



Ottawa, Thursday, November 23, 2000

File No.: PR-2000-023

IN THE MATTER OF a complaint filed by K-Lor Contractors Services Ltd. 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.

Richard Lafontaine

Richard Lafontaine

Presiding Member

Michel P. Granger

Michel P. Granger

Secretary

The reasons for the Tribunal's determination will be issued at a later date.

Date of Determination: November 23, 2000
Date of Reasons: December 14, 2000

Tribunal Member: Richard Lafontaine, Presiding Member

Investigation Officer: Paule Couët

Counsel for the Tribunal: Gerry Stobo

Complainant: K-Lor Contractors Services Ltd.

Counsel for the Complainant: Mark N. Sills
Randal S. Van de Mosselaer
Christopher M. Moore
Alyson D'Oyley

Government Institution: Department of Public Works and Government Services

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



Ottawa, Thursday, December 14, 2000

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IN THE MATTER OF a complaint filed by K-Lor Contractors Services Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

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STATEMENT OF REASONS

On July 12, 2000, K-Lor Contractors Services Ltd. (K-Lor) 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 (Tender No. E0224-00R014/A) by the Department of Public Works and Government Services (the Department) for the provision of services for the construction of a secure landfill site in Argentia, Newfoundland.

K-Lor alleged that the Department improperly rejected its tender for failing to provide the required “Certification of Mandatory Site Visit” (site visit certificate). It claimed that it did include the site visit certificate in its bid documents. This claim is supported by two affidavits from company officials. K-Lor alleged that the Department, by rejecting its tender, breached Article 506(6) of the *Agreement on Internal Trade*.²

K-Lor requested, as a remedy, that the Tribunal postpone the award of the designated contract until the Tribunal determined the validity of the complaint. K-Lor also requested that the Department withdraw its declaration that its bid was non-responsive and award K-Lor the contract. In the alternative, K-Lor requested to be compensated for its lost profits arising from its inability to carry out the contract. K-Lor requested its reasonable costs for filing its complaint and for preparing a response to this invitation to tender (ITT).

On July 17, 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 That same day, the Tribunal issued an order postponing the award of any contract in relation to this procurement until the Tribunal determined the validity of the complaint. The Department was directed to submit its response to the complaint in a Government Institution Report (GIR). On July 18, 2000, the Department certified, in writing, that the procurement was urgent and that a delay in awarding the contract would be contrary to the public interest. Accordingly, on July 24, 2000, the Tribunal rescinded its postponement of award order of July 17, 2000.

On August 11, 2000, before the date set for receipt of the GIR, the Department filed a notice of motion with the Tribunal requesting that the complaint be dismissed because it dealt with an issue outside of

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. As signed at Ottawa, Ontario, 18 July 1994 [hereinafter AIT].
3. S.O.R./93-602 [hereinafter Regulations].

the Tribunal's jurisdiction. On September 8, 2000, the Tribunal dismissed the motion and issued its statement of reasons on October 12, 2000.

On October 4, 2000, the Department filed a GIR with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On October 18, 2000, K-Lor filed its response to the GIR. On October 31, 2000, the Department provided comments on K-Lor's response. On November 2, 2000, the Tribunal requested additional information from the parties. Both parties filed additional affidavits on November 8, 2000. On November 10, 2000, K-Lor filed final comments.

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 31, 2000, a Notice of Proposed Procurement (NPP) was posted on Canada's Electronic Tendering Service (MERX) with a closing date of June 22, 2000. The NPP stated that a mandatory site visit would be held at Argentia on June 14, 2000, and that the failure by a potential supplier to attend the mandatory site visit and to enclose a site visit certificate signed by an authorized representative of the Department with its bid would cause the tender to be considered non-compliant.

The Specifications, as part of the ITT, in the section "General Instructions", included the following :

PART 1 – GENERAL

...

1.5 Examination of site

.1 Prior to submitting tender Contractors are required to attend a mandatory site visit and make their own assessment of the conditions of the site, the facilities available in the area . . .

Note: Contractors are reminded that failure to attend the mandatory site visit and submit a signed copy of the mandatory site visit certificate by a PWGSC representative will constitute the bid as non-responsive and no further consideration will be given.

The Specifications also included a blank copy of the site visit certificate. The site visit certificate included the following note:

IMPORTANT: THIS CERTIFICATION FORM MUST BE SIGNED BY A PWGSC REPRESENTATIVE AND INCLUDED WITH YOUR BID

According to the GIR, in addition to the Specifications, each bidder received a bid package that included the tender forms, plans and a separate blank copy of the site visit certificate found in the Specifications.

The mandatory site visit was held in Argentia on June 14, 2000. K-Lor's representative attended the site visit and the site visit certificate was signed by a PWGSC official and returned to K-Lor's representative.

4. S.O.R./91-499 [hereinafter CITT Rules].

Seven bids, including a bid submitted by K-Lor, were received by the tender closing date by the Department's Bid Receiving Unit. K-Lor also faxed two amendments to its bid, both of which were received by the closing date. On June 22, 2000, at approximately 2:10 p.m., a public tender opening was conducted in the Department's regional office in St. John's, Newfoundland. The bidders' names, bid prices, including all bid amendments, and confirmation of bid security inclusion were read aloud to the attendees. Subsequently, the bidders' names and final bid prices were recorded on the Department's tender result line.⁵ Bidders were reminded during the public tender opening that "all bids are subject to audit". K-Lor submitted the lowest-priced bid.

On June 23, 2000, during the administrative audit of the proposals for the subject procurement, the contracting officer determined that the required site visit certificate was not in K-Lor's proposal. Accordingly, the Department determined that the K-Lor submission did not comply with the mandatory requirements of the tender and was, therefore, non-compliant. On June 28, 2000, the Department advised K-Lor by phone of its disqualification from the competition. In a letter, on July 7, 2000, the Department confirmed that K-Lor's bid was found non-responsive. On July 11, 2000, K-Lor filed a complaint with the Tribunal. On July 26, 2000, a contract in the amount of \$1,981,444 was awarded to Brownco Investments Inc.

POSITION OF PARTIES

Department's Position

The Department submitted that K-Lor's bid was properly disqualified from the solicitation at issue because it did not include the required site visit certificate. In the affidavit evidence presented with its submission, the Department detailed the handling of the K-Lor bid in the following manner.

The K-Lor tender, which was submitted in the afternoon of June 21, 2000, and its subsequent price amendments were received by the Department's Bid Receiving Unit and were securely retained in the unit until they were handed to the contracting officer on June 22, 2000, shortly after 2:00 p.m., the closing date and time of the ITT. The K-Lor bid remained sealed in its envelope until the public opening.

On June 22, 2000, at approximately 2:10 p.m., two contracting officers of the Department conducted the public tender opening. In addition to those two officials, two representatives from companies that had submitted bids were also in attendance. Each tender was opened from its sealed envelope, and the contents of each envelope were stapled with any amendments to their respective envelope. At the public tender opening, the only information read aloud and recorded by Department personnel were the names and addresses of the contractors, the bid prices, including any amendments, and the bid security. The contracting officer that conducted the bid opening informed the attendees that all tenders were subject to audit. After the public opening, all documents were delivered to a departmental procurement assistant who had possession of the documents until the afternoon of June 23, 2000. This person began the process of compiling a bid evaluation sheet for each bid and entering all tenders on a Schedule of Bid form. At the end of the day, all tenders were placed in a secure file cabinet to which she has the only key.

The procurement assistant completed her work on June 23, 2000, and, in the afternoon, delivered the tenders to the contracting officer who proceeded to perform an administrative review of each bid. The administrative review was conducted to ensure that the tender bid form was enclosed, signed and witnessed by an authorized representative of the bidder, that the bid security was in order and, in this case, that the site

5. The tender result line is a phone messaging system that permits bidders who have not attended the public tender opening to find out the names and bid prices for the tenders on that day.

visit certificate was enclosed. The contracting officer began his review with the lowest bidder, in this case, K-Lor, as is his usual practice. He found that K-Lor's bid security was present and in order, that its tender was properly signed, but that the site visit certificate was not enclosed with the bid. According to his affidavit, he checked the envelope and reviewed the bid, page by page, to see whether the certificate was present or referenced in any of the documents. Shortly after, he asked a second contracting officer to review K-Lor's bid. Again, no site visit certificate was found. The contracting officer continued the administrative review of the remaining bids. Once completed, all documents were locked in a cabinet.

On Monday, June 26, 2000, and on Wednesday June 28, 2000, up to four contracting personnel independently reviewed K-Lor's bid and confirmed that the site visit certificate was not present.

The Department submitted that K-Lor has presented no evidence to support its contention that the Department officials were negligent in their management of the tender so as to account for the absence of the site visit certificate. The Department also submitted that the absence of the site visit certificate from K-Lor's bid was a result of an unfortunate error or inadvertence solely attributable to K-Lor.

In its response to K-Lor's comments on the GIR, the Department further submitted that all bids received by the Department are held in a secure area until the stated tender opening time, in accordance with departmental policy.⁶ It submitted that there was no basis to accept K-Lor's speculation that its bid was sabotaged in the bid receiving unit or deliberately tampered with after its arrival at the Department. It reiterated that only two departmental contracting staff persons, as described in the affidavit submitted with the GIR, had possession of the bid documents, secured in locked cabinets when not being reviewed by them, up until the time when the administrative review was conducted and when it was discovered that the required site visit certificate was not included in the bid package.

At the Tribunal's request, the Department filed additional affidavits, addressing in detail the handling of K-Lor's bid in the period starting after the public tender opening to the moment when it was noticed that the site visit certificate was not included in the bid document. The Department submitted that the procurement assistant had exclusive possession of the tenders from the afternoon after the bid opening to the afternoon when the documents were given back to the contracting officer for his administrative review and that she did not alter the bid packages in any way. The Department described in an affidavit the extensive search undertaken to determine if the site visit certificate was, in fact, appended to the bid package, but perhaps misplaced on the file, or if it was inadvertently dropped from the bid package following the opening of K-Lor's envelope. The affidavits gave details of the search of the Department's files and offices for the "missing" site visit certificate.

K-Lor's Position

In its complaint, K-Lor submitted two affidavits from the General Manager and the Project Manager in which it is claimed that the site visit certificate was included in the bid documents sent to the Department in response to the ITT.

K-Lor submitted that there were unexplained gaps in the Department's chain of possession of the K-Lor bid documents, especially as it related to the whereabouts of the documents from the time they were received in the Bid Receiving Unit until the time they were provided to the responsible contracting officer for the public tender opening. It further submitted that the Department had not provided evidence of

6. Article 7D.315 of the *Supply Manual* reads: "Competitive bids, submitted to the bid receiving area, will be time and date stamped upon receipt, and kept unopened in a locked receptacle until after the closing time".

departmental standard operating procedures for the receipt and secure retention of bid documents. K-Lor also raised the possibility that bid envelopes may have been opened, the site visit certificate removed and then the envelope resealed. In concluding, K-Lor reiterated that the Department had the obligation to ensure the safekeeping of documents sent to it and to see that they were not deliberately or negligently misplaced.

At the Tribunal's request, K-Lor submitted an additional affidavit in relation to the circumstances surrounding the preparation of the bid tender package in general and the site visit certificate. In his affidavit evidence, the Project Manager states that K-Lor has a general procedure for the preparation of tender documents. It is submitted that the site visit certificate was photocopied and included in the original tender documents. The Project Manager claims that he placed the photocopy of the site visit certificate at the back of the tender package and that he stapled the documents together. He then placed the bid documents in an appropriately addressed envelope to be sent to the Department. In its last comments in response to the Department's reply to the Tribunal's request, K-Lor asserted that significant evidentiary gaps remain in the Department's submission relative to the handling of the bid documents.

TRIBUNAL'S DECISION

The Tribunal received extensive affidavit evidence from both parties setting out how they dealt with the bid package in respect of the ITT under consideration. Both parties also provided information with respect to their general practices and procedures for handling bid documents. K-Lor states that it submitted the site visit certificate in its bid package as required. The Department states that no site visit certificate was included in the complainant's bid package that it received and evaluated.

In order to initiate an inquiry, the Tribunal must decide whether "the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement has not been carried out in accordance with"⁷ the trade agreements. Following the initiation of an inquiry, the government entity must provide a report detailing how it conducted the procurement and responding to the allegations contained in the complaint.⁸

Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal shall, at the conclusion of an inquiry into a procurement complaint "...determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract, or the class of contracts to which it belongs, have been or are being observed".

More specifically, section 11 of the Regulations provides that the Tribunal "...shall determine whether the procurement was conducted in accordance with the requirements set out in whichever one of NAFTA, the Agreement on Internal Trade or the Agreement on Government Procurement applies".

Once all the relevant information and evidence respecting the complaint has been received, the Tribunal must, in deciding the validity of a complaint, determine whether the facts demonstrate that there has been a breach by the government entity of one of the trade agreements.

7. Paragraph 7(1)(c) of the Regulations.

8. Pursuant to Rule 103 of the CITT Rules, the government entity is required to provide a GIR not later than 25 days from the date of the filing of the complaint in which it provides the following information: 103(2) A report referred to in subrule (1) which contains a copy of the following: (a) the complaint; (b) the solicitation, including the specifications or portions thereof relevant to the complaint; (c) all other documents relevant to the complaint; (d) a statement that sets out all findings, actions and recommendations of the government institution and responds fully to all allegations of the complaint; and (e) any additional evidence or information that may be necessary in order to resolve the complaint.

In procurement complaints, the party alleging that a procurement has not been conducted in accordance with the applicable trade agreements must provide some proof to support that claim. This is not to say that the complainant in a procurement dispute under one of the agreements has the burden of proving all necessary facts as a plaintiff generally does in a civil case.⁹ The wording of both the CITT Act and the Regulations provides the architecture for the bid dispute mechanism, and it is obvious, having regard to those enactments, that procurement complaints before the Tribunal are different from civil actions. However, the complainant must provide sufficient facts or arguments to demonstrate a reasonable indication that a breach of one of the trade agreements has taken place. The wording of the CITT Act and Regulations also makes it clear that a burden rests on the government entity conducting the procurement to explain how it conducted the procurement process in order to demonstrate that no breach of the trade agreements took place. Put differently, the government entity will be expected to show that the procurement was conducted in accordance with the agreements. This expectation will be particularly important where, in cases such as this, the Department has specific, if not exclusive, knowledge about how it conducted itself in the procurement process from the time the bids were received until they were opened by Department officials. Given the nature of the allegations contained in the complaint, the Department, in this case, must show, as required by Articles 506(1) and 518 of the AIT, that the manner in which it treated the tenders received amounted to a fair, open and transparent procurement process.

Having carefully reviewed all the evidence and submissions provided, the Tribunal is satisfied that the bids were held in a secure location from the time they were received until they were opened by departmental officials in the presence of the representatives of two bidders. There is no reliable information that would lead the Tribunal to conclude that the K-Lor bid, or any other bid, was tampered with after it was received and before the time of bid opening. The Tribunal is also satisfied that departmental officials handled all bid documents at the bid opening in an appropriate manner by stapling them and any amendments together with their respective envelopes.

Moreover, the Tribunal is also satisfied that departmental officials appropriately secured those bid documents by ensuring that they were kept in a locked filing cabinet when they were not being reviewed by them. The evidence indicates that all bid documents were under the care and control of a departmental official at all times. That being said, the Tribunal is not convinced that the Department has to demonstrate, on a “minute-by-minute” basis, how the bid documents were treated. It is satisfied by the facts before it that departmental officials acted reasonably in handling and protecting the integrity of K-Lor’s bid package. Several departmental officials searched the files and workstations to ensure that the site visit certificate had not been overlooked or inadvertently misplaced. Further, the steps taken by the Department, after noticing the site visit certificate was not in the bid package, were sufficient in the circumstances.

The Tribunal is of the opinion that the Department acted in accordance with the provisions of the AIT, specifically Articles 506(1) and 518 throughout the procurement process. The Tribunal is not persuaded that the Department acted contrary to the AIT in declaring K-Lor’s bid non-responsive for failing to include the site visit certificate. The Tribunal is of the view that K-Lor’s bid was treated fairly by the Department throughout the procurement process.

9. J. Sopinka, S. Lederman and A. Bryant, *The Law of Evidence in Canada*, 2d. ed. (Toronto and Vancouver: Butterworths, 1998) at 79.

DETERMINATION OF THE TRIBUNAL

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

Richard Lafontaine

Richard Lafontaine

Presiding Member



Ottawa, Friday, March 9, 2001

File No.: PR-2000-023

IN THE MATTER OF a complaint filed by K-Lor Contractors Services Ltd. 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 rendered under section 30.14 of the *Canadian International Trade Tribunal Act*.

CORRIGENDUM

In the English version of the statement of reasons, the last paragraph should read: "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".

By order of the Tribunal,

Michel P. Granger
Secretary