

**Editor's note: Reconsideration denied by order dated Nov. 4, 1974**

MEDFORD CORPORATION, APPELLANT  
OLSON-LAWYER LUMBER COMPANY  
AND  
EUGENE F. BURRILL LUMBER COMPANY, APPELLEES

IBLA 74-298

Decided August 14, 1974

The Bureau of Land Management's Medford District Manager rejected appellant's bid and dismissed its protest against the sale of certain timber which had been reserved for sale to qualifying small business concerns pursuant to the Small Business Act.

Affirmed.

Contracts: Construction and Operation: Generally

Parol evidence cannot be admitted to add a proviso to a written agreement where the written agreement is clear and not ambiguous and makes no reference to the kind of commitment which is sought to be proved by parol.

Federal Employees and Officers: Authority to Bind Government

Reliance upon the oral information, advice or opinion of any Federal officer or employee when entering into a written arrangement or agreement will not bind the United States to vary the terms of the written agreement to conform to the representations allegedly made by such officer or employee, absent proof of extreme circumstances which would vitiate the agreement.

Act of July 18, 1958 – Timber Sales and Disposals

It is proper for the Bureau of Land Management to reserve or "set aside" timber for

sale exclusively to qualifying small business concerns pursuant to the Small Business Act to ensure that such concerns are able to obtain their proportionate share under a reasonable formula, and such sales are not rendered invalid merely because another Federal agency utilizes a somewhat different formula, or because plans to conduct such sales were not announced at the beginning of the fiscal year, or because an appropriate delineation of marketing areas for the purpose of implementing the Act resulted in the inclusion of two timber units in the same marketing area.

APPEARANCES: Norman J. Wiener, Esq., Portland, Oregon, for the appellant; Mark P. Schlefer, Esq., and Michael Joseph, Esq., Washington, D.C., for the appellees; John L. Bishop, Esq., and Donald P. Lawton, Esq., Office of the Solicitor, Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

Medford Corporation has appealed from the dismissal of its protests against the conduct and consummation of two sales of timber by the Manager of the Medford, Oregon, District of the Bureau of Land Management.

The first of these sales, identified as the Salt Creek Sale (74-18), was held on March 28, 1974. Medford Corporation protested this sale by a letter dated March 27, 1974. Olson-Lawyer Timber Company was the successful bidder for the timber offered at this sale. Medford Corporation's protest was rejected by the District Manager's letter-decision of April 15, 1974.

The other sale, identified as the Bowen Creek Sale (74-11), was conducted on April 25, 1974. Medford Corporation protested this sale by its letter dated April 24, 1974. The Eugene F. Burrill Lumber Company was the successful bidder at this sale. Medford Corporation's protest was rejected by the District Manager's letter-decision dated May 6, 1974.

Both of these were "set-aside" timber sales under the Small Business Act of July 18, 1958, as amended, 15 U.S.C. §§ 631 et seq. (1970). The timber so designated is "set aside," or reserved, for sale exclusively to qualifying small business concerns in order to ensure that such concerns are able to obtain their proportionate

share of the timber sold by the federal agency concerned in a given area. 43 CFR 5400.0-5(h). The need for such sales and the volume of timber to be offered thereat is determined by formulas, which will be described more specifically below. Sections 631(a) and 644 of Title 15 made it Congressional policy that a "fair proportion" of sales of federal government property go to small businesses; section 633(a) directs the Small Business Administration to carry out that policy.

In 1973, representatives of the Bureau of Land Management (BLM) and the Small Business Administration (SBA) reached a new interagency agreement for the implementation of a program of such small business set-aside sales. Guidelines were developed which provided BLM district managers in Oregon with a formula for determining whether set-aside sales would occur within their respective districts. In the Medford District there are three "master units," the Josephine, Jackson and Klamath. Master units are designated divisions of a BLM district to facilitate administration. The Medford District was divided into two "small business marketing areas" for the purpose of the formula, one area consisting of the Josephine Master Unit, the other marketing area consisting of the Jackson and Klamath units combined.

The formula involves determining the average "small business share" based upon the historical percentage of the amount of the total volume of timber sold which was purchased by small business within the defined "marketing area." According to the interagency agreement, SBA can request set-aside sales whenever "small business bidders in a marketing area \* \* \* fail to acquire their base share of BLM timber sales by 10 percentage points or more." A similar agreement has been made between SBA and the Forest Service. There is a latent ambiguity within the language quoted above, in that it is not clear whether the formula contemplates that set-aside sales will be "triggered" when the deficiency in the small business share amounts to 10% of the "total volume sold" or when the deficiency is 10% of the "small business share."

In the record before us the unrefuted allegation is that the Forest Service, an agency of the Department of Agriculture, applies the formula by subtracting 10% of the total volume sold from the small business share to ascertain when set-aside sales will be triggered, whereas BLM takes 10% of the small business share and subtracts the result from the small business share, with the result that BLM set-aside timber sales are triggered on the basis of a smaller deficiency than are such sales by the Forest Service.

In its appeal from the dismissal of its protests of the subject sales Medford Corporation makes the following contentions:

1. BLM is in breach of its 1959 perpetual reciprocal right-of-way agreement with Medford by making preferential sales of federal timber within the road agreement area.

2. BLM abused its discretion:

(a) In combining the Jackson and Klamath marketing areas as a single unit for "triggering" purposes for small business set aside sales.

(b) In interpreting the "10 percent deficiency" used as a basis for triggering future small business set aside sales as meaning 10 percent of the "small business share" rather than 10 percent of the "total volume sold."

(c) In making small business set aside sales in March and April, 1974, without giving proper prior public notice.

We will consider these assertions in the order presented.

The appellant and BLM are parties to a perpetual and reciprocal right-of-way and road use agreement, identified as the M-250 agreement, executed on August 14, 1959. The agreement provided both parties with greater access to the intermingled federal forest lands administered by BLM and the private forest lands owned by the appellant in Jackson County, Oregon. Appellant asserts that in the course of negotiating this agreement certain unidentified "authorized representatives of BLM represented to Medford that if such reciprocal right-of-way agreement were entered into, any proposed future sale of federal timber would not be sold on a preferential basis but would be made available for purchase by all prospective bidders who otherwise qualified," and that appellant entered the agreement in reliance on such representation. Because the Salt Creek and Bowen Creek sales were of timber within the road use area defined in the M-250 agreement, appellant maintains that the agreement has been violated. Moreover, for this reason, appellant also says that in conducting these sales BLM has violated a provision of the Small Business Act which prohibits a federal agency from changing "any preferences or priorities established by law with respect to the sale of \* \* \* other property by the Government or any agency thereof." 15 U.S.C. § 644 (1970).

As noted in the appellees' brief, however, there is no provision in the M-250 agreement purporting in any way to place any limitation upon BLM's licensees thereunder or upon the timber sales as to which

licensees would have occasion to use the rights-of-way or roads covered by the agreement. Nevertheless, BLM prohibited such use of private roads, as stated in item 6 of the BLM's Notice to Prospective Purchasers (Appellant's Exh. 9):

Privately Owned or Controlled Roads: Any timber sale tract requiring use of roads owned or controlled by a large business firm cannot be set-aside for small business.

Even so, although both sales are within the "tributary area" of the M-250 agreement, according to appellees, neither sale requires the use of any road owned or controlled by the appellant, nor has the appellant even alleged that its roads will be used by the appellee-purchasers.

Further, since the written M-250 agreement makes no reference to preferential sales, the appellant will not be permitted to establish by parol evidence that the agreement must be altered to incorporate a prohibition of such sales in the affected area. The agreement is clear and unambiguous and no mistake or fraud in the preparation of the written agreement is alleged. The parol evidence rule has long been a fundamental precept of substantive law, and has been generally adhered to by administrative tribunals, including those of this Department. 32A C.J.S. §§ 851 *et seq.*, and cases collected therein; Delaware-New Jersey Ferry Co., 1 NLRB 85 (1935); Ethel E. Tashoff, A-30362 (July 23, 1965); Inter\*Helo, Inc., IBLA-713-5-68 (December 30, 1969).

Moreover, even were we disposed to receive parol evidence of such assurances by unnamed BLM officers or employees, we could not allow such statements to vary the terms of the written agreement or to interdict the implementation of the Small Business Act. Absent proof of circumstances which would vitiate the agreement, reliance upon the oral information, advice or opinion of any Federal officer or employee when entering into a written arrangement or agreement will not bind the United States to vary the terms of the written agreement to conform to the representations allegedly made by such officer or employee. See Federal Crop Insurance v. Merrill, 332 U.S. 380 (1947); Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 80 I.D. 441 (1973); Arland E. Purington, 10 IBLA 118 (1973); Southwest Salt Co., 2 IBLA 81, 78 I.D. 82 (1971); 43 CFR 1810.3.

As to appellant's contention that these two sales violate the Act's prohibition against changing "any preferences or priorities with respect to the sale of \* \* \* property by the Government," appellant has not alleged that it enjoys any preference or priority with regard to the purchase of this timber. It is obvious to us that this

provision of the Act was designed to assure that those who had a priority or preference right under some other provision of law would not have their right denied as impliedly repealed by this Act. Examples of such statutory priorities and preferences are found in the Mineral Leasing Act, 30 U.S.C. § 226(c) (1970), creating a priority in "the person first making application for the lease who is qualified"; or the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 484(j) (1970), which creates a preference in states, territories, local governments, tax supported institutions and eleemosynary institutions to receive donations of surplus property. Accordingly, we find no priority or preference vested in the appellant, and no violation of the quoted portion of 15 U.S.C. § 664.

Next we will consider appellant's allegation that BLM abused its discretion by its several actions. As to the combining of the Jackson Master Unit and the Klamath Master Unit to form a "small business marketing area" for the purposes of the Act, the interagency agreement between BLM and SBA provides that marketing areas "will be no smaller than a BLM master unit and no larger than a BLM district." The division of the Medford District's three master units into two marketing areas accords with this agreement. There is nothing in the nature of master units which requires that they be treated as separate geographic entities for all purposes. They are defined for purposes of administrative convenience. 43 CFR 5042. The claim that if the Klamath and Jackson units had not been combined set-aside sales would not have been triggered in one or other other does not, of itself, demonstrate any abuse of discretion in combining them. Moreover, it is appellant's contention that if they had not been combined no set-aside sale would have been triggered if the BLM had applied the formula according to the method used by the Forest Service. Thus, this contention has no relevance at all unless it can be established that the Forest Service formula is the only proper means of determining when sales shall occur. Since we reject that argument, infra, we need not consider this one further.

Appellant's contention that the method of applying the formula by the BLM results in BLM set-aside sales being triggered earlier than Forest Service set-asides, while apparently true, does not reveal any abuse of discretion by BLM. Appellant asserts that the utilization of the BLM method "results in small business concerns receiving more than 'a fair proportion of the total sales of Government property (timber)' in violation of the Small Business Act," but appellant does not demonstrate that this will be the consequence of these or any other sales triggered by the BLM formula.

Moreover, as appellees point out, the BLM formula is the more rational method because the Forest Service method fails to provide a means of treating small business the same in each marketing area,

since it depends for its critical factor on a ten percent deficiency of the total volume of sales in the area, rather than upon a ten percent deficiency of the small business share, as the BLM formula does. Therefore, in appellees' hypothetical example, where the small business share is 95% in marketing area A and only 9% in marketing area B, under the Forest Service method there will be set-aside sales in area A whenever small business purchases fall to 85%, but in area B there will never be set-aside sales, since even at zero percent small business's share is deficient by only 9 percent of the total volume. By contrast, the BLM formula would trigger set-aside sales in area A when small business purchases fell to 85.5 percent, and in area B when the purchases by small business were 8.1 percent or less, because under the BLM formula so long as small business fails to purchase by as much as 10 percent of its share in that area, set-asides are triggered.

Further, even if BLM had used the Forest Service formula, set-aside sales would have been triggered in the Klamath/Jackson marketing area.

Thus, a different result would have obtained in this case only in the Jackson Master Unit, and only then if the Jackson unit had not been combined with the Klamath Unit, and only then if BLM had used the Forest Service formula rather than its own. The use by BLM of the formula employed, we find, did not constitute an abuse of discretion.

Appellant's final contention is that BLM abused its discretion in not giving adequate public notice of its proposed set aside program. Specifically, appellant alludes to 43 CFR 5410.0-6, which requires that plans for the sale of timber will be developed annually, which plan may be advertised in a newspaper in the area where the timber is located and such advertisement should "indicate generally the probable time when various tracts of timber included in the plan will be offered for sale, set-asides if any, and probable location and anticipated volume of such tracts \* \* \*" Appellant says that the published annual timber plan covering the fiscal year from July 1, 1973, to June 30, 1974, listed both the Bowen Creek Sale and the Salt Creek Sale but did not indicate that these would be set-aside sales for small business, adding that such information could not have been included in the plan "because BLM did not determine to put its set-aside program into effect until January 1, 1974, rather than at the start of its fiscal year." It is also alleged that BLM abused its discretion, "in basing its small business set-aside program on a calendar year rather than a fiscal year basis."

This argument is well nigh incomprehensible. First, the annual timber sale plan is not a contract with the industry or any component of the industry. It is nothing more than a plan, and if appellant

relied upon it to its disadvantage, it had no right to do so. The final sentence of the regulation makes this quite clear, stating:

\* \* \* The authorized officer may subsequently change, alter or amend the annual timber sale plan.

Further, the regulation does not require that the annual timber sale plan be advertised. It merely says that, "Such plan may be advertised \* \* \*"

The fact is that these set-aside sales were formally announced in a notice dated February 6, 1974. Appellant has not shown how it would have benefited from an earlier notice, inasmuch as it could not participate in these sales in any event. Nor has appellant demonstrated how it constitutes an abuse of discretion for BLM to use a calendar year for purposes of the formula rather than its fiscal year, particularly when appellant concedes that BLM could not have included a description of its set-aside program in the plan for fiscal year 1974.

We conclude that the timber sales in question are not precluded by the M-250 agreement, and that there has been no demonstrated abuse of discretion by BLM in connection with these sales.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

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Edward W. Stuebing  
Administrative Judge

We concur.

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Douglas E. Henriques  
Administrative Judge

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Joan B. Thompson  
Administrative Judge

