



Ottawa, Thursday, April 26, 2001

File No.: PR-2000-042

IN THE MATTER OF a complaint filed by the Spallumcheen Band 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.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: April 26, 2001

Tribunal Member: James A. Ogilvy, Presiding Member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Marie-France Dagenais

Complainant: Spallumcheen Band

Intervener: Wolski Environmental Consulting Ltd.

Government Institution: Department of Fisheries and Oceans

Counsel for the Government Institution: Nancy South



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STATEMENT OF REASONS

COMPLAINT

On December 11, 2000, the Spallumcheen Band (the Band) of the Shuswap Nation 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 Solicitation No. F1516-0-0656 by the Department of Fisheries and Oceans (DFO) for the provision of personnel to operate and maintain the Shuswap River hatchery (the Shuswap hatchery) in British Columbia.

The Band alleged that DFO failed to conduct this procurement in conformity with the provisions of the *Agreement on Internal Trade*.² Specifically, the Band alleged that one of the DFO officials involved in this procurement was in a conflict of interest, thereby compromising his impartiality in the matter. It is further alleged that the DFO official in question was also directly involved in changing the bid criteria, thereby favouring a particular bidder.

The Band requested, as a remedy, that the contract awarded to Wolski Environmental Consulting Ltd. (Wolski) be permitted to stand for a further period of three months. During the three-month period, DFO should be required to commission a new and independent evaluation of the two bids received in response to this solicitation. The Band also requested that the costs it incurred in preparing a bid and in filing and proceeding with the complaint be reimbursed.

On December 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*.³ On February 9, 2001, DFO filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On March 2, 2001, the Band filed comments on the GIR with the Tribunal. On the same day, the Tribunal received comments from Wolski on the factual background of the complaint. On March 8, 2001, the Tribunal granted Wolski intervenor status in the matter. No further comments were received by the Tribunal.

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
 2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
 3. S.O.R./93-602 [hereinafter Regulations].
 4. S.O.R./91-499.

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 May 23, 2000, a Request for Proposal (RFP) for this procurement was posted on Canada's Electronic Tendering Service (MERX) with a closing date of June 15, 2000. The services required in this RFP had been provided under two previous contracts. These contracts were awarded as a result of two separate RFPs issued in 1992 and 1996. The successful bidder on both solicitations was Triton Environmental Consultants Ltd. (Triton). Mr. Szczepan Wolski was the hatchery manager for Triton under these two prior contracts.⁵

The Statement of Work of the current RFP includes the following provision relevant to this case:

Given the importance of the fisheries resource to local Bands, the Contractor should be prepared to work closely with First Nations. This may include the provision of technical training, with details as to compensation rate to be negotiated in discussions between the successful bidder, the local Band, and departmental staff.

DFO received two proposals in response to this solicitation, one from the Band and one from Wolski. According to the GIR, both proposals were evaluated and rated independently by two DFO evaluators. On July 6, 2001, the evaluators met to finalize the rating of the proposals. On July 11, 2000, the Band was advised by letter that the contract had been awarded to Wolski. On July 14, 2000, a debriefing by teleconference call was held with the Band to discuss the award of the contract. On July 20, 2000, the Band requested, in writing, that DFO undertake an independent review of the contracting and tendering process leading to the award of the contract. A written review was provided to the Band on August 2, 2000. Letters were exchanged between the Band and DFO officials regarding the alleged conflict of interest between one of the evaluators and the contract awardee and regarding the removal from the current RFP of a criterion included in the previous RFP for the 1996 solicitation. On December 11, 2000, the Band filed a complaint with the Tribunal.

POSITION OF PARTIES

Department's Position

As a general first comment, DFO submitted that the Tribunal lacked jurisdiction to consider this complaint, as the complaint did not disclose a reasonable indication that the procurement was not carried out in accordance with the relevant trade agreement. DFO argued that nowhere in the complaint was there a reference to a specific article of the AIT that had been breached by DFO.

DFO also submitted that the complaint should be dismissed, as the Band did not file any evidence supporting its allegations that the relationship between one of the evaluators and the contract awardee influenced the evaluator in changing certain criteria set out in the RFP or that this relationship influenced the outcome of the evaluation of proposals. One of the evaluators, Mr. L., had been DFO's support biologist and scientific authority for all major hatchery facilities in the interior of British Columbia since the summer of 1990. DFO submitted that, in his role with DFO, Mr. L. has formed many relationships with both DFO

5. Mr. Wolski left Triton sometime in the spring of 2000 and formed his own company, Wolski Environmental Consulting Ltd.

and contract hatchery staff. Because of his position, Mr. L. has known Mr. Wolski for a number of years because of the latter's involvement as hatchery manager at a number of hatcheries in British Columbia, including the Shuswap hatchery. Over the years, a professional relationship developed to such a level that invitations to social events, such as dinner and a Christmas party, were offered. It is also submitted that a similar professional relationship also developed with the project manager put forward by the Band in its proposal. It was submitted that there is nothing inappropriate with respect to these relationships.

DFO submitted that it was aware that a relationship existed between Mr. L. and one of the bidders, that there was no conflict of interest, that standard and proper procedures were followed throughout the evaluation process and that the process was fair and unbiased. DFO asserted that its staff recognized the need to have an evaluator who was not on familiar terms with the bidders to participate in the evaluation process in order to ensure that it would be conducted without bias or appearance of bias. Another biologist from DFO with considerable experience in the field of salmon enhancement, providing support to Vancouver Island hatcheries but with no familiarity with any of the bidders, was assigned to evaluate the proposals. DFO noted in its submission that the other evaluator gave the Band's proposal a lower rating than did Mr. L.

According to the GIR, the requirements contained in the current RFP were essentially the same as those contained in the previous solicitations for operating the hatchery, with the main exception that, in the 1992 and 1996 RFPs, the previous criterion of "evidence of local native involvement" was removed.⁶ DFO decided to remove this criterion for a number of reasons, among which were the subjective nature of the criterion and the difficulty posed in assessing it, the alleged difficulties in having sufficient staff at critical times, and the competing First Nations interests in the particular area in which the Shuswap hatchery was located. DFO decided, instead, to negotiate directly with First Nations regarding their involvement in hatchery operations. Furthermore, this decision was not made by Mr. L. alone, a number of DFO officials were involved in the discussion and decision making resulting in the deletion of the criterion from the RFP.

DFO argued that, even if the Band's allegations were true and, further, that the criterion regarding evidence of local native involvement had not been deleted from the RFP, there would have been no difference in the outcome of the evaluation process.

Band's Position

In its reply to the GIR, the Band requested the opportunity to appear before the Tribunal.

In its submission, the Band asserted that Mr. Wolski, as the manager of the successful bidder in the 1996 solicitation, did not follow through on the training or First Nations involvement, as put forward in its proposal. The Band also submitted that it was improper for DFO to remove the "evidence of local native involvement" criterion on the basis of Mr. Wolski's apparent complaints in regard to the work ethics and abilities of Band members. It is also submitted that the issue of overlapping title claims among First Nations is not a proper factor for consideration in the criteria for the award of a contract. The Band argued that DFO never told the Band that the "evidence of local native involvement" criterion was to be deleted from the RFP.

6. This criterion was replaced by the general statement that the "Contractor should be prepared to work closely with First Nations".

Relying on the Federal Court of Appeal's (the Court) decision in *Cougar Aviation*,⁷ the Band argued that the Tribunal has jurisdiction to hear its complaint dealing with allegations that there was a reasonable apprehension of bias. It noted that, in *Cougar Aviation*, the Court acknowledged the dangers posed by personal friendships between bidders and decision makers. However, the Band asserted that the close and long-standing personal friendship between Mr. L. and the contract awardee, in this case, goes beyond the kind of working relationship alleged in *Cougar Aviation*. The Band also argued that there is an important distinction between, on the one hand, having two people involved in a decision, only one of whom is not personally acquainted with the bidders and, on the other hand, as in *Cougar Aviation*, establishing a multi-person committee headed by someone who does not know the bidders. The half-and-half division between those who know the bidders and those who do not know them is present in both cases, but there is a qualitative difference and a decreasing chance "that 'cronyism' will hold sway the more people one adds to the mix".

Wolski's Position

In its comments, Wolski responded to the complaint in regard to the nature of the discussions that took place at different times with the Band or with Band members, the nature of the "ongoing difficulties" in working with the Band and the training opportunities that it had provided to Band members since 1992. It described its professional relationship with Mr. L. as "a friendly cooperation built over the years" and submitted that it had similar friendly relationships with other DFO employees involved in hatchery projects over a long time.

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 that the Tribunal is required to determine whether the procurement was conducted in accordance with the AIT.

With respect to the request by the Band to present evidence at a public hearing, the Tribunal determined that there is enough evidence on the record and that a public hearing is not required.

Article 501 of the AIT provides, in part, that "the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers". Furthermore, Article 514(2) states that "[i]n order to promote fair, open and impartial procurement procedures, the Federal Government shall adopt and maintain bid protest procedures". Procurement procedures are defined as "the processes by which suppliers are invited to submit a tender, a proposal, qualification information, or a response to a request for information and includes the ways in which those tenders, proposals or information submissions are treated". In this context, the Tribunal will determine whether the alleged conflict of interest between one of the evaluators (Mr. L.) and the contract awardee constitutes a reasonable indication of bias, thereby contravening the non-discrimination provisions of Article 504(2) of the AIT.

7. *Cougar Aviation v. Canada (Minister of Public Works and Government Services)* (28 November 2000), A-421-99 (F.C.A.).

With respect to the argument put forth by DFO that the Tribunal lacks jurisdiction to hear this complaint, the Tribunal believes that, on the face of the facts described in the complaint, there was a reasonable indication of a breach of the trade agreement.

The Band alleged that Mr. L., one of the DFO evaluators who assessed the Band's proposal, was in conflict of interest because of his relationship with Mr. Wolski, the second bidder, and that the evaluation process was therefore unfair or had the appearance of unfairness or bias.

The Tribunal is not convinced that one of the DFO evaluators was biased or had the appearance of bias during the evaluation process, as alleged by the Band. The Tribunal believes that a "professional relationship" built over a number of years between people working in a collaborative manner may evolve into a close relationship akin to friendship. However, the Tribunal finds that this type of personal relationship, which may be marked by personal invitations to social gatherings, such as dinners or fishing trips, does not necessarily lead to or translate into a lack of objectivity or impartiality on the part of the persons involved. On the other hand, the Tribunal accepts, as stated in the Court's decision in *Cougar Aviation*, that "familiarity, and the personal friendships that may develop from a working relationship, are not without their dangers for the integrity of the contract process".⁸ In this context, the Tribunal notes that DFO was aware of the friendship that existed between Mr. L. and the bidders. It also notes that DFO sought to reduce any possibility of bias or of appearance of bias by assigning another DFO official to the evaluation team, with no prior awareness of who the bidders would be. Given the circumstances, the Tribunal is of the opinion that DFO might have been even more prudent and might have constituted a three-person evaluation committee. The presence of a third party would have provided an additional "safeguard" against any apprehension of bias. Nevertheless, the Tribunal finds that DFO acted reasonably to ensure that bidders would be, and were, treated equally.

The Tribunal also relies on the evidence on the record that both evaluators rated Wolski's proposal exactly the same and that the second evaluator did attribute lower rating points to the Band's proposal than did Mr. L. The Tribunal would have expected the opposite if Mr. L. had wanted to favour the other bidder.

In respect of the removal of the "evidence of local native involvement" criterion from the RFP in order to provide an undue advantage to a particular bidder and the role allegedly played by Mr. L. in this deletion, the Tribunal finds that this allegation has no merit. In the Tribunal's opinion, by deleting this criterion, DFO attempted to improve the RFP based on the knowledge acquired throughout the management of the contracts issued from the previous solicitations and on the lack of the anticipated results of having this criterion in the previous RFPs. Furthermore, it appears that this decision by DFO was based on several factors, not only on complaints made by the manager of the Shuswap hatchery, as alleged by the Band. The Tribunal finds that this decision was made following discussions with several DFO officials and that no evidence was adduced that Mr. L. made this decision on his own. In addition, there is no evidence on the record that Mr. L. was in a position to unduly influence this decision. The Tribunal also notes that, although the requirements contained in the current RFP were essentially the same as those contained in the previous solicitations for operating the Shuswap hatchery, 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 also notes that a procuring entity has no obligation, while preparing a solicitation, to incorporate the terms of a previous solicitation and that the terms of a previous solicitation are not determinative of those of a new one.

8. *Ibid.* para. 41.

The Tribunal also accepts DFO's submission that an additional 15 percent attributed for "evidence of local native involvement" would have made no difference in the final outcome of the evaluation. It would have raised the final score of the Band's proposal, but not sufficiently for it to surpass the successful proposal.

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.

James A. Ogilvy
James A. Ogilvy
Presiding Member