

Ottawa, Tuesday, August 22, 2000

**File No.: PR-2000-007**

IN THE MATTER OF a complaint filed by FMD International 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.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

Date of Determination: August 22, 2000

Tribunal Member: Pierre Gosselin (Presiding Member)

Investigation Officer: Paule Couët

Counsel for the Tribunal: Gerry Stobo

Complainant: FMD International Inc.

Government Institution: Department of Fisheries and Oceans

Ottawa, Tuesday, August 22, 2000

File No.: PR-2000-007

IN THE MATTER OF a complaint filed by FMD International 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*.

### STATEMENT OF REASONS

On May 25, 2000, FMD International Inc. (FMD) 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 the procurement (Solicitation No. FP802-0-0006) by the Department of Fisheries and Oceans (F&O) for the provision of professional services for the conduct of a review of the delivery of the Navigation Protection Program and Fish Habitat Management Program.

FMD alleged that F&O improperly evaluated its proposal. Specifically, FMD alleged that the requirements in the Request for Proposal (RFP) pertaining to bilingualism and security clearances had been changed or misapplied and that several areas of its proposal had been underrated at the time of evaluation. FMD requested, as a remedy, that its proposal be re-evaluated in accordance with the criteria set out in the RFP and, should its proposal be determined to be the successful bid, that it be compensated for its loss.

On June 2, 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>2</sup>. On June 27, 2000, F&O filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*<sup>3</sup>. On July 6, 2000, FMD filed its response to 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 February 23, 2000, a Notice of Proposed Procurement and related RFP were published on Canada's Electronic Tendering Service (MERX).

- 
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.

Appendix “C” to the RFP, Statement of Work, includes the following:

### 8.0 LANGUAGE REQUIREMENTS

The proposed team must possess a bilingual capability appropriate to dealing with departmental officials in either official language. Thus, any correspondence or interviews must be provided in the official language of the employee’s choice.

### 11.0 SECRET SECURITY CLEARANCE

**Your attention is drawn to the fact that all parties working under the contract shall have security clearance to the level of secret reliability [from] day one of the contract award.**

Appendix “D” to the RFP, Evaluation Criteria, reads:

Proposals shall be evaluated against the technical criteria listed below. In order to qualify proposals must receive a minimum overall score of 75% for the technical criteria listed below. Proposals which do not achieve the minimum threshold will be declared technically non-responsive and no further evaluation will be conducted with respect to that proposal.

### TECHNICAL CRITERIA

Criteria	Weight
<i>Capability to carry out the Work:</i>	
• Personnel qualifications	5
• Experience	10
• Bilingual capability	5
• Knowledge of DFO and regional/Area Manager structure	10
<i>Project Management:</i>	
• Project approach	10
• Methodology	10
• Timing (workplan)	10
• Team management (role and activities of consultants)	5
<i>Quality of Proposal:</i>	
• Clarity, organization and logic	5

### Scoring of Technical Criteria

Each proposal is rated within a range of 1 to 10 for each of the criteria above according to the following scale:

- |            |                  |
|------------|------------------|
| 1-3 - poor | 7-8 - good       |
| 4-6 - fair | 9-10 - excellent |

Scores are then multiplied by the weighting factor and totaled.

Seven companies submitted proposals in response to this solicitation, including FMD. The evaluation of proposals was conducted individually by two experienced senior representatives of the Review and Audit Group of F&O. FMD obtained a total of 510 points, out of a possible 700 points, for its technical proposal. Since the minimum overall threshold required to be technically compliant was 75 percent, or 525 points out of 700, FMD’s proposal was declared technically non-compliant.

On April 26, 2000, F&O informed FMD, in writing, that Performance Management Network Inc. had been selected as the successful bidder and that it had been awarded a contract in the amount of \$107,350.00 + GST.

On April 27, 2000, FMD was provided, by telephone, the results of its evaluation with point scores and a briefing on the strengths and weaknesses for each of the rated requirements in the RFP. At its request, this information was conveyed to FMD, via E-mail, on April 28, 2000. On April 30, 2000, FMD contacted the contracting officer at F&O to express its disagreement with the evaluation of its proposal. On May 9, 2000, a formal debriefing involving all parties was held via teleconference. FMD filed its complaint with the Tribunal on May 25, 2000.

## **POSITION OF PARTIES**

### **F&O's Position**

F&O submitted that FMD's proposal was treated fairly and that it failed to meet the technical criteria clearly stated in the RFP. It submitted that the entire contracting process was conducted fairly as well as in an open, thorough and professional manner. In the GIR, F&O described in detail the reasons supporting its scoring of the technical aspects of FMD's proposal. Among other things, F&O noted that the reference to bilingualism in the F&O's evaluation notes was misplaced under "Team Management", as bilingualism was evaluated under "Bilingual Capability". In addition, F&O confirmed that the requirement for security clearances was a mandatory criterion of the RFP and, therefore, was not rated. Furthermore, F&O asserted that the bilingualism and security clearance evaluation criteria were not considered as part of the assessment of FMD's proposal under "Team Management".

### **FMD's Position**

In its response of July 6, 2000, FMD advised that it had no comments on the GIR and requested that the Tribunal decide the case 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 provision of the applicable trade agreements.

Article 1015(4)(d) of the *North American Free Trade Agreement*<sup>4</sup> provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation". Article 506(6) of the *Agreement on Internal Trade*<sup>5</sup> provides, in part, that "[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria".

The Tribunal will decide whether, in evaluating FMD's proposal, F&O applied the evaluation methodology set out in the RFP and did so properly.

---

4. 32 I.L.M. 289 [hereinafter NAFTA].

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

The Tribunal notes that FMD agreed with the facts as stated in the GIR and requested that its complaint be decided on the basis of the existing record. After a careful examination of the evidence, the Tribunal finds that the evaluation of FMD's proposal was conducted according to the criteria and methodology set out in the RFP and that the criteria and methodology were properly and fairly applied by F&O. The Tribunal finds that FMD's concerns relative to its response to the evaluation of the bilingualism and security clearance criteria were based on the misplacement by F&O of certain evaluation notes, which resulted in erroneous communications by F&O's officials. However, the Tribunal is satisfied that these administrative errors did not adversely affect the evaluation of FMD's proposal.

The Tribunal periodically receives complaints alleging that the scoring by a government entity against individual criteria was unfair. However, the Tribunal cannot regularly undertake a re-weighting of the points assigned by the government entities unless the treatment of the bid under review amounts to a denial of fair treatment and, consequently, to a breach of the relevant trade agreements. Absent such a fair treatment, the Tribunal will generally defer to the judgement of the officials who are best qualified to assess the merits of the bids. Consequently, even though the Tribunal may disagree with the points awarded to a bidder in respect of specific evaluation criteria, it will not substitute its judgement for that of the government officials, unless their conduct amounts to a breach of one of the trade agreements.

In this case, although the Tribunal appreciates that FMD may not agree with how its proposal was rated at the time of evaluation, the Tribunal is satisfied that F&O, in evaluating its proposal, properly applied the evaluation criteria and methodology set out in the RFP. Therefore, the Tribunal will not disturb the judgement made by F&O's expert personnel in scoring FMD's proposal for technical compliance.

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

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

Pierre Gosselin  
Pierre Gosselin  
Presiding Member



Ottawa, Monday, September 11, 2000

**File No.: PR-2000-007**

IN THE MATTER OF a complaint filed by FMD International 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*.

### **CORRIGENDUM**

The third sentence of the second paragraph on page 4 of the Tribunal's statement of reasons should read: "Absent such unfair treatment, the Tribunal will generally defer to the judgement of the officials who are best qualified to assess the merits of the bids".

By order of the Tribunal,

Michel P. Granger  
Secretary