



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: March 2, 2015

CBCA 2621

JOSEPH GRASSER t/a GRASSER LOGGING,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Joseph L. Luciana III of Dingess, Foster, Luciana, Davidson & Chleboski, LLP, Pittsburgh, PA, counsel for Appellant.

Vince Vukelich, Office of the General Counsel, Department of Agriculture, Milwaukee, WI, counsel for Respondent.

Before Board Judges **GOODMAN, STEEL, and KULLBERG.**

STEEL, Board Judge.

Joseph Grasser t/a Grasser Logging (Grasser) entered into a timber sale contract with the United States Forest Service (FS). Grasser claims that it is entitled to a rate redetermination under the contract or monetary damages under common law in an amount of either \$1,021,815 or \$1,651,357, because of the defective condition of some of the timber – black cherry trees – which was to be cut. A FS contracting officer denied the claim, and Grasser appealed his decision. Grasser now moves for summary relief on a key issue in the appeal. We deny the motion.

Background

In August 2008, the FS advertised for bids to cut timber in a portion of the Allegheny National Forest in Pennsylvania. The advertisement contained a list of estimated quantities and rates for each of six species of timber available for harvesting. The total quantity available was estimated to be 3003 hundred cubic feet (CCF). The species with the greatest estimated quantity was black cherry, with 1357 CCF. The black cherry was advertised as sawtimber, with a rate of \$654.31 per CCF. At this rate, the estimated value of the black cherry timber was \$887,898.67. The estimated value of all the timber was \$931,743.58.

The FS's invitation for bids included a clause entitled "Disclaimer of Estimates and Bidder's Warranty of Inspection." This clause states:

Before submitting this bid, the Bidder is advised and cautioned to inspect the sale area, review the requirements of the sample sale contract, and take other steps as may be reasonably necessary to ascertain the location, estimated volumes, construction estimates, and operating costs of the offered timber or forest product. Failure to do so will not relieve the Bidder from responsibility for completing the contract.

The Bidder warrants that this bid/offer is submitted solely on the basis of its examination and inspection of the quality and quantity of the timber or forest product 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 or forest product quality, quantity or costs of recovery. Bidder further acknowledges that the Forest Service: (i) expressly disclaims any warranty of fitness of timber or forest product for any purpose; (ii) offers this timber or forest product as is without any warranty of quality (merchantability) or quantity and (iii) expressly disclaims any warranty as to the quantity or quality of timber or forest product sold except as may be expressly warranted in the sample contract.

The Bidder further holds the Forest Service harmless for any error, mistake, or negligence regarding estimates except as expressly warranted against in the sample contract.

Grasser visually inspected the trees and submitted a bid in the amount of \$1,310,519.90. This amount was predicated in part on a bid rate of \$940.07 per CCF for black cherry timber. The parties entered into timber sale contract number 03-155879 on December 3, 2008.

The contract contains several provisions which are cited by the parties in this case. Principal among them is BT2.133, "Damage by Catastrophe." This provision states in pertinent part:

As provided under BT8.32 ["Modification for Catastrophe"], undesignated live and dead timber within Sale Area, meeting Utilization Standards, and affected by Catastrophic Damage. "Catastrophic Damage" as used hereunder is a major change or damage to Included Timber of Sale Area, to Sale Area, to access to Sale Area, or a combination thereof:

(a) Caused by forces, or a combination of forces, beyond control of Purchaser, occurring within a 12-month period, including, but not limited to, wind, flood, earthquake, landslide, fire, forest pest epidemic, or other major natural phenomenon and

(b) Affecting the value of any trees or products meeting Utilization Standards, within Sale Area and estimated to total either:

(i) More than half of the estimated timber quantity stated in AT2 [the volume estimates noted above] or

(ii) More than two hundred thousand cubic feet (2,000 CCF) or equivalent.

The contract also contains provision BT8.12, "Liability for Loss," which states in pertinent part:

If Included Timber is destroyed or damaged by an unexpected event that significantly changes the nature of Included Timber, such as fire, wind, flood, insects, disease, or similar cause, the party holding title shall bear the timber value loss resulting from such destruction or damage; except that such losses caused by insect or disease after felling of timber shall be borne by Purchaser, unless Purchaser is prevented from removing such timber for reasons that would qualify for Contract Term Adjustment.

Additional contract provisions cited by the parties are BT8.32, "Modification for Catastrophe," and BT3.32, "Rate Redetermination after Catastrophic Damage." These provisions state in pertinent part:

BT8.32: In event of Catastrophic Damage, . . . Forest Service may propose contract modification to permit the harvest of catastrophe-affected timber. If Purchaser accepts Forest Service proposed modifications, this contract shall be modified to include rates redetermined under BT3.32 and other related revisions as necessary.

BT3.32: In event of Catastrophic Damage and adjustment, if any, of Included Timber, Contracting Officer shall make an appraisal to determine for each species the catastrophe-caused difference between the appraised unit value of Included Timber remaining immediately prior to the catastrophe and the appraised unit value of existing and potential Included Timber immediately after the catastrophe.

The FS knew, as a result of its inquiries to Grasser in evaluating the firm's responsibility to perform under the contract, that Grasser believed it could maximize its profit from the contract by selling black cherry as veneer and export logs. Grasser began harvesting timber under the contract in 2009. Grasser maintains that all of the black cherry logs that it harvested had "defoliation rings" and internal staining and discoloration. The rings caused kiln-dried lumber to separate. Consequently, Grasser was unable to sell black cherry as veneer and export logs, as it had planned to do.

Grasser maintains that because the FS had entered into at least three salvage sales in the environs of this sale area, and because the agency knew from 1990s studies that insect infestation in the general area had increased tree mortality, the agency must have known that a forest pest epidemic in the sale area had caused catastrophic damage to the black cherry trees.

Grasser says that it had projected that cutting black cherry trees in the sale area would generate total revenue of \$2,695,405, but that after harvesting approximately two-thirds of these trees, it had obtained total revenue of only \$921,026.28 from these trees. Grasser estimates that if it had felled the remaining black cherry trees, its total revenue from these trees would have been \$1,042,818 – \$1,652,587 less than it had projected.

On April 27, 2011, Grasser submitted a claim to the contracting officer seeking a rate adjustment under contract clause BT8.12 or contract clause BT3.32, a contract adjustment for mutual mistake, or damages for misrepresentation, all based on the damage to the black cherry trees. Grasser valued its claim as \$1,021,815 due to a reduction in the contract price, or alternatively, \$1,651,357 due to misrepresentation that the trees were free from defects because the sale was not advertised as a salvage sale. Grasser certified its claim on May 27,

2011. The FS contracting officer denied the claim by decision dated September 20, 2011. Grasser appealed the decision to the Board on November 7, 2011.

Discussion

Grasser has filed what it styles a “motion for summary relief on the issue of catas[t]rophic damage to black cherry trees.” In this motion, the appellant “requests that the Civilian Board of Contract Appeals . . . hold that defoliation rings in the black cherry trees in the sale area constitute damage by catastrophe due to forest pest epidemic such that Grasser Logging is entitled to a modification to the Timber Sale Contract in an amount to be subsequently determined.”

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

As the FS points out, whether damage is catastrophic is dictated by whether it meets the standard established by contract clause B2.133. This clause requires that two elements, (a) and (b), be fulfilled. Grasser focuses on element (a), that the damage be caused by forces beyond the control of the purchaser and occurring within a twelve-month period; the appellant maintains that the damage was caused by insect infestation and that while the infestation may have begun before the twelve-month period, it continued through that period. The FS contends that the cause of the damage is unknown and that in any event, it appears to have occurred prior to the twelve-month period. Regardless of whether Grasser can meet element (a), it clearly cannot meet element (b). That portion of BT2.133 requires that to qualify as catastrophic, the damage must have affected “[m]ore than half of the estimated timber quantity stated in [the FS’s volume estimates for the sale]” or more than 2000 CCF of timber. The black cherry trees, as to which Grasser contends catastrophic damage occurred, were estimated to constitute only 1357 CCF of the 3003 CCF of timber in this sale – less than half of the estimated quantity and less than 2000 CCF. Consequently, the damage cannot be deemed catastrophic under the terms of the contract. The fact that the black cherry trees had an estimated value of more than half of the estimated value of the timber in the sale is immaterial; BT2.133 is based on a measure of quantity, not value.

The fact that the FS knew, prior to awarding the contract, that Grasser planned to sell black cherry timber as veneer and export logs, and knew, afterwards, that the appellant had been unable to sell the timber for these purposes, does not make the damage catastrophic. Grasser bid for this contract after having read a FS “Disclaimer of Estimates and Bidder’s

Warranty of Inspection.” This disclaimer required the bidder to warrant that its bid “is based solely on its opinion of the value [of the timber] and its costs of recovery, without any reliance on Forest Service estimates of timber or forest product quality, quantity or costs of recovery.” Grasser valued the black cherry trees as being worth nearly 44% more than the FS’s estimate – \$940.97 per CCF, rather than \$654.31 per CCF. That higher valuation was based on Grasser’s opinion, not the FS’s. Grasser acknowledges that even though it harvested only two-thirds of the black cherry trees in the sale area, it obtained from them more revenue than the FS had estimated – \$921,026.28 rather than \$887,898.67. Although we understand that Grasser did not achieve all the revenue it projected from this contract, we have difficulty in appreciating why the FS should be forced to pay the appellant the difference.

Decision

The appellant’s motion for summary relief on the issue of catastrophic damage to black cherry trees is **DENIED**.

CANDIDA S. STEEL
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

H. CHUCK KULLBERG
Board Judge