



Ottawa, Thursday, May 23, 2002

File No. PR-2001-063

IN THE MATTER OF a complaint filed by Service Star Building Cleaning Inc. 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 not valid.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination: May 23, 2002
Date of Reasons: June 7, 2002

Tribunal Member: Zdenek Kvarda, Presiding Member

Investigation Manager: Paule Couët

Counsel for the Tribunal: Clarissa Lewis

Complainant: Service Star Building Cleaning Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Ian McLeod



Ottawa, Friday, June 7, 2002

File No. PR-2001-063

IN THE MATTER OF a complaint filed by Service Star Building Cleaning Inc. 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*.

STATEMENT OF REASONS

COMPLAINT

On February 18, 2002, Service Star Building Cleaning Inc. (Service Star) 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 (Solicitation No. 31184-010894/A) of janitorial services by the Department of Public Works and Government Services (PWGSC) on behalf of the National Research Council of Canada (NRC).

Service Star alleged that PWGSC improperly awarded the contract, contrary to the provisions of the tender documents. Specifically, it alleged that PWGSC had all the bids re-evaluated by a second team of evaluators, contrary to the provisions of the Request for Proposal (RFP) and the requirements to re-tender. The re-evaluation took place because all bids were initially declared non-responsive; all had failed to meet one or both of the 75 percent overall threshold and the 60 percent threshold for each criterion. Service Star further alleged: that the re-evaluation was done using criteria other than those set out in the RFP, that the team conducting the re-evaluation was aware of the pricing information contained in the proposals, that the re-evaluation was done on the basis of information other than that provided in the proposals, and that the successful bidder was given an opportunity to amend its bid price.

Service Star requested that the Tribunal recommend that it be awarded \$650,000, representing the loss of profit (10 percent of the contract price) for the five-year term of the contract, or, in the alternative, that PWGSC terminate and re-tender the existing contract and award Service Star 10 percent of the contract price until the contract is re-awarded. In addition, it requested that it be awarded its costs incurred in relation to preparing and filing the complaint.

On February 26, 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

On March 26, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On April 10, 2002, Service Star filed comments on the GIR with the Tribunal. On April 19, 2002, the Tribunal requested additional

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.

information from PWGSC. On April 25, 2002, PWGSC responded to the Tribunal's request. Service Star provided comments on that additional information on April 30, 2002.

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

According to the GIR, the RFP was issued on January 10, 2001, and posted on MERX⁴ on January 19, 2001. By amendment, the bid closing date was extended from March 30, 2001, to April 11, 2001. A total of three amendments were issued during the bid solicitation period. Five proposals were submitted in response to the RFP.

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

4.1 Evaluation Process

The evaluation process has three (3) phases, as described in the following sections.

4.1.1 Phase 1 - Mandatory Criteria

Only proposals found to meet ALL the mandatory requirements will be deemed acceptable proposals and will be further evaluated in accordance with the evaluation criteria subject to point rating.

4.1.2 Phase 2 - Rated Technical Proposal

Overall Threshold

A proposal receiving less than 75% of the available total score (100) will be deemed non-responsive and will be given no further consideration.

PWGSC Evaluation Board will not consider the Financial Proposals prior to the completion of Phase 2.

4.1.3 Phase 3 – Basis of Selection

To be considered responsive, a proposal must:

- (a) meet all mandatory requirements of this solicitation; and
- (b) obtain the required minimum of 60 percent of the available score for each technical criterion (4.2.1 to 4.2.6); and
- (c) obtain the required minimum of 75 percent of the available total score.

Proposals not meeting (a), (b) and (c) above will be given no further consideration. The lowest priced responsive bid will be recommended for award of a contract.

One of the proposals was found non-compliant with the mandatory requirements and was therefore given no further consideration. On April 25, 2001, the four remaining proposals were provided to the technical evaluation team.⁵ On June 4, 2001, following the technical evaluation, all four proposals failed to meet one or both of the minimum thresholds set out in the RFP. Specifically, the scores assigned to Service Star and Domus Building Cleaning Company Limited (Domus) failed to meet the overall 75 percent threshold. On June 6, 2001, given that the scores awarded by the technical evaluation team rendered all the bids non-responsive, the procurement officer prepared a Request for Re-tender. On June 8, 2001, the

4. Canada's Electronic Tendering Service.

5. The technical evaluation team was composed of four officials from NRC.

Request for Re-tender was approved, with conditions. According to the GIR, the technical scoring by the evaluation team raised questions for PWGSC managers, as well for NRC managers. On June 13, 2001, upon further consideration, PWGSC managers decided that the questions raised as a result of the technical evaluation were such that it would be prudent to have the proposals re-evaluated by a new evaluation team. This new team would include PWGSC officers with extensive experience in janitorial services and in respect of the evaluation methodology used in the RFP.

On July 10, 2001, the new evaluation team completed the evaluation of the four proposals. Based on the same criteria set out in the RFP and used by the first evaluation team, the new team found that all four proposals met the minimum scoring requirements and were therefore responsive. On July 12, 2001, the procurement officer advised NRC that Domus was the lowest responsive bidder. NRC agreed to proceed with the contract award on July 13, 2001. On July 16, 2001, all bidders were advised of the results of the solicitation. On September 6, 2001, Service Star filed an access to information request in this solicitation, to which the Access to Information Office replied on February 8, 2002. On October 4, 2001, Service Star requested a written debriefing of its technical proposal and a comparison of the scoring of its technical proposal with that of the winning proposal. PWGSC replied on October 9, 2001. Subsequently, Service Star made requests under the *Access to Information Act*⁶ to PWGSC and NRC. It filed its complaint with the Tribunal on February 18, 2002.

POSITION OF PARTIES

PWGSC's Position

In response to the first allegation that PWGSC acted contrary to the RFP in establishing a second evaluation team to re-evaluate the technical portions of the proposals and in not accepting the scores provided by the first evaluation team, PWGSC submitted that it acted in a prudent manner consistent with its obligations to exercise oversight with respect to the solicitation process.

According to the GIR, PWGSC managers were struck by the fact that the proposals of both Service Star and Domus had not been rated sufficiently high to be found responsive. Service Star was the incumbent contractor and had provided satisfactory service. Domus was the prior contractor for the same work and had provided satisfactory service during the course of its contract. The fact that neither proposal from these experienced suppliers was found to meet the minimum standard raised questions in the minds of PWGSC officials and warranted further inquiry and verification. In these circumstances, PWGSC officials concluded that it would be prudent to seek a second opinion from a new evaluation team with additional experience in janitorial services, using the evaluation process contained in the RFP. PWGSC argued that the provisions of the RFP are fully consistent with its responsibility to oversee the solicitation process and that nothing in the RFP stated that it was obliged to accept, without question, verification or review, any scores provided to it by the evaluation team.

PWGSC claimed that Service Star failed to submit evidence to support its allegation that the re-evaluation was done on the basis of criteria different from those set out in the RFP. It submitted that the differing result from the team with greater relevant experience confirmed that there was a problem with the outcome of the initial evaluation. PWGSC argued that this does not necessarily lead to the conclusion that differing criteria were applied by the two teams.

6. R.S.C. 1985, c. A-1.

In reply to the allegation that pricing information contained in the proposals was disclosed to the re-evaluation team, PWGSC submitted that there is no evidence to support such an allegation. It submitted that, in accordance with standard practice, the procurement officer had separated and secured the financial portions of the proposals and that the particulars of the financial proposals were not disclosed until the completion of the re-evaluation of the technical proposals on July 10, 2001. PWGSC further submitted that Service Star appears to rely on inferences that it draws from certain e-mails between PWGSC officials. It argued that these e-mails are reactive to other messages and issues not described in the text of the e-mails and, thus, do not represent the full context of events and discussions. PWGSC submitted that the allegations rely solely on placing the worst possible interpretations on selective passages in the e-mails. In the GIR, it provided the context for these e-mails.

In response to the allegation that the re-evaluation was done on the basis of information other than that contained in the proposals, PWGSC submitted that this allegation is without merit. It submitted that the re-evaluation team, knowing that Service Star was providing satisfactory service under its contract and that the number of employees being used for this satisfactory result would provide a benchmark for the re-evaluation, requested confirmation of the number of employees providing the services.⁷ PWGSC argued that the information provided did not amend or alter any of the proposals and that it merely provided the basic benchmark information by which a diligent evaluation team could evaluate one aspect of the proposals, i.e. the number of employees proposed.

With respect to the allegation that Domus, the low responsive bidder, was permitted to amend its bid after the closing of the solicitation period, PWGSC submitted that the allegation was false and that Domus submitted only one bid. According to the GIR, the pricing inconsistencies referred to by Service Star are factually explained by a number of factors: mathematical error; differences in Domus's own "Total Assessed Proposal Price" and the sum of its unit prices; the Goods and Services Tax; the breakdown of prices bid into "Firm Price" and "As and When Pricing"; and typographical error. PWGSC argued that once all such factors are properly identified, this allegation is without substance.

On April 19, 2002, the Tribunal requested additional information and answers to a number of questions from PWGSC. In its response, PWGSC explained the reference made in the GIR with respect to certain issues and events.⁸ It also submitted that its managers determined that the first team of evaluators, who were NRC officials, had not completely understood the methodology set out in the RFP. With this in mind, PWGSC managers determined that the initial technical results appeared to be sufficiently anomalous in the circumstances to require additional verification. In addition, as an administrative matter, PWGSC wanted to be satisfied that the evaluation was correctly conducted prior to determining that all bidders should be disqualified. It submitted that this was particularly important, having regard to the fact that both Service Star and Domus had provided satisfactory services in past contracts of a similar nature and scope.

Service Star's Position

Service Star submitted its comments on the GIR under four headings. With respect to the improper evaluation, referring to both "The Customer Manual" and PWGSC's "Supply Manual", it submitted that, as a "team", PWGSC and NRC were required to establish the evaluation criteria before issuing the bid solicitation and that these criteria would ensure complete and fair consideration of bids.

7. On June 26, 2001, in response to its question, the re-evaluation team was advised that the incumbent contractor, Service Star, was using 59 employees to provide the required services.

8. GIR, para. 18.

Service Star further submitted that the “benchmark” is to be established by PWGSC’s contracting officer and the client, i.e. NRC, based on the individual requirement, and the collective experience and knowledge of both, to include industry standards and guidelines. It further submitted that the measurable objectives are established prior to the issuance of a solicitation and not established during a technical evaluation. Service Star submitted that PWGSC’s response was a meagre attempt to distract from the facts. It argued that merely knowing the current staffing level negates the solicitation requirements pertaining to the personnel proposed by the contractor, that the current staffing requirements were made a part of the subject solicitation as evidenced in Appendix “F”⁹. Further, Service Star argued that proposals have to be evaluated in a manner that measures both the competence of the bidder and the worth of the bidder’s particular technical approach, and should not be compared against the current contractor. Service Star further argued that PWGSC failed to provide to the evaluation team information relating to the satisfactory service of the awardee.

Service Star also argued that the second evaluation team should have been provided with a briefing, guidance and direction by the responsible contracting authority. It further asserted that one cannot reasonably conclude that the second team of evaluators provided more “extensive experience with janitorial services and the evaluation methodology used in the solicitation.” Service Star concluded that the vastly differing evaluations of the two teams indicated an improper evaluation by the second evaluation team.

With respect to PWGSC’s assertions as to its role in ensuring the integrity of the procurement process, Service Star re-iterated some of the facts contained in its complaint. It submitted that the facts did not support senior level management’s actions to overturn the recommendation of the evaluation team and four PWGSC officials. Service Star further submitted that there were no issues relevant to procurement integrity and that, if there were, intervention did not occur at the onset, but after the issuance of the solicitation, after the closing date and after the first evaluation team had commenced its work.

With respect to inappropriate procedures, Service Star submitted that PWGSC did not acknowledge the portion of the “Supply Manual” that states that, when no responsive bid is received in response to a competitive bid solicitation, the bid solicitation must be cancelled. It re-iterated that the evaluation team did not evaluate the proposals based on the criteria set forth in the RFP.

On the issue of price evaluation, Service Star submitted that it cannot accept the complex explanation offered by PWGSC relative to the pricing discrepancy. It further submitted that Domus’s “Total Assessed Proposal Price”, as reported by PWGSC in the GIR, was alleged to be mathematically incorrect and that PWGSC failed to provide written confirmation or evidence supporting the corrected amount.

In its comments on the information provided by PWGSC in response to the Tribunal’s request, Service Star submitted that the complaint should be reviewed by the Tribunal and that this review should not be based on issues surrounding its previous contract. It further submitted that senior management chose to negate the expertise of PWGSC and NRC during the evaluation process. Service Star argued that there is no evidence that PWGSC questioned the qualifications of any of the first evaluation team members or their ability to comprehend the evaluation guide, as well as the evaluation criteria and methodology. It further argued that, if, in fact, the evaluation team misunderstood the evaluation criteria or methodology, PWGSC bore the responsibility, in exercising oversight, to re-explain the methodology and require the members to re-evaluate based on a clearer understanding. Service Star continued to assert that an improper evaluation was conducted.

9. Appendix “F” to the RFP is entitled “Information on Incumbent Employees”. This appendix provides the number of persons employed by Service Star at the time of the solicitation, their positions, hiring dates, hourly rates and number of hours per week.

TRIBUNAL'S DECISION

Section 30.14 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, it 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 provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the relevant trade agreements.

The Tribunal has determined that both the *Agreement on Internal Trade*¹⁰ and the *North American Free Trade Agreement*¹¹ apply to this procurement. The NRC is an entity covered by these agreements, and janitorial services are covered by these agreements. The value of the procurement met the thresholds of both the AIT and NAFTA.

Article 506(6) of the AIT provides, in part: "The 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 1015(4)(d) of NAFTA provides the following: "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation". In this case, the Tribunal must decide whether PWGSC improperly awarded the contract to Domus, contrary to the requirements specified in the RFP.

With respect to the allegation that PWGSC acted contrary to the RFP by establishing a second evaluation team to re-evaluate the technical portions of the proposals and by not accepting the scores provided by the first evaluation team, the Tribunal finds that this allegation has no merit. It has given careful consideration to the parties' extensive submissions on this issue.

First, the Tribunal accepts PWGSC's position that it is responsible for the conduct and outcome of the procurement process and, therefore, has the obligation to supervise all aspects of the process, including verifying and approving evaluation results. Second, it understands how the unexpected results of the first evaluation, which was performed by NRC officials, might have, in this particular case, raised questions in the minds of PWGSC officials and NRC managers. They were aware of the experience of Service Star and Domus and of the satisfactory level of work performed by these suppliers in previous contracts with the NRC.

The Tribunal is of the view that PWGSC was prudent, in these specific circumstances, to review the results and to request a re-evaluation by a more experienced team of evaluators. It finds that PWGSC did not act contrary to the provisions of the RFP or the relevant trade agreements in this case.

With respect to the second ground of complaint, i.e. that the re-evaluation was based on criteria different from those set out in the RFP, the Tribunal finds that this allegation has no merit. It has carefully reviewed the record and has found no evidence that the second evaluation team did not perform the evaluation as per the criteria in the RFP. The Tribunal noted the increase in points allocated to the bidders' technical proposals resulting from the second evaluation. However, it is not convinced that these results provide evidence that the second team used different criteria. The Tribunal is of the view that the results of the re-evaluation, which saw all bidders go from being declared non-responsive to being found compliant, provide a good indication that there was a problem with the first evaluation.

10. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].

11. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

As far as the allegation that the price proposals were known to the second evaluation team, the Tribunal is also of the opinion that this ground has no merit. It finds that there is no evidence that the second evaluation team had any knowledge of the pricing. The Tribunal is satisfied that normal procedures of separating and securing the financial proposals before any evaluation takes place were followed in this case. It has found no evidence to the contrary. The Tribunal has given careful consideration to the electronic messages, the allegations made by Service Star and the explanations provided in the GIR. It is of the view that this exchange of electronic correspondence does not demonstrate that pricing information was known to anybody, except the PWGSC contracting officer, until the technical evaluation was completed. The Tribunal was somewhat puzzled, at first, by some of the words used in these e-mails, such as “open the price envelopes”, and by the references to events and issues occurring at the time of this solicitation, but a review of the record and the information provided by PWGSC in response to its questions did not show anything inherently suspect. It is satisfied that no negative inference should be drawn from these e-mails and surrounding events.

The Tribunal finds that the allegation that the re-evaluation was done on the basis of information other than that contained in the bids is without merit. It is of the opinion that the fact that the second evaluation team requested the confirmation of the number of employees allocated to the contract does not demonstrate that the re-evaluation was conducted in an improper manner. The Tribunal noted that the number of employees, the positions and the number of hours worked constituted information contained in Appendix “F” to the RFP, which was available to all bidders and could provide some type of benchmark to evaluate the proposals. It is not convinced that the second evaluation team used only the figure confirmed by PWGSC to assess the proposals with respect to the rated evaluation criteria “Organization and Management”.

With respect to the allegation that Domus was permitted to amend its bid after closing and that there was a discrepancy in the pricing submitted by Domus and the awarded contract price, the Tribunal accepts the explanations provided by PWGSC on this issue. It recognizes that Service Star does not have access to the pricing information provided by Domus. In this context, the Tribunal has carefully examined all the evidence on pricing provided by PWGSC, in light of the allegations made, and is of the opinion that there is no merit to the allegations. There is no evidence that Domus amended its prices and that the evaluation of the price proposals was not conducted properly.

In light of the above, the Tribunal concludes that these allegations have no merit and that the procurement was conducted according to the RFP and the relevant trade agreements.

The Tribunal has also decided that the circumstances of this case do not warrant costs against Service Star. Therefore, submissions on this matter are not necessary.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that, pursuant to subsection 30.14(2) of the CITT Act, the complaint is not valid.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member