

Matter of: Department of Agriculture--Reconsideration
File: B-253813.2
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Rhea Daniels Moore, Esq., and Lori Diahann Polin, Esq.,
 Department of Agriculture, for the agency.
 David R. Kohler, Esq., and Amy Mertz Brown, Esq., for the
 Small Business Administration.
 LeRoy W. Wilder, Esq., Hobbs, Straus, Dean & Wilder, for the
 Metlakatla Indian Community.
 Christine F. Davis, Esq., and James A. Spangenberg, Esq.,
 Office of the General Counsel, GAO, participated in the
 preparation of the decision.

DIGEST

The General Accounting Office affirms prior decision that recommended the cancellation of an award by the Forest Service of a small business set-aside timber sale to a bidder, which erroneously certified itself as a small business concern in the face of an applicable adverse Small Business Administration (SBA) size determination, where the Forest Service had been expressly apprised by the SBA prior to award that the bidder could not be considered a small business under the applicable SBA regulations which control such size determinations.

DECISION

The Department of Agriculture, Forest Service, requests reconsideration of our decision and recommendation in Timothy S. Graves, B-253813, Oct. 22, 1993, 93-2 CPD ¶ 244, in which we sustained Timothy S. Graves's protest of an award of a contract to the Metlakatla Indian Community pursuant to the Kitkun Bay Timber Sale, which was set aside for small business. We recommended that the Forest Service cancel the sale to Metlakatla because that firm did not qualify as a small business concern, and make award to Mr. Graves as the next highest bidder who qualifies as a small business concern.

We affirm.

In our prior decision, we found that the award to Metlakatla violated the Small Business Administration (SBA) regulations governing the award of timber sale contracts set aside for small business. The applicable SBA regulations provide that:

"The size status of a concern, including its affiliates, is determined as of the date of its written self-certification as a small business as part of the concern's submission of an offer." 13 C.F.R. § 121.1004(a) (1993).

"(1) A formal size determination becomes effective immediately and remains in full force and effect unless and until reversed upon appeal to SBA's Office of Hearings and Appeals [OHA] . . . unless the concern is recertified as a small business

"(2) After SBA has determined that a protested concern is other than small for purposes of a particular procurement, such concern cannot thereafter become eligible for such procurement by affirmatively reducing its size.

"(3) If SBA has made a formal size determination that a particular concern is not small, the concern will be deemed ineligible within such applicable size standard for any assistance under the Small Business Act . . . unless it is thereafter recertified by SBA as a small business After such an adverse size determination, the concern shall not self-certify as small within the same or a lower employee or annual receipts size standard (whichever is applicable) unless it is recertified." 13 C.F.R. § 121.1606(h).

On October 22, 1992, Metlakatla had been found by an SBA regional office not to be a small business concern in connection with an earlier sale (the Salt Lake sale). In its bid on the Kitkun Bay sale, which opened December 22, 1992, Metlakatla certified itself as a small business in the face of this SBA decision as well as an SBA notice that Metlakatla could not thereafter certify its timber enterprise as small unless the adverse size determination was reversed on appeal or the concern was recertified as small. The contracting officer, aware of the adverse size determination affecting Metlakatla's timber enterprise, questioned the SBA about the concern's certification and size status on the Kitkun Bay sale. The SBA regional office promptly confirmed that Metlakatla was prohibited from certifying itself as a small business with its bid, either under its tribal name or its trade name, and was therefore

not eligible for award of this sale. This determination was confirmed on appeal by the SBA OHA even though the OHA had by then separately reversed the initial adverse size determination on Metlakatla. The Forest Service nevertheless made award of the Kitkun Bay sale to Metlakatla.

Under the SBA regulations and its rulings on this case, the contracting officer could not properly award to Metlakatla since he knew that the SBA had declared the concern to be other than small at the time of December 22, 1992, bid opening. 13 C.F.R. §§ 121.1004(a), 121.1005(b).² Even though Metlakatla later succeeded on appeal in reversing its adverse size determination with regard to timber sales which opened after the determination was reversed, as found by the OHA with regard to the Kitkun Bay sale, the adverse size determination remained in effect at the time of bid opening and under SBA regulations was dispositive of Metlakatla's eligibility to receive an award of that sale. Comet Cleaners, Inc.--Recon., 67 Comp. Gen. 368 (1988), 88-1 CPD ¶ 322; SCS Eng'rs, B-201166, Sept. 29, 1983, 83-2 CPD ¶ 388; Propper Int'l, Inc. et al., 55 Comp. Gen. 1188 (1976), 76-1 CPD ¶ 400.

The Forest Service does not dispute that under SBA regulations Metlakatla was not entitled to the award of this sale. Instead, the Forest Service again argues that its own regulations governing the award of set-aside timber sales should be controlling, which purportedly measure size eligibility as of the time of award. The referenced Forest Service regulation states:

"If timber is advertised as set aside for competitive bidding by small business concerns, award will be made to the highest bidder who qualifies as a small business concern and who has not been determined by the Small Business

¹The reversal was effective with regard to timber sales opening after the reversal date, January 12, 1993.

²The Forest Service asserts that the SBA regulations rob agencies of their ability to accept a bidder's self-certification at face value, without first obtaining an SBA decision. In fact, the SBA regulations expressly permit agencies to accept a bidder's self-certification at face value "in the absence of . . . credible information which would cause a contracting officer to question the veracity of a concern's self-certification as a small business." 13 C.F.R. § 121.1005(b). The Forest Service, being cognizant of the Salt Lake size determination, had reason to question Metlakatla's certification and did so.

Administration to be ineligible for preferential award of set-aside sales." 36 C.F.R. § 223.103 (1993).

The Forest Service claims that it was entitled under this regulation to delay the award to Metlakatla until the concern was successful in its appeal of the adverse size status determination. While the SBA regulations do not provide for this, the Forest Service argues that the "SBA's regulations and the [Forest Service's] must be read together to allow for consideration of eligibility at the time of award."

In our prior decision, we pointed out that the Forest Service regulation provides for the SBA to determine which firms would "be ineligible for preferential award of set-aside sales," and that the SBA regulations require status to be determined as of bid opening. We saw nothing in the Forest Service regulation, and indeed see nothing now, that would permit the Forest Service to do what it did here.

Moreover, to the extent the Forest Service believes that it can provide, by its own regulation, for making an award decision on size status as determined by time of award rather than the status as of bid opening, it invades the province of the SBA, the agency responsible for effectuating the policies of the Small Business Act.³ As stated in our prior decision, the SBA has conclusive authority under the Small Business Act, 15 U.S.C. § 637(b)(6) (1988), to determine within any industry for both procurements and sales the entities to be designated as "small business concerns." Given its broad authority under the Small Business Act, the SBA is solely responsible for determining what constitutes a small business eligible to bid on a restricted government contract, and its determinations are binding on contracting agencies. See Choctaw Mfg. Co., Inc. v. United States, 761 F.2d 609, 611 (11th Cir. 1985).

Pursuant to its authority, the SBA has issued regulations governing small business size eligibility specifically applicable to timber sales, which provide that a firm that lacks the legal status of a small business at the time of bid opening, such as Metlakatla, is not eligible for the award of a set-aside sale.⁴ Notwithstanding the Forest

³For the same reason, we reject the numerous arguments made by the Forest Service that the purposes of the Small Business Act would be better served by implementing its size eligibility regulation, rather than the SBA's.

⁴The reasons for this regulation are discussed in our prior decision.

Service regulation, it is the SBA regulation that prevails. See SCS Eng'rs, supra (conflict between the Federal Procurement Regulations and the SBA regulations as to the controlling date for determining small business size status resolved in favor of the SBA regulations); see also CADCOM, Inc., 57 Comp. Gen. 290 (1978), 78-1 CPD ¶ 137 (conflict between SBA policy and the Armed Services Procurement Regulation as to the controlling date resolved in favor of the SBA position).

Finally, the Forest Service requests that we modify our recommendation to cancel the sale to Metlakatla. The agency notes that Metlakatla's contract does not contain a termination for convenience clause,⁵ such that canceling its contract may render the agency liable for damages. The agency also notes that while actual logging operations have not commenced,⁶ Metlakatla has submitted an operating plan for approval.

We decline to modify our recommendation. Metlakatla's self-certification that it was a small business was contrary to SBA's specific advice, and the Forest Service's decision to make award to Metlakatla contravened the unambiguous regulations and express decisions of the SBA, which has primary responsibility regarding small business size matters. Under the circumstances, we find no basis to

⁵The contract does contain a variety of other contract termination provisions.

⁶The SBA notes that this operating plan was apparently submitted after receipt of our prior decision recommending the cancellation of the sale to Metlakatla.

⁷In comments submitted to our Office in support of the Forest Service's request for reconsideration, Metlakatla asserts that it did not falsely certify its size status when it submitted the Kitkun Bay bid, since it thought the SBA's adverse size determination applied only to its trade name, MITE, and did not effectively prohibit it from claiming small business status under its tribal name. This argument is disingenuous. The SBA's Salt Lake size determination clearly covered Metlakatla under both its trade name and its tribal name, stating that, "Metlakatla Indian Community is . . . ineligible as a small business concern," and "the entity which bid on the subject procurement is, in fact, the Tribe itself." In addition, as noted above, the SBA then specifically advised Metlakatla that it could not be considered, nor certify itself, as a small business concern for such sales until it was determined to qualify as a small business concern.

modify our recommendation that the sale be canceled,⁸ 53 Comp. Gen. 434 (1973), aff'd, Dyneteria, Inc., B-178701, Feb. 22, 1974, 74-1 CPD ¶ 89 and Dyneteria, Inc., B-178701, Feb. 22, 1974, 74-1 CPD ¶ 90 (contracts should be terminated regardless of possible termination costs where the contractor falsely certified itself to be a small business concern and the agency made award to that firm, notwithstanding that it was apprised by the SBA prior to award that the contractor was not a small business).

Our prior decision is affirmed.

Comptroller General
of the United States

⁸Where, as here, an award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor, or if the contractor was on direct notice that the procedures being followed were violative of such requirements, the award may be considered palpably illegal and canceled without liability to the government, except to the extent recovery may be had on the basis of quantum meruit. See United States v. Amdahl Corp., 786 F.2d 387 (Fed. Cir. 1986); 52 Comp. Gen. 215 (1972), and cases cited therein; see also Acumenics Research and Tech., Inc.-- Contract Extension, B-224702, Aug. 5, 1987, 87-2 CPD ¶ 128.