



Comptroller General
of the United States

PR

Washington, D.C. 20548

Decision

Matter of: Bordges Timber--Reconsideration

File: B-239797.3

Date: February 7, 1991

David C. Becker, Esq., Combellack, Driscoll and Runkle, for the protester.

Rhea Daniels Moore, Esq., Department of Agriculture, for the agency.

James M. Cunningham, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of dismissal of protest against cancellation of timber sale as academic is denied where protester is not entitled to award under the initially canceled sale both because the scope of the requirement has materially changed and because the agency properly canceled sale after bid opening because erroneous agency advice and a deficient solicitation had impeded competition.

DECISION

Bordges Timber requests reconsideration of our September 12, 1990, dismissal of the company's protest against a decision by the Forest Service, Department of Agriculture, to cancel a solicitation for the Refuge Insect Salvage Timber Sale in the Stanislaus National Forest, Sonora, California.

We deny the request for reconsideration.

The original prospectus was for the sale of an estimated 729,000 board-feet of timber for which there was expected to be some insect deterioration, without any specific estimate by the Forest Service as to the extent of the deterioration. The prospectus noted that log export and substitution restrictions applied and required bidders to evidence agreement to be bound to these restrictions by submitting with their bids a "signed certification" on Forest Service Form FS-2400-43, which was to be "provided as part of the bid packet." However, because of Forest Service's error, this form was not included in any of the bid packages. The omission of the form was first brought to the Forest Service's attention on May 14, 1990, the day prior to bid opening, when an employee of the Michigan-California Lumber Company (MCLC) told the Forest

Service that the required form was missing from the bid package, and that he believed the form was necessary in order for his bid to be considered. In response, a Forest Service employee told the MCLC representative that the form "would not be needed and that the bid would be accepted without it." Shortly before bid opening, a _____ another prospective bidder, was given similar advice by the Forest Service in response to a request for a copy of the form in order to complete his bid package. Acting pursuant to this advice, MCLC and _____ did not submit an SF-43; additionally, five of the other bidders failed to submit this form with their bids which were opened on May 15, 1990. Only Bordges, the third highest bidder, submitted a bid with the executed SF-43 which the company had obtained from a previous sale.

The Forest Service subsequently determined that an executed SF-43 was required by Forest Service regulation, 36 C.F.R. § 223.87 (1990), in order to have a bid considered for a sale of timber from National Forest System lands. Because of the express representations made to MCLC and Mr. Rodriguez prior to bid opening and the omission of SF-43 from all but one of the bids received, the Forest Service determined to reject all bids shortly after bid opening in an "attempt to prevent any arbitrary action detrimental to the . . . competitive bidding system."

Bordges initially protested that the sale should not have been canceled but rather that an award should have been made to Bordges as the highest, responsive bidder. While Bordges' initial protest was pending before our Office, the Forest Service informed us on September 11, 1990, that it could not await our decision on the protest. Specifically, the Forest Service stated that the sale timber had incurred a "significant amount" of bark beetle damage and that there was a "tremendous likelihood of even further deterioration of the remaining timber" should the Forest Service not be able to solicit and award a contract for the timber prior to October 3, 1990, the expected date for our decision on Bordges' initial protest, which was also the end of the "normal operating season" for logging at that location. Consequently, in order to protect its interest in the timber, the Forest Service stated that it was planning to re-offer (without waiting for our decision) the remaining timber (approximately 350,000 board-feet), which, in the Forest Service's view, now constituted a "different sale" from that originally described.

Upon receiving the Forest Service's statement of this new basis for canceling the original sale and making an award prior to the expected date of our decision on Bordges' initial protest, we dismissed Bordges' initial protest as academic on September 12, 1991.

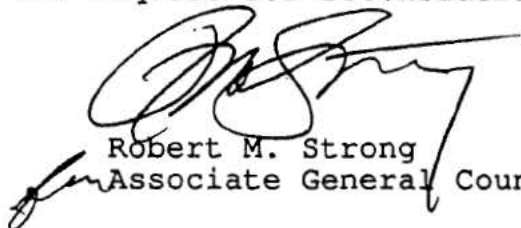
In its reconsideration request, Bordges essentially argues that the Forest Service's justification for an urgent award prior to October 3, 1990, was not well-founded as evidenced by the fact that the Forest Service did not accomplish an award under a new sale prior to October 3. The Forest Service reports that the resale was delayed past the originally expected date of October 3, 1990, in part because the Forest Service had to determine how much of the original timber was still available for sale and to "comply with environmental laws." Since unusual weather, which was relatively mild and dry, still permitted logging, the Forest Service states that in early December it did readvertise the remaining timber (about 350,000 board feet). This timber was offered together with additional new parcels of timber (about 1,700,000 board feet in all), in order to make the resale (split into two separate sales) "desirable and economical."

The Crux of Bordges' argument is that it is entitled to an award under the initial sales prospectus. In fact, apparently because of the continuing insect damage, at the time that the resolicitation was issued less than half of the original timber remained salvageable, and it was necessary for the Forest Service to combine this residuum with other substantially larger timber parcels in order to effect the sale. Thus, the agency's needs were substantially different than they had been under the initial solicitation. The need to change requirements after bid opening in order to properly express the agency's minimum needs constitutes a compelling reason which justifies cancellation. Instrument & Controls Serv., Co., B-231934, Oct. 12, 1988 88-2 CPD ¶ 345. Accordingly, the agency's September 5 decision to cancel and resolicit was proper.

In addition, we do not believe that Bordges suffered any prejudice here since the Forest Service's original decision to cancel also appears to have been proper. Bidder completion of the SF-43 is required under timber sales in order for a bid to be considered responsive. Fort Apache Timber Co., B-237377, Feb. 22, 1990 90-1 CPD ¶ 199. Where, as a result of the Forest Service's omission of this form from the sales prospectus, only one of several bidders submitted an executed form, we have held that cancellation of the prospectus was proper. Intermountain Co., B-182794, July 8, 1975 75-2 CPD ¶ 19. Further, here the agency's erroneous and misleading advice to two bidders (one of which, MCLC, was the high bidder) served to mislead the bidders. As a result of the misleading advice and the omission of the form from the bid packages, only one responsive bid was received. Under these circumstances, we find that the agency properly determined that competition had been undermined, and it was appropriate to cancel rather than make an award under circumstances which

would have been detrimental to the competitive bidding system.
See Nootka Env't'l, Sys., Inc., B-229837, Apr. 25, 1988, 88-1
CPD ¶ 396.

The request for reconsideration is denied.



Robert M. Strong
Associate General Counsel