

Ottawa, Wednesday, August 1, 2001

File No. PR-2000-077

IN THE MATTER OF a complaint filed by Volvo Motor Graders 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 valid.

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

Pierre Gosselin  
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Pierre Gosselin  
Presiding Member

Michel P. Granger  
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Michel P. Granger  
Secretary

Date of Determination and Reasons: August 1, 2001

Tribunal Member: Pierre Gosselin, Presiding Member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Philippe Cellard

Complainant: Volvo Motor Graders Limited

Government Institution: Department of Public Works and Government Services

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

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## STATEMENT OF REASONS

### COMPLAINT

On March 23, 2001, the Canadian International Trade Tribunal (the Tribunal) received a complaint from Volvo Motor Graders Limited (Volvo) concerning Solicitation No. 5P435-000179/A for the purchase by the Department of Public Works and Government Services (the Department) of a motor road grader complete with a rear ripper and a front push plate for the Parks Canada Highway Service Centre<sup>1</sup> for delivery to Kootenay National Park, Radium Hot Springs, British Columbia.

Volvo alleged that, although a valid standing offer was in place for motor road graders, Parks Canada and the Department conducted a separate procurement using restrictive specifications written around a Caterpillar motor road grader, model 14G. In addition, Volvo alleged that insufficient time was afforded to potential suppliers to bid properly.

Volvo requested, as a remedy, that the solicitation be reissued with competitive specifications and reasonable delivery dates. Volvo also indicated that it was expecting that any relevant standing offer in place at the time would receive due consideration in reconducting this procurement.

On April 6, 2001, the Tribunal informed the parties that the complaint had been accepted for inquiry, in part, as it met the requirements of subsection 30.11(2) of the *Canadian International Trade Tribunal Act*<sup>2</sup> and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>3</sup> The Tribunal indicated that it would inquire on the ground of complaint concerning Volvo's allegation that the solicitation did not provide sufficient time to allow for a proper bidding process to take place. The Tribunal also informed the parties that it would not inquire into Volvo's allegation that the specifications set out in the solicitation documents were restrictive because Volvo had failed to provide the relevant supplementary information requested by the Tribunal within the requested time frame. The Tribunal also stated that the ground of complaint concerning the alleged valid standing offer in place for motor graders did not disclose a reasonable indication that the solicitation had not been carried out in accordance with the applicable trade agreements. That same day, the Tribunal issued an order

1. The Parks Canada Highway Service Centre is responsible for the maintenance and upkeep of all roads in Canada's national parks in Alberta and British Columbia, including those in the Mount Revelstoke/Glacier National Park and Yoho/Kootenay National Park areas. Two offices of Parks Canada are mentioned in this decision: the requisitioning office, hereinafter Parks Canada (Revelstoke), and another office, hereinafter Parks Canada (Kootenay).
2. R.S.C. 1985 (4th Supp.), c.47 (hereinafter CITT Act).
3. S.O.R./93-602 [hereinafter Regulations].

postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. On April 10, 2001, the Department informed the Tribunal that a contract for a grader in the amount of \$381,783.49 (GST included) had been awarded to Finning (Canada) (Finning) on March 15, 2001, and that the goods had been delivered. Accordingly, on April 10, 2001, the Tribunal issued an order rescinding its postponement of award order of April 6, 2001. On May 4, 2001, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> On May 23, 2001, Volvo filed comments on the GIR with the Tribunal. On June 5, 2001, the Tribunal wrote to the Department to obtain additional information with respect to the actions that Parks Canada officials had undertaken to rent a grader as a temporary replacement for the damaged grader. On June 11, 2001, the Department filed the additional information with the Tribunal and, on June 13, 2001, Volvo filed comments in response.

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 6, 2001, the motor road grader in use by Parks Canada (Kootenay) on Highway 93 South was involved in a serious motor vehicle accident. On February 7, 2001, Parks Canada (Revelstoke) verified whether the standing offer with Finning for the rental of heavy equipment was still in place. On February 8, 2001, Parks Canada (Revelstoke) contacted Finning to determine if there were any graders complete with a snow wing available within the rental fleet for immediate delivery. On February 9, 2001, Finning advised that there was a 14H grader available, but that it would take some two to four weeks to install a snow wing. On the same occasion, Finning informed Parks Canada (Revelstoke) that it had already made arrangements with Parks Canada to test a six-wheel drive grader in the Mount Revelstoke/Glacier National Park area. In addition, Finning indicated that the test grader was to be delivered within two weeks and that testing would last approximately six weeks. On or about that date, a decision was made by officials of the Highway Service Centre to re-allocate a grader from the Rogers Pass in Glacier National Park area to Highway 93 South (Kootenay National Park) as a temporary measure. According to the GIR, this interim measure compromised the Rogers Pass's area road maintenance requirements and, as a result, Parks Canada decided to initiate a process to purchase a new grader.<sup>5</sup>

On February 20, 2001, the damaged grader was declared not salvageable by the insurance adjusters. On February 22, 2001, Parks Canada (Revelstoke) sent a requisition to the Department for the acquisition of a new grader. That same day, Parks Canada (Revelstoke) forwarded to the Department a rationale in support of the acquisition. The rationale reads, in part: "This [grader] was in use for winter maintenance of a Class 2 highway in a high elevation, mountainous area. Replacement of the machine is critical to ensure service to the travelling public, particularly in view of the winter season and our responsibility for health and safety of highway users." On February 23, 2001, a Notice of Proposed Procurement (NPP) and a Request for Proposal (RFP) for this procurement were forwarded electronically to Canada's Electronic Tendering Service provider (MERX). The documents were posted on MERX on March 2, 2001. The closing date for the receipt of bids was March 13, 2001. The delivery date was March 31, 2001. The NPP indicated that the

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4. S.O.R./91-499.

5. According to the GIR, Parks Canada's officials were not aware that a National Master Standing Offer for the supply of graders was in force.

solicitation was covered by the *North American Free Trade Agreement*,<sup>6</sup> the *Agreement on Government Procurement*<sup>7</sup> and the *Agreement on Internal Trade*.<sup>8</sup>

During the solicitation period, three suppliers, including a representative of Volvo, accessed the solicitation documents. According to MERX's documents, two suppliers downloaded the RFP on March 2 and 3, 2001, and Volvo's representative did likewise on March 13, 2001, the date of bid closing. Two proposals were received by bid closing, including one from Volvo. Volvo's proposal was evaluated as nonresponsive for failing to meet certain mandatory requirements, including the delivery requirement commitment. On March 15, 2001, a contract was awarded to Finning and delivery was made before March 31, 2001.

## POSITION OF PARTIES

### Department's Position

The Department submitted that the facts of this case clearly substantiate that it was necessary for Parks Canada to acquire a motor road grader on an urgent basis. The Department submitted that the solicitation process necessarily had to be conducted as quickly as possible, requiring that all time periods, including tendering and delivery time periods, be as short as reasonably possible.

The Department submitted that the application of an 11-day bidding period in the circumstances is consistent with Articles 1012(2)(a) and 1012(3)(c) of NAFTA and Articles XI(2)(a) and XI(3)(c) of the AGP. The Department further submitted that the 11-day period is also consistent with the requirements of Article 506(5) of the AIT. It also submitted that the facts clearly substantiate the existence of "a state of urgency", which rendered impracticable the 40-day period prescribed by NAFTA and the AGP.

The Department argued that the evidence does not substantiate Volvo's allegation that "the solicitation was not in circulation with sufficient time to allow a proper bidding process to take place". To the contrary, the Department added, a proper competitive solicitation was conducted. Two proposals, including one from Volvo, were received and evaluated in accordance with the criteria and evaluation methodology set out in the RFP, and a contract was awarded and executed.

The Department requested the opportunity to make further submissions with respect to the issue of the award of costs in this matter.

### Volvo's Position

Volvo disputed the Department's assertion in the GIR that no suitable grader was immediately available on the rental market. Having researched the matter, Volvo asserted that there were, in fact, suitable graders immediately available on the rental market, namely, Champion models 730, 740 and 750, from the same company that initially appraised the machine that was damaged, i.e. Wajax Industries Limited (Wajax). Volvo submitted that, although it recognized that a state of urgency existed, the fact that rental units were available diminished the urgency for the replacement.

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6. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

7. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [hereinafter AGP].

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].

In its response to the additional information filed by the Department with the Tribunal on June 11, 2001, Volvo submitted that, if in fact no machine was available from Finning for rental, further investigations of other suppliers would have identified a machine to fill Parks Canada's need in a timely manner.

## TRIBUNAL'S DECISION

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations 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 applicable trade agreements, which, in this instance, comprises NAFTA, the AGP and the AIT.

Article 1012(2)(a) of NAFTA provides, in part, that "an entity shall provide that: (a) in open tendering procedures, the period for the receipt of tenders is no less than 40 days from the date of publication of a notice [of proposed procurement] in accordance with Article 1010". Article 1012(3)(c) provides, in part, that, where a state of urgency duly substantiated by an entity renders impracticable the period of time set out in Article 1012(2)(a) in which to receive tenders, the period may be reduced to no less than 10 days from the date of publication of a notice in accordance with Article 1010.

It is clear from the above provisions that the Department had to duly substantiate a state of urgency that rendered impracticable the 40-day period to receive tenders before it could reduce the length of the said period to 11 days. The Tribunal finds that, while Parks Canada (Kootenay) had an urgent requirement for a replacement grader, this requirement did not render impracticable the minimum 40-day period prescribed to receive tenders. Therefore, the Department used Article 1012(3)(c) of NAFTA to conduct this procurement without meeting its requirements. This is a breach of the trade agreement.

On February 6, 2001, the grader used by Parks Canada (Kootenay) on Highway 93 South was seriously damaged in a road vehicle accident. For the health and safety of the travelling public, the grader had to be replaced on an urgent basis. The parties agree on this point. Furthermore, on or about February 10, 2001, the Parks Canada Highway Service Centre knew two important facts: (1) a fully fitted grader could be made available within two to four weeks on a rental basis from Finning; and (2) an acceptable grader could be provided within two weeks on a loan basis from the Mount Revelstoke/Glacier National Park area for a period of approximately six weeks.

In light of the above, in the Tribunal's opinion, the availability of a grader on loan resolved the urgency until it had to be returned to the Glacier National Park toward the end of March or the beginning of April 2001. By then, it would have been possible for Parks Canada to obtain a fully fitted grader from Finning on a rental basis. In addition, Volvo has asserted that various models of Champion graders were available for lease from Wajax. Either of these approaches would have permitted the conduct of a proper procurement process that would have included the prescribed 40-day period for the receipt of tenders. Therefore, in the Tribunal's view, the state of urgency did not render impracticable a 40-day period to receive tenders. Consequently, Article 1012(2)(a) of NAFTA, which prescribes that period, has been breached. Given the conclusion that NAFTA has been breached, it is not necessary for the Tribunal to determine whether the AIT and the AGP have also been breached.

With respect to remedy, Volvo requested that the solicitation be reissued with competitive specifications and reasonable delivery dates. Volvo also indicated that it was expecting that any relevant standing offer in place at the time would receive due consideration in reconducting this procurement. As indicated earlier, the Tribunal accepted the complaint, in part, judging that the portion of the complaint having to do with the restrictive nature of the specifications was out of time. As such, the Tribunal did not inquire into the matter of the alleged restrictive specifications. Volvo did not demonstrate that it could have submitted a proposal compliant with the specifications set out in the solicitation. Therefore, the Tribunal will not award Volvo monetary compensation for lost profits. With respect to costs, the Tribunal, pursuant to section 30.16 of the CITT Act, awards Volvo its reasonable costs incurred in filing and proceeding with the complaint.

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

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

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

Pierre Gosselin  
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Presiding Member