The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Marathon Watch Company, Ltd. - Reconsideration

File: B-223975.2

Date: October 28, 1986

DIGEST

Prior dismissal of protest because of protester's failure to express continued interest in the protest after receipt of the agency report is affirmed, notwithstanding protester's contention that its response to the first of two agency submissions was enough to express its continuing interest, where first agency submission was not a report, but a letter urging summary dismissal of the protest, and the second agency submission clearly was the contemplated report which required timely comment by the protester.

DECISION

Marathon Watch Company, Ltd., requests that we reconsider our October 2, 1986, dismissal of its protest of an award to World Wide Corporation under invitation for bids (IFB) No. WFCO-A6-R-4882-1-28-86, issued by the General Services Administration (GSA). Marathon had protested GSA's application to World Wide's bid of the Buy American Act price differential prescribed in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 25.105 (1985). We dismissed the protest because Marathon did not follow our Bid Protest Regulations' requirement that the protester, within 7 working days after receipt of the agency report on the protest, either: (1) file comments on the report, (2) file a statement requesting a decision on the existing record, or (3) request an extension for submitting comments. 4 C.F.R. § 21.3(e) (1986).

We affirm the dismissal.

Marathon argues that GSA submitted two agency reports and that Marathon's response to the first one was enough to express its continuing interest in the protest. In the alternative, Marathon requests an extension of the 7-day period prescribed in our Bid Protest Regulations for submission of comments on the agency report.

Marathon filed its protest on August 14, 1986, and we so advised GSA in a telephone call that same day. On August 19, 3 working days later, we received a 2-page letter from GSA urging that we summarily dismiss Marathon's protest. In the letter, which was accompanied by three attachments (a financial report, a plant facility report and a finding and determination of nonresponsibility), GSA argued that Marathon was nonresponsible and therefore not an interested party. GSA furnished a copy of the letter to Marathon with a cover letter stating: "Enclosed is the response from the General Services Administration to the protest filed by Marathon Watch Company."

We nevertheless decided to request a report from GSA on the merits of the protest. On August 21, we sent to GSA a formal request for a report on the protest's merits, and to Marathon a notice acknowledging receipt of the protest and establishing a report due date of September 19. The notice to Marathon expressly stated that under 4 C.F.R. § 21.3(e) the protester had 7 working days from its receipt of the agency report in which to express its continued interest. The notice further warned that unless we heard from the protester by the seventh working day after the report was due, we would close our file.

On August 29, we received a letter from Marathon offering "comments" on the "agency report." Marathon contended that summary dismissal was inappropriate for a number of reasons. As stated above, we already had advised GSA that a report addressing the merits of the protest was necessary.

On September 19, GSA furnished both Marathon and our Office with a copy of the agency report. Its first paragraph reads:

> "Enclosed is the report of the General Services Administration (GSA) in response to protest B-223975, filed by Marathon Watch Co., Ltd. (Marathon). For the reasons stated below, this protest should be dismissed or denied."

The report contained an 8-page contracting officer's statement and 20 exhibits. The comment period expired in 7 days, on September 30, and we closed our file on October 2, after ascertaining that Marathon had not commented on the agency report. Marathon filed its request for reconsideration the following day.

Although our Bid Protest Regulations contemplate an agency's submission of information concerning grounds for dismissal of the protest before submission of the report, 4 C.F.R.

§ 21.3(f) (1986), our Regulations also state in detail what an agency report consists of:

> The report shall contain copies of relevant documents . . . and the contracting officer's statement . . . . The statement shall be fully responsive to all allegations of the protest which the agency contests." 4 C.F.R. § 21.3(c).

We think it clear that GSA's letter of August 19 was only the provision of information on a possible ground for summary dismissal, since it only addressed Marathon's responsibility and did not address the substance of Marathon's protest--the alleged misapplication of the Buy American Act price differential. The second agency submission obviously was the contemplated agency report, since it was dated September 19, fully addressed the price differential issue, and otherwise complied with the provisions of 4 C.F.R. § 21.3(c). Moreover, the report was delivered to Marathon on the date we advised the firm that the agency report was due.

We require a statement of continued interest in pursuing a protest because once protesters read the agency reports they sometimes change their mind about the merits of their protests or about desiring decisions by our Office; the requirement thus prevents unduly delaying the procurement process while we prepare an academic decision. Bannum Enterprises--Reconsideration, B-221279.2, Feb. 25, 1986 86-1 C.P.D. ¶ 194. Here, Marathon's August 29 submission served only to establish the firm's interest in and position on GSA's contention that Marathon was not responsible and the agency therefore should not have to furnish a report on the merits. The firm, however, already knew from our August 21 notice acknowledging receipt of the protest that we had requested a full report, and once Marathon received that report it should have been clear that an expression of continued interest in our resolution of the protest's merits was necessary. We simply had no indication, within the 7-day period from September 19 to 30, that Marathon thought GSA's response on the merits was wrong or inadequate. Our reopening of the file in these circumstances would be inconsistent with the above-stated purpose of our regulations. See Pee Dee Area Community Action Agency/The Southern Farm Development Project--Request for Reconsideration, B-219176.2, Aug. 13, 1985, 85-2 C.P.D. ¶ 164.

Finally, we note that the protest issue was whether GSA, in evaluating the offer of a foreign product by Marathon, a large business, against that of World Wide, which in its bid certified that it was offering a domestic product

manufactured by a small business concern, properly added a 12 percent Buy American Act differential to Marathon's bid; Marathon argued that the source listed in World Wide's bid is a wholly-owned subsidiary of a large business, so that only a 6 percent factor should have applied. See FAR, 48 C.F.R. § 25.105. In its report, GSA argued that in awarding the contract it was entitled to rely on World Wide's self-certification as small since there was no reason to question it--Marathon did not raise the protest issue until after the award to World Wide, upon learning of GSA's decision. Even in its reconsideration request, Marathon asks only that we consider the merits of the protest on the existing record, without any further substantive comment by Marathon. The firm thus suggests no legal basis for our Office to object to GSA's view. In this regard, in our decision in Designware, Inc., B-221423, Feb. 20, 1986, 86-1 C.P.D. ¶ 181, cited in GSA's report, we stated that a contracting officer's good faith reliance on a bidder's Buy American Act certification that it was offering domestic products was proper where the official had no actual knowledge that the certification was false.

We therefore affirm the dismissal of Marathon's protest.

Harry R. Van Cleve
General Counsel