



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pittman Mechanical Contractors, Inc.

File: B-242499

Date: May 6, 1991

C. Jay Robbins, IV, Esq., and David A. Hearne, Esq., Outland, Gray, O'Keefe & Hubbard, for the protester.
Paul M. Fisher, Esq., Vicki O'Keefe, Esq., and James McCutcheon, Esq., Department of the Navy, 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. In view of the conclusive statutory authority of the Small Business Administration (SBA) to determine the responsibility of a small business concern, review by the General Accounting Office of a challenge to a contracting officer's determination that a small business concern is nonresponsible, and the subsequent denial of a certificate of competency by SBA, is limited to determining whether bad faith or fraudulent actions on the part of government officials resulted in denial of a meaningful opportunity to seek SBA review, or whether SBA failed to consider vital information concerning the firm's responsibility.

2. Nonresponsibility determinations associated with contemporaneous procurements do not constitute de facto suspension or debarment where each determination was based on extensive current information documenting recent deficient performance under prior contracts for similar services.

3. Successive determinations of nonresponsibility of a small business concern do not constitute evidence of de facto suspension or debarment where each determination was subject to the Small Business Administration's authority to conclusively determine the responsibility of the small business concern.

DECISION

Pittman Mechanical Contractors, Inc., a small business concern, protests the contracting agency's nonresponsibility determination and the subsequent refusal of the Small Business

Administration (SBA) to issue it a certificate of competency (COC) in connection with invitation for bids (IFB) No. N62470-89-B-2392, issued by the Naval Facilities Engineering Command, Department of the Navy, for various mechanical and electrical projects in Buildings 163 and 234, Norfolk Naval Shipyard, Portsmouth, Virginia.

We deny the protest.

BACKGROUND

Of the six bids the agency received by September 20, 1990, the scheduled bid opening date, Pittman submitted the lowest bid. The agency conducted a pre-award survey (PAS) on Pittman between September 20 and October 9 that included a review of Pittman's performance on six contracts the Navy had awarded to the firm between 1985 and 1989, and on two contracts awarded to Pittman by the Department of the Army Corps of Engineers in 1988. The PAS revealed that interim and final evaluations of Pittman's performance on the eight contracts rated the firm unsatisfactory with respect to various elements of its performance including the firm's "quality of work," "timely performance," "effectiveness of management," "compliance with labor standards," and "compliance with safety standards," earning Pittman an overall evaluation of "unsatisfactory" on virtually all of the performance evaluations reviewed.

The PAS also revealed that, although Pittman submitted the low bid in response to a solicitation recently issued by the Army Corps of Engineers (DACA65-90-B-0030), the Army rejected the firm as nonresponsible based upon Pittman's performance history on two Army contracts; that SBA subsequently declined to issue a COC to the firm^{1/}; and that on September 6, 1990, the Army terminated one of Pittman's two existing contracts for default for failure to diligently prosecute the work required under the contract.

Based on the PAS, the Officer in Charge of Construction for the Norfolk Naval Shipyard determined that Pittman lacked certain elements of responsibility needed to successfully complete the contract including competency, quality of work, effectiveness of management, capacity, perseverance, tenacity, safety awareness, and timely performance, and rejected Pittman as nonresponsible pursuant to Federal Acquisition Regulation

1/ See Pittman Mechanical Contractors, Inc., B-241046.2, Feb. 1, 1991, 91-1 CPD ¶ 103, in which we denied Pittman's subsequent protest to our Office challenging the Army's nonresponsibility determination.

(FAR) § 14.404-2(h). Since Pittman is a small business, on October 10 the contracting officer referred the nonresponsibility determination to SBA for COC proceedings under FAR § 19.602-1.

Following a site visit by an SBA Industrial Specialist and a review of all of the information provided by the Navy and by Pittman with its COC application, on November 15 SBA informed Pittman that it found no sufficient reason for disagreeing with the contracting officer's decision, and declined to issue a COC to the firm. SBA specifically found that Pittman had failed to demonstrate that it had adequately addressed its management and administrative problems in solving labor violations, and that Pittman had not addressed past and present performance issues to SBA's satisfaction.

NAVY'S NONRESPONSIBILITY DETERMINATION AND SBA REVIEW

The protester contends that the contracting agency's determination that Pittman was not responsible was "arbitrary and capricious amounting to bad faith" on its part, arguing that the information relied on by the Navy in making its determination was not relevant to the subject solicitation. Pittman also alleges that SBA failed to consider vital information bearing on the firm's responsibility.

Our Office will not review a contracting officer's determination that a small business concern is nonresponsible where the firm is eligible for COC consideration and SBA exercised its jurisdiction upon referral because SBA's determination, not the contracting officer's, regarding whether the firm is responsible, and hence entitled to a COC, is conclusive. See 15 U.S.C. § 637(b) (1988); Pittman Mechanical Contractors, Inc., B-242102, Mar. 13, 1991, 91-1 CPD ¶ _____. Similarly, since SBA, not our Office, has the statutory authority to determine the responsibility of a small business concern, we will consider a challenge to SBA's decision to issue, or not to issue, a COC only where the protester alleges that bad faith or fraudulent actions on the part of government officials resulted in denial of a meaningful opportunity to seek SBA review, or that SBA failed to consider vital information bearing on the firm's responsibility. Id.; Fastrax, Inc., B-232251.3, Feb. 9, 1989, 89-1 CPD ¶ 132.

The record shows that the Navy based its nonresponsibility determination on a complete review of Pittman's performance history on at least eight government contracts, which, contrary to Pittman's suggestion, is relevant in determining its responsibility. The Navy's referral of the nonresponsibility determination to SBA consisted of a voluminous record of information that included recent evaluation reports on

Pittman's prior performance on all eight government contracts reviewed during the PAS; detailed written narratives explaining each performance element found unsatisfactory during the evaluations; and Pittman's responses with its explanations of each deficiency noted. The record further indicates that Pittman had an opportunity to and did in fact submit additional information to SBA on its behalf with its COC application. Accordingly, there is no evidence to suggest that the agency's actions in any way adversely affected the protester's opportunity for review by SBA.

Pittman also contends that SBA failed to consider vital information concerning the firm's responsibility. In support of this contention, Pittman merely alleged generally in its initial protest letter that SBA did not consider unspecified "management and administrative remedies" taken by Pittman after the cited labor violations occurred and following the unsatisfactory contract performance revealed during the PAS. Pittman did not elaborate on its contention and made no substantive response to the agency report on this issue.

The record shows that the Navy forwarded a complete package of information on Pittman's performance history to SBA, and SBA states that it based its denial of the COC upon a careful review of all the information and data submitted concerning Pittman. The documents forwarded to SBA included all of the findings revealed during the PAS, including performance evaluations of Pittman indicating that its performance on the eight contracts reviewed during the PAS was unsatisfactory. With regard to the documents pertaining to the six Navy contracts, the Navy concluded that Pittman lacked critical elements of responsibility, including but not limited to timeliness of performance; effectiveness of management; and tenacity and perseverance. The documents forwarded to SBA also included the Army's recently-issued unsatisfactory performance evaluations on two of Pittman's contracts, and the termination for default on one of the two contracts. With regard to Pittman's contention that SBA failed to consider certain unspecified management and administrative remedies taken by the firm, in its letter denying the COC SBA specifically states that, based on all the information before it, Pittman had not adequately addressed its problems with management; administration; and past and present performance.

Since the record shows that SBA had before it complete information regarding Pittman's performance history, and Pittman has made no showing of any vital evidence that was not considered, we see no basis to question SBA's determination.

NAVY'S ALLEGED DE FACTO DEBARMENT OR SUSPENSION OF PITTMAN

In its comments on the agency's administrative report to our Office, Pittman alleges that based on a document first revealed in the agency report, the Navy is engaged in a de facto suspension or debarment of Pittman. In support of its allegation, the protester relies on a copy of a September 27, 1990, letter from an Assistant Resident Officer in Charge of Construction (AROICC), Oceana Naval Air Station, addressed to SBA.^{2/} After briefly describing Pittman's recent unsatisfactory performance, the AROICC stated: "I would strongly discourage award of any contracts to Pittman based on my personal experience. Is there something that can be done if they are proposed subcontractors?"

Pittman asserts that the AROICC's statement, coupled with the fact that the firm has been found nonresponsible on approximately five Navy contracts within the past year, provides compelling evidence that the Navy has de facto debarred or suspended the firm from competing in government contracts, without regard to the procedural due process rights afforded under FAR subpart 9.4.

A firm can only be debarred or suspended from competing for government contracts for just cause through the procedures set forth in FAR subpart 9.4. It is therefore improper for a contracting agency to exclude a firm from contracting with it without following the procedures for suspension or debarment by making repeated, or even a single, determination of nonresponsibility, if it is part of a long-term disqualification attempt. Deloitte Haskins & Sells, B-222747, July 24, 1986, 86-2 CPD ¶ 107.

Pittman does not identify the five contracts for which it allegedly was found nonresponsible during the past year. The Navy, however, states that rather than a long-term disqualification attempt as Pittman suggests, the Navy found Pittman nonresponsible in four contemporaneous procurements,^{3/} all of

^{2/} The letter responded to an earlier request from SBA for a performance evaluation of Pittman for consideration incident to a then pending COC application made by Pittman in conjunction with an Army contract for which the firm was also found nonresponsible.

^{3/} Specifically, solicitation Nos. N62470-85-B-7757 (replacement of air handling units); N62470-87-B-8716 (installation of unit heaters); N62470-88-B-2757 (drain system repairs and building modifications); and N62470-89-B-2392 (the procurement at issue here for mechanical and electrical work).

which had scheduled bid openings during September 1990. The agency further states that although it promptly referred all four nonresponsibility determinations to SBA for COC consideration, SBA declined to issue COCs to Pittman for two contracts based on Pittman's unsatisfactory performance history; and SBA refused to exercise its jurisdiction for the remaining two COC applications because Pittman did not meet the applicable size standard for the procurements, rendering the firm ineligible for the COC program. The agency further states that Pittman's reliance on the AROICC's statement is misplaced, since the AROICC is not a contracting officer; is not involved in establishing procurement policy or standards for the agency; and that although the AROICC issued interim performance evaluations of Pittman on two of the Navy contracts reviewed during the PAS, the AROICC did not directly participate in any of the four contemporaneous nonresponsibility determinations of Pittman.

Finally, in a supplemental report on the protest, the Navy informed us that it currently is considering initiating debarment proceedings against Pittman in accordance with the applicable regulations; specifically, the Assistant Secretary of the Navy (Shipbuilding and Logistics), the authorized representative of the debarring official, is in the process of reviewing a request initiated by the contracting officer on January 2, 1991, seeking that Pittman be debarred in accordance with FAR subpart 9.4.

We find that this is not a case of de facto debarment or suspension. Where nonresponsibility determinations involve practically contemporaneous procurements of similar construction services and are based on extensive current information indicating the firm's lack of responsibility, de facto debarment is not established. See Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235. Pittman has simply not shown that the Navy's nonresponsibility determinations, which were based upon an extensive record of Pittman's unsatisfactory performance history and were made in conjunction with four contemporaneous procurements for similar services, are part of a long-term attempt by the agency to preclude Pittman from competing for government contracts.

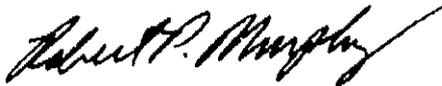
Additionally, as for the two nonresponsibility referrals pursuant to which SBA exercised its COC jurisdiction, successive determinations of nonresponsibility of a small business do not constitute de facto debarment, where, as here, each such determination was subject to SBA's authority to conclusively determine the responsibility of the small business. See Leslie & Elliott Co., Inc., B-237190; B-237192, Jan. 24, 1990, 90-1 CPD ¶ 100.

Pittman's reliance on the AROICC's statement to show that the Navy has de facto debarred or suspended the firm is misplaced. The AROICC's statement reflects only his opinion based solely on his personal experience with Pittman's unsatisfactory performance. The AROICC did not directly participate in the nonresponsibility determinations of Pittman; was not the authority responsible for compiling the information or forwarding the nonresponsibility determination to SBA; is not a contracting officer with authority to determine the eligibility of any bidder to receive a government contract; and does not establish agency policy regarding nonresponsibility determinations. On the contrary, the Navy now is considering whether to initiate debarment proceedings, indicating that it is aware of and intends to follow the applicable procedures if Pittman ultimately is proposed for debarment.

CONCLUSION

Since SBA had before it complete information regarding Pittman's performance history, including information submitted by the Navy, and Pittman had ample opportunity to present evidence on its behalf to SBA, we see no basis to question SBA's determination. Further, the record does not establish that the AROICC's statement expressing only his opinion based upon his personal experience, and the contemporaneous nonresponsibility determinations of Pittman based upon extensive documentation of the firm's unsatisfactory performance, are evidence that the agency has de facto debarred or suspended the protester from government contracts.

The protest is denied.


for James F. Hinchman
General Counsel