

10,908

Proc I

**DECISION**



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

**FILE:** B-194471

**DATE:** August 2, 1979

**MATTER OF:** Lakeside Corporation; McGrew  
Brothers Saw Mills, Inc.

**DIGEST:**

Where eventual high aggregate bidder decreased price on one timber species (but not below written price bid) during oral auction contrary to provision in Forest Service Manual, since this did not prejudice other bidders and rejection of all bids and resolicitation would not benefit competition, award, if otherwise proper, should be made to high bidder.

The Forest Service, Winema National Forest (Region 6), conducted a timber sale on March 19, 1979. On that date, the written bids received on the sale were opened and immediately thereafter a sales auction was conducted among those bidders who had submitted acceptable written bids and who desired to participate in the auction. Eight bidders submitted written bids; three of those bidders participated in the auction. During the auction, McGrew Brothers Saw Mills, Inc. (McGrew), decreased its bid price on one of the three timber species being offered, although the decrease was not below its original written bid price and the resulting McGrew aggregate price on all three species was greater than the previous aggregate price it had bid. This change was remarked upon at that time, but when the auction participants were asked if they objected to this manner of bidding no objections were made. At least once during the later bidding another firm decreased its bid price on one species, and again no objections were raised. McGrew eventually won the auction by submitting the highest aggregate price for all three species.

On March 23, the Lakeside Corporation (Lakeside), a bidder who had not participated in the auction portion of the procurement, protested against the award of any contract because of [alleged improper bidding procedures] The reason



~~206026~~

for the protest is a provision (§ 2431.59--2, Title 2400) in that portion of the Forest Service Manual specifically regarding timber sales in the Pacific Northwest Region (in which the Winema National Forest is located) which reads:

"An oral auction bid cannot be accepted unless it results in a higher total bid than the previous bid. Even though his total bid may be higher than the previous bid, a bidder may not reduce his bid for a species or species group while raising the bid on another species or species group."

McGrew has entered a counter protest against the cancellation of the sale.

The Forest Service has made no final decision on the issue. It does believe for three reasons that it has the authority to reject all bids under the circumstances and to resolicit the sale. First, it is believed that under 36 C.F.R. § 223.7(a) (1978) the Secretary of Agriculture (and, through a delegation, the Regional Forester) has the authority to reject all bids on timber sales as long as the rejection is not arbitrary or capricious. Second, the Forest Service Manual, while not having the force of law, must be given substantial weight and to ignore its rules on oral auctions would make these rules meaningless. Finally, it is believed that to permit bidding in the manner that occurred here would be prejudicial to other bidders since it could create confusion in the bidding process.

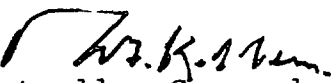
As regards the first contention, the cancellation of all bids and the resolicitation of a procurement may be done only if a compelling reason for such a course of action exists. The Intermountain Company, B-182794, July 8, 1975, 75-2 CPD 19. As regards the second and third contentions of the Forest Service, namely, the reasons which are to constitute that "compelling reason," we do not believe these are sufficient to permit cancellation in this instance. To constitute a compelling reason, there should be a showing that (1) bidders were prejudiced by the defective procedure and (2) competition was affected. Dickson Forest Products, Incorporated, B-191906(1), November 1, 1978, 78-2 CPD 314.

As regards the latter factor, the manner of bidding adopted here had no affect on competition--it did not stop participation in the auction and it was not objected to by the participants. In fact, as noted above, another of the three participants in the auction later followed McGrew's procedure. The third participant recognized the procedure as the kind used in California. The final rounds of the auction finished with the participants bidding increasing prices. Thus, it is not apparent that the manner of bidding was confusing to any of the participants or that any bidder did not have an opportunity to offer an intended bid.

As regards the first factor, for the reasons stated above, no prejudice to bidders occurred. Further, McGrew submitted the highest written and oral bid. If any potential prejudice exists, it would be the prejudice that would result to McGrew if all bids were rejected and the sale were resolicited after McGrew was successful in the prior auction. While we appreciate the concern of the Forest Service in having its auction policy followed, to do so in this case at this time would be emphasizing form over substance.

Therefore, if the McGrew bid is otherwise acceptable, award should be made to McGrew.

Accordingly, the McGrew protest is sustained and the Lakeside protest is denied.

  
Deputy Comptroller General  
of the United States.