

IRVIN PEARCE
d/b/a PEARCE BROS.

IBLA 71-208

Decided April 24, 1972

Appeal from district office determination of purchaser's liability under terms of timber sale contract number 36120-TS70-10, and demand for payment of amount outstanding.

Reversed and remanded

Timber Sales and Disposals

A timber purchaser will be released from the harsh consequences arising from his contractual obligation where the decision to compel him either to perform or to pay damages was premised on a misconception of the latitude afforded the authorized officer by delegated authority, and where that decision was made in disregard of the best interests of the United States, contrary to the policy of this Department.

APPEARANCES: Irvin Pearce, pro se.

OPINION BY MR. STUEBING

Appellant contracted to buy timber offered for sale in section 3 of T. 28 S., R. 11 W., W.M. Oregon, by the Coos Bay district office of the Bureau of Land Management. This tract had not been scheduled for a timber sale. It was offered for the purpose of salvaging the previous winter's blowdown and snowbreak. The sale was composed entirely of salvage material. It was regarded as desirable to salvage the timber in the interest of conservation and to ameliorate the danger from fire and insect infestation.

The sale was held on August 15, 1969. Appellant bid the appraised price of \$8,834.15 based on the BLM cruise of 164 mbf, which was accepted, following which the timber sale contract was executed by the parties and a performance bond was posted by the appellant. A bid deposit of \$900 was made by appellant.

In March of 1970 appellant called the Coos Bay district office to complain that he found that the volume of timber in this sale was approximately 50 percent over-cruised by the Bureau. He based this estimate in part on his own inspection and in part on a private cruise he had contracted for over a portion of the sale area. The district manager then sent the district cruiser/appraiser to make a check cruise. He reported an estimate which was about 20 percent short of the advertised volume.

All the salvage timber included in the sale was marked with paint. Both BLM field reports and appellant indicated that some additional unmarked salvage, both old and recent, is mixed with and adjacent to the marked salvage. However, the district manager was of the opinion that he could not add this to the sale to make up the difference in the volume shortage, and he warned appellant against removing any of it. On reevaluation, the district manager determined that the sale area and portions of the adjacent area should be clear cut in the interest of silviculture and salvage. Accordingly, he recommended that the appellant's contract be cancelled and his down payment be returned, stating his belief that such a course would serve the best interests of the United States as well as those of the appellant. This recommendation was not approved by the acting state director. The district manager advised appellant on June 17, 1970, that the contract would not be cancelled.

The contract expired on September 30, 1970, without any further payment by appellant and without any timber having been removed from the sale area.

The district manager determined that because of continuing deterioration of this stand, the entire area should be scheduled for clearcut harvest and high lead logging during fiscal 1972, and that a re-offering of the salvage which was the subject of the Pearce Bros. sale would delay this schedule for a year. Therefore, the manager caused a new appraisal of the fair market value of the remaining timber in the Pearce Bros. sale to be made so that appellant could be given a credit for this amount against the amount owed to the United States under the contract. ^{1/} A substantial decline in market values had occurred.

^{1/} The reappraisal of the fair market value of the timber for the purpose of computing the credit due and net liability of the purchaser was based upon the original contract estimate of the timber volume. This appears a fair and reasonable method in view of the fact that the original volume estimate was the basis of the contract amount and no timber had been removed. However, it relies upon and perpetuates the fiction that the original volume estimate is correct long after it is known and agreed by all concerned

By his letter dated January 26, 1971, the district manager informed the appellant that the contract had expired; that of the total price of \$8,834.15 there remained a balance due of \$7,934.15; that the appraised fair market value of the timber left in place was \$6,369.45; that the cost of reappraisal, \$41.00, would be deducted from the value of the timber; that this resulted in a net credit to the appellant of \$6,328.45, leaving a remaining liability under the contract of \$1,605.70, for which the district manager made demand.

It is from that action that this appeal is brought. Appellant states that after contracting to purchase the timber he offered to assign the contract to Murphy Veneer Co. The company rejected the offer after its timber cruiser estimated only 80 mbf instead of the 164 mbf advertised by the Bureau as the estimated volume. Appellant states that he then hired Everett Collier to check the result obtained by Murphy Veneer Co. and Collier agreed with the company's estimate. Appellant then hired a certified timber cruiser, Forrest Hales, whose professional estimate ran even lower than the other two. Upon receipt of this information appellant states that he took a tape and scale stick and measured and scaled every marked windfall, arriving at 65 mbf, and estimated the standing trees at about 35 mbf for a total of "just under" 100 mbf.

Appellant further alleges that after the district manager sent his cruiser in to recheck the sale the cruiser informed the appellant that the cruise upon which the sale was based was 30 percent over the volume actually present.

However, the written report of the re-cruise, which was 100 percent on volume, indicated that the discrepancy was only 20 percent. This report expresses the appraiser's opinion that the volume difference in the two BLM cruises "is due to larger diameters and almost

fn. 1 (cont.)

that at least 20% of the volume estimated is not there. The appraiser, then, was obliged to recompute the market value of certain volumes of various species of trees that don't exist. We wonder how this method would have been applied in other circumstances if, after the volume shortage was discovered and acknowledged, the purchaser had logged and removed half of the trees marked before default. Would the Bureau have given full credit for the nonexistent timber as it did in this case? Would it have divided the credit and loss in proportion to the actual removal? Or, would it have simply held that the entire risk of shortage was born by the purchaser and given no credit for the nonexistent trees, as the contract terms, regulation and case law seem to require? If the third alternative would have been employed, it is apparent that the standards for the measurement of damages is at variance with the method employed here. The need to resolve this dilemma is avoided in this instance by our holding.

a log taller tree heights being used in the original cruise." He stated further that since the original cruise it was reasonable to assume some diminution of volume due to sap loss.

In responding to the district manager's recommendations that the contract be cancelled in the interest of both the Government and purchaser the acting state director wrote:

Although a check of the volume made subsequent to the sale date shows a possible volume shortage, we assume the original estimate was made with the best information available at the time, and it was made to BLM timber measurement standards. Had there been any legitimate question on the sale volume prior to sale, undoubtedly the tract would have been withheld pending an accurate volume estimate. Further, we assume that the timber under contract can be segregated from other salvage and the contract is operable as it now exists. It may be in the purchaser's best interest to cancel the contract; it could even be in the Government's interest under certain circumstances, such as silvicultural objectives due to subsequent salvage, etc. If, however, BLM estimated the volume and value without significant error in procedure and an operable contract is possible, the contract should not be cancelled.

* * * * *

You are advised not to cancel the contract and relieve the purchaser from appropriate obligations due to an alleged shortage of timber or deficiency of operation under contract terms.

There is much in this communication to question. First, no better information was at hand and there had been no essential change in forest conditions when the subsequent cruises were performed and the error identified. How then is it possible to justify an assumption "that the original estimate was the best available at the time"? Next, as we have seen, there was considerable additional salvage timber, both recent and old, in and adjacent to the sale area, which was not marked for removal. Since the precise object of the sale was to remove such material, why was it not included? The apparent answer is that it was missed in the original cruise, although it was readily observed and

reported by both parties in later inspections. This reflects considerable doubt on the merit of the acting state director's assumption that the original estimate was made in conformity with BLM standards. Finally, it is implied in the memorandum that the acting state director was of the opinion that even though modification or cancellation of the contract might serve the best interests of both the United States and the purchaser, the contract would have to remain in force as written if it was "operable". ^{2/} This is not the law.

In general, an officer authorized to make a contract for the United States has the implied authority thereafter to modify the provisions of that contract, particularly where it is clearly in the interest of the United States to do so. Branch Banking & Trust Company v. United States, 98 F. Supp. 757 (Ct. Cl. 1951); Goltra v. United States, 96 F. Supp. 618 (Ct. Cl. 1951); United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875); 39 Op. Att'y. Gen. 338 (1939). Certainly this authority does not include the power to cancel or amend a contract to the detriment of the United States by giving up a proper claim against the purchaser or by giving away money or property without deriving a corresponding benefit. Pacific Hardware v. United States, 49 Ct. Cl. 327 (1914). However, in a memorandum dated June 9, 1969, the acting associate solicitor advised the director, Bureau of Land Management, concerning a different case, as follows:

Where a mutual mistake is made by the Government and the purchaser and the contract remains incomplete, the contracting officer (if authority is delegated) may amend the contract to reflect the agreement of the parties. Errors in computations, performance dates, etc., may be corrected or adjusted where not prejudicial to the interests of the Government. applying this principle to the instant case, it seems that the Government made a substantial error in its timber cruise. Because of the circumstances surrounding the sale the purchaser may have been forced to rely on the Government's cruise without cruising the area himself. Other factors may also obtain which would justify modifying the contract. Such determination, of course, is administrative and must be made

^{2/} The question of under what circumstances the contract would cease to be "operable" affords an interesting basis for speculation. However, in light of our conclusion it need not be explored.

by the authorized officer after consideration of all the facts. 3/

We agree with this analysis of the right of the contracting officer to modify, or even to cancel, the contract. Implicit in the statement is that alteration or cancellation can only be accomplished by the contracting officer with the approval and joinder of the other party or parties to the contract.

The general rule applicable to timber sale contracts of this type is that the purchaser offers a fixed amount, or "lump sum," in payment for an estimated volume of timber and, upon entering the contract, he is liable for the entire purchase price even though the quantity of timber cut and removed, or designated for taking, is more or less than the estimated volume or quantity shown. Russell & Pugh Lumber Co. v. United States, 290 F. 2d 938 (Ct. Cl. 1961); Forest Management, Inc., A-31045 (Feb. 6, 1970); Leslie Caughman, A-30890 (Feb. 21, 1968); Main Lumber Co., A-30200 (July 7, 1964); Thompson Timber Co., A-30114 (June 23, 1964); Landreth Timber Co., Inc., A-28861 (Oct. 19, 1961); 43 CFR 5461.3.

However, he is to be given credit for the amount he has paid and the value of the timber remaining uncut, less the cost of conducting a resale. Leslie G. Caughman, supra; cf. Buell Bros., A-30679 (March 29, 1967).

Ordinarily, then, it would not be proper to modify, amend or cancel the contract merely because it became apparent that the estimate of the volume was in error. Buell Bros., supra.

This case, however, is not governed by the general rule because of the special circumstances which obtain. The district manager determined that he could not modify the contract by authorizing the removal of additional unmarked salvage, and the acting state director refused to permit cancellation of the contract despite information that either of these alternatives would contribute to good forest management and serve the

3/ The authority to contract for the sale of timber and to administer timber sales has been delegated by Bureau Order No. 701 dated July 23, 1964 (29 F.R. 10526) and the several amendments thereto. The state director is given authority in section 1.8 of the order, and the district manager is invested with authority by section 3.8 of the order to take "all the actions on" dispositions of forest products up to a certain limitation on volume. 43 CFR 5400.0-5 defines "authorized officer" as an employee of the Bureau of Land Management to whom has been delegated the authority to take action. Thus, by Bureau Order No. 701, as amended, both the state director and the district manager are "authorized officers".

best interests of the United States as well as those of the appellant. The adamant insistence that the purchaser be held strictly to the contract without regard to any other consideration was error, apparently premised on a misconception of the latitude of the authority delegated to the respective administrators.

Because of this error the salvage timber, marked and unmarked, continues to deteriorate in place, losing volume and quality, continuing and increasing the dangers of fire and infestation. The purpose of the sale has been frustrated, but it was recognized during the term of the contract that even if the purchaser fully performed the contract to the removal of the last stick to which he was entitled, a highly unlikely prospect, this would still not meet the intended object of the sale. Re-analysis of the area showed, during the contract term, that it would be better silviculture to include the sale area, as it stood, in a larger area to be clear cut at the earliest opportunity. This proposal was likewise frustrated by the decision not to agree to cancel. The fact that the larger, more desirable sale has been delayed long past its anticipated scheduling is attributable to the acting state director's arbitrary refusal to cancel the contract so that more appropriate action might be taken in the public interest, as is any attendant loss of revenues due to a decline in the market.

Having concluded that the decision not to cancel the contract was error on behalf of the Bureau, made without regard for the public interest, and was therefore contrary to the policy of this Department, we cannot hold that the appellant should be burdened with the consequences.

The relative positions of the contracting parties will be restored by making the correct decision with retroactive effect. The contract is canceled and rescinded and all claims, debts and duties arising therefrom are released and discharged. Restatement of Contracts, Discharge of Contracts, §§ 402, 406, 432. The bid deposit will be returned to the appellant.

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

decision appealed from is reversed and the case is remanded for further action consistent herewith.

Edward W. Stuebing, Member
I concur:

Newton Frishberg, Chairman

I dissent: Martin Ritvo, Member

DISSENTING OPINION BY MR. RITVO

The majority opinion recognizes that under the well-established rule relating to timber sale contracts of this type the purchaser is liable for the entire purchase price even though the amount of timber cut and removed is less than the volume estimated by the United States. It relieves the purchaser of the consequences of that rule on the ground that while, during the life of the contract, the government officials administering the contract had determined that it would be better forest management to clear-cut the area instead of only removing salvage timber and that rescission of the contract would be in the public interest so that the better method could be used, the state director misconceived his authority to rescind the contract and acted against the public interest. It concludes that the contract should now be rescinded and the appellant relieved of the consequences of his default.

The nub of the majority's opinion is that it was in the public interest to rescind the contract while it was still extant. The contract however expired on September 30, 1970, long before the demand for damages was made on appellant.

During the life of the contract the government had an interest in its cancellation so that it could more efficiently dispose of the timber in the area. The existence of the contract was a bar to good timber management. When the contract expired the government was free to dispose of the timber under whatever method it deemed most advantageous, the contract, of course, no longer being of any concern. Therefore it is no longer in the public interest to offer appellant any inducement to surrender its rights under the contract.

In my opinion, we should evaluate the situation in the light of the facts as they are now, not by what they were in the summer of 1970. Therefore, since I can find no public interest in a nunc pro tunc rescission of the contract, I can not agree that the contract should now be set aside. Therefore, I would affirm the decision of the district manager that the appellant remains liable in damages.

