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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Riley Creek Lumber Company

File: B-295322

Date: January 13, 2005

James M. English, Esq., English Law Firm, for the protester.

Lori Polin Jones, Esq., Department of Agriculture, and Julie Clowes, Esq., Small Business Administration, for the agencies.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, participated in the preparation of the decision.

DIGEST

Where neither the Small Business Act, the National Forest Management Act, nor any applicable regulations mandate that certain timber sales be set aside for small business or prohibit setting aside any particular timber sale, the decision to set aside a particular sale is within the discretion of the Forest Service and is not subject to review by the Government Accountability Office pursuant to its bid protest authority.

DECISION

Riley Creek Lumber Company protests the decision of the Department of Agriculture, Forest Service, to set aside the South McSwede, Woody Chuck, and Bristow forest sales, all in Montana's Kootenai National Forest, for small businesses under authority of section 92.3 of the Forest Service Handbook (FSH) 2409.18. Riley Creek, a large business precluded from participating in these timber sales, argues that section 92.3 does not allow the Forest Service and the Small Business Administration (SBA) to establish set-aside sales prior to a "triggering event" in a National Forest, and no such triggering event had occurred in the Kootenai National Forest.

We dismiss the protest.

As a preliminary matter, we note that since the subject matter of this protest is a timber sale, not a procurement of property or services, the protest is outside our bid protest jurisdiction. See 31 U.S.C. § 3551(1)(a) (2000). We will consider protests concerning sales by a federal agency only if that agency has agreed in writing to have

protests decided by our Office, 4 C.F.R. § 21.13(a) (2004); the Forest Service has agreed to have protests concerning timber sales decided by our Office. Delta Timber Co., B-290710, Sept. 6, 2002, 2002 CPD ¶ 161 at 1 n.1.

The Forest Service, in conjunction with the SBA, has established the Timber Sale Set-Aside Program in order to ensure that small business timber purchasers have the opportunity to purchase a portion of the National Forest timber, based on the percentage of timber purchased by small businesses in specific forests at the time the program was created. The Timber Sale Set-Aside Program is conducted as follows. See FSH 2409.18, ch. 90. The Forest Service assigns each National Forest, which is a separate “market area,” a percentage of its timber to be sold to small businesses. These percentages are recomputed every 5 years, and the agency’s progress toward meeting these target percentages is assessed every 6 months. Set-aside sales are automatically triggered when the agency determines that the volume of small business purchases in a market is 10 percent or more below the targeted percentage volume. Although a triggering event did not occur in Kootenai National Forest, the Regional Forester and the SBA Regional Representative, in a letter dated October 25, 2004, jointly agreed that it was appropriate to set aside the three protested timber sales. The two officials concluded that, without the set-aside, small businesses would face possible bankruptcy and a trigger situation would occur for the upcoming 6-month period.

Section 92.3 of FSH 2409.18, entitled “Variation from Required Set-Aside Program,” states: “The Forest Supervisor . . . upon consultation with the SBA Regional Representative, may establish or eliminate set-aside sales when determined appropriate under the Small Business Act. Document such variances.” Riley Creek argues that, absent a triggering event, section 92.3 does not provide the Forest Service Supervisor and the SBA Regional Representative with the discretion to establish set-aside timber sales, while the agency maintains that section 92.3 grants it just such discretion. Riley Creek further argues that the agency’s broad interpretation of Section 92.3 eviscerates the intent of several other FSH section.

Unlike with regard to procurements of property or services, see Federal Acquisition Regulation part 19, there is nothing in the Small Business Act, the National Forest Management Act, or any applicable regulations that mandate that certain timber sales be set aside for small businesses or that prohibit setting aside any timber sale. Accordingly, the Forest Service’s decision, in its discretion, to set aside these three sales is not subject to review pursuant to our Office’s bid protest authority. Tricon Timber, Inc., B-241065, B-242174, Jan. 15, 1991, 91-1 CPD ¶ 37 at 3.

The protest is dismissed.

Anthony H. Gamboa
General Counsel