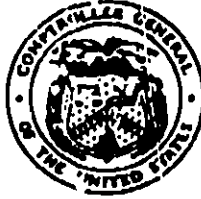


01609

DECISION



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

FILE: B-187952

DATE: March 11, 1977

MATTER OF: Cal-Pacific Manufacturing Company

DIGEST:

Timber sales contracts which include agreements to allow scaling services to be performed by third party at buyer's cost may not be further modified to reduce stumpage rates in recognition of such costs, since no legal consideration for such modification would exist.

In May of 1972, the United States Department of Agriculture Forest Service (Forest Service) entered into two contracts with Cal-Pacific Manufacturing Company (Cal-Pacific) for the sale of timber in the Klamath National Forest (Forest). The transactions were termed the Matthews Creek sale and the Gunbarrel sale. Scaling of the timber (the determination of the number of board feet actually cut by the buyer) under the contracts was to be done by the Forest Service. By letter dated January 21, 1975, Cal-Pacific requested that the Forest Service accept third-party scaling. On March 11, 1975, the two parties executed an agreement providing for scaling by the Northern California and Southern Oregon Log Scaling Bureaus to be paid for by Cal-Pacific. The agreement did not provide for a reduction in 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 the two contracts as soon as possible to provide for third-party scaling with a concurrent stumpage rate reduction. Apparently, this would be accomplished by terminating the March 11 agreement and at the same time issuing the promised modifications. However, modification of the Matthews Creek sale contract was not completed until January 28, 1976, and no modification was made to the Gunbarrel sale contract, since timber cutting in connection with it had been completed in October of 1975.

By letters to the Forest supervisor dated April 7, 1976, Cal-Pacific requested reimbursement for \$2,399.56 in third-party

B-187952

scaling costs incurred under the Gunbarrel sale contract from August 6, 1975, to October 8, 1975, and for \$2,452.20 in such costs incurred under the Matthews Creek sale contract from September 24, 1975, to January 31, 1976. The basis for the requests was that the modifications reducing the stumpage rates should have been issued shortly after June 24, 1975, as promised on that date. The Forest Service has asked us to consider the propriety of payment of the claims.

In B-181477, January 17, 1975, we identified two separate classes of timber sales contracts. One class included those contracts entered into prior to July 1, 1974, which had not been modified to allow third-party scaling. The other class involved those contracts modified to permit third-party scaling but for which stumpage rates had not been reduced to reflect the lessening of the Service's costs and increase in the contractors' costs. In regard to the unmodified contracts, we stated:

"* * * the Government can modify these contracts, with the agreement of the contractors, to provide for bureau scaling. Legal consideration exists in this instance since there is a benefit to the Government in that there is a reduction in its obligation to the contractor because it no longer must provide the scaling and there is a concomitant detriment to the contractor in that it must pay for the scaling. The existence of such consideration would make it legally permissible for the Forest Service to agree with the contractor on a lowered stumpage rate so long as this stumpage rate equals or exceeds the appraised value of the timber. * * *"

Concerning the other class of contracts, however, we stated:

"* * * a downward adjustment of the stumpage rate cannot legally be allowed as there is no benefit flowing to the Government from such an act. Bureau scaling on these contracts is already being practiced. Therefore, downward adjustment of the contract price now merely would mean that the Government would give up a right to a higher price and in exchange receive no further lessening of its obligation to perform."

B-187952

In view of the March 11, 1975, "agreement" between Cal-Pacific and the Forest Service providing for third-party scaling at the contractor's cost, the two sales contracts under consideration clearly fall within the second class of timber sale contracts. Although the Forest Service apparently considers that the subject "agreement" was not a contract "modification" as that term was used in our January 17, 1975, decision, and thus if terminated would have no effect on a "modification" concerning the same matter, we see no such distinction. Rather, 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. In this connection, see for example Federal Procurement Regulations § 1-1.219 (1964 ed. circ. 1), which defines "contract modification" as "* * * any written alteration in * * * [a] contract provision of an existing contract * * * accomplished * * * by mutual action of the parties to the contract. * * *" (Emphasis added.) See also for example Armed Services Procurement Regulation § 1-201.2 (1976 ed.).

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. Thus, there is no legal basis to reimburse Cal-Pacific for the third-party scaling costs that are the subject of its claim.


Acting Comptroller General
of the United States