Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tricon Timber, Inc.

File: B-241065; B-242174

Date: January 15, 1991

Alan I. Saltman, Esq., Bogle & Gates, for the protester.
Rhea Daniels Moore, Esq., Department of Agriculture, for the agency.
Steven W. DeGeorge, Esq., John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where nothing in the Small Business Act, the National Forest Management Act or any applicable regulations mandates that certain timber sales be set aside for small business or prohibits setting aside any particular timber sale, the decision to set aside a particular sale is within the discretion of the Forest Service and is not subject to the General Accounting Office's review.

DECISION

Tricon Timber, Inc. protests the decision of the Forest Service, U.S. Department of Agriculture, to set aside the Meadow Creek and Log Cabin Ridge Timber Sales for small businesses under authority of its Small Business Timber Sale Set-Aside Program. Tricon, a large business, alleges that this decision was arbitrary and capricious and amounted to an improper restriction on competition.

We dismiss the protests.

The Forest Service, in conjunction with the Small Business Administration (SBA), has established the Timber Sale Set-Aside Program in order to ensure that small business timber purchasers have the opportunity to purchase a fair proportion of National Forest Timber. Under this program, the Forest Service has implemented a policy designed to automatically trigger set-aside sales when the agency determines that its small business objectives are not being fulfilled. This policy and its procedures are described in the Forest Service Manual (FSM).

050375 / 142955

According to the procedures set forth in the FSM, the Timber Sale Set-Aside Program is conducted essentially as follows. Each National Forest, which constitutes a "market area" under the program, is assigned a percentage of its timber which is to be sold to small businesses. These "small business proportions" are computed every 5 years, and are assessed in terms of the agency's cumulative progress in meeting them over 6-month intervals. A small business set-aside is "triggered" for a market area when the volume of small business purchases in that market is less than the assigned small business proportionate share during the current 6-month period by 10 percent.

The two protested sales are for timber from the Wasatch-Cache National Forest. The timber sales proportion designated for small business for the Wasatch-Cache is 80 percent of all timber offered for sale during the 5-year period encompassing the protested sales.

In 1986, a sale of timber from the Wasatch-Cache National Forest was made to Longtree Timber Company as a small business set-aside. Subsequent to that sale, the SBA determined that Longtree was a large business concern following a size protest unrelated to the Wasatch-Cache sale. The SBA size decision was dated November 17, 1986 and by its terms had prospective effect.

Based on this information, the Forest Supervisor decided that the 1986 sale had in fact been made to a large business and recalculated the percentage of sales made to small businesses. The new calculation led the Forest Supervisor to conclude that there existed a current deficit in the established small business sales proportion for Wasatch-Cache, and a potential for the deficit to increase absent corrective action. Therefore, with the concurrence of the SBA's program representative, the Forest Supervisor decided to set aside both the Meadow Creek and Log Cabin Ridge sales.

According to Tricon, during the most recent 6-month-analysis period, 88.5 percent of all timber sold from this Forest had been to small businesses. The protester contends that the Forest Supervisor reached her conclusion that a small business sales deficit existed in Wasatch-Cache only after having first improperly redesignated the 1986 sale to Longtree as a large business sale, thereby reducing the cumulative small business sales proportion and triggering the disputed set-asides. Tricon further asserts that because the SBA's size determination concerning Longtree had prospective effect only, the Forest Supervisor lacked authority to make such a redesignation for purposes of her analysis. As such, Tricon submits that the set-asides were not properly triggered under

the procedures stated in the FSM and are therefore an improper limitation on competition.

There is nothing in the Small Business Act, the National Forest Management Act, or any applicable regulations which mandates that certain timber sales be set aside for small business or which prohibits setting aside any particular timber sale. Although Tricon relies on provisions of the FSM relating to timber sale small business set-asides and asserts that they should have the force and effect of law, we view the agreement between SBA and the Forest Service concerning the set-aside program and its implementation in the FSM as merely expressions of Forest Service policy which do not have the status of mandatory regulations. Salmon River Lumber Co., B-202933, Jan. 5, 1982, 82-1 CPD ¶ 9; Blue Lake Forest Prods., Inc., B-224263, Feb. 9, 1987, 87-1 CPD ¶ 135.1/ Accordingly, we will not review the Forest Service's decision to set aside these two sales pursuant to the Timber Sale Set-Aside Program.

The protests are dismissed.

Ronald Berger

Ronald Berger
Associate General Counsel

1/ Tricon submits that the instant case is distinguishable primarily because the triggering procedures for set-asides were published for comment in the Federal Register prior to their being incorporated into the current FSM. We have considered this argument and do not find it persuasive. The FSM, regardless of its manner of promulgation, remains primarily an internal policy document. See, e.g., Lumber, Prod. and Indus. Workers Log Scalers Local 2058 v. U.S., 580 F. Supp. 279 (D. Oregon 1984).