

DECISION

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

60843

FILE: B-182977

DATE: June 30, 1975 97133

MATTER OF: Anderson & Middleton Logging Company

DIGEST:

Where high bid on timber sale was rejected because award would cause bidder to exceed export and substitution quota for calendar year 1974, award, withheld during pendency of protest, can be made in 1975 since no quota prohibition presently exists in 1975.

The instant preaward protest involves Dry County Timber Sale in the Olympic National Forest. Anderson & Middleton Logging Company (A&M) was the high bidder at the sale. However, its bid was rejected since the Forest Service believed that an award to A&M would be in violation of the timber export and substitution restriction contained in 36 C.F.R. § 221.25 (1974).

36 C.F.R. § 221.25 states that:

"Unprocessed timber * * * purchased * * * from the National Forest System * * * may not be exported from the United States nor used as a substitute for timber from private lands exported by the purchaser * * *.

"* * * substitution is the purchase of timber from National Forest Systems lands to be used as replacement for timber exported from private lands. Such replacement occurs when with respect to * * * the purchaser continues to export and increases his purchase of National Forest timber * * * not to exceed 110 percent of the average annual volume purchased or exported in calendar years 1971, 1972, and 1973."

Thus, to prevent replacement and substitution, the Forest Service will not sell to a company which is continuing to export where the company's purchase of the sale in question would cause the 110 percent of the 1971, 1972, 1973 average volume limitation to be exceeded.

A&M argues that the agency erroneously included the Dry County Sale in its projected 1974 volume. The basis for this argument lies in the fact that 1974 was the only year of the timber auction for the Dry County Sale. However, it is argued that A&M would not have acquired title to the timber until the timber is cut, removed from the sale area, scaled and paid for. These steps would not have taken place in 1974 and, accordingly, under this view, A&M would not have exceeded the 110-percent limitation for 1974 and would have been entitled to award. As A&M states in its protest dated and received here in 1975:

"* * * There is no contention by the Forest Service that Anderson & Middleton is ineligible for an award of a national forest timber sale contract in calendar 1975. Nor does any reason appear why Anderson & Middleton's high bid may not now be accepted."

The Forest Service argues that whether A&M is eligible for award in 1975 is irrelevant since the Dry County Sale was advertised in 1974 and is thereby subject to the quotas for 1974 for that is also the year in which award was to have been made. The agency further states that:

"It is true that since January 1, 1975, the A.M.Co. has been free to purchase National Forest timber against its calendar year purchase limitation. However, for two reasons, we do not consider a suggestion for award of the Dry County sale to be a viable nor ethical solution to the A.M.Co. protest. On November 13, 1974, the Regional Attorney determined that award of the sale to the A.M.Co. would increase its purchase of National Forest timber above its historic level in violation of 36 CFR 221.25, and that award to the A.M.Co. could be withheld pursuant to 36 CFR 221.10 (a) (6). Based on such advice, the A.M.Co. bid for the Dry County Timber Sale was formally rejected.

"Subsequent to the bid rejection, action was initiated to determine whether any of the other qualified bidders for the Dry County Timber Sale would be interested in the sale at the bid offered by the A.M.Co. This action was in progress in accord with 36 CFR 221.10, but was temporarily suspended as a consequence of the protest.

"We are not aware of any procedure through which the rejected bid could be reinstated. However, if the rejection was improper, reinstatement would certainly be desirable. If the rejection in November was not improper, it would seem to follow that it would not be ethical to reinstate the bid in 1975 solely because the A.M.Co. has entered into a new calendar year quota period. Other qualified bidders would have a valid basis for protest if the delay was used as a basis for such actions."

Thus, we have a situation where a bidder was deemed ineligible for award on the basis of limitation which expired at the end of 1974. We feel that the situation in the instant case is analogous to that set out in 51 Comp. Gen. 168, 173 (1971).

There, the potential contractor was required to have a security clearance at the time set for performance. The low bidder did not have the clearance and in fact had not even applied for the clearance until 2 days before bid opening. The Navy, therefore, refused to consider the low bid. Subsequently, another bidder submitted a protest to our Office on a somewhat different ground. Award was withheld and during the pendency of the protest a question arose as to whether the bid of the original low bidder could again be considered since it had acquired the necessary security clearance.

We stated that:

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

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Moreover, B-160538, B-160540, March 24, 1967, involved a situation such as this where the protester's own good faith protest allowed it to cure its deficiency prior to award. In the instant case, the Forest Service indicates that the critical time for purposes of applying the 110-percent quota is the date when the award is made. Therefore, since there is apparently no quota prohibition against sales to A&M in 1975, there appears to be no present basis to reject its bid. Accordingly, award to A&M upon its previously rejected bid would not be improper.


Deputy Comptroller General
of the United States