

Van Schaik



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Stocker & Yale, Inc.

File: B-238251

Date: May 16, 1990

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Jay P. Urwitz, Esq., Hale & Dorr, for the protester.  
D. Joe Smith, Esq., Jenner & Block, for Marathon Watch Company, an interested party.  
Michelle Harrell, Esq., Office of the General Counsel, General Services Administration, for the agency.  
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that at time of award, awardee did not have Nuclear Regulatory Commission licenses required by solicitation is sustained where record indicates that contracting agency did not review whether awardee had the appropriate licenses but simply relied on agency responsible for qualified parts list (QPL) to verify possession of licenses and the record does not indicate that QPL authority reviewed whether awardee had licenses called for by solicitation.

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### DECISION

Stocker & Yale, Inc., protests the award of a requirements contract to Marathon Watch Co., Ltd., under request for proposals (RFP) No. FCGA-N3-N-126-9-13-89, issued by the General Services Administration (GSA) for wrist watches. Stocker argues that Marathon should not have received the award because it did not have Nuclear Regulatory Commission (NRC) licenses required by the solicitation.

We sustain the protest.

The RFP solicited offers for an estimated total requirement of 24,420 watches. Award was to be made to the responsible offeror who submitted the technically acceptable offer with the lowest price on the government's peak monthly requirement as set out in the solicitation. The solicitation indicated that the required watches were to be in accordance with "type 1" of military specification MIL-W-46374E, dated

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May 31, 1989, which required the watch features to be "self-luminous" which is achieved by placing on the watch dial and hands glass vials containing phosphor with the hydrogen isotope tritium in gas form as an exciter. The military specification also included the following requirement:

"Nuclear Regulatory Commission License. At the time of contract award, contractor must possess a valid U.S. Nuclear Regulatory Commission (NRC) or Agreement State Byproduct Material License which authorizes possession of sufficient elemental tritium to fulfill contract requirements and which authorizes manufacture of radioactive instruments and articles (i.e., watches). The contractor must also possess an NRC license issued pursuant to 10 CFR 32 which authorizes manufacture and distribution to the general public of the contracted watches as license exempt items. A copy of these licenses, with license application package, will be provided to the contracting officer."

The solicitation also indicated that watches proposed must meet prescribed qualification standards before award. While the solicitation itself included no qualification standards, the referenced military specification stated that awards would only be made for products that have been tested and approved for inclusion on the applicable qualified products list (QPL). The military specification indicated that the Army's Armament, Research, Development and Engineering Center at Picatinny Arsenal, New Jersey, was the activity responsible for the QPL and that suppliers should arrange with that activity to have their products tested for qualification in order to be eligible for award.

Three offers were submitted in response to the solicitation. On the closing date for receipt of proposals, none of the watches offered are listed on the QPL maintained by the Army. GSA conducted negotiations and requested best and final offers (BAFOs) from all three firms. The contracting officer found the low offeror to be nonresponsible leaving only Marathon, with the low priced offer, and Stoker in the competition.

After the receipt of BAFOs, the Army's Armament, Research, Development and Engineering Center listed Marathon's watches on the applicable QPL. At that time, the contracting officer found Marathon responsible and capable of performing. According to GSA, the affirmative responsibility determination was based on the inclusion of Marathon's watches on the QPL, Marathon's satisfactory

financial condition and a positive plant facilities report on Marathon. Further, although the military specification referenced in the RFP required that copies of the NRC licenses be furnished to the contracting officer, the contracting officer explains that she interpreted this "to require delivery of the license to the office in charge of administering the QPL," at Picatinny Arsenal.

Stocker argues that Marathon does not have the required NRC licenses and the contracting officer made no determination that Marathon met the license requirements. According to the protester, GSA simply relied on assertions by Picatinny Arsenal, which was responsible only for the QPL, despite the fact that the military specification referenced in the solicitation required the contracting officer to determine compliance with the license requirements. Stocker further argues that Marathon does not have the required NRC licenses or any other equivalent licenses that meet the RFP requirements.

The record indicates that GSA itself did not specifically determine that Marathon met the NRC license requirements. Rather, GSA simply relied on the Army's inclusion of Marathon's watches on the QPL as the Army's determination that Marathon had the proper licenses. According to GSA, since the responsibility for including products on the QPL belongs to the Army's Picatinny Arsenal, which wrote the specification, that activity is also responsible for the requirements of the QPL and the specification and for determining if a particular firm's products meet those requirements, including the NRC license requirements.

The record includes a January 9, 1990, letter in which the Chief of the Army's Specifications and Standardization Office at Picatinny Arsenal responded to GSA's request for information on Marathon's licenses. In relevant part, the Army's letter states:

"Marathon Watch Company intends to cite the license of the manufacturer, Gallet and Company. Marathon, although applying for its own license, declared their intent to use this approach early in the initiation of the Qualification process. Although this Office cannot state a position on behalf of any given procuring agency, GSA or DLA, it can definitely be stated that Marathon Watch Company is not guilty of any deception or illegal practice by intent.

. . . . .

In summary, the test data and associated correspondence which is the basis for the inclusion of Marathon Watch Company on QPL-46374 appears to be in order and the current version of the QPL valid."

According to GSA, this letter indicates that the Army concluded that the license possessed by the manufacturer of the watches to be supplied by Marathon fulfilled the specification's license requirements. GSA argues that on this basis and as a result of Marathon's satisfactory financial condition and plant facilities report, the contracting officer properly determined Marathon to be responsible.

We generally do not review affirmative responsibility determinations since such determinations are based in large measure on subjective judgments. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1989). One exception to this rule is where a solicitation contains definitive responsibility criteria, which are specific and objective standards established by an agency to measure an offeror's ability to perform the contract. Tama Kensetsu Co., Ltd., and Nippon Hodo., B-233118, Feb. 8, 1989, 89-1 CPD ¶ 128. These special standards put firms on notice that the class of prospective contractors is limited to those who meet qualitative or quantitative criteria deemed necessary for adequate performance. Id. A provision, such as that incorporated into the solicitation here, that requires the awardee to possess specific licenses at the time of award is a definitive responsibility criterion, compliance with which is a necessary prerequisite to contract award.<sup>1/</sup> Aero Sys., Inc., B-215892, Oct. 1, 1984, 84-2 CPD ¶ 374.

Although GSA relied on the Army, as the activity responsible for the QPL, to determine that Marathon possessed the NRC licenses, the military specification included by GSA in

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<sup>1/</sup> GSA, citing HEI Inc., B-228482, Jan. 25, 1988, 88-1 CPD ¶ 68, argues that the NRC license requirement was not a condition for award since it was a part of the specifications and not separately identified as a responsibility criterion pursuant to Federal Acquisition Regulation § 9.104-2(a). We do not agree since, unlike the situation in HEI Inc., here the license provision itself specifically required the awardee to possess the licenses at the time of award. There is thus no question in this case that the licenses are prerequisites to award so the failure to specifically label the requirement is of no consequence.

its solicitation did not assign this responsibility to the Army. In fact, the specification required that the NRC licenses be provided to the contracting officer and required possession of the licenses, "[a]t the time of contract award," not when a firm applied for inclusion on the QPL, an event that would normally occur in advance of the award or even before the issuance of the solicitation. Thus, GSA as the contracting agency had the ultimate responsibility to determine whether the awardee had the required licenses. It does not appear from the record before us that GSA made the required determination.

Moreover, it also seems that the Army made no specific determination that Marathon itself or its manufacturer had the required licenses. The Army's January 9 letter is the only submission from the agency contained in the record that addresses the license requirement. In that letter, rather than concluding that the license of Marathon's manufacturer met the NRC license requirement, the Army specifically declined to "state a position on behalf of any given procuring agency, GSA or DLA." Further, it is not clear that the Army reviewed the manufacturer's license referred to, or any other license information since there is no indication in the file that a license was provided to the Army. In this respect, the information submitted to us indicates that the "test data and associated correspondence" referred to in the Army's letter includes only test results and no licenses. Finally, although the Army's letter states that Marathon's watches were properly on the QPL, the military specification does not make possession of the NRC licenses a prerequisite to inclusion on the QPL.

Although in its submission to this Office Marathon admits that it does not itself have the required NRC licenses, it says it has a license application pending before the NRC and that its suppliers have appropriate Swiss licenses that are recognized by the United States government under "international treaty." Marathon also explains that it has a license from the Canadian Atomic Energy Control Board and that it has contracted to have the watches tested by a laboratory that has an NRC testing license. Also, the record indicates that Marathon's supplier of gaseous tritium is "registered" with the NRC, although neither Marathon, GSA or the Army asserts that this registration meets the NRC license requirements in the solicitation.

With respect to the licenses which Marathon argues will meet the requirement, we have stated that an offeror who does not meet the specific letter of a definitive responsibility requirement, but has clearly exhibited a level of achievement equivalent to or in excess of the requirement, may

properly be considered by a contracting agency to have satisfied the requirement. Unison Transformer Servs., Inc., 68 Comp. Gen. 74 (1988), 88-2 CPD ¶ 471. However, there is no indication that either GSA or the Army reviewed any of the licenses cited by Marathon in its submissions to this Office and judged them to be sufficient under the solicitation. At the time of award, Marathon clearly did not have the specific NRC licenses required by the solicitation.<sup>2/</sup> In the absence of a reasoned determination that the licenses possessed by Marathon or its suppliers were equivalent to or exceeded the solicitation requirements we cannot conclude that Marathon met the RFP license requirements.

Accordingly, by letter of today to the Acting Administrator of General Services, we recommend that GSA determine whether Marathon, on its own or through its suppliers, possesses licenses that meet the RFP requirements. If not, the agency should terminate Marathon's contract and, since at this time the protester has not yet been put on the QPL, resolicit the requirement giving appropriate consideration before award to whether the awardee meets the license requirements included in the new solicitation.<sup>3/</sup> We also find that the protester

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<sup>2/</sup> On May 7, long after the contract was awarded on December 18, 1989, we were notified by GSA that on May 4, the NRC issued a license to Marathon authorizing the firm to distribute its watches with hydrogen-3 "gas in sealed light sources." The license states that it "does not authorize possession or use of licensed material."

<sup>3/</sup> GSA argues that Stocker is not an interested party to file this protest since, when the contract was awarded, Stocker's watches were not on the QPL and thus, the firm was not eligible for award. In general, under our Bid Protest Regulations, an offeror that is not eligible for award is not an interested party to object to the award to another offeror. 4 C.F.R. § 21.0(a); Cumberland Sound Pilots Ass'n, B-229642, Mar. 29, 1988, 88-1 CPD ¶ 316. Here, however, Marathon also may be ineligible and the requirement may have to be resolicited. Under these circumstances, Stocker would have a further opportunity to have its watches qualified and therefore could become eligible for award and therefore is an interested party.

is entitled to the costs of filing and pursuing the protest.  
Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) and (e).

The protest is sustained.

A handwritten signature in cursive script that reads "Milton J. Josten".

Acting Comptroller General  
of the United States