

Ottawa, Thursday, August 3, 2000

File No.: PR-2000-003

IN THE MATTER OF a complaint filed by Canadian Computer Rentals 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 subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services and the Office of the Chief Electoral Officer of Canada set up an evaluation team, comprised of new evaluators who are not aware of the specifics of the previous evaluation, to conduct a new evaluation of the six proposals received in response to Solicitation No. 05005-9-0492/C. The new evaluation team will apply the evaluation criteria and methodology set out in the Request for Proposal (Solicitation No. 05005-9-0492/C).

In the event that Canadian Computer Rentals' proposal is declared successful, the Canadian International Trade Tribunal recommends that the contract awarded to IBM Canada Limited be terminated and that it be awarded to Canadian Computer Rentals. As an alternative, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate Canadian Computer Rentals for the profit that it lost in being deprived of the contract. The basis for calculating the lost profit will be the price bid by Canadian Computer Rentals in the proposal that it made in response to Solicitation No. 05005-9-0492/C.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Canadian Computer Rentals its reasonable costs incurred in filing and proceeding with this complaint.

Richard Lafontaine

Richard Lafontaine
Presiding Member

Michel P. Granger

Michel P. Granger
Secretary

Date of Determination: August 3, 2000

Tribunal Member: Richard Lafontaine

Investigation Officer: Paule Couët

Counsel for the Tribunal: Gilles B. Legault
Dominique Laporte

Complainant: Canadian Computer Rentals

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Suzanne Clarke
Christianne Laizner

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IN THE MATTER OF a complaint filed by Canadian Computer Rentals 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*.

STATEMENT OF REASONS

On May 4, 2000, Canadian Computer Rentals (CCR) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. 05005-9-0492/C) by the Department of Public Works and Government Services (the Department) for the lease of hardware² and service components³ required by the Office of the Chief Electoral Officer of Canada (Elections Canada) to run federal electoral events (general elections, referendums and by-elections). The contract period is 48 months, with an option for 12 additional months.

CCR alleged that the Department negligently reviewed its proposal and, as a result, erroneously concluded that CCR's proposal failed to meet the requirements of item 2.2 of Appendix "H" to the Request for Proposal (RFP) requiring Microsoft for NT server version 4.0 certification. CCR requested, as a remedy, that its offer be reconsidered in accordance with the evaluation criteria set out in the RFP.

On May 9, 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*.⁴ On June 13, 2000, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On June 29, 2000, CCR filed comments on the GIR with the Tribunal. On July 7, 2000, the Tribunal invited the Department to respond to CCR's comments. The Department responded, in writing, on July 11, 2000, and CCR's comments on the response were filed with the Tribunal on July 13, 2000.

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.

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
 2. Equipment estimated volumes are as follows: 3,500 microcomputers, 602 printers, 301 servers, 301 concentrators and related equipment. Source: Request for Proposal at 2.
 3. Including warehousing, delivery, configuration, installation, de-installation, documentation, warranty/maintenance services and technical support. Source: Request for Proposal at 2.
 4. S.O.R./93-602 [hereinafter Regulations].
 5. S.O.R./91-499.

PROCUREMENT PROCESS

The RFP in this complaint was issued on February 16, 2000, in the form of an explanatory covering letter to bidders that participated in previous Solicitation No. 05005-9-0492/B.⁶ The *North American Free Trade Agreement*,⁷ the *Agreement on Government Procurement*⁸ and the *Agreement on Internal Trade*⁹ were identified as being applicable to this procurement.

Item 2.2 of Appendix “H” to the RFP included the following:

Microsoft NT certification

must have Microsoft for NT server vers. 4.0 certification (logo level). The certification must be between Microsoft and the final assembler of the system (as defined by the brand name appearing on the system unit and in all supporting manuals and documentation). Proof of certification for each system bid must be provided in the form of a copy of the complete Microsoft NT certification report. This report(s) must be enclosed in the bid response.

Article 1.0 of Appendix “E” to the RFP provides, in part:

PROPOSAL EVALUATION

The Elections Canada and PWGSC evaluation team will review and evaluate the proposal. The following steps will be performed in sequence until either all steps are completed and the bid is deemed compliant; or performance of one of the following steps results in the bid being deemed non-responsive at which point the proposal will be set aside and given no further consideration.

Article 1.0 of Appendix “E” to the RFP then describes six steps as follows: (1) the confirmation of the completeness of the written proposal; (2) the confirmation of the bidder’s compliance with the mandatory requirements; (3) the evaluation of rated requirements and the assignment and calculation of scores; (4) the establishment of the bid price for purposes of evaluation only; (5) the determination and ranking of responsive proposals on the basis of the evaluated price; and (6) the product evaluation of the top-ranked bidder’s proposed system.

Article 5.0 of Appendix “E” to the RFP reads as follows:

CONTRACTOR SELECTION METHOD

EVALUATION – LOWEST EVALUATED PRICE

Subject to the Proposal Evaluation above, the successful Bidder will be the firm offering the **LOWEST Evaluated Price** as detailed in the section titled Proposal Evaluation.

Proposals will be evaluated according to the criteria contained in the Proposal Evaluation above. To be considered valid, a bid must meet all of the mandatory requirements specified in the RFP and only those proposals achieving a score of **70 per cent** or better and passing the Product Evaluation will be considered for contract award.

Six proposals were received by the closing date of February 22, 2000.

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6. The letter stated, in part, that Solicitation No.: 05005-9-0492/C cancelled and superseded the previous solicitation document, Solicitation No. 05005-9-0492/B, and that it reinstated all the contents of the latter.
 7. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
 8. *Agreement on Government Procurement*, 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].
 9. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].

According to the GIR, CCR's proposal¹⁰ was evaluated as technically non-responsive because the evaluation team was unable to find the Microsoft for NT server version 4.0 certification (logo level) document, as required by item 2.2 of Annex "H" to the RFP. No such certification was contained in Annex 1 of CCR's proposal titled "Certifications".

On March 31, 2000, a contract was awarded to IBM Canada Limited (IBM). On April 4, 2000, the Department informed CCR, in writing, that its bid had been evaluated as non-responsive. On April 13, 2000, CCR contacted the Department to object to the disqualification of its proposal, as it believed that its proposal included the required Microsoft NT certification. During the same communication, in answering the Department's query as to where, in its proposal, CCR had inserted the said certification, CCR was unable, by going through its own file copy of the proposal, to locate the certification. On April 18, 2000, on the occasion of a debriefing with officials of the Department and Elections Canada, CCR was given the opportunity to go through the Crown's copy of its proposal. After a page by page search, CCR discovered the certification at the end of its proposal in Annex 5, titled "System Test Report (PC 98) Desktop Configuration".

On May 4, 2000, CCR filed this complaint with the Tribunal.

Subsequent to May 4, 2000, the evaluation team conducted an evaluation of CCR's rated portion of the technical proposal and its financial proposal. According to the GIR, during the evaluation of the server test report submitted by CCR, the evaluation team discovered that clarification would have been required to complete the certification submitted by CCR and to determine whether the motherboard installed in the server for the Windows NT server version 4.0 certification testing is the same as the one included in the system proposed by CCR in its proposal. The evaluation summary for the rated requirements of CCR's proposal shows that CCR's proposal passed with a score of 70.5 points out of 100 and, therefore, met the required mark of 70 points. Furthermore, the evaluation of CCR's financial proposal showed an evaluated price higher than that quoted by IBM.

POSITION OF PARTIES

Department's Position

The Department submitted that the onus is on the bidder to present a clear proposal organized in such a manner that evaluators can readily and easily locate all information relevant to the requirement. The Department argued that the fact that CCR had to do an extensive page by page search of its proposal to locate the certification in question demonstrates, by itself, that the Department was not negligent in reviewing CCR's proposal.

Furthermore, the Department submitted that its evaluation of CCR's proposal, following the debriefing meeting, demonstrated that CCR's proposal would not have been the top-ranked proposal. Consequently, CCR's proposal would not have been recommended for contract award.

The Department submitted that it acted in good faith in the conduct of this procurement and regrets that the certification was not found at the time of the evaluation of proposals. In addition, the Department submitted that there was no deliberate or negligent misapplication of the evaluation methodology and that,

10. The Tribunal, in this determination, has only used the proposal submitted by CCR to the Department and not the one that CCR sent with its complaint to the Tribunal.

for the reasons set out above, CCR was not prejudiced by the situation. The Department requested the opportunity to make further submissions with respect to costs.

In its comments of July 11, 2000, the Department asserted that CCR's allegation that the Department was biased in its reevaluation is serious and troubling. The Department submitted that CCR's allegation that a remark made facetiously during a telephone conversation meant that the Department was biased against CCR was unfounded, unsubstantiated and unwarranted.

CCR's Position

CCR conceded that it could have made the certification document easier to find. However, the fact remains that the document was in CCR's proposal, as per the instructions in item 2.2 of Appendix "H" to the RFP. CCR submitted that the Department's claim of an "extensive" search to find the document is an overstatement.

Furthermore, CCR asserted that the Department's admission, in the GIR, that its proposal was technically compliant (the Department denies this assertion) but found to be \$225,000 higher than the successful bidder's proposal is the result of a flawed process. CCR argued that the Department, after admitting its negligence during the conduct of the evaluation, is now purporting to investigate itself. CCR submitted that it was simply too convenient that the Department would find that CCR would not have been successful in any event. CCR submitted that the Department was clearly biased when reevaluating CCR's proposal, since it was obviously in the Department's best interest that CCR come in second. CCR asserted that the Department made sure that CCR was the second lowest bidder. CCR submitted that the Department has simply compounded its own original negligent mistake by engaging in this sham of an investigation and has, thereby, caused CCR irreparable damage in both professional and commercial terms.

In its final comments received by the Tribunal on July 13, 2000, CCR noted the Department's failure to respond to the most damaging evidence (i.e. the Department's phone call to CCR questioning the financial portion of its proposal) the day after the debriefing. This phone call, CCR asserted, clearly indicates that the Department did its financial analysis of CCR's proposal before scoring the rated requirements in its proposal, which is in direct contrast to the rules set out in Appendix "E" to the RFP.

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 applicable trade agreements.

Articles 1015(4)(a) of NAFTA and XIII(4)(a) of the AGP provide, in part, that, to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation. Article 506(6) of the AIT provides, in part, that the tender documents shall clearly identify the requirements of the procurement and the criteria that will be used in the evaluation of bids.

There is no dispute between the parties as to whether the requirement in item 2.2 of Annex "H" to the RFP for a Microsoft for NT server version 4.0 certification is a mandatory requirement of this solicitation or whether this requirement is clearly stated in the RFP. What is at issue is whether the

Department and Elections Canada properly applied the evaluation methodology and, on this basis, correctly declared CCR's proposal technically non-responsive for failing to meet mandatory requirement 2.2 of Annex "H".

The facts of this case are undisputed, simple and straightforward. CCR's proposal, as submitted, included the required certification under Annex 5, titled "System Test Report (PC 98) Desktop Configuration".

The Department submitted that the onus is on the bidder to present a clear proposal that is organized in such a manner that evaluators can readily and easily locate all information relevant to the requirement. In the Tribunal's opinion, however, suppliers' proposals must also be reviewed with diligence and thoroughness. After all, potential suppliers invest a significant amount of their own corporate resources to try to offer the government the best possible proposals under risky competitive conditions. This, in the Tribunal's opinion, must be recognized by procuring authorities and, as a minimum, be reflected in their review of proposals. The Tribunal is of the view that, in this instance, CCR has presented the information in question in a manner such that a diligent review by the Department and Elections Canada would have produced the allegedly missing certification.

In this particular instance, CCR had organized the material that it offered in support of its proposal under five annexes, one of which was titled "Certifications" and another, Annex 5, titled "System Test Report (PC 98) Desktop Configuration".¹¹ CCR admits, in its comments on the GIR, that it could have made the certification document easier to find. The Tribunal notes that item 2.2 of Annex "H" to the RFP provides that the Microsoft NT certification report be enclosed in the bid response. Nowhere was it required that the certification report be included under a particular annex or that the documents be attached in a specific manner. The Tribunal is of the view that a thorough and diligent review of CCR's proposal would have allowed the Department and Elections Canada to find the certification in question. The Department itself, in its last submission, admitted that "it ought to have found the document". The Tribunal agrees, and in its opinion, the Department, in this instance, did not conduct a thorough and diligent review of CCR's proposal. Therefore, both the Department and Elections Canada improperly applied the evaluation methodology and criteria and, on this basis, erroneously concluded that CCR's proposal was non-responsive for failing to include the certification required by item 2.2 of Annex "H".

CCR requested, as a remedy, that its proposal be reconsidered in accordance with the evaluation criteria set out in the RFP. After the conduct of the debriefing and the realization by the Department that the certification in question was, in fact, included in CCR's proposal, the Department decided to conduct a full evaluation of CCR's proposal to assess it under the rated requirements and for price. According to the GIR, subject to certain clarifications affecting the certification submitted by CCR, CCR's proposal was determined to meet the pass mark of 70 points for rated requirements. However, the evaluation price was found to be higher than that of the successful bidder. On this basis, the Department concluded that CCR has not been prejudiced by the situation.

The Tribunal is not satisfied that CCR's evaluation was conducted in a fair and equitable manner. Not only was it conducted at a time when the price and the score for rated requirements of IBM's proposal were known but, in addition, the Tribunal is not convinced that the evaluation was conducted according to the sequence set out in the RFP, i.e. that the price evaluation followed the scoring of rated requirements, in

11. The table of contents of the proposal listed the annexes contained in the document in order to provide a succinct description of the content. Annex 5 was listed as "System Test Report PC 98 Desktop. System test report NT server" [emphasis added].

view of the Department's inquiry on the financial aspects of CCR's proposal the day after the debriefing. It is an established and fundamental principle of bid evaluation that, in order to ensure fairness and equity in the assessment and scoring of proposals, prices should be evaluated last in order not to influence the scoring of the proposals. The Tribunal notes the Department's silence on this point in its comments of July 11, 2000.

In the circumstances, the Tribunal is not satisfied that the Department's evaluation of CCR's proposal was conducted according to the sequence set out in the RFP and that it is reliable. Consequently, the Tribunal will recommend that an evaluation team comprised of new evaluators, unaware of the specifics of the evaluation already conducted by the Department, reevaluate the six proposals (the Tribunal proposes this approach, recognizing that, because professional judgement is applied in evaluating rated requirements, it is important for fairness and equity reasons that all proposals be evaluated by the same evaluators) submitted in response to Solicitation No. 05005-9-0492/C. The reevaluation will be conducted in accordance with the methodology and criteria set out in the RFP. The Department will then, as required, proceed with this procurement as is more fully described below in the Tribunal's determination.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the procurement was not conducted in accordance with the requirements of NAFTA, the AGP and the AIT and that, therefore, the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the Department and Elections Canada set up an evaluation team, comprised of new evaluators who are unaware of the specifics of the previous evaluation, to conduct a new evaluation of the six proposals received in response to Solicitation No. 05005-9-0492/C. The new evaluation will apply the evaluation criteria and methodology set out in the RFP (Solicitation No. 05005-9-0492/C), and the Department will proceed with this procurement process according to the terms of the RFP and the trade agreements.

In the event that CCR's proposal is declared successful, the Tribunal recommends that the contract awarded to IBM be terminated and that it be awarded to CCR. As an alternative, the Tribunal recommends that the Department compensate CCR for the profit that it lost in being deprived of the contract. The basis for calculating the lost profit will be the price bid by CCR in the proposal that it made in response to Solicitation No. 05005-9-0492/C.

Pursuant to subsection 30.16(1) of CITT Act, the Tribunal awards CCR its reasonable costs incurred in filing and proceeding with this complaint.

Richard Lafontaine
Richard Lafontaine
Presiding Member