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Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Pittman Mechanical Contractors, Inc.--  
Reconsideration

**File:** B-242242.2; B-242243.2

**Date:** May 31, 1991

David A. Hearne, Esq., Outland, Gray, O'Keefe & Hubbard, for the protester.  
Paul M. Fisher, Esq., and Vicki E. O'Keefe, Esq., Department of the Navy, for the agency.  
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest of agency nonresponsibility determination filed more than 10 working days after the Small Business Administration (SBA) Regional Office finds protester ineligible for consideration under certificate of competency program because the protester is not a small business will be considered timely under the General Accounting Office (GAO) Bid Protest Regulations when filed with GAO within 10 working days of the denial of protester's timely (within 5 working days) appeal by the SBA Office of Hearings and Appeals.

2. Agency reasonably determined protester was nonresponsive where the protester's recent contract performance on similar work was inadequate, and protester does not specifically dispute agency position.

### DECISION

Pittman Mechanical Contractors, Inc. requests reconsideration of our decision in Pittman Mechanical Contractors, Inc., B-242242; B-242243, Dec. 11, 1990, 90-2 CPD ¶ 479, in which we summarily dismissed Pittman's protests of determinations by the Department of the Navy under invitation for bids (IFB) Nos. N62470-85-B-7757 (replacement of air handling units) and N62470-87-B-8716 (installation of heater units), respectively,<sup>1/</sup> that Pittman was not a responsible bidder.

<sup>1/</sup> Neither IFB was set aside for small businesses.

We reverse our decisions dismissing the protests and deny the protests on the merits.

#### PROCEDURAL MATTER

In the initial protests, Pittman stated that the Small Business Administration (SBA) had denied Pittman's requests for certificates of competency (COC) in response to its appeals of the Navy's nonresponsibility determinations on these IFBs, and that the protests were filed within 10 working days of SBA's "final decision" on these matters. We dismissed the protests because the Small Business Act, 15 U.S.C. § 637(b)(7) (1988), gives SBA conclusive authority to decide whether to issue COCs and the protester alleged none of the circumstances, which our Office will review SBA's decision to deny a COC, those being SBA's fraud, bad faith, or failure to consider vital information bearing on the protester's responsibility.

On reconsideration, Pittman states that SBA declined to issue COCs because Pittman was determined to be other than a small business and, therefore, Pittman was ineligible for consideration under the COC program, notwithstanding its self-certification that it was a small business concern.<sup>2/</sup> The SBA Philadelphia Regional Office determined that Pittman was not a small business on October 10, 1990.<sup>3/</sup> On October 18, Pittman appealed that determination to SBA's Office of Hearings and Appeals (OHA). The appeal was denied on November 20, 1990, and Pittman thereafter filed its protests with our Office on December 4. Pittman contends that since SBA will not review the agency's nonresponsibility determinations, it is entitled to a decision by our Office.

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<sup>2/</sup> In its initial protest, Pittman did not disclose the reason for SBA's refusal to issue a COC or the fact that it appealed this decision.

<sup>3/</sup> Both IFBs contained Standard Industrial Classification (SIC) code 1711 (Plumbing, Heating and Air Conditioning) and size standard. SBA found that Pittman's average annual receipts exceeded the \$7 million size standard. In considering a COC referral, SBA can review a firm's eligibility, including its size status, and need not limit its consideration to questions of the firm's responsibility raised by the agency. Astrodyne, Inc.--Recon., B-231509.2, July 7, 1988, 88-2 CPD ¶ 24. Under 15 U.S.C. § 637(b)(6), SBA has conclusive authority to determine matters of small business size status for federal procurement purposes.

We will review protests of agency nonresponsibility determinations, where, as here, SBA declines to issue a COC because an applicant is not a small business. Allied Sales and Eng'g, Inc., B-224345, June 26, 1986, 86-2 CPD ¶ 13. The Navy asserts that Pittman's protests are untimely under the Bid Protest Regulations, since they were filed more than 10 working days after the SBA Regional Office's adverse size determination. 4 C.F.R. § 21.2(a)(2) (1991).

Our Bid Protest Regulations provide that after a protester learns of the specific facts on which it bases its protest, it must file the protest within 10 days. 4 C.F.R. § 21.2(a)(2); see Atlantic Marine, Inc., B-239119.2, Apr. 25, 1990, 90-1 CPD ¶ 427. In this case, Pittman elected to appeal the Regional Office's decision to OHA as was its right under applicable SBA procedures. See 13 C.F.R. § 121.1705(a)(1) (1991). Under SBA's regulations, appeals of size determinations apply to pending procurements when they are filed within the 5 working days of receipt of the determination. 13 C.F.R. § 121.1705(a)(2). Appeals filed within 30 calendar days, but after the 5th working day of receipt of the size determination, apply only to future procurements. Id.

Even though an SBA regional office size determination is effective until reversed, Propper Int'l, Inc.; Soc'y Brand, Inc.; Bancroft Cap Co., Inc., 55 Comp. Gen. 1188 (1976), 76-1 CPD ¶ 400; 13 C.F.R. § 121.3-6 (1991); 53 Comp. Gen. 434 (1973), aff'd, Dyneteria, Inc., B-178701, Feb. 22, 1974, 74-1 CPD ¶ 89, we do not believe that Pittman was required to protest to the General Accounting Office (GAO) while pursuing its appeal to OHA. Requiring an offeror to simultaneously conduct both appeals, with the attendant possibility of inconsistent results,<sup>4/</sup> would unnecessarily burden the offeror as well as the government agencies involved. In our view, a prospective contractor, found to be nonresponsible by the procuring agency and not to be a small business by an SBA regional office, who elects to file a timely appeal with the SBA (within 5 working days), may protest to GAO its rejection as nonresponsible after receiving an adverse decision by OHA.

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<sup>4/</sup> Pittman's filing of a timely 5-working day appeal with SBA opened the door to the possibility of both a reversal of the Regional Office's adverse size determination and the granting of COCs applicable to the pending procurements. If Pittman had also protested the nonresponsibility determinations to our Office at the same time it filed an SBA appeal, our Office could have denied Pittman's protest, finding that the agency reasonably found Pittman not responsible, only to have SBA subsequently issue COCs, which would have the effect of determining Pittman responsible and requiring awards to it.

Thus, any GAO protest filed by a firm also electing to file an SBA appeal within 5 working days is premature. Eagle Design and Mgmt., Inc., B-239833 et al., Sept. 28, 1990, 90-2 CPD 259. As discussed above, if the firm does not appeal its SBA regional office size determination to OHA within 5 working days, the resolution of that appeal will not affect the pending procurement. In that case, the regional office's determination is conclusive for the pending procurement and must be protested to GAO within 10 working days to be timely.

In this case, Pittman filed its OHA appeal within 5 working days of receipt of the regional office determination. Pittman then filed its GAO protests within 10 working days of its receipt of SBA's OHA decision denying its appeal. Under the circumstances, we consider Pittman's protests to be timely filed. 4 C.F.R. § 21.2(a)(2).

#### MERITS

Pittman contends that the Navy's negative determinations of responsibility are based improperly on interim unsatisfactory performance evaluations that Pittman received from the Department of the Army on a single recent contract. Pittman argues that its experience on that \$1,093,000 Army contract is inapposite to its ability to perform the current work for which it was found nonresponsible, since the Army contract required extensive subcontracting, subcontract administration and scheduling on Pittman's part. Pittman contends that the current work is of significantly lesser value--\$146,100 (replacement of air handling units) and \$31,000 (installation of heater units). Pittman claims the work under these IFBs will not require subcontracting and will be relatively simple to administer.

The Federal Acquisition Regulation (FAR) provides that contracts shall be awarded only to responsible contractors. FAR § 9.103(a). In order to be found responsible, a prospective contractor must have a satisfactory performance record. FAR § 9.104-1(c). In particular, a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. FAR § 9.104-3(c). A nonresponsibility determination may be based upon the procuring agency's reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default or the contractor

disputes the agency's interpretation of the facts or has appealed an agency's adverse determination. See Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235; Firm Reiss GmbH, B-224544 et al., Jan. 20, 1987, 87-1 CPD ¶ 72. In our review of nonresponsibility determinations, we consider only whether the negative determination was reasonably based on the information available to the contracting officer at the time it was made. Becker and Schwindenhammer, GmbH, B-225396, supra.

The Navy reports that its negative determinations of Pittman's responsibility are not based simply on Pittman's prior performance on one contract. Rather, the Navy based its determinations on a review of Pittman's performance history on four government contracts (two Navy contracts and two Army contracts), which disclosed untimely performance,<sup>5/</sup> ineffective management,<sup>6/</sup> and a failure to comply with labor standards.<sup>7/</sup> The Navy also considered the Army's recent termination for default of Pittman under Army contract No. DACA65-88-C-0115 for failure to timely complete the work. In its comments on the Navy's report, Pittman does not dispute the seriousness of the reported deficiencies in its performance. Based on our review of the record, the Navy's nonresponsibility determinations were documented and reasonable.

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5/ On contract No. N62470-88-C-2618, the Navy accepted Pittman's work as "useably complete" on December 2, 1989, but more than a year later Pittman had not completed the punchlist items. On contract No. N62470-89C-5481, Pittman began work 4 days before the completion date and completed the work 35 days late.

6/ On contract No. N62470-88-C-2618, Pittman was late in tendering critical submittals, tendered foreign made materials when domestic materials were required, failed to keep its site superintendent on site, and improperly incorporated used materials into the work. On contract No. N62470-89C-5481, Pittman again encountered in the areas of submittals, performance of the site superintendent, and untimely completion of punchlist items.


7/ On both contract Nos. N62470-88-C-2618 and N62470-89C-5481, the Navy found Pittman classifying and paying its employees as if they were laborers when the employees were actually performing the work of higher paid mechanics. Pittman also failed to pay its employees the proper overtime rates. The Navy is withholding approximately \$300,000 in payments due Pittman on account of its labor violations.

Pittman's comments on the report focus entirely on a letter contained in the agency report that, in Pittman's view, shows the Navy is engaged in a de facto suspension or debarment of Pittman. A Navy employee, an Assistant Resident Officer in Charge of Construction, wrote the letter to SBA in response to SBA's request for information on Pittman's responsibility. The letter describes Pittman's recent unsatisfactory performance, and includes the lines:

"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 argues that the letter and the Navy's several negative determinations of Pittman's responsibility show that the Navy has de facto debarred or suspended Pittman without affording Pittman the procedural due process rights of FAR subpart 9. However, we recently considered and rejected this argument. Our decision, Pittman Mechanical Contractors, Inc., May 6, 1991, 91-1 CPD ¶ \_\_\_\_, which found that Pittman de facto debarred.<sup>8/</sup> We see no reason to again consider this matter.

The dismissal is reversed and the protest is denied.

  
for James F. Hinchman  
General Counsel

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<sup>8/</sup> We rejected the argument because the Navy found Pittman nonresponsible on four similar construction services contracts in the past year (including the two solicitations under consideration here) after a comprehensive review of current information on Pittman's responsibility. We noted that the Navy was currently considering the initiation of debarment proceedings against Pittman under FAR subpart 9.4, and found the Navy employee's statement to SBA nothing more than a properly reported personal observation based the employee's actual experience with the contractor.