

Matter of: Collins Pine Company

File: B-261250

Date: September 7, 1995

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Gerald Bendix for Hi-Ridge Lumber Company; and James A. Zito, Esq., Dun & Martinek, for Sierra Pacific, interested parties.

Lori Polin Jones, Esq., Department of Agriculture, for the agency.

Behn Miller, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency's refusal to extend bid opening date precluded purchasers from bidding equally and intelligently for timber sale requirement is denied where: (1) agency reasonably was concerned that delaying the bid opening date might jeopardize forestry research project milestones; and (2) despite lack of physical access to the timber site, agency provided best available estimates--and access to the information upon which these estimates were based--from which all purchasers could reasonably prepare their bids, particularly given their timber harvesting expertise.

DECISION

Collins Pine Company protests the opening of bids under a timber sale solicitation, issued by the Forest Service, Department of Agriculture, for the harvest of various areas of timber in the Blacks Mountain Experimental Forest located in Susanville, California. Collins protests the Forest Service's refusal to extend the bid opening date to permit Collins and other prospective purchasers to physically inspect the timber sale site. Collins argues that heavy snowfall in the months prior to bid opening barred potential bidders from inspecting the site, and without a site inspection, it could not intelligently prepare its bid or compete on an equal basis with at least one of the other potential bidders for this requirement.

We deny the protest.

BACKGROUND

The Requirement

The timber sale at issue here is required as part of a large-scale, long-term interdisciplinary research project in the Blacks Mountain Forest that will provide information necessary to evaluate ecosystem management processes, particularly as these processes relate to old growth forests.¹ The solicitation provided that the timber sale would be conducted as a sealed bid/oral auction procurement and contemplated the award of a 3-year contract. Under the Forest Service's sealed bid/oral auction procedures, the submission of a qualifying sealed bid is a prerequisite to participation in the subsequent oral auction. 36 C.F.R. § 223.88(b) (1994); Fort Apache Timber Co., B-237377, Feb. 22, 1990, 90-1 CPD ¶ 199. The solicitation set forth estimated volume quantities for various species of available timber, and required purchasers to bid a minimum lump-sum amount--\$3,929,156.49--for the total timber harvest. The solicitation also contained a construction requirement for repairing approximately 52 miles of existing road and building 2 miles of new road to access the various timber sites; bidders were to include the cost of this construction in their total bid prices.

To qualify for the oral auction after the bid opening, purchasers were required to bid at least the minimum lump-sum amount, and to provide a properly executed bid guarantee and other certifications required by the solicitation. In a sealed bid/oral auction procurement, once written bids are opened, the highest bid amount is then posted and used as the minimum bid amount for the subsequent oral auction.

Because of the limited harvesting season in the Blacks Mountain Forest, extensive efforts were made by the Forest Service early in the procurement process to inform prospective timber purchasers about the timber sale. On August 8, 1993, the Forest Service held a timber sale planning meeting in Quincy, California, which Collins attended; at this meeting, the agency distributed information about the upcoming Blacks Mountain Forest timber sale, including preliminary timber volume estimates and site locations. On December 16, the Forest Service held a second information meeting in Susanville, California; it held a

¹The Forest Service reports that research under this project will increase understanding of the basic biology and ecology of forests, and will provide information on sustaining forest productivity and protecting inherent biological diversity.

third meeting in Redding, California on April 21, 1994. At each meeting, prospective purchasers were furnished with estimated timber volume quantities, site locations, and a Forest Service contact available to provide additional information about the sale.²

In October 1994, the agency flagged and marked the site where the new road was required to access some of the available timber; by November 18 of that year, the marking of all timber designated for the Blacks Mountain Forest sale was completed. On December 13, the Forest Service synopsisized the timber sale in the Lassen County Times, advising the public of the sale site, and prospective timber quantity estimates. The synopsis also advised prospective purchasers that "[i]nformation and maps concerning the proposed sale" could be obtained at the Forest Service offices in Susanville, California.

On February 28, 1995, the Forest Service resynopsisized the Blacks Mountain Forest timber sale in the Lassen County Times with increased timber estimates, as well as an estimate for the construction requirement. According to the second synopsis, bid opening was scheduled for April 3, 1995; bidders were also advised that in addition to a prospectus about the sale, "[c]omplete information concerning the timber, conditions of sale and submission of bids is available to the public" from the Susanville, California Forest Service offices.

Although the timber sale solicitation and corresponding prospectus set forth estimated volume quantities for each timber species harvest, both documents specifically disclaimed any warranty by the Forest Service as to the accuracy of these estimates. Specifically, the solicitation contained a "Disclaimer of Estimates" clause, a standard Forest Service provision, which requires bidders to warrant that the bid was based on an "examination and inspection of the quality and quantity of the timber offered for sale" without reliance on the solicitation's estimates. The accompanying timber sale prospectus similarly urged prospective purchasers "to examine the timber sale and to make their own estimates" and warned that "[e]stimated quantities in the [solicitation] are not guaranteed."

Requests for Bid Opening Date Extension

By March 25, as a result of heavy snowfall which prevented physical access to most of the timber sale area, the Forest

²The Forest Service also gave radio interviews and conducted media tours in an effort to apprise the public about this sale.

Service received two requests--including one from Collins--to postpone bid opening until the site area could be inspected. On March 31, the Forest Service extended bid opening from April 3 to April 17--and later to May 1. Notwithstanding these extensions, heavy snowfall continued to prevent Collins and other prospective purchasers from visiting the sale area to inspect the trees. Consequently, on May 1, shortly before the bid opening deadline, Collins protested that bid opening be postponed until purchasers could inspect the timber sale site. When the contracting officer denied Collins' agency-level protest and refused to extend the bid opening date, Collins filed this protest at our Office.

When bids were opened the Forest Service received the following purchase prices:

Collins	\$3,929,156.49
Big Valley	\$3,929,157.00
Sierra Pacific	\$3,930,000.00
Hi Ridge	\$4,000,000.00

After bid opening, the results of the subsequent oral auction were

Collins	\$5,547,000.00
Big Valley	\$7,051,000.00
Sierra Pacific	\$7,411,000.00
Hi Ridge	\$7,410,000.00

As a result, the agency identified Sierra Pacific, the highest bidder, as the intended awardee.

PROTESTER'S CONTENTIONS

Collins contends that the agency's failure to extend the bid opening date to permit inspection of the timber sale site violates the National Forest Management Act, which requires the Forest Service to use bidding methods that "insure open and fair competition." 16 U.S.C. § 472a(e)(1)(A) (1994); 36 C.F.R. § 223.88(a)(1). Collins maintains that because it has not been able to inspect the sale area, it cannot meaningfully compete "because it cannot bid as high as it otherwise might." In this regard, Collins asserts that without a site inspection to evaluate or verify the estimated quantities set forth in the solicitation, purchasers run the risk of overpaying the Forest Service for an overestimated quantity of timber. Collins also contends that the agency must postpone bid opening because another purchaser/bidder--Sierra Pacific--has an improper competitive advantage given its greater familiarity with the sale site area.

DISCUSSION

Collins does not argue or otherwise suggest that the Forest Service has prepared the timber quantity estimates arbitrarily, or in bad faith. Rather, the protester contends that without a site inspection the solicitation imposes an undue risk on prospective purchasers--i.e., Collins argues that without the ability to physically "cruise" the site, it cannot ascertain the accuracy of the Forest Service's timber volume estimates.³

While, as a general rule, a procuring agency must give sufficiently detailed information in a solicitation to enable bidders to compete intelligently and on a relatively equal basis, there is no requirement that a solicitation be so detailed as to eliminate all performance uncertainties and risks. KCA Corp., B-236260, Nov. 27, 1989, 89-2 CPD ¶ 498. In fact, we have consistently recognized that there is some amount of risk present in any procurement, and offerors are expected to use their professional expertise and business judgment in taking these risks into account in computing their bids and offers. LBM Inc., 70 Comp. Gen. 493 (1991), 91-1 CPD ¶ 476; Neil Gardis & Assocs., Inc., B-238672, June 25, 1990, 90-1 CPD ¶ 590.

We conclude that the Forest Service decision to proceed with the sale here was reasonable under the circumstances. The record shows that, after extensive efforts beginning in 1993 to inform prospective bidders of the sale, the Forest Service twice extended the bid opening date in response to requests for additional time to inspect the sale site. When--given its concern about the impact of further delay on

³Within the timber industry, the value and volume of standard timber is determined by means of a timber appraisal procedure referred to as "cruising." Using one of several standard cruising methods, the timber seller and purchaser derive tree volume estimates which serve as the basis for subsequent soliciting, bidding, and payment on timber sales. Because the Forest Service and the timber purchaser frequently rely on different cruising methods, the timber volume estimates derived by each party can reasonably differ. In addition, because of the volume of forest typically involved, most cruising methods measure only a sample of trees, and from the sample, a total estimate of volume is extrapolated. Since estimated timber volume often varies from the actual timber harvested due to differences in tree density, incidence of disease, or age, the Forest Service relies on the disclaimer and inspection provisions referenced above to apprise timber purchasers of potential discrepancies and variations between the agency's estimated timber quantities and the actual volume of timber.

the Blacks Mountain Forest project--the Forest Service then decided to proceed with bid opening, it made available sufficient information to permit meaningful competition under the circumstances. Purchasers were given access to the data used by the Forest Service in calculating each of the timber volume estimates and the road construction estimate. In addition to disseminating information and agency contact points at the series of informational meetings, paragraph 4 of the timber sale prospectus, "TIMBER VOLUMES AND RATES," specifically provided that "[t]he quality, size, and age class of the timber are estimates based on detailed cruise information on file and available for inspection at the Forest Service offices listed within the advertisement."

Since prospective purchasers could have used the raw cruising data to adequately--if perhaps not optimally--evaluate the accuracy of the Forest Service's timber estimates, we conclude that bidders should have been able to formulate a bidding strategy for competing intelligently and equally on this requirement.⁴ In reaching this conclusion, we note that each of the competitors under this procurement is a seasoned timber company, and each is familiar with Forest Service sales in the vicinity of the Blacks Mountain Forest. As such, each of the competitors is familiar with potential variances between agency timber quantity estimates and actual harvest volumes. Thus, we see no reason why the risk of bidding without physically cruising the timber site could not be alleviated by building such considerations into the offered purchase price.⁵ See Bean Dredging Corp.,

⁴For example, we note that Sierra Pacific and several other bidders requested additional information from the Forest Service regarding this sale and reviewed the cruising data.

⁵Collins also suggests that the solicitation's standard disclaimer clause indicates that the government's estimate may not be reliable. Despite the apparent intent of such a disclaimer to limit the exposure of the government in cases where a timber estimate proves unreliable, our review shows that these disclaimers have been narrowly interpreted when conditions exist that suggest their application would be unfair--such as including a significant mistake in the estimate. See K & K Logging, Inc., Agriculture Board of Contract Appeals (AGBCA) No. 85-271-3, Oct. 17, 1985, 85-1 BCA ¶ 18,487; Bohemia, Inc., AGBCA No. 82-242-3, Dec. 7, 1982, 83-1 BCA ¶ 16,157. While we are aware of no timber sale case where a bidder or offeror challenged the estimate on the basis that it was unable to inspect the site itself, a contractor's reliance on such estimates--despite a disclaimer, and despite a contractor's duty to perform its

(continued...)

B-239952, Oct. 12, 1990, 90-2 CPD ¶ 286; Neil Gardis & Assocs., Inc., supra.

To the extent Collins asserts that Sierra Pacific will obtain contract award as a result of an improper competitive advantage, the record simply does not support this contention. The record shows that shortly after attending the December 1994 Forest Service meeting in Susanville, California, and prior to the release of the solicitation, Sierra Pacific began inspecting and conducting its own cruise of the prospective timber site. Although the protester now contends that this initial site visit gave Sierra Pacific an improper competitive advantage, and that the Forest Service must equalize the advantage by postponing bid opening to permit Collins to inspect the site, we conclude that the Forest Service is under no requirement to equalize this aspect of the competition.

The competitive advantage allegedly enjoyed by Sierra Pacific's site visit did not result from any agency preference or other unfair treatment by the Forest Service. Rather, all prospective purchasers--including Collins--were furnished with the same information about the upcoming sale, and any one of the prospective purchasers could have performed the same kind of presolicitation inspection of the site. Both Collins and Sierra Pacific are experienced timber contractors; however, the protester chose not to exercise the same initiative as Sierra Pacific and inspect the sale area prior to issuance of the solicitation. Thus, any competitive advantage enjoyed by Sierra Pacific in this procurement resulted only from an exercise of that firm's business judgment, and not from any preference or other

⁵(...continued)

own inspection--has been permitted if a reasonable inspection would not have disclosed the discrepancies. Marmot Constr. Works, Ltd., AGBCA No. 82-131-3, June 21, 1982, 82-2 BCA ¶ 15,863; Willamette Timber Sys., Inc., AGBCA No. 77-112-4, 80-2 BCA ¶ 14,751. Accordingly, we see no basis to conclude that where, as here, conditions prevent site inspection, mere inclusion of the standard disclaimer clause precludes reliance on the government estimate.

unfair action by the government. The Forest Service was under no obligation to equalize any competitive advantage enjoyed by Sierra Pacific as the result of its own efforts. See Continental Lumber Co., Inc., B-258330, Jan. 9, 1995, 95-1 CPD ¶ 12.

The protest is denied.

/s/ Christine S. Melody
for Robert P. Murphy
General Counsel