UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: May 11, 2017

CBCA 5049

JONATHAN NOELDNER,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Jonathan Noeldner, pro se, Eau Claire, WI.

James L. Rosen, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **GOODMAN**.

DANIELS, Board Judge.

The United States Forest Service, an entity within the Department of Agriculture, awarded to Jonathan Noeldner a contract to harvest ponderosa pine timber in the Inyo National Forest of California. The contract was awarded on August 17, 2006, and is known as the Sentry Fuelwood Sale contract. Mr. Noeldner states that he paid $14,514 for the privilege of cutting and removing the trees.

Mr. Noeldner made fifteen separate, numbered claims under this contract. A Forest Service contracting officer denied them all in a single decision, and Mr. Noeldner appealed that decision to the Board.

Mr. Noeldner submitted to us complaints for claims one, three, five, six, eight, nine, and ten, but none of the others; he later informed us that he was pursuing only the claims for which he had filed complaints. The parties agreed to submit the case for a decision on the basis of the written record, without benefit of a hearing. In briefing the case, Mr. Noeldner has addressed only claim one. We therefore conclude that he is now pursing solely this claim. With no justification supporting any of the other claims, we conclude that those claims have been abandoned, so we deny them. We analyze only claim one.

Findings of Fact

Claim one is entitled, "The costs of harvesting and disposing of trash trees erroneously marked the same as, and in addition to, trees counted and included in the Sentry Sale purchase." The Forest Service had estimated, in advertising this sale, that the 109-acre sale area included approximately 3174 trees which would yield 410 hundred cubic feet (CCF) of ponderosa pine. The sale advertisement stated that in addition to the estimated quantity of 410 CCF of ponderosa pine, "there is within the sale area an unestimated volume of Other Softwood fuelwood that the bidder may agree to remove at a fixed rate." According to the claim, "We soon realized there were way more trees marked for removal than what we originally purchased" – meaning 3174 trees. This is because what Mr. Noeldner labeled "junk trees" had the same markings as "trees included in the Sale." "We feel," he told the contracting officer, "that for the 104 [sic] acres of 'junk trees' we cut on the Sentry Sale Areas we should be paid $6000 times 104 acres, which is $624,000.00."

Under the contract, the "Purchaser agree[d] to purchase, cut, and remove Included Timber." "Included Timber" consisted of "Standard Timber" – "[l]ive and dead trees and portions thereof that meet Utilization Standards under [clause] BT2.2 and are designated for cutting under [clause] BT2.3." Clause BT2.2 required the purchaser to "fell and buck" trees that "equal or exceed tree diameters listed in clause AT2 and contain at least one minimum piece." Clause AT2 set a minimum of six inches diameter at breast high (DBH) for ponderosa pine. Clause BT2.3 provided that the Forest Service would mark the trees for cutting. The agency's sale administrator (its contracting officer's representative) led the crew that marked the trees for the Sentry Fuelwood Sale in 2006. He tells us in a declaration that notwithstanding the contract minimum of six inches DBH, the crew marked only trees with a minimum of eight inches DBH.

There is no evidence in our record that Mr. Noeldner began harvesting trees in the sale area earlier than May 2011. Although Mr. Noeldner maintains that he "complained to the Forest Service repeatedly regarding the fact there were way to[o] many trees designated for removal," there is no evidence in our record that this issue arose earlier than August 2011. On August 15, 2011 – after Mr. Noeldner had cut approximately 75% of the marked trees in

payment unit 1 (but none of the trees in the other payment unit, number 2) – the sale administrator, after consulting with the contracting officer, agreed that Mr. Noeldner could, but need not, cut any more trees that were less than ten inches DBH.

The sale administrator's notes for August 15 include the statement: "I discovered that the timber subject to agreement . . . was marked/designated for cutting the same as the Included timber. This came out to approximately 1400 trees that the purchaser was not obligated to cut." The sale administrator wrote to Mr. Noeldner by electronic mail on December 12, 2011:

> When you signed the contract you agreed to fell and remove "Included Timber" this included the "Standard Timber" which is basically the 410 CCF of fuelwood you bid on and COULD have included "Timber Subject to Agreement" had special provision CT 2.11# been included in the contract. . . . Since CT 2.11# was not included in the contract and there is no agreement to be found, [the contracting officer] and I have concluded that you are not obligated to fell and remove those trees.

Mr. Noeldner writes:

> [W]e did not get to focus on the Sentry Contract until some 5 years after it was purchased. Most of the Sentry contract was harvested some 5 to 8 years after the trees were marked for removal. Trees that were small in 2005 and 2006 were much bigger in 2013 making it very difficult to differentiate between actual Contract trees and non-contractual, extra trees. Even after the USFS [Forest Service] finally determined the extra trees were non-contractual, we felled most because the USFS had marked them with the same designation and they had grown so much that we couldn't tell the difference and the USFS said they didn't have the time to do so.
>
> We ultimately harvested approximately 1300 additional non-contractual trees on the Sentry Contract. This means we had to fell, apply pesticide to the stump, limb the tree, pile the slash (on half the Sale Area), process the log and remove it from USFS property.

Discussion

As the parties recognize, the key question to be answered to resolve this case is, which trees was Mr. Noeldner required by the contract to cut and remove? The contract answers the question very directly: trees with a diameter at breast height of at least six inches.

Although Mr. Noeldner seems to believe that smaller trees (smaller than what he does not tell us) were "junk trees," every marked tree in the sale area had a greater DBH than six inches and thus was Included Timber and his responsibility to harvest. The Forest Service took actions which were actually helpful to him in three ways. First, it marked only those trees which had a DBH of eight inches or more, relieving him of the duty to harvest trees with a DBH of between six and eight inches. Second, on August 15, 2011, after he had cut trees on only a portion of the sale acreage, the Forest Service extended that relief to trees with a DBH of between eight and ten inches. Third, it allowed him to cut and remove trees as late as seven or eight years after awarding him the contract, and as the trees grew larger over that period, the trees available to him were larger than would have been anticipated when the contract was awarded.[1]

Mr. Noeldner is unable to demonstrate that the Forest Service required him to cut and remove any trees smaller than those he was contractually responsible for harvesting. He may therefore not recover any of the costs he may have incurred in removing smaller trees.

We recognize that the sale administrator made statements in 2011 that indicated his belief that Mr. Noeldner was not required by the contract to cut and remove some of the smaller trees in payment unit 1. We are not bound by the sale administrator's view of the contract's provisions. His statements are plainly incorrect; they misconstrue the provisions.

Decision

The appeal is **DENIED**.

STEPHEN M. DANIELS
Board Judge

[1] Because of the growth of the trees over time, evaluating whether the number and volume of Included Timber available for cutting when Mr. Noeldner conducted operations were comparable to the number and volume in the sale advertisement is not possible.

We concur:

CATHERINE B. HYATT
Board Judge

ALLAN H. GOODMAN
Board Judge