



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Fort Apache Timber Company
File: B-237377
Date: February 22, 1990

Samuel Goodhope, Esq., for the protester.
Rhea Daniels Moore, Esq., Office of the General Counsel,
U.S. Department of Agriculture, for the agency.
Robert A. Spiegel, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

The contracting officer acted improperly in rejecting a bid as nonresponsive on, and excluding the bidder from, a sealed bid/auction timber sale where the sealed bid included an executed form FS-2400-43, Certification of Nonsubstitution of Domestic Timber, but did not provide requested information regarding the bidder's timber exports, since this information relates to responsibility, rather than responsiveness, and can be supplied any time prior to award.

DECISION

Fort Apache Timber Company protests its exclusion from the Duck Lake timber sale, which was conducted by the Forest Service, Springerville, Arizona. Fort Apache's sealed bid on this combined sealed bid/auction timber sale was rejected as nonresponsive, since the firm did not properly complete the Forest Service form FS-2400-43, Certification of Nonsubstitution of Timber Purchased and Disposition of Domestically Processed and Exported Timber. The protester argues that it should have been afforded an opportunity to cure the defect prior to the auction. We sustain the protest.

On September 27, 1989, sealed bids were opened before the oral auction in accordance with standard operating procedures for a combined sealed bid/auction timber sale. Under these procedures, the submission of a qualifying

sealed bid is a prerequisite to participation in the subsequent oral auction. 36 C.F.R. § 223.88(b) (1989).

The sale prospectus and solicitation informed prospective bidders of the requirement for submission of an executed form FS-2400-43 certification with the bid and warned that failure to include, sign or complete this form would constitute a nonresponsive bid. This certification implements 36 C.F.R. § 223.162 (1989), which generally prohibits the export of certain timber or the substitution of such timber for timber exported from private lands.

Five bidders, including Fort Apache, submitted sealed bids along with executed forms FS-2400-43. The form FS-2400-43 is a statement from the bidder certifying that if awarded the contract, the timber from National Forest System lands will not be used as replacement for timber from private lands that is exported by the bidder. Part I of the form requests information on the disposition of timber harvested by the bidder in the past year and provides that bidders show this information on an "attached Form FS-2400-46" [Purchaser Certification of Timber Domestically Processed and Exported Calendar Year 19__].

Fort Apache indicated on its executed form FS-2400-43 that a form FS-2400-46 was attached. However, no FS-2400-46 was included in Fort Apache's sealed bid. Fort Apache has submitted an affidavit of its general manager who states that the contracting officer refused to permit it to correct the form FS-2400-43 at the bid opening by allowing it to submit the "necessary attachments" [*i.e.*, information regarding disposition of expected timber harvested from private lands]. The Forest Service does not deny this was the case.

The contracting officer rejected Fort Apache's bid as nonresponsive because of this defect and opened the oral auction. Ultimately, Stone Forest Industries, Inc. submitted the high bid at the oral auction. On October 11, Fort Apache protested to our Office. During the pendency of this protest, the Forest Service proceeded to award to Stone Forest Industries.

The Forest Service contends initially that the protest actually concerns the propriety and applicability of the certification requirements. Thus, the Forest Service contends that the protest should be dismissed under our Bid Protest Regulations as untimely since it was filed in our

Office on October 11, 1989, after the September 27 bid opening, before which this protest of an alleged apparent solicitation defect should have been filed. 4 C.F.R. § 21.2(a)(1) (1989). However, Fort Apache's protest is that its failure to properly complete the FS-2400-43 should not cause the rejection of its bid; Fort Apache does not protest the requirement itself.^{1/} Thus, we consider the protest timely filed.

Fort Apache alleges that the Forest Service unreasonably rejected its bid as nonresponsive without affording it an opportunity to cure this defect at bid opening. We agree.

A sealed bid/auction timber sale is significantly different from sealed bid procurements or sales, where the strict rules of bid responsiveness apply. 51 Comp. Gen. 182, 185 (1971); Stimson Lumber Co., 63 Comp. Gen. 344 (1984), 84-1 CPD ¶ 507; Stone Forest Indus., Inc., et al., B-234230, B-234230.2, Apr. 6, 1989, 89-1 CPD ¶ 361. Compare D.M. Baker, B-223091, B-233156, Aug. 11, 1986, 86-2 CPD ¶ 175 (bid on sealed bid timber sale was properly rejected as nonresponsive since it did not include the required form FS-2400-43). That is, under the sealed bid/auction sale procedures, the sealed bids are only employed to ascertain which bidders are qualified to participate in the oral bidding. 51 Comp. Gen., supra, at 185. We have found that under such procedures allowing a bidder the opportunity to correct a bid defect, following bid opening and prior to commencement of the oral bidding, does not result in any competitive advantage to that bidder or competitive disadvantage to the other bidders. Id.; Dickson Forest Prods., Inc., B-191906(1), Nov. 1, 1978, 78-2 CPD ¶ 314, at 4.

In the present case, Fort Apache, by signing and submitting the form FS-2400-43, certified that its purchase of timber was not to replace exported private timber. Thus, on its face, Fort Apache's bid was responsive, since it unequivocally offered to perform the services in conformity with all material terms and conditions of the solicitation. Sage Assocs. General Contractors, Inc., B-235497, Aug. 15, 1989, 89-2 CPD ¶ 141. The requested information pertaining

^{1/} In its initial protest, Fort Apache argued that this certification was not applicable to it since it is a wholly-owned tribal enterprise which has only harvested timber from nonprivate lands. However, we need not resolve this issue since we find the contracting officer's failure to permit Fort Apache to correct this bid defect was unreasonable.

to the previous years' timber exports from private lands had nothing to do with Fort Apache's commitment to perform the contract. Consequently, we think this timber export information is more akin to information relating to bidder responsibility, rather than to bid responsiveness. Id.

Information relating to bidder responsibility can ordinarily be supplied any time prior to award. Id. The mandatory language in the solicitation cautioning that bids would be rejected as nonresponsive if this information was not included with the bid may not convert a matter of responsibility to one of responsiveness. Norfolk Dredging Co., B-229572.2, Jan. 22. 1988, 88-1 CPD ¶ 62. While it is true that a contracting officer need not unreasonably delay award to allow a bidder to provide such information, the record shows that Fort Apache offered at the bid opening to do this and its request was refused out-of-hand.^{2/} Accordingly, we find the contracting officer's denial of Fort Apache's request to correct this defect and the exclusion of Fort Apache from the auction was unreasonable.

The protest is sustained.

However, we do not recommend that the contract award be disturbed in this case. In this regard, we understand that work has proceeded on this timber sale contract and that the contract does not contain a termination for convenience clause. See Louisiana-Pacific Corp., B-210904, Oct. 4, 1983, 83-2 CPD ¶ 415. Consequently, termination of the contract could be costly and impractical. Under the circumstances, Fort Apache is entitled to its protest costs, including attorneys' fees, and the costs of preparing its bid. 4 C.F.R. § 21.6(d).

Milton J. Arola
for
Comptroller General
of the United States

^{2/} The contracting officer's actions here are inconsistent with those taken in a recent sealed bid/auction timber sale also involving the Springerville Ranger District, see Stone Forest Indus., Inc., et al., B-234230, 234230.2, supra, where the contracting officer permitted the awardee to supply omitted information pertaining to private land timber exports during and after the auction.