UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 29, 2014

CBCA 3536

J. C. LEE,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

J. C. Lee, pro se, San Augustine, TX.

David M. Stauss and Robert L. Huddle, Office of the General Counsel, Department of Agriculture, Temple, TX, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **KULLBERG**, and **ZISCHKAU**.

DANIELS, Board Judge.

The Department of Agriculture, respondent, moves for summary relief in an appeal by Mr. J. C. Lee of a contracting officer's decision. Because the department prevails as a matter of law on the basis of undisputed material facts, we grant the motion and, in so doing, deny the appeal.

Uncontested Facts

The department's Forest Service (FS) awarded to J. C. Lee on June 7, 2012 a contract for the Lake Creek Lynch Hazard Timber Sale in the Davy Crockett National Forest, Texas. This was a tree measure sale for the removal of drought-impacted hazardous trees. The

contract provided that in exchange for the payment of $2585.42, Mr. Lee could cut and remove an estimated quantity of 514 hundred cubic feet of southern yellow pine. The trees to be cut were to be marked by the FS with green paint.

The contract included many clauses, among which are the following:

– BT8.11, Title Passage, stated, "All right, title, and interest in and to any Included Timber shall remain in Forest Service until it has been Measured, removed from Sale Area, and paid for, at which time title shall vest in Purchaser."

– BT8.12, Liability for Loss, provided that if "Included Timber to which Forest Service holds title is destroyed, Purchaser will not be obligated to remove and pay for such timber. . . . Current contract Rates in effect at the time of the value loss shall be adjusted by differences to become the redetermined rates."

– BT8.33, Contract Suspension and Modification, allowed the FS contracting officer to "delay or interrupt authorized operations under this contract . . . [t]o ensure consistency with land and resource management plans or other documents prepared pursuant to the National Environmental Policy Act of 1969, 42 USC 4321[-]4347 [NEPA]."

On August 8, 2012, the FS discovered that some of the timber which had been marked as available for cutting in this sale was actually within a special use utility area for which a permit had been granted to BASA Resources, Inc., an oil and gas producing company. Under this permit, BASA Resources was responsible for cutting and leaving on the ground trees within the area which posed a hazard to utilities and oil wells operated by that company.

On September 19, 2012, Mr. Lee began cutting timber under the contract. Early the next morning, he asked the sale administrator why timber near the oil wells had been cut without his approval or notification. FS representatives explained that BASA Resources had permission to fell these trees and offered to deduct the volume of this timber from the sale and return to Mr. Lee a commensurate portion of his payment. The representatives later acknowledged that the trees had improperly been marked for cutting under the contract. As explained by the FS contracting officer, the NEPA decision which authorized removal of trees pursuant to the contract with Mr. Lee did not allow removal of trees within the BASA Resources special use area.

The FS deducted 183 trees, with a volume of 114.2 hundred cubic feet, from the sale. By letter dated September 27, 2012, the FS informed Mr. Lee of this fact and stated that it would refund $532.12 of his payment.

The total volume of timber cut under the contract was 607.32 hundred cubic feet, 93.32 more than the FS's estimate.

On February 12, 2013, Mr. Lee informed the FS that he believed that the timber in the BASA Resources special use area which he had not been allowed to cut and remove was worth $14,936.35. He asked the agency to pay him triple that amount, or $44,809.05, to "settl[e] up." In response to a question from the contracting officer, on April 8, 2013, he designated the February correspondence to constitute a claim. He contended, "These trees are absolutely a part of the original volume of the sale and were paid for." The contracting officer denied the claim by decision dated August 20, 2013, and Mr. Lee has appealed the decision to the Board.

Discussion

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). The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. *Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999).

The premise of Mr. Lee's claim is that by virtue of his having been awarded the contract for the Lake Creek Lynch Hazard Timber Sale, he became the owner of all the timber marked for cutting within a designated area. Contract clause BT8.11 makes clear that this is not so; title to the timber was to "remain in Forest Service until it has been Measured, removed from Sale Area, and paid for, at which time title shall vest in Purchaser." Clause BT8.33 allowed the FS to "interrupt authorized operations under this contract . . . [t]o ensure consistency with land and resource management plans or other documents prepared pursuant to the National Environmental Policy Act." The FS acted consistently with this provision when it prevented Mr. Lee from cutting and removing marked timber in the BASA Resources special use utility area – timber which, because it had not been measured, removed from the sale area, and paid for, remained the property of the FS. Clause BT8.12 required the FS to adjust values under the contract if included timber was destroyed, and the agency did that when it prevented Mr. Lee from cutting and removing certain timber.

Ultimately, the FS allowed Mr. Lee to cut and remove eighteen percent more timber than was estimated in the contract.

Mr. Lee has not quarreled with any of the undisputed facts presented above. In response to the department's statement of facts, he asserts only that the FS's sales administrator believes that by marking trees within the BASA Resources area for cutting, and then preventing him from cutting them, the agency mishandled the contract. The agency admits to its error, but the mistake has no bearing on this case. The FS had the right to compensate for its flawed actions in the way in which it did.

Decision

The Department of Agriculture's motion for summary relief is granted. The appeal is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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H. CHUCK KULLBERG
Board Judge

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JONATHAN D. ZISCHKAU
Board Judge