

DOYLE MILLING CO., INC.

IBLA 73-234

Decided September 27, 1974

Appeal from a decision by the District Manager, Coos Bay, Oregon, District Office, Bureau of Land Management, denying a request to recalculate appellant's liability under timber sale contracts 14-11-0008(8)-312 and 14-11-0008(8)-313.

Reversed and remanded.

1. Timber Sales and Disposals--Words and Phrases

"Market value of the timber remaining." In section 11 of Form 5430-3 (1966) -- Contract for the Sale of Timber, "Cruise Sale" -- the above phrase refers to a single market value for the entire remaining timber.

2. Timber Sales and Disposals

Upon expiration of time for cutting and removing timber under a Form 5430-3 (1966) lump sum timber sale contract, the purchaser is entitled to a credit against the amount due, such credit being in the amount of the market value of the timber remaining on the contract area, or its pro rata contract price, whichever is less, computed on a lump sum rather than a per species basis.

APPEARANCES: Paul L. Roess, Esq., of McKeown, Newhouse, Foss & Whitty, Coos Bay, Oregon, for appellant. Donald P. Lawton, Esq., Office of the Regional Solicitor, Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Doyle Milling Co., Inc., has appealed from a decision by the Coos Bay District Office, Bureau of Land Management, dated December 8, 1972, denying appellant's request for a recalculation of its remaining liability for failure to perform under two timber sale contracts, 14-11-0008(8)-312 and 14-11-0008(8)-313. See Appendix 1.

The history of these contracts is set forth in Doyle Milling Company, 6 IBLA 190 (1972), in which this Board affirmed the District Office's denial of one year extensions on the contracts. The contracts terminated without any timber having been removed by appellant. Following that decision the case file was returned to the District Office in order to determine whether a credit for the timber remaining in the contract area was available against the purchase price due the Government. Such a credit is available pursuant to section 11 of the Bureau of Land Management's standard timber cruise sale contract, Form 5430-3 (1966). Section 11 reads:

If the time specified for cutting and removal of timber has expired or the contract has been cancelled, the Purchaser shall be entitled to a credit against any amount which is due and owing to the Government under this contract, of the market value of the timber remaining on the contract area, or its contract price per unit for such timber, whichever is less. The Authorized Officer shall establish market value as soon as possible after the date of expiration or cancellation through actual resale or by appraisal. There shall be deducted therefrom such amount as the Authorized Officer determines adequate to cover the costs to the Government resulting from the Purchaser's failure to perform, including but not limited to the costs of appraising and of administering any resale of the timber. (Emphasis added.)

Previously, on October 27, 1972, the timber remaining on the tracts covered by contracts 312 and 313 was sold at oral auction. 1/

1/ It will be noted from Appendixes 1 and 2 that the quantities estimated prior to the resales vary from the quantity estimates prior to the original contracts.

Appellant was awarded the two contracts, and it subsequently assigned them to Henry Westbrook III.

Appellant's re-purchase price for the timber remaining uncut under the two contracts was:

Contract 312	\$ 194,496.70 (Lump sum)
Contract 313	\$ 193,897.95 (Lump sum).

See Appendix 2.

By letter dated November 14, 1972, the District Manager informed appellant that under contract 312 its remaining liability was \$ 126,068.75, for which the District Manager made demand. The computations of the District Manager were summarized as follows:

Total purchase price		\$ 327,104.00
Payments completed		<u>-11,600.00</u>
Unpaid purchase		\$ 315,504.00
Value of remaining timber		
Douglas	1970 MBF at \$90.00 =	\$ 177,300.00
Western hemlock	332 MBF at 38.00 =	12,616.00
Western redcedar	18 MBF at 33.00 =	<u>594.00</u>
		\$ 190,510.00
Cost of reappraisal	<u>- 1,074.75</u>	
		\$ 189,435.25- <u>\$189,435.25</u>
Remaining Liability		\$126,068.75

By letter of the same date appellant was also informed by the District Manager that under contract 313 its remaining liability was \$ 143,966.60, the District Manager's computations being:

Total purchase		\$ 322,514.80
Payments completed		<u>-14,800.00</u>
Unpaid purchase price		\$ 307,714.80
Value of remaining timber		
Douglas fir	1577 MBF at \$ 88.05 =	\$ 138,854.85
Grand fir	1041 MBF at 23.35 =	24,307.35
Western hemlock	12 MBF at 47.30 =	567.60
Western redcedar	24 MBF at 48.35 =	1,160.40
Red alder	152 MBF at 3.00 =	<u>456.00</u>
		\$ 165,346.20
Cost of appraisal	<u>- 1,598.00</u>	
	\$ 163,748.20	<u>-\$163,748.20</u> Remaining Liability
\$143,966.60		

It will be noted that for some species the District Manager used the original contract "price per unit" and for some species he used the resale contract "price per unit," selecting the lower of the two. For example, in contract 312 he computed the credit for Douglas fir on the basis of the resale contract "price per unit" of \$ 151. For western hemlock he computed the credit on the basis of the \$ 38 original contract "price per unit," rather than on the resale contract "price per unit" of \$ 48.65.

Appellant by letters dated November 28, 1972, requested the District Office to recalculate the remaining liability due the Government under both of the original contracts. The District Manager on December 8, 1972, denied such request and appellant has appealed such denial.

Appellant admits its liability under the contracts; however, it disputes the Government's method of computing the damages under section 11 of the contracts. The District Office interpreted such section as availing the Government of the option of determining the credit for remaining timber on the basis of original contract price per unit or actual resale price, separately for each species included in the contracts.

Appellant contends that such an interpretation is erroneous and that the Government was bound to assess credit on a lump sum basis, choosing for each contract the lesser of total actual resale value or contract price per unit for the entire contract, rather than separately comparing contract price with resale value for each species.

The District Office interpretation is based in part upon a memorandum opinion rendered by the Office of the Regional Solicitor, Portland, Oregon, and directed to the Oregon State Director, Bureau of Land Management, dated September 29, 1972. The conclusion therein was that in computing credit, the contract price per unit for each species had to be compared with the market value for each species and the lesser of the two used to determine the amount of credit available to the purchaser. The memorandum explained that the original draft of section 11 read ". . . of the market value

of the timber remaining on the contract area, or its contract price per unit, per species, whichever is less." Subsequently, "per species" was deleted as redundant and the language changed to its present form, "its contract price per unit for such timber." If the language deleted from section 11 was redundant, then the deletion did not affect the meaning of the provision.

The memorandum also cites language from various decisions in support of its position; however, in none of these cases was the point at issue discussed or ruled upon.

Both counsel have cited the Uniform Commercial Code § 2-706, Seller's Resale Including Contract for Resale. The Government quotes § 2-706(6) which reads, "The seller is not accountable to the buyer for any profit made on any resale." This principle is well established and is not disputed by appellant. However, such principle is not applicable herein, as the remaining timber was sold on a lump sum basis which was less than the original contract price. Appellant cited § 2-706(1) as stating the general rule for the amount recoverable by a seller upon resale:

* * * [T]he seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price * * *. (Emphasis added.)

Appellant points out that "profits" on the one hand, and damages by way of a deficiency on the other, are mutually exclusive concepts. Appellant argues that we are concerned with a deficiency and the general rule for determining the amount recoverable by a seller upon resale should be applicable, that principle having been incorporated into section 11 of the contracts.

We can find no substantive authority for the District Office per species interpretation. First, it will be noted that section 11 states the market value will be determined "through actual resale or by appraisal." The only "actual resale[s]" here concerned were resales on the lump sum rather than unit basis. The prices per unit listed in the resale contracts are not the contract prices to be paid. In BLM Manual 5424, Appendix 1, page 31, interpreting section 11, it is significant there is no mention that credit is to be computed on a per species basis when the total market value of the timber is less than the value computed on the basis of the original contract.

[1, 2] The phrase "Market value of the timber remaining" refers to a single market value for the entire remaining timber. For the above reasons we conclude that the correct method of assessing credit available to a defaulting purchaser under these circumstances is upon the basis of the lump sum method. The purchaser is entitled to credit for the amount of the market value of

the timber remaining on the contract area, or its pro rata contract price 2/ for such timber, whichever is less. Appellant herein will also receive credit for the amount he has paid, less the cost of reappraisal and resale as provided in section 11.

In the present case, appellant's remaining liability under the contracts is:

Contract 312

Original contract price	\$ 327,104.00
Cost of reappraisal and resale	<u>1,074.75</u>
	\$ 328,178.75
Installment paid	- 11,600.00
Amount received on resale	<u>-194,496.70</u>
Amount due the Government	\$ 122,082.05

Contract 313

Original contract price	\$ 322,514.80
Cost of reappraisal and resale	<u>1,598.00</u>
	\$ 324,112.80
Installment paid	- 14,800.00
Amount received on resale	<u>-193,897.95</u>
Amount due the Government	\$ 115,414.85

2/ We note that the Director, Bureau of Land Management, in a memorandum dated January 5, 1973, transmitting the files herein to this Board, stated that: "The contract for the sale of timber is being revised. We plan to reword Section 11 so that it can be clearly interpreted that the "lump-sum" method is to be used to determine credit value of the remaining timber." If section 11 is to be revised for future lump sum contracts, it would seem that the words "contract price per unit" should be clarified.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded.

Joseph W. Goss
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge

APPENDIX I

Original contract 312 sets forth the following estimates:

<u>Species</u>	<u>Estimated Volume or Quantity (Units Specified)</u>	<u>Unit</u>	<u>Price per x Unit Price</u>	<u>Amount of Estimated Volume or Quantity</u>
Douglas fir	2076 M bd. ft.		\$ 151.00	\$ 313,476.00
Western hemlock	343 M bd. ft.		38.00	13,034.00
Western redcedar	18 M bd. ft.		33.00	<u>594.00</u>
<u>TOTAL</u>	2437 M bd. ft.			\$ 327,104.00

In original contract 313, the following estimates are listed:

<u>Species</u>	<u>Estimated Volume or Quantity (Units Specified)</u>	<u>Unit</u>	<u>Price per x Unit Price</u>	<u>Amount of Estimated Volume or Quantity</u>
Douglas fir	1895 M bd. ft.		\$ 151.00	\$ 286,145.00
Grand fir	1406 M bd. ft.		23.35	32,830.10
Western hemlock	6 M bd. ft.		47.30	283.80
Western redcedar	30 M bd. ft.		48.35	1,450.50
Red alder	153 M bd. ft.		11.80	1,805.40
<u>TOTALS</u>	3490 M bd. ft.			\$ 322,514.80

APPENDIX 2

In the contracts for repurchase of the timber remaining on the area of original contracts, the following estimates are set forth:

Timber from Contract 312

<u>Species</u>	<u>Estimated Volume or Quantity (Units Specified)</u>	<u>Unit</u>	<u>Price per x Unit Price</u>	<u>Amount of Estimated Volume or Quantity</u>
Douglas fir	1970 M bd. ft.		\$ 90.00	\$ 177,300.00
Western hemlock	332 M bd. ft.		48.65	16,151.80
Western redcedar	18 M bd. ft.		58.05	1,044.90
<u>TOTALS</u>	2320 M bd. ft.			\$ 194,496.70

Timber from Contract 313

<u>Species</u>	<u>Estimated Volume or Quantity (Units Specified)</u>	<u>Unit</u>	<u>Price per x Unit Price</u>	<u>Amount of Estimated Volume or Quantity</u>
Douglas fir	1577 M bd. ft.		\$ 88.05	\$ 138,854.85
Grand fir	1041 M bd. ft.		50.10	52,154.10
Western hemlock	12 M bd. ft.		63.55	762.60
Western redcedar	24 M bd. ft.		69.60	1,670.40
Red alder	152 M bd. ft.		3.00	<u>456.00</u>
<u>TOTALS</u>	2806 M bd. ft.			\$ 193,897.95

