



**Comptroller General  
of the United States**

**Washington, D.C. 20548**

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# Decision

**Matter of:** Last Camp Timber

**File:** B-238250

**Date:** May 10, 1990

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for the protester.

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preparation of the decision.

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## DIGEST

The agency properly rejected the high bid in a sealed-bid timber sale, where the high bidder failed to include with its sealed bid a Certificate of Small Business Status, which contained a contract performance requirement that certain contract work be accomplished with the bidder's own employees.

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## DECISION

Last Camp Timber protests the rejection of its bid by the Forest Service, Department of Agriculture, under the Patches Special Salvage Timber Sale in the Olympic National Forest. Last Camp's high bid on this sale, set aside for small business concerns, was rejected as nonresponsive because it failed to include with its bid a "Certificate of Small Business Status," as required by the solicitation. The protester contends that the agency should have waived Last Camp's failure to submit the certificate and permitted its submission after bid opening.

We deny the protest.

The Patches timber sale was advertised as a sealed-bid procurement in a local newspaper of general circulation. The newspaper ad, sale prospectus, and solicitation informed prospective bidders of the requirement that the "Certificate of Small Business Status" be submitted with the bid in order for it to be considered for award unless no bidder submitted a certificate with its bid.

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Last Camp submitted a \$146,146.40 bid which was the highest of the two sealed bids opened on December 20, 1989. Last Camp's bid was initially accepted by the Forest Service on the basis that the agency had independent knowledge of the firm's small business status and because the protester's representative proceeded directly to execute the omitted form. Nevertheless, Last Camp's bid was subsequently rejected and award made to the other bidder, Ben Levine Timber, since Ben Levine Timber submitted a properly executed certificate with its bid.

The primary issue involved in this case is whether Last Camp's bid was responsive so that it could receive the small business preference on the sale as provided in the solicitation. Bid responsiveness involves the question of whether the bid as submitted represents an unequivocal offer to do exactly what the government has specified, so that the acceptance of the bid will bind the contractor to meet the government's requirements in all material aspects.<sup>1/</sup> D.M. Baker, B-223091, B-223156, Aug. 11, 1986, 86-2 CPD ¶ 175. Responsiveness determinations are made exclusively on the basis of information submitted with the bid or available at the time of bid opening. Id.

As noted by the protester, the failure of a bidder on a small business set-aside to submit with its bid a certificate regarding its size status does not, in itself, render the bid nonresponsive in a formally advertised procurement, and that failure can be waived as a minor informality, because this information is not needed to

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<sup>1/</sup> While it is true that the Federal Acquisition Regulation (FAR) does not govern sales solicitations, the strict rules governing bid responsiveness applicable to sealed-bid procurements are generally applied in sealed-bid timber sales. See D.M. Baker, B-223091, B-223156, Aug. 11, 1986, 86-2 CPD ¶ 175; Trans South Indus., Inc., B-224950, Dec. 19, 1986, 86-2 CPD ¶ 692. Compare Fort Apache Timber Co., B-237377, Feb. 22, 1990, 90-1 CPD ¶ 199, where we recognized that combined sealed-bid/auction timber sales are significantly different in this regard. Consequently, our decision in Blue Lake Forest Prods., Inc., B-224263, Feb. 9, 1987, 87-1 CPD ¶ 135 (relied upon by the protester), where we found proper the Forest Service's acceptance, after bid opening, of small business certificates from small business concerns on a small business set-aside timber sale, is not controlling in the present case, since Blue Lake involved a combined sealed-bid/auction sale where no bidders were competitively prejudiced by the post-opening acceptance of these certificates.

determine whether the bid meets the solicitation's material requirements. Insinger Mach. Co., B-234622, Mar. 15, 1989, 89-1 CPD ¶ 277. On the other hand, where a bid fails to include a properly completed certification, which requires a particular performance commitment of the bidder to accomplish the purposes of a small business set-aside (e.g., in solicitations for supplies a commitment not to subcontract the contract work), the bid is nonresponsive and must be rejected. See Insinger Mach. Co., B-234622, supra; Aircraft Components, Inc., B-235204, Aug. 2, 1989, 89-2 CPD ¶ 98.

In the present case, the special salvage timber sale was set aside for small business concerns pursuant to Small Business Administration regulations. See 13 C.F.R. § 121.6(c) (1989). These particular set-asides, as well as the certificate in this solicitation, required a bidder to certify that it is a small business concern as defined in this regulation, and also to agree that it would use its own employees to "accomplish two or more of the following elements [of work]: (a) felling and bucking, (b) yarding, (c) loading," and that it will subcontract only to concerns eligible for preferential award of a special salvage timber sale for those elements not accomplished by the bidder's own employees. See 13 C.F.R. § 121.6(c)(2).

Last Camp argues that the Certificate of Small Business Status only addresses size and that the 13 C.F.R. § 121.6(c) requirements automatically apply if it qualifies as a small business concern. However, as indicated above, the certificate contains a certification of size status and specific performance requirements to which the bidder has not committed if it does not submit an executed certificate with its bid. Also, the regulation does not provide for automatic application of these performance requirements to all small business concerns but only to those concerns which "agree" to comply with them.

Since Last Camp's bid was not responsive to these small business performance requirements, its bid was required to be rejected since another bidder submitted the requisite certificate with its bid. Last Camp's offer to correct this bid defect after bid opening cannot be accepted, since allowing it to correct its nonresponsive bid would have given it the option of accepting or rejecting a contract after the exposure of other bids, which would undermine the competitive process. See Trans South Indus., Inc., B-224950, supra.

Last Camp argues that since the Forest Service recognizes Last Camp as a qualified small business concern, the

rejection of its bid was inconsistent with 36 C.F.R. § 223.103 (1989). This regulation requires that awards be made on solicitations for timber sales, set aside for small business concerns, to the highest bidder who qualifies as a small business concern. As noted by the Forest Service, this regulation must be read in conjunction with 36 C.F.R. § 223.100, which requires the awardee to be responsible and to have submitted the highest bid that conforms to the conditions of the sale as stated in the solicitation. Since Last Camp's bid is nonresponsive, this argument has no merit.

Last Camp finally argues that the rejection of its bid constitutes a de facto debarment in violation of the firm's due process rights. The Forest Service replies that there is no legal or factual basis for this "novel theory." We agree. Debarment is defined in the FAR as an action taken to "exclude a contractor from Government contracting for a reasonable, specified period." FAR § 9.403 (FAC 84-53); Mil-Tech Sys., Inc., et al.--Request for Recon., B-212385.4, B-212385.5, June 18, 1984, 84-1 CPD ¶ 632. Since this is not the case here, this argument also has no merit.

The protest is denied.

  
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General Counsel