

DOCUMENT RESUME

02731 - [A1882931]

[Reconsideration of Reimbursement for Costs Incurred in Connection with Timber Sales Contracts]. B-187952. June 30, 1977. 3 pp.

Decision re: Cal-Pacific Mfg. Co.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Forest Service.
Authority: 36 C.F.R. 221.16(a). B-185199 (1977).

The Forest Service requested reconsideration of a decision that there was no legal basis for reimbursement for costs of third-party scaling incurred in connection with timber sales contracts. Since an agreement for third-party scaling at buyer's cost was still in effect when costs were incurred, and retroactive modification of a timber sales contract is prohibited, reimbursement was not allowed. (HTW)

2931

02731

Cohen
P.L.I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-187952

DATE: June 30, 1977

MATTER OF: Cal-Pacific Manufacturing Company - Reconsideration

DIGEST:

1. Timber sales contracts included agreement to allow third-party scaling services at buyer's cost, terminable by either party upon 30 days' written notice. Upon written termination by buyer and after notice period, legal consideration exists to allow modification of contracts to continue third-party scaling and reduce stumpage rates in recognition of scaling costs; however, while agreement is operative, there is no legal basis to reimburse contractor in form of reduced stumpage rates.
2. Timber sales contractor's forbearance not to terminate agreement terminable by either party upon 30 days' notice would constitute sufficient legal consideration to support contract modification; however, there is no legal basis for reimbursement to contractor prior to date of modification, since prior agreement was effective up to that time and 36 C.F.R. § 221.16(a) prohibits retroactive modification of timber sales contract.

The United States Department of Agriculture Forest Service (Forest Service) requests that we reconsider our decision in Cal-Pacific Manufacturing Company, B-187952, March 11, 1977, 77-1 CPD 186, in which we held that there was no legal basis to reimburse Cal-Pacific Manufacturing Company (Cal-Pacific) for the costs of third-party scaling (the determination of the number of board feet actually cut by the buyer) incurred in connection with two contracts for the sale by the Forest Service to Cal-Pacific of timber in the Klamath National Forest (Forest).

The sales contracts, entered into in May of 1972, provided that scaling was to be done by the Forest Service. On March 11, 1975, the parties executed an agreement providing for third-party scaling to be paid for by Cal-Pacific. The agreement did not provide for a reduced stumpage rate (the rate paid by the buyer under any given contract) to reflect the savings to the Forest Service. On June 24, 1975, the Forest's Timber Management Office orally agreed to modify

B-187952

the two contracts as soon as possible to provide for third-party scaling with a concurrent stumpage rate reduction. This would be accomplished by terminating the March 11 agreement and at the same time issuing the promised modifications. However, one of the contracts was not modified until January 28, 1976, and the other was not modified at all. Cal-Pacific requested reimbursement for third-party scaling costs incurred under the two contracts after June 24, 1975, on the basis that the modifications should have been issued shortly after that date, as promised.

In determining that Cal-Pacific's claims could not properly be paid, we stated as follows:

"* * * by issuing a modification to allow third-party scaling, which was already being performed at the contractor's cost pursuant to the March 11, 1975, agreement, and reducing the stumpage rates, the Government was relinquishing its right to a higher rate without receiving any benefit, i.e., legal consideration, in return.
* * *

"Accordingly, and notwithstanding the Forest Service's oral agreement to modify the two contracts as indicated, the January 28, 1976, modification was improper, as would have been any similar modification issued after March 11, 1975. * * *"

We are now advised that the March 11, 1975, agreement could, by its terms, be terminated by either party if unsatisfactory for any reason, after 30 days' written notice. As stated in our March 11 decision, modification of the contracts as proposed was improper while the March 11, 1975, agreement was in effect, for lack of sufficient consideration. However, once that agreement was terminated, a modification providing for third-party scaling and a concurrent stumpage rate reduction would be legally permissible. See 1 CORBIN ON CONTRACTS, § 186 (1952). We note that Cal-Pacific requested termination of the March 11 agreement by letter dated January 7, 1976. Since termination would not become effective until 30 days after written request, modification of the sales contracts could not be accomplished until approximately February 6. Id. § 164. Accordingly, the March 11, 1975, agreement was operative during the period Cal-Pacific incurred the costs that are the subject of its claim, and there is no legal basis under such circumstances to reimburse the claimant in the form of reduced stumpage rates.

B-187952

Alternatively, if the June 24, 1975, oral agreement to modify the two contracts to reduce the stumpage rates involved Cal-Pacific's promise to forbear the exercise of its right of termination in anticipation of the promised modification, such forbearance would have constituted sufficient legal consideration to support modification. Id. § 175. However, notwithstanding the June 24, 1975, oral agreement and the reason for delay in finally effecting the modifications (Forest officials' belief that the stumpage rate could be reduced retroactively), one contract was in fact not modified until January 28, 1976, and the other was in fact not modified at all. Therefore, until January 28, 1976, in regard to the former, and for the duration of the latter, all parties would have been operating under the March 11, 1975, agreement, which provided that the costs of third-party scaling would be borne by Cal-Pacific. Moreover, 36 C.F.R. § 221.16(a)(1976) prohibits the retroactive modification of a timber sales contract. Gene Peters, B-185199, April 1, 1977, 56 Comp. Gen. _____, 77-1 CPD 225. Accordingly, there is no legal basis under this alternative to reimburse Cal-Pacific for any third-party scaling costs that were incurred prior to January 28, 1976.

The March 11, 1977, decision is hereby amplified in accordance with the above.

R. F. Kitten
Deputy Comptroller General
of the United States