Arsenoff

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: A. Hirsh, Inc.

File: B-237466

Date: February 28, 1990

Daniel B. Michie, Jr., Esq., Fell & Spalding, for the protester.
Jeffrey B. Mulhall, Esq., Saul, Ewing, Remick & Saul, for MFC Corporation, an interested party.
Michael E. Wyant, Esq., Federal Prison Industries, Inc., for the agency.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Domestically performed processing operations on imported horsehair do not constitute "manufacturing" for purposes of the Buy American Act, 41 U.S.C. § 10a et seq. (Supp. IV 1986), since they do not result in a fundamental change to the foreign component.

2. Since overhead and profit are not a part of the test to determine whether the cost of domestic components exceeds 50 percent of the cost of all components for purposes of the Buy American Act, 41 U.S.C. § 10a et seq. (Supp. IV 1986), protester, whose foreign component costs are greater than its domestic component costs, is not entitled to a preference under the Act.

DECISION

A. Hirsh, Inc., protests the award of a contract to MFC Corporation under invitation for bids (IFB) No. SPI-008-9, issued by UNICOR, Federal Prison Industries, Inc., for 24,000 pounds of 100 percent horsehair and 40,000 pounds of a 50 percent horsehair mixture which are used by federal prisoners to make brushes which are then sold to government agencies. Hirsh essentially maintains that it is a domestic manufacturer of the end items sought by UNICOR and that, therefore, its second low bid should have been evaluated as low by application of a 12 percent differential to MFC's low

bid as authorized by the Buy American Act, 41 U.S.C. § 10a et seq. (Supp. IV 1986) (the "Act"). UNICOR declined to apply the differential because it determined that all bidders offered horsehair from foreign sources.

We deny the protest.

The IFB item description calls for 100 percent horsehair in the case of item BRA-0003 and a 50 percent mixture of horsehair and polypropylene fiber in the case of item BRA-0004. MFC received an award for all of item BRA-0003 and a partial award for item BRA-0004. In both cases, the items require horsehair which is extra stiff, natural in color, sterilized, combed and mixed, and free from dirt, excessive shorts, soft and reclaimed hair. Further, the IFB called for horsehair which was 6 inches long--6-3/4 inches in the case of the horsehair polypropylene mixture--packed in containers not to exceed 60 pounds. Amendment No. 1 provided that the horsehair had to be packaged in approximately 1-pound bundles.

In order to qualify for the preference sought by the protester, the clause included in the IFB and set forth at Federal Acquisition Regulation § 52.225-3 requires that an offered item must be an: "[E]nd product manufactured in the United States, if the cost of components . . . manufactured in the United States exceeds 50 percent of the cost of all its components."

Hirsh maintains that the domestic processing operations it performs on imported horsehair constitute manufacturing under the Act, and that the cost of these operations together with the cost of domestic oil it uses to lubricate the horsehair and the polypropylene used in the blend (which together in the protester's view constitute the domestic "components") exceeds the cost of the unprocessed foreign horsehair (i.e., the foreign "component"). The protester outlined in considerable detail the processes it intended to perform as follows: sterilization (which also straightens the hair); sorting; cutting to required length; inspection for stiffness; machine blending with the addition of domestic oil; wrapping in paper bundles; and final trimming. Moreover, Hirsh has submitted confidential cost breakdowns purporting to show that its "domestic component" costs exceed 50 percent of the cost of all components for both line items.

The concept of what precisely constitutes "manufacturing" for the purpose of the Act remains largely undefined; accordingly, we have noted in our decisions in this area that each involves a peculiar factual situation and at best

only provides conceptual guidance in determining whether a given set of operations constitutes manufacturing. See Cincinnati Elecs. Corp. et al., 55 Comp. Gen. 1479 (1976), 76-2 CPD ¶ 286. However, a basic conceptual guide to determining whether manufacturing has occurred may be found in 45 Comp. Gen. 658 (1966), where we held at pages 659-660: "[T]he fact that the material being treated undergoes substantial changes in physical character, is convincing evidence, we think, that it constitutes a manufacturing process within the meaning of the . . . Act." [Emphasis supplied.] See also 48 Comp. Gen. 727 (1969); Marbex, Inc., B-225799, May 4, 1987, 87-1 CPD ¶ 468.

In arguing that the above cited test should not be applied in this case, Hirsh places considerable reliance on our decision in Imperial Eastman Corp., Thorsen Tool Co., 53 Comp. Gen. 726 (1974), 74-1 CPD ¶ 153. While it is true that, under the facts of that case we discounted the importance of the substantial alteration test, we believe the decision is readily distinguishable from the present situation. In Imperial Eastman, we specifically noted in upholding the contracting agency's determination that the assembly of foreign tools into an end-item kit, which also included domestic belts and cases, could be considered manufacturing that in doing so we were recognizing the agency's "administrative competence" in classifying the kit as an end item in the context of a special statutory provision concerning hand tools. We also noted in that case to hold otherwise would impose "almost insurmountable difficulties" in administering kit procurements. Here, there exists no special statutory provision or practical procurement problem and the agency involved maintains that the processing of horsehair does not constitute manufacturing. In the absence of such circumstances, we do not believe that the rather narrow holding in the earlier decision should control this case.

Rather, on the basis of the record before us, we do not find that the sterilizing, sorting, cutting, inspection, blending, wrapping and trimming operations described by Hirsh approach the basic standard described in 45 Comp. Gen. 658, supra, of making substantial changes in the physical character of the horsehair from the time that it is imported until the time the protester has finished with it. In our view, after all the processing is completed the finished product is still horsehair, it may be mixed with other material, it may be cut, sorted cleaned and packaged but it remains horsehair. Accordingly, we are unable to agree that the processes to be performed by Hirsh constitute manufacturing under the Act and, therefore, we have no basis

for concluding that the contracting officer acted incorrectly in deciding not to apply the Buy American differential. See Davis Walker Corp., B-184672, Aug. 23, 1976, 76-2 CPD ¶ 182.

Moreover, even if we were to accept Hirsh's characterization of its domestic processing and finishing operations as "manufacturing" for purposes of the Act, which we do not, the protester would not be entitled to the preference because, when properly computed, the costs of its domestic "components" do not exceed one-half of the total costs of all components. While the protester correctly notes that there are circumstances where appropriate overhead costs may be included in computing component costs, Hirsh fails to recognize that these circumstances are limited to those in which a bidder itself is fabricating the components which makes up the end item. 50 Comp. Gen. 697 (1971). Since Hirsh states that it is purchasing the horsehair, oil and polypropylene, the costs are not allowable.

Thus, contrary to the protester's calculations and absent circumstances not here present, costs for factors such as overhead and profit are not a proper part of the computation in determining domesticity. 46 Comp. Gen. 784 (1967). When such costs are excluded from Hirsh's calculations, it is clear that the foreign horsehair component of both of the products it was offering constitutes well over 50 percent of the total of all component costs and therefore the differential should not apply.

The protest is denied.

James F. Hinchman
General Counsel