

AMERICAN POZZOLAN CORP.

IBLA 73-364

Decided September 10, 1974

Appeal from a decision of the BLM State Director, New Mexico, denying refund on mineral materials sales contract LC-64-4.

Affirmed in part, reversed in part and remanded.

Materials Act--Contracts: Disputes and Remedies: Generally-- Delegation of Authority: Extent of

The purchaser under a mineral materials sales contract is liable for the full purchase price even if he does not remove all of the mineral materials available under the contract; he is, however, to be given credit for the amount he has paid as well as the value of the mineral materials remaining.

Delegation of Authority: Extent of

The Board of Land Appeals has full authority to order the issuance of a refund where it has determined that such refund is required by either the applicable laws or departmental regulations.

APPEARANCES: James J. Aycock, Esq., of Johnson, Allen & Aycock, El Paso, Texas for the appellant; Gayle E. Manges, Esq., Field Solicitor, United States Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

American Pozzolan Corporation has appealed from a decision of the New Mexico State Director, Bureau of Land Management, dated March 29, 1973, denying a requested refund on mineral materials

sales contract LC-64-4 (NM 0437658). Appellant entered into a sales agreement with the Government on August 14, 1963, for the removal of 200,000 tons of volcanic cinders at twelve cents a ton for a total price of \$ 24,000. The contract provided that all purchased material would be removed within a five-year period and for periodic payments semi-annually at the rate of \$ 2,400. Owing to market difficulties the appellant did not remove all the 200,000 tons within the five-year period. Appellant requested and received three consecutive one-year extensions after the original five-year period had elapsed. Though the State Office granted the third extension, it informed appellant at that time that no further extensions would be granted. As the end of the third extension approached, appellant requested a fourth one-year extension. The State Office refused to grant this further extension and appellant appealed to this Board. By decision dated July 14, 1972, this Board affirmed the actions of the State Office in denying the extension. American Pozzolan Corp., 6 IBLA 344 (1972).

In that decision this Board declared:

Regarding appellant's request for a refund, we cannot now ascertain whether the purchaser may be liable for restoration costs or to what extent the Government will be able to meet its obligation to appellant to mitigate damages by reselling the material. These determinations will have to be made after expiration of the period for removal, August 14, 1972, at the local level.

Id. at 345.

It should be noted that as of the time of that decision appellant had paid the full purchase price of \$ 24,000, but had removed only slightly more than one-half of the cinders.

Subsequent to that decision, appellant, by letter dated September 18, 1972, made demand to the BLM State Office for \$ 17,518.51. This figure was arrived at by multiplying the unit cost of \$ .12 a ton with the amount of cinders not removed, 79,629.55 tons. In addition, appellant sought compensation at the rate of \$ .10 a ton for its costs in opening the mining operations, building roads, fences and cattle guards, and requested further compensation of \$ 250 for attorney's fees. By decision, dated March 29, 1973, the State Office rejected appellant's request in toto. This appeal followed.

The State Director cited 43 CFR 610.4(c) as authority for his refusal to refund any money. That section declares, in relevant part, that:

\* \* \* The purchaser shall not be entitled to a refund on a fixed unit sale even though the amount of material removed or designated for removal may be less than the estimated total volume shown in the contract.

We believe that this regulation does not encompass the conclusion that appellant is not entitled to any refund for the mineral materials remaining on the land, which were the subject of the sale, for two separate reasons. First, the quoted sentence of the regulations applies only to fixed unit sales. It is to be noted that a definition of this phrase does not appear in either the statute, the Materials Act of July 31, 1947, 61 Stat. 681, as amended, 30 U.S.C. § 601 et seq., or in the regulations enacted pursuant thereto. We believe, however, that the concept is closely analogous to that of a "cruise" or lump sum timber sale which is conducted under the same Act. The relevant regulation regarding timber sales is found at 43 CFR 5461.3 and provides:

\* \* \* For a cruise sale the purchaser shall not be entitled to a refund even though the amount of timber cut, removed, or designated for cutting may be less than the estimated total volume shown in the contract.

This Board has dealt with lump sum timber contracts on a number of occasions. See e.g., John D. Huffman, 7 IBLA 190, 79 I.D. 567 (1972); Irving Pearce, 5 IBLA 373 (1972). In a lump sum timber contract the authorized officer, on the basis of a particular area or of specified trees, estimates the total board feet that might be realized from a cutting thereof. This estimate, normally in terms of thousands of board feet (Mbf), is used as the basis upon which the Bureau of Land Management determines its estimated value. BLM does not, however, warrant that its estimate is accurate as to the total Mbf that will be recovered from a cutting of the designated timber. John D. Huffman, supra; Irving Pearce, supra; Forest Management, Inc., A-31045 (February 6, 1970). The lump sum timber contract is the normal method utilized by the Bureau in the disposition of timber resources. See 43 CFR 5422.1.

The lump sum "cruise" sale should be contrasted with the "scale" timber sale in which the Bureau, for a number of reasons, scales the individual logs and grants a refund where overpayment has been made by the purchaser. See 43 CFR 5461.3 and BLM Manual 5461.12.

Turning now to mineral materials, disposable under the Materials Act, supra, we note that the regulations differentiate between fixed unit sales and sales for the duration of production or sales of all the mineral materials in a specified area. In the latter case,

43 CFR 3610.4(a), as in a timber "scale" sale, the purchaser is granted a refund of any overpayment made. But 43 CFR 3610.4(c) provides, as we have noted above, that no refund will be granted for shortages in the case of a fixed unit sale.

It is clear that the contract in the instant case was not a sale for the duration of production or a sale of all the mineral materials within a specified area. It does not necessarily follow, however, that the sale was a fixed unit sale within the contemplation of the regulations. We have previously indicated that the benchmark of a lump sum timber contract is the fact that there is no warranty of quantity expressed or implied. In the materials sale contract before us, we find that various provisions conclusively indicate that it was in the contemplation of the parties signatory thereto that a warranty of quantity and quality was intended. Thus, section 4(a) of the contract provided:

In the event that the designated material ceases to be present in paying quantities prior to the extraction of 200,000 tons, the purchaser may request termination and will be requested to pay for only the amount of volcanic cinders extracted and hauled.

Section 4(h) provided:

This contract shall terminate automatically when 200,000 tons of volcanic cinders has been extracted and removed from the contract area if prior to the contract period of Sec. 6.

Finally, section 4(j) provided:

In the event 200,000 tons of volcanic cinders are not available within the designated area, an adjustment in the boundaries will be made so that the contracted amount will be available.

It is clear that the parties to the contract contracted and agreed to the sale of 200,000 tons of volcanic cinders. It is our belief that the added provisions which permitted appellant to take less than the amount agreed upon prevent this agreement from being construed as a "fixed unit sale" within the context of the regulation. Thus, that part of 43 CFR 3610.4(c) which provides that no refund would be granted a purchaser when the amount designated for removal may be less than the estimated total volume is of no applicability. The regulations, therefore, do not prohibit a refund in the case before us.

Furthermore, even were we to assume that the contract herein was a fixed unit sale within the ambit of the regulations, 43 CFR 3610.4(c) does not preclude a pro-rata recovery for that amount of the cinders which were not removed. The State Office interpreted the regulation as meaning that no refund was permissible for mineral materials covered by the sales contract which were present on the premises but which were not removed. There is a sheen of legitimacy to such an interpretation. Deeper analysis, however, clearly indicates that this reading of the regulation is erroneous.

The regulations dealing with lump sum timber contracts also state that no refund will be allowed "even though the amount of timber \* \* \* removed \* \* \* may be less than the estimated total volume shown in the contract." 43 CFR 5461.3. Nevertheless, the Department has consistently held that purchasers are entitled to a credit for that timber, which was designated for cutting, and which was not removed. See e.g., John D. Huffman, *supra*; Leslie G. Caughman A-30890 (February 21, 1968); Buell Brothers, A-30679 (March 29, 1967). The non-removal of which the regulation speaks refers to the fact that there may be shortages in the amount removed, vis-a-vis the estimated total volume, after all the designated material has been taken by the purchaser. For such a shortage, no recovery is allowed. See Irving Pearce, *supra*; Landreth Timber Co., Inc., A-28861 (October 19, 1961). The non-removal does not refer to material remaining after operations are terminated.

We are unable to find any case involving a mineral materials sale that is directly on point. Since, however, both timber and mineral materials sales are authorized under the aegis of the same Act, the Materials Act, *supra*, and since the regulation limiting refunds for mineral materials sales, 43 CFR 3610.4(c) is, in the relevant section, a verbatim replication of the regulation limiting refunds for timber sales, 43 CFR 5461.3, we can perceive no reason why a differing interpretation should be fostered in the instant case.

The Field Solicitor, in his brief in support of the State Director's decision, argues that a requirement that the State Office grant a credit for those cinders purchased by appellant, but not removed, given the fact that appellant has already tendered the full purchase price, would necessitate a refund. This, he contends, is beyond the power of both the State Office and the Board. It is true that in most timber cases the issue of what credit should be granted to a purchaser arises in circumstances in which the purchaser has an outstanding debt to the Government on the contract agreement. It would certainly be anomalous, however, to allow a credit in circumstances in which an appellant has not completed

payment on the contract but to deny it when the purchaser has met his contractual obligations regarding payment. We cannot assent to such a proposition.

Regarding the authority of the State Office or this Board to order a refund we note that in Robert B. Ferguson, 9 IBLA 275 (1973), the Wyoming State Office, BLM, after a discovery that a lease had been improperly issued, ordered a refund of five years rental payments, and the Board affirmed its action. Numerous cases involving oil and gas leases improperly issued, or petitions for reinstatement involving oil and gas leases terminated for failure to timely pay the annual rental similarly encompass the return of money to unsuccessful appellants. We find no basis for the position that issuance of a refund, in the factual circumstances of this case, is beyond the power of either the State Office or this Board.

The Field Solicitor also cites section 26 to the effect that appellant could have removed his property, as therein authorized, "but in lieu thereof chose to store his property on the public lands" and that he should be forced "to suffer the consequences of his decision." The difficulty with this argument is that unsevered cinders are not the property of the appellant such as could be removed under section 26.

Turning to the question of what elements are properly considered in determining the amount of a refund we reject all three of the items requested by the appellant. First of all, appellant seeks a credit of \$ .12 a ton, the purchase price, for the 79,629.55 tons which were not removed. The proper test is not what appellant paid for the cinders, but rather the present value of the cinders. If they are worthless or value of the cinders has declined, appellant, not the Government, must bear this loss. Further, the limit of recovery for this item is \$ 9,555.55 since appellant may not receive more than its bid value for the remaining tonnage of cinders. Secondly, appellant seeks to collect \$ .10 a ton for costs involved in the construction of access roads and other improvements. Appellant misconceives the purpose animating the mitigation of his losses. The Government is under no obligation to make the appellant whole. Rather, the rule is designed to see that the Government is not unjustly enriched at the expense of the appellant. No recovery can be had for the expenses which the appellant incurred in removing and preparing to remove the cinders. Finally, we can perceive no basis upon which the attorney fees of the appellant may be compensated.

The State Office is directed to offer the cinders remaining under the contract for sale. From the realized amount the State Office should subtract the necessary advertising and administrative

costs pertinent to the resale. Should it be determined, according to the guidelines above set forth, that there is money owing to the defendant, a refund should issue.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part and remanded for further actions not inconsistent with this opinion.

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Douglas E. Henriques  
Administrative Judge

I concur:

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Martin Ritvo  
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING IN PART AND DISSENTING IN PART:

I concur in the general result reached by the majority that the that the contract does not embody a fixed unit sale. My position is that refund is not barred by 43 CFR 3610.4(c) because contract special clause (a) provides the purchaser may request termination in the event the cinders cease to be present in "paying quantities." Payment is then only required for the amount hauled away. As stated in Benedum-Trees Oil Co. v. Davis, 107 F.2d 981, 985 (1939):

The term "paying quantities" involves not only the amount of production, but also the ability to market the product at a profit.

Here, appellant requested a refund prior to expiration of the extended period prescribed for removal of the cinders. American Pozzolan Corporation, 6 IBLA 344, 345 (1972). In an October 31, 1971, letter to appellant, the acting District Manager stated there was "a lack of substantive market for volcanic cinders," thereby recognizing in effect that the cinders were not present in paying quantities.

As to the amount of the refund due appellant, appellant under special clause (a) was to "pay" for only the amount of cinders hauled away. Amounts paid in excess thereof, less such contract items as cost of restoration, should therefore be refunded. The value of the cinders remaining is not material.

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Joseph W. Goss  
Administrative Judge

