



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: A & D Machinery Company

File: B-242546; B-242547

Date: May 16, 1991

L.R. Merhaut for the protester,
Major William R. Medsger, Esq., and Bridget A. Stengel, Esq.,
Department of the Army, for the agency.
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the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. A domestic firm, assembling the components necessary to transform an imported "base" or "base frame" into a milling machine which meets the solicitation requirements, satisfies the domestic manufacturing requirement contained in solicitations.
2. The domestic content restriction contained in solicitations for milling machines was met because the domestic component costs were more than 50 percent of the cost of all the components of the milling machine, even though arguably some items included in the calculation were not domestic components.
3. Requirement that milling machine offered be a current model was met where machine is manufactured domestically from a foreign base and domestic components costing more than 50 percent of the cost of all components.

DECISION

A & D Machinery Company protests the award of contracts for milling machines to Foxco Inc. under request for proposals (RFP) Nos. DAAA09-90-R-0458 (RFP-0458) and DAAA09-90-R-0459 (RFP-0459), issued by the United States Army Armament, Munitions and Chemical Command. A & D contends that Foxco's proposal does not comply with the requirement in RFP-0458 that the milling machines be manufactured in the United States or Canada and argues that the machines are not current models of the manufacturer as required by both RFPs.

We deny the protests.

RFP-0458 was issued on March 2, 1990, for 39 milling machines. The solicitation requires that the milling machines "be new and one of the manufacturer's current models." Additionally, the RFP provides that the offeror must certify to the costs of the machines' components manufactured in the United States or Canada, and contains a provision stating that only machines manufactured in the United States or Canada are acceptable and that a machine shall be considered as manufactured in the United States or Canada if the cost of its components manufactured in those countries exceeds 50 percent of the cost of all its components.1/

After negotiations and the submission of best and final offers (BAFO), Foxco was determined to be the low acceptable offeror. It submitted a BAFO in which the firm certified that the milling machine offered, the Turret HV-1 1/2, met or exceeded all solicitation requirements and that the offeror took no exceptions to the RFP. Foxco certified that the total cost of components was \$9,100 for each machine and that the cost of domestic components was \$5,600 or 62 percent of the total. It also submitted to the agency a listing of the cost and origin of the components that comprise the milling machine and stated that the contract was to be performed at Machinery Group USA, Huntington Beach, California. On December 21, the contracting officer made award to Foxco, as the low, acceptable offeror.

RFP-0459 was also issued on March 2, for a quantity of the same milling machines. These machines were for foreign military sales (FMS) requirements. The facts pertinent to this RFP are substantially the same as those described above in connection with RFP-0458, except that the domestic machine tool restrictions did not apply because appropriated funds were not used and the title to the machine tools would vest in the foreign country. However, the Buy American Act was applicable.2/

1/ The solicitation contains the clause at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7023 (1988 ed.), "Restriction on Acquisition of Foreign Machine Tools," and clause HS7108, "Machine Tool Certification."

2/ The Buy American Act establishes a preference for the purchase of domestic products by the government. In implementation of the Act, RFP-0459 defined a domestic end product as one which is produced in the United States and the cost of its qualifying country components and its components which are mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components. See DFARS § 225.102.

A & D has a two-fold objection to the acceptance of Foxco's proposal under the domestic machine requirement. In essence, it first argues that the machine is not going to be manufactured domestically, that Foxco is offering a foreign machine, with domestic components and accessories added in order to meet the restriction. Next, the protester maintains that in any calculation to determine the domestic content of a machine, the cost of domestic "accessories" as opposed to "components" should not be considered.

The restriction is contained in the 1989 National Defense Authorization Act, 10 U.S.C. § 2507 (1988), which states that during fiscal years 1989, 1990, and 1991 funds appropriated or otherwise made available to the Department of Defense may not be used to enter into a contract for the procurement of machine tools in certain specified Federal Supply Classes (FSC) "that are not manufactured in the United States or Canada."^{3/} This restriction was implemented in DFARS § 225.7008, which requires the Army to purchase machines "manufactured" in the United States or Canada where the cost of domestic "components" exceeds 50 percent of the cost of all components. We do not find any specific guidance in either the language or the legislative history of the underlying statute or its predecessors, or in the applicable regulation as to the meaning of the terms "manufacture" and "components."

We have explored the meaning of the term "manufacture" in relation to the Buy American Act. Under a restriction in that Act similar to the domestic machine tool restriction, the term "manufacture" means completion of an article in the form required for use by the government. Marbex, Inc., B-225799, May 4, 1987, 87-1 CPD ¶ 468. Manufacturing may include a mechanical operation performed on a foreign product or assembly of separate items, whereby the identity and character of the end item is established and fixed as to its current and future use. Thus, the key in determining whether a process constitutes manufacturing for Buy American Act purposes is not necessarily whether a foreign product has been significantly altered, but whether the item being purchased by the government is made suitable for its intended use and its identity established. See Hamilton Watch Co., Inc., B-179939, June 6, 1974, 74-1 CPD ¶ 306; Imperial Eastman Corp.; Thorsen Tool Co., 53 Comp. Gen. 726 (1974), 74-1 CPD ¶ 153.

^{3/} Similar restrictions on purchases of machine tools were included in Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-591, § 101(c), 100 Stat. 3341-126 (1986), enacted in October 18, 1986, and in legislation appropriating funds to the Department of Defense for fiscal years 1988 and 1989.

Absent any evidence that Congress intended a different meaning, we adopt the rationale from the Buy American Act cases and find that a milling machine is "manufactured" in the United States or Canada, where the American or Canadian firm assembles items necessary to transform the "base frame" or "base iron" into a machine which meets the solicitation requirements. Manufacturing Technology Solutions, B-237415, Jan. 22, 1990, 90-1 CPD ¶ 88; Morey Mach., Inc., B-233793, Apr. 18, 1989, 89-1 CPD ¶ 383.

It is our view that under the circumstances, the process performed by Machinery Group USA constitutes manufacturing as that term is used in DFARS § 225.7008. The record contains a preaward survey conducted by the agency on Foxco stating that the base frame of the machine is to be purchased from an overseas concern and then shipped to Machinery Group USA's facility where domestic components are to be incorporated to form a completed machine. From the "Special Customs Invoice" which the agency has furnished our Office, it is clear that Machinery Group USA is importing only the shell of the machine, not including electric motors or controls, coolant system, and other major components. Without the substantial additional process undertaken by Machinery Group USA at its facility, the item imported would neither function as a milling machine nor even come close to meeting the requirements of the RFP. We therefore believe that the process performed by Foxco's supplier meets the regulatory and statutory requirement for domestic manufacture.

As far as the actual calculations to determine whether the machine meets the 50 percent domestic "components" requirement is concerned, A & D recognizes that our Office has held that where machines are purchased with incorporated accessory parts which are necessary for the units to comply with agency needs, the cost of those parts may enter into the calculations which determine whether the machine is domestic. Manufacturing Technology Solutions, B-237415, supra. The protester points out that here the solicitation contains separate lists of major items that are set forth under the heading "Components," and less important items that are termed "Equipment," and which, according to the solicitation, are to be furnished "with" the machine. A & D argues that the "Equipment" items are merely add-on-type accessories and should not be considered in determining the cost of domestic "components." In addition, the protester states that in accordance with "common usage in the trade" items such as those listed under the term "Equipment" in the RFP, wrenches, arbors and collets, are "not recognized as components of the machine."

While the protester's arguments concerning interpretation of the term "components" are strong, the issue is not presented in this case. It is clear from the information submitted to

the agency in support of Foxco's certification that, with two minor exceptions, Foxco did not include items listed as "Equipment" in the solicitation as domestic components in calculating the domestic content of its milling machine. The exceptions were name tags and a lubrication plate. When the cost of these items is deducted from the cost of the domestic components, the total cost of the domestic components still remains well above 50 percent of the cost of all the components. None of the other items considered by Foxco to be domestic components, from the coolant system to an anti-backlash adjustment mechanism, are those which the protester argues are "accessories" that should not be considered domestic components. We have carefully reviewed the information relied upon by the agency in concluding that Foxco's offer complied with the domestic content requirements of the solicitation, and we have no legal basis upon which to object to the agency's conclusion.

A & D next argues that the milling machine offered by Foxco is not a current model of Machinery Group USA as required by both the RFPs, because the machine is actually being procured from Taiwan. A & D theorizes that domestic components and accessories will merely be added to the foreign machine in an attempt to convert a foreign product into a domestic one.

Foxco certified in its offer that the Turret HV-1 1/2 will be manufactured in the United States by Machinery Group USA and that the item offered is a current model of the manufacturer. During the preaward survey, as we stated earlier, the agency found that the "base frame" of the machine was to be purchased overseas and shipped to Machinery Group USA's facility where the components, such as the motors and electrical system, would be installed. The survey team also concluded that Machinery Group USA has "the facilities and manufacturing equipment necessary to perform," and that the facility "produces on the premises goods of the specific and general character solicited."

For the reasons set forth below, we think the record supports the agency's acceptance of Foxco's proposal as offering a current model.

First, Foxco's proposal took no exception to the solicitations' terms that required the machines offered to be a current model of the manufacturer. There was no requirement in the solicitations that the offeror supply either descriptive literature or a particular model number in support of the offeror's certification that, in fact, a current model was being offered. By submitting an offer that takes no exception to the RFP, the offeror, Foxco, obligates itself to the terms of the solicitation. United HealthServ, Inc., B-232640 et al., Jan. 18, 1989, 89-1 CPD ¶ 43.

Second, the preaward survey team concluded that the designated manufacturer had the necessary capability to assemble the machine from the domestic components and the foreign base and that it had produced the specific machine solicited. As we stated earlier in this decision, the assembly of components to complete the machine in the form required for use by the government constitutes manufacturing.^{4/}

Since Foxco has certified that the machine offered is a current model of the Machinery Group USA and the information from the preaward survey indicates that the tasks performed on the foreign base are those types of tasks that we have held constitute manufacturing, we find that the Foxco proposal under RFP-0458 was properly accepted as offering a current model.^{5/}


Finally, it is significant in our view that the agency here did not merely accept Foxco's certifications. The agency conducted an extensive preaward survey which included a visit to Foxco's supplier. The agency also requested and received a detailed breakdown of the costs of the domestic and foreign components that make up the machine as well as Customs documentation concerning the imported components. Thus, the agency has fulfilled its obligation to go beyond a firm's self certification where doubt exists as to its validity. See Cryptek, Inc., B-241354, Feb. 4, 1991, 91-1 CPD ¶ 111.

^{4/} The protester points out that the machine offered by Foxco was called both the "AMSTAR" HV-1 1/2 Turret milling machine and the "Turret" HV-1 1/2 milling machine. Foxco's BAFO stated that it was offering the "Turret" machine and certified that this machine was a current model. In view of this and since the certification was supported by the agency's preaward survey, we do not see the legal significance of the fact that Foxco referred to a different model name in its initial offer.

^{5/} We do not find the decision cited by the protester, Omatech Serv. Ltd., B-240426; B-240426.4, Nov. 20, 1990, 70 Comp. Gen. _____, 90-2 CPD ¶ 411, to be applicable here. In that case, the RFP required that the machine be one of the domestic manufacturer's current models and that descriptive literature be submitted. Since the only descriptive literature submitted depicted a machine made in India, not a model of the domestic supplier, the offer had to be rejected. Here, the RFP required that the machine be a current model but no descriptive literature was required and nothing was submitted which was inconsistent with Foxco's representation that the machine was a current model manufactured by Machinery Group USA using, as it is entitled to, an imported base frame.

Since the agency properly accepted the machine under RFP-0458, it is likewise acceptable under the identical provision of RFP-0459 concerning the machine's status as a current model. The machine is also entitled to domestic treatment under the Buy American Act restrictions in RFP-0459, which are less restrictive than the domestic machine requirement in RFP-0458.

The protests are denied.


for James F. Hinchman
General Counsel