



Memorandum

Ms. Nancy Mackarness

Date : February 21, 1991

From : Ken McManigal

Subject: Logging Agreement - City of Portola and Holt/Holt Logging
Log Purchase/Sales Agreement - City of Portola and P&M Cedar
Products, Inc.
Firewood Agreement - City of Portola and Owens

This is in response to your January 15, 1991, memorandum wherein you forwarded copies of several documents pertaining to the City of Portola, Tim Holt dba as Holt Logging, and P&M Cedar Products, Inc. and to the City and Bill Owens, and you asked which are the timber owners for timber yield tax purposes.

The City - Holt Logging Agreement provided, in part:

"The City of Portola, hereinafter called 'City', and Tim Holt, dba Holt Logging, hereinafter called 'Contractor'... hereby agree that,

WHEREAS, 'City' owns certain timberlands in fee and has the right to cut and remove timber from lands described hereinafter; and,

WHEREAS, Contractor desires to purchase and/or cut and remove said timber, or cause the same to be removed;

NOW THEREFORE,... it is mutually agreed as follows:

1. Contractor acknowledges that it has received and read the approved timber harvest plans covering the areas the City wishes to cut and remove timber.... This agreement is not a transfer of the rights of City under and pursuant to the said documents, but is solely and only an agreement for the performing by Contractor, i.e. the purchase of the timber for of the logging and related operations on the properties owned by City.

2. Both parties hereto agree that the scope of work to be performed by Contractor is as follows:

a. Within such periods as may be designated by City, Contractor shall fall, limb, buck, lop, skid, yard, load, dispose of slash, do erosion control work, and perform all other related activities required in the documents described in paragraph 1 hereof... Operation shall be limited to Cedar trees, ten inches (10") or larger in diameter, marked for harvest.

* * *

e. Contractor shall be responsible for 'clean-up' after completion of the logging operation. In order to assure that clean up work is performed the parties agree that P and M Cedar Products, Inc. shall pay the City and additional \$10.00 per MBF, for a total of \$105.00 per MBF. Upon completion of the clean up and written approval by C.D.F. indicating that logging and clean up have been performed satisfactorily, (except burning) the City shall immediately pay the funds withheld, i.e. \$10.00 per MBF.

f. Contractor shall deliver the logs to P and M Cedar Products, Inc., Westwood, CA 96137.

* * *

h. All cull logs 10 feet or more in length shall be skidded and decked and shall remain the property of the City, unless otherwise agreed upon in writing....

3. All of the above work shall be performed by Contractor in a thoroughly workmanlike manner and in accordance with all of the provisions of the following described documents:

a. Timber Harvest Plan No. 2-9-269 PLU (2), dated July 24, 1990, named City of Portola Willow Creek.

4. City and Contractor agree that it is impossible to designate accurately the total volume of logs to be delivered to City, i.e. volume is estimated.

5. The sales and purchase price, the reasonable value of the cedar logs has been determined to be Two Hundred Dollars per 1,000 board feet (\$200.00 MBF).

The parties agree that P and M Cedar Products, Inc., may pay the Contractor \$95.00 per MBF and the City \$105.00 MBF (except for 'Air space'). The amount of \$105.00

includes the amount of \$10.00 per MBF, a hold back fee for clean up in lieu of a bond.

6. This agreement shall consist of the timber harvest plans, contracts, timber sale agreements, and other documents listed in paragraph 3 hereinabove, along with all plans, drawings, and specifications that are made a part of such contracts and agreements; Schedules A and B; the General Conditions attached hereto, and all of the same, by this reference, are made a part of this agreement.

7. a. Time is of the essence of this agreement, and all work to be done hereunder shall be completed according to schedules designated from time to time by City....

b. This agreement shall expire on December 31, 1990,...

Dated: October 30, 1990

CITY OF PORTOLA

Dated: November 2, 1990

CONTRACTOR"

The City - P&M Cedar Products, Inc. Log Purchase/Sales Agreement provided, in part:

<p>"SELLER"</p> <p><u>City of Portola</u> Name</p> <p><u>P.O. Box 1225</u> Mailing Address</p> <p><u>Portola, CA 96122</u> City, State, Zip</p> <p><u>(916) 832-4216</u> Phone Number</p>	<p>'BUYER'</p> <p>Termination Date <u>12/31/90</u></p> <p><u>P&M Cedar Products, Inc.</u> Name</p> <p><u>P.O. Box V</u> Mailing Address</p> <p><u>Westwood, CA 96137</u> City, State, Zip</p> <p><u>(916) 256-3101</u> Phone Number</p>
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1. QUANTITY AND PRICE: Seller agrees to sell and buyer agrees to buy logs of the following quantities, species, grades and prices:

<u>Specie</u>	xxx	<u>Price/MBF Net</u>	xxx
Incense Cedar	---	\$200/MBF Gross	---

* * *

4. DELIVERY: Delivery shall begin 10-17-90 and continue through 12-31-90. Buyer/~~SELLER~~ will take delivery at Westwood between the hours of 7 a.m. and 5 p.m., Monday ~~through~~ Friday.

5. SCALING: Scaling will be performed at Westwood and paid for by Buyer ...
 Seller shall be furnished with scale tickets, daily and monthly scaling bureau printouts.

* * *

9. TITLE: SELLER does hereby guarantee and warrant that he has lawful possession to all timber and logs included in this agreement prior to the execution and shall hold BUYER free and harmless from any and all persons that may claim title to said timber or logs.

9a. It is agreed that P&M Cedar Products, Inc. is not responsible for payment of timber taxes due under provisions of California and/or Oregon tax laws.

9b. Risk of loss of logs due to fire, accident or any other cause remains with the seller until such time as the logs have been scaled and delivered to buyer.

* * *

In witness whereof, the Parties hereto have affixed their signatures this 15 day of October, 1990

P&M CEDAR PRODUCTS, INC."

Revenue and Taxation Code Section 38115 states that timber yield tax is imposed on every timber owner who harvests his timber or causes it to be harvested. Section 38104 defines "timber owner", in part, to mean any person who owns timber immediately prior to felling or the first person who acquires either the legal title or beneficial title to timber after it has been felled from land owned by a federal agency or any other person or agency or entity exempt from property taxation under the Constitution or laws of the United States or under the

Constitution or laws of the State of California. "Timber owner" includes any person who owns or acquires legal title or beneficial title to downed timber in this state.

As you know, the City is a legal entity whose property is exempt from property taxation under Article XIII, Section 3(b) of the California Constitution, except as otherwise provided in Article XIII, Section 11. Thus either Holt/Holt Logging or P&M Cedar was the first person to acquire the legal title or beneficial title to the timber after it had been felled.

Important in this regard is the sequence of events. On October 15, 1990, the City entered into the Log Purchase/Sales Agreement with P&M Cedar pursuant to which the City agreed to sell and P&M Cedar agreed to buy delivered cedar logs at its Westwood place of business at \$200 per thousand board feet (Paragraphs 1 and 4) and the City guaranteed and warranted lawful possession to all timber/logs subject to the Agreement (Paragraph 9). Thereafter, on November 2, 1990, Holt/Holt Logging entered into the Logging Agreement with the City to harvest and deliver the logs:

Holt/Holt Logging desired to purchase and/or cut and remove timber (Second Whereas Clause), the Agreement was not a transfer of City's rights but only an agreement for the performing by Holt/Holt Logging, i.e., the purchase of the timber for the logging and related operations on the properties owned by City (Paragraph 1), scope of the work was felling, limbing, bucking, etc., Cedar trees marked for harvest and delivering logs to P&M Cedar (Paragraph 2a and f), the sale and purchase price for the logs had already been agreed upon by the City and P&M Cedar at \$200 MBF and City and Holt/Holt Logging agreed to divide that price (Paragraph 5), and payment was to be made by P&M Cedar to City and Holt/Holt Logging (Paragraph 2e).

Thus, pursuant to these agreements, the City sold cedar logs to P&M Cedar and then employed Holt/Holt Logging to fell, limb, buck, etc., and deliver the timber to P&M Cedar. Accordingly, title to the logs passed from the City to P&M Cedar pursuant to California Commercial Code Section 2401(2) upon delivery of the logs to P&M Cedar at its Westwood place of business:

"9. TITLE: SELLER does hereby guarantee and warrant that he has lawful possession to all timber and logs included in the agreement prior to the execution and shall hold BUYER free and harmless from any and all persons that may claim title to said timber or logs.
"(City - P&M Cedar Agreement)

"2401.

* * *

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading.

(a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
(b) If the contract requires delivery at destination, title passes on tender there.

* * *

While the use of the "purchase" language in the City-Holt Logging Agreement (Whereas Clause, Holt desires to purchase and/or cut and remove said timber, and Paragraph 1, i.e., the purchase of the timber for the logging and related operations on the City's properties) confuses things, when considered with the City - P&M Cedar Log Purchase/Sales Agreement and in the context of the Logging Agreement, such language is merely an attempt to state that Holt/Holt Logging was acquiring the right to harvest the timber, not purchasing the timber. Thus, that Holt/Holt Logging desired to purchase and/or cut and remove said timber was set forth in the alternative, and the City - P&M Cedar Log Purchase/Sales Agreement and the City-Holt Logging Agreement establish that the City sold logs to P&M Cedar and Holt/Holt Logging only contracted to fall and deliver the timber/logs for the City to P&M Cedar at its Westwood place of business. Holt/Holt Logging could not purchase from the City logs previously sold to P&M Cedar, and Holt/Holt Logging had no contract with P&M Cedar pertaining to any purchase of the logs. Similarly, the language concerning "the purchase of the timber for the logging and related operations on the properties owned by City" is exemplary and follows the statement that the "agreement is not a transfer of the rights of City under and pursuant to the said documents, but is solely and only an agreement for the performing by Contractor (Holt/Holt Logging).

Accordingly, by virtue of the City - P&M Cedar Log Purchase/Sales Agreement and Commercial Code Section 2401(2), P&M Cedar was the first person to acquire legal title and beneficial title to the City's timber after it had been felled by Holt/Holt Logging, and P&M Cedar was the person liable for applicable timber yield taxes. While Paragraph 9a. of the City - P&M Cedar Log Purchase/Sales Agreement states that City and P&M Cedar agree that P&M Cedar is not responsible for payment of timber taxes due under provisions of California laws, such is a matter of contract between the City and P&M Cedar, and such cannot supercede the provisions of Section 38104 and is not binding on the Board. Thus, when applicable timber yield taxes are asserted against P&M Cedar, it will either notify the City, obtain the amount of the taxes from the City, and pay the amount to the Board, or it will pay the amount to the Board and then seek reimbursement of that amount from the City pursuant to Paragraph 9a. Such is between the City and P&M Cedar. Billing must be made to P&M Cedar and payment must be made by P&M Cedar to avoid the possibility of a later claim for refund and the reopening of the matter.

As to the City - Bill Owens Firewood Agreement, the City noticed the Willowcreek Firewood Sale for an estimated 500 cords of marked timber on August 22, 1990. Of those submitting bids, Owens was the successful bidder with a bid of \$15.25 per cord and assumption of all taxes. The City - Owens Firewood Agreement provided, in part:

"The City of Portola, hereinafter called 'City', and Bill Owens, hereinafter called 'Contractor'... hereby agree that,

WHEREAS, 'City' owns certain timberlands in fee and has the right to cut and remove firewood from lands described hereinafter; and,

WHEREAS, Contractor desires to purchase and/or cut and remove said firewood, or cause the same to be removed;

NOW THEREFORE,... it is mutually agreed as follows:

1. Contractor acknowledges that he/she has received and read the approved timber harvest plans covering the areas the City wishes to cut and remove timber or firewood.... This agreement is not a transfer of the rights of City under and pursuant to the said documents, but is solely and only an agreement for the performance by

Contractor, i.e. the purchase of the firewood for the firewood removal and related operations on the properties owned by City.

2. Both parties hereto agree that the scope of work to be performed by Contractor is as follows:

a. Within such periods as may be designated by City, Contractor shall fall, limb, buck, lop, skid, yard, load, dispose of slash, do erosion control work, and perform all other related activities required in the documents described in paragraph 1 hereof...

* * *

d. Contractor shall submit a performance bond in the amount of \$1,000.00, and the amount of \$750.00 in the form of a bid guarantee.

* * *

3. All of the above work shall be performed by Contractor in a thoroughly workmanlike manner and in accordance with all of the provisions of the following described documents:

a. Timber Harvest Plan No. 2-9-269 PLU (2), dated July 24, 1990, named City of Portola Willow Creek.

4. City and Contractor agree that it is impossible to designate accurately the total cords to be cut, i.e. volume is estimated.

5. A deposit equal to one-half (1/2) of the total bid value, less the \$750.00 bid guarantee, shall be made prior to start of operations.... Final payment or refund shall be based on total volume.... Bid Value: All species \$15.25 per cord.

6. This agreement shall consist of the timber harvest plans, contracts, timber sale agreements, and other documents listed in paragraph 3 hereinabove, along with all plans, drawings, and specifications that are made a part of such contracts and agreements; Schedules A and B; the General Conditions attached hereto, and all of the same, by this reference, are made a part of this agreement.

7. a. Time is of the essence of this agreement, and all work to be done hereunder shall be completed according to schedules designated from time to time by City....

b. This agreement shall expire on May 31, 1991....

Dated: September 11, 1990

CITY OF PORTOLA

Dated: September 11, 1990

CONTRACTOR"

General conditions included with the Firewood Agreement provided specific functions to be performed and duties to be undertaken by Owens, Condition 9 provided that title to all firewood shall remain with the City, and Condition 10 provided that Owens was an independent contractor solely responsible for compliance with federal and state employment laws.

As the Notice to Bidders and Bid of Owens contemplated a sale and purchase of timber to be cut for firewood at an agreed-upon price per cord, it would seem that the City sold the firewood to Owens, Owens became the first person to acquire the legal title and beneficial title to the firewood after it had been felled/cut, and Owens was the person liable for applicable timber yield taxes. Again, however, the Logging Agreement had the following language identical to that in the City - Holt Logging Agreement:

Contractor desires to purchase and/or cut and remove said firewood (Second Whereas Clause), and the Agreement is not a transfer of the rights of City but is only an agreement for the performance by Contractor, i.e., the purchase of the firewood for the firewood removal and related operations on the properties owned by City (Paragraph 1).

Thus, there is, apparently, a conflict between the Notice to Bidders and Bid contemplating a sale and purchase of timber/firewood and the Firewood Agreement, which seems to contemplate Owens merely harvesting the timber/firewood as Holt/Holt Logging harvested cedar timber.

Upon consideration, it is our opinion that the Notice to Bidders, Bid, and portions of the Firewood Agreement support the conclusion that there was a sale of the

timber/firewood by the City and a purchase of the timber/firewood by Owens:

1. Notice to Bidders was in the form of a sale for an estimated 500 cords of timber marked or designated for cutting.

2. Owen's Bid to purchase the timber was in the amount of \$15.25 per cord.

3. The general rules of contract law apply to the competitive bidding process. (Pacific Architects Collaborative v. State of California (1979) 100 Cal. App. 3d 110, 123.) Bids are irrevocable offers or options given to the public agency involved. (M. F. Kemper Const. Co. v. City of Los Angeles, (1951) 37 Cal.2d 696, 700, 704.) A contract is complete and binding when a valid bid is accepted. (City of Susanville v. Lee C. Hess Co. (1955) 45 Cal.2d 684.)

4. There was no other party to the City-Owens sale and purchase and harvesting of the timber/firewood, as there was in the City-P&M Cedar sale and purchase of the timber and the City-Holt Logging Agreement for the harvesting of the timber.

5. The City-Owens Firewood Agreement provided, consistent with the Notice of Bidders and Bid, that Owens would pay \$15.25 per cord to the City. Had Owens merely contracted to harvest the timber/firewood as Holt/Holt Logging had harvested timber, Owens would have received payments from the City or a third party for doing so rather than been required to make payments to the City of \$15.25 per cord.

6. The Second Whereas Clause (Owens desires to purchase and/or cut and remove firewood), the Firewood Agreement, Paragraph 1 (Agreement is not a transfer of City's rights but only an agreement for the performance by Owens, i.e., the purchase of the firewood for the firewood removal and related operations on the properties owned by City), and Condition 9 (Title to all firewood shall remain with City) can be reconciled with the Notice of Bidding, Bid, sale and purchase and harvesting of the timber/firewood as limitations on outright purchase by Owens until the timber/firewood operations had been concluded as specified.

7. When the timber/firewood operations were concluded and when Owens had paid the \$15.25 per cord to the City, title to the timber/firewood passed to Owens.

8. Owens, presumably, sold the firewood to others.

Thus, we conclude that Owens was the first person to acquire legal title and beneficial title to the City's timber/firewood after it had been felled/cut, and that Owens was the person liable for applicable timber yield taxes. That this is what the City and Owens understood and intended is also evidenced by the bid submitted by Owens which provided that "All taxes and use fees are the responsibility of the purchaser."


JKM:jd
3683H

cc: Mr. Paul Crebbin
Mr. Earle Gutman