



# ECOSYSTEM WORKFORCE PROGRAM

## Procurement & Timber Sale Contracting Definitions

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(rev. March 12, 2003)

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### INTRODUCTION

This document provides some basic definitions of timber sale and procurement authorities. It includes both traditional and stewardship contracting authorities. These definitions are drawn from interviews and written interpretation and not from laws, court cases, or the Code of Federal Regulations, etc. unless cited. The details of many of these terms are interpreted differently and continue to evolve. Readers concerned with the legal specifics of each form should consult federal code, public laws, the Office of General Council, case law, and the Forest Service Manual.

This document is divided into two major parts—the first focuses on traditional authorities and the second on how the Stewardship Contracting authorities modifies these traditional authorities. Although these authorities are defined separately, many contracting innovations have involved combining various contracting mechanisms and structures.

### TRADITIONAL AUTHORITIES

Congress has passed laws prescribing the ways that federal agencies procure (or acquire) services and dispose of federal property. Historically, the processes of selling timber and purchasing goods and services have been entirely separate. The laws governing them are completely different as are the staff that perform these tasks. The laws governing the sale of timber are located primarily in Title 36 of the Code of Federal Regulations (CFR) along with most of the regulations governing the Forest Service. The regulations governing the purchase of goods and services—including, for example, tree planting, thinning, culvert replacement—are governed by separate titles that apply across the federal government. Although these regulations are also part of the CFR, they are more commonly known as the Federal Acquisition Regulations (FAR).

For the purposes here, the Federal Acquisition Regulations offer three main mechanisms for soliciting bids for goods and services. These are invitation for bid, request for quote, and the request for proposal. In addition, the Code of Federal Regulations offers several mechanisms for disposing of federal property (timber)—primarily administrative use and the timber sale.

## **Procurement/Acquisition of Goods and Services**

When talking about purchasing goods and services, people use a number of different terms more or less synonymously. In particular, acquisition, procurement, and service contracting are often used interchangeably. In some cases, however, service contracting refers to a particular type of procurement—of services rather than goods or construction.

**Invitation for bid (IFB)**—When the Forest Service uses an invitation for bid, the agency solicits price offers for services or supplies and the firms provide the agency with sealed bids. The Forest Service simply picks the lowest cost bid from among the qualified bidders. Traditionally, the Forest Service has used the invitation for bid (sealed bid) as their primary means of soliciting contractors to perform services for them. For the agencies and bidders, this system was simple and required a minimum of preparation. It tended to provide the agencies with the lowest short-term cost for work. However, it provided little flexibility to agency personnel to refuse a bid from a contractor who did minimally acceptable work and provided no mechanism to reward high quality work.

Prior to the mid-1990s, the Forest Service was required to use the IFB for all contracts over \$25,000 when not using the request for proposal. However, acquisition reforms of the 1990s encouraged agencies to use other methods to procure work, including the request for proposal and request for quote.

**Request for proposal (RFP) and request for quotation (RFQ)**—As the Forest Service commonly uses them, the request for proposal and the request for quote are similar tools. In both cases, the Forest Service may ask bidders to provide a bid price and a proposal that might include, for example, information about how they propose to complete the project, what equipment they will use, the skill level and experience of the personnel. The Forest Service may ask bidders to clarify responses and bidders may change their price or withdraw their bid at any time prior to contract award.

The RFQ is generally used for small, relatively simple projects whereas the request for proposals is generally used for larger and more complex projects. The Forest Service may use the RFQ for procurement with an estimated value less than \$100,000. A request for proposal is used for projects estimated to cost greater than \$100,000. The formats of the RFP and RFQ differ, with the RFQ being much simpler. In addition, the advertising requirements for an RFQ are less stringent than for an RFP. Under some circumstances, a contracting officer may solicit offers orally for an RFQ by telephone whereas an RFP requires a written proposal or formal presentation.

**Best Value to the Government**—One of the key features of both the RFP and the RPQ is that the Federal Government may consider “best value to the government,” not simply price when awarding a contract. When using best value, the Forest Service can evaluate responses based on criteria that are identified in advance and reflect management objectives. For example, the Forest Service frequently considers the contractor’s technical proposal, past performance, and contractor experience in addition to price when considering the best value to the government. When submitting an offer, a contractor provides a bid price, but also a proposal that responds to the informational request in the contract solicitation.

Traditionally, the opportunity to award based on best value to the government applies only to procurement and not to timber sales. However, the stewardship contracting grants requires that the agencies consider best value to the government when awarding timber sale contracts consider best value to the government when selling timber.

### **Disposal of Timber**

As suggested above, different laws govern the disposal of timber (for sale or free) than the purchases of goods and services. Although we think primarily of the timber sale, the Forest Service may dispose of trees or other forest products with little or no charge under certain circumstances. Trees for firewood is perhaps the most well-known example of this. For the purposes here, administrative use and the timber sale are defined below.

**Administrative use**—Although the Forest Service primarily disposes of timber through the timber sale as noted above, there are instances in which it may dispose of timber at little or no charge. One of these is “administrative use.” As stated in 36 CFR 223.2, “Trees, portions of trees, or other forest products *in any amount* on National Forest System lands may be disposed of for administrative use, by sale or *without charge*, as may be most advantageous to the United States. . .” (emphasis added). The regulation goes on to limit the administrative use to five circumstances, including “For disposal when removal is desirable to protect or enhance multiple-use values in a particular area” (36 CFR 223.2). Although infrequently used, these clauses allow the Forest Service to give away timber when the objectives are related to “multiple use” rather than timber extraction.

**Timber Sale**—The primary federal property that the Forest Service sells is timber. The National Forest Management Act (NFMA) governs the details of selling of timber from National Forest Lands. The Forest Service sells timber primarily through the bid or a fixed price contract. Whenever the Forest Service has a project with an appraised value above \$10,000, the Forest Service must advertise the timber sale and then offer it through a sealed or open bid. However, national forests “may sell without further advertisement, at not less than appraised value, any timber previously advertised for competitive bid but not sold because of lack of bids. . .” (36 CFR 223.85). When a timber sale has an appraised value less than \$10,000 or does not attract bidders, the Forest Service can offer the sale at a fixed price. The price is the greater of the appraised value or what is known as a base rate. Base rates are prices below which a National Forest may not sell timber. The base rate varies by National Forest and tree species. These fixed price sales are known as pre-measured or 2400-3T sales. The 2400-3T timber sale contracts have been an important innovative tool in recent years. Some National Forests have linked the 2400-3T timber sale to a service contract to undertake the work that involves the removal of timber but does not contain enough value to attract purchasers.

In recent years, there has been much debate and re-examination of what types of activities can be included in a timber sale. The purpose of the timber sale has shifted from being primarily an end goal to one among many tools to achieve ecological goals. As this change has occurred, Forest Service personnel have disagreed about the amount and kinds of trees removal and other activities that can be included in a timber sale. Regarding timber, some personnel argue that,

Through the discretion granted by the NFMA, Forest Service managers may determine the appropriate mix of economically viable and non-viable forest products in a timber sale contract in order to accomplish land management objectives identified in the environmental analysis (Monismith 2000).

The Contracting Task Force (2001) draws a similar conclusion.

Although the Forest Service may include a wide variety of material in a timber sale to meet management objectives when selling timber via bid, the Forest Service is required to choose the highest bidder, except under a narrow set of circumstances such as purchaser debarment. Unlike procurement using the RFP or RFQ, the Forest Service may not consider the best overall value to the government (factors such as logging skills or attention to environmental damage), only the price offered by potential purchasers.

### **Linked and Hybrid Service Contracts and Timber Sales**

**Service contract with an embedded timber sale**—Sometimes, silvicultural restoration projects contain some timber that could be sold to a mill once it was removed from the woods, but this income would not pay the full cost of the project.

When using a service contract with an embedded timber sale, the successful bidder of the service contract is required to execute the timber sale. More simply, the successful bidder completes a service contract and pays for the removed material at base rates. Generally, an RFP is used to select the contractor using best value evaluation. The contract is structured primarily as a procurement instrument not a timber sale. To use the tool, the timber that is to be removed must have an appraised value less than \$10,000 or have failed to sell through the open bid process (Contracting Task Force 2001).

**Separating the logger from the log**—When the “logger is separated from the log” two separate contracts are used. A service contract is used to perform work including the harvest and removal of trees. This allows best value to the government to be considered when awarding the contract as well as the small business set asides (see below). However, the winner of the service contract does not own the timber. Instead, the timber is sold as separate transactions to the highest bidder or bidders.

### **Contracting Structures and Components**

The Forest Service can structure contracts and the work they contain in a variety of ways. Many innovative contracts include two or more of the components defined here.

**Bundled contracts**—Bundled contracts combine several work tasks that have been traditionally issued separately into a single contract. The Small Business Reauthorization Act of 1997 directs agencies to, “avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurement as prime contractors” (15 USC 631). However, the Forest Service may design and package work to meet management objectives. This includes combining different types of work occurring in a single area to reduce impacts of multiple entries.

It may also involve work across larger areas to create longer duration contracts for small businesses and workers or to create administrative efficiencies.

**Indefinite delivery, indefinite quantity (IDIQ)**—Traditionally, Forest Service contracts were written for a specified amount of work to be accomplished in a specified amount of time for a specified amount of money. In an IDIQ contract, the agency offers a contract that contains a minimum and maximum amount of work that the contractor will be asked to perform. The contractor submits a per unit (often per acre) bid based on sample units (acres) that the Forest Service wants to treat. When signing a contract, the Government and the contractor commit to a minimum amount of work and a contract start and end date. The Government then issues task orders to request work during that time period.

**Multiple-award IDIQ solicitations**—The multiple award IDIQ is similar to a regular IDIQ except that it awards the work to several different contractors based on a single solicitation. That is, each awardee will get a minimum amount of work at their proposed prices. Services are purchased using a task order rather than a new contract.

**Performance-based, end-results**—Performance-based, end-result contracts focus on the desired outcome rather than the way that the contractor is required to achieve those results. The contract financially rewards the contractor based on the extent to which the firm achieved the end result not whether the firm used a particular method or prescription to get to that result.

**Designation by description**—In service contracts, the Forest Service commonly designates a work to be performed by description rather than marking every action to be taken. For example, in a pre-commercial thinning project, the Forest Service may describe the types of trees to be cut. However, the National Forest Management Act says that the Forest Service shall designate the timber that it sells, not the purchaser. Consequently, the Forest Service cannot give a timber sale purchaser discretion about which merchantable trees to harvest. With the increasing emphasis on harvesting small diameter, tree marking has become expensive both in labor and paint. Using existing authorities, some Forest Service managers have been experimenting with prescriptions that do not provide any flexibility about which trees would be cut, but do not actually mark the trees. For example, a contract could specify, “cut all lodge pole pine less than 9 inches DBH.”

### **Set Asides**

In general, rules governing procurement are designed to provide fair access to government contracts and the lowest price to the government by maximizing competition. However, there are several exceptions to the principle of free and open competition, which are designed to provide economic benefits to certain types of firms. These set apply only to procurement contracts, and the Forest Service has very limited ability to set aside timber sales for small businesses.

**Small Business Set Asides**—With a few exceptions, the Federal Government is required to set aside for small businesses nearly all contracts that a small business could perform, and the Forest Service sets aside most of its contracts for small businesses. Generally, small forestry services businesses are defined as having less than \$6 million dollars in annual revenue. In heavy

construction work such as road building, small businesses are defined as having less than \$27.5 million dollars in annual revenue.

**Disadvantaged Business [8(a)] Set Asides**—In addition to general small business set asides, the Forest Service may restrict the bidding pool to qualified disadvantaged firms, so-called 8(a) firms. To qualify for this program, the business owner must be from a traditionally disadvantaged group (such as African American, Native Americans, Hispanics, some Asian-Americans, or women) must own the company, have limited net worth, and be growing the company (Small Business Administration. 2001a).

**Historically Underutilized Business (HUB) Zones**—In 1997, Congress directed the Small Business Administration to identify HUB Zones. HUB Zones are Indian reservations, impoverished rural counties, and qualified urban census tracts. Rural counties qualify as HUB Zones when they have a median household income of less than 80% of the statewide average or have an unemployment rate greater than 140% of the statewide average. To qualify as a HUB Zone firm, a business must have its primary office in a HUB Zone and 35% of its employees must live in a HUB Zone. Once signed up for the program, firms are eligible for federal contracts that are set aside for HUB Zone firms. Any contract with an estimated valued above \$100,000 is to be set aside for qualified HUB Zone firms if there are two or more qualified firms likely to bid on the contract.

## STEWARDSHIP ENDRESULTS CONTRACTING AUTHORITIES

Section 347 of the 1999 Omnibus Appropriations Act authorized the Forest Service to establish 28 pilot projects (more have since been authorized) to test a suite of contracting authorities, some of which are not currently allowed under current timber sale and procurement contract regulations. In the FY 2003 Omnibus Appropriations Act, Congress authorized similar authorities until 2013, for use across the Forest Service and Bureau of Land Management. These authorities include: designation by description or prescription, retention of receipts, goods for service, longer multi-year contracts, and best value. These mechanisms may only be used for specific land management goals, including:

- (1) road and trail maintenance or obliteration to restore or maintain water quality;
- (2) soil productivity, habitat for wildlife and fisheries, or other resource values;
- (3) setting of prescribed fires to improve the composition, structure, condition, and health of stands or improve wildlife habitat;
- (4) removing vegetation or other activities to promote healthy forest stands, reduce fire hazards, or achieve other land management objectives;
- (5) watershed restoration and maintenance;
- (6) restoration and maintenance of wildlife and fish habitat; and
- (7) control of noxious and exotic weeds and reestablishing native plant species. (Sec. 323 of P.L. 108-7, 2003.)

**Best Value**—As described above, the Forest Service already had the authority to award procurement contracts on the basis of best value but not timber sales. Stewardship contracting authority requires the Forest Service and the Bureau of Land Management to award stewardship timber sale contracts based on best value, not simply highest bid.

**Multi-year Contracts**—The Forest Service can award 10-year timber sale contracts under traditional authority. The stewardship contracting authority changes the limit from 5 years to 10 years for the maximum contract length for procurement contracts.

**Retention of Receipts**—In general, the Forest Service is required to send the receipts from a timber sale, less deposits to various trust funds, to the Federal Treasury. Congress must appropriate work to be performed under a service contract. Stewardship contracting authority allows that:

(2) USE—Monies from an agreement or contract under subsection (a) may be retained by the Forest Service and shall be available for expenditure without further appropriation at the project site from which the monies are collected or at another project site.

*Retention of receipts and separating the logger from the log.* The challenge of separating the logger from the log is that it can increase the agency costs of administering a project. Without special authorities, to use these mechanisms they must have full funding from Congress to implement the service contract and then must send the proceeds of selling the logs to the Federal Treasury. Retention of receipts allows the receipts from one project to be applied to the service contract of the next project or for service contract work to be funded in whole or in part from receipts from sales of any materials removed as a by-products of service contract work.

**Designation by description/prescription**—In a service contract, the Forest Service and BLM may describe actions to be taken or desired end results. In a timber sale contract, the Forest Service and Bureau of Land Management may either use paint to indicate trees to be removed or provide descriptions that would lead any two people to choose the same trees. The stewardship contracting authority allows the Forest Service to describe a desired end result in a timber sale contract. For example, the Forest Service might want the end result to be 200 foot sight-distances for big horn sheep. The contract solicitation asks the contractor to describe how they will meet the objectives. Monitoring plots or other techniques are used to ensure that the contractor has achieved the desired end result.

**Goods for services**—Generally, the Federal Government is prohibited from trading goods for services. It is not permissible to augment appropriated funds by exchanging something of commercial value. A good is, “an asset of the Federal Government that has economic value, i.e. something that the public is willing to pay for” (USDA Forest Service, Region 6 2001 p. 55). However, the Forest Service Region 6 interpretation is that,

If a commercial product does not have economic value, i.e., can not be reasonably sold since the cost of operation exceeds the economic value (a negative appraisal and clearly no market value based on market experience and conditions), the agency can provide removal rights to any successful bidder [of a service contract] (USDA Forest Service, Region 6 2001, p. 57).

If the project or a subset of it could be packaged as a viable timber sale, then combining it with service work would constitute a trade of goods for services and would not be permitted under normal circumstances.

Stewardship contracting authority allows the creation of a single contract in which commercially valued timber is exchanged for work that the Forest Service would normally have to pay for. In the contract, the Forest Service exchanges goods (timber) for services (other restoration work). The goods-for-services authority allows timber removal to be put in a single contract with other restoration work such as culvert removal, road decommissioning, or grass seeding.

*Timber sale with an embedded service contract*—This is a form of goods-for-services in which a firm buys a timber sale and then is required to execute an associated service contract. The purchasing firm reduces its bid price of the timber sale to cover the costs of completing the service contract. This mechanism is not permitted under traditional authorities because it would exchange goods for services. A service contract with an embedded timber sale is permitted because there is no good—some thing that the public is willing to pay for—involved in the project.

## References

**Contracting Task Force. 2001.** Contracting task force report. Washington, D.C. Version January 11, 2001. <<http://fsweb.wo.fs.fed.us/fm/stewardship/contractguide>>

**Monismith, C. 2000.** Implementing the Starkey Restoration project through creative contracting. Wallowa-Whitman National Forest. 11 p.

**USDA Forest Service, Region 6. 2001.** Toolkit: Promoting Health and Sustainability, A Stewardship Approach to Ecosystem Management. Version 1.1. 118 p.