RICH MACAULEY,	)	**AGBCA No. 2000-155-3**
	)	
Appellant	)	
	)	
Appearing for the Appellant:	)	
	)	
Rich Macauley	)	
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Shingle Springs, California 95682	)	
	)	
Appearing for the Government:	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

March 15, 2001

Before HOURY and POLLACK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK. Separate Concurring Opinion by Administrative Judge HOURY.

This appeal arises out of a dispute between Rich Macauley (Appellant or contractor) of Shingle Springs, California, and the U. S. Department of Agriculture, Forest Service (FS or Government), Eldorado National Forest, Placerville, California, involving the Cole Loop Roadside Hazard Tree Timber Sale, Contract No. 058232. The dispute centers on the application of price escalation provisions to this timber sale contract. As a result of the FS applying price escalation (stumpage rate adjustments) to Appellant's base rate for the timber, the Appellant was required to pay the FS $70,292 in additional stumpage payments, a payment that Appellant had not intended nor contemplated in his bid, and a payment for which Appellant seeks reimbursement.

Appellant argues that its price should not be subject to escalation and contends: (1) bidders were not adequately notified that stumpage rate adjustment provisions were included in the contract; (2) the FS action including the stumpage rate adjustment provisions was inconsistent with both FS policy

and standard practice on the Eldorado National Forest; and (3) the FS, just as Appellant, did not intend nor realize that the stumpage rate adjustment provisions were applicable to this contract and therefore, there was a mutual mistake. The FS contends that the final contract as well as the prospectus and sample contract, available to Appellant, specified that the Cole Loop Sale was subject to stumpage rate adjustment, and thus, the fact that Appellant did not realize that the contract was subject to escalation is no basis for relief. As to mutual mistake, the FS contends that the Contracting Officer (CO) intended and understood during the advertisement and then, at the time of award of the contract, that this was to be an escalated sale. Therefore, according to the FS, the extent to which other FS personnel thought the sale was not escalated, provides no basis for relief sought by Appellant. Finally, as to the charges of failure of the FS to follow its own published policies and procedures, the FS first states that including escalation in this contract was not inconsistent or in conflict with FS policies and procedures; and alternatively, even if FS actions were inconsistent or in conflict with the policies and procedures identified by the Appellant, the Appellant still could not recover since none of the identified policies and procedures have the force and effect of law and as such cannot be enforced against the FS by the Appellant.

Throughout the opinion references are made to the drafts and final versions of the prospectus and contract. The Board points out at this juncture that the draft and final documents were essentially the same, but for a change, which extended the sale bid opening date from October 26, 1998 to November 9, 1998.

The Board has jurisdiction over this appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613. The contractor has elected to proceed under the Accelerated Procedure, 41 U.S.C. § 607(f), 7 C.F.R. § 24.21, Rule 12.3, requiring a decision within 180 days. A hearing was held in this appeal on October 26, 2000, in Sacramento, California. The original due date for a decision was November 22, 2000. That date was thereafter extended first due to procedural matters involving pleadings and thereafter to accommodate briefing.

FINDINGS OF FACT

1. In the summer of 1998, the FS prepared a draft contract package which included a draft sample contract and prospectus for the Cole Loop Timber Sale (Appellant's Exhibit (App. Ex.) A-9, Transcript (Tr.) 186-88). The contract was advertised as an SSTS sale (special salvage timber sale). An SSTS sale is a sale that is offered to firms with under 25 employees and as such is geared to small business (Tr. 103, 163). This was also a road hazard sale. A primary object of a road hazard sale is to get the trees out as soon as possible (Tr. 121), which implicitly does not leave any appreciable time for a logger to try to time the market, if the price of timber changes. The Cole Loop Sale was issued as an escalated sale. That meant that for certain items, the actual price to be paid for the stumpage (stumpage adjustment) was to be increased or decreased from the bid price, subject to application of an index described in the contract. Stumpage rate adjustments of bid prices are not new and have been in effect from at least 1973. The escalation policy in issue here did change in December 1997. The primary aspect of the change was to increase the potential price escalation

adjustment from a 50 percent to a 100 percent increase. The basic operation of the clause, but for the increase in potential escalation, remained essentially the same. (Tr. 97-98.)

2. The contract package in issue in this appeal was prepared by the Ranger District (the customer) for forwarding to the responsible FS contracting officials. David Helton, the Ranger District timber sale manager, was responsible for overseeing the preparation of the documents. As he stated, the "buck" at the District (for this responsibility) stopped at him. He testified that normally the district practice was for him to look at and review the draft package at some point during the process. To the best of his knowledge, that did not happen in this instance. He testified that he was not personally involved in preparing the package nor did he recollect reviewing it before it was sent on to the CO. He could not identify who put the package together, but stated that it would have been prepared by one of a number of individuals who worked for him or were under his supervision. (Tr. 186-87.) As he explained the deviation from normal procedure, "Sometimes in the press of business and meeting deadlines, we expedite things" (Tr. 189).

3. The prospectus sent forward to the CO (Appeal File (AF) 119) and to prospective bidders, called for bids to be advertised on September 17, 1998, and bids to be accepted on October 26, 1998 (AF 116-117). At page three, the third paragraph, the prospectus stated:

> Bid rates for timber, except incense cedar, will be tentative, subject to 100% up and down quarterly adjustment during the contract period.

The prospectus also set out, under PERIOD OF CONTRACT, "The normal operating season shall be considered to be between July 1 and October 31. Contract termination date is 12-31-99. Extensions will not be granted unless it is determined to be in the overriding Government interest." (AF 119.) Although July 1 to October 31 was identified as the normal operating season, generally, work was permitted in the Eldorado National Forest beyond October 31, and depending on weather at the elevation of the project, work could be conducted well into November or possibly December. (Tr. 103-06.)

4. The sample contract contained a number of relevant provisions. Provision A5, at the third page of the contract was titled, "Timber Payment Rates, applicable to B3.1 and B4.0" (the sample contract contained a section designated B clauses and a section designated as C clauses). Directly below the quoted title and indented, was a line which read as follows:

> A5a - For Species and Products to be Paid for at Rates Escalated under B3.2

Below the line set out above was a chart with columns, which identified five different species. It set forth columns identifying the base and advertised rate for each of the species, the bid premium price and Appellant's bid price. The column for the bid price was labeled as "BID (Tentative)." The species listed in this A5a section were those to which the FS applied the escalation factors, which are the subject of this appeal. (AF 134.)

5. Another chart, headed A5b, then followed. It was titled "For Species and Products to be paid for at Flat Rates." Set forth on this chart was incense cedar, as well as softwood cull logs. (AF 134.)

6. Provision A6, was titled "Indices used in Quarterly Adjustment, applicable to B3.2." For each species, it identified the particular industry index which was going to be used to make the quarterly adjustments. (AF 135.)

7. Provision A22 was titled "Inapplicable Standard Provisions." Among the 19 subsections or items of division B which were listed under "Inapplicable," was clause B3.2. That is the escalation clause referenced in the chart at A5a. (AF 140, 147.)

8. Provision A23, "List of Special Provisions," added various provisions. It provided:

> The following listed special provisions are attached to and made a part of this contract as Division C. Unless listed herein or added by modification pursuant to B8.23, B8.3 or B8.31 no provision of Division C shall have force or effect.

(AF 140.)

There were 68 listed provisions under A23. One of the provisions that was added was C3.2, Escalation Procedure (4/98), which read as follows:

> C3.2 - Escalation Procedure. (4/98) Tentative Rates for those species and products listed in A5a are subject to quarterly escalation in accordance with the following procedures: The calendar-quarter index average for each price index described in A6 is the arithmetic average of the three such monthly price indices preceding January 1, April 1, July 1, and October 1. The difference between said calendar-quarter index average and Base Index listed in A5a shall be the basis for quarterly escalation. To arrive at Current Contract Rates for timber scaled during the preceding calendar quarter. Tentative Rates for each species shall be reduced or increased by such difference, except when the calendar-quarter index average is: (a) less than the Base Index, the reduction shall not result in a rate below Base Rate, or (b) greater than the Base Index, the increase shall not exceed the difference between Tentative Rate and Base Rate.
>
> In the event of Contract Term Extension under C8.23, the escalation procedure will be used during the extension period, except that adjusted payment rates for any calendar quarter cannot be less than Tentative Rates, for each species and product group, established under C8.23 for the extension period.

(AF 165.)

9. Under C3.2, logs that were harvested and scaled in August would be subject to the escalation factor calculated on October 1. The escalation factor for October 1 would have been the average for the preceding months of July, August and September. (AF 165; App. Ex. A-3, 4.)

10. The deleted clause B3.2 and the added clause C3.2 were similar in structure and language and each provided for reduction and/or escalation of the amount to be paid for stumpage. However, there was a significant difference. The B3.2 clause, which was an earlier clause, limited any upward adjustment in price to half the difference between the quarter index average and the Base Index. In contrast, the C3.2 clause allowed up to a 100 percent upward adjustment. In operation under the C3.2 clause, if the market cost index of timber declined to a price which was 100 percent below the bid price, a contractor would only have had to pay the base rate for the timber. If the market cost index of the timber, however, increased during the contract by 100 percent, then the contractor, under the C3.2 clause could be held to pay the FS twice as much as it bid. That is essentially what happened here. (AF 32, 50.) Clearly, escalation as a help or hindrance, depended on market conditions during the 3 months which were used to calculate the escalation factor. As the CO pointed out, if the Cole Loop Sale had been awarded 1 year later, with Appellant beginning operations in June 2000 as opposed to June 1999, the escalation would have helped him, because during that time there were declining markets in timber. (Tr. 102.)

11. In approximately August 1998, the Ranger District submitted all of the above discussed draft contract documents to Ms. Patricia Ferrell, the timber sale CO for Eldorado National Forest (Tr. 87-88). Mr. Helton intended the sale to be a flat rate sale. He intended that because he considered the sale to be a short term sale. Although not specifically involved in the preparation of the documents forwarded to Ms. Ferrell, Mr. Helton believed that the Ranger District had prepared and forwarded documents to Ms. Ferrell that called for this sale to be at a flat rate and not an escalated sale. (Tr. 160, 166, 169-72, 174.)

12. After Ms. Ferrell received the sample contract and prospectus, she conducted her own review of the documents. Because the sale's expected duration was greater than 1 year (it was her understanding that FS policy states that sales with a contract length greater than 1 year should contain escalation provisions), she concluded that it was appropriate to issue the sale as escalated. (Tr. 88-89.) When asked if there was another factor other than length used to determine whether to use escalation, she replied "no," noting that escalation, "is determined by the expected length" (Tr. 109). Ms. Ferrell stated that she was aware that the sale was escalated when she issued it to bidders (Tr. 117). Moreover, she further pointed out that given her understanding of FS policy, which was that if a sale was in excess of 1 year, it was to be sold escalated, she would probably not have advertised the sale on a flat rate basis but rather would have asked the district to correct the package and make it escalated (Tr. 143). Appellant, in its brief, challenged her statement and pointed out that on the Tanglefoot Sale (albeit advertised a year later), which essentially mirrored the Cole Sale, Ms. Ferrell used flat rates and not escalated rates (Attachment to Appellant's Brief).

13. Appellant asserted that the use of a flat rate on Tanglefoot established that the practice at Eldorado was not to issue escalated sales on contracts such as Cole. The Appellant continued that

the Board should therefore not accept Ms. Ferrell's statement that she would have independently changed the sale from flat to escalated (even if submitted to her as a flat sale), since her actions on Tanglefoot showed otherwise. (Tr. 114-15, 142-43.) Appellant then set forth a comparison of the Tanglefoot and Cole Sales, which showed them to be virtually identical, except that Tanglefoot was a 1999 and not a 1998 contract. The FS, in its reply brief, took exception to Appellant's contention and comparison and pointed out that there was one glaring difference, that being that the Tanglefoot Sale was awarded in February 2000 and not November 1999, as Appellant represented. Thus, the FS says the contract only had a 10-month period which confirms the FS position that flat rates are only used if less than 1 year. However, the FS identified Appellant as high bidder in November 1999 (similar time frame with Cole). The only reason for the February award appears to be problems establishing the high bidder's responsibility, due to the bidder not having conducted a timber contract for some time. Objectively, the sample contract on Tanglefoot expected a similar time period, 13 months, as the Cole Sale. Thus, on Tanglefoot the FS did treat virtually the same situation differently. (Supplement (Supp.) to record with brief).

14. Mr. Macauley testified that he "apparently read the prospectus," but did not read the sample contract (AF 1; Tr. 52). He explained that he figured that the prospectus was basically it. He noted that he was not an attorney and continued, "As you can see, the sample contract is that thick and there is a C clause and a B clause and this and that, and basically, I'm guilty of working hard and doing it wrong, in part. I guess the contractual part, I should probably pay better attention to. But I figured it's an SSTS sale. It's a quick salvage little thing and it's like I was just doing the last two and a half years." (Tr. 51-52.) The Appellant believed that the language in the prospectus addressing stumpage rate adjustment was confusing and said he did not recognize the significance of the language as to escalation (Tr. 52-54; Complaint at 2). Mr. Macauley also testified that basically, the whole sale was confusing. He acknowledged that he did not seek clarification during the bidding process. (Tr. 53-54.)

15. On or about the time the Cole Loop Sale was being prepared and then advertised, the Appellant was working on another tree hazard sale, the Road Danger Sale, within the Eldorado National Forest. The Appellant had been given a second year extension on that sale by the FS. During that second year, Appellant learned of the proposed Cole Loop Sale. He was under the impression that the Cole Loop Sale would be just like that sale, which was relatively small (comparable in size to Cole Loop) and was being performed on a flat rate basis. (Tr. 49, 50.) During the time he was performing the Road Danger Sale, he had several conversations with FS field personnel, including Mr. John Sweetman, a forester at the Ranger District. During the summer of 1998, Mr. Sweetman told Mr. Macauley that he should consider bidding on the Cole Loop Sale because it was just like the "Road Danger" sale. He did not specifically tell Mr. Macauley that it was a flat rate sale nor was that his intention. (Tr. 50, 214.) In his testimony, Mr. Sweetman stated that if he had known the Cole Loop Sale was to be escalated, it would have raised a red flag in his mind that it was definitely different (Tr. 215). At the time Appellant submitted his bid, the only significant difference that Appellant knew of between his earlier (Road Danger) Sale and the Cole Loop Sale, was a difference in the tree marking process. That difference had been specifically pointed out to him in the field by Mr. Sweetman during a conversation while Mr. Macauley was still performing

the earlier contract. Mr. Macauley took that to indicate that marking would be the only significant difference. (Tr. 55.) Further, the marking had another impact. Although the project was originally advertised on September 17, 1998, with the designated receipt of bids on October 26, 1998 (AF 116), the receipt date for bids was changed by an extension issued on October 21, 1998, which called for bids to be opened on November 9, 1998. The FS issued the extension because some of the sample markings needed to be changed. (AF 231.)

16. Mr. Macauley was not the only bidder who understood this project to be a flat rate rather than escalation sale. Appellant presented testimony of Brian Finigan, another logger who bid on the project. He testified that he did not understand the contract to be escalated but bid on the basis of flat rates. (App. Ex. A-5; Tr. 8-11.) Appellant also presented an affidavit from another bidder, Leo Carter, who also said that he had no knowledge that the sale included escalation provisions (App. Ex. A-6).

17. Bids were finally opened on November 9, 1998 (Tr. 107). The bid form submitted by Appellant under Section 22, Terms of Bidder's Offer, had specific language, where the bidder agreed that by its signature, it represented that it has read and understands each and every provision of the bid form (together with attachments) and the sample sale contract. The section continued that the bidder agreed that it assumed the responsibility to clarify any questions before signing the form and that bidder agreed that the bid form (and any attachments) and the sample sale contract constituted the entire agreement of the parties until a written contract was executed and neither the bid form nor sample contract could be orally modified. (AF 235.) The Appellant stated at the hearing that he in fact never reviewed the sample contract (but had reviewed the prospectus), and therefore was not aware at the time he bid of any escalation provisions contained in the sample contract (AF 235; Tr. 52).

18. Eleven other bidders submitted prices. Prices ranged from a low of $38,001 (Leo Carter) to Appellant's price, at $67,834.51. The next two high bids after Appellant were $59,001.01 and $61,733, the latter being the bid of Mr. Finigan. (AF 239; Tr. 151.)

19. Appellant was designated as the high bidder on November 11, 1998 (AF 240). It bid $63.53 per one hundred cubic feet (CCF) for white fir (the species that constituted the lion's share of the subsequent escalation) (AF 19). The CO awarded the contract to the Appellant on November 19, 1998 (AF 11-12, 235). The CO stated that she could never determine if escalated sales resulted in lower bids and thus saw nothing in Appellant's bid which indicated that Appellant did not understand the escalated nature of the sale (Tr. 101). She also confirmed that she was never contacted by any of the bidders prior to award, asking for clarification of the contract. At the time she made the award, she intended this to be an escalated sale. (Tr. 90.)

20. At no time during the pre-award process nor during the winter and early spring months following award, did the CO hear from any FS official at the district level suggesting there was a possible mistake in drafting this contract as an escalated sale (Tr. 89). Soon after award (November 1998), the CO left on maternity leave and assigned her CO authority to Mr. Tim Dabney. She did

not return until July 1999 (Government Exhibit (Govt. Ex.G- 7; Tr. 90). Ms. Ferrell and Mr. Dabney were the only two people who held the position of CO during the life of this contract (Tr. 113).

21. The contract was executed on December 18, 1998, by the Appellant and executed on behalf of the FS by Mr. Dabney, the successor CO (AF 17). Mr. Dabney said that he made no agreement with Mr. Macauley that this would be a flat sale and he did not believe he made a mistake in executing the escalated sale contract (Tr. 158). The final contract contained the same stumpage rate adjustment provisions which had been set forth in the prospectus and which had been included in the sample contract (AF 19, 20, 25, 50). The Appellant stated at the hearing that he had not reviewed the final contract prior to signing it (Tr. 52).

22. After the bidding process, Appellant went home for the winter and expected to start work some time in the spring (Tr. 59, 61). At some point in the spring, he contacted local mills to arrange for the sale of the timber he was to harvest. He negotiated with one of the two local mills and got the same price he had gotten the year before on the Road Danger Sale. There were only two mills in the area that would purchase logs. (Tr. 60-61.) He executed a fixed-price contract with the mill on May 18, 1999. (App. Ex. A-1, pages 1 and 4 form the contract, as the exhibit numbering is out of sequence).

23. On June 3, 1999, the FS and Mr. Macauley held a pre-operations meeting for the sale. Mr. Macauley met with Mr. Helton and Mr. Sweetman. They asked him, "Do you know it's escalated." He said that he looked at them and said that you better explain it to me. (App. Ex. A-9; Tr. 50.) It was then explained. The next day, Appellant went to Mr. Dabney, the acting CO, to explain his situation and attempt to secure some relief (have the contract administered as a flat rate) (Tr. 50). At the time he was getting calls from his three employees, bugging him about getting to work and so, he started harvesting (Tr. 50).

24. At the pre-operations meeting, both Mr. Sweetman and Mr. Helton expressed surprise over the fact that the sale was advertised as escalated. Their surprise was confirmed by Mr. Dabney, who related a conversation he had with Mr. Helton on or about the time of the pre-operations meeting. In that conversation, Mr. Helton told Mr. Dabney that he (Helton) intended for it to be a flat rate sale and that Mr. Macauley was informed of it (at the pre-operations meeting). Mr. Helton said that Mr. Macauley wanted to know if there was anything that Mr. Dabney could do as CO to modify or otherwise change the contract from escalated to flat rate. At that time, Mr. Dabney told Mr. Helton that he did not think that a mistake had been made, but he would review and make a determination. (Tr. 63, 160, 174.) Mr. Macauley later talked to Mr. Dabney and there was no indication in those conversations (in contrast to Mr. Helton and Mr. Sweetman) that Mr. Dabney was surprised that the sale included escalation provisions (Tr. 66).

25. Mr. Dabney was not willing to modify the contract and felt to do so would not be fair to other bidders. He said that if it was a flat rate, then bidders may have bid differently, describing flat rate and escalated as apples and oranges. (Tr. 152.) His view has to be contrasted with the statement of

Ms. Ferrell, who stated that she would not expect escalation to make a difference in pricing and could not tell from a bid whether it included escalation or not (Tr. 157).

26. According to Mr. Dabney, he gave Mr. Macauley the option of defaulting (Tr. 152-54). Mr. Macauley does not dispute that, although it appears that he was not fully aware of how taking that road would have worked. As stated at one point by Mr. Macauley, "But to me I had no choice. I had to fulfill the contract, and do my job, so that is what I did." (Tr. 62.) At the hearing, the FS spent time pointing out that Mr. Macauley could have taken the default with little financial risk or consequence, implying that Mr. Macauley could have avoided the current problem. However, it appeared clear from the testimony, that the FS never explained the ramifications of default to Mr. Macauley nor indicated that the financial risk would likely have been minimal. (Tr. 152-56.)

27. Appellant harvested the timber on the sale between June 18, 1999 and August 31, 1999 (AF 8). On the final inspection report, Appellant was commended for promptness in completing the sale. (AF 257). During the above time frame, the market for white fir timber (the primary species being harvested) rose dramatically (App. Ex. A 3; Tr. 129). Because of the escalation clause in the contract, the FS demanded and received from Appellant additional stumpage payments of $70,292.00, which was in addition to Appellant's bid price (Tr. 126-30, 192-203). Because the Appellant had negotiated a fixed price with the mill, that price being set in the spring of 1999, Appellant could not increase its price to the mill and thus had to sell the timber to the mill at the agreed price, which had been based on Appellant paying the FS the base bid figure and not a figure that essentially doubled (App. Ex. A-1; Tr. 68-69). As Mr. Macauley explained, with that escalation, he had essentially been out there for nothing (no dollars) (Tr. 62).

28. After Ms. Ferrell returned from leave and resumed her duties as CO, Mr. Macauley met with her and asked if he could get a contract modification or an extension. She reviewed the documents to assure no ambiguity existed and then informed Mr. Macauley that she could not modify the contract and could not extend it unless he met extension requirements. (Tr. 91.)

29. As part of the basis of his claim, Appellant has asserted that the sale violated various FS procedures and policies. At the time Appellant bid, Mr. Macauley was not aware of the alleged FS policy violations that he now places in issue. He learned of the policies and of the alleged failure of the FS to comply, after he had completed the sale, from Mr. Walt Thompson, a former FS employee, whom he consulted at some point after the sale in an attempt to discern what remedy he might have. (Tr. 57-58.) As a threshold matter, there is no question that the FS could have issued this sale as a flat rate sale (under 2 years). The FS acknowledges this in its brief at page 10, in the CO decision letter of February 23, 2000 and in the testimony of Ms. Ferrell (Tr. 98-99). The issue here is not whether using a flat rate sale was permitted but rather whether the FS was legally obligated to issue this solicitation as a flat rate sale.

30. The alleged violations in policy involved a number of policy pronouncements. Appellant alleged that it was improper for the FS to use escalation on an SSTS sale. Appellant asserted that under Washington Office (WO) Amendment 2409-18-92-3, Effective 4/23/92, (A- 7), set aside sales

under the SSTS program were only to be done when the proposed sale met all four of a listed set of criteria. The provision provided:

> 93.2 - Salvage Sale Criteria. Set aside sales under the SSTS program only when the proposed sales meet all of the following criteria:
>
> 1. Salvage sale funds predominately finance sale preparation activities. These sales may include material such as cedar products, even though salvage sale funds did not finance preparation. Where a mix of appropriated and salvage sale funds finance sale preparation, salvage sale funds must comprise more than 50 percent of the estimated preparation cost.
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> 2. The sale period does not exceed 1 year. For a sale sold part way through a logging season, the sale period may extend through the following operating season.
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> 3. The sale involves only minor (less than $10,000 in value) road construction or reconstruction.
>
> 4. The sale does not involve significant catastrophic damage, such as fire or windstorm.

(AF 287).

The Appellant contended that the FS did not meet criteria two.

31. The FS took the position that there is no direct link between an SSTS and the use of escalation or flat rate. (Tr. 112.) Further the FS took the position that this sale met the Salvage Sale criteria two (set out above), as under that criteria, an SSTS sale was proper if it continued through parts of two logging seasons and this sale did that.

32. The Cole Loop Sale, if we use the award date of November 9, 1998, was not awarded during part of two operating seasons (defined in the contract as July 1 to October 31). The Cole Loop Sale as initially advertised would have met the time frame (barely) as the advertisement called for bid opening on October 26 and thus award (theoretically) could have been made prior to October 31, 1998. Moreover, according to Ms. Ferrell the FS initially expected to advertise in August and award by late September or early October 1998 and that would have given Appellant most of October to work. That however, is not consistent with the fact that the Ranger District (which prepared the sale package) did not even provide the CO with the package until some time in August 1998 and that package showed a September 17, 1998 advertisement date and October 26, 1998 opening date. (AF 116-19, 231; Tr. 87-88, 103-06.) As Ms. Ferrell testified, once it became apparent that the project would not run 15 months as anticipated, the FS here chose not to modify or change the sale contract. She continued that the FS had already prepared the sample contract, had issued the bid sets, and advertised the sale. The only change the FS had made was as a result of the district informing them

that they had made some mistakes in sample marking. That was the "only" reason why the contract advertisement was extended and the contract length still exceeded a year in length because of the December 31, 1999 termination date. The December 31, 1999, date was included for the convenience of establishing an escalation figure. (Tr. 115-16.)

33. In January 1998, the FS issued a directive to revise Forest Service Manual (FSM) and the Sale Preparation Handbook (Forest Service Handbook (FSH) 2409.15) . This addressed stumpage rate adjustment policy. Washington Office (WO) Interim Directive 2430-98-1, effective January 30, 1998, to FSM 2431.34. (AF 279.) It states:

> Stumpage rate adjustment: Except for situations that are disadvantageous to the government, the Forest Service timber sale contracts that exceed one year in contract length in the western United States should provide for stumpage rate adjustment.
>
> For example, do not include a stumpage rate adjustment provision for sales that lack a significant amount of sawtimber, when an index is not available for the predominant species in the sale, when there is no reasonably accurate conversion to board feet, or for other similar situations. When providing for stumpage rate adjustment, use contract provision, C/CT3.2 - Escalation Procedure, which provides that 100 percent of the difference between current and base lumber price indices will be added to tentative rates during periods of increasing lumber prices and 100 percent of the difference will be subtracted from tentative rates during periods of declining prices.

Ms. Ferrell relied on the above for the proposition that the FS was obligated to sell this sale on an escalated basis, because the sale in running from November 1998 through December 1999 covered more than 1 year (Tr. 96-98.) While, she was technically correct, she did acknowledge that she did not expect any real work to occur in 1998 (Tr. 115-16). Thus, while the December 31, 1999 date for termination may have helped the Appellant by giving it added time after the operating season, the time from November 1998 through December 1998 was for all intents and purposes, useless to Appellant on this sale. Further, the December 31 date and the time it added until December 31, 1999, was not for purposes of providing more work time, but rather, essentially set forth to conform the end of the contract with the date when quarterly escalation rates are calculated. (Tr. 110-11.)

34. In May 1998, the FS issued Region 5 Supplement No. 2400-98-4 to FSM 2430.3. It states that all timber sale contracts shall include provisions for quarterly stumpage rate adjustments except salvage sales with a contract length under 2 years. The digest for this supplement under FSM 2430.3 states as follows in regard to this matter, " 2430.3 - Allows flat rate pricing on sales sold on a weight basis and salvage sales with a contract length under two years." From this wording in the digest, and particularly the word "allow," the CO concluded that the FS Washington office policy is that flat rates are allowed but not required on these types of contract. (Tr. 98-99.) The specific language (that being digested) however, stated as follows:

2430.3 - Policy.

5. Standard Sale Procedures.

a. Current Contract Rates (B3.1, A5). All timber sale contracts shall include provisions for quarterly stumpage rate adjustment except:

(1) Sales made on contract form FS-2400-3 or FS-2400-4.

(2) Green sales on form FS-2400-6 or FS-2400-6T with contract length of one year or less or salvage sales with a contract length under two years.

(3) Non-sawtimber sales or sales sold using a weight unit of measure.

(4) Species for which flat rate pricing is specifically authorized by the Regional Forester. The species are:

(a) Incense-cedar.

(b) Port Orford-cedar.

© Redwood.

(AF 281.)

35. According to Ms. Ferrell, while the Cole Loop Sale could have been issued as a flat rate sale, it was entirely consistent with FS policy to issue it as escalated, citing the Stumpage Provision addressed earlier. As to how one got around the above Region policy, that clearly calls for salvage sales such as this not to be escalated, she stated that if there is a conflict between national (Washington) policy and regional policy, the national policy would govern. Neither Ms. Ferrell nor counsel for the FS gave any supporting authority for that particular proposition. More important, there is no conflict to be resolved. The Stumpage Provision is worded permissively and with guidance it allows discretion in determining if a sale is escalated or flat, even if the contract exceeds one year. The Region policy, which was listed later, uses mandatory wording for the policy and sets the policy that salvage sales of less than 2 years are to be flat rate. (AF 279; Tr. 99.)

36. The Appellant contended that the escalation was a new policy and as such, the FS was obligated to make it clear to bidders by highlighting the matter. In fact, the escalation policy in issue was not new at the time of this sale. The policy of escalation had been in effect for a number of

years. All that was changed in 1997 (the year of the change) was the amount of escalation that could be calculated. (Tr. 97-98.) This is not a dispute over the amount of escalation that can be taken. This dispute is over whether escalation could operate at all.

37. The FS introduced Govt. Ex. G-1, a listing of type 2400-6 contracts issued by the Forest from 1996 to 1999, to show that it was the practice of this forest to issue sales in excess of 1 year as escalated and sales that were less than 1 year as flat (Tr. 99). Of the eight contracts which were listed as escalated, five were under 14 months in duration (Tr. 100). The list does not include the Tanglefoot Roadside Hazard Sale, which although advertised in 1999 rather than 1998, was almost an advertised mirror image of the Cole Loop Sale in size and timing, except that Tanglefoot was advertised as a flat rate (Tr. 173; Attachment to Appellant's Brief).

DISCUSSION

This appeal presents three legal arguments for relief. The first involves whether the Appellant can establish that he was reasonable in understanding this contract to be a flat rate rather than an escalated sale. This depends on Appellant establishing some ambiguity or confusion caused by the FS sale package and for which Appellant had no obligation to question or inquire at the time of bidding. The second legal argument is whether there was a mutual mistake in the formation of the contract. Put another way, notwithstanding otherwise clear language, did both the FS and Appellant believe and expect that they were entering into a flat rate rather than an escalated sale contract. Third, the final argument is whether the FS failed to follow or violated regulations and procedures as to when to use an escalated sale and, if there was a violation, can the Appellant enforce the policy so as to reform the contract.

Contract Interpretation

Among the most established principles of contract law is the principle that a party who signs a contract is bound to the plain and ordinary meaning of the contract language. When interpreting the language of a contract, a court must give reasonable reading to all parts of the contract. The law is clear that a contract must be read as a harmonious whole and that one cannot ignore or render meaningless provisions in order to reach a meaning. Fortec Constructors v. United States, 760 F. 2d 1288, 1292 (Fed. Cir. 1985). A contractor is expected to understand the contract which it enters into and is bound by the reasonable reading of its terms. The prospectus presented to Mr. Macauley said that bid rates would be tentative and subject to 100 percent escalation up or down. The sample contract included at A5a, a chart that identified the species subject to escalation and a chart in A5b that identified species subject to a flat rate. The bid item was labeled as tentative. Clause C3.2 addressed escalation specifically and set forth how it would be calculated. (Findings of Fact (FF) 3-8.) The terminology in the contract was not particularly subtle. It indicated that the FS intended to escalate some of the prices on this sale and for us to conclude otherwise would render the inclusion of provisions and wording regarding escalation as superfluous. We recognize that Mr. Macauley failed to recognize the significance of the language. However, he did not read the documents with reasonable care. Although he was not a lawyer and there were some portions of

the contract which could be difficult for a layman to understand, the fact remains that escalation was addressed in the sale package, multiple times, and as such cannot be read out of the contract. (FF 3-8, 14.)

Here, even if we concluded that the references to B3.2 and its subsequent deletion were confusing (and while maybe it could have been clearer, we do not find it confusing), the contractor, at a minimum, needed to seek clarification. A reasonable bidder simply could not proceed as if the escalation language was a mistake.

The fact is that Appellant did not closely read the documents. The Bid form, however, clearly set out that he was certifying that he read the contract and documents and the FS had the right to expect that he did what he said. (FF 14, 16.) To allow someone to change the contract terms because of their inadvertence and lack of care, is not an appropriate basis for relief.

As to the Appellant being misled by statements from FS personnel that the Cole Loop contract was the same as the Road Danger Sale, we first find that the relied upon statements (provided in the field by Mr. Sweetman) cannot be considered a positive representation that this sale would be flat and not escalated. (FF 23.) Mr. Sweetman's general statements that the sale was the same as the Road Danger Sale cannot invalidate clear contract language. Further, even if Mr. Sweetman's statements were more specific, they would not have negated the contract language dealing with escalation. First, Mr. Sweetman did not have authority to bind the FS (absent acquiescence or participation by the CO, discussed below), and second, if Appellant took Mr. Sweetman's statement to mean that the contract would be at a flat rate, then when Appellant received the sample contract (which addressed escalation), the Appellant was obligated to inquire about an apparent conflict. (FF 23.)

Mutual Mistake

There is a well established body of law that provides that where a party can establish that there was a mutual mistake in the formation of the contract, that contract can be subject to reformation. Put another way, if a party can show that it and the other contracting party intended to enter into an agreement which was different than what the contract language otherwise states, then the contract (subject to a number of conditions) could be reformed. Generally, a mutual mistake arises in the context of the final written agreement varying from a prior intended antecedent oral agreement of the parties. However, one can have mutual mistake in a case, where arguably a clause is included in the contract that neither party intended to include and where the parties did not hold prior negotiations or discussions. See Fraass Surgical Mfg. Co. v. United States, 215 Ct. Cl. 820, 571 F. 2d 34 (1978). Further, failure of a party to read a contract, will not in and of itself necessarily foreclose reformation, since the gravamen of the reformation inquiry is whether the document reflects the agreement actually reached by the parties. N.W. Ry. Co. v. United States, 68 Ct. Cl. 524, 538 (1929), Louisiana-Pacific Corporation, AGBCA No. 80-186-3, 81-1 BCA ¶ 14,928. That said, the law still requires that the party seeking reformation must show that the Government would have agreed to the contract if worded in accordance with the contractor's intention, McNamara Constr. Ltd. v. United States, 206 Ct. Cl. 1, 9-10 , 509 F. 2d 1166, 1170 (1975), and a contractor, who does

not read a contract furnished to it by the Government, must still show a mistake by the Government and meet the other required elements; Dale Ingram, Inc. v. United States, 201 Ct. Cl. 56, 475 F.2d 1177 (1973).

There are four elements needed to establish mutual mistake. One must establish that both parties to the contract were mistaken in their belief regarding a fact, that this mistaken belief constituted a basic assumption underlying the contract, that this mistake had a material effect on the bargain, and that the contract did not put the risk of the mistake on the party seeking reformation. CCI Contractors, Inc., AGBCA No. 84-314-1, 91-3 BCA ¶ 24,225.

Prior to conducting the hearing in this appeal, it appeared (from the CO's decision) that the FS District, which put the contract together in the field and submitted it to the CO for advertisement and award, did not intend for this to be an escalated sale and was surprised to discover at the pre-operations meeting that the sale was escalated. Thus, it appeared that at least Mr. Helton, the Ranger District timber sale manager, and the Appellant were on the same page as to how they expected the contract to operate. That was in fact confirmed at the hearing. Mr. Helton, who described himself as essentially the final reviewer at the customer level, testified that he was not aware that the contract had been prepared as an escalated sale and had he realized it, he would have sent it forward to the CO as a flat sale, rather than escalated. It was further confirmed at the hearing that the Appellant, regardless of the language in the contract, thought he was bidding on a flat rate sale. (FF 2, 11, 23-24.)

What was not clear going into the hearing was whether Mr. Helton or any Ranger District official had contracting authority. Also, it was not clear if the CO knew of Mr. Helton's intentions (either actually or constructively) at the time of advertisement and award, and finally, whether the CO at the time of advertisement and award intended the sale to be escalated. These questions were crucial to any determination of mutual mistake. An essential requirement in establishing mutual mistake is that both parties have to be mistaken as to the same fact involving a basic assumption of the contract. If only one party had the mistaken impression or understanding, then there can be no mutual mistake. Therefore, in order for Appellant to prevail on the basis of mutual mistake, one of the essential elements that Appellant had to establish was that the CO, in setting out the advertisement and ultimate award, intended and thought that the contract was for a flat sale and not an escalated sale; or that the CO had constructively or actually delegated contractual authority to Mr. Helton, so that Mr. Helton's understanding as to what the contract included (which was that it was flat rate) legally represented the understanding of the FS. In Government contracting, absent Appellant establishing that there was a mutual understanding or meeting of the minds between the authorized contracting officials and the Appellant to the effect that this was a flat sale, Appellant could not prevail on this theory of relief. Thus, the actions and understandings of the CO became a crucial focus of the Board examination, as did the contractual authority, if any, of Mr. Helton.

The testimony was clear at the hearing that Ms. Ferrell, the CO who received the package from Mr. Helton's office, made an independent review of the documents. She at all times (up to and including award) understood the package to call for an escalated sale. She understood that to be the

appropriate type of vehicle for this sale. She was unaware of any mistake on Mr. Helton's part and had no knowledge during the advertisement or award process that Mr. Helton or anyone at the district level thought this should be a flat rate or intended it to be a flat rate rather than escalated sale. Further, she explicitly stated that because of her understanding of FS policy as to sales lasting over 1 year, even had Mr. Helton told her that he wanted the sale to be a flat rate, she would have advertised it as escalated. Even if the Board were to conclude that she would not have necessarily changed this sale to escalated, that does not change the critical fact that during the bidding process and at the time of award, Ms. Ferrell saw this contract and award in a very different light than did the Appellant. She saw this as an escalated sale. Therefore, there was no mutual mistake present here. (FF 9, 12, 24.)

As to whether Ms. Ferrell delegated authority to Mr. Helton so as to have his actions bind the Government, the evidence shows that Ms. Ferrell never delegated authority to Mr. Helton, or Mr. Sweetman, either actually or constructively (FF 20). The FS does its contracting through authorized contracting officers. The law is clear that in terms of binding the Government, that can only be done by an official who is authorized to bind the Government in a matter. Anyone who relies on someone without the requisite authority takes that risk. Federal Crop Insurance v. Merrill, 332 U.S. 380 (1947). Here it must also be pointed out, Appellant did not act in reasonable reliance on Mr. Sweetman or Mr. Helton's representations and beliefs. But for the statement by Mr. Sweetman that the Cole Loop Sale would be like the earlier contract, there was no communication which could even liberally be construed as a representation by the FS that this would be a flat sale. Even where there is authority to vary the terms of a contract, the act of varying the terms has to be knowingly made clear and explicit. Here, those elements are lacking. (FF 15.)

Finally, it is recognized that Mr. Dabney, and not Ms. Ferrell, signed the contract. Mr. Dabney stated that at the time he signed the contract he did not consider escalation to be a mistake or error. Thus, even if the date of signing the contract were crucial, the facts show that at that time, Mr. Dabney intended and understood this to be an escalated sale and had no knowledge that Appellant thought otherwise. (FF 21, 25.)

Compliance with Policy and Regulations

Appellant has identified several FS policies and procedures which he claims were violated by the FS in classifying this solicitation as an escalated sale. The FS counters, asserting that it followed proper procedures. Alternatively the FS contends that even if it did violate policies, the policies it violated are not regulations which have the force and affect of law and therefore cannot be enforced by the Appellant against the FS, so as to invalidate or reform the contract. Appellant also asserts that the FS somehow violated policy by not sufficiently identifying use of the C3.2 clause (which Appellant claimed was a change in procedure, and thus required special notice). On this basis, Appellant contends that it should at best be held to the 50 percent increase rather than the 100 percent increase. The Board finds no merit in that argument. The C3.2 clause was clearly identified in this contract and had Appellant properly read the documents, it would have realized that.

The Salvage Sale Criteria set forth in WO Amendment 2409.18-92-3, effective April 1992, says, "Set aside sales under the SSTS program only when the proposed sale meets all of the following criteria." Item 2 of the criteria states, "The sale period does not exceed 1 year. For a sale sold part way through a logging season, the sale period may extend through the following operating season." Technically the sale as initially advertised met the above standard in that technically it could have been sold part way through a logging season. As advertised, bids were to be opened on October 26, 1998 and the operating season for 1998 did not end until October 31, 1998. The FS thus had 5 days to award, so as to meet the above criteria. In fact, however, the solicitation was changed on October 21, 1998, which postponed the bid opening to November 9, 1998, which was after the close of the 1998 operating season. (FF 15, 17.) From a purely technical standpoint, the FS may have complied with this policy and procedure, but that depends on whether the controlling dates are the time of the advertisement or at the time of the actual sale (award of contract).

In January 1998, the FS issued interim directive, 2431.34 - Stumpage Rate Adjustment, which provided that except for situations that were disadvantageous to the FS, timber sale contracts in excess of one year in the western United States, "should provide for stumpage rate adjustments." This directive is relevant to the appeal in that the FS uses it as a basis for justifying using escalation on the Cole Loop Sale. Further, the FS also uses this directive to buttress its argument as to the meaning of the next matter discussed, the Region 5 Supplement No. 2400-98-4, which sets out the Region's policy and criteria for using escalation rather than flat rate.

In May 1998, Region 5, the Region involved in this sale, issued Supplement No. 2400-98-4. The Posting Notice contained a Digest which stated, "2430.3- Allows flat rate pricing on sales sold on a weight basis and salvage sales with a contract length under two years." The actual supplement itself, was more specific and direct. It stated in pertinent part as follows:

> 2430.3 - Policy
>
> 5. Standard Sale Procedures
>
> a. Current Contract Rates (B3.1, A5) . All timber sale contracts shall include provisions for quarterly stumpage rate adjustment except;
>
> (1) Sales made on contract form FS-2400-3 or FS-2400-4.
>
> (2) Green sales on form FS-2400-6 or FS-2400-6T with contract length of one year or less or salvage sales with a contract length under two years.
>
> (3) Non-sawtimber sales or sales sold using a weight unit of measure.

> (4) Species for which flat rate pricing is specifically authorized by the Regional Forester. The species are:
>
> (a) Incense cedar.
>
> (b) Port Orford-cedar.
>
> © Redwood.

(AF 281.)

The plain reading of the above provision appears to make inclusion of stumpage rates mandatory (shall) for all sales except for those specifically listed. That means that escalation was not supposed to be included in the excepted sales. The Cole Loop Sale was a salvage sale with a length of under 2 years and as such, was a sale that was not supposed to be escalated, under Region 5 policy. Further, it is noteworthy, that item (4)(a), incense cedar, was a flat rate item on the Cole Loop Sale. The FS arguments to the contrary were strained and unconvincing.

Unfortunately for the Appellant, even if we find that the FS did not follow its own policy as to the salvage sale or other identified provisions, that does not resolve the appeal in favor of the Appellant. As counsel for the FS correctly sets forth, in order for the provisions cited by Appellant to be subject to judicial enforcement against the Government, the pronouncements must first be shown to have the force and effect of law. If the policies and procedures are interpretive or general rules of practice, they will not be enforceable against the Government. That is well established law.

Various boards, courts and more specifically the Court of Appeals for the Federal Circuit have concluded that policies such as those here cannot be enforced against the Government. More specifically, the Court of Appeals for the Federal Circuit stated in Horner v. Jeffrey, 823 F.2d 1521, 1529 (Fed. Cir. 1987), the following:

> Even assuming the FPM Supplement provision could be considered the equivalent of a regulation, at a minimum, the provision would need to satisfy the two requirements set out in Chrysler Corp. v. Brown, 441 U.S. 281, 301-304, 99 S. Ct. 1705, 1717-18, 60 L.Ed.2d 208 (1979) to be given the force and effect of law. Under the Chrysler test, for any agency regulation to have the force and effect of law, it must first prescribe substantive or legislative rules rather than merely interpretive rules, general statements of policies, or rules of agency organization, procedure or practice. Id. At 301, 99 S. Ct. at 1717. Second, its promulgation must be pursuant to a specific statutory grant of authority and "must conform with any procedural requirements imposed by Congress." Id.

Although the quoted provision addressed a personnel manual, the general law as to "policies, practices, interpretive rules and guidance" rather than regulation, applies to the FS Manual and other

similar publications. The FS Manual and the policies in issue here are not substantive or legislative rules. In that regard, the Court of Appeals for the 9th Circuit, in Western Radio Services v. Espey, 79 F.3d 896 (9th Cir. 1996), specifically addressed the status of the FS Manual and Handbook. There the court stated that it will only review an agency's alleged non-compliance with an agency pronouncement, if the pronouncement actually has the force and effect of law. United States v. Fifty-Three (53) Eclectus Parrots, 685 F. 2d 1131 (9th Cir. 1982). The court continued, stating that it would not review allegations of non-compliance with an agency statement that is not binding on the agency. The Western Radio court then stated the following, as to whether the FS Manual and Handbook had the independent force and effect of law:

> the agency pronouncement must (1) prescribe substantive rules--*not* interpretive rules, general statements of policy or rules of agency organization, procedure or practice-and, (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.
>
> *Fifty-three Parrots*, 685 F.2d at 1136 (internal quotations and citations omitted); *see also Chrysler Corp. v. Brown,* 441 U.S. 281, 301, 99 S. Ct. 1705, 1717, 60 L.Ed.2d 208 (1979)(*Chrysler*).
>
> Neither the Manual nor the Handbook satisfies either of the requirements in *Fifty-Three Parrots*. First, the Manual and Handbook are not substantive in nature. In *United States v. Doremus*, 888 F.2d 630, 633 n. 3 (9th cir. 1989), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 751, 752, 112 L.Ed.2d 772 (1991), we explained in dictum that "the Forest Service Manual merely establishes guidelines for the exercise of the Service's authority. *Salso Stone Forest Industries v. United States*, 973 F.2d 1548, 1551 (Fed. Cir. 1992)(Manual does not have force and effect of law); *Lumber, Prod. and Indus. Workers Log Scalers Local 2058 v. United States*, 580 F. Supp. 279, 283 (D. Or. 1984) (Manual is "basically a large compilation of guidelines. . .[and] not a 'substantive' rule" (internal quotations and citations omitted)). The Manual and Handbook are a series of [p]rocedures for the conduct of Forest Service activities. 36 C.F.R. 200.4(b), (c)(1) (1995).

The court continued, stating that the manual and handbook were not promulgated in accordance with the requirements of the Administrative Procedures Act. The court said that the manual and handbook were not items subject to notice and to comment rulemaking, and the manual and handbook are not regulations and do not rise to that status. See cited cases, Parker v. United States, 448 F.2d 793 (10th Cir. 1971) cert. denied, 405 U.S. 989, 92 S. Ct. 1252, 31 L.Ed.2d 455 (1972) and Hi-Ridge Lumber Co. v. United States, 443 F. 2d 452, 455 (9th Cir. 1971). Finally, the Court stated that the manual and handbook were not promulgated pursuant to an independent congressional authority, were not in fact regulations from the Secretary of the Department of Agriculture, but instead were rules promulgated

by the Chief of the Forest Service. The court then concluded that the "Manual and Handbook do not have the independent force and effect of law." The Court of Federal Claims in Hoskins Lumber Co., Inc. v. United States, 24 Cl. Ct. 259 (1991) has also ruled on the manual, saying that courts have held that the Forest Service Manual does not rise to the status of a regulation. Citing Hi-Ridge and Lumber, Prod. and Indus.Workers Log Scalers Local 2058 v. United States, 580 F. Supp. 279, 283 (D. Or. 1984). The court in Hoskins described the FS manual as a "general guide which is intended primarily for use by Forest Service employees."

The decision of the court in Western, and the other cited cases clearly establish the general proposition (subject to some exceptions not present here, such as specific inclusion or incorporation into a contract) that the court will not invalidate an agency action on the basis that the agency has failed to follow an agency procedure or interpretation, unless the procedure or interpretation has the force and effect of law. We are bound to apply that well settled law. Although, it may appear to Appellant that the FS should have some responsibility when it does not follow its own procedures, and policies, the law (in a case like this) requires we find otherwise.

Finally, we must point out that the Appellant could have avoided the problem, had it carefully read the solicitation package and had it inquired as to the inclusion of escalation provisions and references. First and foremost, a contractor must read the contract as well as the prospectus. If a contractor finds matters confusing or thinks the Government does not mean what it says, then the contractor must make its protest or inquiry before bids are opened. Otherwise, the contractor will be held to the language in the contract. Where a contractor discovers after award that there is a difference in what it bid from what the contract requires, it is up to the contractor to determine what remedies or options it may have available. Here the FS advised the Appellant that one option was to default on the contract. It was up to the contractor, not the FS, to determine how that would operate, what risk would be involved and what action to take.

DECISION

The appeal is denied.

_____

HOWARD A. POLLACK
Administrative Judge

Separate Concurring Opinion by Administrative Judge HOURY.

While I concur that the appeal should be denied, my view of the relevant facts and legal issues compels a separate opinion.

FINDINGS OF FACT

1. The appeal arose from Contract No. 058232 between the Forest Service, U. S. Department of Agriculture, and Rich Macauley, of Shingle Springs, California (Appellant). The contract was for the sale of an estimated quantity of 500 thousand board feet (MBF) of timber marked or designated for cutting in the Eldorado National Forest in California. The contract was known as the Cole Loop Roadside Hazard Tree Special Salvage Timber Sale (SSTS). The rates to be paid for the species of timber were tentative rates to be escalated (increased or decreased) in accordance with various industry indices, depending on the species (Contract §§ A5a, A6,[1] and Clause C3.2, Appeal File (AF) 134, 135, 165). The Contracting Officer (CO) intended the sale to be an escalated sale (Transcript (Tr.) 88-89, 117, 143).

2. The sale was a sealed bid sale, set-aside for small business firms with 25 or fewer employees (AF 117). Eleven bids were received, and the sale was awarded to Appellant on the basis of Appellant's high bid of $67,834.51 (AF 239). The sale was awarded November 19, 1998, and included an expiration date of December 31, 1999 (AF 11, 12 ,119). Appellant contracted in May 1999 to sell the SSTS timber to Sierra Pacific Industries for a fixed price (App. Ex. 1; Tr. 139-40). Appellant harvested the timber between June and July 1999 (AF 8). The Government does not dispute that Appellant was required to pay $70,292 above the tentative rates for the timber, because the applicable industry indices increased during the contract period (Government's Brief, Introduction).

3. By letter dated January 5, 2000, Appellant filed two claims in the amounts of $70,292 and $35,146, and a third claim that the sale be extended for 2 years, allowing Appellant "the possibility of recovering my losses" (AF 1-3). The bases for Appellant's claims included allegations that: (1) The Forest Service Handbook, at Section 2430.3, precluded salvage sales under 2 years being subject to price adjustments, (2) Appellant was not given adequate notice of the fact that prices were subject to adjustment, and (3) conversations with Forest Service personnel misled Appellant, and indicated the Forest Service intended the sale to be sold as a "flat sale," not subject to price adjustment. The CO denied the claim, and Appellant filed a timely appeal.

4. Prior to bidding Appellant viewed the sale prospectus, which at page three provided that "Bid rates for timber, except incense-cedar, will be tentative, **subject to 100% up and down quarterly adjustment during the contract period**" (AF 1, 119, bold print in original). The next four paragraphs described the adjustment procedure. The sample contract available for bidders' review, and the bid form, included the provisions relating to escalation set forth above (AF 6, 116, 119, 134, 135, 140, 165). Moreover, the bid form includes the following provision:

> 22. Terms Of Bidder's Offer: By its signature, bidder represents that it has read and understands each and every provision . . . and the sample contract. Bidder agrees that

[1] These sections refer to escalation under Clause B3.2, which had been deleted in the sample contract, with Clause C3.2 having been substituted therefor.

> it assumes the responsibility to clarify questions before signing this form. However, bidder agrees that the written provisions of this bid form . . . and the sample contract constitute the entire agreement of the parties . . . and neither the bid form . . . nor sample contract can be orally modified. Bidder expressly adopts the terms of this bid form and the sample contract as material parts of its offer for the advertised timber.

(AF 235.)

Appellant has not shown that any discussions occurred with any Forest Service employee with authority to change the terms and conditions of the sealed bid sale (Tr. 112-14, 167, 177).

5. The Forest Service Manual (FSM) at 2431.34, Stumpage Rate Adjustment, provides, "Except for situations that are disadvantageous to the Government, Forest Service timber sale contracts that exceed 1 year in contract length . . . should provide for stumpage rate adjustment . . . .When providing for stumpage rate adjustment, use contract provision, C/CT3.2 - Escalation Procedure" (AF 279). The Forest Service Region 5 Supplement to the Forest Service Manual (FSM) provided at 2430.3 that "All timber sale contracts shall include provisions for quarterly stumpage rate adjustment except . . . salvage sales with a contract length of under two years" (AF 281). The Digest for the Regional Supplement provides that "2430.3 - Allows flat rate pricing on . . . salvage sales with a contract length under two years" (AF 280).

DISCUSSION

Appellant's claim basis, that it did not have adequate notice that the prices it would pay for the timber were subject to escalation, is simply not supported by the facts, and does not warrant further discussion (Finding of Fact (FF) 1). Appellant is no more entitled to recoup the increased payments due to the escalation on this basis than the Forest Service would have been entitled to recoup decreased payments.

Appellant alleges that the Forest Service violated its own policy by entering into an escalated salvage sale that was under 2 year's duration. At the outset, the FSM section relied upon by Appellant does not rise to the level of a regulation. Even if the FSM was a regulation, Appellant has the burden of showing that the regulation existed for the benefit of private contractors, and Appellant has made no such showing.[2] Freightliner Corp. v. Louis Caldera, 225 F.3d. 1361 (Fed. Cir. 2000). In any event, the FSM clearly does not preclude escalated sales of less than 2 year's duration (FF 5). Appellant's allegation that the present sale should not have been set aside is also unavailing because the set aside

[2] While the provision does offer contractor protection in the event of decreasing market prices for timber, the escalation provision itself appears to be neutral in that it takes both upward and downward market speculations out of the bidding on timber sales. While the benefit appears to be greater for sales of longer duration, even short sales can benefit, although the expenses of administration would tend to neutralize the benefit in a shorter term sale.

has nothing to do with Appellant's claim, and conflicts with Appellant's allegation that the sale should not have been escalated.[3]

Appellant alleges that discussions with Forest Service employees misled Appellant into believing that the sale was not escalated. However, Appellant, in its bid form, acknowledged that the bid form and sample contract represented the complete agreement of the parties and that this agreement could not be changed orally (FF 4). In any event, Appellant has not shown that it had discussions with anyone in authority to modify the terms and conditions of the sale. (FF 4).

Finally, regarding the question of mutual mistake, such a claim was never presented to or decided by the CO. Whether the elements of mutual mistake fall within the parameters of the claims that were presented to the CO (FF 3) has not been demonstrated, and consequently the Board's jurisdiction to decide such a claim, particularly since the parties have not directly addressed the issue of jurisdiction, remains a viable issue. I present my views on mutual mistake in this context.

Appellant signed and transmitted the bid form and contract including §§ A5a, 6a, and clause C3.2, Escalation Procedure, setting forth the escalation provisions of the contract. This was Appellant's manifest objective intent, and constituted Appellant's offer. When the Government accepted Appellant's offer, the Government's manifest objective intent was to enter into a contract that included escalated rates. Thus, there was a meeting of the minds, the only meeting of the minds that occurred, and a contract came into being. Under the circumstances of this case, and in the context of a sealed bid sale, what might have been the separate and disparate subjective intentions of the parties is not relevant.

There clearly was no mutual mistake as to a basic assumption of the contract, or in the integration of the contract. What we do have is unilateral carelessness or error of business judgment discovered after award by Appellant, of which the Government had no knowledge.

_____

EDWARD HOURY
Administrative Judge

Issued at Washington, D.C.
March 15, 2001.

[3] If the sale were not an SSTS, it would fall squarely within FSM 2431.34, requiring escalation in sales in excess of 1 year's duration. The term of the present sale was 13 months and 11 days (FF 2).