



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS IN PART DENIED: April 13, 2015

CBCA 4122

LYB MECHANICAL TIMBER FALLING AND PROCESSING,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Jon E. Cushman of Cushman Law Offices, P.S., Olympia, WA, counsel for Appellant.

Benjamin R. Hartman, Office of General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **SHERIDAN**.

SHERIDAN, Board Judge.

Respondent, Department of Agriculture, Forest Service (FS or agency) moves the Board to dismiss a portion of the claim filed by LYB Mechanical Timber Falling and Processing (LYB or purchaser). In its claim, LYB avers that FS caused it to fail to complete the contract and alleges: (1) FS wrongly denied its request for a contract term extension causing \$451,928 in lost profits; (2) FS's flawed erosion-control requirements on a .3 mile road caused it to incur \$8320 in repair costs and \$180,310 in idle equipment costs; (3) FS's suspension of work on October 5, 2012, caused it to incur \$69,350 in idle equipment and labor costs; and (4) FS's misrepresentation of the sale's actual volume caused it \$201,360 in lost profits.

Respondent's motion requires the Board to determine whether the purchaser timely submitted the portion of its claim seeking \$69,350 in damages that LYB alleges arose when

FS suspended LYB's operations pending correction of certain contract breaches. We deny FS's motion to dismiss for the reasons set forth below.

Background

On January 31, 2005, FS awarded to LYB contract 073614 (contract), known as the Jackson Timber Sale, for the sale of timber in the Olympic National Forest. The sale included an estimated 37,342 tons of timber. That volume was distributed across a 1187 acre sale area which was divided into seventeen subdivisions. Under the terms of the contract, LYB had four years to harvest the timber. FS granted two term adjustments, which extended the time to harvest to December 31, 2013. Sam Bickle was identified as LYB's representative on the sale and Pete Sanda as the FS representative (FSR).

LYB submitted to FS an operating schedule on August 31, 2012, indicating that the operations in subdivision 8E would begin on September 1, 2012, and conclude on October 15, 2012. The schedule also indicated that LYB's operations in subdivision 8F would begin on September 10, 2012, and conclude on October 20, 2012. By early October, appellant had left its logging operations in these subdivisions, taken down its equipment, moved the equipment to subdivision 8B, and set up the equipment in that subdivision.

On October 5, 2012, FS timber sale administrator (SA) Adrian Frank inspected subdivisions 8E and 8F and identified several unsatisfactory conditions regarding the state in which LYB had left those subdivisions, which he documented as contract breaches in a timber sale inspection report (TSIR). Prominent on the TSIR was the title "Notice of Breach." After discussing those breaches with contracting officer (CO) Jana Carlson, SA Frank verbally suspended LYB's cutting operations on October 5, 2012.

Contract provision B9.3, Breach, provides:

In event Purchaser breaches any of the material provisions of this contract, Forest Service shall give Purchaser notice of such breach and, allowing reasonable time for remedy of such breach and of Forest Services's election to suspend, may give notice to suspend all or any part of Purchaser's Operations. Such notice of breach and notice to suspend Purchaser's Operations shall be written, except oral notices may be given if such breach constitutes an immediate threat to human life or a threat of immediate and irreparable damage to National Forest resources.

.....

Suspension under this Section shall not entitle Purchaser to any remedies arising under B8.33 [Contract Suspension and Modification].

By letter dated October 15, 2012, CO Carlson provided to LYB written documentation of the breaches identified in the TSIR, specifying that LYB breached the following contract provisions: B2.2, Utilization and Removal of Included Timber; B6.1, Representatives; B6.3, Control of Operations; B6.32, Protection of Reserve Trees; B6.4, Conduct of Logging; B6.7, Slash Disposal; C2.35, Individual Tree Designation; and C6.74, Slash Treatment. In her letter, CO Carlson set forth the steps LYB needed to follow to remedy the breaches and prevent similar breaches in the future. She notified LYB that all cutting operations were suspended until LYB had designated a field representative, as required by paragraph B6.1 of the contract, who would ensure contract compliance; submitted a written plan describing how the issues would be corrected and safeguarded against in the future; and paid a bill of collection for liquidated damages in the amount of \$70.90 and an administrative fee of \$25 for the undesignated timber that LYB had cut and removed from the sale area. LYB was also instructed to return to subdivision 8E to remove designated trees left uncut and to complete required slash treatments in subdivisions 8E and 8F.

By handwritten letter dated October 15, 2012, Mr. Bickle wrote “[t]o remedy this breach,” and identified David Soderlind and Frank House as LYB’s field representatives. Mr. Bickle also provided a plan describing how the breaches would be cured and how similar breaches would be avoided in the future. On October 16, LYB paid the bill of collection. CO Carlson notified LYB that she considered the issues raised in her breach letter to be corrected and lifted her suspension of cutting operations on October 17, 2012.

On October 24, 2012, SA Frank inspected subdivisions 8C, 8D, 8E, 8F, and 9 and wrote a TSIR, concluding, among other things, that LYB had completed all contractual work for subdivision 8E. At the top of the October 24 TSIR, SA Frank checked the blocks ACCEPTANCE and OTHER. With regard to subdivision 8E, SA Frank wrote, “Recommend unit be accepted.” Some initials beside the recommendation; seem to be either Mr. Soderlind’s or FSR Sanda’s initials. FSR Sanda signed the TSIR on October 24, 2012, and it appears that Mr. Soderlind signed for LYB on October 29, 2012. On that same TSIR, SA Frank identified certain work that remained outstanding in subdivisions 8C, 8D, 8F, and 9.

SA Frank inspected subdivisions 8, 8B, 8D, 8F, and roads on November 14, 2012, and concluded that LYB had completed all contractual work for subdivisions 8D and 8F. He wrote, “Recommend CO/FSR accept both subdivisions as all required work is now completed.” SA Frank checked the blocks ACCEPTANCE and OTHER on the November 14 TSIR. Mr. Bickle signed the November 14 TSIR on November 15, 2012. The signature block for the FS is blank on that TSIR.

On November 16, 2012, CO Carlson sent LYB a letter to document that LYB had fulfilled its obligations as set forth in FS's letter of October 15, 2012, relating to the breaches in subdivisions 8E and 8F.

On December 12, 2013, LYB requested that FS issue an "extension of the [contract] termination date . . . from December 31, 2013 to December 31, 2014." No reasons were given for the request. CO Carlson treated the request as a request for a contract term extension and found that as of December 13, 2013, the conditions for a contract term extension had not been met. She notified LYB that pursuant to contract provision B8.2, Period of Contract, "all obligations of Purchaser shall be discharged no later than 'Termination Date' stated on A15, unless it is adjusted pursuant to B8.21 or B8.212 or extended pursuant to B8.23 or B8.32, excepting only those obligations for which Forest Service has given permission to delay performance."

Pursuant to its terms, contract 073614 terminated on December 31, 2013. CO Carlson wrote LYB on January 6, 2014, explaining why LYB did not qualify for a contract term extension and notifying LYB that contract 073614 was terminated. Among other things, CO Carlson informed LYB that FS would complete a damage appraisal to calculate what, if any, damages were due to FS for LYB's failure to log the entire sale area.

LYB harvested and paid for only 24,513 of the sale's estimated 37,342 tons of timber and logged only twelve of the seventeen subdivisions.

On March 6, 2014, LYB directed a certified claim to CO Carlson seeking a total of \$911,272.33 in damages. The third portion of the claim sought \$69,350 in damages "for loss of 10 operational days" and alleged "unwarranted breach and unreasonable delay in lifting [the] October 2012 suspension." LYB's claim avers that the breach notice was verbally issued in the field on October 5 and corrective work required to lift the suspension was completed on October 8. LYB alleges that written notice of the breaches was "unnecessarily delayed" until October 15, thereby subjecting LYB to an "unreasonably long" suspension period which was not lifted until October 17. "This unwarranted suspension cost LYB 10 days of work where it was prevented from cutting trees per the contract."

CO Carlson issued a final decision on October 31, 2014, rejecting the suspension portion of LYB's claim and concluding that LYB was not entitled to compensation for the time it lost due to its own breaches of the contract:

On October 5, 2012, the Forest Service suspended operations because the Purchaser was not harvesting trees as designated. The agency lifted that suspension once the Purchaser had taken corrective conduct. Both the breach

and the duration of the suspension were warranted. Regardless the Purchaser waived any claim in connection with the October 2012 notice of breach by failing to submit a claim within the established time limits in the contract.

The contract contains several provisions which, in pertinent part, are set forth below. Contract provision B6.36, Acceptance of Work, states that “[w]hen all contractual work of Purchaser has been accepted for any subdivision of Sale Area or cutting unit identified on Sale Area Map, subdivision or cutting unit shall be eliminated from Sale Area on written notice of either party to this contract.” Contract paragraph B9.2, Disputes, provides that “this contract is subject to the Contract Disputes Act of 1978” and defines a claim for purposes of this contract as “a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.” Paragraph B9.2 further dictates that a claim by the purchaser shall be made in writing and submitted to the CO for decision. The contract also includes paragraph B9.21, which further limits the time periods in which a purchaser may file a claim:

Time Limits for Submission of Claim. Failure by Purchaser to submit a Claim within established time limits shall relinquish the United States from any and all obligations whatsoever arising under the contract or portions thereof. Purchaser shall file such Claim within the following time limits:

(a) When Purchaser constructs Specified Road, Purchaser must file any Claim not later than 60 days after receipt of Forest Service written notification of acceptance;

(b) When Forest Service constructs Specified Road, Purchaser must file any Claim not later than 60 days after receipt of Forest Service written notification authorizing use of road;

(c) For subdivisions or cutting units, purchaser must file any claim not later than 60 days after receipt of Forest Service written notification that subdivision or cutting unit has been accepted; and

(d) In all other cases, purchaser must file any Claim not later than 60 days after receipt of Contracting Officer written notification that timber sale is closed.

Discussion

Relying upon provisions found at paragraph B9.21 in the contract, the FS moves to dismiss a portion of this appeal, asserting that LYB failed to submit a legally sufficient and timely claim for the \$69,350 in idle equipment and labor costs it seeks related to FS's October 5, 2012, suspension of work. FS timber sales contracts contain unique contract provisions that address the submission of certain claims. The contract in issue provides that "[f]ailure by Purchaser to submit a Claim within established time limits shall relinquish the United States from any and all obligations whatsoever arising under the contract or portions thereof. . . . For subdivisions or cutting units, Purchaser must file any claim not later than 60 days after receipt of Forest Service written notification that subdivision or cutting unit has been accepted." FS posits that:

[LYB] submitted its March 6, 2014, claim regarding the October 5, 2012, suspension more than 470 days after the subdivisions at issue [subdivisions 8E and 8F] had been accepted. Appellant's third claim is, therefore, time-barred and must be dismissed. That claim undeniably concerns the oral suspension order that was documented in the October 5, 2013, timber inspection report.

....

On October 29, 2012, appellant acknowledged receiving written notification that the Forest Service accepted subdivision 8E when the company's representative signed the October 24, 2012 [TSIR]. On November 15, 2012, appellant acknowledged receiving written notification that the Forest Service accepted subdivision 8E when the company's representative signed the November 14, 2012 [TSIR]. Further, if there were any doubts that work had been completed in those subdivisions, [CO] Carlson followed up with a letter dated November 16, 2012, which stated that appellant had completed all the actions she had required to be done in those subdivisions. Under the most generous interpretation of these facts, 60 days from the time appellant received notice of the Forest Service's acceptance of the subdivision elapsed on January 15, 2013. Appellant asserted no claim involving subdivisions 8E and 8F until March 6, 2014.

Respondent's Memorandum of Law (citations omitted).

LYB opposes the motion and argues that the portion of the claim relating to the \$69,350 in suspension costs should not be dismissed. Appellant argues, in pertinent part, that LYB was not given written notice that subdivisions 8E and 8F were accepted; the contract

requires specific action on the part of FS to convey final acceptance of the work¹; the \$69,350 claim did not become ripe until after the contract terminated; and appellant properly brought its claims under paragraph B9.21(d), which provides in cases not involving specified roads, subdivisions, or cutting units, that the purchaser must file any claim not later than sixty days after receipt of contracting officer written notification that the timber sale is closed.²

Decisions by this Board and its predecessor board for timber sales contracts, the Department of Agriculture Board of Contract Appeals, have upheld the time limits set by the clause found at paragraph B9.21 of the contract. *Duffy Inc. v. Department of Agriculture*, CBCA 1369, 09-2 BCA ¶ 34,250 (claim time barred because it was submitted after the sixty day limit set by paragraph B9.21(d)); *Thomas Creek Lumber & Log Co.*, AGBCA 2005-132-1, 06-1 BCA ¶ 33,283, *aff'd sub nom. Thomas Creek Lumber & Log Co. v. Johanns*, 227 F. App'x 890 (Fed. Cir. 2007) (*per curiam*) (claim time barred because it was submitted after the sixty day limit set by paragraph B9.21(a)).³

FS has not explained what constitutes acceptance of a subdivision or the scope of authority the various FS personnel assigned to this contract possessed to accept subdivision work. Based on the evidence before us, and depending on whose initials are beside the recommendation as to subdivision 8E, subdivision 8E appears to have been accepted either on October 24, 2012, when FSR Sanda signed the TSIR, or on October 29, 2012, when Mr. Soderlind signed the TSIR. It is unclear when the work on subdivision 8F was accepted because it does not appear that a FSR representative ever signed the TSIR. However, this analysis is not relevant to our denial of FS's motion.

We deny the motion because it does not appear that LYB's claim, which purportedly arises out of FS's suspension of its work, is a claim for a subdivision or cutting unit as referenced by paragraph B9.21(c). When FS verbally suspended LYB's cutting operations, it suspended all of LYB's cutting operations, not just those on subdivisions 8E and 8F. Whether or not the suspension was warranted, it purportedly impacted the entire contract.

¹ LYB posits that a recommendation from the SA on a TSIR does not constitute acceptance.

² Respondent refers to the provision at paragraph B9.21(d) as the "catch-all" provision for all other cases that would not otherwise be time-barred under subsections (a) through (c) of ¶ B9.21.

³ In *Thomas Creek*, the Board rejected appellant's argument that a claim related to the issuance of a unilateral change order for particular road that had been accepted could be deferred until contract closure and considered timely under paragraph B9.21(d).

While the FS's decision to suspend LYB's cutting operations was taken as a result of breaches that occurred in logging of subdivisions 8E and 8F, the suspension did not substantially impact those subdivisions because, as indicated by the FS, LYB had completed cutting those subdivisions and had moved to and begun cutting other subdivisions when the suspension was ordered. The suspension, which appears to have been in place eight working days, from October 5 to 17 (October 6 and 7 were a Saturday and Sunday, as were October 13 and 14), potentially affected subdivisions 8C, 8D, 8F and 9, which appear from the October 10 TSIR to have been the subdivisions that LYB was working on when the suspension was issued. Whether or not the length of the suspension was reasonable, given the breaches and remedial actions, and whether or not LYB incurred \$69,350 in idle equipment and labor costs, are issues that are likely related to several subdivisions and not limited to subdivisions 8E and 8F. Application of the time limits set forth in paragraph B9.21(c) of the contract are not appropriate for this portion of the claim.

Decision

Respondent's motion to dismiss in part is denied.

PATRICIA J. SHERIDAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ALLAN H. GOODMAN
Board Judge