

PARKER INDUSTRIES, INC.

IBLA 70-148

Decided November 30, 1971

Contracts: Construction and Operation: Changes and Extras -- Contracts: Construction and  
Operation: Modification of Contracts -- Timber Sales and Disposals

Where a Bureau of Land Management timber sale contract required the purchaser to rock a designated road under certain specifications, in the absence of a "change" clause in the contract, Bureau personnel could not unilaterally require the purchaser to rock another road instead; nevertheless, the parties could agree to a modification of the original contract.

Contracts: Disputes and Remedies: Generally -- Contracts: Performance or Default: Generally -- Rules  
of Practice: Hearings -- Timber Sales and Disposals

A timber sale contract will be considered as modified by the Bureau of Land Management and the purchaser thereunder where the record produced at a hearing provides a reasonable basis for finding that the parties agreed to a substituted change in the road rocking obligations of the purchaser; however, the purchaser will not be found to be in default under the modified terms of the contract if the record fails to substantiate the Bureau's charge that the purchaser breached its obligations.

IBLA 70-148

: Oregon 14-11-0001-11-1046

PARKER INDUSTRIES, INC.

: Hearing on timber sale  
: contract cancellation

: Remanded to Bureau of  
: Land Management

## DECISION

In accordance with the decision dated February 6, 1970, by the Assistant Solicitor, Land Appeals, Parker Industries, Inc., A-31018, which is appended hereto, a hearing was held May 5, 1970, at Medford, Oregon, before hearing examiner Dean F. Ratzman. Pursuant to the rules of practice of this Department the examiner has submitted the record to this Board for decision. 1/

The Departmental decision of February 6, 1970, authorized a hearing in order to permit the appellant, Parker Industries, Inc., to submit evidence to resolve the dispute between the Bureau of Land Management and the appellant as to the terms and conditions of a modification of a timber sales contract and the appellant-purchaser's performance thereunder. The appended Departmental decision adequately discusses the written terms of the contract and, therefore, we will not repeat that discussion.

Basically the dispute between the parties is whether the purchaser was obligated to place only 6,600 cubic yards of loose material on two roads to meet the road rocking requirements of the contract, and whether it did, in fact, place that amount on the roads.

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1/ Regulation 43 CFR 1851.9 (1970), then in effect, has been superseded by 43 CFR 4.439 (36 F.R. 7202, April 15, 1971). This Board has assumed jurisdiction over this case pursuant to the reorganization of the hearings and appeals offices of this Department and the delegation of authority by the Secretary of Interior (Circ. 2273, 35 F.R. 1009; 211 DM 13.5; 35 F.R. 12081).

In large part, the problems in this case have arisen because Bureau personnel purported to change the written contract terms as to the road rocking requirement. By letter of May 27, 1964, the assistant district manager of the Medford District advised the purchaser that rock surfacing should not be placed on a designated segment of the Burnt Creek Ranch Road as required by the contract executed in behalf of the company. Instead, rock surfacing was to be placed on another road, the Burnt Creek Road. The letter indicated that the same specifications would apply to the surfacing of the Burnt Creek Road as was specified for the Burnt Creek Ranch Road.

We agree with the original Departmental decision in concluding that the Bureau could not unilaterally require such a substantial change in the purchaser's performance without a "change" clause in the contract, but that the parties could agree to a modification of the contract.

Mr. Parker, President of Parker Industries, Inc., has consistently maintained he understood the change would not require more than 6,600 cubic yards of material to be placed on the roads. The Bureau, however, has insisted that the 6,600 cubic yard figure is only minimal and the rocking requirements are governed by the width and depth specifications set forth in the written contract.

In remanding the case to permit a hearing, the Departmental decision indicated that the purchaser would have the burden of proof on the issue of whether there was a modification of the contract from the written change order. In reviewing this record we find that this burden has been satisfied. Mr. Parker testified that he was concerned that different conditions between the two roads would require more rock to be placed on the substituted road than on the road in the original contract in order to meet the specifications, but he was assured by Bureau personnel that the volume of rock to surface the substituted road would be the same as that called for under the original contract. Testimony of Bureau employees supports Mr. Parker's testimony on this understanding. It is reasonable to conclude that Mr. Parker believed that the 6,600 cubic yardage figure would be sufficient to meet the substituted road rocking requirement and that any acceptance by him of the proposed modification of the contract was conditional upon that understanding. In making their determinations as to the amount of material placed on the roads, it appears that the Bureau employees used the 6,600 cubic yardage figure as the required quantity to determine if there was a shortage, thus evincing their understanding of the agreement.

We conclude there is support in the record for finding that the contract was modified by substituting one road for a portion

of the other and also by making the 6,600 cubic yard figure an amount sufficient to comply with the road rocking requirement rather than as an estimated amount to meet the specifications.

With this determination that the contract was modified to this extent, the next question is whether there was a breach of the modification due to Parker's failure to place 6,600 cubic yards of material on the roads. The burden of proof on this issue fell upon the Bureau, since it claimed there was a breach. Unfortunately, the record in this case leaves much to be desired. When the change order for the road rocking was made there was no requirement, at least manifest in the record, that Parker furnish Bureau personnel with reports showing the volume of the material as it was placed on the roads, such as setting forth the number of truck hauls and the volume per truck haul, or any other method by which, or the time when, the quantity of rock was to be weighed or measured. The most the record shows in this regard is Government exhibit 4, a purported summary of Parker's trucking time for moving the material to the roads, which gives a total of 200 1/2 hours. It is impossible to determine the volume of material solely from that information.

The Bureau's case rests primarily upon reports by Bureau personnel made following their examination of the roads in May 1965, and then in September 1965. During both examinations they made measurements of the width of the spread of the material on the roads at various intervals and dug small holes to measure the depth of the surfacing. As reflected in Government's exhibit 18, an estimated shortage of 2,416 compacted yards was given after the first examination, or 3,634 yards of loose material. After the second examination by other personnel, a shortage of 3,375 cubic yards was made, taking into account a compaction factor of 33% (see Government exhibit 16 and Tr. 106).

Although Parker finished depositing rock on the road in November 1964, a notice of deficiency of rock was not issued until June 1965, following the May examination, long after Parker had removed its equipment from the site. <sup>2/</sup> Parker submitted evidence that the material made available by Bureau personnel to be used on the roads was of a consistency that it could easily be blown or washed away and that there were severe storms after the rock was placed which could have removed material from the roads. In making their estimates, however, the Bureau employees made no allowance for any possible loss of

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<sup>2/</sup> The observation of a supervisor of the inspection group assigned to check the rocking work (Tr. 111) speaks for itself: "This should've been done last year!" The quoted statement is written and initialed on exhibit 18.

material due to damage from storms. This tends to discount the accuracy of the Bureau estimates. Also, there is nothing in the record to indicate that the compaction factor used by the Bureau is a reliable measure or the manner of making the estimates by the Bureau personnel is a reliable method. Thus, the evidence submitted by the Bureau is incomplete and unsatisfactory in proving the extent of any breach by Parker.

Although Parker also failed to present verifiable evidence showing the quantity of material placed on the claims, there is some corroboration of Mr. Parker's assertion that the amount of rock placed by his company, approximately 7,900 cubic yards, would "have been more than adequate to do the original contract" (Tr. 41, 46), by the following questions to and response of the Bureau's timber manager:

Q. If the rock that was placed under the substitution to the contract -- in other words, in the solid line that was substituted, if that same amount of rock had been placed on the dashed line that was eliminated, what coverage with respect to depth and width would have been obtained?

A. We would have got 8 inches compacted, and specified widths -- or a 12 foot bed with turnouts.

Q. And what length of the dash? [The dashed line showed the original road.]

A. All the way to P. 112 + 05. (Tr. 86-87).

Noncontradicting testimony on this point was also given by another Government witness at Tr. 109-110.

The quoted testimony refers to the specifications and requirements in the original contract. The effect of the testimony is that the volume of material placed by Parker on the substituted road would have been sufficient to meet the specifications of the original road to the terminal station of that road. Since there is no dispute by the Bureau that 6,600 cubic yards were needed to do the work for the original road, it may be deduced from this testimony that at least that quantity was placed under the substitution since the timber manager who observed the placing of the material on the roads considered it sufficient to have met the requirements for the original road. There was certainly no agreement by Parker to place more material under the substitution than would have been required under the original contract.

We conclude there is not a sufficient basis in the record for finding that Parker breached the contract, as it was modified. Therefore, Parker is not to be deemed in default under the modified terms of the contract and the contract is not subject to cancellation for the purchaser's breach of its road rockering obligations. Instead, it appears that the purchaser has completed its obligations under the contract and is entitled to release of its performance bond.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the case is remanded to the Bureau for appropriate action consistent with the conclusions reached herein.

Joan B. Thompson, Member

We concur:

Anne Poindexter Lewis, Member

Martin Ritvo, Member.

A P P E N D I X

PARKER INDUSTRIES, INC.

A-31018            Decided February 6, 1970

Contracts: Construction and Operation: Modification of Contracts -- Rules of Practice: Hearings--  
Timber Sales and Disposals

Where the purchaser under a timber sale contract is charged by the Bureau of Land Management with a breach of contract requirements pertaining to the surfacing of roads and the purchaser contends that the requirements were orally modified by the parties and that it met the modified requirements, a hearing will be ordered to resolve the dispute as to the modification and the performance; however, if the purchaser does not wish a hearing and none is held, the determination that it breached the contract will stand since it has the burden of proving that the contract was orally modified.

A-31018 : Oregon 14-11-0001-11-1046

Parker Industries, Inc. : Timber sale contract cancelled

: Set aside; case remanded

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Parker Industries, Inc., has appealed to the Secretary of the Interior from a decision by the Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated June 6, 1968, affirming a district manager's decision of March 1, 1968, cancelling its timber sale contract Oregon 14-11-0001-11-1046, for the reason that the purchaser, Parker Industries, Inc., breached the contract by failing to meet road improvement and construction requirements.

The timber sale contract was approved August 26, 1963. Section 35(b) of the contract, a special provision, and Exhibit B incorporated therein, required the construction of approximately 8700 feet of surfaced road and the surfacing of approximately 2500 feet of existing road, both shown on a schematic map on page 3 of Exhibit B. This sheet and page 2 of Exhibit B required that the proposed road be surfaced to a compacted depth of not less than 8 inches and a usable wearing "coarse" of not less than 12 feet, 22 feet total in turnouts, with pitrun hard rock of such sizes and consistency as approved by the Authorized Officer. Paragraph 1 of page 2 on "Surfacing" stated that the purchaser "shall apply not less than 6,600 cubic yards of pit run hard rock of such sizes, hardness, and consistency to provide a satisfactory running surface"; paragraph 4 required grid rolling of the subgrade prior to surfacing; and paragraph 5 required grid rolling of the rock surfacing until the oversize particles had been reduced to acceptable size and no "appreciable settlement of the surface layer is effected."

Since 1965 there has been a controversy between the appellant and Bureau district employees as to whether or not the contractual road construction requirements, particularly the surfacing requirement, have ever been satisfied by the timber purchaser, and this was the subject of repeated letter demands by the Bureau for the purchaser to complete the requirements. The

record shows that several meetings have been held by representatives of the purchaser and Bureau district personnel without successfully resolving the problem. It appears that except for the matter of the road construction the contract has otherwise been completed.

The position of the Bureau as reflected in the decision appealed from, and the district manager's decision of March 1, 1968, and letters of September 14, 1967, and December 6, 1967, is that the purchaser never placed the required amount of material on the road to reach the required minimum depth of 8 inches compacted. The letter of December 6, 1967, as a proposed settlement, stated that the Government would accept the purchaser's application of 3375 cubic yards of road rock surfacing to fulfill the requirements.

Appellant contends that the contract was modified by a letter dated May 27, 1964, from the assistant district manager, and by the purchaser's oral agreement with him. The May 27, 1964, letter stated that the Burnt Creek Road (39-3E-17) would serve most advantageously as an eventual link-up mainline road with a highway, rather than the Burnt Creek Ranch Road (39-3E-21), and then stated:

"This being the case, you are requested to make the following substitutions in the rock surfacing requirements set forth in your contract.

Omit all required rock surfacing from Stations 36+34 to 112+05 on the Burnt Creek Ranch Road (39-3E-21) and add the rock surfacing to the Burnt Creek Road (39-3E-17) from its junction with the Burnt Creek Ranch Road to the end (P0+00 to P80+00).

The same specifications shall apply to the surfacing of the Burnt Creek Road as was specified for the Burnt Creek Ranch Road in your contract."

Attached to the letter was a schematic map showing the two roads and the stations stated above.

Appellant states that at the time this letter change was made, it was agreed between the assistant district manager and purchaser that the purchaser would not be required to place on the substituted road more than a total of 6,600 cubic yards of rock. Appellant also asserts that the Burnt Creek Ranch Road, which was originally to have

been rocked under the provisions of the contract, was of a nature that 6,600 cubic yards of rocking would have been more than sufficient to meet the requirements set forth in the contract whereas the substituted road, the Burnt Creek Road, had a surface of black-sticky and yellow clay and could never be adequately rocked within the provisions of the contract, that this difference in the original surfaces of the two roads was pointed out at the time the request to change the road to be rocked was made and that the purchaser consented to the change only with the agreement that not more than a total of 6,600 cubic yards would be required.

Appellant, however, contends that the requirements of the contract have been fulfilled, that 7,900 cubic yards of rock were applied to a depth in excess of 8 inches, that the rock designated by Bureau employees was not of a hard durable type, as pointed out by the purchaser, and that the flood of 1964 did considerable damage to all roads in the immediate vicinity.

Appellant contends that the Bureau's decision is "arbitrary, unreasonable and a breach of good faith and agreement on the part of the Bureau's District Office at Medford, Oregon." Appellant further contends that it has been denied a formal hearing at which testimony could be taken to support its assertions as to the contractual changes. Appellant requests that the Bureau's decision be reversed, the contract terminated as a completed contract, and the purchaser's performance bond released.

Except for releasing the performance bond required by the contract, the cancellation of the contract insofar as the purchaser here is concerned has little or no effect since it appears that appellant has removed the contracted for timber. The Bureau's action of cancelling the contract was not a release of the performance bond, or a satisfaction under the bond. At the most, the Bureau's decision stands as a declaration to the purchaser that it is in default under the contract due to the breach in the road surfacing requirements. Previous correspondence from the district office, such as a letter dated September 14, 1967, had advised the purchaser that if the contract was cancelled the United States would have the required road rocking completed under a separate competitive bid contract and take appropriate action to recover all damages suffered by the Government as a result of the breach. However, no action has yet been taken and damages have not yet been assessed against the purchaser and its surety.

This appeal, therefore, raises only the question of whether or not there was in fact and in law a breach of the contract. This question can be answered only by resolving the issue which appellant has posed as to the agreement between the parties as to the road rocking requirement. The Bureau dismissed appellant's contention that there was an agreement that no more than 6,600 cubic yards would be required by saying that the record did not support such an agreement. The record shows only the original contract terms, which do not support appellant's position, and the letter of May 27, 1964, by the assistant district manager requesting a substitution in the road to be surfaced. This letter also does not support appellant's position as it states that the same specifications would apply to the surfacing of the substituted road as for the original road in the contract. There is nothing else in the record except for Thomas Parker's assertions to support the contention of an oral agreement changing the specifications for the rock surfacing as a condition to Parker's agreeing to the change made in the letter of May 27, 1964.

It is apparent that there was some agreement by the purchaser to the change made by the letter of May 27, 1964, from the original contract terms, since there was at least partial performance of the rocking requirement on the substituted road. The extent of the performance of this requirement on the substituted road and also on the portion of the original road which the letter of May 27, 1964, also required is disputed by the Bureau and by appellant. Appellant has alleged that 7,900 cubic yards of rock were applied to the road to a depth of in excess of 8 inches. However, reports in the record by Bureau employees who examined the two roads do not agree that there were ever 8 inches of compacted rock material placed on them.

There are thus posed in this case two basic factual differences between appellant and the Bureau: first, the facts concerning the exact agreement by the parties as to a modification of the original contract as to the road rocking requirements; and, second, the facts concerning the purchaser's compliance with the contractual requirements as so modified. These factual issues must be resolved to determine whether and to what extent there was a breach of the contract by the purchaser.

The original contract could be modified by the parties by a subsequent agreement. There is nothing in the contract, however, authorizing the Bureau unilaterally to change substantially the agreed upon terms for the road construction without a further

agreement by the purchaser. <sup>1/</sup> The issue posed by appellant's appeal is whether the letter of May 27, 1964, comprises the entire agreement of the parties, with appellant's actions constituting an acceptance of the change made therein since there was no written acceptance, or whether or not there was a further condition agreed upon by the parties orally, as appellant alleges, limiting the amount of rock to be applied. Certainly the absence of any written objection by appellant or other manifestation in the record evidencing a different agreement places the burden of proof upon appellant to demonstrate that there was a subsequent agreement which changed the terms set forth in the letter of May 27, 1964. Nevertheless, since appellant has previously requested a hearing and because the basic factual disputes in this case can not be satisfactorily resolved from the present record in this case, a hearing should be held before a final decision is rendered in this matter in order to provide appellant an opportunity, if it desires, to substantiate its allegations with testimony and other evidence concerning the asserted modification of the contract and its compliance therewith. Such a hearing would be conducted in accordance with the Department's rules of practice, 43 CFR Subparts 1850 and 1851.

If, for any reason appellant no longer wishes a hearing and one is not held in this case, the decision of the Bureau will stand that appellant has breached the contract since it will have failed to come forward to meet its burden of proof. However, this is not to be interpreted and nothing else in this decision should be considered as precluding the Bureau and appellant from reaching a solution to this controversy by some settlement or agreement without having a formal hearing in this matter.

The district manager has indicated a need to have the roads improved for future timber sale activity and timber management in the area. Since appellant has so strongly indicated in correspondence in the case record that it does not intend to do further work on the roads, we see no reason why the Bureau cannot proceed to have the work completed by someone else, even during the pendency of further proceedings in this case. If desired by the parties (including purchaser's surety), the issue as to what damages may be assessable to the appellant in the event of a final determination, following a hearing, that there has been a breach may properly be considered at the hearing so as to resolve all of the issues in this case.

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<sup>1/</sup> The contract did not include a standard "change" clause providing for equitable adjustment for changes issued by the contracting officer as is found in many government contracts.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is set aside and the case is remanded to the Bureau for further action consistent with this decision.

Ernest F. Hom  
Assistant Solicitor  
Land Appeals

