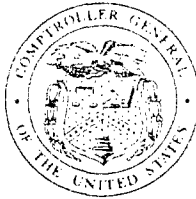


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DECISION



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

FILE: B-195810

DATE: March 7, 1980

MATTER OF: Hudspeth Sawmill Company

DIGEST:

[Protest concerning agency's cancellation of timber sale] will not be considered since agency's statutory right to cancel is currently before court of competent jurisdiction as result of suit by protester.

This protest concerns the propriety of the Forest Service's cancellation of the "No-Name Cabin Timber Sale." On September 7, 1978, the date of bid opening, Hudspeth Sawmill Company (Hudspeth) submitted a bid at a price equal to the solicitation's stated minimum acceptable bid price of \$462,431. Since it was the only bid received, customary oral auction was waived and Hudspeth was declared the high bidder.

In order for a purchaser to harvest and remove timber from a sale area, roads must often be built in the area. Forest Service regulations allow "purchaser road credits" (amounts allowed as credit by the Forest Service to a purchaser to reduce the amount owed for the timber harvested) for this purpose. See 36 C.F.R. Part 233 (1979). Additionally, the National Forest Management Act of 1976, 16 U.S.C. § 472a(i) (1976), and its implementing regulation permit small business purchasers of timber to elect to have the Forest Service construct the necessary roads. See 36 C.F.R. § 223.5 and 223.7 (1979).

In its bid, Hudspeth elected to have the Forest Service build the roads required. Accordingly, the Forest Service proceeded to advertise for bids for the road construction. Although 162 firms were solicited, only one bid was received at \$837,296.36 which exceeded the Forest Service's estimate by 54 percent and which was therefore considered unreasonable and rejected. After exchange of correspondence, the Forest Service, on January 12, 1979, notified Hudspeth that unless it rescinded within 120 days its election to have the Forest Service build the roads and accepted the road construction requirements itself, the timber sale would be canceled.

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Prior to the May 5, 1979 deadline for rescission of its election, Hudspeth filed suit in the United States District Court for the District of Columbia, Civil Action No. 79-1179, seeking declaratory and injunctive relief to restrain the Forest Service from canceling the sale unless Hudspeth agreed to build the roads. Essentially, Hudspeth's suit contended that it had a statutory right as a small business to elect to have the Forest Service build the roads and that the Forest Service regulations under which the agency could condition the award of a sale upon receipt of a satisfactory road bid were inconsistent with the underlying statute.

The parties agreed during the pendency of the judicial proceedings that the Forest Service would take no action with respect to the sale. On June 13, 1979, the Federal District Court dismissed Hudspeth's suit with prejudice. Hudspeth's appeal from this dismissal is now pending in the United States Court of Appeals for the District of Columbia Circuit. }

Subsequent to the District Court's decision, Hudspeth attempted to work out some type of an agreement staying any Forest Service action with respect to the sale until the conclusion of Hudspeth's pending appeal. On July 20, 1979, Hudspeth notified the Forest Service that it was rescinding its election and would agree to construct the roads required thus, according to Hudspeth, "removing the only impediment to award that ever existed." On August 13, 1979, the Forest Service notified Hudspeth that it was canceling the sale. Hudspeth then filed this protest with our Office.

Hudspeth argues that with its rescission of its election to have the Forest Service construct the roads, no compelling reason exists to cancel the sale, citing The Intermountain Company, B-182794, July 8, 1975, 75-2 CPD 19 and Lakeside Corporation; McGrew Brothers Saw Mills, Inc., B-194471, August 2, 1979, 79-2 CPD 75. In this regard

Hudspeth contends that the cancellation was a retaliatory measure taken against Hudspeth because it chose to exercise its legal rights. The Forest Service argues that the matter has and is currently being litigated, that Hudspeth's 120-day period for rescission of its election had expired, and that to allow that firm to rescind now would be unfair since it has had since September 1978 to carefully observe the market with a "cost free option".

It is undisputed that Hudspeth's appeal from the District Court's decision is currently pending and that a decision by the Court of Appeals in its favor (holding that Hudspeth has a statutory right to elect to have the roads constructed by the Forest Service) would moot the entire basis of this protest. Stated somewhat differently, it is arguably entirely within the authority of the Court of Appeals to vindicate the protester and direct award of the sale to it.

While the issue of Hudspeth's rescission of its election was not specifically before the District Court, it is so closely related to the subject matter of the suit that we do not believe our Office should interject itself, through an unsolicited decision, in the currently ongoing judicial proceeding. See Dyneteria, Inc; Jets, Inc. B-194279, B-194284, August 1, 1979, 79-2 CPD 70, and § 20.10 of our Bid Protest Procedures, 4 C.F.R. Part 20 (1979). The issue may, however, be appropriate for future consideration by this Office depending on the outcome of the protester's suit.

The protest is dismissed.

Harry R. Van Cleave
for Milton J. Socolar
General Counsel