



Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

**Matter of:** Timothy S. Graves

**File:** B-253813

**Date:** October 22, 1993

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Timothy S. Graves for the protester.  
Lori Baker, Esq., and Rhea Daniels Moore, Esq., Department  
of Agriculture, for the agency.  
Mona K. Mitnick, Esq., for the Small Business  
Administration.  
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

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### DIGEST

The Forest Service may not contravene the applicable Small Business Administration (SBA) regulations by awarding a contract under a small business set-aside timber sale to a bidder which it knows has been declared other than small by the SBA as of the time of bid opening and therefore ineligible for award, regardless of whether the bidder has certified otherwise in its bid or whether the bidder achieves small business status on appeal after bid opening.

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### DECISION

Timothy S. Graves protests the award of a contract by the Forest Service to the Metlakatla Indian Community pursuant to the Kitkun Bay timber sale, which was set aside for small business. The sale was for an estimated 4 million board feet of timber from the Tongass National Forest, Ketchikan, Alaska. Mr. Graves protests that the Forest Service should have rejected Metlakatla's high bid because the awardee did not qualify as small business concern.

We sustain the protest.

The Forest Service advertised the timber sale on November 21, 1992. Sealed bids were required to be submitted by December 22. The timber sale was set aside for small business concerns, and bidders were required to certify their size status with their bids. The Forest Service received four bids by bid opening; Metlakatla submitted the high bid of \$441,240.80 and Mr. Graves the next high bid of \$355,549.28. All bidders, including

Metlakatla and Mr. Graves, certified themselves as small business concerns.

Earlier, on October 26, 1992, in connection with another timber sale in the Tongass National Forest (the Salt Lake timber sale), a Small Business Administration (SBA) regional office found that Metlakatla, doing business as Metlakatla Indian Timber Enterprises (MITE), was other than a small business concern. Metlakatla received notice of this adverse size determination on October 28, 1992. This notice also advised that Metlakatla could not thereafter certify its timber enterprise as small for any procurement which had the same or lower size standard, unless the adverse size determination was reversed on appeal or the concern was recertified as small. See 13 C.F.R. § 121.1606(h) (1992). Metlakatla appealed this size determination to the SBA Office of Hearings and Appeals (OHA) on November 9. As of the December 22 bid opening, the SBA admonition that Metlakatla could not certify itself as small remained in force.

After bids were opened, the contracting officer questioned Metlakatla's small business size certification in view of the tribe's "apparent close connection" with MITE, which he knew had been the subject of an adverse size determination by the SBA. Promising to "withhold award of the sale to Metlakatla . . . until a decision is made on their status," the contracting officer sought an SBA determination regarding Metlakatla's size. On December 31, the SBA responded to the Forest Service that it had already determined, in its October 26 decision, that Metlakatla was not small using either its own name or its trade name--MITE; that this adverse size determination was in effect as of bid opening for the Kitkun Bay timber sale; and that Metlakatla was prohibited from certifying itself as a small business in its December 22 bid. Metlakatla appealed this decision to the OHA on January 8, 1993.

The OHA reversed the adverse size determination with respect to the Salt Lake timber sale on January 12, 1993. In an April 8 decision, the OHA affirmed that Metlakatla was nonetheless ineligible to certify itself as a small business concern in bidding for the Kitkun Bay timber sale. As reasoned in this decision, Metlakatla's other than small status became effective on October 26 with the adverse SBA size decision, and remained so until January 12, when this determination was reversed on appeal. The OHA therefore found that notwithstanding the pendency of Metlakatla's size appeal at the time of the Kitkun Bay timber sale on December 22, Metlakatla could not certify itself as a small business for this sale because the adverse size determination still remained in effect under applicable SBA regulations.

On June 7, the contracting officer awarded the contract to Metlakatla. The rationale for the award was stated as follows:

"Although the SBA determined that Metlakatla was ineligible to self-certify as a small business as of the date of bidding on the Kitkun Bay contract, the SBA concluded that Metlakatla's small business status again became effective as of January 12, 1993. I have concluded that in this case, small business status should be determined as a final matter as of the date of award."

This protest followed.

There is no dispute that Metlakatla was ineligible to certify itself as a small business in its December 22 bid in the face of an adverse SBA size determination. However, the Forest Service contends that it was proper to accept Metlakatla's bid and self-certification at face value, see 13 C.F.R. 121.1005(b), and to delay the award until Metlakatla could, in fact, properly certify itself as small in the event of a favorable size appeal. In essence, the Forest Service argues that a firm's small business size certification relates to the time of award, not to the time of bid opening.

The Forest Service sells timber from the National Forest System lands under the authority of the National Forest Management Act, 16 U.S.C. § 472a (1988), and its implementing regulations at 36 C.F.R. § 223 (1992). The Forest Service's regulations provide in pertinent part:

"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 [SBA] to be ineligible for preferential award of set-aside sales."  
36 C.F.R. § 223.103 (1992).

The SBA has conclusive authority under the Small Business Act, 15 U.S.C. § 637(b)(6) (1988), to determine within any industry the entities to be designated as "small business concerns." This encompasses the power to set size standards and to determine which concerns qualify as "small" within these size standards. 13 C.F.R. §§ 121.201(a), 121.202(b). Pursuant to this authority, the SBA has issued regulations governing the size eligibility for small business assistance in the sale or lease of government property, including timber sales. 13 C.F.R. §§ 121.1001 et seq. Of relevance here, the SBA regulation regarding the time at which size is determined for a set-aside sale is as follows:

"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).

This rule amended SBA's previous policy of determining size eligibility both at the time of bid opening "and the time of the [OHA's] decision in cases where award had not yet been made." See 46 Fed. Reg. 2591, 2592 (1981). SBA explained that, under the prior policy, size certifications by bidders or offerors could be only "projections of intent rather than a statement of current status." By determining size eligibility solely at the time of the concern's written self-certification, the SBA intended to discourage bidders or offerors misrepresenting their size eligibility in the hope of achieving small business status on appeal prior to award. In addition, the regulation is designed to prevent contracting agencies from considering the bids or offers of concerns that are not small, thereby diverting attention from concerns that have accurately represented their size status with their written self-certification. Id.; see CADCOM, Inc., 57 Comp. Gen. 290 (1978), 78-1 CPD ¶ 137 (discussion of SBA policy that required the bidder to be eligible to certify itself as small as of bid opening).

Here, Metlakatla lacked the legal status of a small business at the time of bid opening, owing to the previous, still outstanding determination by an SBA regional office that it was not small. 13 C.F.R. §§ 121.204, 121.1004(a); 121.1605(h). As a result, at the time of bid opening, the adverse size determination issued by the SBA regional office remained in full force and effect, and was dispositive of Metlakatla's eligibility to receive the award, such that Metlakatla was ineligible to receive award under this small business set-aside, regardless of whether its size status subsequently changed on appeal. Comet Cleaners, Inc.-- Recon., 67 Comp. Gen. 368 (1988), 88-1 CPD ¶ 322; SCS Eng'rs; B-210166; Sept. 29, 1983, 83-2 CPD ¶ 388; Propper Int'l, Inc., et al., B-185302, June 23, 1976, 76-1 CPD ¶ 400. Indeed, as of the time of bid opening, Metlakatla had been expressly admonished by the SBA that it could not certify itself as a small business until it had been recertified as such.

The Forest Service argues that the statutes and regulations governing federal procurements are not strictly applicable to timber sales. See Tangfeldt Wood Prods., Inc., B-207688, May 3, 1983, 83-1 CPD ¶ 468. Thus, the Forest Service suggests that it has discretion to apply its own regulations and policies, rather than those of the SBA, in determining when a bidder must obtain the necessary small business status to qualify for award. According to the Forest

Service, its own regulation governing the award of a timber sale contract measures size eligibility at the time of award.

The Forest Service regulation states that:

"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 Administration to be ineligible for preferential award of set-aside sales." [Emphasis supplied.]  
36 C.F.R. § 223.103.

The regulation specifically defers to the SBA for determining size eligibility, and, as discussed above, the SBA measures size eligibility as of bid opening. 13 C.F.R. § 121.1004(a). Thus, there is no inconsistency between the relevant Forest Service and the SBA regulations.<sup>1</sup>

The Forest Service claims that it nevertheless had the authority to accept Metlakatla's self-certification pursuant to 13 C.F.R. § 121.1005(b), which provides that:

"[i]n the absence of a written protest by other offerors or other credible information which would cause a contracting officer to question the veracity of a concern's self-certification as a small business, a contracting officer may accept the self-certification at face value."

This provision does not assist the agency in this case because here the contracting officer knew of an outstanding, adverse SBA size determination concerning Metlakatla's timber enterprise and, in fact, had sought a formal size determination for Metlakatla. See 13 C.F.R. § 121.1601(b)(4). Thus, the contracting officer could not, and did not, accept Metlakatla self-certification at face value. The contracting officer was not thereafter free to award to Metlakatla unless the SBA found--which it did

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<sup>1</sup>We note that the Forest Service prospectus for this timber sale also defers to the SBA for size status determinations:

"The [SBA] can verify the high bidder's size status. A small business that does not qualify for the program must obtain a recertification of size before self-certifying again for small business set-aside."

not--that Metlakatla was small as of the date of its written self-certification.<sup>2</sup>

We sustain the protest.

The agency advises us that Metlakatla has not commenced performance under its contract. Since Metlakatla improperly certified that it was a small business concern when it submitted its bid, we recommend that the sale to Metlakatla be canceled and award be made to Mr. Graves as the next highest bidder who qualifies as a small business concern.

*for Milton J. Auster*  
Comptroller General  
of the United States

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<sup>2</sup>In fact, the Forest Service awarded the contract after being specifically apprised by OHA that Metlakatla was ineligible to claim small business status for this sale.