



Ottawa, Monday, June 23, 2003

File No. PR-2002-060

IN THE MATTER OF a complaint filed by Polaris Inflatable Boats (Canada) 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.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Date of Determination and Reasons: June 23, 2003

Tribunal Member: Zdenek Kvarda, Presiding Member

Senior Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Dominique Laporte

Complainant: Polaris Inflatable Boats (Canada) Ltd.

Intervener: Zodiac Hurricane Technologies Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: David M. Attwater

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STATEMENT OF REASONS

COMPLAINT

On February 7, 2003, Polaris Inflatable Boats (Canada) Ltd. (Polaris) 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 concerned a Request for Proposal (RFP) by the Department of Public Works and Government Services (PWGSC) (Solicitation No. F1513-020009/A) for the purchase of a seven-metre long rigid hull inflatable boat (RHIB) for the Department of Fisheries and Oceans (DFO).

Polaris alleged that the evaluation plan was ambiguous and subjective, that the quality assurance rating system was improper and that the conduct of the evaluation was improper in a number of areas.

Specifically, Polaris submitted that the point allocation system used by PWGSC was inadequate and did not work. Polaris further alleged that it should have been awarded extra points and also submitted that its bid price was less than the contract award price.

As a form of relief, Polaris requested that PWGSC immediately be obliged to review the point allocation system in order to move towards absolute transparency and accountability. Polaris further requested that it be awarded financial restitution equal to 20 percent of its bid price.

On February 14, 2003, the Tribunal informed the parties that the complaint had been accepted for inquiry pursuant to subsection 30.13(1) of the *CITT Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² This complaint was accepted on one ground only, that is, the allegation that the proposal evaluation was not conducted properly.³ On February 27, 2003, Polaris requested that its complaint be accepted as a single complaint, as it related to the various negative systemic elements of the tendering and evaluation processes used by PWGSC and that the complaint be accepted under paragraph 6(3)(b) of the *Regulations*. On March 13, 2003, the Tribunal informed Polaris that it would

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

3. This was further clarified in correspondence dated February 28, 2003, when the Tribunal stated that “the evaluation plan set out in the Request for Proposal . . . specifically in respect of the sections of specification WC-RHIB-7M-FNS identified in the complaint, disclosed a reasonable indication that the evaluation was not conducted in accordance with the provisions of the applicable trade agreements. In coming to its decision, the Tribunal was not convinced that the evaluation ratings were assigned in accordance with the evaluation plan.”

not reconsider its decision and that the scope of the investigation would remain as described in the Tribunal's notice of inquiry and further clarified in its letter to PWGSC dated February 28, 2003.

On March 17, 2003, Zodiac Hurricane Technologies Inc. (Zodiac) was granted intervener status. On March 21, 2003, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On April 7, 2003, Polaris filed its 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.

PROCUREMENT PROCESS

On November 21, 2002, a Notice of Proposed Procurement was published on MERX.⁵ The requirement was for a contractor to design, construct, test, trial and deliver a seven-metre long fibreglass rigid hull inflatable boat with a mounting for government-supplied outboard motors and ancillary equipment. This procurement had a closing date of January 7, 2003.

Section 36 of the RFP indicated that the evaluation process comprised the following four phases:

- Phase I—Verification of bidder's compliance with the mandatory requirements
- Phase II—Verification of the minimum technical requirements
- Phase III—Scoring of the technical proposals
- Phase IV—Evaluation of the price proposals for use in the best value formula

With respect to Phase III, the RFP provides as follows:

Technical proposals will be compared separately against the evaluation criteria identified herein and with the specification WC-RHIB-7M-FNS dated November 19, 2002. A technical rating, up to the maximum points available will be assigned by the evaluation team to score each rated criterion.

Clause 35 of the RFP describes the selection method as follows:

The selection of the responsive Bidder to whom a Contract to fulfil this Requirement may be awarded will be made by the best value selection method specified in clause 36. The method of selection will be based on the technical merit being worth 70% and the price being worth 30%. Neither the responses to this RFP that score the highest number of points, nor the ones that contain the lowest Total Price for Evaluation will necessarily be selected. The Bidder's proposal offering the best value score will be recommended to be the recipient of a Contract to fulfil this Requirement.

On December 12, 2002, Polaris sent a letter to the PWGSC contracting officer requesting clarifications and amendments. Specifically, the letter requested clarifications on the request for manuals, the projected vessel weight and the point allocation system for certification by the International Organization for Standardization (ISO).

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

5. Canada's Electronic Tendering Service.

On December 18, 2002, technical clarifications and amendments were sent to Polaris, and, on January 2 and 3, 2003, clarifications with an increased point scale were sent to Polaris. The point scale for non-ISO-registered suppliers was increased from 40 to 60 points, as compared to a possible 110 points for ISO-registered suppliers.

In a letter to PWGSC, dated January 24, 2003, Polaris assured PWGSC that it would fully comply with the contractual requirements for quality control, but that there were some areas within the application of the systems that needed to be addressed and that it had initiated appropriate measures.

Bids closed on January 7, 2003, and on January 24, 2003, after the evaluation of proposals, a contract was awarded to Zodiac.

On January 27, 2003, Polaris was informed that another company's proposal had received more points. Polaris requested a copy of its evaluation summary, but declined PWGSC's offer for a debriefing to discuss its proposal. On January 28, 2003, Polaris advised PWGSC that it had found four areas that, it believed, merited a higher point award. On January 29, 2003, Polaris was informed by PWGSC that the contract had been awarded. On February 7, 2003, Polaris filed its complaint with the Tribunal.

POSITION OF PARTIES

PWGSC's Position

PWGSC submitted that it understood that the inquiry was limited to whether it breached the applicable trade agreements by not awarding Polaris enough points for the technical merit of its proposal.

PWGSC submitted that the Tribunal has stated, on several occasions, that it will defer to the scoring of technical experts where it is satisfied that they evaluated a proposal in a procedurally fair manner.

According to PWGSC, after the bid closing on January 7, 2003, a PWGSC supply specialist confirmed that both Zodiac and Polaris had passed the first two phases of the evaluation. The technical evaluation team responsible for Phase III of the evaluation process consisted of two subject-matter experts from the DFO. A technical evaluation meeting occurred on January 16, 2003. The PWGSC supply specialist reviewed the evaluation process with the technical evaluation team. Each DFO evaluator received a copy of the same proposal, and each evaluator individually reviewed the proposal. The two DFO evaluators then discussed and agreed upon scores for technical merit, having regard to the RFP specification, WC-RHIB-7M-FNS, the evaluation criteria and grid. After evaluating the first proposal, the DFO evaluators proceeded with the second proposal in the same manner.

The technical evaluation team sought two clarifications from Polaris during the evaluation of its proposal. The PWGSC supply specialist was in attendance during the entire evaluation process by the DFO evaluators. Prior to reporting by the quality assurance inspector, discussed below, Polaris was awarded full marks for quality assurance available to a non-ISO-registered bidder.

On January 8, 2003, the PWGSC supply specialist requested that the PWGSC inspection authority do a quality assurance inspection of Polaris as follows:

Polaris Inflatable Boats has submitted a manual titled ISO9001:2000 Quality Systems Manual unsigned and not Certified. I would like to request that this office do a Quality inspection of this Company As Soon As Possible.

On January 17, 2003, a PWGSC inspector reviewed Polaris's existing quality control against the ISO 9001-2000 standards. On January 20, 2003, Polaris sent a letter to PWGSC concerning its ISO upgrades and also acknowledged certain deficiencies contained in its quality assurance manuals.

On January 23, 2003, the PWGSC auditor reported his findings and recommendations regarding the quality assurance inspection of Polaris's quality systems.

Furthermore, the quality assurance inspector recommended that, out of a total of 60 points, 52 points be awarded (marking down 8 for the lack of calibrated devices and the absence of details of non-conformances with corrective action). The best value was determined after receiving the quality assurance report.

According to PWGSC, Polaris has tendered no proof that its proposal was evaluated in other than a procedurally fair manner and that scoring less than 100 percent for the technical merit of a proposal does not constitute proof that the evaluation was done improperly. According to PWGSC, the same evaluators, exercising the same professional judgement in the same manner, evaluated both bidders' proposals.

PWGSC submitted that both the Tribunal and the Federal Court of Appeal have recognized that evaluating a proposal involves a subjective assessment of its merits by reference to objective data.

PWGSC submitted that it is improper for the Tribunal to second-guess the scoring of the rated requirements of a single bidder's proposal by a team of subject-matter experts because doing so would mean giving approval to the use of a "different yardstick" to measure different proposals. PWGSC further submitted that it is unfair for one proposal to be evaluated by a team of subject-matter experts and a second proposal to be evaluated in isolation by the Tribunal. PWGSC also submitted that it is not a breach of the trade agreements to assign less than 100 percent of the points available to a rated requirement.

PWGSC submitted that the drawings accompanying Polaris's bid specified dimensions that did not meet the requirements found in clauses 3.1.2 and 3.1.3 of the RFP and that a subsequent clarification led to a lack of confidence in Polaris's proposal for the evaluators. In addition, PWGSC claimed that Polaris's proposal fell short of the documentary requirements of the RFP.

PWGSC also added that it was a mandatory requirement that proposals be of a proven design and that the evaluators had noted that, if Polaris had built a similar vessel to the one being offered so as to prove its design, then it should have included documentation from that similar vessel.

PWGSC submitted that a bidder was required to "demonstrate" to the proposal evaluation team that it was capable of carrying out the specified trials as required by the RFP. According to PWGSC, Polaris's proposal included no documentary evidence (e.g. samples of test sheets, trial sheets, inspection check lists) to indicate how all the required data would be captured and displayed, or that it actually completed tests and trials of the kind required by the RFP on an RHIB or, indeed, any boat. According to PWGSC, the manual provided with Polaris's bid contained no test and trial information. Furthermore, PWGSC stated that the evaluation team was required to score Polaris's proposal against the requirement to "demonstrate compliance" based solely on Polaris's assertion that it complied with the requirements. According to PWGSC, Polaris lost 10 points because the evaluation team was not fully satisfied that Polaris had demonstrated compliance with the specifications.

PWGSC submitted that the evaluator had found that, of the 37 construction requirements, only one or two were exceeded in Polaris's proposal. According to PWGSC, Polaris was awarded the full 20 points

for marginally exceeding the requirements. PWGSC also submitted that Polaris is time barred from complaining about the scoring for quality assurance for non-ISO-registered bidders. PWGSC added that Polaris was awarded all but 91 of the available points for the technical merit of its proposal.

PWGSC submitted that the Tribunal should make a recommendation only if it is satisfied that Polaris's proposal should have been awarded at least 59 more points (out of 91 points). Furthermore, PWGSC submitted that, in the event that the Tribunal found a breach of the trade agreements and recommended a re-evaluation, both proposals should be re-evaluated.

PWGSC also submitted that any award of monetary compensation should be based on net profit and not gross profit. PWGSC also requested its complaint costs.

Polaris's Position

Polaris submitted that PWGSC could not prove that Polaris's proposal was evaluated fairly and/or that there were no ambiguities within the evaluation system. Polaris further submitted that the criteria and evaluation methodology set forth in the RFP were not well defined and were subject to interpretation.

Polaris submitted that, with respect to the technical evaluation, the two subject-matter experts from the DFO were not named nor were their qualifications stated. Polaris submitted that PWGSC did not apply itself in evaluating its proposal and that PWGSC ignored information provided in its bid response, basing much of the evaluation on undisclosed criteria. Polaris submitted that it did not fail to meet the requirements of clauses 3.1.2 and 3.1.3 of the RFP and that it should not have been penalised 20 points. Furthermore, Polaris stated that it did not understand how its informal clarification "led to a lack of confidence with evaluators that any of the dimensions shown on the drawings could be relied upon." According to Polaris, the component location and placement were questioned, not the measurements. Polaris also submitted that PWGSC and DFO's rationalization is biased and unprofessional.

Polaris also stated that the two technical clarifications sought by the technical evaluation team were not presented in any formal way. Instead PWGSC's contracting officer simply called, as if launching an informal discussion. According to Polaris, it did not know and had no means of knowing that proper clarifications were in fact needed, otherwise it would have formalized its response. Polaris was of the opinion that the informal method of clarification used by PWGSC was wrong, as it negatively affected the evaluation.

Polaris submitted that it assured PWGSC in writing that its ISO systems and controls would be fully compliant with the contractual requirements. Polaris further submitted that it had demonstrated its capability to fully meet the requirements of the solicitation regarding compliance with the requirements of ISO 9002.

With respect to the allocated points for item 25, Polaris submitted that it should have been given the full 60 points available (an additional 4 points), with an extra 6 points allocated for its quality control system being higher than the ISO 9001-2000 standard. Furthermore, Polaris indicated that its copy of the evaluation plan scoring, as provided by PWGSC and attached to its complaint, does not match the evaluation plan scoring issued with the GIR.

Polaris submitted that DFO representatives are PWGSC's clients and end users and that, although DFO officers are fully qualified operators, they are not qualified boat designers or builders. According to Polaris, the DFO representatives engaged in the process of evaluation were not identified, their credentials remained unknown and, as such, their "professional judgement" remained in question.

Polaris submitted that, on advising PWGSC that it did not, as yet, have a specific manual for the vessel, PWGSC suggested that Polaris provide a sample manual. According to Polaris, it extensively described the contents of the solicited manual and annexed a sample manual from its smaller rescue boat. According to Polaris, the concept was to provide evidence that it understood that it could deliver the requested manuals.

Polaris claimed that its proposed vessel greatly exceeded the requirements and that it should have been allocated 79 additional points.

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 the *Agreement on Internal Trade*⁶ and the *North American Free Trade Agreement*.⁷ Article 1015(4)(d) of *NAFTA* stipulates that awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

In its complaint, Polaris submitted, among other things, that it was not awarded sufficient points in respect of several aspects of its proposal. After having reviewed the evidence on the file, the Tribunal sees no reason to conclude that Polaris's proposal was not evaluated in accordance with the criteria and methodology set out in the solicitation documents or that the evaluators did not apply their minds to these items at the time of the evaluation. In the absence of evidence that the evaluation was not conducted in a procedurally fair manner, the Tribunal normally defers to the judgement of the evaluation team as to the assignment of points for the rated technical requirements. The Tribunal notes that clauses 1.1 and 1.2 of the RFP made it clear that the onus was on the bidders to demonstrate that the vessel and its equipment met all the requirements of the RFP, by providing the supporting documentary evidence. The evaluation team could not, legitimately, take into account that Polaris was not a newcomer in supplying similar vessels to government agencies or that PWGSC inspectors had previously witnessed specified trials aboard its vessels. The Tribunal will, therefore, not second-guess the evaluation team with regard to its conclusion that Polaris's proposal failed to demonstrate "full compliance" with some of the technical requirements.

Polaris argued that the adopted specifications and requirements were ambiguous, as they contained subjective factors when evaluated with the use of Annex C. In its comments on the GIR, Polaris argued that PWGSC based much of the evaluation on undisclosed criteria, such as "marginally exceeds", "greatly exceeds". Although it notes that this ground of complaint was found to be late, and without wanting to deal here with its merit, the Tribunal nevertheless finds that the requirements and the evaluation plan did allow for a high degree of subjectivity on the part of the evaluation team. Given that it was too late to complain about this specific ground, Polaris had therefore no choice but to live with the methodology set out in the RFP. The Tribunal, in determining if the ratings had been assigned in accordance with the evaluation plan, had consequently to take into consideration the broad latitude conferred to the evaluation team in the scoring of the proposals.

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>>.

7. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

Polaris also called into question the “professional judgement” of the DFO representatives. However, other than mentioning a lower than expected mark received in the evaluation, Polaris presented no evidence to indicate that the DFO representatives acted improperly or in an unfair manner toward Polaris. In this respect, the Tribunal sees no reason not to accept PWGSC’s statement that the evaluators, exercising the same professional judgement, evaluated both bidders’ proposals in the same manner.

For the above reasons, the Tribunal finds no evidence that PWGSC did not evaluate the proposals in a manner consistent with the solicitation documents and the applicable trade agreements. Therefore, the Tribunal finds that this complaint is not valid.

Although the complaint is found not to be valid, the Tribunal is of the view that the very specific circumstances of this case warrant that no costs be awarded to PWGSC. Indeed, the Tribunal finds that the fact that no reasons were given under Annex C of the evaluation plan to explain Polaris’s scoring has certainly been an important factor that contributed to the filing of the complaint. When PWGSC uses a scoring grid such as the one used in this case, which is very broad and allows for considerable discretion in the evaluation, it is reasonable for bidders to expect from PWGSC a rationale explaining their marks. The Tribunal considers that, because of the way in which Annex C was constructed, with a blank column for maximum possible points, it is reasonable to expect that reasons explaining the scoring would be provided. Had Polaris been provided with some reasons that explained its scoring in the first place, it may well have decided not to file a complaint and PWGSC would not have incurred costs in this matter. For the above reasons, each party will bear its own costs.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member