; *see also* Appeal File Supplement, Exhibit 25 (Deposition of David Cotterman (Feb. 28, 2008)) at 19, 39, 40. The information from the dot tally sheets was entered into a FS computer database, called the National Timber Cruise

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<sup>3</sup> The record reveals that Mr. Adams became a certified qualified timber cruiser in 1996 and maintained FS certification through 2005. Adams Declaration ¶ 1. No declarations were received from Messrs. Fish and Swartzbeck regarding the status of their cruiser certifications; however, it appears from the record that Mr. Fish became a certified qualified timber cruiser in 1992 and Mr. Swartzbeck became one in 1995. Appeal File, Exhibits 66, 68-70, 72-74; Appeal File Supplement, Exhibit 13. Both Messrs. Fish and Swartzbeck appear to have had sufficient training to maintain their cruiser certifications. *Id.*

<sup>4</sup> A merchantable black cherry or red maple tree had to be at least 11 inches in diameter at breast height (DBH), 9.6 inches in diameter at the small end, and at least 8 feet in length. Appeal File, Exhibit 26 at 431.

Program (NATCRS), where a computer printout was generated that included, among other things, the UC5 report. The UC5 report showed the overall total number of trees, estimated gross volume of timber species by CUFT (cubic feet) and BDFT (board feet) using the International 1/4-inch log rule (hereinafter referred to as the International scale), and the estimated net volume of timber species by CUFT and BDFT. Appeal File, Exhibit 10 at 144. The UC5 report also provided this information by payment unit. *Id.* at 135-43. Sometime after the cruise, the sale area was divided into two smaller sales, referred to as the Silver Fox timber sale and the FR 580 timber sale. *Id.*, Exhibit 7.

After the NATCRS run was completed, and prior to the FS offering the timber for sale, David Cotterman, a forest technician and timber sale administrator at the ANF, did a line-by-line review of the tree measurement data that had been input into the computer. Cotterman Deposition at 10-13. Comparing the computer data against the cruise dot tally sheets, he found no errors in the data input. *Id.* Mr. Cotterman also reviewed the tree count data and made three corrections; two corrections were made due to omissions in unit 7 for pulpwood sample measurement trees, and one correction was made due to over-counting one beech tree in unit 16. Appeal File, Exhibit 9 at 83, 92, 106. The FS handled the potential for unseen defect during the appraisal process by reducing the advertised price for the sale. Durner Deposition at 72-73; Appeal File, Exhibit 60. Mr. Durner applied a factor of 7.5% for defect in black cherry sawtimber as his review of past sales indicated that the average deduction for defect in black cherry sawtimber was 6.4%. Durner Deposition at 72-74.

Since the total estimated sale volume exceeded 2000 CCF, a check cruise was called for. Appeal File, Exhibits 10, 15, 16 at 287; Appeal File Supplement, Exhibit 23 (Deposition of Michael Van Dyck (Feb. 29, 2008)) at 16, 36. Regarding check cruises, the FS Timber Cruising Handbook provides the following guidance: "Measurement checks should be designed to obtain a representative sample of the original number of sample units . . . . The sample should be dispersed throughout the cutting units in the sale area to determine if all significant variables . . . have been identified." Appeal File, Exhibit 16 at 287.<sup>5</sup> In June

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<sup>5</sup> Cochran mentions that several years earlier some FS staff had met to discuss tolerances as a possible way of evaluating cruiser performance and check cruises, but no action was taken to implement any staff recommendations or amend FS Timber Cruising Handbook. Appeal File, Exhibit 1003; Durner Deposition at 57-58, 69; Van Dyck Deposition at 37. The FS generally evaluates timber cruises using a volume comparison; FS personnel compare cruise volume estimates with the estimated volume of a subsequent check cruise to ensure that the cruise estimate of volume is within +/- 10% of the check cruise estimate. Cotterman Deposition at 31-33. Cochran has not established the materiality of these facts.

2005, the FS contracted with an independent check cruise contractor, Joseph Hepinger, to perform the check cruise. *Id.* at 231, 287; *see also id.*, Exhibits 12, 16; Appeal File Supplement, Exhibit 24 (Deposition of Joseph Hepinger (Feb. 29, 2008)) at 10. The FS purchase order for the check cruise provided that the check cruiser was to check measure fifty sample measurement trees throughout the timber sale area. Appeal File, Exhibit 12 at 147. The check cruiser should: “perform check measurements on sample measurement trees dispersed over at least 40% or twelve (12) of the cutting units across the sale, to account for all significant variables. A representative sample of various species and products is desired.” *Id.* at 151. The purchase order did not require that the tree count be reviewed or that the trees be recounted. *Id.*

Mr. Hepinger independently determined the units to check cruise based on a random selection among the measurement trees. Appeal File, Exhibit 12; Hepinger Deposition at 14-15, 30; Cotterman Deposition at 24-25. He checked the required total of fifty trees. Appeal File, Exhibit 14; Hepinger Deposition at 24. Despite the terms of the purchase order, however, Mr. Hepinger checked trees in only four payment units, asserting that, based on his knowledge of timber conditions and his field experience in the sale area, he knew that the timber was uniform and did not require him to examine additional units. Hepinger Deposition at 22-24, 32-33. The check cruise was completed in July 2005. Appeal File, Exhibit 14; Hepinger Deposition at 30-31. Sometime after the FS realized that Mr. Hepinger had check cruised only four units, Mr. Cotterman evaluated the check cruise data again and concluded that the trees that were checked were properly dispersed and representative of the characteristics of the sale. Cotterman Deposition at 27-29. Even if the check cruiser did not fulfill his contractual requirements, the record supports the conclusion that the check cruise satisfied the guidance of the FS Timber Cruising Handbook. The appellant has identified no data discrepancies that were not identified by the check cruise.

The check cruise data were input into NATCRS and then compared with the data from the original cruise. Appeal File, Exhibit 15. Mr. Cotterman determined that the check cruise validated the cruise data, and was within the reasonably acceptable error rate of +/- 10% of sawtimber volume, because the tree species matched and there was only a 1% difference between the sawtimber volume between the original cruise and the check cruise. Appeal File, Exhibits 10, 15; Cotterman Deposition at 31, 32-33, 36-37. The results from the count and sample measurement trees were extrapolated to all the trees in the population to arrive at a total estimated volume of timber by species. Appeal File, Exhibit 16 at 231.

Based on the record, the Board finds that the cruise and check cruise were adequately conducted and that the estimates generated were reasonably accurate.

#### The solicitation and contract

Using volume estimates, the FS issued a bid advertisement for the Silver Fox timber sale on September 1, 2005, noting that prospective bidders could request a copy of the sale prospectus. Appeal File, Exhibit 21 at 400. The notice stated that the estimates were not guaranteed and the prospectus was informational only. A purchaser would buy all designated timber at a total purchase price without regard to the actual or measured quantity removed. The bid advertisement showed that there was an estimated volume of 1058 CCF of black cherry sawtimber, 16 CCF of beech sawtimber, 676 CCF of red maple sawtimber, and 1209 CCF of pulpwood. *Id.* at 377. Bidders were instructed that “[a]ward of the contract will be made to that responsible bidder whose bid, conforming to the invitation for bids, is most advantageous to the United States on the basis of total value at rates bid for the estimated quantities.” *Id.* at 400. The sale advertisement also contained several disclaimers that are standard to FS timber sales, and bidders were warned that they would be required to execute the disclaimers when bidding. *Id.* at 395-98.

The sale prospectus that was made available to all prospective bidders warned that it was not a legally binding document. Appeal File, Exhibit 20 at 378. Prospective bidders were informed that the “[t]otal sale value on advertised rates is \$1,030,307.30,” thus establishing a minimum bid total. *Id.* at 384.

The quality, size, cut per acre and product suitability of the timber are estimates based on detailed cruise information on file and available for inspection at the Forest Service offices listed above and in the advertisement. VOLUME QUANTITIES LISTED HERE ARE MADE AVAILABLE WITH THE UNDERSTANDING THAT VALUES SHOWN ARE FOREST SERVICE ESTIMATES AND ARE NOT GUARANTEED. For these reasons, bidders are urged to examine the timber sale area and make their own estimates.

*Id.* Attached to the sale prospectus was the NATCRS computer printout, including the UC5 report. *Id.* at 394; Cotterman Deposition at 38.

Prior to bidding, Wade Cochran, who was Cochran’s president, spent approximately fifteen hours examining the timber in units 1, 2, 5 through 7, 9, 12, 13, 15 through 19, 21 through 23, and 30 of the sale area. Appellant’s Rule 19 Submission, Attachment 1 (Affidavit of Wade Cochran (undated)) ¶¶ 1, 5-6; Board Exhibit 1 (Deposition of Wade Cochran (Feb. 29, 2008)) at 30. He elected to not visit the remaining thirteen units because he “assumed that the whole area was pretty much the same quality of timber and size.” Cochran Deposition at 32. During his inspection, Mr. Cochran did not measure any tree heights or diameters to verify the FS measurements; instead, he “used pretty much the [FS] prospectus and [his] experience” to develop the offer. *Id.* at 22-23, 32-33. He estimated

wood defect based upon “what [he] could see and [his] experience from previous sales.” *Id.* at 23. Mr. Cochran understood that the timber quantity set forth in the documents he was using was not guaranteed. *Id.* at 57.

On or about October 31, 2005, Cochran made a bid on the sale. Appeal File, Exhibit 23. The bid, which had been formulated by Mr. Cochran, shows Cochran offering to pay \$932.16 per CCF for an estimated 1058 CCF of black cherry sawtimber, \$6.00 per CCF for an estimated 16 CCF of beech sawtimber, \$61.67 per CCF for an estimated 676 CCF of red maple sawtimber, and \$1.90 per CCF for an estimated 1209 CCF of pulpwood. *Id.* Multiplied, the offer amounted to a total of \$1,030,307.30, but the bid form did not contain the total value figure. *Id.*

Having inspected the sale area to his satisfaction to be able to formulate a bid, Mr. Cochran, on behalf of Cochran, executed the several disclaimers associated with the volume estimates:

**DISCLAIMER OF ESTIMATES AND BIDDER’S WARRANTY OF INSPECTION:** Before submitting this bid, the Bidder is advised and cautioned to inspect the sale area, review the requirements of the sample sale contract, and take other steps as may be reasonably necessary to ascertain the location, estimated volume, construction estimates, and operating costs of the offered timber or forest products. Failure to do so will not relieve the Bidder from responsibility for completing the contract.

The Bidder warrants that this bid/offer is submitted solely on the basis of its examination and inspection of the quality and quantity of the timber or forest product offered for sale and is based solely on its opinion of the value thereof and its costs of recovery, without any reliance on Forest Service estimates of timber or forest product quality, quantity or costs of recovery. Bidder further 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.

Appeal File, Exhibit 23 at 409. The sample contract set forth the Adjustment for Quantity Errors clause as the sole express warranty here relevant.

On January 3, 2006, based on Cochran's bid in the amount of \$1,030,307.30, the FS awarded the Silver Fox timber sale, contract 02-153346, to Cochran. Appeal File, Exhibit 25 at 419.

Consistent with the solicitation, the contract contained a variety of clauses common to timber sales contracts, including several clauses dealing with the timber volumes in the sale. Clause AT2, Volume Estimation and Utilization Standards, set forth the FS' estimated volume of timber by total quantity and by species. Appeal File, Exhibit 26 at 431. The total estimated volume of timber was 2959 CCF, derived from an estimated volume of 1058 CCF of black cherry sawtimber, 16 CCF of beech sawtimber, 676 CCF of red maple sawtimber, and 1209 CCF of pulpwood. The contract provided that "the estimated quantities stated in AT2 are not to be construed as guarantees or limitations of the timber quantities to be designated for cutting under the terms of this contract." *Id.* at 449. At clause AT4b of the contract, Cochran agreed to pay the FS the flat rates for each variety of timber that it had bid. *Id.* at 432. That is, Cochran was obligated to pay the FS the sum of the estimated volume times the flat rate. Payment was not dependent upon actual volumes removed. The contract also contained clause AT4c, Schedule of Payment Units, which listed thirty payment units by number, each listing the species, the estimated volume of timber by CCF, and the flat rate payment expected from Cochran, using the flat rates set forth at clause AT4b. *Id.* at 433-35.

Several other provisions that further addressed the responsibilities and risks associated with the estimates were in the contract. Pertinent to the dispute before us, clauses BT2.4 and BT2.43 provided:

BT2.4, Quantity Estimate. The estimated quantities of timber by species designated for cutting under BT2.3 and expected to be cut under utilization standards are listed in AT2.

....

BT2.43, Adjustment for Quantity Errors. An estimated quantity shown in AT2 shall be revised by correcting *identified errors made in determining estimated quantity* that result in a change in total timber sale quantity of at least 10 percent or \$1,000 in value, whichever is less, when an incorrect estimated quantity is caused by computer malfunction or an error in calculations, area determination, or computer input.

No adjustments in quantity shall be made for variations in accuracy resulting from planned sampling and measuring methods or judgments of timber quality or defect.

Appeal File, Exhibit 26 at 448-49. On January 3, 2006, the contract was modified to divide payment unit 24 into units 24A and 24B. *Id.* at 427.

### Timber harvest

Cochran commenced harvesting on the Silver Fox timber sale in January 2006. Appeal File, Exhibit 28. Cochran cut the timber in a unit, took the timber to its log yard, measured it to establish gross volume, cut out the defective wood, and then measured the timber to derive net volume. *Id.* at 70-71.

On August 16, 2006, Mr. Cochran called Mr. Durner to request a meeting to discuss timber volume issues. Appeal File, Exhibit 30. Cochran stated that while the gross volume of the timber was “coming out well,” the net volume “was a problem.” *Id.*; Durner Deposition at 15. Volume was being lost due to red rot defect in the heartwood of the black cherry logs, and in units 16, 17, 18, and 19, due to ring shake, another type of internal wood defect. Appeal File, Exhibit 30. Mr. Cochran told Mr. Durner that thirty percent of the black cherry sawtimber he had harvested had red rot defect in it to varying degrees. *Id.* At a meeting held on August 17, 2006, Cochran asserted that the FS had breached the contract by failing to follow its own protocol when estimating the timber volume, and had as a result overstated the timber volume for the sale. *Id.* Mr. Cochran acknowledged that he knew the sale area would have red rot defect in the black cherry heartwood, but that, based on his pre-offer inspection, the amount of defect he was encountering was greater than he expected. Cochran Deposition at 81, 83-84. Following the August 17 meeting, Mr. Durner asked Mr. Cotterman to review the cruise data for the Silver Fox timber sale to see if there were data entry errors. Durner Deposition at 19-21. Mr. Cotterman reviewed the data but did not find any errors in data entry. *Id.*

On December 21, 2006, Cochran’s attorney wrote to Mr. Durner, representing that Cochran had finished harvesting payment units 8 through 13, 16 through 23, 24A, and 30, and that the FS had billed Cochran “total flat payment amounts” for those units. Appeal File, Exhibit 33. Setting forth figures that he asserted showed overstated estimated quantities of black cherry sawtimber, Cochran’s attorney argued that Cochran was entitled to a reduction in the FS billing based on the Adjustment for Quantity Errors clause of the contract and mutual mistake. *Id.* Cochran’s attorney also requested that the FS cancel the remaining units in the sale, which Cochran had not yet begun harvesting. *Id.* Mr. Durner treated the December 21 correspondence as a claim and on January 23, 2007, wrote Cochran requesting that it provide specific information on the monetary amount claimed. *Id.*, Exhibit 34.

Cochran responded on February 13, 2007, stating a “supplemental request to convert our request to a formal claim” would be submitted “in the near future.” *Id.*, Exhibit 36.

Mr. Durner and other FS personnel met with Mr. Cochran and his attorney on March 1, 2007, to discuss further the volume issues relating to the sale. Appeal File, Exhibit 37. Cochran indicated that it had stopped harvesting, did not have the financial resources to complete performance of the contract, and wanted to terminate the contract. *Id.*, Exhibits 37, 52. Also during the discussion, Cochran maintained that the sale’s check cruise was inadequate and that the sawtimber volume harvested was reduced due to red rot. *Id.*, Exhibit 37. When Mr. Cochran stated that he had calculated Cochran’s volume shortfall using the Doyle log rule (hereinafter referred to as the Doyle scale), Mr. Durner responded that Cochran would have to convert that data to CCF measurements for comparison purposes because the FS’ estimated volumes were in CCF and CCF was the controlling unit of measure under the contract. *Id.* The FS agreed to review its cruise and check cruise data for errors that might have contributed to a volume shortfall. *Id.*

James Campbell, a timber sale representative in ANF’s forest supervisor’s office, reviewed the cruise and check cruise data for possible errors using a newly developed computer program called CheckMate. Appeal File, Exhibit 44 at 708-14; *see also id.*, Exhibit 77. The CheckMate report showed that the Silver Fox cruise and check cruise “passed,” with the sawlog height measurements for the sale receiving a score of 96% accuracy and the cruise and check cruise data as overall being 98% accurate. *Id.*, Exhibit 44 at 708. Mr. Campbell reviewed other data and noted in an internal FS document that he believed the “amount of volume loss or difference is extremely low for a two year old salvage sale.” *Id.*, Exhibit 84 at 1154. Mr. Campbell wrote:

After reviewing all the documentation associated with this sale, I can find no errors in the sale. However, there are errors in the collection of data. At a minimum, I would expect to see a difference of at least 10% between gross and net on two year old blowdown. A difference of 20% would not surprise me in the white woods. Some studies conducted by the Experiment Station on blowdown timber show 95% of the red maple boards sawn two years after the windstorm can no longer be sold as lumber, i.e., sawtimber. They would have to be sold as pulpwood.

It appears from looking through the sale documentation that no deductions were made in volume for the two year old blowdown. All the deductions were made at the quality and market level during the appraisal. A reduced advertised dollar value at advertisement does nothing for volume that is not there.

*Id.* Mr. Campbell raised the possibility of an error in the timber defect percentage with the contracting officer, but Mr. Durner, who was Mr. Campbell's supervisor, disagreed with Mr. Campbell's concern that the timber defect percentage was low. Durner Declaration ¶ 6. Using his twenty-two years of ANF experience, the results of a destructive sampling examination conducted in the ANF on February 28, 2006, and a review of past field defect judgments of sawtimber volume estimates, Mr. Durner concluded that the wood defect estimate of 7.5% for the black cherry sawtimber was reasonable and reliable. *Id.*; *see also* Durner Deposition at 72-73. In short, he concluded that Mr. Campbell's concern that "there are errors in the collection of data," was not borne out by the record. We find Mr. Durner's assessment more persuasive, as it is consistent with other analyses in the record.

On November 20, 2007, the FS sent a notice to Cochran that a periodic payment of \$183,124.01 was due for the units it had harvested. Durner Declaration ¶ 27. After not receiving a response from Cochran, and with the payment still outstanding, on March 6, 2008, Mr. Durner sent Cochran a notice stating that the FS considered Cochran to have breached the contract and "all harvest operations are hereby suspended immediately on the sale until the breach is remedied." Appeal File, Exhibit 89.

Hoping to obtain relief from the contract, Cochran submitted some log scale summary sheets and other information on March 27, 2007, listing in Doyle scale the gross and net BDFT of sawtimber that it had harvested. Appeal File, Exhibit 39. The contracting officer responded on April 12, 2007, to the volume concerns raised by Cochran, stating that the FS had found no problems with the cruise or check cruise, or errors that would qualify Cochran for a volume adjustment under the Adjustment for Quantity Errors clause. *Id.*

Alleging that it had "only been able to cut approximately 65% of the timber in the sale area," Cochran submitted a certified claim on May 4, 2007, seeking, *inter alia*, \$436,330 in breach damages, or, alternatively, \$221,629.78 for correction or reformation of the contract payment amounts for units 8 through 13, 16 through 23, 24A, and 30. Appeal File, Exhibit 47. Attaching tables to its claim, Cochran depicted by payment unit the FS' estimated black cherry and red maple sawtimber by BDFT (in International scale) as found in the prospectus, and the BDFT of the sawtimber it harvested (in Doyle scale). Using the BDFT volumes derived from the two different forms of measurement, Cochran then subtracted the volume

it recovered from the units it harvested from the FS estimates to reach a purported difference. Next, it converted that difference into CCF, applied the appropriate payment rate for the species of sawtimber, and reached what it alleged was the plus or minus dollar difference between the FS estimates and the timber it harvested. *Id.*<sup>6</sup> Cochran also sought cancellation of the work in payment units 1 through 7, 14, 15, 24B, and 26 through 29, a sixty-five percent *pro rata* reduction in the \$23,850.91 it alleges the FS had billed it for road construction, and reimbursement of \$8900.51 in legal fees and costs for preparing and negotiating the associated request for an equitable adjustment.

In August 2007, Mr. Durner reconsidered an earlier request from Cochran for a stump count of harvested trees. Durner Declaration ¶ 10. Although he believed stump counts were of limited usefulness, questionable accuracy, and rarely conducted in the FS Eastern Region because of that, he decided a stump count would provide “one more piece of information to consider in the context of the other reviews” to use in making his final decision. *Id.* ¶¶ 7-10. Mr. Durner noted that “in post harvest [stump] counts, it’s difficult to always capture all the tree [stumps] due to disturbance, cover up, tops on stumps, [and] things like that.” Durner Deposition at 94; Durner Declaration ¶ 12. A stump count of payment units 10 and 13 was conducted by the FS in August 2007, covering approximately thirty-one acres, and showing that there were thirty-three fewer stumps than in the cruise count. Durner Declaration ¶ 11; *see also* Appeal File Supplement, Exhibit 11 at 1; Appeal File, Exhibit 20 at 388; Durner Deposition at 93-94. Mr. Durner declared that he did not find the results from the stump count “conclusive,” “unusual or unexpected,” as the difference averaged only approximately one stump per acre. Durner Declaration ¶¶ 11-12. Mr. Durner stated that he considered the stump count information, as well as “the totality of the record, including the two reviews of the check cruise data,” in making his final decision. *Id.* ¶ 12.

Cochran’s argument is based on its calculations showing the net volumes of the black cherry and red maple sawtimber as harvested by payment units, after the defects have been cut out. According to its scaling data, the harvested volume in some units was greater than the FS’ volume estimate, and in others it was less. Appeal File, Exhibit 60 at 855 (table).<sup>7</sup>

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<sup>6</sup> The first table depicts that for the units harvested, the FS estimated 417,015 BDFT of black cherry and Cochran harvested 284,996 BDFT, for a difference of 132,019 BDFT and a loss of \$205,112.48. The second table depicts that for the payment units harvested, the FS estimated 313,982 BDFT of black cherry and Cochran harvested 153,548 BDFT, for a difference of 160,434 BDFT and a loss of \$16,517.30. Appeal File, Exhibit 47.

<sup>7</sup> According to Cochran’s figures, nine payment units had a greater harvest volume than the FS estimates: unit 8 (113%); unit 11 (142%); unit 12 (120%); unit 16 (102%); unit 17 (135%); unit 19 (120%); unit 20 (154%); unit 22 (175%); and unit 25 (102%). Appeal

Cochran requested that “the timber quantities in table AT2 and the total payment figures shown in AT4c . . . be revised to conform to the actual tallies shown in the Cochran scaling records.” Appeal File, Exhibit 47.

On August 24, 2007, Mr. Durner issued a contracting officer’s decision denying the claim and concluding that, among other things, Cochran had not proved that the FS had overestimated the sawtimber to be removed and was not entitled to recovery under the Adjustment for Quantity Errors clause, it had failed to show that the FS breached the contract by failing to follow FS protocol and procedures, and it had failed to demonstrate that a mutual mistake had occurred. Appeal File, Exhibit 52.

In support of its claim and throughout the dispute process, Cochran submitted several versions of information and calculations comparing the FS estimates to the timber quantities it harvested. *See* Appeal File, Exhibits 47, 60; Appeal File Supplement, Exhibit 17; Appellant’s Rule 19 Submission. In the claim itself, Cochran did not provide comparable scaling methodologies with which to make reliable comparisons. Later, after the final decision had been issued and in an undated submission, appellant shows tables containing the Doyle scale quantities set forth in its claim and, among other things a column purporting to show the Doyle scale quantities and the International scale quantities. Appeal File Supplement, Exhibit 17.<sup>8</sup>

Michael Van Dyck, who since 2003 has been the FS Eastern Region timber measurements specialist responsible for oversight of timber volume estimation procedures, analyzed some of the data Cochran submitted on the red maple and black cherry sawtimber volumes. Van Dyck Declaration ¶ 1. During the course of attempting to prove volume losses, Cochran presented three different sets of red maple log scale information to the FS positing that the total net volume of red maple timber it harvested was 322 CCF as compared to FS’ estimated amount of 481 CCF for the same area. Respondent’s Rule 19 Submission, Attachment E (Declaration of Michael Van Dyck (Apr. 28, 2008)) ¶ 3. This, Cochran asserted, led to a shortfall of 33.1% for the red maple sawtimber. Appellant’s Rule 19 Submission at 26-28. A comparison of two of the versions of data showed discrepancies.

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File, Exhibit 60 at 855 (table). In other units, appellant’s reported harvested volume was less than the FS estimates: unit 9 (69%); unit 10 (48%); unit 13 (65%); unit 21 (80%); unit 23 (35%); and unit 30 (81%). *Id.*

<sup>8</sup> Although it is not so stated in the record, these tables seem to be what the parties refer to as Cochran’s January 2008 submission.

Van Dyck Declaration ¶ 6.<sup>9</sup> In a later-provided third set of red maple log scale information, additional discrepancies were found. *Id.* ¶ 7. Mr. Van Dyck determined that because of unexplained inconsistencies in the three versions of red maple volume data that the FS had received, he was unable to prepare an accurate comparison of the red maple sawtimber volume. *Id.* ¶¶ 8-9. We find the red maple volume information proffered by Cochran to justify volume discrepancies faulty, confusing, and often conclusory. We agree with Mr. Van Dyck's assessment that the red maple sawtimber data the FS received was unreliable.

Regarding the alleged volume differences in the black cherry sawtimber, on February 1, 2008, Mr. Van Dyck, using the figures he received from Cochran's January 2008 submission on the individual payment units and without any independent calculations of his own, compared Cochran's volumes with the FS' estimated volumes. Appeal File, Exhibit 59. He concluded that there was a 13.9% volume difference between the FS estimates for units 8 through 13, 16 through 23, 25, and 30, and the volumes Cochran claimed it harvested on those units. *Id.* According to Cochran, the total net volume of black cherry timber it harvested was 444 CCF. Appellant's Rule 19 Submission at 26-28. Based on the FS' 574 CCF estimated net volume of black cherry sawtimber, Cochran asserted it experienced a shortfall of 22.65% for black cherry sawtimber. *Id.*

That same day, Mr. Van Dyck prepared his own calculations using the information from the January 2008 submission as well as Cochran's tally of marketable black cherry sawtimber. Appeal File, Exhibit 60. For this report, and by each payment unit, Mr. Van Dyck used Cochran's measurement of each piece of marketable black cherry sawtimber to calculate directly the CCF of each piece of black cherry sawtimber. *Id.* He then took the total of the CCF figures he had calculated using Cochran's tally data and compared that total to the totals of the FS' estimated black cherry CCF for the harvested payment units, to determine whether there was a difference, and if so, how much of a difference. *Id.* Mr. Van Dyck found an 8% difference between the FS' estimated CCF of black cherry sawtimber and Cochran's tally data; Cochran had harvested 472.12 CCF of marketable black cherry sawtimber as opposed to the contract's estimate of 512 CCF. *Id.*; Van Dyck Declaration ¶

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<sup>9</sup> Mr. Van Dyck discussed significant data disparities between the first and second red maple data submissions in a report dated March 5, 2008, noting no explanation was given for the disappearance of logs from one data set to the next or the appearance of new logs. He believed that the conflicting data "casts doubt on the accuracy of the black cherry scale data [and] the Government has no assurance that data is accurate." Appeal File, Exhibit 61 at 894.

10.<sup>10</sup> A later comparison of the log scale sheets and the January 2008 data indicated to Mr. Van Dyck that Cochran had not accounted for all the black cherry sawlog volume in its January 2008 submission, so he opined that the total harvested volume was likely greater than 92% of the contract estimate. Van Dyck Declaration ¶¶ 11-14.<sup>11</sup>

Mr. Van Dyck noted several other problems associated with the January 2008 data the FS received from Cochran:

The Government has no way to verify that the scale data are accurate, nor that all [the] logs removed from the units as sawtimber are represented. The values for log lengths and diameter are used without modification and without any attempt to identify errors.

....

It is important to note that black cherry sawtimber was bid as a lump sum across all cutting units in the sale. Individual units are specified in the contract only for the purpose of calculating payments. It is impossible to determine how well the actual yield of black cherry sawtimber compares to the contract volume until all units have been harvested.

Appeal File, Exhibit 60 at 855. Like the red maple information, we similarly find the black cherry volume data Cochran proffered to justify volume discrepancies faulty, confusing, and often conclusory. Some of the calculations appeared to account for defects and others did not. The Board finds Mr. Van Dyck's calculations contained in the second report to be more compelling than those proffered by appellant. Appellant has not convincingly rebutted Mr. Van Dyck's conclusions.

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<sup>10</sup> The FS avers that appellant's calculations are erroneous in part because the volume of the Government's estimate should be 512 CCF, not 574 CCF. Transcript at 55-57.

<sup>11</sup> Mr. Van Dyck wrote that there were some sawtimber logs cut that met size specifications, but were rejected by Cochran as not being marketable because of internal defect (e.g., rot or ring shake). Appeal File, Exhibit 60 at 855. He noted that the rejected sawtimber logs were not included in Cochran's log scale data, but that: "[t]hese logs [sh]ould have been included . . . since the timber cruise only accounts for defects that can be seen before the tree is cut. The potential for unseen defect is addressed through the appraisal process as a reduction in the advertised price." *Id.*

Cochran never resumed cutting timber on the Silver Fox timber sale. The contract expired on October 31, 2008. Appeal File, Exhibit 26 at 429. The FS concluded that because not all the timber in the contract had been harvested by Cochran, it was not possible to determine accurately how the actual yield of sawtimber compared to the contract volume estimate. *Id.*, Exhibit 60 at 855.

In addition to harvesting the timber, Cochran agreed under the contract to bear certain road construction costs. Appeal File, Exhibit 26 at 438, 454-57. Cochran was also required to deposit \$6200 for engineering services associated with road construction by February 8, 2007. *Id.*, Exhibits 26 at 479, 60 at 786, 87 at 1161. There is no indication in the record that Cochran ever paid the deposit. Billing associated with road construction totaling \$10,837.78 has, to date, been deferred by the FS. *Id.*, Exhibit 52 at 786.

Based upon the record, the Board concludes that the volume estimates in the solicitation and contract were reasonably accurate. The FS calculations and reviews are well supported. The purchaser has not established whether or how much it accounted for actual timber quality and defects. Cochran has not presented credible information regarding its harvest and has not adequately accounted for the various discrepancies in its figures. Cochran has failed to provide reliable estimates or bases to discount the figures of the FS, most importantly regarding the total timber volumes for the sale.

#### Positions of the Parties

Appellant claims that the FS made faulty volume estimates and that as a result of those faulty estimates it harvested less timber than the estimated quantities in the contract. Appellant proffers three arguments for recovery. Appellant asserts it is entitled to an equitable adjustment pursuant to the contract's Adjustment for Quantity Errors clause because respondent allegedly input incorrect data into the computer program, resulting in errors exceeding \$1000. These errors in calculations, computer inputs, tree counts, and sawlog heights, appellant argues, caused damages for which it seeks "either \$221,629, based on the difference in net volume of black cherry and red maple sawtimber in board feet, or \$130,346, based on the difference in net volume of black cherry and red maple sawtimber in CCF." Next, appellant posits that respondent's failure to follow the applicable FS Timber Cruising Handbook provisions, while conducting the timber cruise and check cruise to calculate the estimated timber quantities on the sale, constituted a breach of contract entitling it to recover \$415,580 in damages. Finally, appellant asserts it is entitled to equitable relief based on mutual mistake, including \$415,580 for financial losses and loss of estimated profit, \$8347.82 in road construction costs, \$8900 in legal fees incurred prior to this litigation, and "such other legal and equitable relief as is just, including reformation of the contract price for cut portions and rescission of the uncut cutting payment units of the contract . . .

including reformation of the price for cut portions . . . and rescission of the uncut cutting/payment units of the contract.”

Respondent asserts the volume estimate for the sale was reliable, its tree count and measurements were accurate, and relief under the contract’s Adjustment for Quantity Errors clause is not warranted. Regarding the alleged breach of contract, respondent avers that it followed the FS Timber Cruising Handbook procedures in conducting the timber cruise and check cruise and did not breach the contract. Respondent also asserts that appellant misrepresented the difference between the estimated and harvested volumes when calculating the quantum portion of its claim, and that when the harvested volume in CCF is used to calculate the difference, there is no evidence of a grossly inadequate volume estimate. Finally, respondent contends that appellant has failed to prove it is entitled to recover under its theory of mutual mistake.

### Discussion

This contract was for the sale of designated timber. The purchaser agreed to pay the bid rate multiplied by the estimated quantities for each timber species. To prepare for the sale, the FS cruised the sale area; it conducted a 100% tree count and used a selective sampling of the timber that it then measured for height and diameter at breast height. Using the data obtained from the cruise, the FS extrapolated the figures to the timber in the population, applied a percentage factor for defective wood, and derived the timber volume estimates that it used for the sale. During the appraisal process the advertised price for the sale was reduced to compensate for potential but unseen wood defects. The sale was advertised and sold based on the estimated volume of timber by species, and the contract award was made “on the basis of total value at rates bid for the estimated quantities.” The purchaser obtained the marked timber on the sale and agreed to pay the fixed price of \$1,030,307.30, without regard to the actual volume removed, unless it could prove it was entitled to relief under the terms of the contract or because the FS, in some way, breached the contract.

When half-way through the harvest of the sale the purchaser concluded it was recovering less timber than it had anticipated, it stopped cutting and failed to pay the payment amount set for the units that it had harvested. Appellant seeks reduction of the payment amount and cancellation of the rest of the contract

The language of the contract with its risk-shifting provisions and the findings of fact dictate a framework of analysis to be utilized in addressing the specific issues raised by appellant. We first examine whether appellant was entitled to relief under the contract pursuant to the Adjustment for Quantity Errors clause. To recover under that clause, a

purchaser must identify errors made in determining the estimated volume quantities that result in a change in total timber sale quantity of at least 10% or \$1000 in value (whichever is less), and must demonstrate that the incorrect estimated quantity was caused by computer malfunction or an error in calculations, area determination or computer input. Here, appellant failed to establish both elements required for relief. Next, we consider whether the FS had, in some way breached the contract, and determine it had not. Finally, we conclude that no mutual mistake occurred. We analyze each of appellant's recovery theories in detail below.

### Risk-shifting provisions under the contract

Central to resolving this dispute is an understanding of the language of this timber sale contract in which the FS expressly placed risks upon the purchaser while limiting its own liabilities. The FS disclaimed the accuracy of its volume estimates as well as the fitness of the timber or forest product for any purpose, and offering them "as is" without any warranty of quality or quantity. Under the terms of the contract, the FS agreed in limited circumstances to revise the estimated quantities (shown at contract clause AT2) by correcting identified errors made in determining the estimated quantity, when an incorrect estimated volume quantity was caused by computer malfunction or an error in calculations, area determination, or computer input. The contract specified and appellant agreed that no adjustments for quantity errors would be made for variations in accuracy resulting from planned sampling and measuring methods or judgments of timber quality or defect. The purchaser was also required to sign a disclaimer holding the FS "harmless for any error, mistake, or negligence regarding estimates except as expressly warranted against in the sample contract." Thus, the purchaser's ability to recover for volume estimation errors was extremely limited by the clear terms of the contract. *Caffall Bros. Forest Products, Inc. v. United States*, 678 F.2d 1071 (Ct. Cl. 1982); *Webco Lumber, Inc. v. United States*, 677 F.2d 860 (Ct. Cl. 1982); *Lance Logging Co.*, AGBCA 98-137-1, et al., 01-1 BCA ¶ 31,356; *D & L Construction Co.*, AGBCA 96-207-1, 00-2 BCA ¶ 30,926 (1999).

By execution of the required disclaimers the purchaser also acknowledged that it had not relied upon the FS' estimates. Case law and general principles of contracting that suggest relief may be available for faulty estimates must be read in light of, and contrasted against, language in a contract which sets forth only narrow limited circumstances under which relief may be available for faulty volume estimates. *Carr Forest Products, Inc. v. Department of Agriculture*, CBCA 588, 08-2 BCA ¶ 33,883, at 167,697 (quoting *Summit Contractors v. United States*, 21 Cl. Ct. 767, 776 (1990)). Under the facts presented by this case, the sole contract provision permitting the type of relief sought by appellant is found in the Adjustment for Quantity Errors clause.

### The Adjustment for Quantity Errors clause

Pursuant to clause BT2.43, Adjustment for Quantity Errors, a purchaser may request that “an estimated quantity shown in clause AT2 of the contract be revised.” The clause does not require an appellant to establish detrimental reliance upon the estimates. To obtain an adjustment appellant must identify errors in the FS’ estimated volume that resulted in a change in “total timber sale quantity” of at least 10% or \$1000 in value, whichever is less, and prove that the error was “caused by computer malfunction or an error in calculations, area determination, or computer input.” This is a two-pronged requirement, with the first looking to variations from the total timber sale quantity (not on a payment unit basis), and the second examining the basis of the error.

Appellant has a threshold burden of establishing that the total timber sale quantity was less than the total timber sale quantity as estimated in the contract. *Carr*, 08-2 BCA at 167,701. Appellant attempted to prove entitlement by comparing the volume of timber it says it harvested in sixteen of the thirty-one payment units, against the estimated volume quantities of those units as set forth in clause AT4c of the contract. However, a purchaser cannot cut only certain units, and then, without accounting for the remaining uncut timber, use only those units to obtain a contract adjustment under the clause. Such a comparison does not satisfy the first requirement for recovery under the clause; to recover, a purchaser must show that the *total timber sale quantity* it harvested differed from the FS estimates of the *total timber sale quantity*. Appellant made no discernable attempt to inventory the balance of the uncut timber on the sale. As appellant has the burden of establishing that the total timber sale quantity in the contract differed from the FS estimate, its failure to provide probative evidence of a discrepancy in the total timber sale quantity is a fatal flaw in proving the initial requirement for recovery under the clause. Here, appellant wholly failed to provide evidence establishing that the total timber sale quantity was less than the FS estimated. Given this principal failure of proof, the Board need not delve into the inadequacies of proof proffered by Cochran, using various methods of measurement for the units it harvested, more than it has done so already in the findings of fact.

As a second matter, to recover under the Adjustment for Quantity Errors clause a purchaser must also prove that the incorrect estimated volumes were caused by specific errors identified as a computer malfunction or an error in calculations, area determination, or computer input. Appellant has asserted that it harvested lower volumes of timber than it anticipated, but has not articulated or provided supporting evidence that identified errors occurred that would allow for relief under the clause. Well after it had submitted its claim to the FS, appellant identified lower tree counts as the error causing its lower volume recovery. Errors in tree counts, sample tree data, and cruise data have been construed as “input errors in the volume estimation equations and calculation errors in the volume

estimate results” falling within the clause. *Cleereman Forest Products*, AGBCA 2000-101-1, 02-1 BCA ¶ 31,664, at 156,459 (2001), *reconsideration denied*, 02-1 BCA ¶ 31,829. However, while alleging lower tree counts, appellant failed to follow-up with credible evidence as to the specifics on the overall tree count showing that counting errors had actually occurred.<sup>12</sup>

As appellant recognized, defects in the timber accounted for a significant decrease in the volume of the sawtimber. When appellant first raised an alleged lower volume harvest with the FS, it posited that excessive red rot and ring shake were the probable causes of the lower volume. To the extent that there may be a discrepancy between the FS estimated volumes and the volumes that were actually harvested on the Silver Fox timber sale, appellant has not demonstrated the cause as being other than its own judgmental error regarding quality and quantity. The Adjustment for Quantity Errors clause provides that “[n]o adjustments in quantity shall be made for variations in accuracy resulting from planned sampling and measuring methods or judgments of timber quality or defect.” *Carr*, 08-2 BCA at 167,699.

The various figures, measurements, and comparisons urged by appellant are not persuasive in establishing the actual volume of timber available under the contract or that any specific errors occurred which would entitle appellant to recover under the clause. Much of the data pointed to by appellant was confusing and unconvincing, and contained discrepancies that were never fully explained or able to be reconciled by the record. Appellant has provided no compelling evidence accounting for timber quality and defects. The Board finds that alleged volume shortfalls reasonably could be attributable to the timber quality and defects such as rot. It appears to us that appellant anticipated fewer defects and better quality timber than was present in the sale area.

#### Breach of contract

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<sup>12</sup> We consider the information from the stump count conducted by the FS in August 2007 on units 10 and 13, covering approximately thirty-one acres, not to be compelling evidence of error in the overall tree count because this limited survey failed to prove that the tree count for the sale area as a whole was incorrect and also provided no means of quantifying how purported errors in the tree count impacted volume recovery. Moreover, the lower figures attained during the stump count may reflect that stumps were covered or otherwise not counted, and there was no assurance that all designated trees were cut.

Aside from its arguments stemming from volume deficiencies and the applicability of the Adjustment for Quantity Errors clause, appellant posits that the FS breached the contract because it “did not follow numerous significant provisions” of the FS Timber Cruising Handbook, and this failure “resulted in quantities of timber for which [appellant] was charged under the contract, but which did not exist.” We note at the outset of this discussion that the purchaser signed a disclaimer holding the FS “harmless for any error, mistake, or negligence regarding estimates except as expressly warranted against in the sample contract.” A FS breach of contract was found when the contract expressly stated that the agency had followed the FS Timber Cruising Handbook but, in fact, it did not abide by material handbook provisions. *Cleereman*, 02-1 BCA ¶ 31,664, at 156,449. Here, as the FS did not contractually commit to conduct the cruise or check cruise in accordance with the FS Timber Cruising Handbook, we cannot find that the FS breached a contractual provision.

Protocols in the FS manuals and handbooks do not create extra-contractual rights, and breach of internal FS policies that have not been incorporated into a contract do not serve as a basis for a claim of government breach. The Federal Circuit has held that a FS violation of a statutory obligation does not, by itself, establish a breach of contract unless the statutory obligation is incorporated into the contract. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1369 (Fed. Cir. 2003). The FS manuals and handbooks are general rules of practice, primarily for internal guidance, that do not automatically extend rights to purchasers. *Carr*, 08-2 BCA ¶ 33,883, at 167,698-99; *see also Rich Macauley*, AGBCA 2000-155-3, 01-1 BCA ¶ 31,350; *Kearney Logging & Sawmill, Inc.*, AGBCA 86-247-3, 87-1 BCA ¶ 19,488. Expressly incorporating a handbook into a contract produces a different result. *Cleereman*, 02-1 BCA ¶ 31,829, at 157,264 (in finding that the contract had been breached, the opinion noted that if the FS did not intend to commit to strictly follow the dictates of the FS Timber Cruising Handbook, it should not contractually guarantee that it had followed the handbook procedures in reaching its estimates). The contract before us does not state that the volume estimates were determined using FS Timber Cruising Handbook procedures. The limited contractual language found in the present case distinguishes this matter from *Cleereman*. Since the FS did not contractually commit to having conducted the cruise or check cruise in accordance with the FS Timber Cruising Handbook, the FS did not mislead this appellant or breach the contract.

Apart from its failure to identify a contract provision the FS breached, the appellant has identified, at best, minor, non-material violations of the FS Timber Cruising Handbook. We found the cruisers certified and the check cruise adequate, even though the check cruise contractor failed to fully comply with the terms of its contract. However, even had we not made these findings, we would find no breach because appellant failed to prove the estimates were erroneous and that the alleged errors caused or contributed to faulty FS estimates. We

also saw no evidence that the FS acted in some way that might have breached the contract, particularly in light of the disclaimers appellant executed. In sum, appellant has provided no nexus between any alleged volume estimation errors and actions or inactions on the part of the FS.

### Mutual mistake

Appellant also asserts it is entitled to equitable relief based on mutual mistake. The elements of mutual mistake of fact that would, if proven, allow for relief include:

- (1) the parties to the contract were mistaken in their belief regarding an existing fact;
- (2) that mistaken belief constituted a basic assumption underlying the contract;
- (3) the mistake had a material effect on the bargain;
- and (4) the contract did not put the risk of mistake on the party seeking reformation.

*CH2M Hill Hanford Group, Inc. v. Department of Energy*, CBCA 708, 08-2 BCA ¶ 33,871, at 167,666 (citing *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994); *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990)).

To recover based on mutual mistake, both parties must be mistaken as to the same fact. *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 669 (Fed. Cir. 1992). Where the FS makes clear throughout the contract that it is not warranting the volume estimate and that the purchaser was assuming risks, even if the estimate was in error, appellant is unable to establish a mutual mistake of fact. *Id.* Appellant has failed to provide any compelling evidence that it is entitled to equitable relief based on mutual mistake.

Appellant's arguments regarding road construction costs, legal fees incurred prior to this litigation, and "such other legal and equitable relief as is just, including reformation of the contract price for cut portions and rescission of the uncut cutting payment units of the contract," have also been fully considered by the Board and found to be without merit.

### Decision

Appellant has not proved it is entitled to relief from the contract. The appeal is **DENIED**.

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PATRICIA J. SHERIDAN  
Board Judge

I concur:

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JOSEPH A. VERGILIO  
Board Judge

**McCANN**, Board Judge, concurring.

This appeal arises out of a timber sale contract. This case is actually quite simple and can be decided without the lengthy recitation of facts and most of the analysis in the majority's opinion. I find much of the analysis confusing and would decide the case as follows.

The appellant claims it is entitled to compensation because of incorrect timber volume estimates contained in the contract. I would deny the appeal because appellant has not proven that the estimates were defective.

#### Findings of Fact

The FS issued a bid advertisement for the Silver Fox timber sale on September 1, 2005. The advertisement showed that there was an estimated volume of 1058 CCF of black cherry sawtimber, 16 CCF of beech sawtimber, 6765 CCF of red maple sawtimber and 1209 CCF of pulpwood. On October 31, 2005, Cochran submitted a bid. This bid offered to purchase the various kinds of timber at a specified rate for each kind of wood. The total amount of the bid was \$1,030,307.30. On January 3, 2006, the FS awarded contract 02-153346 to Cochran in the bid amount.

Cochran commenced harvesting timber in January 2006. At a meeting held on August 17, 2006, Cochran asserted that the FS had breached the contract by failing to follow its own protocol when estimating the timber volume and had, as a result, overstated the timber volume for the sale.

On December 21, 2006, Cochran's attorney wrote to the contracting officer asserting that Cochran was entitled to a reduction in the FS billing based upon the Adjustment for Quantity Errors clause and mutual mistake. Appeal File, Exhibit 33. At a meeting on March 1, 2007, Mr. Cochran indicated that Cochran had stopped harvesting, said that it did not have the financial resources to complete performance, and asked that the contract be terminated. Appeal File, Exhibits 37, 52.

On May 4, 2007, Cochran submitted a certified claim seeking \$436,330.00 in breach damages, or alternatively \$221,629.78 for correction or reformation of the contract payment amounts for the units it had harvested, which was about half the units (units 8 through 13, 16 through 23, 24A, and 30). Appeal File, Exhibit 47. Cochran also sought a reduction in the \$23,850.91 it alleges the FS had billed it for road construction, reimbursement of \$8900.51 in legal fees and costs, and termination of the contract. On August 24, 2007, the contracting officer denied Cochran's claim.

### Discussion

Cochran has predicated all theories supporting its claims against the FS on the ground that the timber estimates set forth in the contract for the Silver Fox timber sale were excessive. Cochran arrived at its claimed difference between the FS estimates and its actuals by subtracting the BDFT of black cherry and red maple that Cochran had actually reaped, from the BDFT of black cherry and red maple contained in the prospectus.<sup>1</sup> Appeal File, Exhibit 20. It then converted this BDFT difference into a CCF difference by the use of an unknown conversion factor. Finally, it multiplied this CCF difference by the bid price per CCF to arrive at the amount of its claim. *Id.*, Exhibit 47.

Cochran's calculation is invalid because the prospectus' BDFT estimates of timber are calculated in International scale and the actual amount of timber that Cochran harvested was calculated in Doyle scale, the scale used by the lumber mills. The two log scales are distinctly different and lead to distinctly different amounts of BDFT when converting timber scaled in CCF to BDFT. *Carr Forest Products, Inc. v. Department of Agriculture*, CBCA 588, 08-2 BCA ¶ 33,883, at 167,700. To subtract timber scaled in one scale from timber scaled in another scale is like subtracting apples from oranges. It simply cannot be done. Any attempt to do so is patently invalid.

This defect in Cochran's claim was pointed out in the contracting officer's decision dated August 24, 2007. Appeal File, Exhibit 52. In fact, the contracting officer went into great detail regarding the differences in the two scales and how using two different scales would lead to wildly different and inflated results. The contracting officer indicated that this difference could be as much as forty percent. Cochran has not attempted to rebut the contracting officer's finding. Thus, we have an unrebutted finding of a fatal flaw in Cochran's claim. I see no reason to question the contracting officer's finding on this issue.

Regardless, in its complaint filed November 5, 2007, Cochran maintained its original position that used two different scaling methodologies to arrive at the alleged timber volume shortfall. However, in January 2008, Cochran submitted additional calculations of timber volumes to the contracting officer. Appellant's Supplemental Appeal File, Exhibit 17. Along with the January calculations, Cochran submitted electronically generated log scaling sheets that show the dimensions of the harvested logs, with accompanying Doyle scale and International scale values for each log. The cover sheet is a table that purportedly shows the

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<sup>1</sup> This BDFT figure is not found in the contract. The contract is written entirely in CCF. The prospectus, however, contained an estimate in both CCF and BDFT (in International scale).

total volumes for all the harvested logs in Doyle and International scales and the Government estimates from the prospectus in International scale. On the cover sheet was a calculation subtracting Cochran's International scale total from the Government's total estimate in International scale for the harvested units. The calculation showed that Cochran's volume in International scale was 16.5% less than that shown in the prospectus.

The FS does not accept this conversion and calculation, and Cochran has not explained how it arrived at its figures. Cochran alleges that its calculation is based upon harvested log measurements contained in the scaling sheets. How Cochran arrived at these International scale figures from these measurements is unknown. The conversion factor, if one was used, also is unknown. Further unknowns include the accuracy of Cochran's measurements, whether or not defects had been removed prior to measuring, the completeness of the scaling sheets, and whether figures from unit 24, which was not completely harvested, should be included. Accordingly, the accuracy of this calculation is very suspect.

After making its January submission, Cochran requested that the FS calculate the CCF volumes for the timber that Cochran had removed from the site from the scaling sheets contained in its January submission. Respondent's Rule 19 Submission, Attachment E. Mr. Michael Van Dyck, the Regional Measurement Specialist for the FS, performed this calculation. In his calculation dated February 1, 2008, Mr. Van Dyck found that the CCF volume that had been harvested by Cochran constituted at least 92% of the estimated quantities contained in the contract. Respondent's Supplemental Appeal File, Exhibit 60. Mr. Van Dyck noted that he had no way of knowing whether all of the logs Cochran had harvested had been included in the sheets, or whether defects had been removed from the logs before the sheets had been tallied.<sup>2</sup> Subsequently, in his April 28, 2008, declaration, Mr. Van Dyck noted that 184 sawlogs had been omitted from the data that Cochran had supplied to him in January. Respondent's Rule 19 Submission, Attachment E. With the addition of these logs, Mr. Van Dyck indicated that it is likely that there was little, if any, discrepancy between the black cherry estimates and what was actually harvested.<sup>3</sup>

Cochran also argues that it did a calculation in CCF and arrived at a shortfall of 22.65% between the contract estimates and what was actually harvested. It claims that this calculation is based upon Appellant's Supplemental Appeal File, Exhibit 18, and is

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<sup>2</sup> If defects had been removed this would reduce the CCF volume reflected on the tally sheets.

<sup>3</sup> Mr. Van Dyck did not perform a calculation for red maple, as Cochran submitted three sets of data and Mr. Van Dyck could not determine what data was correct.

summarized in Attachment 4 to Appellant's Rule 19 Submission. Appellant's Rule 19 Submission at 27. Exhibit 18 is over 100 pages of mostly handwritten documents chock-full of numbers ostensibly written by personnel at various lumber mills, with no summary or conclusion attached. Attachment 4 to Appellant's Rule 19 Submission is the first attempt by Cochran to make any sense out of Exhibit 18. It seemingly arrives at conclusions based on the mill records contained in Exhibit 18. As it was submitted along with Appellant's Rule 19 Submission, it has not been reviewed by the contracting officer. This 22.65% calculation submitted so late in the proceeding cannot be given credibility. We simply have no reason to believe that it is based on accurate or complete data and we have no way of determining whether any of the calculations going into it are correct.

Based upon the evidence presented, I conclude that Cochran has failed to establish with reasonable certainty that there was any discrepancy between the estimates in the contract and what was actually harvested. I find Mr. Van Dyck's calculations done in CCF more reliable and compelling than Cochran's done in International scale. This is especially true where, as here, the contract estimates were done in CCF. The fact that Cochran has not disputed Mr. Van Dyck's calculation is also telling. It had ample time to do so, but chose not to. Instead, it did its own calculation in CCF. We have no way of judging the differences between Mr. Van Dyck's calculation done in CCF based on log measurements and Cochran's late calculations done in CCF seemingly based on mill data. Again, I find Mr. Van Dyck's calculation to be more reliable. In addition, all of Cochran's arguments and calculations are unreliable because they are based upon only the harvested units which comprise about one-half of the total units. Cochran has made no attempt to account for the timber on the other half. In addition, the information and data supplied by Cochran are generally unsubstantiated, arguably incomplete, generally unexplained, disjointed, and confusing. Cochran simply has not adequately supported its claim.<sup>4</sup>

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<sup>4</sup> As part of its claim to the contracting officer, Cochran also submitted a calculation of damages based upon an alleged discrepancy between what the contract indicated would be the difference between the gross and net volumes of black cherry timber due to defect and what Cochran actually found to be the difference due to defect. The contracting officer indicated that he found this claim to be very confusing. Accordingly, he restated Cochran's claim in an attempt to make sense out of it and to reflect what he thought Cochran was trying to contend. Then he explained why Cochran's claim, as he had restated it, lacked validity. I commend the contracting officer for his efforts, as I too find this part of Cochran's claim to be unintelligible. I cannot tell whether the contracting officer restated it correctly and in accordance with Cochran's intent. Since the claim is unintelligible, Cochran has not met its burden of proof.

On the basis of erroneous estimates contained in the contract, Cochran contends that it is entitled to recovery under a number of alternative theories. However, since Cochran has not demonstrated that the contract estimates were incorrect, we need not pursue these theories. Cochran's claim fails.

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R. ANTHONY McCANN  
Board Judge