

DECISION



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

9404

FILE: B-191906 (2) DATE: March 13, 1979

MATTER OF: Little River Lumber Company

DL601136

DIGEST:

[Allegation of Errors in Appraisal and Advertisement of Timber Sales]

When scientific and technical issues raised by protest either have been rendered moot by agency action, or are being studied by or appealed within agency, which has broad discretion, GAO will decline to consider same issues unless agency action is shown to be arbitrary, capricious, an abuse of discretion, or contrary to law.

Little River Lumber Company (Little River) has protested what it alleges are "fundamental errors" in the appraisal and subsequent advertisement of timber sales in the Black Hills National Forest. Although its objections encompass methods and practices which the Forest Service has followed on all Black Hills sales, the protest is limited to two, Bogus Jim and Black Fox, both of which occurred on May 1, 1978.

ALLEGORY

Little River submitted sealed bids to qualify for both sales, but states that it withdrew before oral auctions began. In each case, Little River's vice president presented a letter dated May 1, 1978, to the sale officer, requesting postponement of the particular sale and stating that if the request was not granted, a formal protest would be registered with our Office. Such a protest was filed (received) on May 11, 1978.

Little River argues that there are errors in the method used to measure roundwood logs more than 4 and less than 6 inches in diameter, also known as cordwood or pulpwood) and in conversion of the volume measured to thousand board feet (MBF). According to Little River, because of these errors the Forest Service overstates the total volume of timber and requires purchasers to pay for roundwood at the escalated rate for sawtimber (wood 6 inches or more in diameter).

004009

Little River also alleges that the Forest Service overstates lumber selling prices and mill overrun and chip recovery factors, but understates costs of logging both roundwood and sawtimber. In addition, Little River alleges that the Forest Service assumes a continuous and viable market for roundwood when there is virtually none, and uses an index, the Western Wood Products Ponderosa Pine Index, to escalate stumpage (adjust prices quarterly to reflect market changes) which is not appropriate for the Black Hills.

DLG-00188

Little River concludes that the Forest Service is selling timber at prices in excess of its fair market value, contrary to 16 U.S.C. 472a (1976) and 36 C.F.R. 223.4 (1977) and is violating the duty of good faith imposed by § 1-203 of the Uniform Commercial Code (UCC). Little River seeks rescission of the Bogus Jim and Black Fox contracts, which have been awarded to the Wheeler Division, St. Regis Paper Company (Wheeler) and to Dickson Forest Products, Inc. (Dickson), respectively, and reoffering after corrective measures which it proposes have been taken by the Forest Service. DLG-01157

A threshold question is whether Little River's protest is timely. Under our Bid Protest Procedures, alleged improprieties which are apparent before bid opening must be protested by that time. 4 C.F.R. 20.2 (b)(1). There is a conflict in the record as to when on May 1, 1978, Little River's letters requesting postponement of the two sales actually were delivered to the sale officers. Wheeler, in comments to our Office regarding the Bogus Jim sale, alleges that Little River did not withdraw until after the oral auction had begun, and argues that if there had been no other qualified bidders, Little River would have been awarded the sale.

The Forest Service, however, informs us that in both sales, Little River's letters were delivered and its bids withdrawn about 15 minutes before other sealed bids were opened. However, the agency does not believe these letters constituted timely protests, since they dealt with matters of long-standing controversy; rather, the Forest Service argues, they merely provided notice of Little River's intent to file a protest with our Office.

We believe any doubts about the timeliness should be resolved in favor of the protester, particularly since Little River had previously engaged in both written and oral discussions with the Forest Service regarding its appraisal methods. We also believe that Little River's letters of May 1, 1978, constituted protests to the agency. Assuming that proceeding with or awarding the protested sales was adverse agency action, Little River's May 11, 1978 protest to our Office was timely, since it was filed within 10 days thereafter. See American Electric Construction Co., Inc., B-189532, November 8, 1977, 77-2 CPD 350, 4 C.F.R. 20.2(a), supra.

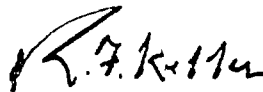
In addition to protesting to our Office, Little River has continued to seek relief from the Forest Service. The record indicates that the Regional Forester, Rocky Mountain Region, informed Little River on September 19, 1978, that the following issues involved in its protest had been resolved: The Whitewood Index will be used to escalate stumpage on all sales advertised after July 12, 1978; a new Roundwood Volume Table has been developed for use on all sales sold after August 21, 1978; and a new contract provision, with a different method for measuring sawtimber volume, will be included in all timber sale contracts after August 21, 1978. In addition, the Forest Service has agreed to study mills, logging costs, and roundwood measurement methods in order to develop new selling values and cost data, and to make scheduled rate redeterminations for all Black Hills contracts advertised after October 1, 1978, within 45 days after such studies are approved.

~~In view of these changes, which we believe are evidence of the good faith of the Forest Service, many of the issues which Little River has raised are moot.~~ In a letter to the Chief of the Forest Service dated October 11, 1978, appealing denial of its request for a suspension of all planned timber sales in the Black Hills, counsel for Little River acknowledges that the new contract provision for scheduled rate redetermination "may correct most of the points raised by Little River."

Although Little River seeks further changes, we agree with the Forest Service that the Secretary of Agriculture is granted broad discretion to administer the public forests by the Organic Act of 1897, 16 U.S.C. 471 et seq. (1976), the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 - 531 (1976), and the National Forest Management Act of 1976, 16 U.S.C.A. 1600 - 1614 (1976). The remaining issues in the bid protest either will be studied by the Forest Service or reviewed during Little River's appeal to the Chief of the Forest Service. We therefore decline to consider the same issues, since they are complex scientific and technical ones, primarily within the discretion of the Forest Service, and we do not believe the agency's actions have been shown to be arbitrary, capricious, or an abuse of discretion.

Nor do we believe the Forest Service's actions were contrary to law. The Secretary of Agriculture is authorized by 16 U.S.C. 472a, supra, to sell trees, portions of trees, or forest products at "not less than appraised value." This is a minimum, not a maximum; there is nothing in the statute which prohibits the sale of timber at more than appraised value. The object of National Forest timber appraisals, according to 36 C.F.R. 223.4, supra, is to "estimate fair market value." The comments of other willing buyers, Wheeler and Dickson, to our Office regarding the protested sales indicate that they agreed with the Government, a willing seller, upon a fair market value.

The protest is denied.



Deputy Comptroller General
of the United States