



Decision

Matter of: Timbered Rangeland Management, LLC

File: B-418424

Date: April 15, 2020

Bret Daugherty, for the protester.
Lori Polin Jones, Esq., U.S. Department of Agriculture, for the agency.
Christine Milne, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest that the agency violated timber sale bidding regulations by allowing a bidder to participate in an oral auction via telephone is denied where the agency reasonably applied its discretion in determining to allow such participation, which also enhanced competition and the fair market value of the sale to the government.

DECISION

Timbered Rangeland Management, LLC, of Ellensburg, Washington, protests the circumstances surrounding its award of a timber sale contract under solicitation No. 13302, issued by the U.S. Department of Agriculture, Forest Service, for an approximate volume of 6,874 cubic feet (CCF) of timber to be cut and sold, and biomass to be removed, in the Okanogan-Wenatchee National Forest in Washington. The protester primarily argues that the agency improperly allowed another firm to participate in the oral auction via telephone.

We deny the protest.

BACKGROUND

The solicitation for this timber sale was advertised in a local newspaper and via letter sent to prospective bidders on December 21, 2019. Agency Report (AR), Tab 3, Newspaper Advertisement, at 27-28; Tab 4, Letter to Prospective Bidders, at 29. The advertisement and letter provided that the agency would receive sealed and oral bids in public on January 21, 2020, at the Wenatchee Forest Supervisor's Office at 10 a.m. Pacific Time. *Id.* at 29. Two sealed bids were received on the day of the oral auction; one from Timbered and one from Gibson and Son Road Building, Inc. Contracting

Officer's Statement (COS) at 1. The owner of Timbered, and an employee of Gibson, were present to hand in the sealed bids and participate in the oral auction. *Id.*

The contracting officer consulted the bid authority binder to confirm whether the individuals present were authorized to bid in the oral auction. *Id.* He determined that the Gibson employee was not authorized to bid on behalf of Gibson and so informed her. The employee asked that Gibson's owner be permitted to bid on behalf of Gibson via speaker phone on her cell phone during the oral auction. *Id.* at 1. Timbered's owner objected, asserting that bidding this way was not allowed. *Id.* at 3. The contracting officer left the room to call the regional claims forester and discuss whether bidding over an electronic device, such as a cell phone, should be permitted. The contracting officer and the regional claims forester decided that it was acceptable for Gibson's owner to bid over speakerphone and the bidders were informed of this decision. Timbered's owner repeated his earlier objection. *Id.* at 1. The Gibson employee then called the firm's owner who announced himself over the phone by name and affiliation, and the contracting officer confirmed that he recognized the voice of Gibson's owner. *Id.*

Two of the agency's timber resource specialists opened the sealed bids to review their contents and confirm the required documents were included. *Id.* While reviewing Timbered's bid, the contracting officer discovered that box eight on page one of the bid form was left blank; the box required a checkmark for whether the "type of bid" was sealed or oral. *Id.* at 3; AR, Tab 8, Timbered Sealed Bid Form, at 197. While reviewing Gibson's bid, the contracting officer discovered that box 16 on page two of the bid form was left blank; the box required a checkmark for whether the bidder was a "[m]anufacturer or [n]on-manufacturer of sawtimber." COS at 3; AR, Tab 9, Gibson Sealed Bid Form, at 204. The contracting officer concluded that these two omissions were minor informalities and not grounds to reject the bids as nonresponsive. COS at 3. Both bids were found responsive and the oral auction commenced. *Id.* at 1. Both sealed bids set forth the minimum required bid of \$0.25/CCF, and the sale was bid up to \$32.51/CCF by Timbered as the apparent high bidder. *Id.* at 2.

After being declared the apparent high bidder, Timbered's owner objected a third time to the oral auction, asserting that it was improper for Gibson's owner to have bid over the phone and stated that he intended to file a bid protest. *Id.* He was provided the regional claims forester's contact information and he then signed the auction record. *Id.* at 3. The contracting officer called Gibson's owner shortly after the end of the oral auction to confirm that he did in fact bid over the phone for Gibson.¹ *Id.* at 2. The contracting officer then realized that Timbered's owner had not signed his bid form to confirm his winning bid in writing and arranged to meet him the following day to do so. *Id.* at 3. On January 24, Timbered filed this protest.

¹ On their telephone call, Gibson's owner advised the contracting officer, "I wasn't aware that [the employee] couldn't bid on the sale. I wasn't prepared to bid over the phone." COS at 2.

DISCUSSION

Timbered alleges that Gibson's sealed bid was non-responsive, that the agency improperly allowed Gibson to bid in the oral auction over the phone, and that the agency failed to consider evidence of collusion. For the reasons discussed below, we deny the protest.

Sealed Bid Omissions

Timbered asserts that Gibson's sealed bid was non-responsive for two reasons: (1) because no one authorized to bid on behalf of Gibson was present at the time sealed bids were delivered and opened; and (2) because the box on Gibson's bid form regarding manufacturer status was left unchecked.² Protest at 1-2. The agency contends that Gibson's bid was responsive because a signatory of a sealed bid is not required to be present at the sealed bid opening and because the contracting officer determined that the unchecked box on the firm's form was a minor informality the agency could waive in accordance with the Forest Service Handbook (FSH) 2409.18 Ch. 60, 62.22 and Federal Acquisition Regulation subpart 14.405. Memorandum of Law (MOL) at 7 n.5; COS at 3-4. Timbered did not respond to these arguments in its comments, and therefore we consider the firm to have abandoned these arguments and will not consider them further. *Yang Enterprises, Inc.*, B-415923, Mar. 12, 2018, 2018 CPD ¶ 109 (argument considered abandoned where not renewed following the agency's response).

Oral Auction

Timbered argues that Gibson should not have been allowed to bid over the phone because an oral bid does not authorize the use of an electrical or digital device. The firm asserts that bidding electronically should not have been allowed because it is not expressly permitted by the bid documents, advertisement, or the FSH. Protest at 2; Comments at 2-3. Timbered also argues that no one can prove that the voice heard over the phone was in fact that of Gibson's owner, and the contracting officer's verification of the voice was inappropriate. Protest at 2; Comments at 2. The firm also argues that the apparent high bidder must be present to immediately confirm the winning oral bid in writing and Gibson's owner would not have been able to do so here had Gibson been the apparent high bidder. Protest at 2.

The agency asserts that the sealed bid opening and oral auction were conducted in accordance with the bid documents, Forest Service policy, and insured a fair and open competition that resulted in the government receiving at least fair market value for the timber. AR, MOL, at 8. The agency states that nothing in the bid forms, prospectus, instructions to bidders, or Forest Service policy prohibited the contracting officer from allowing Gibson's owner to participate over the phone and that GAO has recognized an agency's discretion to set the terms of an oral auction. *Id.* at 7. The agency asserts

² Timbered's sealed bid suffered from a similar omission and was found responsive.

that Timbered merely wants to have been awarded the contract at its original, significantly lower, bid price. Agency Response to Comments at 3.

The agency next argues that the contracting officer had a long-standing working relationship with Gibson's owner, had spoken to him over the phone numerous times, and could recognize his "distinctive" voice. MOL at 7; COS at 5. The agency states that whether Gibson's owner had been physically present in the room or competed via phone as he did, the result here would have been the same. Agency Response to Comments at 3. Finally, the agency notes that while Gibson's owner was not physically present to sign an apparent high bid, there are other circumstances where the apparent high bidder may not be able to sign immediately, for example, if an apparent high bidder is determined to be nonresponsive or is rejected on responsibility grounds. *Id.* at 3 n.2.

The Forest Service is directed by statute to hold timber sales using a bidding method that insures fair and open competition, and that protects the government from receiving less than fair market value. 16 U.S.C. § 472a(e)(1)(A) & (B); 36 C.F.R. § 223.88(a). To implement these requirements, the Forest Service issues administrative directives through the Forest Service Directive System. The system is made up of the Forest Service Manual (FSM) and FSHs, which codify the agency's policies, practices, and procedures. The Timber Sale Preparation Handbook, 2409.18, Ch. 60, lays out the specific processes for managing sealed and oral bidding in a timber sale.

The FSH states multiple times in different contexts that contracting officers are required to make decisions with the government's best interest in mind. See, e.g., FSH 2409.18, Chp. 60, 62.23; 62.24; 62.31. Section 62.31 of the FSH describes the oral auction procedures, and provides that "[b]efore beginning the oral auction, the sale officer shall describe the auction procedure and restrictions. . . ." FSH 2409.18, Ch. 60, 62.31. The section then provides additional guidelines for conducting the auction, some of which give the contracting officer discretion in setting recess time and the amount of time each bidder is allotted to make an oral bid. FSH 2409.18, Ch. 60, 62.31. The last sentence in the section provides: "[r]egional foresters may issue additional instructions covering oral auction procedures." FSH 2409.18, Ch. 60, 62.31. With regard to how a bidder may bid during oral auctions, there are no specific guidelines addressing whether a bidder may bid over the phone or must be physically present to bid. See FSH, 2409.18, Ch. 60, 62.31.

While the contracting officer could have refused to allow Gibson to bid via phone, *Sierra Pacific Industries*, B-248492, Aug. 12, 1992, 92-2 CPD ¶ 101, he was not required to do so. Here, we have no basis to question the reasonableness of the contracting officer's decision to allow Gibson to bid because we conclude that the process created fair and open competition and insured that the government would receive above fair market value, as the bid price went up from \$0.25/CCF to \$32.51/CCF as a result of Gibson's participation. *Sierra Pacific Industries*, supra; *Dickson Forest Products, Inc.*, B-191906, Nov. 1, 1978, 78-2 CPD ¶ 314. Gibson's participation was therefore clearly in the government's best interest.

The FSH does prescribe that only an authorized person may bid on behalf of a bidding party. There is no dispute that Gibson's owner was authorized to bid on behalf of Gibson. Given that the contracting officer has worked with Gibson's owner for several years and is confident in his ability to recognize this individual's "distinctive" voice, we have no basis to find the contracting officer's confidence in his own recognition unreasonable. Further, Gibson's owner spoke to the contracting officer immediately following the oral auction to express his surprise at bidding over the phone because he had not planned to do so and was unaware that his employee could not bid, thereby confirming that he did in fact participate in the oral auction.

We note the protester's concern that had Gibson's owner been the apparent high bidder, he would not have been physically present to confirm his oral bid in writing. The FSH requires that the bid be confirmed "immediately" in writing, but does not provide a definition of immediately. FSH 2409.18, Ch. 60, 62.31(7); AR, Tab 6, Bid Form at 42. Because Mr. Gibson was not the apparent high bidder, we need not attempt to define "immediately" here.³

Collusion

Finally, Timbered argues that allowing Gibson's owner to bid over the phone could have facilitated collusion or collusive behavior and, because of this risk, electronic bidding should not have been allowed. Comments at 3. The agency responds that the protester has not shown any evidence that collusion actually occurred or who Gibson's owner would have colluded with, since Timbered and Gibson were the only two companies to submit sealed bids. Agency Response to Comments at 3. Timbered does not provide any support for its allegation of collusion or potential collusion, rendering it a bare assertion. Our Bid Protest Regulations require that a protest include a sufficiently detailed statement of the grounds supporting the protest allegations. 4 C.F.R. §§ 21.1(c)(4), 21.1(f), and 21.5(f). That is, a protest must include sufficient factual bases to establish a reasonable potential that the protester's allegations may have merit; bare allegations or speculation are insufficient to meet this requirement. *Castro & Company, LLC*, B-415508.10, June 11, 2019, 2019 CPD ¶ 215. Unsupported assertions such as these that are mere speculation on the part of the protester do not provide an adequate basis for protest. *Id.*

The protest is denied.

Thomas H. Armstrong
General Counsel

³ Timbered's owner did not actually sign his own bid until the day after the oral auction; he only signed the auction record. Whether this time lapse is still considered immediate is unclear.