D & L CONSTRUCTION CO., INC.,	)	**AGBCA No. 96-207-1**
	)	
Appellant	)	
	)	
Appearing for the Appellant:	)	
	)	
Larry L. Smith	)	
D & L Construction Co., Inc.	)	
P.O. Box 680	)	
Cooper Landing, Alaska 99572	)	
	)	
Appearing for the Government:	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

July 29, 1999

OPINION BY ADMINISTRATIVE JUDGE HOWARD A. POLLACK

This appeal arises out of Contract No. 30-002141, the LV Ray Salvage Timber Sale, between D & L Construction Co., Inc. (D & L or Appellant), of Cooper Landing, Alaska, and the U. S. Department of Agriculture, Forest Service (FS or Government), Seward Ranger District, Chugach National Forest (Chugach), Anchorage, Alaska. Appellant initially claimed it was owed $12,409.32, asserting in its claim letter that it removed 315 thousand board feet (MBF) of "spruce sawtimber," some 154 MBF less than the FS advertised amount of 469 MBF of total timber. The Contracting Officer (CO) denied Appellant's claim in a decision dated June 13, 1996, which Appellant timely appealed and which the Board docketed as AGBCA No. 96-207-1.

Thereafter, Appellant addressed a December 5, 1996 letter to the CO, with a copy to the Board. Appellant characterized the letter as an amendment of its claim. In the letter, Appellant increased the claim by $23,977.68 to $36,387 claiming that the timber sale did not have any white spruce sawtimber but contained only white spruce fuelwood. The bid advertisement for sale had a

Government estimate which broke down the projected timber estimate of 469 MBF[1] into 297 MBF of white spruce sawtimber and 172 MBF of white spruce fuelwood. The advertised price for sawtimber was $87.09 per MBF while the advertised price for fuelwood was $3.00 per MBF. The CO responded to the December 5 letter by letter dated February 10, 1997 (the February letter carries the date 1996, however, it is clear from the context that it was actually written in 1997). The CO identified its February 10 response as a final decision and set out Appellant's appeal rights. Appellant did not file any document appealing that decision. Appellant, however, did include in its Complaint, filed in the initial appeal (also filed on December 5, 1996), the charge that the harvested timber contained no white spruce sawtimber. The dollar value in the Complaint however was not changed.

A hearing was held on July 17, 1997, in Seward, Alaska. Soon after the hearing, the Board was notified by the reporting service that it could not provide the transcript of testimony of certain witnesses because the recording tape had been destroyed and there was no backup tape. As a result, the Board had to take substitute testimony. That was done on December 3, 1997. During that portion of the hearing, it was learned that certain documents requested in discovery existed but had not been provided to Appellant. The proceeding was thus continued until the documents were produced. Thereafter, additional testimony was taken on January 21, 1998. The record was then closed, but for the briefing. The proceedings in this appeal were conducted by Administrative Judge Sean Doherty, who retired from the Board in April 1998.

Subsequent to the close of the record, the Board requested a copy of the CO's February 10, 1997 decision, as the decision had not been made part of the record during the earlier proceedings. For purposes of this decision, that document is identified as Board 1. Further, for purposes of this decision, we have designated the transcript for July 17, 1997 as (Tr. 1); the transcript for December 3, 1997 as (Tr. 2); and, the transcript for January 21, 1998 as (Tr. 3). For purposes of citation to the transcripts, the transcripts are first cited by volume number and then by the applicable pages. Appellant exhibits are identified by the prefix A and Government exhibits by the prefix G.

The Appellant brings this case before the Board, relying upon the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended.

FINDINGS OF FACT

1. On July 20, 1994, the FS awarded the lump sum sale contract on the LV Ray Salvage sale to D & L in the amount of $37,794 (Appeal File (AF) 12, 28). There were four other bidders and bids ranged from $37,016 to $26,500 (AF 10). The original completion date for the contract was October 30, 1995. The contract specified a normal operating season for harvest of June 1 through

[1] One MBF is equivalent to 1,000 board feet. Throughout the hearing parties shifted back and forth, sometimes using MBF and at other times board feet. For purposes of facilitating com- parison and readability, we have rounded board feet to the nearest MBF.

March 31. Contract time was adjusted twice during the life of the sale, making the final completion date June 18, 1996. (AF 12-14.) The adjustments in time were discussed in various letters between D & L and the FS. One reason for the extension was reflected in a letter of October 6, 1995, where D & L requested 60 days to December 31, 1995, due to having encountered extremely wet weather during the preceding summer and fall. (AF 14, 47, 48.)

2. As part of the solicitation process, the FS initially issued a Prospectus. The Prospectus provided that the purchaser was to cut and remove all designated dead and infested spruce trees in a 32-acre sale area. (AF 4.) The trees were generally Lutz spruce, a hybrid between white spruce and Sitka spruce. Lutz spruce is smaller than Sitka spruce, can vary in size, grows on drier and higher sites and is basically an interior Alaska species. (Tr. 3-41, 42.)

3. The Prospectus provided information on anticipated timber volume and rates. It included the caveat that the data made available was not part of the Timber Sale Contract, and warned prospective bidders that the data "do not estimate a purchaser's own recovery." The Prospectus however, also stated, "The quality, size and age class of the timber reflects estimates based on detailed cruise information." (AF 5.)

4. The following volumes and rates were set forth in the Prospectus (AF 5) :

Estimated Volume:	297 MBF Spruce Sawlogs
	172 MBF Spruce Fuelwood
	469 MBF Total
Base Rate:	$6.00/MBF Sawlogs
	$3.00/MBF Fuelwood
Advertised Rate:	$87.09/MBF Sawtimber
	$ 3.00/MBF Fuelwood

5. Paragraph 13 of the Prospectus titled, LOG EXPORT AND SUBSTITUTION RESTRICTIONS, provided, "Purchasers may not transport logs, cordwood, or other primary forest product, derived from included timber, from Alaska for processing without prior Regional Forester consent." The Appellant was aware at the time it bid of that export restriction and acknowledged that every previous time it had asked for waiver of the export restriction for timber from Chugach, the waiver had been denied. (Tr. 1-40, 41.) A similar restriction on exporting timber was repeated in the sale contract at CT8.642 - Use of Timber (AF 12, page (p.) 21).

6. After releasing the Prospectus, the FS issued a solicitation dated July 12, 1994, which repeated the volume and rates set out in the Prospectus. The solicitation, at AT2, called for bidders to price the work through applying unit prices to the FS estimate. The solicitation provided for a minimum acceptable bid of $26,381.73. (AF 7.)

7. In addition to the disclaimers earlier identified (Finding of Fact (FF) 3), the Bid Form (AF 7) which Appellant used to submit its bid contained the following language at Paragraph 23,

Disclaimer of Estimates and Bidder's Warranty of Inspection:

> **23. DISCLAIMER OF ESTIMATES AND BIDDER'S WARRANTY OF INSPECTION:** BEFORE SUBMITTING THIS BID, BIDDER IS ADVISED AND CAUTIONED TO INSPECT THE SALE AREA, REVIEW THE REQUIREMENTS OF THE SAMPLE TIMBER SALE CONTRACT, AND TAKE SUCH OTHER STEPS AS MAY BE REASONABLY NECESSARY TO ASCERTAIN THE LOCATION, ESTIMATED VOLUMES, CONSTRUCTION ESTIMATES, AND OPERATING COSTS OF THE OFFERED TIMBER. FAILURE TO DO SO WILL NOT RELIEVE BIDDERS FROM RESPONSIBILITY FOR COMPLETING THE CONTRACT.
>
> BIDDER/PURCHASER WARRANTS THAT THIS BID/OFFER IS SUBMITTED SOLELY ON THE BASIS OF ITS EXAMINATION AND INSPECTION OF THE QUALITY AND QUANTITY OF THE TIMBER OFFERED FOR SALE AND IS BASED SOLELY ON ITS OPINION OF THE VALUE THEREOF AND ITS COSTS OF RECOVERY, WITHOUT ANY RELIANCE ON FOREST SERVICE ESTIMATES OF TIMBER QUALITY, QUANTITY OR COSTS OF RECOVERY. BIDDER FURTHER ACKNOWLEDGES THAT THE FOREST SERVICE: (i) EXPRESSLY DISCLAIMS ANY WARRANTY OF FITNESS OF TIMBER FOR ANY PURPOSE; (ii) OFFERS THIS TIMBER AS IS WITHOUT ANY WARRANTY OF QUALITY (MERCHANTABILITY) OR QUANTITY AND, (iii) EXPRESSLY DISCLAIMS ANY WARRANTY AS TO THE QUANTITY OR QUALITY OF TIMBER SOLD EXCEPT AS MAY BE EXPRESSLY WARRANTED IN THE SAMPLE CONTRACT.
>
> BIDDER/PURCHASER FURTHER HOLDS FOREST SERVICE HARMLESS FOR ANY ERROR, MISTAKE, OR NEGLIGENCE REGARDING ESTIMATES EXCEPT AS EXPRESSLY WARRANTED AGAINST IN THE SAMPLE CONTRACT.
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> **********
>
> **24. CERTIFICATION OF COMPLIANCE WITH EXPORT AND SUBSTITUTION RESTRICTIONS.**
> By submission of this bid each bidder certifies that the bidder is in compliance with applicable prohibitions against export and substitution prescribed in the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620 et seq.) In Alaska, exports of logs, cordwood or primary products derived from included timber may not be transported from Alaska without Regional Forester approval (See instruction 15).

8. Also, the following provision in the Sale Contract (AF 12) is relevant to the volume dispute and sets out the basis for making an adjustment for a volume estimate error. It states:

> CT4.12 Adjustments of Volume. (6/81) A volume estimate shown in AT2 shall be revised at Purchaser's request by correcting identified errors made in determining estimated volume which results in a decrease of total sale volume of at least 10 percent or $1,000 in value, whichever is less, when an incorrect volume estimate is caused by (a) an area determination error, (b) computer input error or computer malfunction, (c) a calculation error.
>
> No adjustments in volume shall be made for variations in accuracy resulting from planned sampling and measuring methods or judgments of timber quality or defect.

9. The data for the FS estimate on this sale was gathered and prepared by Allen Saberniak, who

had been employed as a forester with the FS since 1972. During the summer of 1993, he was detailed to the Seward District from Hiawatha National Forest in Michigan and spent approximately 2 months at Chugach, where one of his responsibilities was cruising to establish a quantity for the LV Ray project (Tr. 1-65-67.)

10. At various times during his FS career, he had been certified as a timber cruiser and had cruised 50 to 100 similar small sales (Tr. 1-66, 2-10). He was not positive as to whether he had a current cruiser certification during 1993, but had been certified for cruising prior to 1993 and during 1994 (Tr. 1-83). He had no cruiser certification specifically for Alaska. The FS had an Alaska cruising certification but it was solely for Tongass National Forest, with no similar certification program for Chugach. (Tr. 3-24, 37-38.) As Mr. Doug Newbould, the CO Technical Representative (COTR) on the project explained, an Alaska certification was not critical in order to conduct an adequate cruise. The skills and general procedures used in cruising do not significantly vary from location to location and generally are interchangeable. A person certified in one area is generally qualified to conduct a cruise in another, although the person needs to have some local information. The FS accepts a number of cruising methods and all foresters are required to learn those methods as a part of the certification process. (Tr. 3-24-25.)

11. In addition to Mr. Saberniak, the FS also utilized a number of detailers (some from other forests), to assist in determining volume for this project. The detailers had to qualify as either foresters or forestry technicians. Among the tasks required to qualify for such positions was proficiency in cruising. (Tr. 3-32.)

12. Mr. Saberniak was directed by the Ranger District to conduct two different cruises. For the first, he conducted a volume-per-acre or area measurement cruise, which was referred to as the preliminary cruise at the hearing and in briefs. There, Mr. Saberniak took area plots recording whether the timber was white spruce, Sitka spruce or dead. He also cruised other tree species. He stated that calculating volumes per acre by hand with a plot cruise (10 factor) was somewhat difficult and not simply a matter of multiplying. It required that one have the number of trees per acre represented by each tree. For that reason, Mr. Saberniak submitted the gathered data (recorded on A- 22, p. 5) and faxed it to his home base at Hiawatha National Forest in Michigan. He then had personnel run the data through Hiawatha's nine-volume program to give him a volume per acre. (Tr. 1- 67-69, 72; G-22.) The Hiawatha computer program used factors against the data that reflected tree species and their growing conditions on the Hiawatha National Forest (A-23). The results of the computer program showed 158 MBF of white spruce, 25 MBF of Sitka spruce and 147 MBF of dead spruce. In a handwritten document included with the computer printouts from Hiawatha, the above three figures were added. The figures totaled 330 MBF. That figure was then multiplied by .9, identified as "less 10% defect," with the resulting total of 297 MBF of sawtimber. (AF 23.) On another set of documents, Appellant set out a handwritten calculation for the cord wood (fuelwood) which ultimately totaled 172 MBF after adjustments. Adding the sawtimber and cordwood together totaled 469 MBF, the figure ultimately used for the contract estimate.

13. Mr. Saberniak said at one point that he was relatively satisfied with the accuracy of the

preliminary cruise and believed that the volume in that cruise "slightly under represented the stand." Based on that, he put a note on the first page of his data (A-22), which stated "Preliminary." He attributed what he characterized as a low volume to several factors, among which were that the area was probably larger than 32 acres (basing this on subsequent mapping and dot gridding which he said show the area as 35 acres); plots were on a spacing of 3 X 4 chains; spacing plots did not fall in the far upper edge of the unit where mortality and total volume were the highest; and volume was cruised to a 10-inch top for sawtimber and 4-inch top for pulpwood (with the higher percentage of the cruise to be sawtimber). (Tr. 1-73-74.)

14. In his initial testimony, Mr. Saberniak acknowledged concerns over the validity of using the Michigan program to sell timber in Alaska. He said he was not sure that the Hiawatha program was accurate in relation to Chugach and explained that he used the Hiawatha program because Chugach had not developed its own volume tables for a program. (Tr. 1- 95-96, 126-127.) He said there are differences as to species in Michigan and Alaska, with white but not Sitka spruce being plentiful in Michigan (Tr. 1-98, 3-41). His lack of certainty as to the applicability of the Michigan data was initially echoed by Mr. Newbould, the COTR (Tr. 1-126). Nevertheless, Mr. Saberniak stated that in this case, applying the Michigan program to the first cruise (preliminary cruise) was adequate, as he was simply looking for a rough estimate. When asked directly, in regard to the preliminary cruise, if it is valid to take Michigan data and sell timber in Alaska, he replied, "No." (Tr. 1-96.)

15. During Mr. Saberniak's second round of testimony, he took a less critical view of the Michigan program and explained that the Michigan program "works on a per plot basis, and it calculates the volume of the tally trees for that particular species at that plot, then it multiplies that species by a correction factor which is specific to the Hiawatha National Forest and that particular species." He identified the species correction factor for spruce in the Hiawatha National Forest as .9, noting that when it prints out the volume for spruce, there is a 10 percent volume reduction. He said that if one did not know the right correction factor, then one would use no correction factor at all. He therefore reasoned that by using the 10 percent, the FS was here providing a more conservative volume. (Tr. 2-14.) This testimony, however, begged the question in that the issue was whether a proper factor for Alaska would have caused a higher correction and different growth rate than the Michigan factors.

16. Mr. Saberniak explained that he designated the first cruise as a "Preliminary Cruise," because he was looking for "rough estimates and that did it for me" (Tr. 1-95-96). In another instance, when questioned about some documents, he characterized the first cruise as very preliminary data for description of some stands and continued that in some of the areas he cruised, he should not have used the word "cruised," because it was a preliminary estimate of stand examination rather than a cruise (Tr. 1-109; A-2). In the paperwork for the preliminary cruise, the FS showed a potential error rate of 20 percent at a confidence interval of 95 percent (AF 23).

17. Mr. Saberniak, however, as noted above, conducted two cruises and not simply the preliminary cruise. His second cruise was a tree measurement cruise, where he went through and

marked most of the trees (with the exception of about 20 trees that met the prescription of salvaging the dead timber). In the second cruise he counted trees and measured every 50th tree. (Tr. 1-91.) Then using FS Technical Bulletin 1104, he calculated the volume. Technical Bulletin 1104, was dated 1955. It is a composite of volume tables for timber and their application in the lake states and was still current at the time of the cruising. He did the calculations on the second cruise by hand and unlike, the first cruise, did not send the data back to Michigan for input. (Tr. 1-100-01.) Mr. Saberniak did not know if Bulletin 1104 was the current bulletin used for volume computations in the Seward Ranger District and Chugach (Tr. 1-101). Although the reference in the Bulletin to lake states raises questions, Appellant provided no testimony or information challenging the use of the tables in the Bulletin in this sale and only a small segment of the Bulletin was put into evidence (Packages A & B).

18. The results of the second cruise are set out in A-22. The last page of A-22 sets out Mr. Saberniak's results, showing net figures, after applying an unexplained adjustment. Live spruce is listed as 152 MBF. The dead spruce is 304 MBF. The adjusted volumes of pulpwood is 154 MBF cords. Set out below these numbers was a total of 533 MBF. That is the total of 152 MBF, 304 MBF and 77 MBF (two cords equal one MBF). (AF 23.) The notes show that the cruise did not take into account unseen defects but did take into account visible conks, sweeps or cold spots that were evident to the eye at the time cruised. Since there was no way to make a visual estimate of an unseen defect, Mr. Saberniak simply suggested to whoever would pick up the data and use it, that a 10 percent reduction of the volumes would probably be appropriate for the sawtimber. That reduction was to cover hidden defects, which he had no way of seeing. (Tr. 1-75.)

19. The presence of open areas in the sale area was not important as to the accuracy of the tree measurement cruise, since it was an actual count of trees. This contrasted with how open areas were taken into account on the first cruise, where Mr. Saberniak dot-gridded the boundary of the sale as drawn on an aerial photograph and followed what he said was his normal practice to randomly lay down the dot grid on the photograph and then not count dots that fall within an open area, such as a powerline. (Tr. 1-76.) It was Mr. Saberniak's opinion, as a professional forester, that his cruises followed the proper FS procedure and the national standards established by the FS (Tr. 1-80). It was established that there was approximately 14.5 MBF of timber removed from the sale area as part of a FS study, between the time of the cruise and advertisement of the contract. That removed quantity was not deducted from the preliminary cruise number. The involved trees however, were not counted by Mr. Saberniak as part of the second cruise tree measurement count (as the trees had already been marked for the study). (AF 24, 25; Tr. 1-115-20.)

20. Mr. Newbould of the FS was also a forester. He had a number of responsibilities on this contract. He was the timber sale administrator, COTR and sale preparation forester. Additionally, he prepared the timber sale contracts, bid package and appraisals for this sale. (Tr. 3-16, 17.) He took the data from Mr. Saberniak's preliminary cruise and the print-out that came with it and added up the volumes of the white, Sitka and dead spruce. He then subtracted from that the 10 percent that Mr. Saberniak had proposed for hidden defects and from that came up with the volumes shown in the contract. (Tr. 1-87-88.) Mr. Newbould was a certified cruiser at the time the project was let and

further was certified for scaling from June 3, 1991, through January 1, 1994. The later certification was issued out of White River National Forest, Colorado, and like Mr. Saberniak, he was never

certified in Alaska as a timber cruiser. (Tr. 3-18.) He had prepared dozens of timber sale permits and contracts at Seward Ranger District (Tr. 3-17).

21. While Mr. Newbould used Mr. Saberniak's volume estimates to develop the contract volume for the sale (Tr. 3-17), he also took additional steps to assure that the numbers were reasonable. (Tr. 3-27-28). He looked at the information Mr. Saberniak provided, from both cruises, studied the numbers and then applied his professional judgment. He felt that the volume in the estimate represented what was on the ground after his walk-through of the sale area, and that the estimated volume per acre, which was roughly 14.7 MBF per acre compared favorably to other sales that the District had sold. In choosing the volume he used for this sale, he decided to use the smaller total (that from the preliminary cruise), which was the more conservative of Mr. Saberniak's estimates. Using a more conservative number had been his practice as a forester and how he had been taught in cruising school. He believed that Mr. Saberniak's estimates provided a good basis for the contract. (Tr. 3-20, 27-28, 45.)

22. In addition to considering the information noted above, Mr. Newbould (during the summer when the contract was prepared) sent out a small timber crew to conduct a traverse of the site to verify acreage. Despite searching for the traverse documents during discovery, he could not find nor produce that work product. Therefore, in preparation for the hearing, he conducted his own traverse of the sale area during February 1997. He walked the exact boundary of the timber sale, did a traverse and ran the survey numbers through the computer. He essentially came up with 32 acres, the amount shown on the contract. He arrived at the figure by taking the computer calculation of 35.8 acres and reducing it by 3.3 acres to account for power line right-of-way clearing, plus other natural openings. (Tr. 3-21-23; G-24.)

23. There was disagreement between the parties as to whether the FS met the requirements of the FS Handbook on timber cruising standards in conducting the second cruise. Mr. Newbould testified that the methodologies used followed National Forest cruising standards for the cruise methods and the volume determinations, and as such followed the National Cruise Handbook Guidelines. (Tr. 3-39.) He acknowledged that he did not follow each and every listed procedure. For example, he did not do a check cruise of Mr. Saberniak's work nor was there a written certification of Mr. Saberniak's cruise. (Tr. 3-40.) When asked if those are required under the requirements of the FS Handbook for timber cruising, he replied that it is a common practice for high value timber sales to be certified by a cruiser. He continued, "I would say that on the Seward Ranger District, that had not been a practice in my tenure there. There was no routine certification of timber cruises for those salvage sales." (Tr. 3-40.)

24. Mr. Newbould knew of no volume errors caused by area determination errors, by computer input errors or caused by computer malfunction (Tr. 3-28).

25. Larry Smith, the principal of D & L, was D & L's only witness and represented D & L at the hearing.[2] He had lived and worked in the general area for 45 years and had been awarded prior sales on the Seward Ranger District. All but one of those sales contained timber estimates. He had inspected the sale prior to bid. His inspection involved walking around the boundary of the sale area and up and down the terrain. He also read the sample contract, timber sale prospectus and bid documents and looked at some of the cruise information prior to bid. He did not have training in cruising timber and acknowledged that he was aware prior to bidding that the FS did not warrant or guarantee a specific volume to be removed from the sale. (Tr. 1-39, 40-42, 50.)

26. In identifying what he characterized as a calculation error in the preliminary cruise, Mr. Smith stated that he could find nothing in the cruise data to allow for areas within the 32 acres that had no timber, or which were primarily residual (areas with mountain hemlock, which was not to be cut), nor did he see allowances where there was basically no spruce timber. He also specifically referred to the power line area and other areas in aerial photographs. He concluded that the Government's estimated volume per acre times the number of acres to come up to 469 MBF was in error. (A-9; Tr. 1-60- 63.) He said that the bid documents were specific, but the cruise documents were not and instead were very vague, showing 300 to 600 MBF. He, however, provided no material amplification or explanation. (Tr. 1- 42-43.) He also provided a document from Ketchikan Pulp Company to the FS dated October 17, 1995, which in his view established a pattern of error in FS estimates in Chugach. In that letter, a Ketchikan official stated that there had been a number of FS sales where Ketchikan had found the estimates to be significantly off and which had caused Ketchikan to stop bidding. (A-3.) Mr. Smith also produced a document titled site characteristics, which at the top showed 31 acres and listed 11 MBF as the net volume per acre. At another point, the sheet shows 10.5 MBF per acre plus 14.3 cords of topwood. The document was prepared by Mr. Saberniak and dated July 3, 1993. (A-4.) When questioned about the document, Mr. Saberniak pointed out that he was not certain but believed it was related to preparation of the prescription for the sale and as such it could have been generated from a visual estimate or from walking through a stand. He said it had nothing to do with the cruise estimates. (Tr. 1-114.)

27. As to other documentation which he believed supported his position, Mr. Smith presented a tally sheet for a cruise at Moose Pass (A-2) which Mr. Smith stated was conducted by the FS. A portion of the area cruised at Moose Pass was near the LV Ray site. Mr. Smith pointed out that the cruise showed an average of 5.9 MBF per acre for spruce as compared to 14 MBF per acre that the FS estimated on LV Ray. The FS, however, denied knowledge as to who prepared the document or whether it was even a Government document. Other than putting the document in evidence and pointing out the difference in average per acre, nothing further was presented to develop this exhibit. (Tr. 1-11-12.)

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[2] At the initial hearing, Mr. Smith attempted to introduce an affidavit from a Mr. Terry Brady. According to Mr. Smith, Mr. Brady could not be at the hearing and had sent Mr. Smith a sworn affidavit. The Government objected to its introduction and the presiding judge denied its admission into evidence.

28. While Mr. Smith asserted that there was an error in the area determination (amount of acreage) and also a calculation error in cruise data, he failed to provide significant supporting data establishing a cruise error. Mr. Smith noted that "this just appears to be not a very exact science, the cruise information, even though we have computers and we have all this stuff. There appears to be an element of error in there can be as much as 30 to 40 percent" and he said what brought him into this dispute was that 30 to 40 percent error. (Tr. 1-39, 56.)

29. Regarding the area determination, Mr. Smith contended that the sale area map was grossly inaccurate (Tr. 1-57-58; AF 19; A-11). He said that the traverse of February 10, 1997 (G-24) showed 20-32 acres of logged area; however, using the scale on the sale area map of approximately 8 inches equals 1 mile, the total was approximately 180 acres of harvest area. Mr. Smith said he tried to scale it several ways and was unable to find a way to come anywhere near 32 acres. In his view, this was evidence of defective documents. He also, however, acknowledged that the sale was marked on the ground by painted trees and he walked the boundaries before he bid the sale. He agreed that he was ultimately allowed to harvest what he had walked. (Tr. 1-58-60.)

PERFORMANCE:

30. Harvest began some time in November 1995 and was completed on or about March 1996. The FS stated, through Mr. Newbould, that deterioration of timber during the period of time between award and removal of the timber could have affected the volume. According to Mr. Newbould, it is common knowledge within the timber community that there can be a loss of volume and value over time. The CO, in his decision, stated that it is well known that spruce bark beetle kill timber deteriorates rapidly once the tree is killed by the bark beetle. There are a number of different types of rot that get into the wood. Also "checking" takes place where frost and sunlight cause a tree to crack and there is natural rot that occurs in spruce trees outside of the influence of the spruce bark beetle. Over time, defects can be rather rapid and cause the loss of merchantable volume within a tree. (AF 65; Tr. 1-43, 3-26-27.) While the CO and Mr. Newbould addressed this potential deterioration, neither quantified the amount of deterioration which would occur over the time period involved in this contract.

31. Appellant claims to have removed approximately 315 MBF of timber based on a conversion of tonnage to thousand board feet. According to Appellant, that was not solely sawtimber, the description used in its initial claim letter, but also included "saw timber, pulp timber, firewood timber." Appellant calculated the amount it harvested by taking the total tonnage of harvested timber and dividing that by the conversion figure regularly used by Ketchikan of 6.5 tons per board foot. (Tr. 1-23, 44; A-6.) Appellant also showed through other documents that the FS at times used 7 as a conversion figure, when dealing with green lumber (Tr. 1-26; A-7). While Appellant established a total volume of timber harvested, Appellant never provided any breakdown for how much of each category it took off of the sale. Further, Appellant noted that the 315 MBF did not take into account approximately 5 MBF of firewood, sold to others. (Tr. 1-43-46.) The FS raised a number of possibilities, for why Appellant's count of 315 MBF may have been inaccurate and low, citing

specifically the effect on measurement of log lengths, number of samples taken and effect of deterioration. The FS failed to amplify or quantify any of the aforementioned effects. (AF 65.)

32. From early indications, Appellant expected to harvest soon after award but ran into problems in finding a local market. By letter of July 21, 1994, Appellant wrote to the Regional Forester and requested an export permit for the timber which it anticipated harvesting. In the letter, D & L stated, that it had spoken to Seward Forest Products, the Seward sawmill, and was told that Seward was not buying timber. D & L had also talked to a chip exporter who told it that it was not economically feasible to chip the timber and truck it to Homer, Alaska. Also D & L had spoken to most of the sawmills on the Kenai Peninsula and in Anchorage with similar lack of success. (AF 29.) The regulations dealing with export limitations on harvesting timber in Alaska are set out in 36 C.F.R. § 223.161. They provide that unprocessed timber from FS lands in Alaska may not be exported from the United States or shipped to other states without the prior approval of the Regional Forester. The regulation then lists certain criteria, "among other things," which were to be considered in determining whether consent would be given. Nothing in the regulation indicated that as a necessary condition for export, the contract solicitation had to specify that the FS would allow export. (AF 50.)

33. The Regional Forester responded to Appellant's export waiver request by letter dated August 11, 1994. In that letter, he told D & L that after reviewing D & L's letter, he had requested additional information regarding the sale and number of bidders. He was told that there were five bidders including D & L and of the five only two had milling capacity. He continued that interest shown by other bidders to purchase the sale did not indicate that this timber was surplus to domestic needs within the state of Alaska and therefore, he was denying the request for an export permit. (A-5.) Thereafter, by letter of November 18, 1994, D & L again asked for an export waiver based on the lack of a local market for the timber (AF 39). In a letter of December 5, 1994 (AF 40), the District Ranger, supported Appellant's request, citing the unlikelihood that the local mill would reopen in the near future and his impression that there was a lack of market for sawtimber in South Central Alaska , and on the Kenai Peninsula. The District Ranger stated in the letter to the Forester that "there is also a need to harvest this timber before it loses its value as sawtimber." He then closed noting that he supported an exemption for the export restrictions for the sale and requested that it be forwarded to the Regional Forester for his affirmative action. (AF 40, 62, 63.) In an internal message of December 19, 1994, to the CO's Representative (COR), from a FS official, who was identified as acting on behalf of the CO (and which contained a series of previous e-mail messages), the representative stated that the RO (Regional Office) is not going to approve export permit for LV Ray because other bidders were not given the same opportunity for any future salvage sale. (Moose Pass for example will have to determine up front if we want to go for export and appraise and advertise as such if we want to get an export permit). Other messages between various officials, suggested that the waiver was normally only issued for compelling reasons. None of the FS personnel identified on the messages were the Regional Forester, who was the individual charged with deciding whether or not to issue a waiver. (AF 41.)

34. More information as to the Regional Forester's policy regarding export permits was set forth in a letter of May 14, 1997, from Mr. Phil Janik, the Regional Forester, to D & L regarding a request made on a different and much later contract (North Shore Salvage Sale). There, the Regional Forester stated that Region 10's policy is to consider export applications on a case-by-case basis after sale award and that the Region would evaluate the specific information provided with the application in determining whether or not to approve the application. Regarding D & L's concerns over previous decisions where waivers had been granted for Alaska timber, the Regional Forester contrasted the allowance of sales from Tongass National Forest with Chugach, noting that the Tongass species had a limited market in Alaska, while the spruce sawlogs (the subject of D & L's requests for Chugach) had a domestic market in the Chugach area. (A-5.)

35. In its letter of December 29, 1995, to the Ranger District, D & L again addressed waiver and delays due to weather conditions. Here it explained that the log market had virtually dried up during the prior 30 days. D & L continued that as of that time, it did not appear that there would be any buyers until at least January 22, 1996. (AF 52.) As a result , D & L again asked for a waiver of the export restriction. The CO responded to this and a number of other issues by letter of February 15, 1996. In that letter the CO noted that he felt the request had merit and thus he was continuing to seek approval. He noted, however, the following, "I do know that the Region does not generally grant export waivers for existing contracts, when the possibility for export has not been stated in the Timber Sale Prospectus, prior to sale award. I will inform you when there is a change in the status of the policy." (AF 57.)

36. This was not the first time that D & L had attempted to avail itself of the export process. In a letter of January 11, 1993, D & L had requested a waiver on the Bear Flats Sale. Of note is D & L's comment in the letter, that most of this timber has been dead for years and its economic value is declining rapidly. D & L then noted that an immediate response would be greatly appreciated. (A-5.)

QUANTUM AND FILING OF CLAIM AND APPEAL:

37. By letter dated April 11, 1996, D & L submitted a notice of claim of $12,409.32 asserting that it removed 315 MBF of "spruce sawtimber" from the sale, some 154 MBF less than the advertised amount. D & L stated that it had completed timber harvest activities on the sale. The letter went on as follows:

> However, we hereby make demand for the return of $12,409.32 stumpage for 154 MBF @ $80.58/MBF of spruce sawtimber that was not in this sale. As you know, we have been required to keep strict records of the volume of timber removed from this sale. As such, we know that we have removed 2,048.95 green tons of spruce sawtimber from this sale. And using Ketchikan Pulp Companies [sic] conversion rate of 6.5 green ton/MBF we have determined that we have removed only 315 MBF of spruce sawtimber from this sale; some 154 MBF less than the advertised amount.

D & L further charged in its letter that the persons who cruised the timber were not the same as those who flagged the boundaries and that such persons did not include all timber intended by the cruisers. (AF 15.) These allegations were never amplified and although the FS acknowledged that the individuals who flagged were different, Appellant never identified any actions they took which established error in their activities.

38. The CO denied Appellant's claim of $12,409.32 by decision dated June 13, 1996 (AF 19). In the decision the CO defended the volume stated in the contract, stating it was based on a detailed cruise conducted by qualified personnel in June 1993. It was based on 16-foot logs and included a deduction of 10 percent for defect. Under clauses BT8.2 and BT8.21, the sale was extended past the termination date to June 18, 1996. Harvest was not begun until November 1995 and not completed until March 1996, some 15 to 20 months after award. The CO continued that "as an experienced purchaser of beetle killed timber," the contractor was aware of how timber deteriorates with time. The CO then stated that "undoubtedly, from sale award through completion of the harvest, there was a loss of volume due to deterioration of dead trees in excess of the 10 percent defect identified in the cruise." In addition to the above, the CO pointed out that the use of 32-foot rather than 16-foot logs for scaling and the use of a small sample, could have contributed to the difference in volume. The CO also addressed the Appellant's allegation that the same persons who marked and surveyed the timber were not the cruisers. The CO agreed that different people were used but said it was not important because the cruise determined an average volume per acre. Finally, the CO cited a number of clauses in the Prospectus and solicitation which placed responsibility for determining volume on the contractor and disclaimed that the FS estimates were in any manner a guarantee.

39. By letter of July 18, 1996, the CO provided Appellant with a final inspection report from the sale administrator which the CO said "details the successful completion of all of your contractual responsibilities for the LV Ray Timber Sale." The CO further stated that the letter served as notice that the surety performance bond was released. (AF 16.) The contract contained a clause at CT9.21 (AF 12) which provides in part, "Failure by Purchaser to submit a claim within these time limits shall relinquish the United States from any and all obligations whatsoever arising under said contract or portion thereof when: . . . (d) All other-Purchaser must file any claims not later than 60 days after receipt of Forest Service written notice to Purchaser that sale is closed."

40. By letter of December 5, 1996, Appellant gave notice to the FS of an amended claim for the timber sale. Appellant claimed an additional $23,977.68 which brought its claim to $36,387. (AF 3.) Appellant said that the additional claim was based upon the fact that there was no white spruce sawtimber in the LV Ray Salvage Timber Sale. According to the Appellant, all the included timber was white spruce fuelwood and Appellant continued that the FS had negotiated the sale of some 30 acres of white spruce firewood near LV Ray for $3.00/MBF. Also on December 5, 1996, Appellant submitted its Complaint. In its Complaint at paragraph 4, the Appellant stated that the sale was advertised and awarded to include white spruce sawtimber (297 MBF) and white spruce fuelwood (172 MBF). Appellant alleged that the sale did not have any white spruce sawtimber, it contained only white spruce fuelwood. Appellant also included allegations in its Complaint regarding export restrictions and charging bad faith in denying Appellant the export waiver. Appellant also charged

that the deduction of 10 percent for defect used by the FS was erroneous and charged in another count that the CO took bad faith actions regarding Appellant's bonding. Finally, Appellant charged that the CO knew or should have known that other timber sales administered in the District, had insufficient volume and thus should have been adjusted to reflect that history in this instance. The evidence bearing on that matter was the earlier referenced letter from Ketchikan Pulp Company to the Forest Supervisor dated October 17, 1995, where Ketchikan explained why they were not bidding on the last three FS sales. In the letter, Ketchikan said that while the first sale they bid on contained approximately the volume advertised, the last three had less than half the volume. (A-3.)

41. By letter of February 10, 1997, the CO issued a separate and specific decision denying the claim set out in Appellant's December 5, 1996 letter regarding the complete absence of sawlogs. The CO set out Appellant's appeal rights. (Board 1.) The basis of the CO's denial of the December 5, 1996 claim was that the Appellant had failed to comply with the contract provision which required that claims be submitted no later than 60 days after close of the contract. According to the FS, the contract had been closed out on July 18, 1996, thereby making this beyond the 60 days. The CO also denied this claim on the merits, referencing the disclaimer clauses regarding quantities. Appellant did not appeal this final decision. Finally, as noted earlier in these findings of fact, on the same date as Appellant sent its letter to the CO as to the lack of sawtimber, the Appellant also forwarded its Complaint in the underlying appeal. In that Complaint, the Appellant made its lack of sawtimber allegation. In its Answer to Appellant's complaint and again at the hearing, the FS asserted that the matter was not properly before the Board because it had not been the subject of an appealed final decision. At the hearing and in briefing, the FS asserted the issue of no sawtimber was time barred due to Appellant's failure to timely appeal. Finally, on at least two occasions prior to the hearing and then again at the hearing, the matter of the December 5 amendment and claim was addressed by the Board at which time the Board advised Appellant that the Board might not have jurisdiction over the amended claim (pointing out that in order for the Board to have jurisdiction, Appellant would have to show that it was not an independent claim but rather a refinement of the claim before the Board).

42. As noted earlier, in its Complaint, Appellant also raised an issue involving bonding. The FS wrote to Appellant by letter of October 25, 1994, informing Appellant that the surety bond for the LV Ray project was no longer satisfactory, as the Department of Treasury had terminated the bonding company's certificate of authority. Under the contract (BT.9.1), Appellant was to maintain a surety or letter of credit of $4,000 and where the bond became unsatisfactory, the contractor had 30 days to provide a substitution. (AF 12.) By letter of April 19, 1995 (AF 43), the FS wrote to D & L on the matter and reviewed the history and threatened termination based on breach. The letter suspended all of the contractor's operations in the area. By letter of April 20, 1995, the FS internally agreed to allow D & L to begin operations on the sale, under conditions that its current bond with American Bonding remain in effect until a substitute bond could be secured through an approved bonding company and on the basis that Appellant secure a bond within 30 days. (AF 45.) It is not clear from the record whether the suspension was reinstated after 30 days, however, by July 1995, Appellant had secured substitute bonding (AF 45, 46).

DISCUSSION

PRELIMINARY JURISDICTIONAL MATTERS:

The Board has jurisdiction over the issues raised in Appellant's claim for $12,409.32 which Appellant set out in its claim letter of April 11, 1996. In that letter, Appellant asserted that it removed some 315 MBF of "spruce sawtimber," some 154 MBF less than the advertised amount. Appellant filed a new claim by letter of December 5, 1996, and claimed therein that there was no sawtimber but only fuelwood on the contract. In that claim Appellant sought compensation for 459 MBF of timber. (FF 40.) In addition, on the same date as the letter, Appellant submitted its Complaint, where it set out the same allegation as to an alleged total absence of sawtimber.

The CO responded to Appellant's December 5, 1996 letter in a letter of February 27, 1997, which the CO designated as a final decision. In that letter the CO denied Appellant's claim on both the merits and on a procedural basis (failure to claim within 60 days of the close of the contract). The CO additionally advised Appellant as to its right to appeal. The Appellant did not appeal the February decision. Further, when the FS filed its Answer to Appellant's Complaint, the FS specifically denied the allegations as to the sawtimber; and further asserted that the matter had not been the subject of a final decision and thus the Board did not have jurisdiction. (FF 39, 40, 41.)

Appellant's April 11, 1996 claim, which was addressed by the June 13, 1996 CO decision appealed to this Board, did not allege (as Appellant later contended in the December 5, 1996 claim letter) that the FS had completely mischaracterized a substantial portion of the advertised timber. In the claim letter of December 5, 1996, Appellant asserts that this sale had no sawtimber. Although the letter does not explain its calculations, the Appellant's theory of relief is that the solicitation mischaracterized the quality of timber. As such, on its face, the amended claim of December 5, 1996 is distinct from the matter raised in AGBCA No. 96-207-1. Accordingly, until December 5, 1996, the matter of a total absence of sawtimber had not been the subject of a claim to the CO. As such, the fact that Appellant inserted the issues into its Complaint in this appeal would not give the Board jurisdiction over the matter. (FF 37, 38.)

Additionally, Appellant was provided a separate CO final decision, with appeal rights (FF 41), on the amended claim set forth in Appellant's December 5, 1996 letter. Had Appellant simply filed an appeal within the time identified in the decision, either to this Board or to the Court of Federal Claims (COFC), one of the forums would have had jurisdiction over that new appeal. The fact is that the Appellant did not appeal that decision, notwithstanding the fact that several times (all within the 1-year period for appeal to the COFC), the Board raised concerns as to jurisdiction. While we recognize that Appellant handled this matter without an attorney, that does not change the fact that the claim, alleging no sawtimber, is a new claim, which was not part of AGBCA No. 96-207-1 and thus is not properly before this Board.

While we dispose of the December 5 claim as noted above, we point out that even if we had deemed the "no sawtimber" allegations as a refinement of Appellant's original claim and appeal, we still

would not find for the Appellant on the merits. The allegation that there was no sawtimber at all on this contract is simply inconsistent with substantial evidence, which clearly refers to harvested sawtimber. In its claim letter of April 11, 1996. setting out the claim (filed after harvest was completed), Appellant never mentions there being no sawtimber. Instead it says, "we have removed only 315 MBF of spruce sawtimber." At the hearing Appellant explained that specific reference to sawtimber, noting that in saying "sawtimber" he did not mean "only sawtimber." Rather, he said in explanation of the April 11, 1996 reference, "it includes sawtimber, pulptimber and firewood timber." Further, in his testimony, Mr. Smith says that he walked the site prior to bid. Had there been no sawtimber at all, as alleged in the December letter, that lack of sawtimber would have had to be evident. Finally, a review of the extensive Appeal File and supplements by Appellant reveals no mention or allegation of a total absence of sawtimber until the filing of the December 5, 1996 letter. Simply put, this claim theory is not supported by evidence. (FF 31, 35, 37.)

THE APPEAL FOR DEFECTIVE ESTIMATE:

We start with the basic proposition that the FS does not guarantee quantities and that the estimating of timber sale volumes is often subject to variations. Doug Jones Sawmill, AGBCA No. 94-193-1, 96-1 BCA ¶ 28,176; K & K Logging, Inc., AGBCA No. 85-271-3, 85-3 BCA ¶ 18,487. Appellant knew when it bid that the contract contained disclaimers telling bidders that they should not rely on the FS estimate as a guarantee of quantity (FF 3, 7, 8). Appellant in its testimony acknowledged knowing that quantities could vary significantly (FF 25). Any bidder providing a price on this job therefore, took the risk that the quantity which it would harvest would not be the same as that listed in the estimate, unless the difference in quantity was due to a matter covered in clause CT4.12 of the contract, which provides that in order for a contractor to qualify for relief due to a disparity in quantity, the contractor had to show the disparity resulted from an area determination error, computer input error, computer malfunction, or a calculation error. (FF 8.) Under the contract terms, D & L cannot prevail simply on the basis of alleging a large discrepancy between the harvest and estimate.

The record in this case supports that Appellant removed approximately 315 MBF of timber. That number, notwithstanding Appellant labeling it in its claim as "315 MBF of sawtimber," was clarified in his testimony and clearly included sawtimber, fuelwood and pulpwood. As its measure of damages,
Appellant seeks to recover $80.58 for each MBF of sawtimber that was less than the FS estimate. Appellant uses the difference between 469 MBF for all timber estimated and 315 MBF, the volume it claims it harvested. Appellant uses the wrong comparison.

Any recovery in this case would have to compare how much sawtimber Appellant removed against 272 MBF of sawtimber set forth in the estimate and not against 469 MBF of total timber. To make that comparison, we need to have a figure for how much of the 315 MBF, removed, was sawtimber. We do not have such a figure. Therefore, even were we to find that the estimate met the criteria in CT4.12, Adjustments in Volume, so as to allow relief, we could not find for Appellant. Since Appellant failed to quantify how much of the 315 MBF that it removed was sawtimber, we therefore have no means of comparing the volume he removed against the 297 MBF of sawtimber estimated

in the contract. Accordingly, the record does not allow us to conclude that errors (qualifying under CT4.12) existed in the estimate.

While Appellant has raised some questions as to aspects of the FS methodology on the preliminary cruise, particularly the impact of using the Michigan program data, Appellant did not move beyond raising questions and has not given us information from which we can quantify that effect. In fact, the limited quantification we have is from Mr. Saberniak, who indicated that the Michigan adjustments went to the correction factor and were not material. We have no evidence from which we can compare correction factors or growth factors between Michigan and Alaska. Appellant did not challenge with hard evidence but rather relied essentially on the numerical discrepancies. That is not enough. (FF 12, 14, 15.)

While, as stated above, we find a lack of proof as to error on the preliminary cruise, we must note that our decision in this appeal does not turn on that matter alone. That is because on this sale the FS conducted two cruises, not just the preliminary cruise upon which Appellant primarily focused. In fact, while the FS used the cruise volume from the preliminary cruise for the estimate in this contract, the evidence was clear and undisputed that the only reason it used the preliminary cruise volume number was because that estimate was lower than the estimate from the second cruise. Because the preliminary cruise volume estimate was lower, Mr. Newbould, in attempting to be conservative, used the smaller preliminary cruise volume for the sale, instead of the volume estimate from the second cruise. (FF 12, 13, 16, 17, 21.)

Because there were two cruises and the second and more detailed cruise showed a higher volume, we must, for purposes of deciding if the FS met its obligation to properly provide an estimate, examine the second cruise and determine if it contained material errors which affected that estimate. While Appellant is correct that some of the procedures from the FS Handbook were not used, we have no evidence that shows that the failure to use those procedures was material, that the tree measurement cruise conducted by Mr. Saberniak was not done professionally, nor evidence that the failure to follow those procedures would have changed the result of the second cruise or the final volume set forth in the sale contract. Mr. Saberniak explained in detail what he did to assure a correct number on the second cruise. Mr. Newbould similarly described the steps he took. The fact that their conclusions may have resulted in an overstated estimate, does not under this contract make the FS liable. The act of choosing to use the smaller number of the preliminary cruise, if anything, is an indicator of the reasonableness of the FS actions. (FF 17-24.) We stress here that the test for relief is not whether the volume advertised is the same as that harvested. Rather, for Appellant to prevail, it must show some material error on the FS part on the second cruise. That simply has not been done by the Appellant in this appeal. (FF 12, 18.)

Appellant presented no witnesses but for its principal, Mr. Smith. While Mr. Smith had experience in purchasing timber, he did not demonstrate that he was better qualified or more familiar with the circumstances at the site than were the FS witnesses. Both Mr. Saberniak and Mr. Newbould demonstrated significant knowledge as to cruising and conveyed that due care was taken to assure an accurate estimate. (FF 17-23, 26-30.) Certainly, we recognize that the amount Appellant

claimed to remove was significantly less than the sale estimate. However, that difference must be viewed in light of the known potential variation between timber estimates and actual recovery (estimating is not an exact science and in many respects is judgmental). (FF 25, 28, 37.) Further, one must take into account that this was a beetle-infested sale and as noted in various documents, time was a deteriorating factor in a sale such as this and getting the timber out quickly, before it loses value, is not an insubstantial consideration (FF 30, 33, 38). Finally, the contract contained clear and obvious disclaimers, which put any bidder on notice that it was taking a significant risk if it relied solely on the FS figures (FF 3, 7, 26, 28).

Appellant spent considerable time pointing out potential errors as to acreage, and particularly as to its charges as to error in the scale on the map. We find these charges to be non-dispositive. The alleged errors as to acreage are not material to the accuracy of the tree measurement cruise (the second cruise), which was conducted by actually counting trees within the designated sale area and not through use of extrapolation. (FF 19.) Finally, even if we accept as accurate Appellant's allegation that by using the 8-inch scale, the site appears to have over 180 acres, we must also note that Appellant acknowledged that it knew the overall size of the sale area, had the opportunity to walk the acreage and was allowed to harvest the acreage for the area he had walked. Clearly from the walk through, it was evident that the project was not 180 acres of harvest and Appellant does not even make that argument. (FF 29.) Rather, all Appellant does is point out a possible error, attempting to establish a pattern of lack of care and sloppiness on the part of the FS. That, however, does not establish a material error, which affected the volume.

This is very much a lack of proof case. Appellant makes many allegations and provides information from which inferences could be made in its favor; however, for virtually every inference which goes Appellant's way, one could make an equally persuasive inference on behalf of the FS. We must decide the case on the basis of evidence and not speculation. On balance, Appellant has not convinced us by probative evidence that the FS committed an error which allows recovery.

In rendering this decision, we find it appropriate to briefly address some other points. First, we find that Mr. Saberniak was qualified to perform the cruise. The evidence was clear that cruising skills are not confined to one location. (FF 9, 10.) As to Mr. Newbould not conducting a check cruise or written certification, we find that Appellant has not established that following those procedures would have materially changed the volume estimate. In fact, Mr. Newbould pointed out that it was not the practice in the District to follow those procedures on salvage sales and further, he made it clear that he did not blindly adopt the numbers and included as a factor in settling on the estimate the fact that the estimate was consistent with his prior experience in the area. (FF 20-23.)

Appellant asserts that the CO did not make a personal and independent review of the claim. Appellant states that the CO statement in the decision that "Our estimate was based on a detailed cruise by qualified personnel in June 1993," is false, pointing out that the cruise clearly states "Preliminary Volume Estimate," and that the CO used the numbers from that preliminary estimate for the volume in this sale. Appellant asserts, that a preliminary cruise does not equate to a detailed cruise by qualified personnel and accordingly, asks that the CO decision be rendered null and void.

According to Appellant, the CO is acting as an advocate for Government position and as such did not fulfill his obligations under the CDA. Here, Appellant puts form over substance. A CO is entitled to rely on information provided by others, particularly as to technical matters. The CO was provided explanations, through his staff, as to the cruise data and as such, was not obligated to go behind those numbers. In point of fact, evidence shows he did make review of the issues and the fact he used the word "detailed" in his final decision does not change that. Moreover, while he used the volume number from the preliminary estimate, he only used it so he would have a figure lower than the tree measurement estimate and did that in an attempt to benefit the contractor. Finally, once a decision reaches the level of the Board, it is reviewed de novo and no presumption is given to the CO's determination as to factual and legal conclusions.

While not dispositive of this appeal, we do find it useful to address the export waiver issue. There were a number of references in the Appeal File where Government officials noted that an export waiver would only be granted in Region 10, if the intent to waiver was stated in the contract. We note that those references did not come from the Regional Forester, who specifically stated in his letter of May 14, 1997 (albeit a letter much after this contract and dealing with a different contract) that in making a decision on waiver, he considers many factors. Further, in his letter of August 11, 1994, denying waiver on this contract, the Regional Forester made no assertion that waiver required pre-notice in the contract. Instead, he set out specific reasons in the denial. Appellant never called the Regional Forester nor is there any evidence that what the Regional Forester said in his letters is not a true reflection of how he handled the waiver matter in this and in other cases. We thus find he acted within the regulations. (FF 32-35.)

Finally, while Appellant inserted allegations in its Complaint as to alleged wrongful acts by the FS relating to its performance bond, that too was a matter that had never been made the subject of a prior claim. Again for the record, the documents in the Appeal File relating to the performance bond clearly showed that the FS acted within its contractual rights as to the disputed actions. (FF 42.)

DECISION

The Appellant's appeal is denied.

HOWARD A. POLLACK
Administrative Judge

Concurring in the Result with Separate Opinion:

JOSEPH A. VERGILIO
Administrative Judge

EDWARD HOURY
Administrative Judge

Issued at Washington, D.C.
July 29, 1999

CONCURRING OPINION BY ADMINISTRATIVE JUDGES JOSEPH A. VERGILIO AND EDWARD HOURY

We concur with the presiding judge that the appeal should be denied, but we utilize the following rationale. The contractor warranted with its bid that it did not rely upon the quantity or quality estimates provided (and largely disclaimed) by the Government. In light of the contractor's warranty, it has not proven reasonable, detrimental reliance upon the estimates. Further, while the contract dictates when a revision to the volume estimates shall occur, the contractor has failed to satisfy a fundamental burden to recover under the clause. It has not shown that the estimates in the solicitation were inaccurate or that any variations in accuracy arose from a correctable basis.

The flat rate sale was advertised as a salvage sale,[1] under which the purchaser cuts and removes all designated dead and infested spruce trees in the sale area (Appeal File, Exhibits 5 (¶ 3), 6) (all exhibits are in the appeal file).[2] In a flat rate sale, the contractor pays the Government a fixed price (the sum here of the rates multiplied by the estimated number of thousand board feet (MBF)) and removes the marked or designated trees. Although the estimated MBF serve as the basis for payment, the estimates are not guaranteed to reflect the contractor's recovery. A flat rate sale contrasts with a scaled sale, that is, one in which the timber is removed and paid for based upon the volume scaled upon removal. Here, the Forest Service did not measure the volume of the timber removed. The contractor was in the unique position to prove the quantity and quality of timber removed. It failed to carry its burden.

Contractor warranty and Government disclaimer

The solicitation contains a Government disclaimer of estimates and a bidder warranty of inspection. Pursuant to the clause, the contractor warranted that it submitted its bid solely on the basis of its examination and inspection of the quality and quantity of the timber, without any reliance on Forest Service estimates of timber quality or quantity. (Exhibit 8 (¶ 23).) Moreover, this contractor walked the sale area prior to bidding (Transcript at 41 (July 17, 1997)). Its bid, in excess of the advertised rates for both types of timber (sawtimber and fuelwood) included in the contract, suggests that the contractor concluded that the quality and quantity of the timber justified the rates it bid for the flat

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[1] The solicitation estimates that the sale encompasses 297 MBF of "sawtimber" and 172 MBF of "fuelwood" (Exhibit 12 (¶¶ AT2, AT5c)). The contract required payment at flat rates. For the sawtimber, per MBF, the advertised rate was $87.09, the contractor's bid rate was $124.7620. For the fuelwood, per MBF, the advertised rate was $3.00, the contractor's bid rate was $4.3005. (Exhibit 12 (¶ AT5b).)

[2] Beetles infested or had infested some of the trees. The beetles decreased the quality of the wood and would lead to the deterioration of the quality and quantity of the timber, particularly with the passage of time. (Exhibit 65; Transcript at 26-27 (Jan. 21, 1998).)

rate sale. Absent relief under another theory, the disclaimer and warranty here preclude recovery for the alleged variations in quality and quantity. Doug Jones Sawmill, AGBCA No. 94-193-1, 96-1 BCA ¶ 28,176.

The estimates

The contract specifies that the volume estimate shall be revised for errors made in determining estimated volume when the errors result in a decrease of total sale volume of at least 10 percent or $1,000 in value (whichever is less), when an incorrect volume estimate is caused by (a) an area determination error, (b) computer input error or computer malfunction, or (c) a calculation error. However, no adjustments in volume shall be made for variations in accuracy resulting from judgments of timber quality or defect. (Exhibit 12 (¶ CT4.12).) The contractor has not demonstrated entitlement under the terms of the contract.

The contractor has not demonstrated that an error of any of the three enumerated varieties occurred and it has not adequately supported its statements as to the quantity and quality of timber removed. Despite the contractor's assertion that it was required to maintain detailed records of timber removed during the sale, the evidence supporting the 315 MBF it contends it removed, in terms of board feet or weight and the appropriate conversion factor, is not convincing (Transcript at 43-46 (July 17, 1997)). Further, the contractor has not affirmatively demonstrated the quality of the timber it removed. By the contractor's estimates, it sold at least 250 MBF of timber to the Ketchikan Pulp Company as "pulpwood" (for $170.625 per MBF) and it sold other timber for log homes, as sawtimber, and as fuelwood. (Exhibit 64; Transcript at 24, 34-36, 45-46 (July 17, 1997)). As the contractor recognized, as early as July 1994, a limited market existed for its sale of timber (Exhibit 29). The record does not demonstrate that the timber sold did not qualify as sawtimber.

Significantly, even assuming the correctness of the 315 MBF as the volume of timber removed, the accuracy of the Government estimate in the contract is not impugned. Approximately 16 months elapsed between award and cutting. The record demonstrates that the volume of timber removed after several months had elapsed from the award (and several more months from the time of the estimate) would be less than that which existed at the time of award. This was because of the passage of time and the bark beetle infestation. (Exhibit 65; Transcript at 26-27 (Jan. 21, 1998).)

Finally, the contractor's claim fails to give weight to the contract's statement that no adjustments in volume shall be made for variations in accuracy resulting from judgments of timber quality or defect (Exhibit 12 (¶ CT4.12)). Particularly with the bark beetle and the passage of time (as noted above), timber may not have been suitable for sawtimber or fuelwood. The contract expressly places such risks solely on the contractor. Any deterioration in the quality or quantity of the timber is a risk the contract allocates to the contractor. Hence, if sawtimber became pulpwood (or if the timber was pulpwood at the time of the estimate), the timber quantities are not to be revised.