JOHN E. GALLNO,	)	**AGBCA No. 97-146-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
David A. Linn	)	
Linn & Blate	)	
Attorneys at Law	)	
P.O. Box 2347	)	
Oakhurst, California 93644	)	
	)	
Representing the Government:	)	
	)	
Jack Gipsman	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
33 New Montgomery Street, 17th Floor	)	
San Francisco, California 94105-4511	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

May 7, 1999

OPINION BY ADMINISTRATIVE JUDGE EDWARD HOURY

This appeal arises under Contract No. 058013, the Wrights Creek II Multi-Product Timber Sale in the Mi-Wok Ranger District of the Stanislaus National Forest, California. The Forest Service awarded the contract to John E. Gallno of Sonora, California (Appellant), on May 5, 1995. The contract was for the sale of 5,620 thousand board feet (MBF) of Ponderosa pine and Jeffrey pine, and unestimated quantities of other species, for a bid price of $165,000. As a part of the contract, Appellant was required to construct or reconstruct 12 road segments needed for the removal of the timber. The sale covered 2,261 acres and included at least 24 separate cutting units.

Appellant operated the sale during 1995 and 1996, prior to a dispute surfacing regarding the trees Appellant could cut. The dispute related to an interpretation of contract clause CT2.366# - Designation of Included Timber (9/17/94). On May 24, 1996, the Forest Service suspended Appellant's operations until Appellant agreed to operate the sale in accordance with the Forest

Service's interpretation of the contract. Appellant's position was that the Forest Service's interpretation would delete half of the timber Appellant anticipated being able to cut.

Generally, the contract allowed the removal of all trees so long as Appellant maintained a triangular spacing of 40' between leave trees, and left at least 63 trees per acre. After Appellant began operations, Appellant discovered it could not meet these requirements simultaneously and requested the Forest Service to interpret the contract to apply whichever of the two requirements were the least restrictive. The Forest Service opted to redefine the cutting so that the forest would be silviculturally acceptable after the cutting was completed. The parties could not agree on a revised cutting formula.

On August 15, 1996, Appellant assigned the contract to Sierra Resource Management. The assignment was approved by the Forest Service on or about September 3, 1996. Appellant filed a lost profits claim in the amount of $1,263,480 which was denied by the Contracting Officer (CO). Appellant filed this timely appeal. The Government filed a Motion to Dismiss asserting that Appellant was no longer a "contractor" as a consequence of Appellant's having assigned the contract.[1] Appellant opposed the Government's Motion, among other things, asserting that the Government represented to Appellant that Appellant would not lose his right to claim damages as a result of the assignment.

The Board denied the Government's Motion, holding that the particular assignment language did not act as a release, discharge, or waiver of Appellant's rights against the Government, and that Appellant had raised and supported questions of fact relating to whether the assignment was an integrated agreement, including whether the Forest Service had represented that Appellant could file claims notwithstanding the assignment. John E. Gallno, AGBCA No. 97-146-1, 98-1 BCA ¶ 29,616.

Thereafter, the Board convened a number of telephone conference calls to move the appeal along and to perform what can best be described as "early neutral evaluation" to assist the parties in settling the appeal. Generally, the Board posited that where the specification was impossible to meet, as seemed to be the case here, and the contract had been assigned, Appellant may be able to recover the pre-assignment increased costs of attempting to meet the specification, but that Appellant would have difficulty demonstrating entitlement to the lost profits claimed. The possibility of recission based upon mutual mistake was also considered. A cut-off date was established for the completion of discovery, subpoenas were issued, and a hearing was set for April 13-15, 1999.

Just prior to the start of the formal hearing, the Board offered the parties another opportunity to discuss settlement. The parties were able to agree on a settlement, which was read into the record. The agreement included the payment of a specific sum of money to Appellant, with both sides being responsible for their own litigation expenses.

---

[1] The Contract Disputes Act, 41 U.S.C. §§ 601-613, provides that the "contractor" means a party to a Government contract other than the Government. 41 U.S.C. § 601(4). The Government contended that as a consequence of the assignment Appellant was no longer the "contractor" and may, therefore, not bring the present appeal.

DECISION

The appeal is dismissed as settled.

_____
EDWARD HOURY
Administrative Judge

Concurring:

_____
HOWARD A. POLLACK
Administrative Judge

_____
ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
May 7, 1999