WOODS

The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** The Pratt & Whitney Company, Inc.; Onsrud Machine Corporation--Reconsideration

**File:** B-232190.3, B-232190.4

**Date:** September 27, 1989

## DIGEST

1. The award of a contract constitutes an affirmative determination of responsibility.

2. Eligibility under the Walsh-Healey Public Contracts Act is not for resolution by the General Accounting Office.

## DECISION

The Pratt & Whitney Company, Inc., and Onsrud Machine Corporation request reconsideration of our decision in The Pratt & Whitney Co., Inc.; Onsrud Machine Corp., B-232190, et al., Dec. 13, 1988, 88-2 CPD ¶ 588, in which we denied protests by those firms of the award by Wright-Patterson Air Force Base of a contract for a vertical CNC six-axis machining center to the Italian Machine Tool Agency, Inc. (IMTA) under request for proposals (RFP) No. F33601-88-R-0017. We affirm our prior decision.1/

In their original protests, both Pratt & Whitney and Onsrud questioned IMTA's ability to comply with a solicitation requirement that the machining center be of United States or Canadian origin. The protesters contended that the machining center IMTA proposed to supply would be made by a company located in Italy. We noted that there was no exception taken by IMTA to the solicitation requirement and concluded that the contracting officer had no information prior to award that was inconsistent with IMTA's commitment to supply a machining center of U.S. or Canadian origin. We added that whether IMTA actually complies with the requirement is an issue of contract administration, which we do not review under our Bid Protest Regulations. 4 C.F.R. § 21.3(m)(1)(1988).

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1/ This procurement was also the subject of a separate audit conducted by this Office. The preliminary audit findings are discussed later in this decision.

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We did not consider the protesters' allegations that IMTA was not eligible for award because it was not a manufacturer under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1982). We said that the question of a firm's status under that Act is for the contracting agency to decide, subject to review by the Department of Labor (DOL) or, if a small business is involved, the Small Business Administration (SBA).

Finally, we noted that questions as to whether IMTA was a responsible contractor--that is, whether it had the ability to comply with solicitation requirements--also were beyond the scope of our review. Under our Regulations, we only review affirmative responsibility determinations upon a showing that such a determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(m)(5).

Onsrud contends on reconsideration that the Air Force failed to apply definitive responsibility criteria, citing section 9.104 of the Federal Acquisition Regulation (FAR) as containing the standards the Air Force was required to apply in determining IMTA's responsibility. The standards contained in FAR section 9.104, however, are general standards (such as adequate financial resources and a satisfactory record of integrity) that apply to all procurements; they are not the type of specific, objective standards (such as a minimum period of prescribed experience) that would constitute definitive responsibility criteria. Onsrud also contends that the Air Force failed to make any responsibility determination at all. We do not agree; the award of a government contract constitutes the contracting officer's affirmative determination of the contractor's responsibility. Aesculap Instruments Corp., B-208202, Aug. 23, 1983, 83-2 CPD ¶ 228.

Pratt & Whitney's position on reconsideration is that the Air Force should have done more prior to award to satisfy itself that IMTA would supply a U.S.- or Canadian-made machining center and that the firm was a manufacturer under the Walsh-Healey Act. We agree. For the reasons discussed below, however, we have no basis for recommending that the award to IMTA be disturbed.

With respect to the country-of-origin issue, the solicitation provided that a machining center would be considered to be of U.S. or Canadian origin, if (1) it was manufactured in the United States or Canada, and (2) the cost of its components manufactured in the United States or Canada exceeded 50 percent of the cost of all its components. As

we pointed out in our prior decision, the contracting officer concluded that IMTA's machining center would be of U.S. origin based in part on a price list provided by IMTA prior to award indicating "the amount of foreign content" for various items. Based on the price list, the contracting officer calculated that 61 percent of IMTA's price for the machining center represented domestic content.

Although we previously did not question the agency's analysis, we now find that the analysis was flawed. First, the agency's analysis was based on IMTA's prices for, not the costs of, components that make up the machining center. The list also did not indicate which components were foreign and which were domestic. In addition, IMTA's list, and the agency's calculation, included amounts for such non-component items as engineering and installation. Finally, the information submitted by IMTA was not sufficient to permit the agency to exclude from its calculation amounts for such non-component costs as the labor and overhead incident to final assembly of the end product. In short, the Air Force needed more information from IMTA in order to perform the proper analysis.

Our conclusion here does not mean, however, that the protests should have been sustained. Fundamentally, an agency's preaward determination concerning a prospective contractor's ability to supply a U.S. or Canadian end product involves an issue of responsibility. Because responsibility determinations are basically judgmental, and generally not susceptible to objective review, our Regulations provide for review of affirmative responsibility determinations only in cases of possible misapplication of definitive responsibility criteria, fraud, or bad faith on the part of procurement officials. The protests involved none of these circumstances. Therefore, if we had found in the initial protests that the contracting officer's conclusion was based in part on incomplete information, we would not have sustained the protests with a recommendation for cancellation of the contract. Rather, we would have suggested that the Air Force obtain the necessary cost data from IMTA and perform the proper analysis before final acceptance of the end product. We understand from our audit work that the Air Force intends to do so and that it has arranged for the Defense Contract Audit Agency and the Defense Contract Administration Services Management Area, Chicago, to monitor performance and provide other assistance to ensure that IMTA supplies a U.S. product.

Regarding the Walsh-Healey issue, our prior decision correctly pointed out that a firm's status as a manufacturer under that Act is not a matter for this Office to decide.

Rather, FAR § 22.608-3(b) provides that a challenge to an agency's Walsh-Healey determination is a matter for either DOL or SBA. We therefore affirm our decision on this point.

Nevertheless, we found in the course of our audit that the Air Force failed to pursue IMTA's Walsh-Healey eligibility as required by FAR § 22.608-2(b)(3), which provides that the contracting officer must investigate the Walsh-Healey eligibility of an offeror, and not rely on the offeror's Walsh-Healey certification, if, as here, the individual acquisition office has not previously awarded a contract to that offeror. Had such an investigation been conducted prior to award, it is unlikely that the Air Force would have determined that IMTA qualified as a manufacturer under the Walsh-Healey Act because the firm had not made preaward arrangements for manufacturing space, equipment, and personnel as required by section 22.606-1(a)(2) of the FAR.

FAR section 22.608-6(b) provides that if a contracting officer discovers after contract award that the award was made to an ineligible offeror, the contracting officer may terminate the contract if the offeror's Walsh-Healey Act certification was not made in good faith. That, of course, is a question for the contracting agency to decide. We found no evidence during our audit, however, that IMTA was not acting in good faith when it made its certification. As part of our audit we visited IMTA's facilities and it appears to us that the firm now has the resources required to qualify as a manufacturer.

Milton J. Socolar

for Comptroller General
of the United States