

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-183293

DATE: December 16, 1975

MATTER OF: Consolidated Airborne Systems, Inc.

DIGEST:

Contracting officer's determination that bidder is nonresponsible because of a lack of tenacity and perseverance based on bidder's poor performance on recent contracts is sustained notwithstanding Small Business Administration's (SBA) appeal of that determination which was denied by head of agency. Fact cited by SBA that bidder's performance record recently had shown marked improvement does not establish that contracting officer's determination is unreasonable where record indicates that decrease in number of bidder's delinquent contracts resulted from delivery date extensions granted by Government and completion of already delinquent contracts rather than from bidder's tenacity and perseverance.

Consolidated Airborne Systems, Inc. (CAS), a small business concern, was the low bidder under invitation for bids (IFB) DAAAJ01-74-B-0473 (PIB), issued by the Army Aviation Systems Command (AVSCOM), for furnishing of 47 test set indicators and related equipment. However, CAS was declared nonresponsible pursuant to Armed Services Procurement Regulation (ASPR) § 1-903 (1974 ed.), because of past unsatisfactory performance due to its failure to apply the necessary tenacity and perseverance to overcome deficiencies in performance and meet delivery schedules on prior contracts.

CAS maintains that it was the low responsive, responsible bidder and, as such, should receive the award. The protester contends that certain deficiencies in performance were not its fault and resulted from circumstances beyond its control. In support of its position, CAS submitted an analysis of each of its delinquent contracts to establish that delays in performance were not the result of its failure to apply the necessary tenacity and perseverance. CAS also protests AVSCOM's withdrawal of the matter from SBA consideration relative to the possible issuance of a COC as to its capacity and credit to perform any resultant contract. Award to the second low bidder, Simmonds Precision, has been withheld pending resolution of CAS' protest.

The administrative record indicates that following the opening of bids, AVSCOM requested that the Defense Contract Administration Services District (DCASD), Garden City, New York, perform a preaward survey of CAS. The report submitted by DCASD on October 24, 1974, recommended that "no award" be made to CAS primarily on the basis that the survey revealed CAS was unsatisfactory in the areas of performance and ability to meet the delivery schedule of the contemplated contract. Specifically, in regard to CAS' past performance record, the survey revealed that of the 101 contracts completed by the bidder during the period January through June 1974, 27 were performed in a delinquent status. While CAS' deteriorating performance record was attributed in part to late vendor deliveries and poor in-house planning, the report emphasized that surveillance during performance on prior contracts indicated that the contractor had not made any effort to improve performance by instituting procedures to overcome its deficiencies. However, on the basis of representations by the protester following the survey that it had sufficient back-up to support an affirmative preaward survey, the contracting officer requested a second survey. The findings of this survey dated December 17, 1974, were also negative in the same areas as in the previous survey with the additional information that CAS was delinquent on 11 of the 23 contracts it had completed during the months of October and November. Furthermore, the report indicated that CAS had 79 active contracts under DCASD's administration of which 21 were due for delivery and were delinquent. The preaward survey team cited the same reasons for CAS' poor performance record and emphasized that due to the bidder's prior history of poor in-house planning and vendor control, it lacked confidence in the bidder's ability to meet the delivery schedule of the proposed contract.

CAS took exception to the negative findings of the above survey and in a letter dated December 30, 1974, forwarded additional supporting documentation to AVSCOM respecting its responsibility for the subject procurement. Consequently, a partial re-survey was requested by the contracting officer in the areas of purchasing and subcontracting (Item 5), performance record (Item 12) and ability to meet required schedule (Item 13). This re-survey confirmed the negative findings of the two previous surveys. Specifically, the survey report indicated that the additional information submitted by the bidder did not cover all the subcontracted items. This unsatisfactory rating in the area of purchasing and subcontracting in conjunction with the bidder's poor performance record on both past

and present Government contracts and its failure to take positive steps to rectify the situation, led DCASD to conclude once more that CAS would not be able to meet the proposed contract's delivery schedule, and thus it recommended "no award".

On the basis of these negative preaward surveys, the contracting officer made a determination that CAS was nonresponsible because it did not meet the minimum standards for responsibility set forth in ASPR § § 1-902 and 1-903 (1974 ed.). Pursuant to ASPR § 1-705.4 (c), the contracting officer (on January 31, 1975) referred the matter of CAS' responsibility to SBA for consideration of the issuance of a certificate of competency. However, shortly thereafter, upon the recommendation of DCASD and AVSCOM's Production Technical Services, following CAS' meeting at DCASD at which time new information was introduced, the contracting officer requested that DCASD conduct a second partial re-survey of the bidder in regard to items 5, 12, and 13. Although the survey resulted in CAS being rated satisfactory in the area of purchasing and subcontracting, DCASD, for the fourth time, recommended that no award be made to CAS on the basis of the unsatisfactory findings regarding the bidder's performance record and ability to meet the delivery schedule. The report read in pertinent part:

"PERFORMANCE RECORD: Unsatisfactory

"Consolidated Airborne Systems has seventy-eight (78) active Government contracts under administration of this office. Thirteen (13) contracts are open due for delivery and are delinquent. * * *

"In the 5 Dec 1974 PAS (S3309A4D007) nine of the * * * thirteen contracts were scheduled to get well (according to the proposed contractor's forecast) during the period 12/31/74 - 1/31/75. Of these nine, none got well and the get well dates depicted are a 'best estimate' forecast developed by the Industrial Specialist because of the absence of definitive information.

"The past performance record is as follows:

| <u>PERIOD</u> | <u>CONTRs. COMPL.</u> | <u># DELINQ.</u> |
|---------------|-----------------------|------------------|
| Apr - Jun 74 | 46 | 10 |
| Jul - Sep 74 | 0 | 0 |
| Oct - Dec 74 | 23 | 11 |
| Jan 75 | 18 | 8 |

"The foregoing reflects an unsatisfactory performance record on the part of Consolidated Airborne Systems. This poor performance record is based on a lack of in-house coordination, poor in-house planning and late vendor deliveries. Continuing production surveillance has revealed the contractor has neglected to develop meaningful corrective measures to improve his present unsatisfactory record. On numerous occasions contractor representatives have failed to provide the Production Division with up-to-date contract status and accurate Milestone charts. Therefore, because of the foregoing, it is the opinion of the Industrial Specialist that award of this contract will seriously compromise his existing Government contractual backlog.

"ABILITY TO MEET REQUIRED SCHEDULE: Unsatisfactory

"The proposed bidder produced a phase planning chart showing elements of manufacture that were within the time constraints of the IFB. However, because of the contractor's poor overall performance record, a continuing history of poor in house planning and lack of adequate vendor control there is little confidence that the contractor will meet the delivery schedule of the proposed contract.

"RECOMMENDATION:

"Based upon the unsatisfactory findings for factors 12 and 13, no award is recommended."

Subsequently, on March 7, 1975, AVSCOM formally withdrew its request for SBA to institute COC procedures. This action was taken because a re-evaluation of the available data supporting the determination of CAS' nonresponsibility indicated that it was not CAS' capacity or credit that was in question, but rather, the bidder's persistent failure to apply the necessary tenacity and perseverance to do an acceptable job. In accordance with ASPR § 1-705.4 (c) (vi) (1974 ed.), the contracting officer forwarded the determination of nonresponsibility to the Deputy Chief, Aircraft Systems Procurement Division, for approval, and concurrently, a copy of the documentation was transmitted to the New York Regional Office of the Small Business Administration (SBA) for the submission, if desired, of contrary views to the procuring agency. The contracting officer's "Determination of Non-responsibility" read in pertinent part as follows:

"The presence of lack of tenacity and perseverance is obvious when considering the following facts.

"a. Over a period of 5 months, despite the contractor's promise of corrections and efforts to improve performances on past due contracts the following conditions still exist.

"b. In Dec 74, contractor promised to improve or correct 9 out of 13 contracts that were delinquent, however in the period of 31 Dec 74 and 31 Jan 75, none showed any change.

"c. The in-house planning and coordination, as well as vendor control clearly is deficient as continuous production surveillance indicates the contractor has repeatedly failed to develop any meaningful corrective measures to improve his unsatisfactory record. It is clearly indicated that the contractor did not diligently or aggressively take necessary steps and or action to solve his problems--an evident fact which is obvious because of the many delinquent contracts over the years.

"d. Again after a period of months, contractor failed to furnish full requirement of vendor quotes necessary to satisfy a Pre-Award survey.

"e. Contractor has consistently displayed an uncooperative attitude regarding furnishing full information desired on contractual status.

"Summarizing the above, there is no evidence to indicate the Contractor has made any persistent steps to correct or meet our basic requirements, despite our efforts to cooperate in every way possible. As a result, and in view of the above, I hereby determine that Consolidated Airborne Systems is nonresponsible within the meaning of ASPR 1-705.4 (c) (vi)."

On April 10, 1975, SBA formally appealed the contracting officer's determination of nonresponsibility (ASPR § 1-705.4 (c) (iv) (1974 ed.)) on the basis that CAS was a responsible bidder which "had taken reasonable and prudent action to assure prompt deliveries on [its] Government work" and further recommended that the ultimate determination of CAS' responsibility under the subject IFB be referred to SBA for possible issuance of a certificate of competency (COC). In support of its position, SBA submitted an analysis and

status report on each of the bidder's allegedly "delinquent" contracts referenced in the aforementioned preaward surveys in an effort to negate the contracting officer's determination that CAS lacked the necessary tenacity and perseverance to do an acceptable job.

SBA offered the explanation that many of CAS' delinquencies were caused by circumstances which existed throughout the industry and were beyond the bidder's control and therefore did not reflect the firm's failure to apply sufficient tenacity and perseverance to insure satisfactory completion of its contracts. More significantly, SBA emphasized the marked improvement in CAS' performance since the last preaward survey. SBA indicated that contrary to AVSCOM's belief, the bidder has exhibited tenacity and perseverance by diligently taking corrective measures to assure the timely performance of its Government contracts. In this regard, SBA noted that as of April 5, 1975, CAS had reduced the number of its delinquent contracts to a total of two as compared to the 13 delinquencies indicated in the final preaward survey leading to the ultimate determination of nonresponsibility. SBA asserted that such findings did not indicate a nonresponsible bidder, but rather, reflected a bidder that has taken reasonable and prudent action to resolve its problems so as to assure prompt deliveries on its Government contracts. Accordingly, SBA maintained that the nonresponsibility determination should be referred to SBA for possible issuance of a COC since it is CAS' capacity as a prospective contractor that was in question.

However, on May 15, 1975, the Commander, AVSCOM, informed SBA that its appeal had been denied and the contracting officer's determination that CAS was nonresponsible for lack of tenacity and perseverance was affirmed.

ASPR § 1-902 (1974 ed.) provides that contracts shall be awarded to responsible contractors only, and that if the information available to the contracting officer "does not indicate clearly that the prospective contractor is responsible", a determination of nonresponsibility is required. ASPR § 1-902 (1974 ed.). In this regard, past unsatisfactory performance, due to failure to apply necessary tenacity and perseverance to do an acceptable job is sufficient to justify a finding of nonresponsibility. ASPR § 1-903.1 (iii) (1974 ed.).

However, ASPR § 1-705.4(c)(vi) (1974 ed.) requires that a determination by a contracting officer that a small business concern is not responsible due to lack of tenacity and perseverance in the performance of previous contracts, "must be supported by substantial evidence documented in the contract files." Recognizing that

the determination of a prospective contractor's responsibility is primarily the function of the procuring activity, and is necessarily a matter of judgment involving a considerable degree of discretion, we will not object to a contracting officer's determination of lack of tenacity and perseverance when the substantial evidence of record reasonably provides a basis for such determination. Kennedy Van and Storage Company, Inc., B-180973, June 19, 1974, 74-1 CPD 334. Where a determination is made based upon an alleged lack of tenacity and perseverance and the evidence does not either relate to these factors, or does not adequately establish a basis for the determination, our Office will not uphold such determinations. 49 Comp. Gen. 600 (1970); 39 Comp. Gen. 868 (1960).

The evidence in support of the determination must be germane to the inquiry. A mere assumption or an unsupported statement by a contracting officer that a prospective contractor's past unsatisfactory performance resulted from a lack of tenacity and perseverance is insufficient for purposes of meeting the evidentiary test required. 49 *id.* 600; 43 Comp. Gen. 298 (1963). We have also recognized that the cumulative effect of various minor deficiencies which, when taken together, unduly increase the burden of administration from the Government's standpoint, can support a finding of nonresponsibility based, in appropriate circumstances, on lack of tenacity and perseverance. 49 Comp. Gen. 139 (1969). Furthermore, we have recognized that poor business practices go to questions concerning tenacity and perseverance rather than considerations of capacity and credit. The Transport Tire Company, B-179098, January 24, 1974, 74-1 CPD 27. What is required to sustain a determination of nonresponsibility for lack of tenacity and perseverance to do an acceptable job is a clear showing that a prospective contractor did not diligently or aggressively take whatever action was reasonably necessary to resolve its problems. B-170224(2), October 8, 1970. We are concerned not with whether a firm has or can acquire the capability to perform, but whether a firm that is deemed to possess adequate capability applies it in sufficient measure to insure satisfactory completion of the contract. 51 Comp. Gen. 288 (1971).

From our review of the record, including SBA's appeal, we are unable to conclude that AVSCOM's determination that CAS lacked tenacity and perseverance was unreasonable. We take this position notwithstanding SBA's data regarding CAS' "improved" performance record and the fact that certain of the

protester's deficiencies in performance may well have been the result of circumstances beyond its control.

In particular, although SBA claims that CAS has applied the necessary tenacity and perseverance to cure its deficiencies in performance as evidenced by the "marked improvement" in its delivery status, the other evidence of record does not support such a conclusion. While AVSCOM does not take issue with SBA's data indicating that CAS had only 2 delinquent contracts as of April 5, 1975, the activity emphasizes that this seemingly rapid improvement in CAS' performance record should not be attributed to the firm's tenacity and perseverance, but rather to other circumstances not indicative of its responsibility. Although AVSCOM concedes that only 13 out of the some 28 contracts indicated as delinquent at some point during the preaward survey process were proper for consideration in the determination of CAS' nonresponsibility the activity concludes that the record is sufficient to substantiate its nonresponsibility determination.

Specifically, AVSCOM states that the delinquency status of many of CAS' contracts have been improved due to completions in a delinquent status and extension of delivery due dates. Of the thirteen contracts noted above, five have been or were being modified with consideration to the Government, one was modified without consideration due to a past delinquency change, and seven were completed late. In essence, it is AVSCOM's position that the modification or completion of already delinquent contracts, while removing them from the status of being delinquent, does not alter or remove the underlying factors which caused the delinquency in the first instance, namely, a lack of tenacity and perseverance. Under the circumstances, we cannot agree with SBA that it was CAS' tenacity and perseverance in the performance of its contracts that resulted in the lower delinquency rate. To the contrary, the record reflects a concerted effort on the part of the Government to assist CAS with its contractual obligations by extending due dates on already existing delinquent contracts. For this reason, we are not convinced solely by the lower number of delinquent contracts that CAS applied the necessary tenacity and perseverance to resolve its problems so as to qualify for the instant procurement.

While reasonable persons might disagree by interpreting identical factual matters relative to tenacity and perseverance differently, our Office will not substitute its judgment for that of contracting officials absent a flagrant or unreasonable abuse of discretion. Thus, the fact that CAS has completed performance on its previous Government contracts and has subsequently been

awarded new contracts, is not persuasive of its responsibility for the subject procurement. We have held that even on the basis of the same information, contracting officers reasonably may reach different conclusions as to a bidder's responsibility for the same kind of procurement since the determination of responsibility is judgmental. See 43 Comp. Gen. 228, 230 (1963).

The protester has furnished an affidavit from the SBA's Industrial Specialist in which he states that members of DCASD-Garden City had expressed to him the opinion that CAS did not lack tenacity and perseverance. The determination of whether a prospective contractor is nonresponsible for failure to apply the necessary tenacity and perseverance to do an acceptable job is reserved solely to the contracting officer. ASPR § 1-904.1 (1974 ed.). Whether or not the preaward survey team members regarded CAS as lacking in tenacity and perseverance, we believe the information contained in the narrative portions of the negative preaward survey reports supports the contracting officer's determination. Accordingly, we find no basis to question the propriety of the contracting officer's determination that CAS was nonresponsible by reason of lack of tenacity and perseverance, or to question the proposed award to Simmonds, who has been determined to be responsible as well as responsive.

Finally, CAS' reference to SBA's favorable report and the existence of new legislation before Congress expanding the role of SBA in all determinations of nonresponsibility for small businesses, including those involving tenacity and perseverance, does not in any way repudiate the contracting officer's decision, since at the present time, ASPR 1-705.4(c) (vi) (1974 ed.) attaches finality to the decision of the Commander, AVSCOM on the SBA appeal from the determination that CAS lacked the requisite tenacity and perseverance.



Acting Comptroller General
of the United States