

DOCUMENT RESUME

03257 - [A2173299]

[Determination of Nonresponsibility]. B-188559. August 3, 1977.  
3 pp.

Decision re: Eastern Tank, Inc.; by Robert F. Keller, Deputy  
Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense -  
Procurement & Contracts (058).

Organization Concerned: Department of the Army: Army  
Tank-Automotive Materiel Readiness Command, Warren, MI.

Authority: A.S.P.R. 1-903.1(iii). A.S.P.R. 1-705.4c(iv).

B-182293 (1976). B-179098 (1974). B-184698 (1975). P-187130  
(1977). 55 Comp. Gen. 571.

The low bidder objected to the contracting officer's  
determination that it was nonresponsible due to a lack of  
perseverance and tenacity in performing past and current  
contracts. GAO will not disturb the contracting officer's  
determination that the prospective contractor was nonresponsible  
based on poor performance records on recent contracts since the  
determination was not unreasonable. (Author/SC)

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J. Cohen  
Proc I



**DECISION**

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

**FILE: B-188559**

**DATE: August 3, 1977**

**MATTER OF: Eastern Tank, Inc.**

**DIGEST:**

1. Poor business practices go to questions of tenacity and perseverance rather than to questions of capacity and credit, i.e., to whether bidder will perform as opposed to whether bidder can perform.
2. GAO will not disturb contracting officer's determination that prospective contractor was nonresponsible due to lack of tenacity and perseverance based on poor performance record on recent contracts, since determination was not unreasonable.

Eastern Tank, Inc. (ETI), the low bidder under invitation for bids (IFB) No. DAAEO7-77-B-3206 issued by the United States Army Tank-Automotive Materiel Readiness Command (TARCOM) for delivery of six tank trucks, protests the contracting officer's determination that ETI was nonresponsible due to a lack of tenacity and perseverance in performing past and current contracts. The determination was made pursuant to Armed Services Procurement Regulation (ASPR) § 1-903.1(iii) (1976 ed.), which requires:

"[A prospective contractor must] have a satisfactory record of performance \* \* \*. Past unsatisfactory performance, due to failure to apply necessary tenacity or perseverance to do an acceptable job, shall be sufficient to justify a finding of nonresponsibility.  
\* \* \*"

A preaward survey of ETI resulted in a recommendation that award not be made to that firm. Areas listed in the survey as unsatisfactory were (1) production capability, (2) past and present performance record, and (3) ability to meet the required schedule. The contracting officer's determination of nonresponsibility was based on the preaward survey and stated that three of four recent contracts had been completed in a delinquent status, and performance of four of seven current contracts was already late. The determination further stated:

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"Numerous reasons are evident for these delinquencies as set forth in the Pre-Award, and a listing of the more prevalent causes is as follows:

- a. Poor Production planning
- b. Shop overloading
- c. Financial Problems
- d. First Article approval and/or Quality problems in the field
- e. Poor Contractor-Vendor Communications."

The Small Business Administration (SBA) appealed the matter to the TARCOM Director of Procurement and Production in accordance with ASPR § 1-705.4c(iv) (1976 ed.). In its appeal, SBA argued that the "more prevalent" factors cited in the contracting officer's determination of nonresponsibility are more appropriate for a Certificate of Competency (COC) review than one involving tenacity and perseverance. In addition, SBA contended that ETI had recently taken steps to improve its contract administration, and that past delays in performance were caused by circumstances not under ETI's control, such as supplier delays and general economic uncertainties. However, on June 13 the TARCOM Director of Procurement and Production denied SBA's appeal.

Concerning whether ETI's delinquency problems should be the subject of a COC review rather than a review under ASPR § 1-903.1(111) (1976 ed.), the "more prevalent" causes for ETI's delinquencies cited in the contracting officer's nonresponsibility determination primarily reflect ETI's business practices. We have recognized that poor business practices go to questions of tenacity and perseverance rather than to considerations of capacity and credit, i.e., whether ETI will perform as opposed to whether it can perform. Consolidated Airborne Systems, Inc.--Reconsideration, B-183293, June 3, 1976, 76-1 CPD 356,; The Transport Tire Company, B-179098, January 24, 1974, 74-1 CPD 27.

In regard to the contracting officer's decision and its affirmation on appeal, 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. Therefore, our Office will not disturb a determination of nonresponsibility due to a lack of tenacity and perseverance when the record provides a reasonable basis for such determination. Propserv Incorporated, B-184698, December 22, 1975, 75-2 CPD 405; A. C. Ball Company, B-187130, January 27, 1977, 77-1 CPD 67.

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As noted above, at the time of the preaward survey, three of ETI's four completed contracts with TARCOM had been late, and a number of then current ones were delinquent. In response to the SBA appeal, the contracting officer reviewed the status of contracts with ETI either completed since the preaward survey or still open. One of the three completed was completed early. Of four still open, two were delinquent, and delivery under the others was not yet required. The review concluded:

"In reference to Contracts completed with the U.S. Army Tank-Automotive Command in the 1974 to date period, Eastern Tank's overall performance history shows an average time span of 17 months was used to effect delivery. Since 1975, the trend of delinquency rate worsened. Recent shipment of two vehicles early (with still a minimum time span of 10 months used) is not considered evidence of marked improvement. If the two open contracts (76-C-4593 and 76-C-4530), due in Oct 76 and Jan 77 [these dates should be Oct 77 and Jan 78] are delivered on schedule or early, then there would be evidence of marked improvement. Until such time the recommendation of 'NO-AWARD' is unchanged."

It was largely on the basis of that review that the contracting officer's determination of nonresponsibility because of a lack of tenacity and perseverance was affirmed.

We have reviewed the entire record, including the SBA appeal. Although the SBA states in its appeal that ETI has taken "major moves" to reorganize its administrative staff, that reorganization, apparently only recently completed, has not yet had the opportunity to alter ETI's poor performance record, which itself is properly a basis for a nonresponsibility determination. Moreover, ETI is already delinquent on contracts still open. Thus, notwithstanding recent early deliveries, ETI's performance has only marginally improved, if at all. On that basis, and notwithstanding that certain of ETI's deficiencies may well have been the result of circumstances beyond its control, we cannot conclude that TARCOM's position was unreasonable. See Consolidated Airborne Systems, Inc., 55 Comp. Gen. 571 (1975), 75-2 CPD 395.

The protest is denied.

  
Deputy Comptroller General  
of the United States