

TOMCO, INC.

IBLA 76-622

Decided March 30, 1977

Appeal from decision of the Mohawk Area Manager, Eugene District, Oregon State Office, Bureau of Land Management, denying a request to close timber contract number ORO90-TS6-29.

Affirmed.

1. Contracts: Construction and Operation: General Rules of Construction

The rules of construction applicable to Government contracts are the same rules applied to contracts between private parties.

2. Contracts: Construction and Operation: Intent of Parties

Usage and custom in the trade may be proved to aid in interpretation of the contract between parties, and can add words the parties have not expressed. However, the purpose of such proof is to give effect to the intention of the parties.

3. Contracts: Performance or Default: Substantial Performance

Where one of the parties was to receive money and a rocked timber road according to specifications as consideration for a contract, and the road is not completed according to specification, nor is it suitable for the intended purpose, the doctrine of substantial performance will not apply as one of the parties is not

compelled to accept a measure of performance fundamentally less than that bargained for.

4. Contracts: Disputes and Remedies: Damages: Generally

In an instance where a party to a contract claims substantial but not complete performance of the contract to satisfy his obligation he must either complete the job according to specifications or pay the cost of completion.

5. Estoppel

Where tests performed by the BLM to determine whether rock placed on a timber road met specifications were not completed until the timber purchaser had finished his work on the road, there can be no basis for estoppel even if that doctrine were otherwise applicable.

APPEARANCES: Jack B. Lively, Esq., Sanders, Lively & Wiswall, Springfield, Oregon, for appellant, and Donald P. Lawton, Esq., Office of the Solicitor, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Tomco, Inc., appeals from a decision of the Mohawk Area Manager, Eugene District Office, Oregon, Bureau of Land Management (BLM), dated April 30, 1976, denying its request to close a contract for the Sale of Timber, dated October 3, 1975. If the contract were to be closed, the bond given by appellant for its performance would be released.

The timber sale contract required Tomco, Inc., to rock 2,835 feet of dirt logging road with 12 inches of specification hard rock as part of the consideration for the contract. The BLM made allowances for acquisition of the rock and for transportation of the rock to the construction site. Exhibit "C" of the contract requires that both the coarse and fine aggregate shall show a durability value of not less than 35 as determined by AASHO (American Association of State Highway Officers) T 210-64 test.

After entering into the original contract, Tomco, Inc., requested a modification to allow use of a BLM rock source.

On November 28, 1975, the Eugene District Office, BLM, concurred with this request. However, BLM proposed additional stipulations. One of the stipulations is set forth below:

You should be aware that this modification does not guarantee the quality or quantity of rock in the subject quarry. All rock applied to the roads as required by the contract will be tested in place on the roads and accepted or rejected following testing for the contract specifications by BLM.

The additional stipulations were agreed to by Tomco, Inc.

Appellant submitted samples of the rock from the quarry to Pittsburgh Testing Laboratory, prior to entering into the modification agreement. Appellant alleged that "the rock in the quarry adequately met all of the specifications for use on the road and exceeded the minimum specifications of the contract requirements."

The rock was placed on the road on various dates between the 8th and 19th of December 1975. On December 11 and 16, the BLM took samples of rock from the road for testing by the Forest Service Laboratory. These results were available on December 19, 1975, and Tomco was informed by the BLM of the results and the fact that "the rock was being rejected."

These tests indicated the coarse material met the durability test. However, the fine material did not meet the minimum acceptable standard of 35.

On December 23, 1975, the BLM again took samples from the road, and once again the results showed the fine material did not meet the minimum standards. Thereafter, on January 5, 1976, the BLM sent a letter to Tomco, Inc., formally notifying it the top 8 inches of road surfacing did not meet contract specifications for durability.

After receiving the BLM letter of January 5, 1976, appellant again had Pittsburgh Testing Laboratory perform a durability test of rock taken from the belt (*i.e.*, belt test). These test results again indicated a test higher than the contract minimum requirement of 35 for the fine material.

Later tests by the BLM indicate the fine material had degraded further from an original value of 31 to 33 to a present value of 20, and could be expected to degrade to a value of 18. When wet the present road has a support capability only half that of an

equal depth of specification hard rock. In this instance the present surface only has the support value of 6 inches of specification hard rock when wet whereas 12 inches was required by the timber contract.

[1] The rules of construction applicable to Government contracts are the same rules applied to contracts between private parties. Abraham Epstein, 24 IBLA 195 (1976); Standard Oil Co. of California v. Hicckel, 317 F. Supp. 1192 (1970), aff'd per curiam, 450 F.2d 493 (9th Cir. 1971); Reading Steel Casting Co. v. United States, 268 U.S. 186, 45 S. Ct. 469, 69 L. Ed. 907 (1925).

[2] In the November 28, 1975, modification of the timber sale contract the BLM gave Tomco permission to use a rock source located on BLM land. One of the stipulations in the modification provided for the rock to be tested in place on the road. Appellant agreed to this.

Appellant now states in its brief that it is the practice of the industry that once the rock is in place, no objection will thereafter be made. It should be noted the fine material meets the durability test when taken off the belt after crushing, i.e., the belt test; but fails the durability test when taken off from the road.

Whatever the industry practice is, it cannot prevail over the intention of the parties as plainly expressed in the contract. The modification agreed to by the appellant states that the rock will be tested off from the road. The intention of the parties as to when the rock would be tested could not be any clearer.

As a leading authority says:

Usages and customs may be proved, not only to aid in interpretation of the words of the parties, but also to affect the contractual relations of the parties by adding a provision to the contract that the words of the parties can scarcely be said to have expressed. The purpose of such proof, however, is generally to ascertain and to give effect to the intention of the parties. (Emphasis supplied). Corbin, Contracts, § 556.

Therefore, in determining whether there has been substantial performance, we must look to the durability tests of the rock taken off from the road. These tests establish that the fine material on the road does not meet the specification agreed to.

[3] Nonetheless, appellant asserts that for other reasons it should be found to have complied with the requirements of the contract. First it claims substantial performance of the contract. It contends that the difference in the durability value of the fine material between its actual durability and the minimum required value of 35 to be negligible. Especially, appellant argues, when considering it believes it has complied with all of the major terms of the contract.

Substantial performance is an equitable doctrine, where the law looks not to whether the contract has been strictly complied with, but whether it has been substantially complied with in order for a party to recover on the contract. The party claiming substantial performance need not be totally free from fault or omission, but must have acted in good faith. However, the showing of substantial performance does not always totally exonerate a party from liability under the contract. The other party still may recover the contract price less allowances for defects in performance or damages for failure to comply with the contract strictly. 17 Am. Jur. 2d, Contracts, § 375.

Here, appellant has already received its bargained for consideration. It has removed from BLM land the timber to which it was entitled.

In exchange the BLM was to receive the contract price in money, and a road which would be usable in the future for removal of other BLM timber.

The BLM has not received a major part of their bargained for consideration. According to the test results presented and the affidavit of Mr. Winsor Fernette, a BLM engineer, the road, particularly when wet, is not suitable to support truck traffic. Taken in this light, it is significantly different from appellant's contention that the road has been built according to specifications, with the minor defect that the fine material does not meet the minimum durability value. As stated in Franklin E. Penny Co. v. U.S., 524 F.2d 668, 677 ((1975) U.S. Ct. of Cl.):

Admittedly, the purpose of the substantial performance doctrine is to avoid the harshness of a forfeiture. By the same token, however, the doctrine should not be carried to the point where the non-defaulting party is compelled to accept a measure of performance fundamentally less than had been bargained for. Substantial performance is never properly invoked unless the promise has

obtained all benefits which he reasonably anticipated receiving under the contract.
[Emphasis supplied.]

[4] There are two remedies available in this situation where one of the parties has not received the bargained for consideration. One is to have the road rocked according to specification by either removing the present rock, and then adding additional material; or alternately just to add additional material on the existing surface until it is brought up to specification. 17 Am. Jur. 2d, Contracts § 375 (1964). The second remedy is payment of the cost of completion (cost of actual curing of the defects). Corbin, Contracts § 1089. Here the cost would be the amount necessary to bring the road up to specification.

[5] Appellant claims estoppel of the BLM to object to the rock on the road, because the BLM waited for too long a period of time before rejecting the rock. On the facts as presented appellant placed rock on the road from December 8 thru 19, 1975. The BLM took samples of the rock for testing on December 11 and 16, 1975, prior to any log hauling on the road and samples were taken only from the top portion to avoid including any of the subgrade dirt into the sample. The BLM informed appellant of the rejection of the rock on December 19, 1975, the day the testing was complete and also the date on which appellant completed the road. The facts just do not present a case for estoppel, even if the doctrine were otherwise applicable. See: Siesta Investments, Inc., 28 IBLA 118 (1976).

Therefore, 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 affirmed.

Martin Ritvo

Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

