

WEYERHAEUSER CO. (ON RECONSIDERATION)

IBLA 77-574

Decided March 28, 1978

Appeal from decision of the Eugene, Oregon, District Office, Bureau of Land Management, denying request for credit for purchase price of rock under material sales contract OR 090-MP7-54.

Reversed and remanded.

1. Materials Act

The purchaser of rock under a cash sale contract authorized by the Materials Act of July 31, 1947, as amended, 30 U.S.C. § 601 et seq. (1970), is entitled to a refund, based on resale value less administrative costs, for rock covered by the contract which is available but not removed from the site by such purchaser.

APPEARANCES: J. W. Gischel, Jr., Land Use Supervisor, Weyerhaeuser Company, Springfield, Oregon.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This case is before us on reconsideration of our decision in Weyerhaeuser Company, 33 IBLA 254 (1978), pursuant to the Board's order of January 19, 1978.

By letter dated May 17, 1977, Weyerhaeuser Company requested that the Bureau of Land Management (BLM), sell to the company 7,500 cubic yards of pit run rock from land administered by BLM in the NW 1/4 SE 1/4, section 27, T. 22 S., R. 3 W., Willamette meridian, Oregon.

On June 6, 1977, Weyerhaeuser and BLM entered into a cash sale contract authorized by the Materials Act of July 31, 1947, as amended, 30 U.S.C. § 601 et seq. (1970), whereby Weyerhaeuser agreed to purchase 7,500 cubic yards of pit run quarry rock at 25 cents per cubic

yard for a total contract price of \$1,875. The contract was to expire on August 31, 1977.

In a letter received by BLM on August 29, 1977, Weyerhaeuser stated:

Weyerhaeuser Company requests that the purchase of 7,500 cubic yards of pit run rock from your quarry in the NW 1/4 SE 1/4, Section 27, T. 22 S. R. 3 W., be cancelled and that the \$1,875.00 be held as credit against future purchase of rock from the Eugene District. Weyerhaeuser Company did not remove any rock products from this quarry due to the type and quality of the material.

By decision dated September 6, 1977, BLM denied the request of Weyerhaeuser to hold the \$1,875 as a credit against future purchase of rock. BLM stated:

Our response to your request is mandated by regulation as specified in 43 CFR 3610.4(c) (last sentence) which states:

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.

Likewise Section 2 of the contract (BLM Form 3600-4, July 1966) states, in part:

Purchaser shall be liable for the total purchase price shown above, even though the quantity of materials extracted, severed, or removed or designated therefor, is less than the estimated quantity set forth above.

On appeal, Weyerhaeuser reaffirms its request for a credit, stating only that the "rock was not removed during the term of the contract due to a change in construction priorities and in addition was unsuitable for our use during this period."

[1] BLM interpreted 43 CFR 3610.4(c) to preclude any recovery by the purchaser for materials covered by the sales contract which were available but were not removed from the site. In American Pozzolan Corp., 17 IBLA 105 (1974), which involved a materials sales contract for volcanic cinders ^{1/} the Board, after careful

^{1/} In that case, the appellant had paid a total purchase price of \$24,000 for 200,000 tons of cinders but had removed only slightly more than one-half of this amount.

consideration, found such an interpretation of the regulation erroneous. In that case, we analogized the concept "fixed unit sale" to that of a "cruise" or lump sum timber sale, also conducted under the Materials Act, supra, stating as follows at 109:

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 [7 IBLA 190, 79 I.D. 567]; 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 reasoned further:

Since * * * both timber and mineral materials sales are authorized under the aegis of * * * 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.

17 IBLA at 109.

The above rationale is directly applicable to the case before us and impels the conclusion that a refund is not precluded. We believe that the proper criteria for determining the amount of a refund is the present value of the pit run rock, but may not exceed the total purchase price paid by appellant.

We are of the view that the Government has an obligation to mitigate damages caused by appellant's breach. Corbin on Contracts (1964 ed.) discusses the obligation to mitigate damages as follows:

§ 1039. Damages are Not Recoverable for Avoidable
Consequences

Since the purpose of the rule concerning damages is to put the injured party in as good a position as he would have been put by full performance of the contract at the least necessary cost to the defendant, the plaintiff is never given judgment for damages for losses that he could have avoided by reasonable effort without risk of other substantial loss of injury. Likewise, gains that he could have made by reasonable effort and without risk of substantial loss or injury by reason of opportunities that he would not have had but for the other party's breach are deducted from the amount that he could otherwise recover.

It is not infrequently said that it is the "duty" of the injured party to mitigate his damages so far as that can be done by reasonable effort on his part. Since there is no judicial penalty, however, for his failure to make this effort, it is not desirable to say that he is under a "duty". His recovery against the defendant will be exactly the same whether he makes the effort and mitigates his loss, or not; but if he fails to make the reasonable effort, with the result that his injury is greater than it would otherwise have been, he cannot recover judgment for the amount of this avoidable and unnecessary increase. The law does not penalize his inaction; it merely does nothing to compensate him for the loss that he helped to cause by not avoiding it.

* * * * *

If a buyer of good repudiates, the seller can usually make another sale or make other use of his goods. A similar rule therefore measures the seller's damages by the contract price less the market price - the price actually obtained or reasonably obtainable by a new sale. The rule properly applies, however, only when the new sale is to a customer that the seller could not have supplied but for the buyer's repudiation. A manufacturer or jobber who has capacity to supply all orders is not required to give any credit to a defaulting buyer for the profits of any sale that he could and would have made even if the buyer had not repudiated. In such a case the buyer's breach does not enable the seller to make a substituted profit; it merely enables him to save one cost of manufacture or procurement. The damages, therefore, are the contract price less the cost of procurement. [Footnotes omitted.]

In Wolf v. Missouri State Training School for Boys, 517 SW.2d 138, 142-3 (Mo. 1974), the court held:

There is a well established principle of law known as the rule of avoidable consequences which requires one damaged by breach of contract to make reasonable efforts to minimize the resulting damages. 22 Am. Jur. 2d Damages # 22, Annot. 150 A.L. R. 100

See also Apex Mining Co. v. Chicago Copper & Chemical Co., 340 F.2d 985, 987 (8th Cir. 1965); W. H. Edgar & Son v. Grocers Wholesale Co., 298 F. 878, 882 (8th Cir. 1924).

The District Office is directed to offer the rock for sale and to deduct from the amount realized the advertising and administrative costs of the resale. The remainder, if any, should issue to appellant as a refund. American Pozzolan, supra at 110; See Los Angeles Coin-O-Matic Laundries v. Harow, 15 Cal. Rptr. 693, 697-8 (1961).

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 reversed and remanded for further action consistent herewith.

Frederick Fishman
Administrative Judge

I concur.

Martin Ritvo
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

While my interpretation of 43 CFR 3610.4(c) and section 2 of the contract would otherwise indicate that the Bureau of Land Management decision should be affirmed as set forth in 33 IBLA 254 (1978), I feel that appellant should have the benefit of the long-standing departmental policy and precedent. American Pozzolan Corp., 17 IBLA 105 (1974); Leslie G. Caughman, A-30890 (February 21, 1968); Buell Brothers, A-30679 (March 29, 1967), note 1. To avoid future misunderstandings, it would be helpful if the regulations were amended to better express the departmental position.

Joseph W. Goss
Administrative Judge

