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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Stocker & Yale, Inc.--Reconsideration

File: B-242568.2

Date: October 28, 1991

Jay P. Urwitz, Esq., Hale and 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.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reconsideration request that seeks modification of remedy in prior decision sustaining protest is denied. Although protester argues that agency and awardee should have informed General Accounting Office that only 4,042 of 61,000 watches had been delivered under improperly awarded contract, since the decision not to terminate the contract also was supported by the urgency of the requirement and the cost of termination, the actual extent of deliveries was not itself determinative.

DECISION

Stocker & Yale, Inc. requests that we reconsider and modify the recommended remedy in our decision Stocker & Yale, Inc., B-242568, May 13, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 460, in which we sustained Stocker's protest of the award of a contract to Marathon Watch Company, Ltd. under request for proposals (RFP) No. DLA400-90-R-2009, issued by the Defense General Supply Center of the Defense Logistics Agency (DLA) for 61,000 wristwatches.

We sustained the protest based on our finding that Marathon's proposal did not include an offer to comply with a mandatory jewel-bearing clause in the RFP. Since suspension of Marathon's contract performance was not required under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (1988), because Stocker's protest was filed in our Office more than 10 days after the award was made and since performance had begun, we did not recommend

termination and recompetition of the requirement. Stocker now argues that we were misled by DLA and Marathon as to the extent of contract performance and that we should have recommended termination of the contract.

We deny the request for reconsideration.

DLA reports that the original delivery schedule in Marathon's contract, which required delivery of the watches from June 28 until December 25, 1991, was accelerated by a contract modification dated February 8, due to an urgent requirement for the watches to support Operation Desert Shield. According to DLA, the accelerated schedule required the first deliveries of 15,000 watches on March 15 and deliveries of 5,000 watches every week thereafter until the final delivery of 1,000 watches on May 24.

DLA further reports that after it accepted the first delivery of 4,042 watches from Marathon on March 12, Marathon became delinquent on its deliveries under the accelerated schedule. DLA reports that it accepted an additional 9,558 watches on May 30 and June 5--after our decision was issued on May 13--and that, in response to a request from Marathon, on June 17, it extended the delivery schedule so that the final delivery will not be made until December 25, 1991. As consideration for the extension, the contract value was decreased by $73,874.

DLA argues that our initial decision to permit the contract to continue was appropriate. According to the agency, because of the urgent need for the watches, both the agency and Marathon attempted to have the contract performed as quickly as possible. DLA also argues that, given the extent of performance of the contract, and the materials which Marathon had on hand at the time of our initial decision, termination of the contract was not in the government's interest at that time.[1]

Stocker's argument that our decision was in error is primarily based upon its view that the number of watches delivered at the time our decision was issued, 4,042 out of 61,000, indicated that the contract had not been substantially performed. In addition, Stocker argues that both Marathon and DLA misled us as to the extent of contract

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[1] Both the agency and Marathon have submitted information concerning costs incurred and contract performance accomplished after our decision was issued. Under the circumstances here such information is not relevant to the question of whether our recommendation in the decision was proper and we have not considered it in reaching our decision.

performance: Marathon by exaggerating the number of watches delivered and DLA by not correcting Marathon's exaggeration. Stocker argues that we should find that Marathon and DLA acted in bad faith and that we should now recommend termination of the contract.

Although our original decision referred generally to substantial performance of the contract as the reason for not recommending termination, the decision is supported by three principal factors: (1) the cost to the government of a termination of the contract, (2) the degree of performance under the contract, and (3) DLA's urgent need for the watches. These factors are consistent with our Bid Protest Regulations, 4 C.F.R. § 21.6(b) (1991), which provides that in determining the appropriate remedy when we sustain a protest, we will:

> "consider all the circumstances surrounding the procurement or proposed procurement including, but not limited to, the seriousness of the procurement deficiency, the degree of prejudice to other interested parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, cost to the government, the urgency of the procurement and the impact of the recommendation on the contracting agency's mission."

First, we think there was some urgency to the procurement. The record indicated that the watches were to be used by Army personnel in Operation Desert Storm and that there were backorders for the watches, a situation which the agency described as critical. Second, with respect to the degree of performance and the cost of termination, although neither DLA or Marathon indicated the number of watches that actually had been delivered, in a March 4 submission Marathon informed us that it was committed to a schedule that required the delivery of 54,900 of the 61,000 watches by May 10. Additionally, Marathon informed us that it had placed firm orders for tritium vials, cases, straps and movements for the full quantity of 61,000 watches and that its manufacturer had received substantial quantities of these items and was assembling watches as quickly as possible. Obviously, this indicated that DLA would likely incur substantial costs if it terminated the contract since Marathon had placed orders for, and its manufacturer had received, substantial quantities of the parts required to assemble the watches. Qualimetrics, Inc., B-213162, Mar. 20, 1984, 84-1 CPD ¶ 332.

Finally, Stocker argues that the failure of DLA and Marathon to clearly inform us as to the extent of deliveries--which it views as far short of substantial performance--was bad

faith. The fact that only 4,042 of the 61,000 watches had actually been delivered and that Stocker was having problems meeting the accelerated schedule would have been considered in reaching our original decision. Nonetheless, there is nothing in Stocker's reconsideration request or its other submissions which demonstrates that at the time our decision was issued, DLA did not urgently need the watches or that termination of the contract would not have involved significant costs to the government. It is our view that our recommendation would not have been different had we known at the time when we issued our decision the number of watches actually delivered.

Stocker has presented no evidence that our original decision was based on legal or factual errors. Therefore, the request for reconsideration is denied. 4 C.F.R. § 21.12(a).

for James F. Hinchman
General Counsel