

Kauffman

DECISION



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

FILE: B-221181, B-221182 **DATE:** April 2, 1986
MATTER OF: Big Valley Lumber Co.

DIGEST:

1. The Federal Sustained Yield Act does not require a prospective bidder for a sales contract for timber located in a sustained yield unit to own or operate a permanent facility located in that unit in order for the prospective bidder to submit a bid.
2. Policy Statement for the Big Valley Federal Sustained Yield Unit, which permits the sale of timber within the Unit to any bidder who agrees to give primary manufacture to 80 percent of the timber within the Big Valley area and to establish sufficient yard facilities and planning mill capacity in the Big Valley area, is not inconsistent with the Federal Sustained Yield Act, which requires timber to be sold only to responsible purchasers within the community or communities.
3. Whether a bidder has the ability to establish manufacturing facilities and perform in accordance with contract requirements is a question of responsibility, and our Office does not review protests against affirmative determinations of responsibility absent a showing of fraud or bad faith on the part of the contracting agency.
4. Whether an awardee performs in compliance with contract requirements is a matter of contract administration not for consideration under Bid Protest Regulations.

Big Valley Lumber Company (Big Valley) protests the award of two timber sales contracts by the United States Forest Service to Nevada Skylines Inc. (Nevada Skylines) and Almanor Forest Products (Almanor) under the Final

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Chance Timber Sale and the Stratton Timber Sale, respectively.^{1/} Both of the sales are located within the Big Valley Federal Sustained Yield Unit (hereafter the Unit), Modac National Forest, California. Big Valley, the only other bidder in each sale, contends that the bids submitted by Nevada Skylines and Almanor should have been rejected because neither bidder was qualified under the Federal Sustained Yield Act of 1944, 16 U.S.C. § 583, et seq. (1982), to bid on timber sales within the Unit. We deny both protests.

The Federal Sustained Yield Act of 1944 (hereafter the Act) gives the Secretary of Agriculture and the Secretary of the Interior discretion to establish sustained yield units of federal land in order to stabilize forest industries, employment, communities and taxable forest wealth. 16 U.S.C. § 583. Whenever the maintenance of a stable community is primarily dependent upon the sale of timber or other forest products from such a unit, the Act permits the sale to be made "without competitive bidding . . . to responsible purchasers within such community or communities." 16 U.S.C. § 583(b).

The Forest Service's implementing regulation also authorizes noncompetitive sales where necessary for the maintenance of a stable community within a sustained yield unit. That provision provides for the sale of timber:

". . . to responsible operators within . . . such communities . . . without competition or with competition restricted to responsible operators who will manufacture the timber to at least a stated degree within the community or communities to be maintained."

36 C.F.R. § 223.117(b) (1985). In addition, the Forest Service Manual indicates that timber, located in a sustained yield unit, shall be sold competitively to any operator of a plant or any logging operator who agrees to comply with the policy statement established for that particular unit. Forest Service Manual para. 2469.1 (Amend. No. 131, July 1983).

^{1/} In accordance with 4 C.F.R. § 21.11 (1985), the Forest Service has agreed to have its protests concerning timber sales decided by our Office.

The Policy Statement for the Big Valley Federal Sustained Yield Unit states that the primary purpose of the Unit is to provide permanent support to the Big Valley community from the lumber industry. The timber from the Unit is to be sold in such a manner as to promote the maintenance of steady employment opportunities, the employment of local labor and to provide opportunities for members of the community to obtain lumber. The Policy Statement indicates that to provide the necessary level of support, at least 80 percent of the timber sold in the Unit must be given primary manufacture within the Big Valley community and that, at a minimum, purchasers must have sufficient yard facilities for drying the sold timber and the planning mill capacity to surface approximately 50 percent of the lumber produced.

The prospectuses issued for the Final Chance Timber Sale and for the Stratton Timber Sale each contained specific provisions (paragraph C8.8), alerting prospective bidders to the Policy Statement requirements governing timber sales in the Unit. Nevada Skylines and Almanor were the high bidders and neither firm took exception to the Policy Statement requirements. After investigating both firms and concluding that both had the financial resources to complete the contract and that both intended to comply with the special manufacturing provisions, the Forest Service awarded the contracts to the firms.

Big Valley contends that the Act requires timber to be sold to purchasers within the community and that neither Nevada Skylines nor Almanor has or proposes to build permanent facilities within the Unit. Big Valley argues that Nevada Skylines and Almanor are merely acting as brokers, cutting and logging the timber and selling to third parties within the Unit and points to the fact that both firms have already approached Big Valley to manufacture the timber. Notwithstanding the language contained in the Policy Statement, Big Valley contends that the Forest Service has for the past 35 years sold only to purchasers whose sawmill and related facilities were permanently located within the Unit and there is no basis to depart from this scheme. Big Valley argues that the Forest Service's actions subvert the intent of the Act and that it will result in the destruction of the community stability which the Unit was created to protect.

Our review of the Act provides no basis to conclude that the requirement that timber be sold to a purchaser "within" the community was intended to restrict eligible bidders only to those firms that have permanent facilities

or intend to build such facilities within the established sustained yield unit. Furthermore, the Act does not require that these purchasers must be located "within" the community at the time bids are submitted or define the extent of their affiliation with the local community in order to be considered eligible. See 16 U.S.C. § 483(b). This Office is required to give great deference to an agency's reasonable interpretation of its regulations, S.F.A. Corp., 63 Comp. Gen. 154 (1984), 84-1 CPD ¶ 57. We find that the Forest Service's implementing regulations, which, in effect, permit any firm which agrees to manufacture the lumber within the unit to a stated degree, are not inconsistent with the express language of the Act.

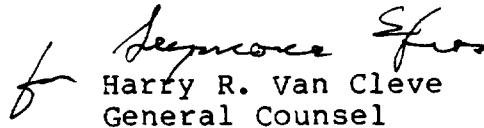
While we recognize Big Valley's contention that the Forest Service is deviating from the policy it has followed for the past 35 years, under our Bid Protest Regulations, 4 C.F.R. part 21 (1985), we deal only with whether an award or proposed award of a contract complies with statutory, regulatory, and other legal requirements. See Coast Canvas Products II Co., Inc., B-219512, Nov. 1, 1985, 85-2 CPD ¶ 502. As we concluded above, the Act does not prohibit the award of a contract to a firm which complies with the special manufacturing provisions contained in the prospectuses, and we do not review questions regarding the policy an agency should follow in implementing existing law. Detroit Broach and Machine--Reconsideration, B-213643.2, July 12, 1984, 84-2 CPD ¶ 43. Although Big Valley contends that this change will destroy the economic stability of the Unit, the Forest Service has determined that firms which manufacture the timber to a stated degree within the Unit will promote the stability of the Unit, and we have no legal basis to object to this determination.

Concerning the ability of Nevada Skylines and Almanor to comply with the requirements of each sale's prospectus and the objectives of the Policy Statement, this concerns a bidder's responsibility, which necessarily involves a subjective business judgment for procuring officials, and, thus, is not easily susceptible to our review. D.D.S. Pac., B-216286, Apr. 12, 1985, 85-1 CPD ¶ 418. Therefore, this Office does not review protests against affirmative determinations of responsibility unless there is a showing of possible fraud or bad faith on the part of the contracting agency or that the solicitation contains definitive responsibility criteria that have not been applied. Imperial Oil Co., Inc., B-220236, Sept. 20, 1985, 85-2 CPD ¶ 316.

The record shows that after bid opening, but prior to awarding the contracts, the Forest Service requested Nevada Skylines and Almanor to submit financial data and information indicating how the firms intended to comply with the special manufacturing requirements contained in the prospectuses. The Forest Service awarded the contracts after establishing that both firms planned to conform with the special manufacturing requirements. The evidence does not indicate any possible fraud or bad faith on the part of the Forest Service, and we therefore have no basis to question the Forest Service's conclusion that Nevada Skylines and Almanor are responsible bidders.

Finally, we note Big Valley's claim that neither Nevada Skylines nor Almanor will comply with the manufacturing restrictions since it is not economically feasible. Whether Nevada Skylines or Almanor abides by these restrictions and performs the contracts in compliance with contract requirements is a matter of contract administration and not for consideration under our Bid Protest Regulations. Meditech, Inc., B-217428, Jan. 16, 1985, 85-1 CPD ¶ 45.

We deny the protests.


Harry R. Van Cleve
General Counsel