

19058

**DECISION**



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

FILE: B-202981

DATE: August 7, 1981

MATTER OF: Stocker & Yale Inc.

**DIGEST:**

1. Protest of enforcement of Jewel Bearing clause in solicitation filed after award is untimely where request for best and final offers stated that clause would be applied to protester's offer, as Bid Protest Procedures require that protests of alleged improprieties not existing in original solicitation but subsequently incorporated therein must be filed no later than next closing date for receipt of proposals.
2. Even if conversations between protester and contracting officer during preparation period for best and final proposals are considered oral protest to agency, subsequent protest to GAO is untimely, as receipt of best and final proposals by agency without altering Jewel Bearing requirement would constitute adverse agency action and protest to GAO was filed more than 10 days thereafter.
3. Even though protest is untimely, it is GAO's view that under Jewel Bearing clause offerors who elect to supply items which contain jewel bearings must purchase them from William Langer Plant even if specifications do not require items to incorporate jewel bearings.

Stocker & Yale, Inc. (S&Y) protests any award under request for proposals (RFP) No. DLA400-81-R-0674 issued by the Defense General Supply Center, Richmond, Virginia for procurement of 53,006 mechanical wrist watches.

*[Protest Concerning Procurement of Mechanical Wrist Watches]*

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S&Y contends that the clause in Defense Acquisition Regulation (DAR) § 7-104.37 entitled "Required Source for Jewel Bearings and Related Items (1977 November)" which requires any jewel bearings used in items to be supplied under a Government contract to be purchased from the Government owned William Langer Bearing Plant in Rolla, North Dakota and was incorporated in the solicitation applies only when jewel bearings are required by the specifications in the solicitation. Since the specification in the subject solicitation did not require the use of jewel bearings, S&Y objects to the agency requiring that the jewel bearings in the watches proposed by S&Y be purchased from the William Langer Plant, thereby increasing S&Y's costs and preventing it from submitting the low offer.

S&Y's original proposal submitted on January 15, 1981, offering a unit price of \$38.75 was based on furnishing a 17-jewel movement manufactured in Switzerland. It stated that if the requirements of the Jewel Bearing clause could be waived, its price could be reduced by \$10.00 per unit. S&Y's amended proposal, submitted on January 30, offered a unit price of \$23.40, and asked for a waiver of the Jewel Bearing clause. After negotiations were completed with all offerors, the agency, on February 20, called for best and final offers to be submitted on February 26, stating that while the specifications did not require the use of jewel bearings, the requirements of DAR § 7-104.37 applied if jewel bearings were used in the items furnished and that this requirement could not be waived.

S&Y's best and final offer of \$31.49 per unit was expressly based on the "use of 17 William Langer Jewels" and was evaluated as the highest of the three offers received. On April 13, S&Y was given written notice that award would be made to the Timex Corporation whose evaluated price was \$22.23 for watches with no jewels. S&Y's protest to our Office was received on April 20.

S&Y's protest is based primarily on its objection to the agency's interpretation of DAR § 7-104.37. As the clause in DAR § 7-104.37 was incorporated into the original solicitation and the agency's view that it applied to offers like that submitted by S&Y was made known in its request for best and final offers, the basis for S&Y's protest was clearly known to that firm no later than its receipt of the February 20 request for best and final offers, and therefore

the protest of April 20 is clearly untimely under our Bid Protest Procedures, 4 C.F.R. Part 21 (1981). These Procedures require that protests based on alleged improprieties in a request for proposals be filed prior to receipt of initial proposals and that alleged improprieties not existing in the initial solicitation but which are subsequently incorporated therein be protested no later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21(b)(1). S&Y's April 20 protest does not meet these requirements.

S&Y contends it protested the agency's position on the applicability of the Jewel Bearing clause during five different telephone conversations with the contracting officer between February 13 and 26. There is no evidence in this regard indicating that the contracting officer provided S&Y any reasonable basis for believing that S&Y's position as to its applicability would be accepted by the agency or that the clause would be waived. Even if we view the telephone conversations as an oral protest to the agency, the agency's call for and receipt on February 26 of best and final offers without taking the corrective action desired by S&Y constituted adverse agency action which S&Y should have protested to our Office within 10 working days. Our Procedures require that if a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days after notification of initial adverse agency action. 4 C.F.R. § 21.2(a). It is apparent that S&Y's protest of April 20 to our Office was not filed within this period.

Moreover, we see no merit in S&Y's contention that because the specification did not require use of jewel bearings, those offerors who might elect to use them need not buy the bearings from the William Langer Plant. The clause expressly states in paragraph (a) that it applies "only if supplies furnished under this contract contain jewel bearings." Thus, in our view the clause applies when such items are furnished which contain jewel bearings whether or not the specifications require jewel bearings.

The protest is dismissed.



For Harry R. Van Cleve  
Acting General Counsel