

Burke 147130



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

Decision

Matter of: Julie Cades
File: B-248218
Date: July 13, 1992

Julie Cades for the protester.
Rhea Daniels Moore, Esq., United States Department of Agriculture, for the agency.
Kathryn M. Burke and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly rejected the high bid in a sealed bid timber sale set aside for small business concerns where the high bidder failed to include a Certificate of Small Business Status with her bid since, in the absence of a signed certificate, the bidder had not bound herself to comply with the performance restrictions set out in the certificate regarding the resale, logging, and manufacture of the timber.

DECISION

Julie Cades protests the rejection by the United States Forest Service, Department of Agriculture, of her bid for the BC Hazard Trees Special Salvage Timber Sale (SSTS) in the Oroville Ranger District, Plumas National Forest. Julie Cades's high bid on the sale, set aside for small business concerns, was rejected as nonresponsive because it failed to include a Certificate of Small Business Status, as required by the solicitation. The protester contends that her failure to submit the certificate should not have disqualified her bid and that she should have been allowed to submit the certificate after bid opening.

We deny the protest.

The Forest Service initially rejected the protester's bid on the basis that her form FS 2400-43, "Certification of Nonsubstitution of Timber Purchased and Disposition of Domestically Processed and Exported Timber," was incomplete and the bid did not include a form FS-2400-46, on which the bidder was to list any such disposition of timber. The Forest Service later conceded that these issues were not valid grounds for rejection, since the protester had agreed to the material term of form FS 2400-43 merely by signing

the form, and since submission of form FS 2400-46 is a matter of responsibility, not responsiveness, which can be accomplished any time prior to award of the contract.

The Forest Service subsequently asserted another reason, failure to include a signed Certificate of Small Business Status with the bid, to support the rejection of the protester's bid. The agency maintains that by failing to submit a signed certificate, the protester failed to bind herself to the performance requirements set out in the certificate.

The protester argues that her bid should have been accepted since she did not receive the Certificate of Small Business Status with the bid materials and since the absence of this document from the bid does not make the bid nonresponsive.

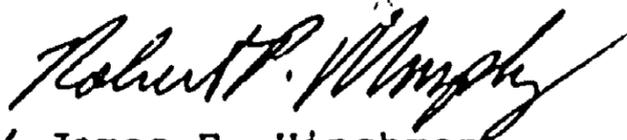
Regardless of whether the protester received the Certificate of Small Business Status, she was put on notice of the requirement for the certificate by section 7 of the Instructions to Bidders, which specifically states that completion of the Certificate of Small Business Status is a prerequisite for preferential consideration for sales set aside for small business concerns. Notice that a particular form is required is sufficient to hold a bidder responsible for such document, since it gives the bidder an opportunity to obtain a copy of the missing form. Sierra Forest Prods., B-245393, Jan. 2, 1992, 92-1 CPD ¶ 4.

Inclusion of the Certificate of Small Business Status is required for bid responsiveness because the certificate solicits, in addition to size certification, a particular performance commitment from the bidder which is necessary to accomplish the purposes of a small business set-aside SSTS, namely, restrictions on the logging, manufacture, and resale of the timber. Last Camp Timber, B-238250, May 10, 1990, 90-1 CPD ¶ 461. This requirement cannot be met at a later date since responsiveness is determined at the time of bid opening and is measured as whether acceptance of the bid would bind the contractor to meet the government's needs in all material respects. D. M. Baker, B-223091; B-223156, Aug. 11, 1986, 86-2 CPD ¶ 175. Without signing the certificate, a bidder is not bound to comply with the logging, manufacturing, or resale restrictions.

The case cited by the protester, Blue Lake Forest Prods., Inc., B-224263, Feb. 9, 1987, 87-1 CPD ¶ 135, allowing for completion of the Certificate of Small Business Status after bid opening, does not apply to the present case. Unlike the sealed bid sale at issue here, the sale in Blue Lake was a combination sealed bid/auction sale. Since the sealed bid in a combination sale is only to determine who is qualified to bid in the auction, we have held that 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 disadvantage. Fort Apache Timber Co., B-237377, Feb. 22, 1990, 90-1 CPD ¶ 199. Consequently, in Blue Lake, a sealed bid/auction sale, none of the bidders was competitively prejudiced by the acceptance of the Certificates of Small Business Status after bid opening. See Last Camp Timber, supra. In an exclusive sealed bid sale, however, omitting material terms can result in a competitive advantage to that bidder, in that the bidder could wait until after the bids were opened to see if it would be necessary to bind itself to those terms. Therefore, where, as here, a bid in a sealed bid sale fails to include a Certificate of Small Business Status, which requires a particular performance commitment of the bidder, the bid is nonresponsive and must be rejected. Id.

The protest is denied.


for James F. Hinchman
General Counsel