



Ottawa, Monday, February 19, 2001

File No.: PR-2000-040

IN THE MATTER OF a complaint filed by Canadian Helicopters Limited 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 not valid.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination: February 19, 2001

Tribunal Member: Richard Lafontaine, Presiding Member

Investigation Officer: Paule Couët

Counsel for the Tribunal: Michèle Hurteau

Complainant: Canadian Helicopters Limited

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Christianne M. Laizner
Susan D. Clarke
Ian Mcleod

IN THE MATTER OF a complaint filed by Canadian Helicopters Limited 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 November 24, 2000, Canadian Helicopters Limited (CHL) 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. W3999-01M339/A) by the Department of Public Works and Government Services (the Department) providing for the dry lease of three Bell 206 Jet Ranger III helicopters for the tactical helicopter squadrons of the Department of National Defense (DND) based at Borden, Ontario, Edmonton, Alberta, and St. Hubert, Quebec.

CHL alleged that the Department, contrary to past practice, improperly declared its proposal non-responsive for providing with its bid certain required financial information from a parent company only. CHL also alleged that, contrary to the provisions of the Request for Proposal (RFP), the Department is now attempting to issue more than one contract as a result of this solicitation.

CHL requested, as a remedy, that the Department award it the contract based on its response to the solicitation.

On November 30, 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*.² On December 4, 2000, the Department informed the Tribunal, in writing, that a contract in the amount of \$333,412 had been awarded to National Helicopters Inc. (National) on November 10, 2000. On January 12, 2001, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On January 26, 2001, CHL advised the Tribunal that it had no comments on the GIR.

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 July 26, 2000, a Notice of Proposed Procurement (NPP) and related RFP for Solicitation No. W3999-01M339/A were posted on Canada's Electronic Tendering Service (MERX) with a closing date of August 28, 2000.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. S.O.R./93-602 [hereinafter Regulations].
3. S.O.R./91-499.

The NPP reads, in part, as follows:

More than one Contract may be issued to different Contractors.

The RFP includes the following provisions:

Standard Instructions and Conditions

Standard Instructions and Conditions in DSS-MAS 9403 (05/00) set out in the SACC Manual [Standard Acquisition Clauses and Conditions Manual⁴] are hereby incorporated by reference into and form part of this solicitation. Submission of a bid constitutes acknowledgement that the Bidder has read and agrees to be bound by such instructions.

The requirement regarding financial capability set out in the RFP reads, in part, as follows:

The Bidder must have the financial capability to undertake this project. In order to demonstrate its financial capability, the Bidder shall include in its proposal:

I) Audited Financial Statements if available, or Unaudited Financial Statements, for the Bidder's last three fiscal years, including, as a minimum, the Balance Sheet, Statement of [Retained] Earnings, Income Statement and any notes to the statements, and Interim Financial Statements, being a Balance Sheet, Statement of Retained Earnings and Income Statement as of December 31, 1999, if this period is more than three months from the Bidder's fiscal year end date.

V) If the Bidder is a subsidiary of another company, then the requirements stated in paragraphs (I) through (IV) above should be provided for the Bidder as well as the Parent company.

Three bids were received in response to this solicitation. According to the GIR, two bidders submitted proposals with respect to the supply of one helicopter at one specific site each, one for Borden and one for Edmonton. CHL proposed to supply three helicopters, one for each of the three sites specified in the RFP. At the conclusion of the evaluation process, one proposal was found to be compliant. No compliant proposal was received with respect to either the St. Hubert site or the Edmonton site. On November 10, 2000, CHL was advised by telephone that its bid had been found to be non-compliant for failing to meet one of the mandatory requirements of the RFP, i.e. the provision of its audited or unaudited financial statements. The Department confirmed its decision in writing on the same day. On November 10, 2000, a contract for the Borden site was awarded to National. On November 24, 2000, CHL filed a complaint with the Tribunal.

According to the GIR, the existing contracts, to be replaced as a result of the solicitation at issue, were to expire on August 31, 2000. Because the solicitation process was not completed on time, several extensions to the existing contracts were granted to the incumbents, i.e. to CHL, with respect to the St. Hubert site, and Avialta Helicopters Limited (Avialta), with respect to the Edmonton site, to November 30, 2000. Subsequently, in November, in light of the proceedings before the Tribunal which would delay the commencement of a new solicitation with respect to the St. Hubert and Edmonton sites, the Department extended both the CHL and Avialta contracts to February 28, 2001, pending the disposition of the complaint.

4. Section A.1(2) of the standard instructions and conditions in DSS-MAS 9403 (05/00) provides as follows: "Bids may be accepted in whole or in part. The lowest or any bid will not necessarily be accepted".

POSITION OF PARTIES

Department's Position

In response to CHL's allegation that the Department improperly declared its proposal non-compliant due to the absence of its financial statements, the Department submitted that this requirement was clearly stated in the RFP, mandatory and unambiguous in intent, and that CHL did not submit its own financial statements as required by the RFP, but rather submitted those of its grandparent company. In addition, the Department submitted that a second provision of the RFP, pertaining to the situation where a bidder is a subsidiary of another company, provided further confirmation of the requirement that financial statements had to be provided for both the bidder and the parent company. The Department stated that it requested a clarification as to CHL's corporate organizational structure during the evaluation process. The organizational structure showed that CHL is a subsidiary of CHC Helicopter Holdings Limited which, in turn, is a subsidiary of CHC Helicopter Corporation. CHL submitted only the financial statements of CHC Helicopter Corporation, CHL's grandparent company. Upon obtaining the clarification, the Department evaluated CHL's proposal as non-responsive, as it failed to file its own financial statements and those of its parent company, CHC Helicopter Holdings Limited.

In reply to the assertion by CHL that it successfully submitted similar financial information in response to a solicitation in 1997 for the dry lease of helicopters, the Department submitted that this earlier solicitation was not relevant to the matter, as the terms and conditions of the solicitation at issue were defined by the express terms set out in the RFP for that solicitation and were not amended by the terms of a previous RFP, any prior discussions, provisions or practices. It also submitted that the previous solicitation did not include any requirements for the submission of financial statements and that it contained a statement of work substantially different from the one contained in the solicitation at issue.

With respect to the allegation that the Department acted improperly in accepting proposals limited to one site, contrary to the terms of the RFP, and thus attempted to change the terms of the solicitation by breaking up the requirement, the Department submitted that it acted in conformity with the terms and conditions of the NPP and RFP and with the standard instructions and conditions which were specifically incorporated into the RFP. The Department submitted that these provisions permit the award of a contract for any or all of the sites defined in the solicitation. In addition, it stated that, in submitting its proposal, CHL acknowledged and contemplated that a contract might be awarded for one or more sites.

It was also submitted that, because there were no compliant bids with respect to the St. Hubert and Edmonton sites, the Department and DND, pending the result of the Tribunal's inquiry, anticipate the initiation of a new competitive process for these sites. This will benefit CHL as it will have the opportunity to submit a new proposal.

The Department requested the opportunity to make further submissions with respect to costs.

CHL's Position

CHL did not comment on the Department's position and requested that the Tribunal render its decision on the basis of the existing record.

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 *Agreement on Internal Trade*⁵ provides, in part, that “the tender documents shall clearly identify the requirements of the procurement”.

With respect to CHL's allegation that the Department improperly declared its bid non-responsive, the Tribunal finds that it has no merit. The Tribunal finds that the requirement for the bidder to provide financial statements was explicitly stated in the RFP and was a mandatory requirement. The Tribunal notes that CHL's proposal included a set of financial statements; however, they were those of a parent company, not its own. As a subsidiary company, for this solicitation, CHL had to provide its own financial statements in addition to those of the parent company. The Tribunal finds that the Department acted appropriately in declaring CHL's proposal non-responsive.

In respect of CHL's argument that, in the 1997 solicitation for the dry lease of helicopters, it successfully provided similar financial statements, the Tribunal notes that bidders should treat all solicitations as independent and should be governed by the express terms set out in the RFP for a particular solicitation.

The Tribunal finds the allegation that the solicitation called for one contract for all three sites and that the award of more than one contract is tantamount to changing the terms of the solicitation to be without merit. The Tribunal notes that, in respect of the award of one or more contracts, the NPP was clear in notifying potential bidders that more than one contract could be issued to different contractors. The Tribunal also notes that the standard instructions and conditions were incorporated into the RFP and that one of these standard conditions allowed the Department to accept bids in whole or in part. The Tribunal also observes that, in its own proposal, CHL stated, in the context of its detailed cost breakdown, that “[i]n the event that the entire contract is awarded to [CHL], these minimums may be averaged across the three bases”, thus acknowledging that a contract might be awarded in its entirety or, alternatively, on a site-by-site basis. Accordingly, the Tribunal finds that the Department acted properly and did not breach any provision of the AIT.

In the GIR, the Department requested 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 CHL. Therefore, submissions on this matter are not necessary.

5. As signed at Ottawa, Ontario, 18 July 1994 [hereinafter AIT].

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was conducted in accordance with the requirements of the AIT and that, therefore, the complaint is not valid.

Richard Lafontaine

Richard Lafontaine

Presiding Member