DECISION

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

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FILE: B-213936 **DATE:** March 15, 1984

MATTER OF: Seaboard Lumber Co.

DIGEST:

1. Since defaulted timber sale contractor is not eligible to bid, it is not an interested party for purposes of protesting the procedures followed during an oral auction for resale of the same timber. Exclusion of bidders who have failed to complete timber sale contracts is specifically permitted by Forest Service regulations and has been upheld by the courts and by GAO.

2. Defaulted timber sale contractor's allegations that the Forest Service has not resold timber at the highest obtainable price or reasonably attempted to mitigate damages are matters "relating to" the original contract, and they therefore must be resolved by the Department of Agriculture Board of Contract Appeals.

Seaboard Lumber Co. protests the use of allegedly improper procedures by the Quilcene Ranger District during an oral auction for resale of the Rainbow Timber Sale, Olympic National Forest, Olympia, Washington. We dismiss the protest.

Seaboard breached a contract for sale of the same timber, awarded March 27, 1980, by failing to make required extension deposits. By letter dated May 6, 1983, the Forest Service notified Seaboard of the resulting cancellation of the contract, stating that damages would be calculated according to Standard Provision B9.4, Failure to Cut. Under this provision, damages are measured by the difference between the original contract value and the resale value at the new bid price.

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In advertisements for the November 30, 1983, resale, the Forest Service specifically stated that Seaboard would not be permitted to bid; it also required other bidders to certify that they were not affiliated with Seaboard. The firm nevertheless submitted a bid that the sale officer rejected and returned.

Seaboard alleges that the oral auction, which followed submission of sealed bids, was closed prematurely while another bidder, Ben Levine, was attempting to submit a bid. The proposed award to Handley and Phillips Logging Company, the high bidder at the time the sale was closed, would be improper, according to Seaboard, because the Forest Service is required to resell the timber at the highest obtainable price and to mitigate the damages that will be assessed against Seaboard.

The Forest Service responds, first, that Seaboard should not be considered an interested party under our Bid Protest Procedures, 4 C.F.R. § 21.1(a) (1983), because it lacks a sufficient, direct interest in the Rainbow resale and because other bidders, including Levine, which clearly would have such an interest, have not protested.

In any event, the Forest Service argues, the auction was conducted according to procedures announced at the start: when bidding appeared to have ended, the sale officer announced that the sale would be closed in 1 minute if no further bids were forthcoming. The sale officer noted the time at 15-second intervals, and the entire period had expired at the time that Levine, which had already submitted a bid but apparently anticipated that bidders would be polled following expiration of the 1-minute period, attempted to bid again. While in the past bidders have been polled, the Forest Service notes, this practice has been discontinued. Since all bidders had notice of the time limits, the Forest Service concludes, its procedures were proper; however, it has delayed award to Handley and Phillips pending our decision.

Since Seaboard was not eligible to bid on the Rainbow Timber Sale resale, we agree with the Forest Service that it is not an interested party for purposes of protesting the procedures followed during the oral auction and/or the sale officer's refusal to permit Ben Levine to bid following expiration of the 1-minute period. Exclusion from

resales of bidders who have failed to complete timber sale contracts is specifically permitted by Forest Service regulations, 36 C.F.R. § 223.5(h)(1) (1983), and has been upheld by the courts and by our Office. See Siller Brothers, Incorporated v. United States, 655 F.2d 1039 (Cl. Ct. 1981), cert. denied, 102 S. Ct. 1970 (1982); Tangfeldt Wood Products, Inc., B-207688, May 3, 1983, 83-1 CPD 468. Thus, Seaboard's bid was properly rejected, and the firm's status is neither that of a disappointed bidder nor of one that was prevented from bidding due to alleged improprieties in the sale, giving it the requisite interest in a protest. Cf. Die Mesh Corporation, 58 Comp. Gen. 111 (1978), 78-2 CPD 374 (stating the general rule that a party ineligible for award of a procurement contract is not sufficiently interested to protest which of several competing bidders should receive it).

Rather, Seaboard's status is that of a defaulted contractor seeking to limit the damages with which it may be charged. Whether the resale price was reasonable and whether the Forest Service reasonably attempted to mitigate damages are questions "relating to" the original timber sale contract, and under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 - 613 (Supp. IV 1980), must be resolved by the Department of Agriculture Board of Contract Appeals. See Ordnance Materials, Inc., B-212772, September 23, 1983, 83-2 CPD 371; Introl Corporation, B-210321, June 1, 1983, 83-1 CPD 591; see also G&W Logging, AGBCA No. 83-264-3, October 25, 1983, 83-2 BCA ¶ 16,878 (considering, among other things, whether damages for breach of a timber sale contract may be assessed before the resale contract has been performed).

Seaboard's protest is dismissed.

Harry R. Van Cleve
Acting General Counsel