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THREAT OF LEGAL ACTION BY COMPANY THAT WAS DENIED THE OPPORTUNITY TO COMPETE FOR HELICOPTER LOGGING CONTRACT FORCES FOREST SERVICE TO TERMINATE IMPROPERLY AWARDED SOLE-SOURCE CONTRACT

Flush with stimulus money, the Forest Service was finally able to go forward with a long needed project on the Bitterroot National Forest in Montana to reduce hazardous fuels using helicopter logging. The contractual vehicle the Forest Service chose was an Integrated Resource Contract for Services, *i.e.*, a stewardship contract where the value of the services required is greater than the value of the timber being removed. However, rather than soliciting competitive proposals to select the company offering the best value to the government for contract award, the Forest Service solicited a proposal from only one company and awarded the contract on a sole-source basis. The Forest Service's "justification" for proceeding in this manner was that the awardee was "the only remaining helicopter logging firm located in Western Montana."

Immediately upon learning of the sole-source award, a helicopter logging company located in Idaho protested. At first, the Forest Service defended its action, citing cases in which, at the time of the solicitation, there was only one company with a product that had been tested and approved for use by the government and it would take months for any new company to get its product similarly qualified. However, once the Idaho company hired knowledgeable government contract counsel, it quickly learned that the government's position was unsupportable under the law. The Idaho company's counsel notified the Forest Service that it faced an immediate injunction against further performance of the sole-source contract as well as liability under the Equal Access to Justice Act (EAJA) for the company's legal fees if the Forest Service did not take corrective action. The EAJA permits a small business to recover attorneys' fees in cases where the position of the government is not substantially justified. Faced with the fact that its failure to solicit competitive proposals from other qualified companies would not withstand judicial scrutiny, the Forest Service terminated the sole-source contract within 24 hours. We understand that the Forest Service plans to reoffer the contract in a manner that complies with the requirements for competitive bidding so a contract can be awarded to a company that represents the best value to the government and the needed hazardous fuels reduction project can go forward in a timely manner. ■

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Legal Briefs is published by Saltman & Stevens, P.C. to update developments of interest to those who enter into contracts with the federal government. It is not intended to provide legal advice. Such advice may be given only when related to specific facts. Those desiring further information may contact Alan Saltman, Ruth Tiger (editor), or Richard Goeken at (202) 452-2140.

PURCHASER FAILS TO PROVE ENTITLEMENT TO RECOVERY FOR VOLUME UNDERRUN

The purchaser of a lump sum timber sale contract claimed that the Forest Service's volume estimates were unreasonably inaccurate and tried unsuccessfully to recover under several different theories, including under the standard Adjustment for Quantity Errors clause (BT2.43). The clause provides that the estimated quantity set forth in the contract "shall be revised" if the incorrect estimated quantity "is caused by computer malfunction or an error in calculations, area determination, or computer input." The clause also provides that no adjustments will be made "for variations in accuracy resulting from planned sampling and measuring methods or judgments of timber quality or defect." Older Forest Service timber sale contracts contain a similar Adjustment of Volume clause (CT4.12). In this case, the purchaser claimed he was experiencing a 20% underrun, but he could not demonstrate any of the types of errors that would require adjustment under the clause. On the contrary, the evidence suggested that the volume shortfall was attributable to greater defect in the timber than anticipated, not any error in the Forest Service's volume estimate. ■

FALSE CLAIMS ACT APPLIES TO MISREPRESENTATIONS IN FUNDING APPLICATION

In 1982, Congress established the Small Business Innovation Research (SBIR) program to stimulate technological innovation and use small businesses to meet federal research and development needs. Interested companies submit proposals to individual government agencies who then select the proposals deemed to offer the best value to the government. The merits of a SBIR proposal are measured in part based on an examination of the applicant's qualifications, including the availability of key personnel to perform the research, the facilities and equipment available to the applicant, and the scope of any previously funded work performed by the applicant that is similar to that proposed. In one recent case, an applicant knowingly made numerous false representations including: that it was incorporated when it was not, the identifies of key personnel that would be conducting the research work, the state of its facilities and equipment (which were not operational at the time it submitted its proposals), and that it had previously performed similar work. Based in part on these misrepresentations, the applicant was awarded several SBIR contracts under which it received funding of over \$1.6 million. Because the false statements influenced the government's decision to award the contracts,

the applicant was found to have violated the False Claims Act, even though there were no false statements in any of the requests for payment it submitted, which is often the focus of False Claims Act cases. Unfortunately for the applicant, the False Claims Act provides for treble damages and the court found the applicant liable for three times the amount of funding received – almost \$5 million.

MORE ABOUT THE SBIR PROGRAM: The Small Business Administration maintains a publicly available database, known as Tech-Net, which contains information on SBIR opportunities and on all contract awards made through the SBIR program. <http://web.sba.gov/tech-net/docrootpages/index.cfm>. A recent statement discussing the SBIR program's successes and challenges, including how agencies make eligibility determinations, was presented to the Senate Committee on Commerce, Science and Transportation by the Government Accountability Office's Managing Director for Natural Resources and Environment. The statement is available at <http://www.gao.gov/new.items/d09956t.pdf>

CBCA REJECTS REQUESTS TO WITHDRAW DECISIONS ADVERSE TO GOVERNMENT

Seeking to avoid the precedent set by a case it lost before the Civilian Board of Contract Appeals (CBCA), the Forest Service offered to forego an appeal of the adverse ruling and to pay a timber sale purchaser more than the amount awarded by the CBCA if the purchaser would join it in asking the CBCA to withdraw its decision. The purchaser agreed and the parties submitted a joint request for the CBCA to vacate the decision, but the CBCA denied the request. The parties each had their own reasons for submitting the request – the purchaser wanted to end the case without appeal and get paid as soon as possible, and the Forest Service wanted to avoid what it viewed as a bad precedent. However, the CBCA ruled that these reasons did not rise to the level of the exceptional circumstances needed to support vacating the decision.

Recently, the National Park Service (NPS) unsuccessfully attempted a similar maneuver to avoid another adverse ruling issued by the CBCA. In the NPS case, the government argued that the CBCA lacked jurisdiction under the Contract Disputes Act (CDA) to consider a dispute over the valuation of a concession contractor's facilities constructed on National Park Service land for purposes of performing the contract because NPS' regulations state that concession contracts are not subject to the CDA. Not surprisingly, the CBCA rejected the government's argument, noting that the Supreme Court had already discounted the statement in NPS' regulations as "nothing more than a 'general statement of policy' designed to inform the public of NPS' views on the proper application of the CDA." The CBCA concluded that it had jurisdiction under the CDA because the concession contract required the contractor to construct and maintain buildings, equipment and other improvements for purposes of performing the contract which clearly fall within the coverage of the CDA. After the CBCA issued its jurisdictional ruling, NPS agreed to pay the concession contractor over \$100,000 to settle the valuation claim but expressly conditioned the settlement on the agreement of the CBCA to vacate its earlier ruling. As it did in the Forest Service case, the CBCA refused to vacate its decision, concluding that because judicial precedents are valuable to the public as a whole and "not merely the property of private litigants," decisions can be vacated only in exceptional circumstances, which the parties had failed to demonstrate. ■

PURCHASER WHO FAILED TO COMPLY WITH TIME LIMIT SPECIFIED IN FOREST SERVICE STANDARD CONTRACT CLAUSE B(T)9.21 FORFEITS ABILITY TO PURSUE CLAIM

The Forest Service's standard timber sale contract contains clause B(T)9.21, which requires that claims must be submitted no later than 60 days after the purchaser's receipt of written notification that the sale is closed. In one recent case, a purchaser failed to file its claim within 60 days but argued that an earlier letter he sent to the contracting officer, which stated his intent to file a claim in the future, somehow met the requirement. The CBCA rejected this argument, finding that providing notice that a claim would be forthcoming was not the same thing as the actual submission of a claim. By failing to meet the 60-day requirement, the purchaser forfeited his right to bring a claim, regardless of whether the claim had any merit.

COMMENT: The right to submit claims under government contracts, including timber sale, stewardship, service, and construction contracts, is governed both by the terms of the individual contract and by the CDA. Although the process of submitting a claim is relatively simple, there are several options and requirements that must be kept in mind. For example, the standard Forest Service timber sale contract requires that claims must be submitted within 60 days of receipt of the contract closure letter as discussed above, but claims associated with road construction must be filed within 60 days of receipt of notification authorizing use of the road. Each claim must fairly put the contracting officer on notice of the general factual and legal bases for it. The amount of factual detail and specificity of the legal theory will vary in each case. The claim must also seek a "sum certain," *i.e.*, a specific amount of money. Claims seeking "in excess of" a certain amount have been deemed inadequate, as have claims that request an "approximate" amount. However, it is not required that costs or damages actually be incurred before a claim is submitted. There are also strict time limits for taking an appeal from a contracting officer's decision denying a contract claim and any appeal must be filed with the CBCA within 90 days or with the Court of Federal Claims within one year. Failure to perfect a timely appeal renders the contracting officer's decision final. A contractor who contemplates filing a claim should carefully consider these and other factors when deciding whether to proceed on its own or whether to retain the assistance of legal counsel well versed in the intricacies of government contract law and procedure. ■

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**BLM RESPONDS TO REQUEST FOR CONTRACT EXTENSIONS BY
ESTABLISHING PROCESS FOR SEEKING MUTUAL CANCELLATION
OF EXISTING TIMBER SALE CONTRACTS**

In response to requests that it grant three-year extensions of existing contracts as a means to avoid defaults and maintain industry infrastructure, the Bureau of Land Management (BLM) recently issued policy direction to provide for the mutual cancellation of contracts sold on or before September 15, 2009. BLM claimed that it could not grant the requested extensions under its existing authorities, but that it could agree with purchasers to mutually cancel existing contracts. Based on this determination, on October 14, 2009, BLM issued an Instruction Memorandum (IM) describing the process by which a purchaser may seek mutual cancellation.

Among other things, the IM requires the contracting officer (CO) to offer each purchaser of an eligible timber sale contract the opportunity to request mutual cancellation and requires that the purchaser make a written request for mutual cancellation within 60 days of receipt of the offer. The CO must obtain the approval of the State Director to either approve or deny a request. If the CO receives approval to go forward, he must enter into negotiations with the purchaser to reach agreement on a cancellation "that serves both parties to the contract and protects the government's interests." To meet this latter condition, the IM requires that the purchaser waive all claims it may have with respect to the affected timber sale contract. It is likely that the devil will be in the details in determining whether mutual cancellation makes sense on any particular timber sale contract, but purchasers will need to act promptly upon receipt of the CO's offer in order to meet the 60-day deadline for taking advantage of this opportunity. The IM can be found online at:

http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-003.html

About Us...

Saltman & Stevens, P.C. was founded in 1980 and our focus is on matters involving contracts with the federal government. We are located in the heart of Washington, D.C., close to the specialized courts and administrative tribunals that resolve disputes related to every type of government contract. This location also permits us to conduct frequent face-to-face meetings with top-level agency officials. The Firm provides counseling and litigation representation to a nationwide and international clientele on matters such as preparing and litigating government contract claims and bid protests, obtaining and maintaining government contracts and permits, and advising clients on compliance with numerous policies and regulations that affect their ability to deal with the federal government. The Firm also has a nationally recognized practice in federal timber contract law and in the use and enjoyment of natural resources within the national forests, national parks, and other federal lands. For more information about the Firm's attorneys and practice areas, please visit our website at www.saltmanandstevens.com.