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**Comptroller General  
of the United States**

**Washington, D.C. 20548**

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# **Decision**

**Matter of:** Timberland Logging

**File:** B-282461

**Date:** July 8, 1999

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Mark D. Gibson for the protester.

Alan D. Groesbeck, Esq., Department of Agriculture, for the agency.

Robert C. Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

Protest that agency deliberately excluded the incumbent protester from competition is denied where record establishes that protester's name was inadvertently dropped from bidders' mailing list and adequate competition was obtained.

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## **DECISION**

Timberland Logging protests its alleged exclusion from competition under invitation for bids (IFB) No. R5-99-08, issued as a total small business set-aside by the Forest Service Region 5 (California) contracting office for "Call When Needed" (CWN) helicopter services. Timberland, an incumbent which had a CWN helicopter services contract awarded by Region 5 in 1997 that expired in May 1999, asserts that the agency deliberately failed to send it a copy of the solicitation.

We deny the protest.

On January 8, 1999, the procurement was synopsisized in the Commerce Business Daily (CBD). The synopsis indicated that the solicitation would be issued on or about March 1. The IFB, contemplating multiple 1-year contracts beginning in May 1999 with two 1-year option periods, was actually issued on February 23, with bid opening scheduled for March 23. Timberland, which apparently did not see the CBD synopsis, first contacted the Region 5 contracting office on March 30 to inquire about obtaining a copy of the solicitation only to learn that bid opening had occurred a week earlier. Thereupon, Timberland filed this protest on April 7, alleging that it was improperly excluded from the competition and suggesting that the sole reason for the exclusion was that the firm held a CWN helicopter services contract awarded by the Forest Service's Region 6 (Oregon and Washington).

During a June 15 telephone conference held with the parties at the request of our Office, the agency explained that it has a nationwide program for obtaining CWN helicopter services. These services are used for fire support, project, law enforcement and administrative flights. IFB § C.1(2). During the conference, the agency explained that each Forest Service region periodically solicits bids for these services; both parties agreed that the contract periods for Region 5 and Region 6 are approximately coextensive. Multiple awards are made to bidders submitting responsive bids and offering reasonable prices to obtain a sufficient number of helicopters to meet anticipated agency needs. IFB §§ M.3(1), (2). In this case, approximately 27 firms were solicited, 19 bids were received and 17 contracts were awarded. As a result, Region 5 has 51 helicopters under contract and the agency reports that this number of aircraft meets its needs. Contracting Officer's Statement, Apr. 19, 1999, at 2.

Although the IFB was issued by the Forest Service's Region 5, the scope of the awarded contracts is not limited to performing within that region. Rather, as explained by the agency during the telephone conference, as with all CWN helicopter contracts awarded by the agency, all CWN helicopter services solicitations provide that the government may dispatch aircraft under resultant contracts for use wherever the Forest Service has interagency or cooperative agreements with "State Agencies and private landholders." See IFB § C.1(3). Thus, CWN contracts awarded by any Forest Service region are effectively nationwide in scope.

Orders for services needed within or outside a given Forest Service region are to be filled based on "performance and cost" considerations. IFB § F.4(1). The government does not guarantee the placement of any orders and contractors are not obligated to accept any orders; however, once an order is accepted, the contractor is obligated to perform in accordance with the terms and conditions of its contract. IFB § F.4(2). Performance relates to a government-determined ability of the contractor's helicopter to perform a needed service, IFB § F.4(1), while cost involves the daily availability rate bid by firms when competing for CWN helicopter services contracts as well as an hourly flight rate which is standardized by the Forest Service for all CWN helicopter services contractors. See IFB §§ B.1.A, J.2(19), J.7. Thus, proximity to an area where services are required is an important cost factor in the placement of orders. In this regard, the Forest Service official responsible for placing orders in response to needs arising in Northern California states in a declaration that he dispatches, or causes to be dispatched, the closest available helicopter under a CWN helicopter services contract, irrespective of what Forest Service region awarded the contract. Declaration of North Zone Dispatch Center Logistics Coordinator ¶¶ 2-4.

From 1992 to 1997, Timberland held a CWN contract awarded by Forest Service Region 6. Timberland is located in Region 6, approximately 12 miles north of the border with Region 5 (Protest at 1), and, therefore, expected to receive orders for work in Northern California at sites to which it is proximate; however, during this period of time, Timberland received no orders for work in Region 5. Protester's

Supplemental Comments at 1. The protester attempted, unsuccessfully, to compete for contracts awarded by Region 5 during this time; finally, in 1997, the protester was awarded a CWN contract by Region 5 and began to receive orders for work in that region. The Region 5 contract expired in May 1999. Timberland currently holds a CWN contract awarded by Region 6. The protester contends that the Forest Service deliberately did not solicit Timberland for the Region 5 procurement at issue because of the agency's unwritten policy that firms with a contract awarded by another region do not need a contract awarded by Region 5 in order to receive orders for Region 5 work.

Where an agency inadvertently fails to solicit a successfully performing incumbent with the result that there is only a minimal level of competition, or makes a deliberate or conscious attempt to preclude the entity from competing, it does not meet its obligation of obtaining full and open competition. Interproperty Invs., Inc., B-281600, Mar. 8, 1999, 99-1 CPD 55 at 3. However, where adequate competition is achieved resulting in reasonable prices, we will not sustain a protest in the absence of conclusive evidence that the agency deliberately excluded an incumbent from the competition. Id. at 4-5.

Here, adequate competition was achieved since, as indicated above, the agency received 19 bids and awarded 17 contracts for 51 helicopters at prices it determined to be reasonable, which determination the protester does not dispute. The only question presented is whether the agency deliberately excluded Timberland from the competition. For the reasons set forth below, we conclude that Timberland was not deliberately excluded.

In preparing to issue the IFB, the contracting officer apparently annotated a nationwide bidders' list with asterisks and check marks indicating those firms to be solicited; on that list, Timberland's entry was checked, denoting that it was to be sent a copy of the solicitation. The annotated list was sent to a procurement assistant in El Dorado National Forest who had agreed to distribute solicitations while the contracting office was changing locations within California. Declaration of Contracting Officer ¶ 2. The procurement assistant explicitly states that she was not instructed to, nor did she intend to, exclude Timberland from the final mailing list, and explains that, in transcribing the annotated list to a format suitable for making mailing labels, Timberland's name was inadvertently dropped from the list. Declaration of Procurement Assistant ¶ 7. Timberland's submissions provide no evidence to the contrary. Rather, after a review of this information during the above-referenced June 15 conference call, Timberland submitted written comments in which it did not rebut the account of events presented by agency representatives and, instead, noted that Timberland has been receiving orders for work in Region 5 under its Region 6 contract since this protest was filed but expressed a concern that the agency might revert to a policy where all Region 5 resources will allegedly be exhausted before helicopters from Region 6 contractors are dispatched. However, that is essentially a question of contract administration which is not for consideration

by our Office. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (1999). Since the record does not contain any evidence of Timberland's deliberate exclusion and the agency otherwise obtained adequate competition and reasonable prices, the protest is without merit. Interproperty Invs., Inc., supra, at 4-5.

The protest is denied.

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of the United States