

Benejam



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pittman Mechanical Contractors, Inc.

File: B-241046.2

Date: February 1, 1991

C. Jay Robbins IV, Esq., Outland, Gray, O'Keefe & Hubbard, for the protester.
 Craig R. Schmauder, Esq., Department of the Army, for the agency.
 Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The General Accounting Office's review of a contracting officer's determination that a small business concern is nonresponsible, where the firm is eligible for certificate of competency (COC) consideration by the Small Business Administration (SBA) and SBA exercised its COC jurisdiction upon referral, is limited to determining whether bad faith or fraudulent actions on the part of government officials resulted in a denial of opportunity to seek SBA review.
2. Where the record shows that the Small Business Administration (SBA) considered all information provided to it by the contracting agency and the protester during the certificate of competency (COC) proceedings, mere disagreement with the result SBA reached after considering all the evidence does not show that SBA ignored vital information in declining to issue a COC.
3. The General Accounting Office will not consider a challenge to the propriety of a contracting agency's decision to terminate a contract for default, since that is a matter to be resolved under the disputes clause of the terminated contract.
4. Fact that termination for default under previous contract has been appealed does not eliminate such a termination as evidence of protester's nonresponsibility.

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DECISION

Pittman Mechanical Contractors, Inc., a small business, protests its rejection as nonresponsible under invitation for bids (IFB) No. DACA65-90-B-0030, issued by the Department of the Army, Corps of Engineers, for the addition of a phosphorus removal system to an existing waste water treatment plant at Fort Eustis, Virginia. Pittman contends that the agency's nonresponsibility determination was made in bad faith and lacks a reasonable basis. Pittman also challenges three interim unsatisfactory performance evaluations and a termination for default, which formed the basis for the nonresponsibility determination.

We deny the protest.

BACKGROUND

The IFB was issued on June 11, 1990, on an unrestricted basis and contemplated award of a fixed-price construction contract. The Army received seven bids by the July 25 extended bid opening date; Pittman submitted the apparent low bid. The agency conducted a pre-award survey (PAS) of Pittman on August 17, which resulted in a recommendation that award not be made to the firm. The PAS revealed that Pittman had recently received three interim unsatisfactory performance evaluations on two separate construction contracts at Fort Eustis, one of which the agency subsequently terminated for default on September 6. The PAS also revealed that Pittman's current performance as a subcontractor at Langley Air Force Base was below average; that the firm failed to adequately respond to agency requests in connection with its work at Langley; and that Pittman had several outstanding labor violations.

Based on the PAS, the contracting officer found that Pittman lacked the competence, quality of work, management effectiveness, capacity, tenacity and perseverance necessary to perform the work required by the IFB, and rejected Pittman as nonresponsible pursuant to Federal Acquisition Regulation (FAR) § 14.404-2(h).^{1/} Since Pittman is a small business, by letter dated August 22, the contracting officer referred the nonresponsibility determination to the Small Business Administration (SBA) for certificate of competency (COC) proceedings under FAR § 19.602-1.

^{1/} The agency informed our Office that, since the remaining six bids exceed the statutory limit for the procurement, the solicitation would be canceled.

Following a site visit and a review of all the information provided by the Army and Pittman, on September 26 SBA informed Pittman that it had no reason for disagreeing with the contracting officer's determination, and declined to issue a COC to the firm. The SBA specifically found that Pittman's "lack of management capability and quality assurance, together with [Pittman's] performance record, precludes the issuance of a COC," and invited Pittman to meet with SBA officials to assist the firm in improving its position in connection with future procurements.

Pittman initially protested the Army's nonresponsibility determination to our Office on September 7, 1990. We dismissed the protest because we generally do not review contracting agencies' small business nonresponsibility determinations that have been referred to SBA for consideration and decision, nor do we review SBA's COC decisions, absent a showing of possible fraud or bad faith on the part of government officials. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(3) (1990).

Pittman now states that it is not protesting SBA's judgment in declining to issue a COC to the firm. Instead, Pittman alleges that the Army's nonresponsibility determination was made in bad faith and lacks a reasonable basis. In its comments on the agency's administrative report to our Office, Pittman further alleges that, based on facts discovered after it filed the protest, Army officials acted in bad faith when issuing the interim unsatisfactory performance evaluations and the subsequent termination for default. Pittman also contends that SBA ignored critical information vital in determining its responsibility.

ARMY'S NONRESPONSIBILITY DETERMINATION

As a preliminary matter, Pittman relies on our decisions in SPM Mfg. Corp., 67 Comp. Gen. 375 (1988), 88-1 CPD ¶ 370, and Wallace & Wallace, Inc., et al.--Recon., B-209859.2; B-209860.2, July 29, 1983, 83-2 CPD ¶ 142, to argue that our Office should review the contracting officer's nonresponsibility determination because, according to Pittman, it was made in bad faith.^{2/}

^{2/} Pittman also cites Brussels Steel Am., Inc., B-225556 et al., Apr. 16, 1987, 87-1 CPD ¶ 415, for the proposition that our Office will review a nonresponsibility determination where a small business is concerned and the protester alleges bad faith on the part of the contracting officer. Since Brussels Steel Am., Inc., did not involve a small business concern, that case is not applicable here.

In both SPM Mfg. Corp. and Wallace & Wallace, Inc., et al.-- Recon., we reviewed a contracting officer's determination that a small business was nonresponsible after SBA declined to exercise its COC jurisdiction because the protesters were nonmanufacturers proposing to furnish a foreign product (imported linoleum desk pads in SPM Mfg.; Venezuelan petroleum in Wallace & Wallace, Inc.), and thus were ineligible for COC consideration. See 13 C.F.R. § 125.5(c) (1990). These cases are not controlling here, however, since Pittman was eligible for COC consideration and SBA in fact exercised its jurisdiction to review the firm's COC application. In these circumstances, our Office has limited authority to review the contracting officer's nonresponsibility determination of Pittman.

Under 15 U.S.C. § 637(b)(7)(C) (1988), SBA, and not this Office, has the statutory authority to review a contracting officer's finding of nonresponsibility and to conclusively determine a small business concern's responsibility through the COC process. Oakland Corp., B-230717.2, July 27, 1988, 88-2 CPD ¶ 91. In discharging its statutory authority, SBA designed the COC process to afford small business firms protection against allegedly unreasonable determinations by contracting officers in situations where, as here, matters concerning contract performance are in dispute. Zan Co., Inc., B-229705, Dec. 15, 1987, 87-2 CPD ¶ 598, aff'd, B-229705.2, Jan. 19, 1988, 88-1 CPD ¶ 50.

Our review is therefore limited to determining whether bad faith or fraudulent actions on the part of government officials resulted in a denial of the protester's opportunity to seek SBA review of a nonresponsibility determination, or whether the SBA's denial of a COC was made as the result of bad faith or a failure to consider vital information bearing on the firm's responsibility. Lida Credit Agency, B-239270, Aug. 6, 1990, 90-2 CPD ¶ 112.

The contracting officer's August 22 letter referring the nonresponsibility determination to SBA specifically stated that he based his determination primarily on Pittman's unsatisfactory performance on two recent construction contracts at Fort Eustis: contract No. DACA65-88-C-0115 (0115) to construct a new boiler plant and replace steam lines; and contract No. DACA65-88-C-0106 (0106), to replace air handling units and a heating system in two buildings at Fort Eustis.

The report the agency forwarded to SBA was divided into three sections, corresponding to the major categories of deficiencies the Army had found with respect to Pittman's performance on contract No. 0115: Quality of Work; Timely Performance; and Effectiveness of Management. The report also included the

results of the PAS; the interim unsatisfactory performance evaluations of Pittman on contracts No. 0115 and No. 0106; the termination for default; and numerous other records documenting Pittman's unsatisfactory performance on both contracts.

While the bulk of the report to SBA concerned Pittman's performance on contract No. 0115, it also contained information regarding contract No. 0106, showing that on May 23, 1989, the Army issued an interim performance evaluation rating Pittman's "quality of work," "timely performance," "effectiveness of management," "compliance with safety standards," and Pittman's "overall" performance as "unsatisfactory." An explanation appended to the evaluation specifically noted that Pittman had failed to update its expired quality control plan; failed to prosecute the work under the contract in a timely manner; failed to respond to Army letters and requests for proposals pertaining to the project; and stated that Pittman had violated several safety standards while performing the contract.

Pittman alleges that the Army acted in bad faith when issuing the interim unsatisfactory performance evaluations and the termination for default and, by extension, that the nonresponsibility finding was made in bad faith. In support of its allegations, Pittman provided various documents presumably showing how government-caused delays stemming from system designs on contract No. 0115 ultimately resulted in the unsatisfactory performance ratings. In its comments on the agency report, Pittman recounts what it considers to be critical events preceding the termination for default of contract No. 0115, purporting to show that the interim unsatisfactory performance evaluations and the default termination were improperly motivated attempts at shifting the blame for government-caused delays to Pittman, and were retaliatory for its filing the instant protest.

Pittman's allegations concerning the propriety of the termination for default are matters of contract administration within the jurisdiction of the contracting agency and the Armed Services Board of Contract Appeals (ASBCA), for resolution under the disputes clause of Pittman's contracts. Pacific Dry Dock & Repair Co., B-237611.2; B-237751, Mar. 19, 1990, 90-1 CPD ¶ 302. Since the protester states that it has appealed the termination for default, its propriety is for resolution before the ASBCA, not under our Bid Protest Regulations. Id.

Pittman also argues that since the termination for default on contract No. 0115 is being appealed, it should not have been considered in determining the firm's responsibility. While the termination for default does not necessarily require rejection of a firm as nonresponsible, such a termination is a proper matter for consideration in determining a firm's responsibility, despite its pending appeal to the agency and to the ASBCA. Herbert Bauer GmbH & Co., B-225500.3, Aug. 10, 1987, 87-2 CPD ¶ 142. Accordingly, the contracting officer properly notified SBA of the default termination of Pittman for its consideration during the COC proceedings, and SBA was entitled to rely on that information pending the appeal.

With regard to Pittman's challenge to the interim unsatisfactory performance evaluations, our consideration of Pittman's protest is limited to determining whether the firm was deprived of a meaningful opportunity to seek SBA review of the Army's nonresponsibility finding due to bad faith or fraudulent actions by the Army. Lida Credit Agency, B-239270, supra. There is no such indication in the record here. On the contrary, as discussed below, the Army submitted substantial information to SBA concerning Pittman's prior performance; SBA conducted a survey of Pittman's facilities, during which an SBA official discussed the procurement at length with the protester; and Pittman had ample opportunity to and did present information supporting its position to the SBA. The record further shows that SBA based its decision not to issue a COC on a consideration of the complete record. Pittman thus was not deprived of a meaningful opportunity to have its allegations that the Army acted in bad faith when issuing the interim unsatisfactory performance evaluations investigated and considered by SBA during the COC proceedings.

SBA REVIEW

On September 12, 1990, incident to Pittman's COC application, an SBA Industrial Specialist (IS) conducted an on-site plant survey of Pittman's facility. The IS prepared an "Analysis and Evaluation" (A&E) report on the site visit in which the IS evaluated Pittman's technical capability, plant facilities and equipment, material availability, quality control, performance record, and production/performance capability. The A&E report indicates that the IS discussed the procurement at length with the firm's president.

A copy of the minutes of the SBA's COC Review Committee meeting held on September 20, 1990, reflects that the IS presented to the Committee information on Pittman's past performance, management, and quality assurance--the areas in which Pittman was found deficient by the Army. The minutes further show that the IS also presented certain information regarding Pittman, which the procuring agency and the IS found

satisfactory, and with which the COC Review Committee concurred. The Committee found, however, that while Pittman had adequate financial resources, Pittman lacked the technical capability necessary to perform the contract. Following a discussion of all the evidence supporting the deficiencies under review, the minutes show that the Committee was unanimous in its recommendation to decline Pittman's COC application.

The protester does not refute any of the findings of the A&E report, nor the COC Review Committee conclusions. The protester states, however, that even if the Army had justifiable concerns about Pittman's ability to construct a building such as was required under contract No. 0115 (boiler plant), those concerns are irrelevant to Pittman's ability to perform the work under the IFB, which the protester characterizes as only calling for a unit of preconstructed tanks and mixers. Pittman argues that since the total cost of the tanks and mixers (\$85,220) constitutes 51 percent of Pittman's total bid price, it was unreasonable to consider Pittman's performance on a construction contract (No. 0115) for more than \$1 million, especially where the electrical, masonry and structural work was subcontracted. Pittman thus concludes that in declining to issue a COC to the firm, SBA did not consider the "critical differences" between the type of work the Army found unsatisfactory under the prior contracts, and the type of work required by the IFB here.

The record indicates that the SBA's district office loan specialist, who also prepared and submitted a report to the COC Review Committee, and the IS, found that the type of work required under the IFB^{3/} and the work rated unsatisfactory

3/ The IFB's specifications divided the required work into 10 major construction categories as follows: (1) Earthwork (demolition, excavation, filling and backfilling for buildings and utilities systems, grading, water lines, and turf); (2) Concrete (structural formwork, reinforcement, building construction sidewalks); (3) Masonry; (4) Metals (structural steel and miscellaneous metal); (5) Thermal and Moisture Protection (sealants); (6) Doors, Windows and Glass (steel door and frames, hardware); (7) Finishes (painting); (8) Equipment (chemical storage and feed systems); (9) Mechanical (plumbing, ventilation, and exhaust systems); and (10) Electrical (underground electrical distribution system, interior electrical work, space heating and equipment).

under the prior contracts^{4/} was sufficiently similar to warrant reliance on Pittman's unsatisfactory performance on the prior contracts. The COC Review Committee also based its determination in large part on the PAS and on the information provided by the Army and the protester regarding contract Nos. 0115 and 0106, suggesting that in reaching its unanimous decision, the Committee considered that the prior contracts and the work required under the IFB were sufficiently similar to warrant reviewing Pittman's prior unsatisfactory performance.

Section 6 of both performance evaluations the Army issued on contract No. 0115, titled "Fiscal Data," specifies that the amount of the basic contract was \$1,090,500. Additionally, the loan specialist's report on Pittman's COC application and the A&E report both identify Pittman's bid amount of \$166,000. SBA thus had before it the differences in price between contract No. 0115 and the instant IFB for its consideration.

Further, both unsatisfactory performance evaluations explicitly describe the type and extent of work Pittman subcontracted on contract No. 0115, indicating that masonry, concrete slabwork, and electrical work were initially 100 percent subcontracted. The second interim performance evaluation of contract No. 0115 apparently contained updated information on the type and extent of subcontracted work, also expressed in percentages as: masonry (5), electrical (5), sitework (4), doors and windows (2), concrete (13), roofing (2), metal work (2), painting (1), and energy management (14). Accordingly, SBA had sufficient information upon which to discern the extent to which Pittman performed the work found unsatisfactory by the Army.

Pittman's position that SBA ignored "critical differences" between contract No. 0115 and the IFB is in essence a challenge to the weight SBA placed on the information considered during the COC proceedings and a disagreement with SBA's conclusion. The fact that SBA did not view the data in the performance evaluations and the information the protester

^{4/} The interim unsatisfactory performance evaluations on contract No. 0115 summarize the required work under that contract as follows: "Project consists of construction of a new boiler plant facility, including demolition of an existing building, excavation, and various sitework, paving, masonry, roofing, electrical, and mechanical installation." The interim unsatisfactory performance evaluation on contract No. 0106 describes the work as including "demolition, removal and disposal of asbestos materials, miscellaneous metalwork, caulking and sealants, painting, mechanical, electrical . . . and other associated work."

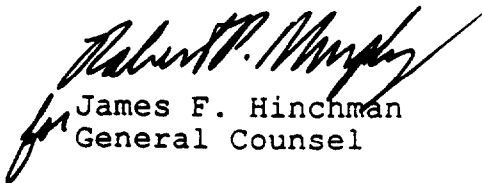
submitted more favorably, however, or that Pittman may disagree with the COC Review Committee's conclusions, does not constitute a showing that SBA acted in bad faith in declining to issue a COC. Lida Credit Agency, B-239270, supra.

Pittman had ample opportunity to present evidence to SBA to prove its responsibility. The record shows that by letter dated September 18, 1990, 6 days following the on-site plant survey conducted by the IS, Pittman presented evidence to the IS on its behalf regarding its "quality of work," "timely performance," and "effectiveness of management," allegedly explaining how the government improperly issued the termination for default. The IS found, however, that Pittman provided no specific corrective actions to any of the deficiencies noted by the Army. The IS found that instead of providing relevant information about its responsibility in its September 18 letter, the protester selectively related its own interpretation of events pertinent to the complaints made by the Army.

It is thus clear from its September 18 submission that Pittman knew what areas of its responsibility were under review. Yet, while Pittman had an opportunity to and did in fact respond to SBA's concerns during the COC proceedings, it did so incompletely, providing evidence insufficient to overcome the COC Review Committee's concerns over Pittman's technical capability. To the extent that Pittman failed to present relevant information to SBA when required during the COC process, it may not now use the bid protest process to do so. See Fastrax, Inc., B-232251.3, Feb.9, 1989, 89-1 CPD ¶ 132.

Pittman argues that SBA also failed to consider vital information during the COC proceedings because SBA ignored or was unaware of the Army's improper motive in issuing the unsatisfactory performance evaluations and the default termination. Since the underlying challenge to the validity of the Army's termination for default, which is being appealed, is not for review by this Office, Pacific Dry Dock & Repair Co., B-237611.2; B-237751, supra, and Pittman had ample opportunity to present evidence on its behalf to SBA, we see no basis to question SBA's consideration of the unsatisfactory performance evaluations of Pittman or of the default termination.

The protest is denied.


for James F. Hinchman
General Counsel