

CLEEREMAN FOREST PRODUCTS,

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AGBCA No. 2002-106-R

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Appellant

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Representing the Appellant:

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RULING ON GOVERNMENT'S MOTION FOR RECONSIDERATION

March 20, 2002

**Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.¹
Opinion for the Board by Administrative Judge VERGILIO.**

¹ The panel on reconsideration includes Administrative Judge Pollack, who was not on the original panel. He replaces Administrative Judge Houry, who has retired from the Government. Two judges support the replacement; they have previously addressed this matter in Rain & Hail Insurance Service, Inc., AGBCA No. 98-186-R, 99-1 BCA & 30,307 (for the purpose of resolving a motion for reconsideration, this Board replaced a judge who had served on the original panel but no longer was with the Board).

Administrative Judge Vergilio would not replace the retired Board member for the following reason. The new panel member is not called upon to reconsider the original decision, but to decide the factual and legal issues anew. Such is contrary to his notion of reconsideration, and unwisely subjects Board decisions to revisitation after the departure of any judge. The rationale expressed in Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1406 n. 9 (Fed. Cir. 1986), provides a sound basis to maintain the original panel, without expansion. At best, the additional judge is superfluous to the question of reconsideration. At the other extreme, altering a panel may be perceived as constructing a new panel to change a result, after a Board majority has spoken.

On December 3, 2001, the Board received from the U. S. Department of Agriculture, Forest Service (Government), a motion for reconsideration of the decision in Cleereman Forest Products, AGBCA No. 2000-101-1, 02-1 BCA & 31,664. Cleereman Forest Products, of Newald, Wisconsin (purchaser) had filed the appeal, as the purchaser on the Northern Pike Timber Sale contract, No. 027403, in the Iron River District of the Ottawa National Forest, Michigan. The purchaser sought relief based on alleged timber volume overstatements in the contract, claiming that Government actions reveal gross inadequacies and negligence in the preparation of the estimates, and that such actions resulted in calculation and input errors in the volume estimates. In the decision, the Board found the purchaser entitled to the requested contract price adjustment of \$78,164.53, and that the purchaser is to recover \$5,607.60, as its expenses incurred prior to the litigation.

The motion for reconsideration, submitted pursuant to Board Rule 29, requests that the claim be denied in its entirety or that the claim be dismissed without prejudice pending completion of the timber sale. The motion is grounded on three bases. First, the Appeal is premature because the contract, which terminates on August 15, 2003, is not yet completed and the timber was sold on a lump sum basis; therefore accurate adjustments as to volume can only be made upon completion of the contract[.]@ Second, the purchaser did not comply with Board orders to furnish all submissions to the Government; thereby depriving the Government of the opportunity to rebut any such submissions. Third, in the findings of fact, the Board has misunderstood, misquoted, or misinterpreted factual timber cruise information in the appeal file. (Memorandum of Specific Grounds for Reconsideration at 1.)

The Government has submitted a memorandum in support of its motion, together with five exhibits. The purchaser has submitted comments opposing the requested reconsideration.

The Government has not demonstrated that reconsideration is merited. The Board denies the request.

Appeal is not premature

In its motion for reconsideration, the Government asserts that the appeal should be dismissed without prejudice as premature, because the sale is not yet complete. It notes that it raised this same issue earlier.

The Government has asserted nothing new on reconsideration. The Government counted the trees prior to the sale. The correct count of trees is not dependent upon the completion of the sale. The contractor's payment is not dependent on the number or volume of trees removed; this was not a scaled sale. The parties were permitted to develop the evidentiary record to demonstrate the actual number of trees cut and to be cut under the sale. The correct tree count, as determined by the Board based upon the evidentiary record, permitted a correction--either under a theory of breach, as found by one judge, or as satisfying the threshold of the Adjustment of Volume clause. The appeal was not premature. No necessary facts awaited the completion of the contract. This basis raised by the Government does not merit reconsideration of the decision.

Lack of receipt of submissions is not material

The Government states that, prior to its receipt of the decision, it received no brief or other submission from the purchaser in this matter. Upon its review of the record, the Government has identified no material other than the brief submitted by the purchaser, which it had not received. The Government has not asserted any prejudice or harm from its lack of receipt of the material.

The Government correctly notes that the purchaser should have served its brief upon the Government. In a memorandum of telephone conference held on October 3, 2000, the Board stated:

Briefs are to be filed and served so as to be received no later than Thursday, November 30, 2000. With the issues and facts well focused, parties should write briefs with the expectation that reply briefs will not be permitted. Should either party desire to file a reply brief it should so inform the Board and opposing party and provide an explanation as to the need for a reply.

Although the purchaser improperly failed to serve a copy of its brief upon the Government, the Government made no inquiry regarding a submission by the purchaser. Moreover, having reviewed the submission, the Government has not suggested that it would have requested permission to submit a reply brief. Nothing in the purchaser's submission warranted a reply brief.

This basis raised by the Government does not merit reconsideration of the decision.

Factual and legal disputes

Taking issue with several findings of fact (paragraphs 1-5, 8, 10, 14, 18, 21, 23, 25, 26, 28, 36, and 38) and legal conclusions of the Board, the Government submits argument and five exhibits in support of its assertions. The issue of the accuracy of the tree count formed the focus of this dispute. The evidentiary record closed before briefing. The Government's attempts to expand the evidentiary record and reargue its case come too late. The five exhibits are not part of the evidentiary record. A few matters raised by the Government, however, merit discussion.

The Government asserts that the volumes in the various tables are accurate. It points out, with explanation not previously provided, how the volumes were determined and how the various tables are to be read together. The Government attempts to supplement the record in an untimely manner. As the Board found in paragraph 14: "The record does not explain variations in the reports." Even were the Board to accept as true the Government's belatedly-provided explanations, and conclude that the various reports are consistent with one another, the decision in the case is not altered, because the actual tree counts differ from those represented in the prospectus and utilized in determining the estimated volumes. The Government did not conduct its cruise in accordance with the dictates of the Forest Service Handbook, and the tree counts utilized by the Forest Service were not representative of the actual trees.

The Government insists that the tree counts were conveyed as estimates and fall under the disclaimer language. The Board has found to the contrary. The tree counts referenced in the prospectus were said to have been arrived at pursuant to a 100% count, conducted in accordance with the Forest Service Handbook. As stated previously, nothing suggests that the detailed cruise information (the raw data collected) is meaningless or unreliable or was itself not based on actual measurements.

The Government maintains that the purchaser's claim should be denied because of a lack of proof. The Board views the record differently than does the Government. As stated in the findings and discussion of the underlying decision, the Board gave credence to various assertions of the purchaser over those of the Government, particularly given the on-site confirmation of discrepancies asserted by the purchaser (finding of fact, paragraph 30). The Government's recount of the trees, with the large variations in numbers and types, with little explanation or support, proved less credible than other material in the record.

Another assertion

In its memorandum in support of reconsideration (at page 2) to this Board, the Government states, in part:

The offer in this case was based upon a decision to purchase the quantity and quality of timber that it had independently determined to exist on the sale area. In fact, it expressly warranted that it made the independent determination as to the volume of timber. It was upon this representation that the Government accepted the purchaser's offer. The record is crystal clear that the purchaser understood the terms upon which the timber would be sold, but chose to ignore them. Yet, the Board quotes at page 17 of the decision: "This purchaser credibly notes that it lacked the time and resources to cruise the sale area prior to the bid or award" [emphasis added by Government]. The prospectus and the contract make no such exception. Nowhere in the contract does it say that the United States must bear the risk for private business decisions. The purchaser breached the contract ab initio. This sort of conduct undermines the whole bidding process; it is unfair to those bidders that did the necessary, thorough examination of the sale. If the holding in this decision stands, it may drastically change the way the Forest Service sells its timber.

Contrary to the suggestion of the Government, it is the intended effect of the decision that the Forest Service alter its way of doing business. The Forest Service should not mislead purchasers. The Forest Service here acted without regard to its own handbook, as it misinformed actual and potential purchasers regarding the tree count--what it represented and how it was conducted. The prospectus represents that the Forest Service conducted a 100% cruise of the sale area. The count of trees is represented as a figure derived from cruising the entire area and making the necessary assessments. If the Forest Service cannot count trees in accordance with the dictates of its own handbook, it should not represent the results as it did in this case.

The purchaser was entitled to determine timber quantity and quality, while assuming that the timber cruise was conducted in accordance with the handbook. The purchaser did not ignore the terms and conditions of the sale. The prospectus and solicitation did not require or suggest that a prospective purchaser should undertake a tree count or assessment of every aspect of the sale. The purchaser reasonably relied upon the tree count figures as representative of what would be encountered, without conducting his own tree count. The inaccurate tree counts misled the purchaser.

The bidding process is not undermined by this holding. Rather, all potential purchasers reasonably would have relied on the information provided in the solicitation and prospectus as reflective of what existed.

The language the Government relies upon, in the disclaimers and prospectus, do not instruct prospective purchasers of the need to discount any and all information provided by the Government. To the contrary, the prospectus indicates that the tree count and cruise were conducted pursuant to the dictates of the Forest Service Handbook, and were verified by a check cruise in accordance with the handbook. To adopt the Government's interpretation would rewrite the prospectus, solicitation, and contract, to state that cruise information is not necessarily reliable or accurate as described in the handbook. Contrary to the Government's assertions, the exculpatory and disclaimer language does not place all risks of shortfalls on the purchaser. For example, the Adjustment of Volume clause mandates that, under given conditions, an adjustment be made to the volume in the contract without regard to assumptions the purchaser made when pricing its bid.

RULING

The Board denies the Government's motion for reconsideration.

JOSEPH A. VERGILIO
Administrative Judge

Concurring:

HOWARD A. POLLACK
Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

Issued in Washington, D.C.
March 20, 2002