



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Marathon Watch Company, Ltd.

File: B-247043

Date: April 23, 1992

D. Joe Smith, Esq., and Claude P. Goddard, Esq., Jenner & Block, for the protester.
Jay P. Urwitz, Esq., Hale & Dorr, for Stocker & Yale, an interested party.
Michael Trovarelli, Esq., and Frederick M. Quattrone, Esq., Defense Logistics Agency, Defense Personnel Support Center, for the agency.
Sylvia Schatz, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Nonresponsibility determination based primarily on information that protester had experienced serious performance problems on four recent government contracts, leading contracting officer to conclude that the offeror lacked the necessary technical and production capabilities to satisfy the current requirement on a timely basis, was reasonable where the delinquencies in fact existed and were not shown to be excusable.

DECISION

Marathon Watch Company, Ltd.¹ protests award of a contract to Stocker & Yale, Inc., under request for proposals (RFP) No. DLA120-91-R-0791, issued by the Defense Logistics Agency (DLA), Defense Personnel Support Center (DPSC), for magnetic pocket compasses (National Stock Number 6605-01-326-1654). Marathon disputes DPSC's determination that Marathon was

¹Marathon is a Canadian corporation and pursuant to applicable regulations and procedures, the Canadian Commercial Corporation (CCC) is the actual offeror. When CCC is awarded a contract, it subcontracts 100 percent of the contract to a Canadian corporation, such as Marathon. Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 225.71; see Diemaster Tool, Inc., B-241239, B-241239.2, Jan. 30, 1991, 91-1 CPD ¶ 89. For purposes of simplicity, we refer to Marathon as the protester.

nonresponsible because of unsatisfactory technical and production capability.

We deny the protest.

The RFP solicited proposals for a firm, fixed-price contract for a basic requirement for 5,612 magnetic pocket compasses, to be supplied in incremental quantities by December 31, 1991, with one option for the same quantity. Three offers, including Marathon's and Stocker's, were received by the closing date. Following the evaluation of initial proposals, only Marathon's and Stocker's proposals were included in the competitive range and only they were requested to submit best and final offers. Marathon submitted the lowest price, and DLA requested a preaward survey (PAS) of the firm from the Defense Contract Management Area Operations (DCMAO) office in Ottawa, Canada. The PAS recommended against award to Marathon because of the firm's "inadequate technical and production capabilities", its "poor performance of past and current contracts", and DCMAO's negative experience with Marathon's proposed subcontractor. With regard to Marathon's production capability, the PAS indicated that Marathon had been late on three current contracts and one recent contract with DLA. With regard to Marathon's technical capability, the PAS stated that Marathon provided nonconforming products on two of the four contracts, leading to its failure to meet the required delivery schedules.

In finding Marathon nonresponsible, the contracting officer took into consideration DCMAO's findings, and specifically noted from the PAS that Marathon was delinquent in its performance of the four contracts referenced above. The contracting officer also took into consideration the conditional letter of endorsement from the Canadian Commercial Corporation (CCC), issued in accordance with Defense Federal Acquisition Regulation Supplement (DFARS) § 225.7104(A)(2)(i), in which the CCC stated that it could not certify Marathon's technical capability or guarantee its performance, because Marathon proposed a subcontractor to manufacture the compasses which was located in Taiwan. Based on these considerations, the contracting officer determined Marathon nonresponsible and made award to Stocker.

In its protest, Marathon principally argues that the nonresponsibility determination was unreasonable because it was based in part on erroneous and misleading findings in the PAS concerning Marathon's prior performance. Regarding the four contracts identified in the PAS as having been delinquent, Marathon alleges: (1) that the delays in the delivery schedules under contract No. N00104-89-C-G316, for

the supply of quartz wall clocks, and contract No. DLA400-91-C-5091, for wristwatches, were caused by ambiguities in the agency's specifications; (2) that the delays in Marathon's performance under contract No. DLA400-90-C-5144, for navigational watches, were caused by unsubstantiated allegations to the Nuclear Regulatory Commission (NRC) from Stocker that the tritium (a radioactive material) used in Marathon's watches rendered them unsafe, thereby causing the NRC to withhold issuance of the requisite distribution license for more than two months, and by the refusal of the supplier of the tritium to make timely delivery; and (3) that the delay under contract No. DLA400-90-C-5008, for mechanical stopwatches, was caused by Marathon's supplier.

Before awarding a contract, a contracting officer must make an affirmative determination that the prospective contractor is responsible. Federal Acquisition Regulation (FAR) § 9.103(b). With regard to a prospective contractor's prior performance, the firm must have a satisfactory performance record, and a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control. FAR § 9.104-1(c) and FAR § 9.104-3(c); Engineered Fabrics Corp., B-244566, Oct. 29, 1991, 91-2 CPD ¶ 392. We will not question a nonresponsibility determination absent a showing of bad faith by the contracting agency or the lack of any reasonable basis for the determination, since the determination is essentially a matter of business judgment and encompasses a wide degree of discretion. Martin Widerker, Eng'r, B-219872 et al., Nov. 20, 1985, 85-2 CPD ¶ 571; S.A.F.E. Export Corp., B-208744, Apr. 22, 1983, 83-1 CPD ¶ 437, aff'd, B-208744.2, July 14, 1983, 83-2 CPD ¶ 90.

Marathon does not allege bad faith and we find that the contracting agency had a reasonable basis for its nonresponsibility determination. In support of his determination, the contracting officer has submitted detailed information concerning the protester's prior unsatisfactory performance under the four contracts referenced above. Contract No. -5008, as awarded, required delivery of 6,000 stopwatches by April 18, 1990. However, Marathon's failure to make timely deliveries led the agency to extend the delivery dates four times, resulting in the final shipment of watches being delivered almost 1 year after the original delivery date. Likewise, while contract No. -5144, as awarded, required delivery of a total of 25,300 wristwatches in incremental quantities, with the final delivery to be made by August 29, the agency was compelled to extend the delivery dates four times, with the final contract modification requiring the delivery of all watches by October 30, 1991. The record further indicates that, to

date, Marathon has delivered only 16,485 of the 25,300 wristwatches called for under the contract. Although Marathon claims that the delays under these two contracts were caused in whole or in part by its suppliers, a prime contractor is responsible for all of the work performed under its contracts with the government, even that performed by its subcontractors. Accordingly, delinquencies under prior contracts for which the contractor utilized the services of subcontractors may properly be considered by the contracting officer in determining the responsibility of the contractor. NJCT Corp., 64 Comp. Gen. 883 (1985), 85-2 CPD ¶ 342. While Marathon also claims that the delays under contract No. -5144 were caused in part by the Stocker's baseless complaints to the NRC, this does not change the fact that a significant cause of the delays was attributed, by the protester, to the subcontractor's performance, for which Marathon was responsible.


Contract No. -G316, as awarded, required delivery of a total of 731 quartz wall clocks in incremental quantities, with the final delivery to be made by July 5, 1990. When Marathon's clocks failed to pass required fungus, salt, fog, and shock tests, the agency approved several deviations; although the contract was then modified to extend the delivery schedule to August 30, 1991, the agency has not yet received any of the 731 wall clocks, because of the protester's further inability to comply with the solicitation requirement for a first article test. As a result, Marathon is more than 15 months late on this contract. In addition, contract No. -5091 required delivery of 61,000 wristwatches in incremental quantities, with the final delivery to be made by December 25, 1991. When Marathon failed to supply watches with the required jewel bearings, case, and strap color, the agency approved requested deviations. Nevertheless, Marathon has been approximately 100 days late on every incremental shipment of wristwatches delivered, and, moreover, has delivered only 34,022 of the required total of 61,000 wristwatches. Although Marathon attributes the delays in these two contracts to ambiguities in the specifications, it is the contracting officer's reasonable judgment of events--that the delays resulted from the protester's failure to meet the required specifications--that must govern the agency's determination, even where the agency's interpretation is in dispute. Aydin Vector Div., B-244838, Nov. 13, 1991, 91-2 CPD ¶ 455.

Marathon further asserts that the nonresponsibility determination was improper because the firm has had an overall positive performance record. In this regard, Marathon has submitted a list of 49 contracts with United States government agencies (including the two contracts for wristwatches, discussed above) which were performed within the past 11 years, all of which Marathon claims were

successfully completed, as shown by the fact that they were not terminated for default.

We find Marathon's position unconvincing. First, it is not clear from the record that Marathon, in fact, possessed a satisfactory performance record under these contracts. For example, with respect to the two contracts for wristwatches, which were the largest contracts performed by Marathon within the past 2 years and which were significantly higher in total value than the current requirement, Marathon's performance, as discussed above, has been found delinquent. Further, a number of the contracts referenced by Marathon were for products, such as surgeon's gloves and batteries, which were much less complex to manufacture than the compasses here, and therefore were of limited relevance to the agency's assessment of Marathon's responsibility under the current solicitation. Here, DLA possessed detailed information showing Marathon's poor performance on four recent government contracts for products similar or greater in complexity to the compasses sought under the current procurement. Consequently, even if Marathon did not have any performance problems on other government contracts, this does not alter the fact that there was sufficient evidence for the contracting officer to conclude that Marathon had a history of performance problems that cast doubt on whether it possessed the technical and production skills necessary to deliver acceptable compasses in accordance with the required delivery schedule. MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431; see Avdin Vector Division, supra. In our view, the contracting officer therefore acted reasonably in finding Marathon nonresponsible.

The protest is denied.


James F. Hinchman
General Counsel