

Ottawa, Wednesday, November 28, 2001

File No. PR-2001-027

IN THE MATTER OF a complaint filed by PTI Services 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 subsections 30.15(2) and 30.15(3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services not exercise the options under the current contract and that it tender a new solicitation for the contract period from June 15 to August 27, 2002, with at least one subsequent option year. In addition, the Canadian International Trade Tribunal recommends that PTI Services be compensated one quarter of the profit that it would have made under the contract for the period from June 15 to August 27, 2001.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards PTI Services its reasonable costs incurred in relation to preparing and proceeding with the complaint.

Ellen Fry

Ellen Fry

Presiding Member

Michel P. Granger

Michel P. Granger

Secretary

Date of Determination and Reasons: November 28, 2001

Tribunal Member: Ellen Fry, Presiding Member

Investigation Manager: Paule Couët

Counsel for the Tribunal: John Dodsworth

Complainant: PTI Services

Government Institution: Department of Public Works and Government Services

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

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STATEMENT OF REASONS

COMPLAINT

On September 25, 2001, PTI Services (PTI) 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 a procurement (Solicitation No. E0209-000104/A) by the Department of Public Works and Government Services (PWGSC) for the supply of food and food services for the Rocky Mountain National Army Cadet Summer Training Centre located near Cochrane, Alberta.

PTI alleges that its proposal was incorrectly and unfairly evaluated with respect to the requirements for a kitchen supervisor, a resident manager and corporate experience. As a result, PTI claims that it lost the contract to another company.

As a remedy, PTI requests that its bid be re-evaluated and seeks compensation for loss of profit for the current year of the contract and the two option years.

On September 28, 2001, 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 October 23, 2001, PWGSC filed a letter with the Tribunal that it stated was in lieu of the Government Institution Report required by rule 103 of the *Canadian International Trade Tribunal Rules*.³ On October 31, 2001, PTI filed comments on PWGSC's letter 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 March 14, 2001, a Notice of Proposed Procurement and a Request for Proposal (RFP) were issued. They were posted on Canada's Electronic Tendering Service (MERX) on March 20, 2001, with a closing date of May 2, 2001. Four proposals were received, including one from PTI. All bids were found to

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.

be compliant. Travers Food Service Ltd. received the highest number of points in accordance with the evaluation criteria. On May 25, 2001, it was awarded the contract for a total of \$237,665.19 (GST included).

The following provisions of the RFP are relevant to this matter:

Evaluation Criteria

...

- | | |
|--|---------------|
| 2. Experience of Personnel Assigned: | Max 20 points |
| • Resident Manager; | 10 |
| • Kitchen Supervisor; | 10 |
| 3. Experience with previous DND Catering Contracts: | Max 10 points |

...

Contractor Selection

Any Contract resulting from this solicitation will be awarded to the responsive bidder that scores the highest number of points in accordance with the evaluation criteria as set out in the "Food and Food Services Contract" specifications attached.

The following provisions of the "Food and Food Services Specification" (the Specification) are also relevant:

CLAUSE 1 – BASIC REQUIREMENTS CLAUSE

1. The following basic qualification criteria shall be met by bidders for all DND catering contracts:
...
 - c. The catering firm shall employ a resident manager who has a minimum of four years successful experience in a similar appointment. Formal training may be treated as experience equivalents if title of courses taken, number of hours of theoretical and practical instruction for every course and the name of the institution are specified;
 - d. the catering firm shall employ one kitchen supervisor (formerly Executive Chief) for each kitchen to be operated. The kitchen supervisor shall have three years experience in a similar appointment and shall hold cook journeyman papers or shall have at least five years experience as a kitchen supervisor in an operation of similar size;

...

CLAUSE 2 – REVIEW OF BIDS CLAUSE

...

3. Proposals will be evaluated on the basis of their content with respect to the basic qualifying criteria identified in para 1 above. In addition, the evaluators shall take into account [bidders'] previous experience with regard to DND catering contracts.

POSITION OF PARTIES

PWGSC's Position

In its letter of October 23, 2001, to the Tribunal, PWGSC admitted that the "Evaluation Criteria" section of the RFP was ambiguous with regard to the use of its point rating to evaluate the mandatory requirements set out in paragraphs 1.c. and 1.d. of the Specification. According to that letter, a rating guide was developed prior to the commencement of the evaluation of the proposals for the purposes of evaluating the experience of the resident manager and kitchen supervisor. PWGSC admitted that the specific criteria set

out in the rating guide expanded upon the evaluation criteria contained in the RFP and the requirements set out in the Specification. Consequently, in view of the concerns raised with regard to the evaluation criteria contained in the solicitation at issue, PWGSC indicated that it had decided not to exercise the option years under the current contract. Rather, PWGSC indicated that it would commence a new solicitation for the contract period from June 15 to August 27, 2002, with two subsequent option years.

PWGSC submitted that, under the circumstances, PTI was not entitled to lost profits because it was not clear that PTI ought to have been awarded the contract. PWGSC submitted that it was not possible to make such a determination based on the criteria contained in the solicitation at issue. However, PWGSC submitted that, if the Tribunal determines that PTI should be compensated for loss of opportunity, it should be established by the Tribunal as one-in-four opportunity as per the Tribunal's *Procurement Compensation Guidelines*.

PTI's Position

In its reply to PWGSC's letter, PTI acknowledged PWGSC's response that the evaluation process was done incorrectly. PTI submitted that, had the evaluation process been handled properly, PTI's score for technical evaluation would have been near perfect and, as a result, PTI would have been awarded the contract. PTI reiterated that it was seeking compensation for one year's loss of profit, as well as administrative costs incurred in filing its complaint.

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 requirements of the *Agreement on Internal Trade*.⁴

Article 506(6) of the AIT provides that 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.

In this instance, PWGSC admitted that the point rating used to evaluate the various mandatory requirements relating to the personnel and corporate experience, as specified in the RFP, was ambiguous. It further submitted that the specific criteria, as set out in the rating guide, expanded upon the evaluation criteria contained in the RFP. The Tribunal accepts PWGSC's submission in this regard and, on this basis, finds that PWGSC has failed to apply the provisions of Article 506(6) of the AIT, in that it failed to identify clearly the criteria to be used in the evaluation of the proposals.

In determining the most appropriate remedy, the Tribunal will, to the greatest extent possible, attempt to put PTI in the position in which it would have been, but for PWGSC's breach of the AIT. The contract has already been awarded, and the initial time period of the contract has passed. In the circumstances, the Tribunal will not order that the contract be terminated.

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].

With respect to compensation, it is clear to the Tribunal that PWGSC's failure to clearly identify, in the RFP, the criteria to be used in the evaluation of proposals had a negative impact on the evaluation of PTI's proposal. Consequently, PTI was denied an opportunity to be successful in competing for this requirement, to be awarded the contract and to profit therefrom. However, the Tribunal cannot determine whether PTI would have won the contract, but for the breach by PWGSC. In these circumstances, the Tribunal will recommend compensation for loss of opportunity. In this regard, the record shows that four bids were received in response to this solicitation, including that of PTI, and that all were found by PWGSC to be compliant. On this basis, the Tribunal is of the opinion that an appropriate compensation for loss of opportunity would be one fourth of the profit that PTI would have made, had it been awarded the contract, for the initial period of the contract, i.e. for the period from June 15 to August 27, 2001.

DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and 30.15(3) of the CITT Act, the Tribunal recommends, as a remedy, that PTI be compensated one quarter of the profit that it would have made under the contract for the period from June 15 to August 27, 2001. In addition, the Tribunal recommends that PWGSC not exercise the options under the current contract and tender a new solicitation for the contract period from June 15 to August 27, 2002, with at least one subsequent option year.

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

Ellen Fry
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Presiding Member