DECISION

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

50974

FILE: B-182977 DATE: August 5,1975

MATTER OF: Northwest Logging, Inc. 97307

DIGEST:

Earlier decision regarding rejection of high bid on timber sale and effect of lapsing of high bidder's 1974 quota restriction was not erroneous in either fact or law. Contention that quota restriction was still in effect at time set for contract performance, i.e., timber purchase, i.e., date of bid opening, October 23, 1974, is rejected since purchase did not occur on that date as no contract came into being merely by submission of high bid. Moreover, as set out in earlier decision, fact that protester's own good faith protest allowed 1974 quota restriction to lapse does not provide basis to reject bid in 1975.

The instant case is a request for reconsideration filed by Northwest Logging, Inc., with regard to our decision in Anderson & Middleton Logging Company, B-182977, June 30, 1975. In essence, our earlier decision held that where the high bidder on the Dry County Timber Sale in the Olympic National Forest, Anderson & Middleton Logging Company (A&M), was rejected because award to that company would have caused it to exceed its export and substitution quotas for 1974 (36 C.F.R. § 221.25 (1974)), award could be made to A&M in 1975 since no quota prohibition existed in 1975 even though the reason award was not made in 1974 was A&M's protest against the rejection of its bid.

Northwest Logging, in accordance with section 20.9 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), has requested reconsideration of our decision on the basis that our decision contained an error of law, specifically that a prime case relied on in our earier decision, 51 Comp. Gen. 168 (1971), is not analogous to the situation presented by the instant case.

In 51 Comp. Gen. 168, we stated at 173 that:

"* * * [The protester contends] the Navy's possible consideration of the bid of * * * [the original low bidder] would make a mockery of the

095307 - 095307

> competitive bidding system, since that firm did not possess any security clearance at either the time of bid opening, or at the time performance was contemplated to have begun, but for your protest. As stated above, the time for submission of evidence of a bidder's responsibility is governed by the time when performance is required. In this case, in view of the preaward posture of * * * [the] protest, contract performance, of course, is not required as of this date. Therefore, we would have no objection to the Navy's consideration of that bid if that firm will have the necessary clearance prior to the time for contract performance. See B-160538, B-160540, March 24, 1967."

In arguing that the situation in 51 Comp. Gen., supra, is not analogous, Northwest states that in 51 Comp. Gen., supra, the delay in the required performance was caused by a protest submitted by another party on grounds unrelated to the deficiency which was corrected during the pendency of the protest. In the present case, Northwest states that A&M's protest was directly on the point that "The Comptroller General conclude[d] * * * [was] moot because of the delay caused by the [Anderson & Middleton] protest," i.e., that A&M was subject to the quota limitation in 1974 to such an extent that the instant sale could not be made to that company. Northwest's second argument against our analogy to 51 Comp. Gen., supra, is that unlike that situation there, A&M was still under the quota restriction at the time set for contract performance, which it is alleged was the purchase of the timber and not the cutting and processing of the timber. Moreover, Northwest argues that purchase occurred when A&M submitted the high bid on the sale on October 23, 1974.

With regard to this latter point, we believe that it is fundamental that no purchase can occur unless and until a contract comes into being. Clearly, no contract came into being on October 23, 1974, merely upon the submission of a high bid by A&M. Similarly, no contract came into being with A&M from that time up to the date of our earlier decision, June 30, 1975. Thus, we do not see that in this regard our earlier decision was erroneous.

As to Northwest's point that the timely A&M protest, which was filed here on January 7, 1975, after being pursued through the Forest Service, provided the basis for the 1974 quota restriction to lapse, we note that our earlier decision cited B-160538, B-160540, March 24,

1967, which involved a situation such as the instant case where protester's own good-faith protest allowed it to cure its deficiencies prior to award. That case involved a protest received from the second low bidder, Metropolitan Security Services, Inc. Metropolitan alleged that the low bidder did not have an operating license which was required by the invitation. During the pendency of the protest, the low bid submitted by Service Engineers Inc. was allowed to expire. However, the General Services Administration (GSA) stated that Metropolitan was not entitled to receive the award for, just as it had alleged with regard to Service Engineers Inc., Metropolitan also did not have the requisite license either at the time set for bid opening (December 6, 1966), the date of the protest (December 7, 1966), or the date upon which performance was to have commenced (January 1, 1967). Indeed, it was not until January 19, 1967, that Metropolitan secured such a license. GSA pointed out that but for the fact of the protest, an award would have been made and performance would have commenced on January 1, at which time Metropolitan did not have the requisite license.

Our Office, in deciding the issue, concluded that Metropolitan's protest was not frivolous or without merit. Secondly, our Office could not say that the Metropolitan protest was filed solely to gain time for the issuance of a license to that firm or that, absent its protest, award would necessarily have been accomplished prior to the issuance of that license. Similarly, in the instant case, we have no basis to conclude that A&M's protest was not pursued in good faith, that is, A&M's protest against the application of the quota was not frivolous or without merit. Nor can we say that the protest was filed solely to permit the 1974 quota restriction to lapse or that, absent the protest, the Forest Service would have awarded the instant contract prior to the close of business on December 31, 1974, the time at which A&M's quota restriction ended.

In view of the foregoing, we do not believe that our earlier decision is erroneous in either fact or law and it is, therefore, affirmed.

R. F. Keller

Deputy Comptroller General
of the United States