



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Decision

Matter of: Boise Cascade Wood Products, LLC

File: B-413987.2

Date: April 3, 2017

Elizabeth E. Howard, Esq., Schwabe, Williamson & Wyatt, P.C., for the protester.
Lori Polin Jones, Esq., Department of Agriculture, United States Forest Service, for the agency.

Michael Willems, Esq., Eric Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request that GAO recommend reimbursement of the protester's costs of filing and pursuing a protest concerning a timber sale under the authority of 16 U.S.C. § 6591c, which resulted in agency corrective action, is denied where protests of timber sales under 16 U.S.C. § 6591c are not within GAO's statutory bid protest jurisdiction, but are instead considered pursuant to an agreement with the Forest Service, and reimbursement would be inappropriate in the context of our regulatory prohibition on recommending the reimbursement of protest costs when a nonstatutory protest is sustained.

DECISION

Boise Cascade Wood Products, LLC (Boise), a small business of Monmouth, Oregon, requests that we recommend reimbursement of the costs of filing and pursuing its protest of Forest Service solicitation FS-2400-14BV for a transaction that involves both a timber sale and a procurement of services. Boise contends that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Boise also asserts that its protest of the transaction was filed under our Office's statutory bid protest jurisdiction, and was not a nonstatutory protest to which the exception to recommendations for the payment of costs set forth in our Bid Protest Regulations, 4 C.F.R. § 21.13(b), would apply.

We deny the request for reimbursement.

BACKGROUND

On July 18, 2016, the Forest Service issued solicitation FS-2400-14BV for a forest stewardship contract in the Siuslaw National Forest in Corvallis, Oregon. The Forest Service is authorized to enter into contracts to perform stewardship projects in the national forests, and these contracts typically involve the sale of timber or forest products and the performance of certain services in furtherance of the agency's land management goals. See 16 U.S.C. § 6591c. Additionally, 16 U.S.C. § 6591c(d)(2) provides that such contracts "may, at the discretion of the Secretary of Agriculture, be considered a contract for the sale of property under such terms as the Secretary may prescribe without regard to any other provision of law." The Forest Service's implementing regulations provide that when the value of timber or other forest products removed through the contract exceeds the total value of the services received, the transaction shall be conducted in accordance with the procedures used for a sale of property. See 36 C.F.R. § 223.301(b)(2).

The solicitation required bidders to propose cash bids and agree to perform certain forest road maintenance and tree replanting services for the Forest Service in exchange for the right to remove approximately 17,000 tons of timber. Solicitation at 1-2. The solicitation provided that bids would be evaluated on the basis of four factors: (1) technical approach; (2) capability and past performance; (3) local workforce utilization; and (4) price. Id. at 7-8. Additionally, the solicitation indicated that award would be based on a best-value tradeoff between price and technical, with the three non-price factors being significantly more important than price. Id.

Based on the Forest Service's evaluation of the three non-price factors, Boise received an overall rating of "marginal," while Seneca Sawmill Company (Seneca) received an overall rating of "acceptable." Contracting Officer's Statement of Facts at 2-3. However, Boise proposed to pay the government \$846,153 for the value of the timber, valuing the services to be performed at \$61,156, while Seneca proposed to pay \$495,664 for the value of the timber, valuing the services to be performed at \$71,753. Id. On the basis of Seneca's higher technical rating, the agency concluded that Seneca represented the best value to the government, and the contract was awarded to Seneca on September 26, 2016. Id. Boise requested a debriefing, and received one on October 3. Id.

Boise's original protest followed on October 11, alleging that the agency misevaluated its bid and that the agency's best-value tradeoff was unreasonable. Following the submission of the agency report and protester's comments, the GAO attorney handling the protest conducted outcome prediction alternative dispute resolution (ADR) via teleconference, and informed the parties that GAO would likely sustain Boise's protest in part. Following the ADR teleconference, the agency informed our Office of its intent to take corrective action, agreeing to reevaluate the bids and conduct, and document, a new best-value tradeoff analysis. On December 19, based on the agency's corrective action, our Office dismissed Boise's protest as academic. This request for reimbursement of costs followed.

DISCUSSION

Boise argues that we should recommend reimbursement of its costs because its protest was clearly meritorious, and the agency unduly delayed taking corrective action. Comments on Agency Response to Request for Reimbursement at 3. Specifically, Boise contends that its protest was clearly meritorious because the ADR teleconference indicated it was likely our Office would sustain the protest and that corrective action was unduly delayed because it came both after the issuance of the agency report and the ADR teleconference. Request for Reimbursement at 3.

Additionally, Boise contends that its requests for costs is not precluded by our regulations, which otherwise establish that we will not recommend the payment of protest costs in connection with nonstatutory protests. See 4 C.F.R. § 21.13(b). First, Boise argues that its protest was filed under our Office's statutory jurisdiction to review protests concerning the procurement of goods and services, and not under our nonstatutory agreement with the Forest Service to hear protests of timber sales.¹ Comments on Agency Response to Request for Reimbursement at 3, citing 31 U.S.C. §§ 3551, 3552. While its protest involved a transaction for both the sale of goods and the procurement of services, Boise asserts that our Office has historically exercised statutory jurisdiction over such "mixed transactions." Comments at 3.

Second, and alternatively, Boise argues that even if GAO's jurisdiction over the protest was based on our nonstatutory agreement with the Forest Service, our regulations do not bar recommendations for recovery of costs in these circumstances. Comments at 6-7. Specifically, Boise notes that our Bid Protest Regulations provide that they shall apply to nonstatutory protests "except for the provision of § 21.8(d) pertaining to recommendations for the payment of costs." See 4 C.F.R. § 21.13(b). Boise argues that section 21.8(d) of our regulations refers solely to situations where GAO determines that a solicitation, proposed award, or award does not comply with statute or regulation, which is to say, where GAO issues a decision sustaining the protest. Comments at 6-7. By contrast, Boise argues that our regulations governing nonstatutory protests do not exempt recovery of costs under section 21.8(e), which provides for recovery of costs where, as here, the agency takes corrective action in response to a protest. Id.

In response, the agency contends that this transaction was a timber sale--not a "mixed transaction"--and that its statute gives it discretion to make that determination. Agency Response to Request for Reimbursement at 2-4. The agency notes that its regulations require that stewardship transactions such as these--where the value of the sale outweighs the value of the services--must be conducted pursuant to procedures for

¹ Our Office considers protests concerning sales by a federal agency if that agency has agreed in writing to have protests decided by our Office. 4 C.F.R. § 21.13(a). The Forest Service has expressly 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.

timber sales. Id. The agency contends that the protest was filed pursuant to the Forest Service's agreement with GAO to hear protests of timber sales. Id. at 4. The Forest Service argues that we should not recommend reimbursement of costs as our Bid Protest Regulations do not generally provide for the recovery of costs in nonstatutory protests. See 4 C.F.R. § 21.13(b). Furthermore, the Forest Service asserts that it would create a disincentive to corrective action in nonstatutory protests were agencies required to pay costs in cases where they took corrective action, but not in cases where GAO issued a merits decision sustaining a protest. Agency Response at 5-7. The Forest Service does not appear to dispute that Boise's protest was clearly meritorious or that corrective action was unduly delayed.

In this case, because the agency does not contest whether the protest was clearly meritorious or whether it unduly delayed corrective action, the issues to be decided are: whether our authority to consider Boise's protest derived from our statutory bid protest jurisdiction or our agreement with the Forest Service to review protests of timber sales; whether our Bid Protest Regulations, 4 C.F.R. § 21.13(b), prohibit recovery of costs where an agency takes corrective action in a nonstatutory protest; and whether reimbursement of costs following agency corrective action is appropriate in this context under 4 C.F.R. § 21.8(e). Our Office has not previously addressed the question of costs in the context of a timber sale that also incorporated a procurement of services.²

Statutory vs Nonstatutory Protests

Boise contends that their protest was filed pursuant to our statutory jurisdiction, because our Office has historically taken statutory jurisdiction over "mixed transactions," which, like this transaction, involve both a sale and a procurement of goods or services. Under the Competition in Contracting Act of 1984 (CICA) and our Office's Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for procurement of goods and services, and solicitations leading to such awards. 31 U.S.C. §§ 3551, 3552; 4 C.F.R. § 21.1(a) (2009). As a general matter, sales by a federal agency, such as timber sales, are not procurements of property or services, and are therefore not within our Office's bid protest jurisdiction. See 31 U.S.C. § 3551(1)(a). We also recognize, however, that certain transactions can involve both a sale of government property and a procurement of goods or services, and we have sometimes exercised jurisdiction in mixed, or bundled, transaction cases. See, e.g., Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192.

² See, e.g., United States Department of Agriculture--Recon., B-277705.2, Oct. 31, 1997, 97-2 CPD ¶ 130 (declining to award costs in a pure timber sale transaction), and Interfor US, Inc., B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 3 n.4 (declining to decide whether the protest involving a potential mixed transaction was being considered under our statutory jurisdiction, because it was not necessary to reach the issue to resolve the protest).

It has consistently been our Office's view that a mixed transaction, like this one, which includes the delivery of goods or services of more than de minimis value to the government, is a procurement within the meaning of CICA. See Public Commc'ns Servs., Inc., B-400058, B-400058.3, July 18, 2008, 2009 CPD ¶ 154 at 7. Here, however, the specific statute authorizing stewardship contracts provides that the transactions "may, at the discretion of the Secretary of Agriculture, be considered a contract for the sale of property under such terms as the Secretary may prescribe without regard to any other provision of law." 16 U.S.C. § 6591c(d)(2) (emphasis added). Accordingly, the question of whether this transaction should be considered a mixed transaction reviewed pursuant to our statutory authority under CICA or as a timber sale reviewed pursuant to our nonstatutory agreement with the Forest Service hinges on the meaning of the "without regard" provision in 16 U.S.C. § 6591c(d)(2).

In general, the plain meaning of a statute's provisions must be read in the context of the broader statutory scheme, and must be read in a way to give effect to all provisions of the law. See, e.g., K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); Mastro Plastics Corp. v. National Labor Relations Board, 350 U.S. 270, 285 (1956), quoting United States v. Boisdore's Heirs, 8 How. 113, 12 L.Ed. 1009 (1850); Lowe v. SEC, 472 U.S. 181, 207 n.53 (1985). In interpreting similar "notwithstanding any other provision of law" or "without regard to any other provision of law" provisions, we have considered whether the provisions of the relevant laws are directly in conflict when determining if such provisions displace generally applicable procurement laws. See, e.g., Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶ 16 at 7-10 (similar provision did not displace generally applicable procurement law to the extent the requirements of the statutory provision were not actually inconsistent with generally applicable procurement laws); Pierce First Medical; Alternative Contracting Enterprises, LLC--Recon., B-406291.3, B-406291.4, June 13, 2012, 2012 CPD ¶ 182 at 4-5 (similar provision did not supersede certain generally applicable provisions of law that could be read in such a way as to give both provisions effect); c.f., RJO Enterprises, Inc., B-252232, June 9, 1993, 93-1 CPD ¶ 446 at 5-6 (similar provision displaces generally applicable procurement laws where the application of those laws would be inconsistent with the plain language of the provision, and would render it "a nullity"). Likewise, courts have consistently read similar provisions as superseding all other laws that are directly inconsistent with them. See, e.g., Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993), citing Liberty Maritime Corp. v. United States, 928 F.2d 413 (D.C. Cir. 1991); Saco River Cellular, Inc. v. Federal Communications Comm., 133 F.3d 25, 30 (D.C. Cir. 1998); Illinois Nat'l Guard v. Federal Labor Relations Authority, 854 F.2d 1396, 1403 (D.C. Cir. 1988), quoting New Jersey Air National Guard v. FLRA, 677 F.2d 276, 283 (3d Cir. 1982).

In this case, the provision authorizes the agency to determine whether or not a stewardship contract is a sale of property and set its terms without regard to any other provision of law. 16 U.S.C. § 6591c(d)(2). On its face, the effect of the "without regard" provision is to specifically exempt the determination that a given contract is a sale of

property from the statutory framework governing such a determination.³ Put another way, rejecting the agency’s determination that this transaction was a sale of property in favor of a contrary determination that CICA applies to this transaction would have the effect of rendering the “without regard” provision a nullity. We conclude, therefore, that the plain language of the statute gives the agency discretion to determine whether a contract undertaken using this authority is a sale of property without regard to any other provision of law, including CICA. We see no other reasonable interpretation of the broad and unequivocal language of the “without regard” clause in the statute.

The agency regulations implementing the statute provide that “[w]hen the value of timber or other forest products removed through the contract is equal to or exceeds the total value of the service work items received by the Forest Service, the activity shall be considered a sale of property[....]” 36 C.F.R. § 223.301(b)(2). In this case, the value of the forest products significantly exceeded the value of the services, and the agency accordingly determined to solicit the contract as a timber sale. Agency Response at 3. On these facts, we conclude that this transaction was properly solicited under the applicable regulations as a sale of property, which does not fall within our statutory bid protest jurisdiction, and that Boise’s protest was therefore a nonstatutory protest under our Office’s agreement with the Forest Service to decide protests of timber sales.

Recovery of Costs Following Corrective Action in Nonstatutory Protest

As its secondary argument, Boise correctly notes that under our regulations, as written, we are not precluded from recommending reimbursement of costs pursuant to section 21.8(e) of our Bid Protest Regulations. As a general matter, section 21.8(e) authorizes our Office to recommend the payment of protest costs where the agency has taken corrective action in response to a protest, as in this case. See 4 C.F.R. § 21.8(e). Section 21.13(b) of our regulations, governing nonstatutory protests, establishes only that the provisions of 4 C.F.R. § 21.8(d), generally authorizing the payment of protest costs where GAO has determined that the agency has violated law or regulation, do not apply to nonstatutory protests. See 4 C.F.R. § 21.13(b). Section 21.13(b) does not carve out a similar exception with respect to the recovery of costs under section 21.8(e). Id.

Section 21.8(e), on which the protester relies for the recovery of its costs, however, provides that our Office “may” recommend reimbursement of costs, and we have explained that the decision of whether to award costs is appropriately based on the circumstances of each case. See 4 C.F.R. § 21.8(e) and Alban Engine Power Systems,

³ We also note that the statutory section in question contains other similar “without regard” provisions related to generally applicable procurement laws, such as giving discretion to the agency to determine the appropriate contracting officer to enter into and administer stewardship contracts or agreements, evidencing a broader legislative intent to exempt these transactions from specific provisions of generally applicable procurement laws. See, e.g., 16 U.S.C. § 6591c(d)(6).

B-247614.2, Apr. 8, 1992, 92-1 CPD ¶ 354 at 2. We have noted, in another context, that the language of section 21.8(e) does not include a bright line rule concerning costs and the timing of corrective action, and that there may be circumstances where the award of costs, even where corrective action was taken after submission of the agency report, would not be justified, just as there could be circumstances where the award of costs would be appropriate even where corrective action was taken prior to report submission. See Alban Engine Power Systems, supra.

It is our view that the inconsistency identified by the protester is an oversight in our regulatory structure. We agree with the agency that there is no sound policy reason to recommend that protesters receive reimbursement of costs where the agency voluntarily takes corrective action, but not where we issue a decision on the merits sustaining the protest. We conclude that it would be inappropriate to recommend the reimbursement of protest costs following agency corrective action in response to a nonstatutory protest, where our Office could not recommend reimbursement if we had sustained the protest.

The request is denied.

Susan A. Poling
General Counsel