

Matter of: Omatech Service Limited

File: B-254498; B-254498.2

Date: December 17, 1993

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Alan M. Winterhalter, Esq., Alan M. Winterhalter & Associates, P.C., for Barer Engineering Co., an interested party.

Stephen Stastny, Esq., Department of Defense, for the agency.

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DIGEST

1. Challenge to the domestic content of the awardee's product need not be resolved, where the awardee submitted the low, technically acceptable offer with or without application of a 50 percent evaluation premium which is required to be added to offers of foreign made machine tools.
2. Firm offering lathe which meets technical specifications after minor modification satisfies the specification requirement that a current production model be proposed where the firm manufactures the lathe using an imported lathe bed and non-imported components, has offered this lathe for sale for 3 years prior to solicitation and provides descriptive literature with its offer showing that the lathe meets solicitation specifications.
3. Where the solicitation lists minimum dimensional specifications for lathes without providing maximum limits, the agency reasonably concluded that a proposal in which certain dimensions of the offered lathe are slightly larger than the specified minimums is technically acceptable.

DECISION

Omatech Service Limited protests the award of a contract to Barer Engineering Company under request for proposals (RFP) No. DLA490-93-R-1280, issued by the Defense General Supply Center (DGSC) for the supply of certain lathes. Omatech contends that Barer's offered lathe is of foreign origin and does not comply with the RFP requirement that offerors propose a current production model.

We deny the protest.

The RFP contemplated award of a fixed-price requirements contract for specified new engine lathes, Federal Stock Class No. 3416, meeting military specification No. MIL-L-23249D, as amended. This specification provides that the equipment offered must be a manufacturer's current production model and requires the offeror to submit descriptive literature. The RFP also contained the preference for United States and Canadian machine tools clause, Department of Defense Supplement to Federal Acquisition Regulation § 252.225-7017. The clause defines tools meeting the preference as those manufactured in the United States or Canada for which the cost of components manufactured in either country exceeds 50 percent of the cost of all its components. Under this provision, non-Canadian or United States manufactured tools are evaluated on the basis of the offered price plus a 50 percent premium. In addition, for evaluation purposes, another \$5,000 is added to the total price offered for such tools to account for inspection/acceptance testing outside the continental United States.

The basis for award was Federal Acquisition Regulation § 52.215-216 (Alt. II), incorporated by reference in the RFP, under which award is to be made to the "responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, cost or price and other factors, specified elsewhere in this solicitation, considered." The RFP did not specify any evaluation factors apart from price. For price evaluation purposes, the combined prices for an estimated quantity of eight lathes per year for 2 years (base plus option) were to be considered.

Seven offerors, including Barer and Omatech, submitted proposals by the March 18, 1993, closing date. Both offerors identified the country of origin of their lathes as Canada and both proposals were evaluated as technically unacceptable, but capable of being made acceptable. On the basis of written discussions, both offerors corrected deficiencies in their proposals and were evaluated as

technically acceptable. Based on best and final offers (BAFO), Barer, with an offered price of \$373,200, was evaluated as the low-priced, technically acceptable offeror. On August 5, the agency awarded a contract to Barer as a subcontractor to the Canadian Commercial Corporation (CCC). Omatech's price was the highest of all offers submitted. Upon receiving notice of the award, Omatech filed this protest.

In its original protest, Omatech argued that Barer's lathe was not a Canadian or United States product, therefore, a 50 percent premium should have been added to its price for evaluation purposes. Omatech originally alleged that application of the premium would have sufficiently raised Barer's price to make Omatech the low offeror. Omatech's allegation is incorrect. Even with the addition to Barer's offer of the 50 percent premium and \$5,000 for testing, Barer's price would be lower than Omatech's price.² Since Barer remains low even if Omatech's allegation regarding Barer's product is correct, we need not decide whether Barer's lathe in fact qualifies as a Canadian or United States product.

In its comments on the agency report, Omatech argues that its offer should have been selected despite its higher price since this was a negotiated procurement where "price was not expressly stated to be the determinative factor for source selection." This argument is without merit. The RFP provided for award to the offer most advantageous to the government, "cost or price and other factors, specified elsewhere in this solicitation, considered." Where, as here, the RFP does not specify any other evaluation factors "elsewhere," price is the only determining award factor. See, e.g., Blane Corp., B-234887, Apr. 24, 1989, 89-1 CPD ¶ 403. Since Barer was evaluated as the low, technically acceptable offeror, the agency properly awarded the contract to Barer as a subcontractor to the CCC.

Omatech next argues that Barer's lathe does not meet the specification requirement that the product be a current production model. The applicable military specification

¹After application of the preference premium to the offerors other than Barer, Omatech's price was evaluated as second low.

²Barer's unit price of \$23,200 if increased by the 50 percent premium is \$34,800. Omatech's unit prices are more than \$2,000 higher. Barer's total evaluated price, as so increased, including all line items and the \$5,000 foreign testing figure, would be \$563,800, approximately \$42,000 less than Omatech's BAFO price.

describes "current production model" as equipment which, on the date of the solicitation "has been designed, engineered and sold or is being offered for sale through advertisements or manufacturer's published catalogs or brochures." Prototypes, preproduction models, or experimental units do not qualify. To establish that an offered product is a current production model, offerors must submit descriptive literature (e.g., manufacturer's published brochures, "as built" drawings and associated parts lists, and published technical manuals) with details of the product offered pertinent to the design, construction, operation, materials, components, capacities and performance characteristics and accessories.

Omatech contends that Barer's lathe is a "hybrid" machine based on an Enterprise lathe manufactured in India and incorporating United States and Canadian components in an effort to meet the technical specifications and the preference clause. In a negotiated procurement, any proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. Instruments S.A., Inc.; VG Instruments Inc., B-238452; B-238452.2, May 16, 1990, 90-1 CPD ¶ 476. From our review of the record, we conclude that the agency reasonably determined that Barer's lathe is that firm's current production model.

Barer proposed its Barer-Enterprise Model 450 lathe and submitted a detailed product brochure setting forth the lathe's specifications, all of which meet or exceed the RFP specifications. According to Barer, it has offered the Model 450 for sale since 1990, including presentations at three trade shows in 1990 and 1992. Barer explains that it manufactures its Model 450 lathe in Canada, using a lathe carcass consisting of a cast-iron bed and headstock assemblies which it obtains from a supplier in India, to which it incorporates the motor, transmission (including gearing, shafts, and bearing), electric control box, panel and circuitry (including switchgear, wiring, and control circuits). After manufacture and assembly, Barer tests, inspects, and performs quality control operations to the completed lathe, after which it mounts specified accessories, such as the digital readout. The CCC, based on its independent review of information relating to the manufacture of the lathe and the cost of components, foreign and domestic, has endorsed Barer's lathe as being a Canadian product.

Barer acknowledges that its Canadian Model 450 is similar to the Indian Enterprise 450 lathe, but explains that it has the North American manufacturing rights to produce the Enterprise Model 450. The lathe, when manufactured in

Canada contains critical components which are produced in the United States or Canada to meet the technical and safety specifications of North American customers. When a Model 450 lathe is manufactured in India, Barer markets it as the Enterprise Model 450; when a Model 450 lathe is manufactured in Canada, Barer markets it as the Barer Enterprise Model 450. Barer explains that because the basic design and capabilities of the Indian and Canadian lathes are similar, Barer does not print its own catalogue material, but uses catalogue material printed in India to which it affixes its company name via a label to save printing costs.

Citing Omatech Serv. Ltd., 70 Comp. Gen. 99 (1990), 90-2 CPD ¶ 411, Omatech argues that because of this "alteration of literature," coupled with Barer's addition of components to an Indian lathe, the Barer lathe should not be considered a current production model.³ In Omatech, the offeror submitted descriptive literature for an Enterprise 1675 lathe which did not comply with all solicitation specifications. During negotiations, the offeror explained that its American subcontractor would import a Model 1675 lathe and add numerous major components of domestic origin which would make the lathe meet the specifications. Since the descriptive literature did not match the end product proposed and the end product represented a hybrid machine consisting of an Indian lathe with numerous substituted major components, we concluded that the offeror's product did not meet the current model requirement. Here, in contrast, the descriptive literature accurately describes the end product, which is regularly manufactured by the awardee in a North American configuration under rights from the Indian manufacturer. Accordingly, the agency reasonably concluded that Barer's lathe is a current production model unlike the lathe offered in Omatech, *supra*. See A & D Machinery Co., B-242546; B-242547, May 16, 1991, 91-1 CPD ¶ 473 (manufacture of machine tool from imported "base" and domestic components meets requirement for current production model).

³Omatech is correct that the RFP warned that the descriptive literature "shall not be altered in any way." However, it is plain from the context of the descriptive literature clause that the warning against alterations was designed to prevent alterations to technical information within the literature. In our view, the mere attachment of a label identifying the Canadian manufacturer of the lathe does not constitute "alteration" within the meaning of the clause.

While Omatech disagrees with this position, it offers no evidence to support its dispute of Barer's explanation of its manufacturing process and rights, its product history, or its explanation of its catalogue. We have no basis to question Barer's explanation and DLA's reliance on this explanation.

Omatech also contends that the lathe offered by Barer is not a current model because Barer will modify the lathe bedways to meet the specifications. During the technical evaluation, the agency found that Barer's descriptive literature was silent regarding the degree of hardness (Rockwell C-50) of the lathe bedways and, in discussions, requested verification that the offered lathe met the specification. In reply, Barer confirmed to the agency that its lathe bedways "will be hardened to Rockwell C-50 or greater." This explanation may simply reflect the fact that the standard Barer Model 450 lathe meets the RFP bedways hardness requirement. However, even if we assume, for the sake of argument, that Barer's use of the future tense indicated that its standard bedways do not meet the hardness requirement, such a modification would not make the lathe fail to qualify as a "current model." The requirement for supply of a current model does not preclude minor modifications to meet specifications. Omatech Serv. Ltd., supra; Clausing Mach. Tools, B-216113, May 13, 1985, 85-1 CPD ¶ 533. Although Omatech argues that the hardness requirement represents a "material" specification since it was identified during discussions, it presents no evidence that such additional hardening represents a major modification, and there is nothing in the record which suggests that additional hardening of the bedways is other than a minor modification.

In a supplemental protest, Omatech argued that Barer's lathe was technically unacceptable because its cross-over slide capacity (11 inches) exceeded the specified capacity (9 inches) by more than the 10 percent maximum increase permitted by the military specification.⁴ However, the agency points out that the 10 percent maximum relied upon by Omatech was deleted by a 1986 amendment to the military specification and the specification as amended was part of the original RFP package. While Omatech acknowledges the agency's position as correct, it nonetheless argues that the amended specification would not allow an offeror to exceed stated dimensions by just "any margin." We disagree. The military specification clearly provides only that, unless otherwise specified, the size and capacities of the machine

⁴The cross-over slide capacity defines the maximum diameter of an item to be machined on the lathe. Barer's lathe would permit an item 11 inches in diameter to be machined.

shall not be less than those identified in a table provided elsewhere in the specification. Neither the cross-over slide capacity, nor the other "excessive" dimensions identified by Omatech (longitudinal feed selections and compound slide travel), are restricted to a particular maximum by the specifications, and there is no evidence that the dimensions of the Barer lathe make the Barer lathe technically unacceptable.

The protest is denied.

James F. Hinchman
General Counsel