

DECISION

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

60321

FILE: B-184698

DATE: December 22- 1975

MATTER OF: Proserv Incorporated

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DIGEST:

1. Determination by contracting officer that low bidder, small business concern, was nonresponsible for lack of tenacity and perseverance, based, in part, on unfavorable evaluations from other procuring activities, was proper, where evaluations from other activities were supported by contemporaneous documents in contract files.
2. Protest by low bidder that contracting officer's nonresponsibility determinations for lack of tenacity and perseverance were not based on substantial evidence documented in contract file at time of determination is denied. While statements from other activities, concerning bidder's unsatisfactory performance, made subsequent to contract performance are of doubtful evidentiary value, there was sufficient contemporaneous evidence to support contracting officer's determination.
3. Protest by low bidder that difficulties experienced by bidder on contracts performed as much as 5 years previously should not be considered as evidence of bidder's lack of tenacity and perseverance since that did not constitute current information need not be considered, since contemporaneous evidence does exist from recent contracts sufficient to support contracting officer's determinations.

By letter of August 6, 1975, Proserv Incorporated protested against the rejection of its bids submitted in response to invitations for bids (IFB) N62470-75-B-1654 and N62470-75-B-1655, issued at Naval Amphibious Base, Little Creek, Norfolk, Virginia. Both procurements were total small business set-asides.

Bids under IFB -1654 for maintenance, structures (exterior/interior), Naval Amphibious Base, Little Creek, Norfolk, Virginia, were opened on June 30, 1975. Two bids were received in response to the IFB and Proserv was determined to be the low responsive

bidder. Bids under IFB -1655 for housing maintenance A/C and heating systems, Naval Amphibious Base, were also opened on June 30, 1975, and Propserv was also ultimately determined to be the low responsive bidder.

On the basis of his own personal experience and several reports received from other activities in connection with another procurement, the Officer in Charge of Construction (OICC), Little Creek, by separate written determinations both dated July 3, 1975, concluded that Propserv was not a responsible prospective contractor on the basis that it lacked the necessary capacity and credit to perform the work required by the IFB's in question. Since Propserv is a small business firm, by letter of July 18, 1975, the matter of Propserv's capacity and credit was, pursuant to section 1-705.4 of the Armed Services Procurement Regulation (ASPR), submitted to the Small Business Administration (SBA) for the possible issuance of a certificate of competency (COC). However, on August 14, 1975, both determinations were corrected to reflect that past unsatisfactory performance was also due to failure to apply the necessary tenacity and perseverance to do acceptable work, and not due to a lack of capacity and credit alone.

The Navy therefore subsequently withdrew its COC referral from SBA. By letter of September 5, 1975, the SBA appealed to the appropriate Navy authority the determination by the OICC, Little Creek, that Propserv was nonresponsible for lack of tenacity and perseverance so as to prevent it being awarded the two contracts, pursuant to Armed Services Procurement Regulation (ASPR) § 1-705.4 (c)(vi) (1974 ed.). It is SBA's position that Propserv's unsatisfactory performance was due to capacity and/or credit factors rather than lack of tenacity and perseverance. On September 18, 1975, a three member Contract Award and Review Board held hearings to review the determination by the OICC, Little Creek, that Propserv was not a responsible bidder. As a result of the hearing the OICC's determination was upheld, and, such determination is final as to SBA's appeal under the applicable regulation.

It is Propserv's contention that it is a responsible contractor, having satisfactorily performed over \$275,000 worth of work for the Naval Amphibious Base, Little Creek, since 1973 and \$2.4 million, involving 20 contracts, for other Government agencies during the same period. Also, Propserv contends that the Government's memoranda in support of the determinations of nonresponsibility do not

satisfy the evidentiary standard of ASPR § 1-705.4(c)(vi) (1974 ed.) which requires that the determinations based on factors other than capacity and credit must be supported by substantial evidence documented in the contract file. Propserv further contends that the determinations of nonresponsibility constituted avoidance of the SBA COC procedures in that they were based on lack of tenacity and perseverance rather than lack of capacity and credit.

As mentioned above, the OICC's determination was based on his own experience with Propserv, as well as several reports received from other activities in connection with another procurement with which he was familiar (IFB N62470-75-B-0371). Bids for the latter procurement were opened on January 7, 1975. Subsequently, the OICC, Little Creek, requested evaluations of Propserv's performance from six other East Coast naval facilities where Propserv had been awarded contracts or who were familiar with Propserv's performance. According to a letter dated March 10, 1975, from the OICC, Little Creek, to the Commander, Atlantic Division, Naval Facilities Engineering Command, the evaluations from these activities established that Propserv's performance was characterized by the following:

1. Faulty workmanship.
2. Repeated service calls for rework.
3. Unqualified or poorly qualified employees.
4. Little or no supervision.
5. Poor supervision.
6. Repeated inconveniences to the Government and the occupants of Government housing.
7. Vacancy losses.
8. Requests for payment for incomplete or faulty work.
9. Poor credit with material suppliers.

Based upon these facts the question of Propserv's "capacity and credit" was referred to SBA for a COC. However, for business reasons, Propserv elected not to apply for a COC and permitted its bid to expire. Consequently, on April 29, 1975, the OICC determined that Propserv was nonresponsible as to "capacity and credit" under IFB -0371.

It was, for the most part, on the basis of these evaluations that the OICC, Little Creek, made his current determinations concerning Propserv's responsibility. Thus, since the earlier determination

was based upon a lack of capacity and credit, it is necessary that we examine these prior evaluations in the context of a tenacity and perseverance determination. The Naval Air Station at Key West and Milton, Florida, stated that they had no previous experience with Prop-serv. The OICC, Philadelphia, Pennsylvania, replied that Prop-serv had been awarded contract N62472-73-C-4695 but since the contract had not been formally closed out and claims were still pending, he did not consider it appropriate to comment on Prop-serv's performance.

The Commanding Officer, Naval Weapons Station, Charleston, South Carolina, stated that Prop-serv's overall performance was barely satisfactory. While the Commanding Officer, Naval Station, Charleston, South Carolina, in a letter dated February 4, 1975, gave Prop-serv a satisfactory rating, he did, however, comment on occurrences of "makeshift" repairs, reluctance on part of Prop-serv to keep a sufficient supply of stock and to maintain a work force large enough to accomplish all work orders, and reluctance of suppliers to fill orders for Prop-serv except on a cash and carry basis. This evaluation of Prop-serv's performance on contract N62467-71-C-0466 during the 1971-72 period was supported by contemporaneous correspondence and general observations made during, or soon after, contract performance. There was evidence of record concerning delinquencies in performing work orders, supply shortages and unsatisfactory repairs. The record indicates that there were several discussions between the OICC's and Prop-serv regarding these deficiencies.

The Commanding Officer, Southern Division, Naval Facilities Engineering Command, by letter of January 30, 1975, to the OICC, Little Creek, rated Prop-serv as "marginal" but ultimately satisfactory. There was no formal documentation of this evaluation. The OICC, Virginia Beach Area, Naval Amphibious Base, Little Creek, by letter of February 7, 1975, rated Prop-serv's overall performance of contract N62470-73-C-0457, covering 1973-74 period, as satisfactory. However, the OICC did rate Prop-serv's effectiveness of management unsatisfactory stating that Prop-serv had difficulty maintaining an adequate staff.

The OICC, Mayport, Florida, stated in connection with Prop-serv's performance of contracts N62467-73-C-6452, N62467-72-C-6455, N62467-74-C-2916, and N62467-74-C-0309 (the latter two contracts were administered by the OICC, Jacksonville), that Prop-serv's performance

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was unsatisfactory, quality of workmanship was frequently poor, timeliness of response frequently unsatisfactory, qualifications of maintenance personnel questionable, and the administrative burden of doing business with Propserv was enormous. The record contains several letters complaining of poor quality of work. However, we note that most of the deficiencies under contract -6452 appear to have occurred during the first few days of the contract period and resulted from a backlog of work orders carried over from the previous contract. This, however, does not appear to be the case with the other contracts.

The Commander, Norfolk, Naval Shipyard, stated in a letter dated February 21, 1975, in connection with Propserv's performance of contract N62470-73-C-0751, covering 1973-74 period, that Propserv's performance was unsatisfactory due to inexperience of workmen, repeated discrepancies on "completed" work, poor workmanship, and the need for the Government to perform extensive inspection and reinspection. The record contains contemporaneous correspondence in support of the above evaluation which is too numerous to discuss in detail. Suffice it to say that the record adequately supports the unsatisfactory evaluation of Propserv's performance on this particular contract.

Also, Propserv's performance of N62467-70-C-4019, covering the period July 1, 1970, to June 30, 1971, is discussed. The present OICC, Little Creek, administered this contract. Propserv was given an unsatisfactory performance rating on this contract because of poor quality of workmanship, untimely performance and ineffective management. The record on this contract also contains sufficient contemporaneous evidence to support the unsatisfactory evaluation.

Before award of a contract, the contracting officer must make an affirmative determination that the prospective contractor is responsible. ASPR § 1-904.1 (1974 ed.). 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.). ASPR § 1-903.1(iii) (1974 ed.) requires that a contractor must have a satisfactory record of performance. 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. However, when the prospective contractor is a small business, such as Propserv, and a determination

of nonresponsibility is based on factors which do not relate to capacity or credit, the provisions of ASPR § 1-705.4(c)(vi) (1974 ed.) are applicable.

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 evidence of record reasonably provides a basis for such determination. Kennedy Van & Storage Company, Inc., B-180973, June 19, 1974, 74-1 CPD 334. However, 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 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 Comp. Gen. 600 supra. Thus, in the present case, the statement by OICC, Little Creek, that Propserv lacks the necessary tenacity and perseverance to perform the contracts in question standing alone would be insufficient to meet the above evidentiary test. For that matter, many of the statements made by the various OICC's in response to the inquiry by the OICC, Little Creek, regarding Propserv's performance, are of doubtful evidentiary value since the statements are not supported by contemporaneous evidence documented in the contract file. However, many of the responses were supported by contemporaneous evidence in the contract file and support the determinations by the OICC, Little Creek. While much of the contemporaneous evidence related to minor deficiencies which would not, by themselves, warrant serious consideration by anyone involved, the evidence is sufficient to establish a pattern of poor workmanship and untimely performance. In this regard, we have held that the

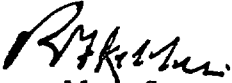
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cumulative effect of various minor deficiencies which, when taken together, unduly increase the burden of administration from the Government's standpoint, can support a finding of nonresponsibility based, in appropriate circumstances, on lack of tenacity and perseverance rather than considerations of capacity and credit. 49 Comp. Gen. 139 (1969). While in the present case, we recognize that certain factors such as reluctance of suppliers to furnish supplies on credit would be properly for consideration by SBA under COC procedures, the evidence of record concerning Propserv's past performance does relate more clearly to factors indicating a lack of tenacity and perseverance rather than to factors related to capacity and credit.

Also, Propserv, while admitting that it had experienced some difficulties in connection with earlier contracts, contends that its performance on these contracts should not be considered as evidence of its present lack of tenacity and perseverance since performance on these earlier contracts could not be considered current information. While ASPR § 1-905.1(b) does require that the contracting officer in making a determination of responsibility shall make maximum practicable use of currently valid information, we are of the view that the evidence from more recent contracts, especially contract N62470-73-C-0751, is currently valid information sufficient to prove a pattern of cumulative minor deficiencies which, when taken together, have unduly increased the burden of administration from the Government's standpoint.

From our review of the record, we cannot say that the determination that Propserv lacked tenacity and perseverance was arbitrary, capricious or not based on substantial evidence.

Accordingly, the protest by Propserv is denied.


Deputy Comptroller General
of the United States