



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Morey Machinery, Incorporated

File: B-233793

Date: April 18, 1989

DIGEST

1. Allegations that the procuring agency improperly deleted a requirement for a current production model and made the delivery term unreasonable in an amendment issued after the closing date for the receipt of proposals are untimely where filed after the next closing date for the receipt of proposals.
2. In the absence of any specific guidance on the definition of manufacturing found in the Department of Defense Federal Acquisition Regulation Supplement (DFARS) which requires that no appropriated funds be used to purchase machine tools unless manufactured in the United States or Canada, an agency's evaluation of a product as domestically manufactured will not be disturbed where a foreign manufactured machine iron is transformed into a finished milling machine by a domestic manufacturer who installs domestically manufactured electrical components and the domestic components constitute more than 50 percent of the cost of the end product.
3. Allegation that the awardee's milling machine did not meet the requirement in the specifications for front and rear controls is denied where the protester is unreasonably interpreting the specifications.

DECISION

Morey Machinery, Incorporated, protests the proposed award of a contract to Foxco, Inc., under request for proposals (RFP) No. N00600-88-R-0226 (formerly N00600-87-R-2374), issued by the Naval Regional Contracting Center, Washington, D.C., for 35 horizontal, spindle knee type, milling machines. Morey contends that Foxco's milling machine did not meet certain RFP requirements, that the RFP contained inappropriate specifications, and that the Navy improperly amended the RFP.

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We dismiss the protest in part and deny it in part.

The original RFP was issued on September 4, 1987, and required that the machine represent a current production model. The RFP also required the milling machine to be manufactured in the United States or Canada. Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 225-7008 (1988 ed.), governing the acquisition of machine tools, limits the Navy to purchasing a milling machine manufactured in the United States or Canada and defines such a machine as one that is manufactured in the United States or Canada and the cost of its components manufactured in the United States or Canada exceeds 50 percent of the costs of all its components. Accordingly, offerors were required to certify the percentage and dollar amount of foreign components contained in their machines.

Six offerors submitted proposals in response to the RFP by the October 5, 1987, closing date. Along with the Navy's second request for best and final offers (BAFOs) on August 10, 1988, the Navy issued amendment No. 0002 which, among other things, deleted the requirement for a current production model and required first article testing unless the machine had been previously tested and approved by the Navy. Only Foxco and Morey submitted BAFOs. After evaluating BAFOs, the technical evaluation panel determined both Morey and Foxco to be technically acceptable and recommended award to Foxco because it proposed the lowest price. On December 6, the Navy's preaward survey also recommended award to Foxco. However, on December 8, Morey protested the proposed award and the Navy has withheld award pending resolution of the protest.

Morey contends that deleting the requirement for a current production model was such a material deviation from the initial RFP that the Navy was required to resolicit and revise the specifications. Also, Morey argues that a 120-day delivery period cannot be met by a contractor offering a preproduction/prototype machine. These allegations are untimely. Alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1988). Since the basis for these allegations was apparent from amendment No. 0002, Morey was required to protest prior to the submission of BAFOs, instead of waiting until the Navy proposed award to Foxco. See Interstate Diesel Services, Inc., B-232668.2, Oct 28, 1988, 88-2 CPD ¶ 408.

Morey argues that Foxco's machine does not meet the RFP's requirement for United States or Canadian manufacture because the manufacturer is merely assembling electrical components on a completed machine iron--which the Navy reports is simply the shell of the machine--imported from Spain. Morey states that such a process cannot be regarded as manufacturing because it does not result in a substantial or fundamental change to the physical character of the imported portion of the machine. Moreover, Morey contends that Foxco's machine does not meet the 50 percent domestic content test, and that the Navy concluded otherwise because the Navy improperly permitted Foxco to certify the accessories as part of the milling machine's domestic components. Morey argues that, for purposes of the domestic content test under DFARS § 225.7008, a milling machine and its accessories are to be evaluated separately because there are separate federal supply classification (FSC) numbers for each item. See DFARS § 225.7001.

In response to the Navy's inquiry concerning its manufacturing process, Foxco advised that the base iron component of the machine is imported from Spain and received at the factory in Harbor City, California, where the manufacturer equips the machine with a complete U.S. manufactured electrical component package in accordance with the RFP requirement for electronics and controls and with a digital readout system and measuring device. Foxco further advised that the company manufactures both computer numerically controlled and conventional manually operated lathes and milling machines at its facility for commercial and governmental customers.

We see no basis to conclude that the process performed by Foxco's manufacturer does not constitute manufacturing. The imported machine iron clearly is only the shell of the machine, and without the added process undertaken by the manufacturer at the factory the item would neither function as a milling machine nor meet the requirements of the RFP. Morey would have us define manufacturing to require a certain degree of fabrication of the components as opposed to merely the assembly of previously fabricated components. We think to define the term manufacturing in this way would be unreasonable. First, DFARS § 225.7008 does not specifically define or specify a particular test for determining the process of manufacturing. Second, in other areas where this question has arisen, such as in connection with the Buy American Act, we have interpreted the term "manufacture" to mean completion of the article in the form required for use

by the government, Marbex, Inc., B-225799, May 4, 1987, 87-1 CPD ¶ 468, and have held that assembly can constitute manufacturing. See Hamilton Watch Co., Inc., B-179939, June 6, 1974, 74-1 CPD ¶ 306. The Walsh-Healey Act, 41 U.S.C. § 35-45 (1982), and the implementing Federal Acquisition Regulation (FAR) provision at § 22.606-1(d) also permit assembly operation to be considered manufacturing. Therefore, we conclude that the Navy properly determined that Foxco's machine is being manufactured in the United States.

Regarding the certification made by Foxco of the cost of the foreign versus domestic components, Foxco certified that its machine was 47 percent foreign components and 53 percent North American components. The Navy reports that the preaward team survey reviewed the purchase orders and invoices of the items in stock of the manufacturer and determined that the foreign components did not exceed 50 percent, as certified by Foxco. Morey argues that certain milling machine accessories were improperly included in the certification as components of the mill because there are separate FSC numbers to identify the milling machine and the accessories. We do not find this argument to be persuasive. Despite the different FSC numbers, the agency is purchasing a milling machine with accessory parts which are deemed necessary for the unit to comply with agency needs. It would not be reasonable to exclude the cost of these parts in determining whether the milling machine is a domestic product.

Morey also contends that Foxco's machine does not meet the requirement for front and rear controls and that the Navy has improperly relaxed the specifications in order to accept the Foxco machine. Morey argues that paragraph 3.4.12 requires that the milling machine have the identical controls and capability in the rear of the machine as in the front of the machine. Morey argues that Foxco's rear controls only permit a start and stop function. Alternatively, Morey contends that if Foxco's machine is determined to meet the front and rear control requirement, the specifications were ambiguous and offerors competed on an unequal basis.

In its entirety, the specification read as follows:

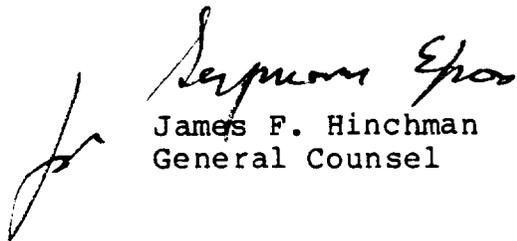
"All operating controls and all manual adjustments shall be grouped in a location convenient to the operator except as otherwise specified herein. All front hand wheels and cranks shall be safety interlocked or shall automatically and positively disengage during power rapid traverse and power

table feeds. When specified, the machine shall be provided with controls for starting and stopping the spindle, and initiating any table movement from the front and rear of the machine."

Thus, the specification only requires that the rear controls be capable of starting and stopping the spindle and initiating movement of the mill's table. Morey's interpretation would be reading requirements into the specification that simply are not stated there. Therefore, we do not find that the Navy improperly accepted the Foxco machine or that the specification was ambiguous as alleged by Morey.

Morey argues that in another procurement, the Navy interpreted the specification in a manner different from its interpretation here. However, in that case, the contracting officer informed Morey only that she was rejecting another firm's machine because its rear controls would not allow spindle control and any table movement. That is what the specifications require here.

The protest is dismissed in part and denied in part.



James F. Hinchman
General Counsel