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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Stocker & Yale, Inc.

File: B-242568

Date: May 13, 1991

Jay P. Urwitz, Esq., Hale & Dorr, for the protester.
D. Joe Smith, Esq., Jenner & Block, for Marathon Watch Company, Ltd. and Canadian Commercial Corporation, interested parties.
Philip F. Eckert, Jr., Esq., Defense Logistics Agency, for the agency
Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly awarded contract on basis of proposal which indicated that the offeror would not comply with a jewel-bearing clause contained in the solicitation, which was a material contract requirement.

DECISION

Stocker & Yale, Inc. protests the award of a contract to Marathon Watch Company, Ltd.,1/ under request for proposals (RFP) No. DLA400-90-R-2009, issued by the Defense General Supply Center (DGSC) of the Defense Logistics Agency (DLA). The RFP sought proposals to provide 61,000 wristwatches. We find that Marathon's proposal did not include an offer to comply with a jewel-bearing clause, which was a mandatory requirement under this RFP; rather Marathon, in effect, certified that it would not comply with the requirement.

We sustain the protest.

1/ Marathon is a Canadian corporation and pursuant to applicable regulations and procedures, the Canadian Commercial Corporation (CCC) is the actual awardee; after award, CCC subcontracts 100 percent of the contract to Marathon. For purposes of simplicity, we refer to Marathon as the awardee.

The RFP was issued by DLA on February 12, 1990, seeking offers for 61,000 analog, encapsulated tritium, general purpose wristwatches and required that any watch offered must be listed on the Qualified Products List (QPL) for this procurement. The RFP included Federal Acquisition Regulation clause 52.208-2, which requires offerors to certify whether any jewel bearings are required for the product offered and, if so, that the jewel bearings will be purchased from the William Langer Plant in Rolla, North Dakota. Further, the RFP required that this certificate include an attachment estimating the quantity, type, and size of the jewel bearings required.

Initial proposals were submitted on or before March 14, 1990. Following an amendment to the solicitation, Marathon submitted its best and final offer on December 11, 1990, proposing to provide a watch designated as model 348A. This watch contains 17 jewel bearings and was the only Marathon watch listed on the QPL for this procurement. With its offer, Marathon submitted a partially completed certificate regarding its compliance with the jewel-bearing clause.2/ Marathon also attached to its certification a quotation from the William Langer Plant indicating its intent to order seven jewel bearings per watch from that facility.

On December 24, 1990, DLA awarded a contact to Marathon. On February 5, 1991, DLA granted Marathon a "one-time deviation" from the requirements of the jewel-bearing clause, and justified this deviation by stating:

> "The deviation is required because Marathon . . . has ordered only 7 of the required jewel bearings for each watch under the contract (a total of 61,000 watches) from the William Langer Plant. FAR § 52.208-1, incorporated in this contract, requires [the contractor] to order all required jewel bearings (17 per watch) from the William Langer Plant. . . . DGSC has requested that the deviation apply . . . because Marathon pointed out to DGSC on 5 February 1991 that the contracting officer had constructive notice of Marathon's intention to order only 7 jewel bearings per watch when it [Marathon] submitted its bid." (Emphasis added.)

2/ Marathon left blank the space next to "date of execution," and failed to strike through either of two alternative provisions designed to advise the agency whether or not the product offered contained jewel bearings.

DLA first argues that Stocker should not be considered an interested party to file this protest because, according to DLA, Stocker does not hold certain distribution licenses, which the RFP required the awardee to obtain prior to contract award. DLA also asserts that Stocker also intended to purchase only seven jewel bearings from the William Langer Plant for the watch it proposed and, therefore, is in the same position as Marathon. Stocker disputes both of DLA's assertions. Stocker maintains that, in fact, it holds licenses that meet the RFP's requirements. With regard to compliance with the jewel-bearing clause, Stocker asserts that DLA is confused by the fact that Stocker had two different watches listed on the QPL for this procurement, and maintains that its proposal fully complied with the jewel-bearing clause for the watch that it proposed to provide.

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) (1991). However, we will not conduct an investigation regarding the acceptability of the protester's proposal where the record has not clearly resolved this matter previously. See Radiation Safety Serv., Inc., B-239995.2, Nov. 27, 1990, 90-2 CPD ¶ 427. Further, when an award is improperly made to an offeror who fails to meet a solicitation's mandatory requirements, we will consider a protest challenging that award because the contract requirements may have to be resolicited. See Stocker & Yale, Inc., B-238251, May 16, 1990, 90-1 CPD ¶ 475. We note that DLA did not make a negative responsibility determination on the basis of Stocker's licenses prior to contract award and did not challenge the acceptability of Stocker's proposal on any other basis prior to the time Stocker filed this protest. In our view, the current record does not provide sufficient evidence to conclude that Stocker would not have qualified for award of the contract.3/ We have no basis to dismiss Stocker's protest on the grounds that it is not an interested party.

DLA next argues that Marathon's compliance with the jewel-bearing clause is a matter of contract administration and should not be considered. We agree that in instances where an offeror has properly certified that it will comply with a particular solicitation requirement, whether the contractor does, in fact, meet its obligations in that regard is a matter of contract administration not for consideration by this

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3/ We note that we have previously determined that Stocker does comply with the solicitation licensing requirement at issue. Stocker & Yale, Inc., B-238251.2, Dec. 6, 1990, 90-2 CPD ¶ 461.

Office. See, e.g., American Instrument Corp., B-239997, Oct. 12, 1990, 90-2 CPD ¶ 287. However, where a proposal fails to indicate that the offeror is contractually bound to meet a particular solicitation requirement, the acceptability of the proposal is at issue. Such an issue is within the purview of our Office. See, e.g., Mid-East Contractors, Inc., B-242436, Mar. 29, 1991, 91-1 CPD ¶ ___; 52 Comp. Gen. 874 (1973).

Based on the record, it is clear that Marathon did not, in fact, offer to be bound by the requirements of the jewel-bearing clause. On the contrary, Marathon submitted with its certification a document indicating it did not intend to purchase all the jewel bearings in the watch it offered from the William Langer Plant. As noted above, in persuading DLA to grant a contract deviation, Marathon itself properly argued that its proposal put DLA on notice that Marathon did not offer to comply with the jewel-bearing clause.

In negotiated procurements, a proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations. See, e.g., Eklund Infrared, B-238021, Mar. 23, 1990, 90-1 CPD ¶ 328; Biegert Aviation, Inc., B-222645, Oct. 10, 1986, 86-2 CPD ¶ 419. Under this solicitation, offerors were required to certify as part of their proposal that they would purchase from the William Langer Plant "all jewel bearings . . . required for the supplies to be furnished under this contract." Since Marathon's proposal failed to comply with this material solicitation requirement, and in essence specifically indicated its intended noncompliance, award based on that proposal was improper.

Suspension of Marathon's contract performance was not required under the Competition in Contracting Act because Stocker's protest was filed in our Office more than 10 days after the award was made. We understand the contract has now been substantially performed; accordingly, termination and recompetition is not a feasible remedy. However, since the agency improperly awarded the contract to an offeror that failed to comply with the mandatory requirements of the solicitation, the protester is entitled to recover its

proposal preparation costs and the costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d); Video Ventures, Inc., B-240016, Oct. 19, 1990, 90-2 CPD ¶ 317.

The protest is sustained.

Milton J. Socolar

Acting Comptroller General
of the United States