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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Poston Logging; Shasta Green, Inc; Sierra Cedar Products; Trinity River Lumber Company; Freres Lumber Co., Inc.

File: B-310081; B-310275; B-310290; B-310370; B-310370.2; B-310371; B-310373; B-310467; B-310470

Date: November 13, 2007

Brian W. Craver, Esq., for Poston Logging; Diane Franklin, Shasta Green, Inc.; Tony Sims, Sierra Cedar Products; Dee Sanders, Trinity River Lumber Company; and Robert Freres, Jr., Freres Lumber Co., Inc., the protesters.
Lori Polin Jones, United States Department of Agriculture, and Kenneth Dodds, Esq., Small Business Administration, for the agencies.
Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Forest Service was not required by any law or regulation to consider resale limitations applicable to small business timber purchasers under small business set-asides in preparing the appraisals for those sales; the clear purpose of the appraisal requirements in the National Forest Management Act, 16 U.S.C. § 472a(a) (2000), is to ensure that the public receives fair value from the sale of timber and does not require a separate or different appraisal method for small business set-aside timber sales in order to encourage small business sales.

DECISION

Poston Logging, Shasta Green, Inc., Sierra Cedar Products, Trinity River Lumber Company, and Freres Lumber Co., Inc., protest the terms of eight Forest Service timber sales, all set aside for small businesses, under sale Nos. 54344, 53612, 54345, 30406, 30408, 20185, 07004, and 00082. The protesters contend that the agency included erroneous timber values in the sale prospectuses in violation of statute, regulation, and policy.¹

¹ As a general rule, our Office does not have jurisdiction over timber sale protests because they are not procurements for property or services. See 31 U.S.C. § 3551(1)(a) (2000). However, we will consider protests concerning sales by a

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We deny the protest.

The Forest Service, in conjunction with the Small Business Administration (SBA), has established the Timber Sale Set-Aside Program in order to ensure that small business timber purchasers have an opportunity to purchase a “fair portion of the sale of timber from the National Forests.” 55 Fed. Reg. 30485, 30486 (1990). The Timber Sale Set-Aside Program is conducted in accordance with published policies and procedures set forth in the Forest Service Handbook (FSH), see FSH 2409.18, ch. 90,² and includes a requirement that small business purchasers under a set-aside sale cannot “deliver more than 30 percent of advertised sawtimber volume (30% Rule) to processing facilities that are other than small business.”³ Id. § 92.51.

As indicated, the eight sales here were set aside for small businesses. Each prospectus specified the location of the timber, the estimated volume of each of the various varieties of timber to be sold, and the minimum acceptable bid rate for each variety of timber. These bid rates represented the “appraised value” or “fair market value” of the timber. 36 C.F.R. §§ 223.60, 223.61, 223.63 (2007). The prospectuses also included the “30% Rule” restriction on resale of the timber.

As specified in the prospectuses, each company’s bid was required to be for at least the appraised value because, as discussed more fully below, the Forest Service is prohibited from selling the timber for less than the appraised value. National Forest Management Act (NFMA), 16 U.S.C. § 472a(a) (2000); 36 C.F.R. § 223.61. To determine the appraised or fair market value as required by the NFMA, the use of any particular appraisal method is not required; the discretion to establish such method rests with the Forest Service. 36 C.F.R. § 223.60. The appraisal methods

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federal agency if the agency has agreed in writing to have protests decided by our Office. 4 C.F.R. § 21.13(a) (2007). 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.

² Citations in this decision refer to the Forest Service National Headquarters FSH unless otherwise noted. The Forest Service has also published regional amendments to this FSH, which are specific to a particular timber region. However, the regional amendments pertaining to timber sale appraisals do not significantly differ from the national FSH provisions, or the differences are not pertinent here.

³ The SBA has defined a small business for timber sales to include a requirement that the small business agree that it will not sell more than 30 percent of the timber to other than a concern that qualified as a small business. 13 C.F.R. § 121.507(a)(4)(i) (2007). The SBA has issued no other regulations directly pertinent to the Timber Sale Set-Aside Program.

used by the Forest Service are published in the FSH (at FSH 2409.18, ch. 40) and include the “transaction evidence appraisal” method, which, since 1996, has been the primary appraisal method used by the Forest Service. Agency Report (B-310081) at 6; FSH 2409.18, ch. 40 § 45.12. According to the FSH, the transaction evidence appraisal method “is designed to estimate fair market value of timber based on bid rates of past timber sale transactions,” using sales data from competitive sales over a period of time. FSH 2409.18, ch. 40 § 45.3. With the transaction evidence method, the agency measures the fair market value based on an “appraisal or marketing point,” which the handbook states is the “most advantageous location from the transportation standpoint [which includes] identify[ing] the marketing location that will develop the highest appraised or advertised rate.” *Id.* § 45.11. The “most advantageous appraisal point” must be a location “where the manufacturing facility is capable of processing the end product that is being appraised” without regard to whether the timber sale is to be set-aside for small businesses. *Id.*; see, e.g., Pacific Southwest Region Timber Appraisal Handbook 2409.22, ch. 48 § 48.16.1(d).

In computing the appraised value, the Forest Service considered the costs of selling the timber, including hauling costs, to the processing mill capable of processing the timber that was closest to the sale location. For each of these sales, the closest processing mill was a large business. The parties agree that small business processing mills were located at further distances away from the sale locations and that considering the higher hauling costs associated with the greater distances would have resulted in a reduction of the appraised, or fair market, value of the timber.

The protesters contend that considering the costs of processing the timber at large business mills in conducting each appraisal “inflated” the appraised value because this analysis does not take into account that the small business processing mills are located farther away from the sale location than the large business mills, and therefore small businesses would have higher hauling costs than were accounted for in the appraisal. The protesters argue that because the timber sales were set aside for small businesses, and small businesses are prohibited from reselling more than 30 percent of the timber to large businesses, the Forest Service’s use of the estimated costs based on the use of large business mills for more than 30 percent of the timber volume in developing the appraisal was improper. The protesters argue that the agency’s use of large business data for all of the timber volume constitutes a violation of the Small Business Act, the NFMA, implementing regulations, and Forest Service policies.

The Timber Sale Set-Aside Program implements a longstanding Memorandum of Understanding (MOU) between the SBA and the Forest Service.⁴ This agreement implements the policies of the Small Business Act as stated in 15 U.S.C. § 631(a), which provides:

⁴ Shasta Green has provided a copy of the MOU dated December 29, 1971.

It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as it possible, the interests of small-business concerns in order to preserve free competitive enterprise . . . to insure that a fair proportion of the total sales of Government property be made to [small businesses].

However, because the Program is established by agreement, the implementation of the program, specifically, determining whether a particular sale should be set aside for small business, is discretionary with the Forest Service and is not governed by the Small Business Act, the NFMA, or any other regulation. Accordingly, we have found that the FSH provisions relating to set-aside decisions represent Forest Service policy not subject to our Office's review. Riley Creek Lumber Co., B-295322, Jan. 13, 2005, 2005 CPD ¶ 15 at 2; Tricon Timber, Inc., B-241065, B-242174, Jan. 15, 1991, 91-1 CPD ¶ 37 at 3.

With regard to asserted Small Business Act violations, the protesters have not cited to any provision of the Small Business Act or its implementing regulations that would govern the establishment of appraised values for timber sales under the Timber Sale Set-Aside Program. While Shasta Green contends that 15 U.S.C. § 631(a) (quoted above) requires the Forest Service to use an appraisal method that encourages small business participation, this statutory provision is merely a statement of policy; it does not place any limitations on how the Forest Service should conduct its appraisals as Shasta Green contends. The protesters cite also to 15 U.S.C § 644(e)(1), which involves procurement strategies and bundling (not sales), and 13 C.F.R. § 121.507(a)(4), which defines small business size standards for timber purchasers and restricts designated small businesses from reselling more than 30 percent of the purchased timber to large businesses; neither applies to the appraisal issue presented here.

As to the NFMA, that Act authorizes the Forest Service, under rules and regulations prescribed by the Secretary of Agriculture, to sell "at not less than appraised value, trees, portions of trees, or forest products located on National Forest System lands." 16 U.S.C. § 472a(a); 36 C.F.R § 223.60. This requirement for an appraisal is to ensure that the public receives fair value from the sale of timber. American Forest Prods. Co., AGBCA No. 79-170-1, Oct. 18, 1984, 85-1 BCA ¶ 17,720 at 88,459. Contrary to the protesters' arguments, neither the NFMA, implementing regulations, nor Forest Service policies require that appraisals take into account that a particular acquisition is set aside for small businesses.⁵ Thus, the Forest Service was not required by the

⁵ Although 36 C.F.R. § 223.60 addresses appraisal methods, that provision conspicuously omits any reference to small business considerations in computing fair market value. In this regard, the regulation states only that "[p]ertinent factors" the agency could consider in making its appraisal

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NFMA or its implementing regulations to create a separate or different appraisal method for small business set-aside timber sales in order to encourage small business sales.⁶

The protest is denied.

Gary L. Kepplinger
General Counsel

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include, but are not limited to, prices paid and valuations established for comparable timber, selling value of products produced, estimated operating costs, operating difficulties, and quality of timber. Considerations and valuations may recognize and adjust for factors which are not normal market influences.

36 C.F.R. § 223.60. Although the SBA (which our Office requested comments from) argues that the mention of “estimated operation costs,” “operating difficulties,” and “not normal market influences” contemplates consideration of the fact that small business set-asides could impact appraisal value, we note that, even if the SBA is correct, such considerations are permissive and not mandatory.

⁶ In so finding, we have considered the various other alleged violations of statute, regulation, and policy cited by the protesters and find those arguments to be without merit.