

Ottawa, Monday, September 11, 2000

**File No.: PR-2000-011**

IN THE MATTER OF a complaint filed by Western Star Trucks Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

### **DETERMINATION OF THE TRIBUNAL**

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Zdenek Kvarda  
Zdenek Kvarda  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

Date of Determination:	September 11, 2000
Tribunal Member:	Zdenek Kvarda, Presiding Member
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	Marie-France Dagenais
Complainant:	Western Star Trucks Inc.
Counsel for the Complainant:	Gordon LaFortune
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	David M. Attwater

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## STATEMENT OF REASONS

On June 12, 2000, Western Star Trucks Inc. (Western Star) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a request for a standing offer (Solicitation No. E60TB-7-TRUK/A) by the Department of Public Works and Government Services (the Department) for the provision and servicing of Class 8 heavy trucks, in various sizes and configurations, equipped for different applications for the Department of National Defence (DND) and various other listed federal government departments and agencies. The standing offer would be valid until March 31, 2003, with an option to extend it for two additional one-year periods. The estimated value of the requirement is between \$20 million and \$50 million.

Western Star alleged that, in conducting this procurement, the Department, contrary to the provisions of Article 1008(2)(b) of the *North American Free Trade Agreement*,<sup>2</sup> has failed to provide all suppliers with equal access to information. Furthermore, Western Star alleged that the Department's decision to divide the requirement into two blocks of trucks (rear-wheel and all-wheel drive) violated the provisions of Article 1007(2) of NAFTA and Articles 504(3)(b) and 506(6) of the *Agreement on Internal Trade*.<sup>3</sup> Western Star also alleged that the Department's decision to divide the requirement into two blocks of trucks for bidding purposes (block bidding) and to introduce a \$10,000 monetary threshold to cover the cost of issuing and administering a second standing offer (the monetary threshold) in evaluating proposals is contrary to the provisions of Article 1008(1)(a) of NAFTA, Article VII:1 of the *Agreement on Government Procurement*<sup>4</sup> and Article 506(6) of the AIT.

Western Star requested, as a remedy, that the Tribunal direct the Department not to proceed with this procurement until it has reversed its decision to divide the requirement into two blocks and revert to its original procurement strategy. In the alternative, Western Star requested to be compensated and reimbursed for its costs associated with this complaint.

On June 19, 2000, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>5</sup> That

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
3. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].
4. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [hereinafter AGP].
5. S.O.R./93-602 [hereinafter Regulations].

same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. On July 17, 2000, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>6</sup> On July 27, 2000, Western Star filed its comments on the GIR with the Tribunal.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

## PROCUREMENT PROCESS

On December 3, 1999, a Notice of Proposed Procurement (NPP) and a Request for a Standing Offer (RFSO) for this requirement were posted on Canada's Electronic Tendering Service (MERX).

The original RFSO covered seven different vehicle configurations, including both rear-wheel drive and all-wheel drive. By means of amendment No. 2 to the RFSO dated January 19, 2000, an eighth vehicle configuration was added to the solicitation. The original RFSO provided that a single National Mater Standing Offer (NMSO) would be issued as a result of this solicitation and that, therefore, it was mandatory for bidders to bid on the supply and servicing of all vehicle configurations.

Clause 8 of the RFSO, entitled "Queries", indicates that "[a]ll inquiries and other communications with government officials throughout the solicitation period are to be directed ONLY to the Contracting Authority named on page one of the solicitation".

Clause 10 of the RFSO, entitled "Bidders' Conference", reads, in part: "Bidders are advised that any clarifications or changes resulting from the bidders' conference shall be included as an amendment to the bid solicitation document".

According to the GIR, the Department, as a result of communications with potential suppliers at the bidders' conference held on December 17, 1999, which was attended by Western Star, and of subsequent communications received from potential suppliers, concluded that the requirement to bid on the supply and servicing of all vehicle configurations was unreasonably restricting the ability of suppliers to participate in this procurement.

Accordingly, on April 10, 2000, the Department issued amendment No. 6 to the RFSO. Attachment No. 1 to the amendment reads, in part:

For evaluation purposes trucks offered will be broken down into the following two BLOCKS:

- BLOCK "1" – CONFIGURATIONS "A", "C", "D", "F" & "G";
- BLOCK "2" – CONFIGURATIONS "B", "E" & "E1".

### 3. AWARD OF STANDING OFFERS:

If the combination of the lowest EBPs [evaluation bid prices] for BLOCK "1" and BLOCK "2" trucks is more than \$10,000.00 less than the lowest combined (single company) bid EBPs for both BLOCKS, then two Standing Offers will be awarded, to the two companies with the lowest EBP for each BLOCK; otherwise, one standing offer will be awarded to the single company with the lowest combined EBPs for both BLOCKS. The associated ITEM "B" Units will be included in the

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6. S.O.R./91-499.

award(s). This standing offer(s) will be as the PRIMARY SUPPLIER of trucks (see RFSO CLAUSE 18 for definition). The \$10,000.00 represents an estimate of the costs to the government of issuance and maintenance of separate standing offers, and of supporting different makes of trucks.

The Standing Offer(s) for BACK-UP SUPPLIER(S) will be awarded to the company(s) with the lowest remaining (not awarded) EBP's for BLOCK "1" and BLOCK "2" trucks.

On May 17, 2000, Western Star wrote to the Department expressing concerns about the changes made to the RFSO, specifically those made as a result of amendment No. 6. On May 29, 2000, the Department responded to Western Star, in part, as follows:

One of the purposes of having consultations with industry and allowing input from potential bidders prior to and during the solicitation period is to provide us with the opportunity to improve the solicitation. We do this so that we can achieve a variety of objectives such as ensuring fair and equitable treatment to bidders, obtain reasonable competition and obtain best value on behalf of our clients and taxpayers.

As this solicitation evolved we determined that if we maintained the position that bidders could only bid on the entire list of vehicles we would be unreasonably restricting the potential competition.

On May 31, 2000, Western Star wrote the Department, objecting to the way the Department had conducted consultations during this solicitation. On June 12, 2000, the Department responded, in part, as follows:

I have reviewed your correspondence and would like to emphasize that the consultation process referred to in my May 29th letter did not take the form of PWGSC approaching or selecting suppliers. This was the result of the bidders' conference and the subsequent communications received from potential suppliers, including Western Star.

Amendment No. 8 to the RFSO, dated May 30, 2000, added two vehicle configurations to the RFSO and extended the period for the submission of proposals to August 8, 2000.

## **POSITION OF PARTIES**

### **Department's Position**

The Department submitted that clause 8 of the RFSO advised bidders to direct their queries to the named contracting authority. This practice, the Department submitted, is essential to enable potential suppliers to fully and effectively participate in a procurement process. It also enables the Department to respond to problems experienced by potential suppliers. The need to respond to any reasonable request for relevant information, the Department submitted, is recognized at Article 1013(2)(b) of NAFTA.

The Department also submitted that a contracting authority must ensure that the goods and services intended to be procured are actually acquired, that the procurement is open, fair and competitive and that it is conducted in a manner conducive to securing fair value to Canada.

Furthermore, the Department submitted that, contrary to Western Star's allegation to the effect that Western Star's exclusion from the above-mentioned consultations constitutes a violation of Article 1008(2)(b) of NAFTA, it acted in these communications consistently with the RFSO and the trade agreements. In this context, the Department submitted that the term "information" mentioned in Article 1008(2)(b) of NAFTA does not include the substance of all conversations that a contracting authority may have with bidders and that there are no obligations under the RFSO or the trade agreements to consult with bidders, or seek bidders' advice, comments or permission, prior to amending the RFSO.

The Department submitted that restructuring the solicitation to allow bidders to bid on either all-wheel drive vehicles or rear-wheel drive vehicles, or both, is not modifying a technical specification and that, as a consequence, Western Star could not reasonably allege that, in so doing, the Department breached the provisions of Article 1007(2) of NAFTA or Articles 504(3)(b) and 506(6) of the AIT.

The Department further submitted that, by allowing block bidding, it did not bias the procurement process in favour of or against particular goods or services or the suppliers of those goods or services. More simply, the Department asserted that block bidding has to facilitate access to the procurement and create competition consistent with the purpose of the AIT, as described in Article 501. Western Star's real complaint, the Department argued, is that it will be subject to more competition as a result of the creation of two blocks of vehicles on which to bid. The Department also submitted that creating two blocks of vehicles on which to bid does not constitute a breach of Article 506(6) of the AIT, as such action does not relate to the evaluation of tenders, but to how the procurement is to be structured, and that no evidence was produced by Western Star to show that the changes introduced by amendment No. 6 to the RFSO were discriminatory.

With respect to Western Star's allegation that the monetary threshold is discriminatory against Western Star in favour of bidders that may bid on only one of the two blocks of vehicles, the Department argued that there is no merit to this allegation. Because Western Star intends to bid on all vehicles as a single company, the Department claimed that the provision cannot prejudice its proposal. Furthermore, the Department submitted that Western Star is inconsistent in its rationale, in that it suggested in its complaint that, if the monetary threshold were significantly higher, then the monetary threshold would not be prejudicial to its interests. In any event, the Department argued, neither the RFSO nor the trade agreements require that the evaluation criteria in the RFSO be adjusted to reflect the additional costs of administering a second standing offer. Furthermore, the Department submitted that it is the one in the best position to determine the magnitude of such additional costs, not Western Star. Finally, the Department noted that it is not because the amount of the monetary threshold has allegedly been improperly estimated that this evaluation criterion was not clearly stated in the RFSO, as amended.

The Department requested its complaint costs and, in the alternative, reserved its right to make further submissions with respect to the award of costs in this matter.

### **Western Star's Position**

Western Star submitted that the Department has not presented any evidence in the GIR that rebuts the evidence that it presented in its complaint and that the Department has failed to raise any credible defence in response to the arguments made by Western Star. The Department has produced no evidence in the GIR to show that its decision to amend the RFSO to accommodate block bidding was not made to extend an advantage to particular potential suppliers to the detriment of Western Star. Furthermore, Western Star denied any suggestion by the Department to the effect that Western Star's motivation in filing this complaint is to oppose increased competition. Western Star further denied any suggestion by the Department that the RFSO would have resulted in a single bidder, if amendment No. 6 had not been issued. Indeed, Western Star submitted, it operates in a healthy industry and it faces competition every day from other suppliers. According to Western Star, a number of other potential suppliers were fully capable of responding to the RFSO as originally drafted.

Specifically, Western Star submitted that the process of responding to requests for information relating to the RFSO is not the issue before the Tribunal. Rather, the issue concerns the Department's decision to make fundamental changes to the RFSO following consultations held with particular suppliers

but not Western Star. Western Star added that the Department's attempt to justify its consultations with two unnamed suppliers on the basis of some connection to the bidders' conference must fail. In any event, Western Star submitted, the consultations clearly involved an exchange of information not shared by all potential suppliers on an equal basis. This, Western Star submitted, is a breach of Article 1008(2)(b) of NAFTA. Western Star submitted that the fact that the potential suppliers might have initiated the consultations changes nothing to the requirement that potential suppliers be provided with equal access to information. Furthermore, Western Star submitted, contrary to the Department's assertion, Article 1008(2)(b) of NAFTA does not qualify or limit the information to be shared equally among suppliers to "relevant information", as provided by Article 1013(2)(b) of NAFTA. In any event, Western Star submitted, the information exchanged during these consultations was relevant, in that it eventually caused material changes to the RFSO. Western Star argued that the amendments to the RFSO are tantamount to issuing a notice or tender documentation and that the Department, in the GIR, has offered no argument to counter Western Star's allegation in that respect.

With respect to the issue of the restrictive technical specifications, Western Star submitted that, because the division of the requirement into two blocks, based on the drivetrain of the trucks required, was done in order to meet the particular needs of two unnamed suppliers, this action amounts to creating a restrictive specification intended to favour suppliers of particular goods and to discriminate against suppliers of other goods. This, Western Star alleged, is a breach of Articles 504(3) and 506(6) of the AIT.

Furthermore, Western Star argued that the decision to divide the trucks into two blocks allegedly to increase competition is patently false. If the intention was to increase competition, Western Star submitted, the relevant questions are why the Department did not decide to completely open the competition by accepting separate bids on individual trucks, or why the Department did not decide to allow all potential suppliers to structure their own packages outlining the trucks that they would supply.

Western Star agreed that creating competition does not, in and of itself, create a bias or an advantage in favour of additional bidders. However, it argued that this is not the situation here. The Department's decision to allow bidding on separate blocks of trucks was not made independently to open the procurement to a number of unknown suppliers. It was made by the Department following consultations with particular potential suppliers, with the intention of providing a benefit to those suppliers.

With respect to the monetary threshold, Western Star submitted that it is discriminatory, because potential suppliers bidding on one block of trucks have the benefit of not having to cover all the additional costs to government incurred as a result of accepting their submission, while Western Star, bidding on all trucks, is forced to absorb all these costs in its bid. Furthermore, Western Star submitted that the monetary threshold criterion is not clearly set out in the RFSO because it does not appropriately reflect the reasonable costs to government of issuing and maintaining a second standing offer over five years.

## **TRIBUNAL'S DECISION**

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the provisions of the applicable trade agreements.

Article 506(6) of the AIT requires that the tender documents clearly identify the criteria that will be used in the evaluation of bids. Western Star alleged that the monetary threshold criterion in amendment No. 6 to the RFSO was not clearly stated, in that the amount thereof was allegedly underestimated.

The Tribunal finds that this ground of complaint was filed outside the 10-working-day time frame prescribed in section 6 of the Regulations and that, therefore, it is late. Consequently, the Tribunal will not address this ground on its merits. Amendment No. 6 to the RFSO was issued on April 10, 2000. In the Tribunal's opinion, the amendment clearly indicated that a monetary threshold was being introduced as an evaluation factor and that the quantum of the factor was \$10,000. In the Tribunal's opinion, Western Star knew or reasonably should have known whether the criterion or its amount was objectionable on or about the time the amendment was issued. However, Western Star only raised the matter in its complaint of June 12, 2000, which falls outside the 10-working-day time frame prescribed to make an objection and/or file a complaint.

Article 1008(2)(b) of NAFTA requires entities to "provide all suppliers equal access to information with respect to a procurement during the period prior to the issuance of any notice or tender documentation".

Article 1013(2)(b) of NAFTA requires that, where an entity provides tender documentation to suppliers, the entity shall "reply promptly to any reasonable request for relevant information made by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract".

Western Star alleged that, by conducting "consultations" with two unnamed potential suppliers in its absence and, on that basis, amending the RFSO to allow block bidding, the Department breached the provisions of Article 1008(2)(b) of NAFTA. The Tribunal finds that this allegation has no merits. The Tribunal notes that Article 1008(2)(b) requires that entities provide all suppliers equal access to information during the period prior to the issuance of any notice or tender documentation. In the Tribunal's opinion, Western Star has produced no evidence to demonstrate that the alleged "consultations" between the Department and the two unnamed potential suppliers took place during "the period prior to the issuance of any notice or tender documentation".

The Tribunal is satisfied that representations were made by suppliers at the bidders' conference that subsequently lead to the issuance of amendment No. 6 to the RFSO. The Department indicated that these representations took place after the issuance of the NPP and the RFSO. In the Tribunal's opinion, there is no evidence to the contrary on the record. This kind of representation is quite common, and the RFSO specifically provided for such communications under clause 8, "Queries", and clause 10, "Bidders' Conference".

Western Star submitted that the process for responding to requests for information on the RFSO is not at issue, but that the manner in which the Department conducted this process, for example by leaving Western Star out of the alleged "consultations", is at issue. Again, in the Tribunal's opinion, Western Star has produced no evidence whatsoever to demonstrate that the Department improperly initiated discussions with unnamed suppliers to give them an advantage or to discriminate against Western Star. The Tribunal understands the facts of this case as follows. After the issuance of the NPP and the RFSO, potential suppliers, at the bidders' conference and, subsequently, before bid closing, made representations to the Department to restructure the bidding approach so as to accommodate greater participation by suppliers. The Department, after considering these representations, concluded that it could allow greater competition and decided to amend the RFSO to allow block bidding. The Tribunal finds nothing objectionable about this



manner of proceeding. There is no obligation on the Department to consult with potential bidders in considering suggestions for improvement made by bidders and, as a result, to make changes to the solicitation documents. Of course, in so doing, the Department is bound at all times by the provisions of the applicable trade agreements, including the right of potential suppliers to object, in a timely manner, to the changes thus made.

Article 504(3)(b) of the AIT prohibits “the biasing of technical specifications<sup>7]</sup> in favour of, or against, particular goods or services, . . . or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter”. As well, Article 506(6) prohibits the use of evaluation criteria inconsistent with Article 504, “Reciprocal non-discrimination,” in the evaluation of tenders.

Western Star alleged that, because block bidding is based on the truck’s drivetrain (rear-wheel or all-wheel), it therefore constitutes a biased technical specification within the meaning of Article 504(3)(b) of the AIT and is in breach of this Article and, by way of consequence, Article 506(6). The Tribunal finds that the block bidding introduced by amendment No. 6 to the RFSO is not a technical specification. The fact that it is based on the drivetrain of the trucks, a technical feature, does not make the bidding structure a technical specification. In the Tribunal’s opinion, the bidding structure is just that, a structure, and not a “good” or a service. Because block bidding is not a “good” or a service or a process related thereto, the Tribunal finds that it is not a technical specification and that, therefore, the provisions of Article 504(3)(b) do not apply to the situation.

Western Star alleged that, because the bidding structure was modified to accommodate the specific interests of two unnamed potential suppliers and because the monetary threshold associated with block bidding has been kept arbitrarily low by the Department, again to accommodate the same potential suppliers, the Department, in conducting this procurement, has failed to meet the requirements of Article 1008(a) of NAFTA and Article VII(1) of the AGP. Article 1008(1)(a) of NAFTA requires each Party to ensure that the tendering procedures of its entities are “applied in a non-discriminatory manner”. Article VII(1) of the AGP provides likewise.

The Tribunal finds that there is no foundation to this allegation. The facts of the case on this point are clear and undisputed. As a result of representations made by potential suppliers after the procurement process had commenced, the Department, through amendment No. 6 to the RFSO, permitted block bidding, subject to a monetary threshold. Where the parties disagree is with respect to the intent that guided this change. Western Star alleged that the Department’s intent was to favour two unnamed potential suppliers to its detriment. For its part, the Department asserted that its goal in making the change was to increase supplier access, while preserving the needs of its clients and ensuring best value for Canada.

In the Tribunal’s opinion, the introduction of block bidding, subject to the monetary threshold, did not prejudice Western Star nor favour any other bidder. For example, Western Star was at liberty to bid separately on blocks of trucks or on all trucks, being subject, in so doing, to the exact same terms and conditions applicable to any other potential suppliers.

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7. Article 518 of the AIT defines technical specification as “a specification that sets out characteristics of goods or their related processes and production methods, or characteristics of services or their related operating methods, including applicable administrative provisions, and may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a good, process, or production or operating method”.

Moreover, in the Tribunal's opinion, Western Star has produced no evidence that the Department has not reasonably reflected the cost of issuing and administering a second standing offer, in the circumstances, in establishing the monetary threshold affecting block bidding. Western Star has submitted that the industry in which it operates is a competitive one and that there existed other bidders capable of bidding on the truck requirement as originally structured and that, therefore, there was no need to allow more potential suppliers to compete for this requirement. The Tribunal has no reason to doubt this assertion. However, the Tribunal fails to understand why, under such circumstances, the Department is prevented from opening competition to even more potential suppliers, consistent with the need of the client and sound procurement and contract administration practices. The Tribunal is not cognizant of any rules in the trade agreements that guard against greater or excessive competition. Furthermore, the Tribunal is satisfied, on the basis of the evidence on the record, that the changes in the bidding structure were not directed against Western Star nor introduced to favour specific potential suppliers. The Tribunal is persuaded that these changes were introduced by the Department to relax a bidding structure that was judged to be unnecessarily restrictive in the circumstances.

The Department requested, in the GIR, the opportunity to make further submissions with respect to the award of costs in this matter. The Tribunal has decided that the circumstances of this case do not warrant costs against Western Star. While Western Star's complaint is not valid, it was not without merit.<sup>8</sup> Therefore, submissions on this matter are not necessary, and no costs will be awarded.

#### **DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines that the procurement was conducted in accordance with the provisions of the applicable trade agreements and that, therefore, the complaint is not valid.

Zdenek Kvarda  
Zdenek Kvarda  
Presiding Member

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8. *Flolite Industries, Addendum* (7 August 1998), PR-97-045 (CITT).