



Comptroller General
of the United States

Washington, D.C. 20548

145622

Decision

Matter of: Sierra Forest Products

File: B-245393

Date: January 2, 1992

Glen H. Duysen for the protester.

Rhea Daniels Moore, Esq., Department of Agriculture, for the agency.

David Hasfurther, Esq., Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Cancellation after bid opening of a sealed bid timber sale because the bid packet sent to prospective bidders did not include Form FS-2400-43, Certification of Nonsubstitution of Domestic Timber, which bidders were required to submit with their bids, was improper since an award to the high bidder, whose bid was responsive and contained an executed certification, would have satisfied the government's needs, and there is no showing of prejudice to other bidders.

DECISION

Sierra Forest Products protests the decision by the Forest Service, Department of Agriculture, to cancel the Pine-Mill insect salvage timber sale, which was conducted by the Hume Lake District, Sequoia National Forest. The Forest Service canceled that solicitation after bid opening because the bid packet sent to prospective bidders did not contain Form FS-2400-43, Certification of Nonsubstitution of Timber Purchased and Disposition of Domestically Processed and Exported Timber, which all bidders were required by the prospectus to complete and include with their bids.

We sustain the protest.

The timber sale was advertised on August 1, 1991. The original prospectus provided for the sale of an estimated 1,000 board-feet of timber. The prospectus noted that log export and substitution restrictions applied and required bidders to evidence agreement to be bound to these

restrictions by submitting with their bids a signed certification on FS-2400-43, which was to be "provided as part of the bid packet." However, because of the Forest Service's error, this form was not included in any bid packages. The omission of the form was first brought to the Forest Service's attention after bids were opened on August 8, when an employee of Sequoia Forest Industries mentioned that the Forest Service had failed to include the required form.

Five bids were received by the August 8 bid opening. Only two bidders, Sierra and Sequoia, had included completed certifications with their bids. Sierra was the apparent high bidder and Sequoia was the apparent second high bidder. The Forest Service determined that the solicitation would be canceled and the sale resolicited because the agency had failed to include Form FS-2400-43 in the bid packets provided to bidders. Because the timber sold was essentially dead and deteriorating rapidly due to a combination of weather conditions and the small diameter of some of the timber, an expeditious sale was considered necessary. By letter dated August 8, and received by the protester on August 12, Sierra was notified that the sale was canceled and would be readvertised. The protester states that it was provided the details concerning the cancellation on August 13.

The sale was readvertised on August 10, and bid opening was set for August 19. Under the resolicitation, only three bids were received, all from bidders that had participated in the original sale. Sequoia submitted the high bid and award was made to it on August 23. Sierra did not bid on the resolicitation. Sierra filed a protest against the cancellation and its failure to receive the award with our Office on August 27.

The agency argues initially that because Sierra was notified on August 12 by certified mail that the sale had been canceled, Sierra's August 27 protest to our Office was not received within the time required under our Bid Protest Regulations. We disagree. Protests, as here, that are not based on alleged improprieties in a solicitation must be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1991). Only when Sierra learned of the specific reason for the cancellation--the failure to include Form FS-2400-43 in the bid packets--did it know the basis of its protest. The record shows that the letter Sierra received from the agency on August 12 simply advised it that its bid bond was being returned, that the solicitation had been canceled, and that the sale would be resolicited. Sierra only learned the reason for the cancellation during conversations with the agency on

August 13, Sierra's protest filed with our Office on August 27 was filed within 10 working days of August 13 and is therefore timely.

The protester argues that the decision to reject all bids and cancel the sale was improper because the high bidder, Sierra, and the second high bidder, Sequoia, submitted qualified and responsive bids. The protester maintains that the other three bids, whether responsive or not, did not have any bearing on the outcome of the sale.

The Forest Service concedes that Sierra's high bid was responsive and states that it was unfortunate that the initial solicitation was canceled. Nonetheless, the Forest Service reports it felt it had to honor the contract awarded to Sequoia because the contract does not contain a termination for convenience clause.

We believe that cancellation of the original timber sale solicitation was improper. While a contracting agency has broad discretion to cancel an advertised solicitation, there must be a compelling reason to do so after bid opening because of the potential adverse impact on the competitive bidding system of cancellation after the exposure of bid prices. See Bordges Timber--Recon., B-239797.3, Feb. 7, 1991, 91-2 CPD ¶ _____. Where an award under a solicitation would meet the government's actual needs and the other bidders would not be prejudiced by that award, cancellation of the solicitation is not proper. ADAK Communications Sys., Inc., B-220613, Feb. 5, 1986, 86-1 CPD ¶ 131; Tapex Am. Corp., B-224206, Jan. 16, 1987, 87-1 CPD ¶ 63. We think cancellation was not justified here.


Bidder completion of the FS-2400-43 is required under timber sales in order for a bid to be considered responsive. Fort Apache Timber, Co., B-237377, Feb. 22, 1990, 90-1 CPD ¶ 199. While we agree that the Forest Service erred by not including the form in the bid packet as provided in the prospectus, the prospectus specifically advised bidders of the requirement for the form. Therefore, bidders were on notice of the requirement and could have obtained a copy of the missing form. See D. M. Baker, B-223091; B-223156, Aug. 11, 1986, 86-2 CPD ¶ 175. Here, both the high and second high bidders submitted bids containing the executed FS-2400-43. Sierra's bid was both high and responsive, and it is undisputed that the award to Sierra would have met the government's needs.¹ Moreover, the record fails to

¹We have previously held that where, as a result of the Forest Service's omission of FS-2400-43 from the sales prospectus, only one of several bidders submitted an executed form, that cancellation of the prospectus was

establish any reasonable possibility of prejudice to the other bidders. The agency advises that it is generally recognized that the prohibition against export and against substitution would cause the prices received by the agency for the sale to be lower than they would have been if no prohibition had been applicable to the sale because the prohibition limits disposition of the timber. Thus, even assuming that the bidders who did not submit the form with their bids did not bid on the basis of the prohibition, bidding now on the basis of the prohibition would cause these bidders to lower their prices, not raise them.

Accordingly, since award under the original solicitation would have met the agency's need and no bidder would have been prejudiced by an award under the initial solicitation to the high, responsive bidder, cancellation was improper. The protest is therefore sustained.

Although we sustain the protest, we do not recommend corrective action since we understand that work has proceeded on this timber sale contract and, as indicated above, the contract does not contain a termination for convenience clause. Consequently, termination of the contract is impractical. See Louisiana-Pacific Corp., B-210904, Oct. 4, 1983, 83-2 CPD ¶ 415. Under the circumstances, we find Sierra entitled to the costs of preparing its bid. 4 C.F.R. § 21.6(d).

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proper. See Bordges Timber--Recon., supra; Intermountain Co., B-182794, July 8, 1975, 75-2 CPD ¶ 19. However, in both those cases, the only responsive bid received was not the high bidder and thus the competition appeared to be materially affected by the solicitation defect. Moreover, in Bordges, two bidders, one of which was high, were misled by erroneous agency advice that the forms were not necessary.