

**DECISION**

THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20540

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FILE: B-191933

DATE: November 1, 1976

MATTER OF: Siller Brothers, Inc.

**DIGEST:**

Notwithstanding bidder, later found to be other than small business concern, participated in small business set-aside oral timber sale, there is no basis to reduce successful small business firm's bid by disregarding all bids by ineligible firm, absent clause providing for such reduction in sale documents. Contract should be awarded to small business submitting high bid or sale should be canceled and resolicited.

Siller Brothers, Inc. (Siller), has protested that Siller's final oral bid under the Department of the Interior's Alder Creek Skyhook Timber Sale, a small business set-aside, should be reduced because a large business took part in the oral bidding.

The sale was for tract 78-18, which contained an estimated 4,966 MM board feet with an appraised value of \$436,199.70. All bidders had to submit a written bid of not less than the appraised value, a bid deposit of \$43,700 and a self-certification as to the bidder's status as a small business.

Four bidders complied with these requirements and the high written bid received for Douglas fir was 89.10/M board feet by The Murphy Company (Murphy). Murphy began the oral bidding at this price which was raised to \$89.15/M board feet by Scotsman Timber Company (Scotsman). Siller then bid \$90/M board feet. Thereafter, the bidding continued for 185 bids with only Siller and Scotsman bidding. Murphy made no more oral bids and Coos Head Timber Company, the other qualified bidder, never made an oral bid. Siller finally submitted the high bid of \$181/M board feet.

On the fifth working day following the sale, Siller protested the small business size status of Scotsman to the contracting officer and requested that

award be made to Siller at its initial oral bid price of \$90/M board feet or that the sale be set aside and readvertised.

Subsequently, the Small Business Administration (SBA) Seattle Regional Office determined that Scotsman was other than a small business and upon appeal by Scotsman, the SBA Size Appeals Board affirmed the Regional Office determination.

Siller's protest to our Office requests that the contract be awarded to it for \$90/M board feet because of the improper participation by Scotsman, a large business. Interior has responded to the protest by stating that the contract should either be awarded to Siller at \$181/M board feet or that all bids should be rejected and a recompetition held.

Siller contends that there is precedent for reducing its bid price from \$181 to \$90 in the procedures utilized by the U.S. Forest Service in its oral auctions of timber. Small business set-aside sales by the Forest Service contain the following statement:

"If the advertisement for this sale provides for oral auction bidding, award will be conditioned on the bidding record. All qualified participants will be offered an opportunity to record an oral bid before a new bid will be accepted from a previous bidder. All bids received from any concern which is later disqualified as to small-business status by the Small Business Administration will be stricken from the record. In such a case, award will be made to the qualified small-business concern which submitted the highest bid, at its first bid which exceeded other bids from qualified small-business concerns."

While our Office has previously considered the factual situation presented here in B-164516, July 5, 1968, that decision concerned a Forest Service sale which contained the above clause. We concluded that the contract should either be awarded at the reduced price pursuant to the above-noted clause or all bids should be rejected.

However, we do not find that decision controlling here because of the absence of a provision in the sale documents permitting the disregarding of all bids by a firm later found to be other than a small business.

The instant sale contained the following regarding the "Award of contract" in the "Instructions to Bidders":

Government may require high bidder to furnish such information as is necessary to determine the ability of bidder to perform the obligation of contract. Contract will be awarded to high bidder, unless he is not qualified or responsible, or unless all bids are rejected. If high bidder is not qualified or responsible, or fails to sign and return the contract together with required performance bond and any required payment, contract may be offered and awarded to the highest of bidders qualified, responsible and willing to accept the contract."

Siller argues that its ultimate oral bid price of \$181/M board feet is not necessarily an objective manifestation of the true timber value because oral bids are influenced by what other bidders quote during the auction and, therefore, the impact of other than a small business competing is great.

We do not find this argument convincing. At the time of the auction, Siller believed Scotsman to be a small business and, furthermore, Siller has indicated to Interior that it would have been willing to accept award of the contract at \$181/M board feet, subject to the outcome of the instant protest and any subsequent price reduction recommended.

Finally, Siller contends that the \$90 figure represents the true value of the timber to a small business since the other two bidders did not participate in the bidding after that figure was reached. Interior responds to this argument by stating that it is normal in timber auction for the bidding to be done by only two firms, notwithstanding the presence of other qualified firms, and that had not Scotsman bid against Siller above the \$90 level, one of the other bidders would have become more active.

We believe it is too speculative to attempt to predict what would have occurred had Scotsman not been bidding.

Accordingly, under the terms of the sale, Siller was the high bidder, and assuming Siller is found to be qualified and responsible, award should be made to Siller at its high bid price.

However, recognizing that an unqualified firm participated in the sale, if Siller does not desire the contract at the \$181/M board feet price, we would have no objection to canceling the sale and conducting a recompetition without assessing damages to Siller.

Interior has also requested our recommendation as to the handling of these types of problems in the future since Interior's sale documents contain no provisions regarding this situation.

While it would not be inappropriate for Interior to adopt a clause similar to the one utilized by the Forest Service, we believe the Forest Service clause may be prejudicial to the Government from a cost standpoint. Through the rejection of bids from a firm found to be other than small, timber would be sold for a price artificially arrived at after the competition is concluded. It would be preferable to have a clause in the bidding documents which would permit, following a successful size protest, award

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to the small business bidder who submitted the highest bid or, if the bidder did not desire the award at that price, cancellation and readvertisement of the sale.

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