



Ottawa, Monday, July 15, 2002

File No. PR-2002-005

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

AND FURTHER TO 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 (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of National Defence accept SPMgroup Ltd.'s bid for evaluation. However, the Canadian International Trade Tribunal directs SPMgroup Ltd., in re-sending its bid, to provide some formal assurance that no changes or modifications have been made to the original bid documents that it submitted to the Department of National Defence. The Canadian International Trade Tribunal requests that this be done by the appropriate executive of SPMgroup Ltd. by means of an affidavit.

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

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: July 15, 2002

Tribunal Member: Richard Lafontaine, Presiding Member

Investigation Officer: Cathy Turner

Counsel for the Tribunal: Lynne Soublière

Complainant: SPMgroup Ltd.

Government Institution: Department of National Defence

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STATEMENT OF REASONS

COMPLAINT

On April 15, 2002, SPMgroup Ltd. (SPM) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerns the procurement (Solicitation No. DND 2002/0063) by the Department of National Defence (DND) for the delivery of a generic project-management course.

SPM alleged that DND improperly rejected its proposal on the basis that the proposal was delivered by Purolator, a Canada Post-owned company.

SPM requested, as a remedy, that its proposal be accepted for consideration by DND. It also requested that the requirements for the submission of proposals be clarified for future solicitations.

On April 23, 2002, 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 That same day, the Tribunal issued an order postponing the award of any contract in relation to the solicitation until the Tribunal determined the validity of the complaint. On May 17, 2002, DND filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On May 30, 2002, SPM filed its comments on 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.

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.

PROCUREMENT PROCESS

On February 11, 2002, DND posted the Notice of Proposed Procurement (NPP) on MERX⁴ for the provision of Generic Project Management Training to DND. The Request for Proposal (RFP) includes the following provisions that are relevant to this case:

5. Proposals **MUST BE** mailed via Canada Post must be POST MARKED on or before the closing date of 21 March 2002. The mailing address^[5] is:

Directorate of Contracting Policy 3
10 CBN
Department of National Defence
MGen George R. Pearkes Building
101 Colonel By Drive
Ottawa ON K1A 0K2

8. Questions concerning the content of this Request for Proposals must be submitted in writing to the above address or by fax to (613) 992-1463 or by e-mail fisher.nj@forces.ca. Responses to questions will only be provided in writing as amendments/updates to the RFP and distributed to everyone in receipt of a bid package by the MERX Distribution Unit. **Questions must be submitted by 7 March 2002.**

SPM ordered the RFP from MERX on February 15 and 18, 2002. On March 7, 2002, it submitted questions in accordance with the instructions outlined in paragraph 8 of the RFP. Five firms submitted proposals. All the proposals, with the exception of SPM's proposal, were mailed via Canada Post and were postmarked on or before March 21, 2002. SPM's proposal was delivered by Purolator. On April 2, 2002, DND sent SPM a facsimile, which, in part, stated:

I regret to inform you that given that your proposal was sent by courier vice Canada Post, and it cannot be accepted. (The box containing your proposal will be returned to you under separate cover.)

POSITION OF PARTIES

DND's Position

DND submitted that the onus is on the bidder to ensure that the bid is delivered in accordance with the RFP to the location designated by the Contracting Authority. The location designated in the RFP is a mailing address, as DND has not had a bid drop-off unit since September 11, 2001. DND submitted that the RFP did not state that the proposals had to be received by DC Pol by the closing date, but simply that they had to be "POST MARKED" on or before the closing date.

4. Canada's Electronic Tendering Service.

5. Prior to September 11, 2001, bidders were given an option with respect to the submission of their proposals. They could either submit the proposal by mail (which would be deemed timely if postmarked the day prior to closing date) or delivered and received at the Directorate of Contracting Policy (DC Pol) bid drop-off unit before 14:00 hours EST on the closing date. This unit was responsible for dating, time stamping and receiving incoming bids. Due to security reasons, the latter option was discontinued after September 11, 2001, and the use of mail services via Canada Post was made mandatory.

DND submitted that the *Canada Post Corporation Act*⁶ definition of “mail” is “deliverable matter from the time it is posted to the time it is delivered to the addressee”;⁷ “mail conveyance” is “any physical, electronic, optical or other means used to transmit mail”; “mailable matter” is “any message, information, funds or goods that may be transmitted by post”; and “transmit by post” is “to transmit through or by means of the Corporation”.

DND submitted that the instructions contained in the RFP for submitting proposals are not ambiguous, as alleged by SPM, and that all the other bidders complied with the instructions when responding to the RFP.

DND argued that SPM chose not to ask DND for any clarification on the mail delivery options and not to clarify the proposal submission instructions when it submitted questions regarding the contents of the RFP. Instead, SPM sought advice from Canada Post.

DND submitted that Canada Post’s ownership of Purolator, and the availability of Purolator services at Canada Post outlets, does not mean that Purolator provides Canada Post mail services or has the legal right to do so.

DND further submitted that SPM’s proposal cannot and should not be accepted because SPM failed to understand the submission instructions or because the instructions in the RFP were different from previous or regular requirements. It submitted that bidders must treat all solicitations as independent. The express terms of the RFP for a particular solicitation govern that solicitation.

DND submitted that acceptance of SPM’s proposal would be unfair to the other bidders who complied with the mandatory instructions governing the submission of proposals. Furthermore, it submitted that there is no way to ensure that SPM’s bid has not been modified since bid closing.

DND requested its complaint costs.

SPM’s Position

SPM noted that DND eliminated the courier drop-off unit because of the events of September 11, 2001. It submitted that, given this change in practice, DND had to ensure that the method of delivery of bids was stated explicitly and without ambiguity in the RFP, including, as appropriate, the exclusion of courier services offered by Canada Post or any other kind of courier services. SPM submitted that this was not done and, therefore, constitutes a breach of Article 506(6) of the *Agreement on Internal Trade*⁸ and Article 1013(1) of the *North American Free Trade Agreement*.⁹

SPM submitted that DND’s line of reasoning based on the definitions of the CPC Act are irrelevant since the CPC Act has no bearing on this RFP and it is not appropriate to refer to the specific technical definitions of the CPC Act in interpreting the RFP. It further submitted that the terms of the RFP must be interpreted based on their common meaning and usage.

6. R.S.C. 1985, c. C-10, as amended [hereinafter CPC Act].

7. In fact, “mail” is defined in the CPC Act as “**mailable** matter from the time it is posted to the time it is delivered to the addressee **thereof**.”

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

9. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

SPM submitted that, in any event, since Purolator is offered as a service by Canada Post through Canada Post offices, this constitutes transmission “through or by means of” Canada Post. It added that, likewise, the definition of “mail conveyance” — “any physical, electronic, optical or other means used to transmit mail” — is broad enough to include any delivery service offered by Canada Post, including Purolator.

SPM submitted that it interpreted the RFP’s requirement that “proposals **MUST BE** mailed via Canada Post” to include the use of Purolator, a service owned and offered by Canada Post, through Canada Post outlets, by Canada Post employees or representatives. This, SPM submitted, was a reasonable interpretation of the RFP. SPM also submitted that Purolator timestamps and obtains a signature when the delivery is picked up and is signed and accepted by the client. This digital record, it submitted, constitutes a postmark. SPM further submitted that the material was delivered to, and signed for, at the correct address prior to the closing date specified in the RFP.

SPM submitted that the fact that other bidders chose a different Canada Post service to deliver their proposals does not affect in any way the reasonableness of its interpretation of the RFP, based on the ordinary meaning and usage of the terms.

SPM submitted that it did not raise the delivery issue in its pre-closing questions because it believed that it understood the delivery terms and that its interpretation was reasonable. Furthermore, it submitted that the Purolator option was provided to it only when it went to ship its proposal, a period of time obviously too late to submit questions to DND.

Therefore, SPM submitted that its bid was unjustifiably rejected, contrary to the provisions of the AIT and NAFTA.

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, are NAFTA and the AIT.

Article 506(6) of the AIT 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.”

Article 1013(1) of NAFTA stipulates, in part, that “[w]here an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders, including information required to be published in the notice referred to in Article 1010(2), except for the information required under Article 1010(2)(h).”

Article 1015(4)(a) of NAFTA stipulates, in part, that “to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation.”

The issue before the Tribunal in this case is whether SPM mailed its proposal via Canada Post as required by paragraph 5 of the RFP.

SPM indicated that, pursuant to the instructions of the RFP pertaining to the submission of proposals, it investigated mail delivery options at Canada Post, which recommended the use of Purolator. It also stated, in its complaint, that all mail delivery options at Canada Post offices include Purolator.

In this regard, DND responded in its letter of April 5, 2002, that, although Purolator may in fact be owned by Canada Post, it is a “courier” or “shipping service” and not a “mail” service. In the GIR, DND indicated that the CPC Act makes no reference to Purolator as a “mail service” nor does the Canada Post Web site for deliveries in Canada. However, it submitted that the Web site advertises “Xpresspost” as an option for rush mail and “Priority Courier” as an option for next day courier service. Finally, DND argued, the retail sale by Canada Post of another company’s courier services does not transform those services in “mail” within the meaning of the CPC Act.

DND also indicated in the GIR that, prior to September 11, 2001, bidders were given an option to either submit their proposal by mail to DC Pol 3 and postmarked at least one day prior to closing, or have it delivered and received at the DC Pol bid drop-off unit by 14:00 hours on the closing date. As a result of September 11, 2001, it was decided to disallow the couriers access to the building, remove the drop-off option and, as the best alternative, make mandatory the use of “mail” services via Canada Post. The receipt by mail had the added advantage of ensuring that the incoming mail was X-rayed for potential chemical/biological threats.

Given that the RFP does not refer to or incorporate by reference the CPC Act, the Tribunal is of the view that it should first and foremost rely on the ordinary meaning and usage of the terms used in the RFP.

The verb “mail” is defined in *The Canadian Oxford Dictionary*¹⁰ as “send (a letter etc.) through the postal service.” The term “postal system” is one of the meanings attributed to the noun “mail”. Additionally, the following meanings are given to the preposition “via”: “by way of; through”; “by means of; with the aid of”.

The Tribunal notes that DND submitted that the Canada Post Web site made no reference to Purolator deliveries in Canada. However, in its reply submissions to the GIR, SPM provided evidence that Canada Post outlets advertise Purolator delivery services in Canada.

In light of the foregoing, the Tribunal is of the view that the stipulation in paragraph 5 of the RFP to have the submissions “mailed via Canada Post” could reasonably be interpreted to mean that they be sent by using the services offered by Canada Post. Therefore, it would also be reasonable, in the Tribunal’s view, to conclude that the postal service offered by Canada Post includes courier services provided by its related entity, Purolator, and that Purolator is part of the postal system, particularly given that these services, together with Xpresspost and Priority Courier, are advertised and offered in Canada Post outlets.

Moreover, the Tribunal is of the view that these conclusions are not inconsistent with the definitions of the CPC Act. Specifically, it notes that the phrase “transmit by post” is defined as “to transmit through or by means of the Corporation”. The Tribunal is of the view that this can be broadly interpreted to include Canada Post and the entities for which it either acts as agent or that are otherwise part of the range of

10. Oxford University Press, 1998.

services that Canada Post offers. Clearly, SPM's proposal was submitted "through or by means of" Canada Post in that it availed itself of the services provided by Canada Post.

As for the background explanation provided in the GIR by DND to support its submissions regarding the requirement that proposals be mailed via Canada Post, the Tribunal is of the view that this explanation is of no assistance to DND's position in that it was not indicated in the RFP documents. Furthermore, the Tribunal is not convinced that SPM should have sought clarification in respect of the RFP requirement to have proposals mailed via Canada Post in light of SPM's admission that it found the instructions regarding the submission of proposals different from past or regular requirements. SPM did not indicate that it believed the instructions to be ambiguous; it simply found them to be different.

Accordingly, the Tribunal finds that DND improperly applied the mandatory requirement in paragraph 5 of the RFP stating that proposals be mailed via Canada Post and incorrectly rejected SPM's proposal, contrary to Article 506(6) of the AIT and Article 1015(4)(a) of NAFTA. Therefore, the Tribunal finds that the complaint is valid.

With respect to the relief requested by SPM, the Tribunal notes the submissions made by DND and SPM in this regard. The Tribunal is of the view that paragraph 21 of SPM's reply to the GIR is ambiguous as to when SPM received the bid proposal material from DND. However, the Tribunal also notes that Article 1015(2) of NAFTA stipulates that a supplier may not be penalized for the late arrival of its bid if the delay is due solely to mishandling on the part of the government entity.

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 NAFTA and that the complaint is therefore valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that DND accept SPM's bid for evaluation. However, the Tribunal directs SPM, in re-sending its bid, to provide some formal assurance that no changes or modifications have been made to the original bid documents that it submitted to DND. The Tribunal requests that this be done by the appropriate executive of SPM by means of an affidavit.

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

Richard Lafontaine
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Presiding Member