



Ottawa, Tuesday, December 17, 2002

File No. PR-2002-023

IN THE MATTER OF a complaint filed by Nanaimo Shipyard 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 not valid.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: December 17, 2002

Tribunal Member: Pierre Gosselin, Presiding Member

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Philippe Cellard

Complainant: Nanaimo Shipyard Ltd.

Government Institution: Department of Public Works and Government Services

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



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STATEMENT OF REASONS

COMPLAINT

On September 18, 2002, Nanaimo Shipyard Ltd. (Nanaimo) 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 (Letter of Interest [LOI] No. W8483-01FD03/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the refit of the HMCS Algonquin, an Iroquois class destroyer based in Victoria, British Columbia.

Nanaimo submitted that, contrary to the provisions of the *Agreement on Internal Trade*,² PWGSC issued an LOI with restrictive and biased criteria that only one bidder could meet, that it failed to fully disclose the evaluation criteria used in the one mandatory item that Nanaimo did not pass and that it used an unfair evaluation process. As a remedy, Nanaimo requested that it receive the Invitation to Tender (ITT) for this requirement and that the ITT be in an acceptable and unbiased form.

On September 27, 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*.³ On October 25, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On November 7, 2002, Nanaimo filed comments on the GIR.

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. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
3. S.O.R./93-602 [hereinafter Regulations].
4. S.O.R./91-499.

PROCUREMENT PROCESS

On April 11, 2002, an LOI was issued and made available to suppliers through MERX. The process was to have two phases, i.e. a pre-qualification of bidders and the issuance of an ITT. The LOI gave May 6, 2002, as the closing date for responses to the pre-qualification requirement.

The LOI described the project, in part, as follows:

Detailed information will be forthcoming with the issue of the Crown's Invitation to Tender documentation. It is anticipated that major requirements of the refit work will [include] significant dry docking work; steering and propulsion machinery system surveys/repairs; painting and preservation of underwater hull, tanks, bilges, cofferdams and void spaces. Comprehensive maintenance/repairs to various ship systems including air conditioning system; piping systems; electrical equipment/systems; and deck equipment. Painting and preservation program for the hull, superstructure, and exterior decks, accommodation and machinery spaces. Modifications/installations to the various control and communication systems. Upgrading of the ship's black water system.

Item 1, "History/Previous Experience", of Annex "A" to the LOI listed as a mandatory requirement that "[t]he Company must have completed a major refit or construction project within the last five years equivalent to the proposed refit of HMCS ALGONQUIN." Item 2, "Financial Assessment", listed as a mandatory requirement that "[t]he current financial capability of the company shall be evaluated via an analysis of the company's certified financial statements to determine if the Company is financially capable of completing this project. Companies shall submit properly certified financial statements for the past two years in response to the Crown's Letter of Interest. Financial statements shall include, as a minimum, the accountant's endorsement, income statement, balance sheet and notes."

By May 8, 2002, PWGSC had received no response from Nanaimo in relation to the LOI and contacted Nanaimo to inquire whether it intended to respond to the LOI. On May 9, 2002, Nanaimo responded to PWGSC, advising that it was working on a response and asking to be given until May 21, 2002, to respond. PWGSC agreed to extend the deadline and, on May 21, 2002, Nanaimo responded to the LOI.

On June 5, 2002, Nanaimo was advised that its response to the LOI failed to meet items 1 and 2 of Annex "A" to the LOI. It was also advised that it had not scored the minimum mark necessary in the rated section dealing with facilities and capacity. As such, Nanaimo was advised that it would not be invited to submit a bid.

A number of communications, meetings and exchanges occurred between Nanaimo and PWGSC and DND from June 11 to September 5, 2002. Nanaimo was given at least two more opportunities to submit and/or present additional material in response to the LOI in relation to the areas of concern. During that time, the issues relating to the mandatory financial assessment requirement and the rated section dealing with facilities and capacity were resolved. However, PWGSC and DND were still of the view that Nanaimo had not satisfied the mandatory history/previous experience requirement. On September 13, 2002, PWGSC confirmed the decision to Nanaimo in writing.

On September 18, 2002, Nanaimo filed its complaint with the Tribunal.

POSITION OF PARTIES

PWGSC's Position

PWGSC submitted that the complaint raised two issues, i.e. the inclusion of history/previous experience as a mandatory requirement in the LOI and the determination that the information submitted by Nanaimo did not satisfy the requirement.

With respect to the inclusion of history/previous experience as a mandatory requirement in the LOI, PWGSC submitted that, by the time the complaint was filed with the Tribunal, the time for filing such a complaint had long since expired. PWGSC submitted that Nanaimo had knowledge of this requirement and its mandatory nature as of April 11, 2002. According to PWGSC, Nanaimo did not raise any questions relating to this requirement prior to its response to the LOI on May 21, 2002, and did not raise any objections to the nature of this requirement until July 17, 2002, after its response to the LOI was rejected. As such, PWGSC submitted that any complaint filed in relation to this ground would not be in compliance with section 6 of the Regulations. PWGSC submitted a number of alternative views of when one might consider that Nanaimo may have known or ought to have known of the basis of its complaint and, in each case, PWGSC argued that the complaint would still have been filed outside the prescribed time limit.

In addition, PWGSC submitted that the Crown is entitled to set its own reasonable requirements in a solicitation and that it is not required to compromise its own legitimate operational requirements in order to accommodate a supplier's own corporate circumstances. In this case, PWGSC submitted that the requirement was necessary in order to establish that a potential bidder was fully qualified to carry out a refit project of this magnitude; as such, the requirement was a legitimate operational requirement of the Crown, and PWGSC was entitled to include it in the LOI. PWGSC submitted, therefore, that the complaint relating to the requirement was untimely and without merit and should be dismissed.

PWGSC submitted that it correctly evaluated the information submitted by Nanaimo as not satisfying the mandatory history/previous experience requirement in the LOI. PWGSC submitted that the requirement to have "completed a major refit or construction project" did not limit eligible experience to previous naval work or even prior government contracts and that this was explained in an e-mail to Nanaimo on June 26, 2002. PWGSC submitted that the refit or construction project had to be "major" and had to be "equivalent to the proposed refit of HMCS ALGONQUIN." According to PWGSC, the evaluators from PWGSC and DND evaluated all the technical information submitted by Nanaimo and concluded that none of the contracts cited by Nanaimo met the mandatory history/previous experience requirement. PWGSC submitted that, at the end of the process, Nanaimo conceded that it had not been engaged in an equivalent major refit in the last five years.

Finally, PWGSC reserved the right to make further submissions with respect to any award of costs in this matter.

Nanaimo's Position

With respect to PWGSC's submission that the allegation relating to the inclusion of history/previous experience as a mandatory requirement in the LOI was untimely, Nanaimo submitted that there were discussions about the restrictive nature of this procurement from the onset, but that it was told that the requirement would not change. Nanaimo submitted that it proceeded to supply information to best meet the criterion and did not know if it would be qualified or disqualified until the meetings in Victoria, British Columbia, on September 4 and 5, 2002.

Nanaimo submitted that PWGSC had used a similar process in a previous project, except that the previous experience criterion covered the past 10 years. According to Nanaimo, only one bidder qualified for that project. Therefore, PWGSC would have known that the limitation to the past 5 years would restrict the procurement even more.

With respect to Nanaimo's proposal not satisfying the history/previous experience requirement, Nanaimo submitted that it believed that PWGSC used an additional five criteria for the evaluation of previous history. Nanaimo submitted that it was never made aware of what these criteria were. Nanaimo submitted that PWGSC had requested further information in relation to Nanaimo's previous experience and even requested contact names for customers, but that these customers were never contacted.

Nanaimo submitted that the issue of PWGSC stating that Nanaimo did not satisfy the requirement is intertwined with the issue of the requirement being overly restrictive and that both issues must be examined in the same light.

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. 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 AIT.

The Tribunal is of the view that this complaint can be separated into two parts. The first relates to the nature of the LOI specification and the second relates to the evaluation of Nanaimo's response to the LOI.

With respect to the nature of the specification, Nanaimo submitted that the history/previous experience requirement was overly restrictive and favoured one particular supplier. PWGSC submitted that this ground of complaint was not filed within the time limit prescribed by the Regulations and that the requirement was necessary and reflected the essential operational requirements of DND.

The Tribunal is of the view that this element of the complaint was not filed within the time limit prescribed by section 6 of the Regulations. The Tribunal finds that Nanaimo had knowledge of the specification on or about April 11, 2002. Subsection 6(1) requires that a complainant file a complaint with the Tribunal within 10 working days from the time that it knew or reasonably should have known the basis for its complaint. Subsection 6(2) permits a complainant to file a complaint after the time specified in subsection 6(1) if the complainant has filed an objection with the government institution. However, that objection must be filed within 10 working days from the time the complainant knew or reasonably should have known the basis for its complaint. Nanaimo did not file its complaint with the Tribunal until September 18, 2002, and, according to the evidence on the record, did not file an objection about the specification with PWGSC until June 19, 2002, when it responded to the evaluation summary sent to it by PWGSC. As such, both the complaint and the objection pertaining to the nature of the specification were filed outside the time limit prescribed by the Regulations.

With respect to the evaluation of Nanaimo's submission and PWGSC's decision that it failed to meet the history/previous experience requirement, the Tribunal finds that this element of the complaint is not valid.

The history/previous experience requirement provided that: “[t]he Company must have completed a major refit or construction project within the last five years equivalent to the proposed refit of HMCS ALGONQUIN.” The Tribunal finds that this requirement could have been clearer. The Tribunal strongly encourages PWGSC to ensure that future requirements contain a precise and unambiguous description of how equivalence to a requirement is to be measured. Nevertheless, in the present case, the Tribunal finds that PWGSC was entitled to reject Nanaimo’s proposal for not meeting the history/previous experience requirement. Evaluators from PWGSC and DND could not identify, in Nanaimo’s response to the LOI and subsequent information provided, any project completed by Nanaimo that could meet that requirement. Based on the information on file, the Tribunal finds that PWGSC and DND made no error in arriving at this conclusion. The Tribunal notes that, in its submissions, first to PWGSC and then to the Tribunal, Nanaimo did not argue that any project that it had completed would meet the history/previous experience requirement. On the contrary, Nanaimo, in its correspondence to PWGSC, stated on more than one occasion that the only other refit of this value done on the West Coast in the last five years was that of HMCS Protecteur, which was completed by a competitor. Therefore, the Tribunal is of the opinion that, on the basis of the evidence before it, PWGSC did not violate the AIT in arriving at the conclusion that Nanaimo’s response to the LOI failed to meet the history/previous experience requirement.

Accordingly, the Tribunal determines that the complaint is not valid.

With respect to the costs associated with these proceedings, the Tribunal determines that no costs will be awarded to any of the parties to this complaint.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the complaint is not valid.

Pierre Gosselin
Pierre Gosselin
Presiding Member