

GAO

Report to the Honorable  
Robert W. Kasten, Jr., U.S. Senate, and  
the Honorable John E. Porter, House of  
Representatives

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February 1990

# DEFENSE CONTRACTING

## Air Force Machine Tool Procurement Raises Buy American Questions



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**National Security and  
International Affairs Division**

B-232190

February 21, 1990

The Honorable Robert W. Kasten, Jr.  
United States SenateThe Honorable John E. Porter  
House of Representatives

In your respective letters of December 29, 1988, and January 4, 1989, you requested that we examine the circumstances of the Air Force's July 15, 1988, contract award to the Italian Machine Tool Agency (IMTA), Inc. The firm fixed-price contract in the amount of \$1,299,531 was for a machining center. You expressed concern that the award was in direct conflict with the statutory restriction prohibiting the use of funds for foreign-made tools. Specifically, you requested that we provide information on the Air Force's actions relative to its compliance with the statutory restriction prohibiting the acquisition of foreign machine tools, determination that IMTA was a manufacturer as defined in the Walsh-Healey Act, and determination that IMTA was "responsible" as defined in the Federal Acquisition Regulation. Subsequent to our review work, IMTA disclosed that it would be unable to build the machining center. Details on IMTA's disclosure and information you requested are summarized below and discussed in appendix I.

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**Results in Brief**

We reviewed the Air Force's actions from both a legal and an audit standpoint and believe the Air Force, in awarding the contract to IMTA, acted on information that was too limited to determine that IMTA would deliver a domestic product in compliance with the statutory restriction and that IMTA met the Walsh-Healey Act requirements. Nevertheless, we have no legal basis to challenge the contract award to IMTA and therefore sustained the Air Force's award in a bid protest reconsideration decision dated September 27, 1989 (see app. II).

Of primary importance now is that IMTA disclosed in early October 1989 that it would be unable to build the machine specified in the contract because a major supplier would not honor an agreement to supply a critical item. IMTA proposed that it supply a machine from the Henri Line Company, which IMTA indicated is a Canadian manufacturer. IMTA stated that the Line machine has the exact specifications of the proposed IMTA machine. The Air Force is considering IMTA's proposal and has asked IMTA to provide data to ensure that the Line machine meets the domestic content criteria.

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## Domestic Content

IMTA's contract requires that it deliver a domestic product.<sup>1</sup> A product is considered to be domestic if it is manufactured in the United States or Canada and the cost of its U.S. and/or Canadian components<sup>2</sup> exceeds 50 percent of the cost of all its components. IMTA certified in a letter that it would meet the U.S.-manufactured requirement. Also, the contracting officer requested that IMTA provide evidence to show that it would meet the U.S.-manufactured requirement. In response, IMTA provided a price list that purported to show the portion of domestic and foreign components to be used in producing the machining center. The contracting officer reviewed the price list and concluded that IMTA would manufacture a domestic product.

We do not believe that the price data contained the detail necessary to conclude that IMTA would deliver a domestic product. The contracting officer should have requested that IMTA provide a more detailed listing of anticipated foreign and domestic component parts as well as projected costs for those items. The Air Force should have obtained sufficient data to ensure compliance with statutory restrictions.

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## Walsh-Healey Act

Under the Walsh-Healey Act, a contractor must certify that it is either a manufacturer of or a regular dealer in the items to be delivered under a government supply contract over \$10,000. IMTA certified that it was a manufacturer under the Walsh-Healey Act. The contracting officer determined that IMTA qualified as a manufacturer based on IMTA's certification and its parent company's status as a manufacturer. However, the contracting officer did not apply the provisions of the Federal Acquisition Regulation that state that each offeror must qualify in its own right as a manufacturer and that an offeror's affiliation with or relation to another firm, even its parent company, are not evidence of the offeror's own eligibility as a manufacturer. The regulation provides that the contracting officer must investigate and determine the eligibility of an offeror if the offeror has not previously been awarded a contract by the individual acquisition office.

At the time of the award, IMTA did not meet the regulation's requirements in terms of having the necessary prerequisites, such as plant and equipment, or having made all the necessary arrangements and commitments to obtain them. To remedy this situation, a contracting officer

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<sup>1</sup>The restriction on buying domestic products is generally referred to as a "Buy American" restriction.

<sup>2</sup>Components are those articles, materials, and supplies incorporated directly into end products.

may terminate a contract if it is determined that the Walsh-Healey Act certification was not made in good faith. We found no evidence during our review that IMTA had not acted in good faith, but the Air Force must make this determination.

## Responsibility Determination

Before awarding a government contract, a contracting officer must determine that the potential contractor is responsible in accordance with acquisition regulations. The contracting officer must determine whether the potential contractor has, among other things, adequate financial, technical, and physical resources to perform the contract or the ability to obtain such resources. Although the regulations specify the factors to be considered in determining whether a prospective contractor is responsible, the specific type and quantity of information used in making such a determination is left to the contracting officer's judgment. In this case, IMTA was judged to be responsible based on very general input from the Des Plaines, Illinois, Better Business Bureau on IMTA's record as a distributor.

## Agency Comments

The Department of Defense generally concurred with our findings and acknowledged that the contracting officer did not comply with some parts of the Federal Acquisition Regulation (see app. III). However, the Department believed we erroneously implied that a contracting officer, in most cases, must conduct a detailed cost analysis to ensure domestic content. The Department also believed that we gave a misleading impression that the contracting officer's analysis was inadequate, even though the contracting officer did more than was required to conclude that IMTA would deliver a domestic product and could have relied solely on IMTA's certification.

We recognize that domestic origin certifications from contractors are usually accepted by the Department of Defense's contracting officers at face value. However, the Comptroller General has taken the position in bid protest decisions that an agency should not automatically rely on such certifications when it has reason to question whether a domestic end product will be furnished. It was apparent that the contracting officer requested additional information from IMTA because some questions existed regarding IMTA's ability to deliver a domestic product.

We believe that once the contracting officer received the additional information, she was responsible for analyzing it. Under the regulations, to determine whether an item is a domestic product, only the total cost

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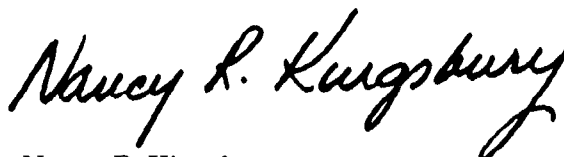
of the components is used (i.e., what the contractor paid for the components or the total cost to make them in-house). The key indicator is cost of components. IMTA provided information that showed the price, not the cost, of major components and noncomponents. In short, the Air Force needed more information from IMTA to resolve the contracting officer's apparent concerns that led her to request additional data.

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The problems identified in this report reinforce the need for better application of acquisition regulation requirements. Because our scope was limited to one contract, we are not making any recommendations. However, we suggested to Department of Defense officials that better application of acquisition regulation requirements be included as an issue needing attention in the fiscal year 1990 Federal Managers' Financial Integrity Act<sup>3</sup> analysis.

We are sending copies of this report to the Chairmen, House and Senate Committees on Appropriations and on Armed Services; the Secretaries of Defense and the Air Force; the Director, Office of Management and Budget; and other interested parties.

Please contact me on (202) 275-4268 if you or your staff have any questions concerning this report. Other major contributors to this report are listed in appendix IV.



Nancy R. Kingsbury  
Director  
Air Force Issues

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<sup>3</sup>Under provisions of the Federal Managers' Financial Integrity Act of 1982 (31 U.S.C. 3512(b) and (c)), agency managers are given the primary responsibility for maintaining adequate systems of internal control and accounting. The act requires agency heads to report annually to the President and the Congress on the status of these systems, and it holds managers responsible for correcting identified deficiencies.



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## Abbreviations

DCASMA	Defense Contract Administration Services Management Area
FAR	Federal Acquisition Regulation
GAO	General Accounting Office
IMTA	Italian Machine Tool Agency





# Buy American Questions Raised in Air Force Machine Tool Procurement

In October 1987 the Air Force Contracting Center, Wright-Patterson Air Force Base, Dayton, Ohio, was asked by the 4950th Test Wing (Fabrication and Modification Division), the primary design and manufacturing facility at the base, to procure a six-axis machining center. A machining center is a computer-controlled machine that, depending on the number of axes, is capable of performing a variety of complex operations. According to the test wing, the machine was needed in the modification, research, and development area to ensure higher mission capabilities and enable the test wing to provide faster and more sophisticated support to its customers. It estimated that the Air Force would save millions of dollars by having these capabilities in-house. The test wing also planned to use the machining center to produce aircraft and other parts of major weapons systems and estimated that it had spent over \$1 million in the past 3 years to have a contractor make parts requiring six-axis capability.

Before requesting the assistance of the contracting office, engineers from the test wing visited several potential contractors, including Pratt & Whitney, Cincinnati Millicron, and White Sunstrand, to examine their machining centers. They initially became interested in a machining center with a brand name of "Jo Mach 23" through a presentation by Walker Machinery Company, who they believed was the manufacturer of this machine. After considering its options, the Air Force decided that the Jo Mach machine, or its equivalent, would best meet its needs, and it initiated the procurement process.

On December 4, 1987, the contracting office at Wright-Patterson Air Force Base issued a synopsis in the Commerce Business Daily stating that the Air Force wanted to procure a Jo Mach 23 or equivalent machining center. According to contracting officials, the Air Force often issues "brand name or equal" solicitations to buy off-the-shelf items. This practice is not illegal or against procurement policies. However, through discussions with officials of Walker Machinery, the contracting office later learned that the Jo Mach 23 was made by the Italian Machine Tool Agency (IMTA) Industrial Goods, Ltd., Worthing, England, and that Walker was merely a distributor for the manufacturer. Due to the statutory restriction on the acquisition of foreign machine tools, the Air Force withdrew its synopsis, wrote a generic specification for the machine, and issued a request for proposals on March 21, 1988.

The Air Force's request for proposals provided for full and open competition and required that offers be submitted by May 12, 1988, for a vertical six-axis machining center with all necessary tooling, operation and maintenance manuals, training, and installation. The Air Force received offers from four firms. One of the offers was determined to be technically unacceptable. According to contracting office officials, a letter was sent on June 14, 1988, to the remaining three offerors, asking that best and final offers be submitted by June 24, 1988. Only two of the three acceptable offerors responded with best and final offers and were therefore considered for award.

The contracting officer said that based on a technical evaluation, best and final responses, and all other information available, the contract was awarded on July 15, 1988, to IMTA Inc., a subsidiary of IMTA Industrial Goods, whose best and final offer was the lowest received. The firm-fixed price contract was in the amount of \$1,299,531 and was numbered F33601-88-C-0153.

Pratt & Whitney and Onsrud, two of the competing contractors, filed bid protests with us, contesting the contract award to IMTA and suggesting that the contract should be terminated. On December 13, 1988, we denied the protests.<sup>1</sup> We said that the contracting officer did not have information before the contract award that was inconsistent with IMTA's commitment to supply a domestic machining center. We also said that the protesters' contentions concerning IMTA's responsibility and its status as a manufacturer under the Walsh-Healey Act were not subject to review under our bid protest regulations. We do not consider protests challenging affirmative responsibility determinations in the absence of a showing of possible fraud or bad faith on the part of contracting officials or an allegation that definitive responsibility criteria contained in the solicitation were misapplied. None of these conditions had been alleged. With respect to IMTA's status as a manufacturer under the Walsh-Healey Act, we said that such matters, by law, are to be decided by the contracting agency, subject to review by the Small Business Administration (if a small business is involved) and the Department of Labor.

On December 30, 1988, and January 3, 1989, Pratt & Whitney and Onsrud, respectively, filed requests with us for reconsideration of the bid protest decision. On September 27, 1989, we affirmed our prior bid protest decision. A copy of the decision is included in appendix II.

<sup>1</sup>The Pratt & Whitney Co., Inc.; Onsrud Machine Corp., B-232190, et al., Dec. 13, 1988, 88-2 CPD 588.

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## Objectives, Scope, and Methodology

On December 29, 1988, and January 4, 1989, Senator Kasten and Congressman Porter, respectively, requested that we examine the Air Force's contract award for the machining center to IMTA. We agreed to determine (1) whether the Air Force complied with the statutory restriction prohibiting the acquisition of foreign machine tools, (2) what oversight steps the Air Force will take to ensure that IMTA's product will be manufactured in the United States or Canada, (3) whether the Air Force properly determined that IMTA was a manufacturer as defined in the Walsh-Healey Act, (4) whether the Air Force properly determined IMTA was "responsible" as defined in the Federal Acquisition Regulation (FAR), (5) the status of the contract, paying particular attention to the plant, equipment, and labor force, (6) the reason the Air Force initially specified it wanted the Jo Mach 23 or equivalent and whether that specification was legal, (7) the adequacy and timing of the surveys performed by the Defense Contract Administration Services Management Area (DCASMA), and (8) whether the Air Force was obligated to ask Onsrud for a best and final offer and what method the Air Force used to request a best and final offer from Onsrud.

We interviewed responsible agency officials and reviewed pertinent contract and related documents and regulations at the Departments of Defense and the Air Force, Washington, D.C.; the using organization and contracting office at Wright-Patterson Air Force Base, Dayton, Ohio; and DCASMA, Chicago, Illinois. We visited the IMTA facility in Rockford, Illinois, and interviewed the president of IMTA. We examined the limited records that IMTA made available to us. We conducted our review from February through September 1989 in accordance with generally accepted government auditing standards.

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## Measures Taken to Ensure Domestic Content

The solicitation for the six-axis machining center included the clause from section 52.225-7023 of the Department of Defense FAR Supplement, "Restriction on Acquisition of Foreign Machine Tools," which states that the machine tool to be supplied must be of domestic origin. To be considered domestic, the machine tool must be manufactured in the United States or Canada, and the cost of its components manufactured in the United States or Canada must exceed 50 percent of the cost of all its components. IMTA certified that the machine tool would be of domestic origin. Also, in response to a specific request from the Air Force, IMTA provided a price list to show that it would deliver a domestic product. However, we do not believe that the Air Force could have determined the dollar value of the foreign components of the machine tool because

(1) there was no component-by-component breakdown sufficient to permit a thorough analysis of foreign versus domestic costs and (2) costs such as labor, material, and overhead incurred in assembling the various components into the final product were not separately stated.

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**Criteria**

As a general rule, all contractors bidding on Department of Defense contracts for certain classes of machine tools, including the machining center the Air Force contracted for, must agree that the product will be manufactured in the United States or Canada and the cost of its component parts manufactured in the United States or Canada will exceed 50 percent of the cost of all components. This is based on an appropriation restriction, which, for the fiscal year involved in this case, was contained in section 8085 of Public Law 100-202, dated December 22, 1987. The Department of Defense FAR Supplement, section 225.7008, implements the law. Additional guidance concerning the domestic content of products has also been addressed in our decisions<sup>2</sup> on "Buy American" issues that also involve the 50-percent domestic content rule.

To determine whether an item is a domestic end product that has been manufactured in the United States, only the total cost of the components is used (i.e., what the manufacturer paid for the components or the total cost to manufacture them in-house). The total cost of the end product, price minus profit, is irrelevant because total cost includes noncomponent costs such as labor, overhead, packaging, testing, and evaluation costs. However, when the same manufacturer produces a component and incorporates it into an end product, the manufacturer can include appropriate overhead and other costs incurred in the manufacture of the component in the total cost of the component.

We were told by the president of IMTA in March 1989 that some of the components for the machining center will be manufactured in IMTA's Rockford, Illinois, facility and that the machining center will also be assembled at that facility. IMTA's president said that this is his first manufacturing contract and thus cost projections are not available. He also told us that his bid was based on data provided by the parent company.

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<sup>2</sup>See, for example, 48 Comp. Gen. 727 (1969) and 50 Comp. Gen. 697 (1971).

**Appendix I  
Buy American Questions Raised in Air Force  
Machine Tool Procurement**

**Air Force's Analysis**

The contract awarded to IMTA is for the items shown in table I.1.

**Table I.1: Schedule of Items in IMTA's Contract**

<b>Item no.</b>	<b>Item</b>	<b>Price</b>
1	Six-axis milling machine	\$995,800
2	Tooling package	21,051
3	Installation	47,300
4	Manuals	19,650
5	Training	8,800
6	Jib crane	6,580
7	Foundation	36,000
8	Automatic digitizing cell	164,350
<b>Total</b>		<b>\$1,299,531</b>

In addition to IMTA's certification that it would comply with the domestic content restriction, the contracting officer asked IMTA to furnish a breakdown (foreign versus domestic) for each of the items. This additional step was to ensure that IMTA would meet the U.S.-manufactured requirement. IMTA provided a price list on June 6, 1988, which showed only items 1 and 8 as having foreign components. The documentation provided a major component breakdown for items 1 and 8 and the amount of "foreign content" for the two items.

The Air Force contracting officials analyzed the price breakdown for items 1 and 8 and concluded that \$388,500, or 39 percent, of the \$995,800 price for item 1 and \$56,850, or 34.6 percent, of the \$164,350 price for item 8 was for foreign components. On the basis of this information, the officials concluded that IMTA would manufacture a domestic product.

We question the Air Force's analysis. Prior GAO decisions have stated that when determining the portion of the product that is foreign, only the cost of the components (what the manufacturer paid for the components or the total cost to manufacture them in-house) is used. The price that the contractor charges for the components (cost plus profit) is irrelevant. We believe the Air Force could not have performed the required cost analysis using the price list provided by IMTA.

Further, the price list should have alerted the Air Force that IMTA's price list included noncomponent items. IMTA's price list included such noncomponent items as installation at the manufacturer's and customer's plants, installation engineering and implementation for tracing

and digitizing, and parametric programming. These are noncomponent-type items; therefore, their costs cannot be considered in determining the portion of the total cost of components that is foreign.

We do not know the final assembly costs for items 1 and 8 or what profit is included in the prices given for those items. We asked the president of IMTA in March 1989 to provide us with this information but were told that the information is not available.

In addition, to perform a proper domestic content analysis, we believe that the Air Force needed a more detailed cost breakdown of the components (foreign versus domestic) included in each end item. Such a breakdown was not provided by IMTA or requested by the Air Force. For example, IMTA's price breakdown showed that the six-axis milling machine included such components as a worktable, direct reading scales, and an operator's control panel, but it did not indicate which components were domestic and which were foreign or the cost for any of the components.

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## Monitoring Domestic Content

The Air Force is monitoring the domestic content of the machining center with the aid of DCASMA-Chicago. According to Air Force contract administration officials at Wright-Patterson Air Force Base, DCASMA-Chicago has the basic oversight responsibilities in administering the contract after award. Initially, the Air Force had no special arrangements planned for administering the contract. However, because of congressional interest in the Air Force's compliance with the statutory restriction prohibiting the purchase of foreign machine tools, we suggested that the Air Force provide close surveillance to ensure that IMTA would supply a U.S.-manufactured product. As a result of our suggestion, the Air Force, in February 1989, requested that DCASMA provide close surveillance of IMTA's production to ensure strict compliance with the domestic content requirement. The Air Force also requested that DCASMA provide monthly reports on its findings. To satisfy the Air Force's request, DCASMA devised a plan in March 1989, which the Air Force approved. The plan includes having an industrial specialist visit IMTA's facility monthly to (1) monitor IMTA's overall performance and ability to meet milestone schedules, (2) review names and locations of major suppliers and subcontractors and the items or materials to be furnished by them, and (3) verify orders placed and subcontracts used. DCASMA believes that this information would show from which sources IMTA intends to procure the material necessary to perform the contract.

In addition, the Defense Contract Audit Agency and DCASMA's Financial Services Branch planned to perform quarterly audits to review all direct material invoices and corresponding purchase orders to verify actual origin of acquisition. They planned to provide the Air Force with quarterly reports on their findings.

Even though DCASMA agreed in March 1989 to increase its production surveillance by having an industrial specialist visit IMTA's facility on a monthly basis and have its Financial Services Branch and the Defense Contract Audit Agency conduct quarterly audits, few visits have actually been made to date. More specifically, DCASMA's industrial specialist has only visited IMTA's facility twice (in August and October 1989) over an 8-month period from March 1989 through November 1989. Moreover, no quarterly audits have been conducted during this period. We were told by an Air Force official that the industrial specialist had called IMTA frequently over the period to discuss the status of IMTA's production efforts. Accordingly, the specialist found that plant visits were not necessary at the time because no production activity had occurred. Additionally, since IMTA had not placed any purchase orders or requested progress payments, quarterly reviews did not have to be conducted by DCASMA's Financial Services Branch and the Defense Contract Audit Agency.

## **Walsh-Healey Determination**

Under the Walsh-Healey Act, a contractor must certify that it is either a manufacturer of or a regular dealer in the items delivered under a government supply contract over \$10,000. FAR subpart 22.6 implements this requirement.

FAR 22.606-1(a)(2) requires new manufacturers to have made all the necessary arrangements and commitments for manufacturing space, equipment, and personnel. At the time of award, IMTA did not appear to meet this requirement in terms of having the necessary prerequisites such as a plant and equipment, or having made all the necessary arrangements and commitments to obtain them. However, at the time of our visit IMTA appeared to be a manufacturer under the Walsh-Healey Act.

Although IMTA certified when it responded to the solicitation that it was a manufacturer, it did not have at that time or at the time of the award the manufacturing facilities, equipment, or personnel needed to perform a manufacturing operation, or written, legally binding arrangements or commitments to obtain them. The contracting office considered IMTA as

an established manufacturer and not a "new" manufacturer just entering the business, primarily because of the reputation of its parent company, IMTA Industrial Goods, Ltd., Worthing, England. Contracting office officials advised us that IMTA was "just setting up shop in another country" and would only be transferring its technology to the United States; therefore, IMTA was considered eligible to receive the contract.

Contracting office officials explained that they did not pursue IMTA's status as a manufacturer because no one came forth before the award to protest IMTA's eligibility and no information in the files cast doubt on IMTA's ability to perform as a manufacturer. They pointed out that at the time of the award FAR 9.104-3 stated in part that the contracting officer shall investigate and determine Walsh-Healey Act eligibility and not rely on the prospective contractor's representation if a protest has been lodged or the contracting officer has knowledge that casts doubt on the validity of the representation.<sup>3</sup> We were told that since none of these circumstances existed, the contracting officer did not consider the requirement for further eligibility examination to be applicable.

We do not agree with the Air Force's position. Even though an investigation to ensure IMTA's status as a manufacturer may not have been required under section 9.104-3(a) of the FAR, section 22.606-1(c) of the FAR provides that every offeror must qualify as a manufacturer in its own right and that an offeror's affiliation or relation to another firm, even its parent company, are not evidence of the offeror's own eligibility as a manufacturer. Further, section 22.608-2(b) provides

"The contracting officer shall investigate and determine the eligibility of the offeror and not rely on the offeror's representation that it is a manufacturer or regular dealer in the following circumstances:

"(3) The offeror that is in line for contract award has not previously been awarded a contract subject to the Act by the individual acquisition office."

The contracting office in this case had no prior contracting experience with IMTA. Thus, further inquiry into IMTA's ability to satisfy the Walsh-Healey Act was required. At the time of award, IMTA did not qualify as a Walsh-Healey manufacturer because IMTA did not have the prerequisite resources or explicit arrangements or commitments to obtain them.

<sup>3</sup>Section 9.104-3, which was arguably inconsistent with FAR 22.608-2, has subsequently been changed and now merely cites FAR section 22.608-2 as the applicable FAR provision on Walsh-Healey Act determinations.



## Determination of IMTA's Responsibility

The Air Force concluded that IMTA had the necessary financial, technical, and physical resources (i.e., personnel and equipment) to perform the contract primarily as a result of IMTA's record as a distributor.

To be eligible to receive a government contract, a contracting officer must determine that the prospective contractor is "responsible" in accordance with FAR criteria. FAR Subpart 9.103 (a) and (b) provides that contracts are to be awarded to responsible prospective contractors only and that no award should be made unless the contracting officer makes an affirmative determination of responsibility. To be determined responsible within the meaning of FAR 9.104-1, a prospective contractor must

- have adequate financial resources to perform the contract or the ability to obtain them;
- be able to comply with the required or proposed delivery or performance schedule, considering all existing commercial and governmental business commitments;
- have a satisfactory performance record;
- have a satisfactory record of integrity and business ethics;
- have the necessary organization, experience, accounting and operational controls, and technical skills (including, as appropriate, such elements as production control procedures, property control systems, and quality assurance measures applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors) or the ability to obtain them;
- have the necessary production, construction, and technical equipment and facilities or the ability to obtain them; and
- be qualified and eligible to receive an award under applicable laws and regulations.

The contracting officer at Wright-Patterson Air Force Base made an affirmative determination that IMTA was a responsible manufacturer within the meaning prescribed in FAR. According to contracting office officials, the determination was primarily based on a Better Business Bureau report from the Bureau's office in Des Plaines, Illinois. The contracting center and the Defense Contract Audit Agency indicated that IMTA never had a contract with the contracting center, the Air Force, the Department of Defense, or the government. However, the Better Business Bureau reported that IMTA is a member in good standing, had no record of any complaints, and had successfully completed work on various municipal projects in the Des Plaines area.

Although the FAR specifies the factors to be considered in determining whether a prospective contractor is responsible, the specific type and quantity of information used in making such a determination is left to the contracting officer's judgment. In this case, the contracting officer could have sought additional information to assess whether IMTA was responsible; however, we have no basis for taking exception to the contracting officer's affirmative determination of IMTA's responsibility.

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## **Status of IMTA Contract**

As of March 1989, IMTA was operating out of its leased facility in Rockford, Illinois, where it planned to manufacture the six-axis machining center. IMTA signed a lease with EX-CELL-O Corporation on November 17, 1988, for 2 years, with options to extend the term of the lease for additional periods of 1 year each. At the time of our visit on March 3, 1989, IMTA had 23 employees, including engineers, draftsmen, and a machine designer, and planned to hire an additional 7 skilled machinists by mid-1989. Although IMTA planned to subcontract out much of the machining components to job shops in the area, it had two large overhead cranes and planned to purchase a three-axis machining center to do manufacturing work in-house. The president of IMTA advised us at the time of our visit that he was confident that IMTA could perform the work for the contract on time and meet the provisions of the contract. He also advised us that about 10 percent of the contract was completed.

More recent information indicates that IMTA cannot manufacture the machining center. In an October 4, 1989, site visit to IMTA by DCASMA's industrial specialist, IMTA disclosed that it would not be able to build the machine specified in the contract because a major supplier of IMTA would not honor an agreement to supply castings. IMTA proposed that it supply a machine from the Henri Line Company, which IMTA indicated is a Canadian manufacturer. IMTA states the Line machine has the exact specifications of the proposed IMTA machine. The Air Force is considering IMTA's proposals and has asked IMTA to provide data to ensure that the Line machine meets the domestic content criteria.

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## **Adequacy and Timing of Site Visits**

After the contract had been awarded, the Air Force asked DCASMA to visit IMTA and determine its ability to perform the contract. One of the Air Force's primary concerns was whether IMTA could meet the domestic content requirement. Two industrial specialist from DCASMA visited IMTA. The visits consisted primarily of a tour of the facilities and an interview with the president of IMTA.

One of the industrial specialists visited IMTA's administrative facility in Des Plaines, Illinois, in August 1988. (IMTA had not yet leased its facility in Rockford, Illinois.) The other specialist visited IMTA's newly leased facility in Rockford in December 1988. Both concluded that IMTA could meet the terms of the contract.

We believe that since this was IMTA's first manufacturing contract and first contract with the federal government, it would have been prudent for the Air Force to have asked DCASMA, before contract award, to visit IMTA to determine its ability to perform the contract. We also believe that if a preaward visit/survey had been conducted, the Air Force would have obtained more detailed information on IMTA's status as a manufacturer (i.e., having prerequisite resources) necessary to make its Walsh-Healey Act determination.

## Best and Final Offers

In its bid protest to us, Onsrud argued that it was not afforded the opportunity to present a best and final offer. An official from Onsrud stated in an affidavit that he did not receive any telephone calls or correspondence from the Air Force stating that it wanted a best and final offer. However, contracting office officials stated that they sent requests to Onsrud and two other acceptable offerors for best and final offers and showed us copies of the requests. (The FAR does not require certified mail in requesting best and final offers. Air Force contracting officials said they use regular mail for this purpose.)

The Air Force's contract files contained a copy of a June 14, 1988, letter to Onsrud, which requested a best and final offer. An Air Force official told us that he had telephoned an Onsrud official before the letter was sent to advise the official that the Air Force was requesting a best and final offer. The contracting office had no documentation of that call, since it does not prepare such documentation.

## Agency Comments and Our Evaluation

The Department of Defense generally concurred with our findings and acknowledged that the contracting officer did not comply with some parts of the Federal Acquisition Regulation (see app. III). However, the Department believed we erroneously implied that a contracting officer, in most cases, must conduct a detailed cost analysis to ensure domestic content. The Department also believed that we gave a misleading impression that the contracting officer's analysis was inadequate even though the contracting officer did more than was required to conclude

that IMTA would deliver a domestic product and could have relied solely on IMTA certification.

We recognize that domestic origin certifications from contractors are usually accepted by the Department of Defense's contracting officers at face value. However, the Comptroller General has taken the position in bid protest decisions that an agency should not automatically rely on such certifications when it has reason to question whether a domestic end product will be furnished.<sup>4</sup> It is apparent that the contracting officer requested additional information from IMTA because some questions existed regarding IMTA's ability to deliver a domestic product.

We believe that once the contracting officer received the additional information, she was responsible for analyzing it. The information provided by IMTA showed its prices for major components and noncomponents totaling to the contract price of \$1.3 million. The contracting officer concluded from this information that IMTA would deliver a domestic product.

Under the regulations, to determine whether an item is a domestic product, only the total cost of the components is used (i.e., what the contractor paid for the components or the total cost to make them in-house). The total cost of the end product, price minus profit, is irrelevant because total cost includes noncomponent cost such as labor, overhead, packaging, testing, and evaluation costs.

We recognize that the contracting office will have to exercise some judgment in determining what information is needed to make an adequate domestic content analysis. In this case, Air Force's analysis was based on IMTA's prices for, not the costs of, components that make up the machining center. In addition, IMTA's list and the Air Force's calculation included amounts for such noncomponent items as engineering and installation. Further, the information submitted by IMTA was not sufficient to permit the Air Force to exclude from its calculation amounts for such noncomponent costs as the labor and overhead incident to final assembly of the end product. In short, the additional information provided by IMTA could not have been sufficient to resolve the contracting officer's apparent concerns that led her to request additional data.

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<sup>4</sup>Wire Rope Corporation of America, Inc., B-225672, Mar. 13, 1987, 87-1 CPD 286.

# Bid Protest Reconsideration Decision



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.<sup>1/</sup>

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).

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

**Appendix II**  
**Bid Protest Reconsideration Decision**

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

**Appendix II**  
**Bid Protest Reconsideration Decision**

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.

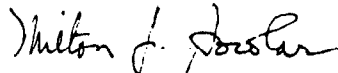
Regarding the Walsh-Healey issue, our prior decision correctly pointed out that a firm's status as a manufacturer under that Act is not a matter for this Office to decide.

Appendix II  
Bid Protest Reconsideration Decision

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.

  
for Comptroller General  
of the United States



# Comments From the Department of Defense



ASSISTANT SECRETARY OF DEFENSE  
WASHINGTON, D.C. 20301-8000

PRODUCTION AND  
LOGISTICS  
P/FC

December 1, 1989

Mr. Frank C. Conahan  
Assistant Comptroller General  
National Security and International  
Affairs Division  
U.S. General Accounting Office  
Washington, DC 20548

Dear Mr. Conahan:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report, "DEFENSE CONTRACTING: Air Force Machine Tool Procurement Raises Buy American Questions," dated September 29, 1989 (GAO Code 392484), OSD Case 8140. The Department generally agrees with the report.

The DoD agrees that the contracting officer did not comply with the provisions of Federal Acquisition Regulation 22.608-2(b). However, the report is misleading in some areas particularly in its indirect criticism of the contracting officer's actions. The draft report states that the price data in the letter submitted to the contracting officer by the contractor did not contain sufficient detail to conclude that the contractor would deliver a domestic product. This implies that the contracting officer did less than required. In fact, the contracting officer was not required to request the letter at all, but could have relied solely on the certification provided by the contractor in his proposal. Instead, the contracting officer requested additional information to support the contractor's certification. Based on information available at the time, the contracting officer was satisfied the contractor would be able to meet the domestic content requirement.

The detailed DoD comments on the report findings are provided in the enclosure. The DoD appreciates the opportunity to comment on the draft report.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jack Katzen".

Jack Katzen

Enclosure

GAO DRAFT REPORT - DATED SEPTEMBER 29, 1989  
CODE (GAO 392484) OSD CASE 8140

"DEFENSE CONTRACTING: AIR FORCE MACHINE TOOL PROCUREMENT  
RAISES BUY AMERICAN QUESTIONS"

DEPARTMENT OF DEFENSE COMMENTS

\* \* \* \* \*

FINDINGS

**FINDING A: Background on Contract Award to Italian Machine Tool Agency, Inc.** The GAO reported that, on July 15, 1988, the Air Force awarded a contract to the Italian Machine Tool Agency, Inc., for a six-axis machining center--including associated tooling and training. The GAO explained that a statutory restriction on the purchase of foreign machine tools by Defense agencies states that certain classes of machine tools, such as the one contracted for by the Air Force, must be manufactured in the U.S. or Canada. In addition, the GAO noted the implementing Federal Acquisition Regulation instructions require that the cost of U.S. or Canadian components must exceed 50 percent of the cost of all its components. The GAO found that the contract with the Italian Machine Tool Agency required the contractor to deliver a U.S.-made or Canadian-made product in line with these provisions. The GAO also found that, at the request of the Air Force, the Italian Machine Tool Agency certified it would meet the U.S.-manufactured requirement--and provided a price list that purported to show the portion of U.S. and foreign components to be used in producing the machine tool. (pp.2-5, pp.18-20/GAO Draft Report)

**DOD RESPONSE:** Concur.

**FINDING B: Air Force Analysis of The Contractor's Certification.** The GAO reported that, in addition to receiving the contractor's certification it would meet the U.S.-made requirement, the Air Force also asked the contractor to furnish a breakdown (foreign versus domestic) for each of the contract items. According to the GAO, the contractor then provided a listing that showed only two of the eight items contained foreign items. The GAO noted that, according to the President of Italian Machine Tool Agency, a proportionate share of final assembly costs and profit is included in each of its major component prices. The GAO found that Air Force contracting officials analyzed the price breakdown for these two items and concluded that 39 percent and 34.6 percent, respectively, of the two items were for foreign components. However, the GAO questioned the Air Force analysis. The GAO

Enclosure

Now on pp. 1-2, 10-14.

Now on pp. 2, 10-14.

pointed out that, in prior decisions it has issued, only the cost of the components is to be used in determining the portion of the product that is foreign--with the price the contractor charges being irrelevant. The GAO concluded that the Air Force could not have performed the required cost analysis using the price list provided by the Italian Machine Tool Agency. The GAO further concluded that the price list the contractor provided should have alerted the Air Force that noncomponent items were listed. The GAO emphasized that noncomponent costs cannot be considered in determining the portion of the total cost that is foreign. The GAO also observed that the Air Force needed a more detailed cost breakdown of the components included in each end item--however, such a breakdown was not requested by the Air Force or provided by the contractor. Overall, the GAO concluded that the Air Force contracting officer should have done more to ensure that the contractor's product would be made in accordance with requirements. (p.2, pp. 5-6, pp. 19-22/GAO Draft Report)

**DOD RESPONSE:** Partially concur. The DoD concurs with the facts as stated but does not concur with the GAO interpretation of the facts. As written, the report gives the impression that, in most cases, it is the obligation of the contracting officer to conduct a detailed cost analysis in order to ensure that products required by law to be domestic are in fact domestic product, the contracting officer is not required, and should not reasonably be expected, to conduct a detailed cost analysis.

The report also gives the impression that the contracting officer's analysis was inadequate and that this inadequacy was the contracting officer's fault. As the report indicates, however, even this far into the contract, it is too early to tell whether the contractor will actually comply with the statutory restriction. Only after a detailed cost analysis of actual component costs can it be conclusively determined whether there will be compliance. Therefore, regardless of the extent of analysis done by the contracting officer prior to award, the matter could not have been conclusively resolved. The contracting officer did as detailed an analysis as he believed necessary under the circumstances to assure that requirements were met.

**FINDING C: Air Force Actions to Ensure Domestic Content.** The GAO found that after the contract was awarded, the Air Force took steps to ensure that the Italian Machine Tool Agency would meet the domestic content requirement. In this regard, the GAO reported that the Air Force asked the Defense Contract Administration Services Management Area to visit the contractor's Illinois facility and provide an analysis of the domestic content requirement. According to the GAO, the Defense Contract

Administration specialists concluded that the contractor could meet the requirement--however, they were provided the same price list as was previously provided to the Air Force. The GAO also found that, in February 1989, the Air Force requested the Defense Contract Administration Services Management provide close surveillance of the Italian Machine Tool Agency production to ensure strict compliance with the domestic content requirement and provide informal monthly reports. The GAO reported that, in March 1989, the Defense Contract Administration Services Management Area indicated it plans to increase production surveillance and to have the specialists (1) verify orders placed, (2) major suppliers and subcontractors used, and (3) the materials furnished by them. The GAO further reported that the Defense Contract Administration Services Management Area also plans to have its officials and the Defense Contract Audit Agency conduct quarterly audits of the contractor--to review and report to the Air Force on all direct material invoices and corresponding purchase orders to verify actual origin. The GAO concluded that, although the Air Force is taking action to ensure delivery of a U.S.-manufactured product, it is too early to tell whether the Air Force will comply with the statutory restriction prohibiting the use of funds to procure foreign machine tools. (p.2, pp. 6-7, pp. 9-10, pp. 22-23/GAO Draft Report)

**DOD RESPONSE:** Concur. The DoD concurs with the GAO conclusion that it is too early to predict whether the contractor will comply with the contractual requirements. The Air Force plans to comply with the statutory requirement. If the contractor does not comply, appropriate actions will be taken. It should be recognized, however, that it was not the Air Force responsibility, as a normal course of action, to require anything more than the contractor's certification regarding the domestic content of the item. The Air Force was required to obtain certification from the contractor that the item met the domestic content criteria. The contracting officer obtained the necessary certification. However, because of the concerns raised by the Congress and the GAO, the Air Force also requested the Defense Contract Administration Services Management Area to provide close surveillance to ensure contract compliance.

**FINDING D: Walsh-Healy Act Considerations.** The GAO reported the Walsh-Healy Act, as implemented by the Federal Acquisition Regulation, requires that a contractor certify that it is either a manufacturer of, or a regular dealer in, the items to be delivered under a Government supply contract over \$10,000. In addition, the GAO reported that the Federal Acquisition Regulation requires that new manufacturers have made all the necessary arrangements and commitments for manufacturing space, equipment, and personnel

Now on pp. 13-14.

before contract award. The GAO further reported the Federal Acquisition Regulation requires that each offeror qualify in its own right as a manufacturer--and that an offeror's affiliation with, or relation to, another firm, even its parent company, are not evidence of the offeror's own eligibility. The GAO found that, at the time of contract award, the Italian Machine Tool Agency did not meet these requirements in terms of having the necessary prerequisites, such as a plant and equipment. The GAO found that, instead, the Air Force determined the contractor was qualified under Walsh-Healy requirements based on the contractor's certification and its parent company's status as a manufacturer. In addition, the GAO found that the contracting officer did not follow Federal Acquisition Regulation provisions which state the contracting officer must investigate and determine the eligibility of an offeror--if the offeror has not previously been awarded a contract by the acquisition office. The GAO reported that the contracting officials explained they did not pursue the status of the Italian Machine Tool Agency as a manufacturer because (1) no one came forward before the award to protest its eligibility and (2) no information in the files cast doubt on the contractor's ability to perform. The GAO disagreed with that position--concluding that, under Federal Acquisition Regulation provisions, an investigation of eligibility should have been conducted. The GAO also observed that, although the Italian Machine Tool Agency did not qualify as a Walsh-Healy manufacturer at the time of contract award, it now appears to qualify, since it has the necessary resources. The GAO concluded, therefore, that the purposes of Walsh-Healy are being served. The GAO further observed that it found no evidence the contractor certification was not made in good faith. The GAO also concluded, therefore, that there is no basis to recommend termination of the contract. (p. 2-3, pp. 7-10, pp. 23-25/GAO Draft Report)

Now on pp. 2, 14-15.

**DOD RESPONSE:** Concur. The contracting officer did not comply with Federal Acquisition Regulation 22.608-2(b). However, failure to comply with this provision should not be interpreted to mean that the contractor did not comply with the provisions of the Walsh-Healy Act.

**FINDING E: Determination of the Contractor's Responsibility.** The GAO reported that, before awarding a government contract, a contracting officer must determine that the prospective contractor is "responsible" in accordance with stated Federal Acquisition Regulation criteria. According to the GAO, contracting officials made an affirmative determination of the Italian Machine Tool Agency's responsibility--based primarily on a report by the Better Business Bureau. The GAO pointed out that although the Federal Acquisition Regulation specifies the factors to be considered in

Now on pp. 3, 16-17.

determining whether a prospective contractor is responsible, the specific type and quantity of information used is left to the judgment of the contracting officer. The GAO observed that in this case, the contracting officer could have sought additional information to assess the contractor's responsibility. The GAO concluded, however, that there is no basis for questioning the contracting officer's determination that the Italian Machine Tool Agency was responsible. (p.3, pp. 9-10, pp. 25-27/GAO Draft Report)

**DOD RESPONSE:** Concur.

**FINDING F: Adequacy and Timing of Site Visits.** The GAO found that after the contract had been awarded, the Air Force asked the Defense Contract Administration Services Management Area to visit the Italian Machine Tool Agency and determine its ability to perform the contract and meet the domestic content requirement. The GAO found that two representatives did visit the Italian Machine Tool Agency in 1988--(1) touring the facilities and (2) interviewing the president. According to the GAO, both the Defense Contract Administration representatives concluded that the Italian Machine Tool Agency could meet the terms of the contract. The GAO concluded, however, that since this was the first manufacturing contract for the Italian Machine Tool Agency, as well as its first contract with the Government--it would have been prudent for the Air Force to have asked the contract administration staff to visit the Italian Machine Tool Agency and determine its ability to perform the contract. The GAO also concluded that, had a preaward visit/survey been conducted, the Air Force would have obtained more detailed information on the contractor's status as a manufacturer necessary to make its Walsh-Healy Act determination. (pp. 28-29/GAO Draft Report)

Now on pp. 17-18.

**DOD RESPONSE:** Concur.

\* \* \* \* \*

**RECOMMENDATIONS**

None.

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