4176

K. Baker
Piece II

DECISION

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

FILE: B-189428 DATE: October 13, 1977

MATTER OF: Air Unlimited

DIGEST:

1. Where contracting officer failed to comply with a provision of the Federal Procurement Regulations which, at the time of the agency action, required that a contracting officer notify the SBA that he has determined a small business to be nonresponsible on the basis of lack of tenacity and perseverance, GAO will review the merits of a protester's argument that it erroneously was rejected as nonresponsible.

2. Nonresponsibility determination may be based on acts of person operating the business of the protester even though bid was nominally submitted by part-owner who was not directly involved in prior instances of unsafe practices. Fact that operator who allegedly had committed unsafe acts would no longer pilot flights under instant procurement does not preclude a finding of nonresponsibility based on alleged disconcern of management for safe practices.

3. Contracting officer's determination that bidder was nonresponsible because of lack of tenacity and perseverance based on bidder's poor safety record is sustained.

Air Unlimited protests a contracting officer's determination that it was a nonresponsible bidder under invitation for bids (IFB) No. R4-77-45, issued by the Forest Service, Department of Agriculture. Air Unlimited also claims that it was not notified prior to rejection of its bid of adverse information regarding its responsibility or given an opportunity to rebut such information.

The IFB called for aircraft services to transport personnel, equipment and supplies from one airfield to another, and to conduct search and rescue missions, aerial surveys, and fire management missions in Challis National Forest. The procurement was a total small business set-aside. Air Unlimited, a small business, submitted the low bid. However, the contracting officer determined that the protester's perseverance and tenacity in making safety an integral part of performance under a similar contract for the prior year was inadequate and thus that Air Unlimited was not a responsible bidder. Award was made to the next low bidder.

The Federal Procurement Regulations (FPR) § 1-1.708-2 (a)(5)(i), (ii) (1976 ed.) provide that a contracting officer, prior to submitting his determination of nonresponsibility to the head of the procuring agency for approval, shall:

> "* * * transmit a copy of the documentation supporting the determination that a small business concern is not responsible, for reasons other than deficiencies in capacity or credit to the assigned SBA representative or to the nearest SBA regional office, as appropriate.
>
> "(ii) The SBA office receiving the documentation will, within 5 workdays after receipt of the documentation, notify the contracting officer in writing whether SBA desires to submit contrary views concerning the determination."

We note that a recent amendment to the Small Business Act, 15 U.S.C. § 637 (1970), as amended by Act of August 4, 1977, Pub. L. No. 95-89, Section 501, authorizes the SBA to conclusively certify all aspects of a small business bidder's responsibility, including tenacity and perseverance. However, the regulation quoted above was controlling on the date of award and will be applied. Here, the contracting officer failed to notify the SBA of his determination that Air Unlimited was nonresponsible for lack of tenacity and perseverance as required by the above-quoted regulation. We are notifying the Department

of Agriculture, by separate letter, that steps should be taken to insure that, in the future, its contracting officers are aware of and follow all procedures concerning determinations of responsibility of small business bidders.

This Office, generally, will not review determinations of nonresponsibility based on alleged lack of integrity, tenacity or perseverance where SBA has been notified of the proposed bid rejection and SBA declines to contest that determination pursuant to applicable regulations. See Ekistics Design Group, Inc., B-187168, January 12, 1977, 77-1 CPD 22; Building Maintenance Specialists, Inc., B-181936, February 28, 1975. 75-1 CPD 122. In the present case, however, SBA was not notified. In such circumstances we will consider the merits of protests concerning the contracting officer's nonresponsibility determination.

A contracting officer must, prior to awarding a contract, make an affirmative determination that the prospective contractor is responsible. FPR § 1-1.1204-1(a). A bidder must be responsible both as to its capacity and credit to perform the contract and as to its integrity, tenacity and perseverance. FPR § 1-1.1203-1. While the question of capacity and credit goes to whether a bidder can perform, questions of tenacity and perseverance go to whether the bidder will perform. 43 Comp. Gen. 298, 300 (1963). The contracting officer's determination that Air Unlimited lacked the integrity, tenacity and perseverance to perform safely was based on several alleged incidents involving Mr. Searles, the co-owner and operator of Air Unlimited during the performance of a prior contract, ending May 30, 1977. Those incidents allegedly included:

1) flying at less than the legally-allowable altitude;

2) striking a tree top during a Forest Service flight;

3) failing to stop to examine damage;

4) failing to report damage resulting from an accident;

5) flying with a damaged propellor;

6) flying without a maintenance and repair release;

7) filling fuel tanks while engine was running.

The protester first asserts that because the bid was signed by Mrs. Searles, as part-owner of the business, and because she was to manage the contract and would furnish pilots other than Mr. Searles, the conduct of Mr. Searles under prior Forest Service contracts with Air Unlimited should not be considered. However, it appears from the record that Mr. Searles in reality will continue to participate in the operations of the firm. While this Office has held that prior delinquencies of a business entity should not be imputed to it after it is acquired by persons who had no prior connection with its management (50 Comp. Gen. 360, 366 (1970)), the protester, here, has not shown that such a change in management of Air Unlimited has occurred.

The protester also points out that Mr. Searles was not listed on the bid form as one of the pilots to be employed on this contract and was not, in fact, intended to be used. However, the alleged deficiencies, summarized above, which were the basis for the contracting officer's determination that Air Unlimited was not responsible, relate to the concern of the management of Air Unlimited for safety, as well as to the safety record of a particular pilot. Consequently, the fact that the objectionable pilot would not be utilized under the contract does not preclude a finding that existing management of Air Unlimited had not demonstrated sufficient tenacity and perseverance with respect to the safety considerations.

Having determined that the acts of an owner during the performance of a prior Forest Service contract with Air Unlimited may be considered, we proceed to determine whether those alleged acts constitute a reasonable basis for the contracting officer's negative determination of responsibility. The report submitted by the Forest Service states that on December 13, 1976, an Air Unlimited aircraft, operated by Mr. Searles, struck a tree top while making a low-level flight. At the time of the incident, Mr. Searles was conducting a game count and was accompanied by two passengers, an employee of the Challis National Forest and a graduate student from the University of Idaho. Mr. Searles completed the flight

before returning to the airport from which he had departed. The incident was reported by Mr. Searles to the Forest Service Supervisor's Office at about 11 a.m. on the following day. At that time, no damage to the aircraft was reported.

The Forect Service asserts that the low-level flight which resulted in contact with a tree was in violation of FAA Regulation (F.A.R.) part 135.91, 14 C.F.R. 135.91 (1976). That regulation, which prohibits daytime flights at less than 500 feet above the surface, applies to the carrying in air commerce of persons or property for compensation or hire. However, the regulation does not apply in certain instances, among which are "aerial photography or survey." F.A.R. 135.1 (a) (4) (iii). It may be that the mission flown by Mr. Searles could be characterized as a "survey" and thus the fact that Mr. Searles was flying at less than 500 feet does not necessarily indicate a violation. However, the fact that Mr. Searles did strike a tree provides a basis for the contracting officer to question whether Mr. Searles operated the aircraft with sufficient care. Moreover, the Forest Service further asserts that Mr. Searles, by not immediately returning to the airport to examine the aircraft for damage, violated F.A.R. 91.29b which provides that a pilot shall discontinue a flight when unairworthy mechanical or structural conditions occur. It is not necessary for this Office to decide whether a violation, in fact, occurred because we believe the Forest Service reasonably could expect the contractor to follow the safest procedure, which would have been to immediately return to the airport to check for damage even if, as contended by the protester, the pilot was not on notice of an unairworthy mechanical or structural condition.

The Forest Service also asserts that Mr. Searles concealed the fact that his aircraft had been damaged by the tree-striking incident. The record indicates that when Mr. Searles reported the tree-striking incident to the Forest Service Supervisor's Office on the morning after the incident, he reported that it was thought that the landing gear or antenna had been hit but that no damage had been noticed. When he was later asked if there was any damage to the antenna or wheel, he replied that there had not been. About two weeks after the tree-striking incident, a Forest Service pilot saw Mr. Searles' aircraft in a repair shop in Boise, Idaho, and discovered that the horizontal stabilizer was bent. Mr. Searles

has admitted that the stabilizer was damaged as a result of the tree-striking incident. However, Mr. Searles has submitted an inspection certificate which indicates that after the tree-striking incident and on the same day, he flew the aircraft to Salmon, Idaho for a 100-hour inspection and the aircraft was certified as airworthy. Mr. Searles subsequently did have the stabilizer repaired, but there is no indication in the record that when he reported the tree-striking incident to the Forest Service, he was aware of damage to the stabilizer and purposely concealed the information.

The Forest Service next asserts several incidents of unsafe and unlawful actions by Air Unlimited relating to a bent propellor. The record shows that while Mr. Searles' aircraft was in Boise, Idaho for repairs to the stabilizer, a bent propellor was discovered. The agency report states that Mr. Searles was informed that the repairs to the stabilizer would not be certified until the propellor was fixed and that the aircraft should not be flown until the propellor was repaired. However, Mr. Searles, without obtaining a release from the repair shop, flew the aircraft to Western Skyways in Troutdale, Oregon, where repairs to the propellor were made.

The Forest Service alleges that when Mr. Searles flew the aircraft from Boise, Idaho to Troutdale, Oregon, after he had been informed of the damaged propellor, he violated several provisions of the Federal Aviation Regulations. First, the agency asserts that this incident was a violation of F.A.R. 91.29a which states that:

> "No person may operate a civil aircraft unless it is in an airworthy condition."

The Forest Service also alleges that by flying his aircraft from Boise, Idaho without obtaining a release from the repair shop, Mr. Searles violated F.A.R. 43.5a. That regulation states that no person may return to service an aircraft that has undergone maintenance unless it has been approved for return to service by an authorized maintenance person, and unless the appropriate maintenance record entry has been made.

Mr. Searles has produced a log entry that the aircraft was certified as airworthy to fly from Challis, Idaho to Troutdale, Oregon for propellor repairs, but there is no indication that he was certified for the flight from Boise, Idaho. Mr. Searles has also stated that when he arrived at Western Skyways, Inc. in Troutdale, Oregon, the mechanic considered the damage to be minor and considered the aircraft to be airworthy. This statement, however, conflicts with a letter from Western Skyways to the F.A.A. General Aviation District Officer which states that the propellor was un-airworthy according to McCauley Service Manual #720415. In the circumstances, the flight out of Boise, Idaho, without a service release reasonably could be regarded as a questionable practice.

The agency cites one further instance of alleged unsafe practices by Mr. Searles. The record indicates that on April 4, 1977, two Forest Service employees observed Mr. Searles refueling his aircraft while the engine was running. The tanks on Mr. Searles' aircraft are located directly behind the propellor and when he was asked whether he considered this procedure to be dangerous, Mr. Searles allegedly responded that "he would rather not refuel it that way, but that the engine didn't warm up very fast." We have no basis upon which to object to the agency's conclusion that this act exhibited a disregard for safety.

In summary, the information available to the agency supported findings that: 1) Mr. Searles came in contact with a tree top while flying a Forest Service flight, and the incident has not been shown to have been due to unavoidable causes; 2) Mr. Searles flew an aircraft which an attending mechanic considered to be in an unairworthy condition and failed to receive a maintenance release before commencing to fly; 3) Mr. Searles exhibited insufficient regard for safety by fueling his aircraft's tanks while the engine was running.

This Office has recognized 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 disturb a determination of nonresponsibility based on lack of tenacity and perseverance when the record shows a reasonable basis for such determination. See Kennedy Van & Storage Co., Inc., B-180973, June 19, 1974, 74-1 CPD 334; A. C. Ball Co., B-187130,

January 27, 1977, 77-1 CPD 67. Furthermore, we have held that the cumulative effect of various deficiencies which, when taken together, unduly increases the burden of administration from the Government's standpoint, can support a finding of nonresponsibility based on lack of tenacity and perseverance. Prosserv Inc., B-184698, December 22, 1975, 75-2 CPD 407 at 7; 49 Comp. Gen. 139 (1969). In the present case, when the above-summarized events are considered in the aggregate, there is no basis upon which to question the agency's finding that Air Unlimited was not a responsible bidder for the subject contract.

The protester next asserts that the rejection of its low bid was made without reasonable notice of the nature of the alleged adverse information possessed by the agency. The record shows that Mr. Bills, Forest Supervisor at Challis National Forest, notified Mr. Searles, by letter of December 17, 1976, that the tree striking incident during a low level flight exhibited "both a disregard for safety regulations and poor pilot judgment." Moreover, Allan Dunham, the contracting officer's representative, notified Mr. Searles, by letter of April 12, 1977, that it believed the firm had violated FAA regulations by: 1) operating an aircraft in an un-airworthy condition; 2) continuing flight without checking for structural damage; 3) operating an aircraft in a careless or reckless manner; and 4) operating an aircraft without a maintenance release. Thus, the contractor was on notice that the agency possessed information drawing into question Air Unlimited's responsibility.

The protester also asserts that it was not given an opportunity to rebut the adverse information possessed by the agency. In this connection, paragraph 1-1.1205-3(b) of the FPR states that:

> "Where it is considered necessary by the contracting officer to prevent practices prejudicial to fair and open competition or for other reasons, prospective contractors may be required to submit statements concerning their ability to meet any of the minimum standards [of responsibility]."

The pertinent regulation does not require the contracting officer to provide a prospective contractor the opportunity to rebut the information before him. Furthermore, even if the contracting officer had sought a formal rebuttal from the bidder, it does not appear that the bidder could have presented any more convincing evidence than it now has presented before this Office. See P. T. & L. Construction Co., Inc., B-183966, October 2, 1975, 75-2 CPD 208.

The protester further asserts that the Forest Service should not be able to consider any unsubstantiated charges made against Mr. Searles until he has had a hearing and there has been a determination by the FAA on such charges. However, it is not necessary that a bidder be found to have violated a law or regulation in order for a contracting officer to determine that the bidder is nonresponsible for a follow-on procurement. Transport Tire Co., B-170098, January 24, 1974, 74-1 CPD 27. Consequently, the fact that FAA has not had a hearing on the alleged violations of the F.A.R. does not preclude a finding of nonresponsibility on the basis of actions which could be objectionable irrespective of whether they also constitute violations of the F.A.R.

Accordingly, the protest is denied.

Paul G. Dembling
Acting Comptroller General
of the United States