UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 15, 2016

CBCA 4939

BMC CONTRACTING, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE

Respondent.

Robert S. Moberly, Executive Vice President of BMC Contracting, LLC, Mt. Sterling, KY, appearing for Appellant.

Steven J. Youngpeter, Office of the General Counsel, Department of Agriculture, Atlanta, GA, counsel for Respondent.

Before Board Judges **HYATT**, **DRUMMOND**, and **WALTERS**.

DRUMMOND, Board Judge.

BMC Contracting, LLC (BMC) entered into a timber sale contract with the United States Forest Service (FS), an entity within the Department of Agriculture. BMC appeals a contracting officer's (CO's) decision denying its claim for a 35% reduction, or the amount of $91,879.35, to the total contract purchase price. BMC alleges that the FS's methods for estimating the quantity and the value of the timber provided inaccurate results as to the timber volumes available for sale. BMC also alleges that defects in the timber (fire scars and decay) contributed to the lower harvest volumes. BMC pursues relief under six theories. The FS has moved for summary relief. BMC opposes the FS's motion.

Findings of Fact[1]

In July of 2014, the FS advertised for bids for the sale of timber in a portion of the Daniel Boone National Forest in Kentucky. The total estimated volume of timber was 4537 hundred cubic feet (CCF), derived from an estimated volume of 2714 CCF sawtimber and 1823 CCF of pulpwood. The prospectus urged bidders to examine the timber units to make their own estimates, emphasizing that the volume quantities listed were merely estimates and were not guaranteed. The estimated total value of all the timber was $200,344.50.

The bid form included a "Disclaimer of Estimates and Bidder's Warranty of Inspection" clause. This clause states:

> Before submitting this bid, the Bidder is advised and cautioned to inspect the sale area, review the requirements of the sample contract, and take other steps as may be reasonably necessary to ascertain the location, estimated volumes, 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.
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> The Bidder warrants that its 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. 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.
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> The Bidder further holds the FS harmless for any error, mistake, or negligence regarding estimates except as expressly warranted against in the sample contract.[2]

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[1] The relevant facts are not in dispute.

[2] Neither party submitted the sample contract for review. Appellant has not argued that any exception in this document would apply.

Prior to bidding, BMC made four trips to the timber site – two of the four with different loggers who, according to BMC, have a combined 120 years' experience in the logging industry.

BMC submitted a bid in the amount of $262,512.45. BMC, by signing the bid form, warranted that it was submitting its bid "solely on the basis of its examination and inspection of the quality and quantity of the timber" and that the bid was "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." The parties entered into the Freeman Fork timber sale contract on September 18, 2014. The contract divided BMC's purchases into eight payment units.

The contract expressly stated that the written terms of the contract, which consists of three divisions – AT (specific conditions), BT (standard provisions), and CT (special provisions) – represent the premises and promises of the agreement. Clause AT2, "Volume Estimation," repeats the FS's estimated volume of timber by total quantity and by species stated in the sales prospectus. In particular, it states that the merchantable hardwoods for sawtimber would be least twelve inches in diameter at breast height (DBH) and would contain at least 1.5 minimum pieces per tree. A minimum piece is defined as eight feet in length with a small end diameter inside the bark of ten inches. The contract warns 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 contract." At clause AT4b, BMC agreed to pay the FS the flat rates for each variety of timber that it had bid. That is, BMC was obligated to pay the FS, for each variety, the product of the estimated volume times the flat rate stated in the contract. Payment was not dependent upon the actual volumes removed.

The contract also includes several other provisions pertinent to this dispute. Clause BT2.43, "Adjustment for Quantity Errors," provides for adjustments of volume errors made by the FS, but only for errors attributed to computer or mathematical calculation mistakes. The error must also "result in a change in total timber sale quantity of at least 10 percent or $1000 in value, whichever is less." This provision also specifically prohibits adjustments based on FS misjudgments in quantity or quality based on the FS's measuring methods or judgments of timber quantity or defect. It states that "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."

Clause BT3.33, "Rate Redetermination for Market Change," addresses value changes due to delay or interruption. This provision states that for delays or interruptions exceeding ninety days, the CO would make "an appraisal to determine for each species the difference

between the appraised unit value of Included Timber immediately prior to the delay or interruption and the appraised unit value of Included Timber immediately after the delay or interruption."

Clause BT3.34, "Emergency Rate Redetermination," states, in part:

> Forest Service shall redetermine rates if, upon Purchaser's application, Forest Service determines that, because of changes in the timber market since the award date or the last rate redetermination under this provision, the Producer Price Index identified in AT17 has declined by 25 percent.

Finally, clause BT8.12, "Liability for Loss," provides, in part:

> Included Timber is destroyed or damaged by an unexpected event that significantly changes the nature of included timber, such as fire, wind, flood, insects, disease, or similar cause, the party holding title shall bear the timber value loss resulting from such destruction or damage; except . . . . In the event Included timber to which Forest Service holds title is damaged, contracting officer shall make an appraisal to determine for each species the difference between the appraised unit value of included timber immediately prior to the value loss and the appraised unit value of timber after the loss . . . .

After harvesting 70% of unit 2 (the first payment unit BMC began harvesting), BMC raised concerns to the FS about the overall quality and quantity of the timber. By letter dated June 8, 2015, BMC submitted the subject claim to the CO seeking a 35% reduction to the total price it had bid for the sale, or $91,879.35. BMC complained that a major portion of the timber was pulpwood and that the timber contained fire scars and decay. As a result, BMC asserted the harvest volume of sawtimber would be "much less than could have been reasonably anticipated." BMC maintained that there was no way to anticipate the fire scars and decay "even after [four] trips to inspect." BMC further maintained that the FS's "cruise and data sampling methods must be adjusted in order to give a more reasonable estimate of the real value of the timber." BMC stated that the area market did not support a 12" DBH for the sawtimber. BMC believed that it would continue to lose 35% in volume on each of the remaining units. BMC provided no documentation to support its claimed amount.

On June 16, 2015, the CO met with the owner of BMC at unit 2 to discuss BMC's concerns and to inspect the overall quality and size of the timber. The CO determined that there were no errors in the calculations and that the trees inspected did not support BMC's claim.

The CO denied BMC's claim on July 24, 2015. BMC filed a timely appeal. In its appeal, BMC states that during the initial, pre-bid inspection its representatives inquired about fire damage during the past years and were told by FS employees "that to their knowledge, no fire damage had occurred on the 8 units." BMC states further that the "fire damage is clearly evident." BMC complained that the sawtimber class size of 12" DBH is too small. BMC offered no documentary evidence to support its assertions.

BMC's complaint[3] asserted six claims for relief. First, BMC alleged mutual mistake. Second, BMC alleged the FS misrepresented the condition of timber prior to the sale. Third, BMC complained that the FS failed to disclose information concerning the sale, particularly an environmental assessment that was prepared by the FS. Fourth, BMC pointed to the contract's Liability for Loss clause (BT8.12) as justification for its claim. Fifth, BMC pointed to the contract's Rate Redetermination for Market Change clause (BT3.33) as justification for its claim. Sixth, BMC pointed to the contract's Emergency Rate Redetermination clause (BT3.34) as justification for its claim.

Discussion

The FS has moved for summary relief. Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The moving party's burden may also be discharged by showing the absence of evidence in support of the nonmoving party's case. *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 15-1 BCA ¶ 36,164, at 176,476. The party opposing a motion for summary relief "must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *J.C. Lee v. Department of Agriculture*, CBCA 3536, 14-1 BCA ¶ 35,595. The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. *Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999).

BMC opposes the FS's motion. BMC contends that there are material issues of fact concerning the reasonableness of the FS's timber estimates. BMC also posits that summary relief is inappropriate because it needs time to depose current and former representatives of

[3] BMC designated its notice of appeal, which included its initial claim, and a letter dated September 30, 2015, as its complaint.

the FS. In this regard, BMC states it needs to conduct depositions to prove, inter alia, that the FS's cruise and data sampling methods need to be adjusted to give a more reasonable estimate of the real value of the timber in the area. It also wants to depose FS employees about prior fire damage to the timber.

BMC's arguments about the extent of the fire damage and the FS's cruise and data sampling methods are not relevant to our resolution of this case. The FS expressly made no representations concerning the quantity or quality of the timber. The risk that the ultimate value of the timber might be less than estimated was assumed by BMC. Further, assuming that FS employees made statements about the timber that are not true, the statements cannot have constituted misrepresentations which prejudiced BMC. BMC agreed when submitting its bid that the bid was based solely on its own examination and inspection of the quantity of the timber offered. Here, the FS's disclaimers and the affirmative acknowledgments by BMC were explicit and unambiguous, such that there is no need for extrinsic evidence to establish the meaning of the contract. *Lance Logging Co.*, AGBCA 98-137-1, et al., 01-1 BCA ¶ 31,356, at 154,847-48. Any information which could be derived from the depositions would not be "information that is essential" to BMC's opposition to the FS's motion. *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993). Ruling on the FS's motion without affording BMC the opportunity to take depositions is consequently not precluded.

The FS addresses in its motion each of the six counts raised by BMC in its complaint. Count I of the complaint asserts mutual mistake. BMC argues the FS's methods for estimating the quantity and the value of the timber provided inaccurate results and BMC, too, was mistaken as to the same facts even after several inspections of the site. BMC also alleges that the timber was damaged due to fire scars and decay, and the extent of such damage could not be estimated through inspections. According to BMC, the FS should have "used a more reasonable estimate of the real value of the timber." Taken all together, BMC argues a mutual mistake as the basis for recovery.

The FS argues that mutual mistake is not an appropriate basis for relief in this appeal. Relying on the decision in *Cochran Lumber Co. v. Department of Agriculture*, CBCA 895, 09-2 BCA ¶ 34,154, the FS argues that even if its estimate was incorrect, BMC is unable to establish a mutual mistake. The FS notes that in *Cochran Lumber*, the Board explained that "[t]o recover based on mutual mistake, both parties must be mistaken as to the same fact," and "[w]here 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*. at 168,837.

We do not find any mutual mistake here. As stated in *Cochran Lumber*, the FS expressly placed risks with regard to the quality and quantity of the timber on BMC while limiting its own liability. The contract clearly stated the timber was offered "as is" without any warranty. Thus, even if the quantity and value estimates were in error, as BMC claims, it is unable to establish a mutual mistake. *See Cochran Lumber*, 09-2 BCA at 168,837; *see also Joseph Grasser v. Department of Agriculture*, CBCA 2621, 15-1 BCA ¶ 35,995, at 175,845-46.

The only contract provision permitting the type of relief sought by BMC in this case is clause BT2.43, "Adjustment for Quantity Errors." Under this provision, the quantities shown in clause AT2 of the contract must be revised if it is demonstrated that the estimated quantity was incorrect because of computer malfunction or an error in calculations, area determinations, or computer input. The error must result in a change of quantity of at least 10% or $1000 in value, whichever is less. BMC does not raise this provision as a basis for relief. Moreover, as set out in the CO's final decision, there were no errors in the calculations.[4]

Count II of the complaint alleges misrepresentation. BMC states that the FS misinformed two representatives of BMC about the "fire damage that could be anticipated from prior years" during their initial inspection. BMC represents that the fire damage is clearly evident. BMC also argues that granting summary relief to the FS is premature because BMC has not had the opportunity to depose two FS inspectors and other FS employees associated with this and other FS contracts. The FS cites to *Joseph M. Hutchinson v. General Services Administration*, CBCA 752, 08-1 BCA ¶ 33,804, at 167,341, for the proposition that "[t]o constitute misrepresentation the Government had to represent as true certain elements which it knew were false." The FS says that with regard to the timber sale, it did not represent as true anything which it knew was false. The FS also notes that the contract and solicitation forms all made clear that there is no implied warranty that the information provided to the bidders by the FS is accurate.

We do not find misrepresentation here. First, the FS provided prospective bidders (including BMC) with only estimates as to the quantity and overall value of the timber for sale. The advertisement urged bidders, prior to bid submission, "to inspect the sale area, review the requirements of the sample contract, and take other steps as reasonably

[4] Data collected from measuring the individual tree sizes at the timber sale site were the foundation for the FS's estimates in the cruise report. The report provided a range of tree sizes found at the site. In addition to determining there were no errors in calculation, and that the report was produced consistent with policy and procedure, the CO found the measured trees at the site were within the range of possibilities as determined in the report.

necessary." Prior to submitting its bid, BMC made four trips to the timber site – two of the four with "different [l]oggers who have a combined 120 [y]ears' experience in the logging [i]ndustry." BMC warranted that its bid was submitted "solely on the basis of its examination and inspection of the quality and quantity of the timber." The FS expressly disclaimed any warranty of quality, quantity, or fitness of the timber. The FS did not guarantee the value of the timber products. Nor did it guarantee BMC's profits. BMC extrapolated from various facts to come to its own conclusions about the value of the timber. BMC's conclusions may have been overly optimistic, resulting in a business decision that was not sound – but that is not the FS's fault.

In count III, BMC appears to argue that it is entitled to a rate redetermination based on alleged damage to timber that occurred slowly over several months before BMC harvested the trees. The FS states BMC has not pointed to any unexpected event that occurred after contract award that significantly changed the nature of the timber. BMC argues that the FS should have furnished a copy of the environmental assessment prior to contract award. BMC does not offer an explanation as to the significance of the environmental assessment. The FS notes that the assessment and all project documents associated with the sale were made available to the public at a FS website. The FS also points out that the sales prospectus advised potential bidders to contact the "Stearns Ranger District within the Daniel Boone National Forest for any information regarding the . . . sale." In the absence of any information to the contrary, we find BMC's argument to be unpersuasive.

In count IV, BMC argues that it is entitled to a rate redetermination pursuant to clause BT8.12, "Liability for Loss," based on damage to timber that had occurred slowly over several months before BMC commenced harvesting. The FS notes that this provision requires proof that the damage or destruction to the timber occurred as a result of an unexpected event such as fire, wind, flood, insects, disease, or similar causes that significantly changed the nature of the included timber in the contract. The FS argues that BMC has not identified any unexpected event that occurred after contract award that significantly changed the nature of the timber. The FS maintains that the damages alleged by BMC occurred long before contract award. We do not find a rate redetermination pursuant to clause BT8.12, "Liability for Loss," warranted here.

In count V, BMC points to clause BT3.33, "Rate Redetermination for Market Changes," as justification for a 35% rate adjustment. The FS argues this clause is not applicable, as there is no evidence of a ninety-day delay or interruption under the contract that would make BT3.33 applicable. We agree with the FS as to this count.

In count VI, BMC points to clause BT3.34, "Emergency Rate Redetermination," as justification for a 35% rate adjustment. The FS argues this clause is inapplicable, as there

is no evidence of a 25% reduction in the producer price index justifying an emergency rate redetermination under BT3.34. We agree with the FS as to this count.

Decision

For the reasons stated above, we find there are no genuine issues of material fact and the FS is entitled to judgment as a matter of law. The Board grants the FS's motion and **DENIES** the appeal.

JEROME M. DRUMMOND
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

RICHARD C. WALTERS
Board Judge