



Ottawa, Tuesday, August 5, 2003

File No. PR-2003-016

IN THE MATTER OF a complaint filed by Dollco Printing (Dollco Corporation) 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, as a remedy, that the Department of Canadian Heritage reinstate the proposal of Dollco Printing (Dollco Corporation) and proceed with its evaluation. Should the proposal be found to be responsive, Dollco Printing (Dollco Corporation) should become part of the established supply arrangement. Alternatively, the Canadian International Trade Tribunal recommends that the supply arrangements with all suppliers be cancelled and the process restarted, with appropriate instructions and clauses relating to conflict of interest clearly identified in the Request for a Supply Arrangement.

Pursuant to subsections 30.16(1) and (2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Dollco Printing (Dollco Corporation) its reasonable costs incurred in preparing and proceeding with the complaint.

Richard. Lafontaine

Richard. Lafontaine
Presiding Member

Pierre Gosselin

Pierre Gosselin
Member

Patricia M. Close

Patricia M. Close
Member

Michel P. Granger

Michel P. Granger
Secretary

Date of Determination and Reasons: August 5, 2003

Tribunal Members: Richard Lafontaine, Presiding Member
Pierre Gosselin, Member
Patricia M. Close, Member

Senior Investigation Officer: Daniel Chamaillard

Counsel for the Tribunal: Roger Nassrallah

Complainant: Dollco Printing (Dollco Corporation)

Government Institution: Department of Canadian Heritage

Counsel for the Government Institution: David M. Attwater



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STATEMENT OF REASONS

THE COMPLAINT

On May 5, 2003, Dollco Printing (Dollco Corporation) (Dollco) 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 a Request for a Supply Arrangement (RFSA) (Solicitation No. 10022105/02) by the Department of Canadian Heritage (CH) for the supply of various printing services, on an “as and when required” basis.

Dollco’s original complaint included five grounds. However, the Tribunal accepted only two of the grounds for inquiry, namely:

- that CH improperly disqualified Dollco for inclusion in the supply arrangement
- that CH improperly interpreted the “Conflict of Interest Guidelines” used to support its decision to disqualify Dollco

Dollco requested, as a remedy, that the bid that it submitted in response to the RFSA be evaluated and ranked on its merits.

On June 6, 2003, CH filed a Government Institution Report (GIR) with the Tribunal. Dollco did not file 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

An RFSA, with a closing date of December 10, 2002, was issued through MERX² on October 30, 2002. The purpose of the procurement was to establish a supply arrangement for various printing services.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. Canada’s electronic tendering service.

Dollco submitted its proposal on December 10, 2002. On March 12, 2003, Dollco wrote to CH requesting an update on the evaluation process and inquiring into whether the supply arrangements had been issued. On March 18, 2003, CH responded and indicated that a supply arrangement would not be established with Dollco because CH had identified a possible conflict of interest. The conflict was related to the inclusion of a particular individual in Dollco's proposal, who, according to CH, had been previously employed by CH to develop the RFSA.

On March 27, 2003, Dollco wrote to CH objecting to the disqualification of its proposal on the basis of a possible conflict of interest. On April 17, 2003, CH responded to Dollco's objection, maintaining its position with respect to Dollco's disqualification.

Sixteen bidders responded to the RFSA. CH awarded 10 supply arrangements.

Dollco filed its complaint with the Tribunal on May 5, 2003.

POSITIONS OF PARTIES

Dollco's Position

In its objection to CH, Dollco submitted that it had only recently become aware that, on or about April 10, 2002, a contract had been issued by CH to PrintSpex for the purpose of preparing a Scope of Work (SOW) and evaluation criteria for a proposed RSFA in connection with printing services. According to Dollco, the documents were delivered to CH on or about June 25, 2002. Dollco submitted that it hired the sole proprietor of PrintSpex on July 15, 2002, as a salaried employee and that he is still in its employ.

Dollco submitted that the supply arrangement process is designed to solicit proposals from potential supplier firms only for the establishment of a list of qualified firms deemed to be technically competent and responsive, meeting the technical evaluation criteria, terms and conditions established in the tender document. Dollco submitted that CH was in complete control of the final version of the SOW and the evaluation criteria that were published in the RFSA. According to Dollco, the fact that CH required outside technical assistance from PrintSpex to develop parts of the RFSA is now being held against Dollco, when it had nothing to do with the firm or individual hired by CH to do the work. In fact, according to Dollco, the individual in question was employed by another printing group at the time that the work was performed for CH.

CH's Position

CH submitted that Dollco's proposal was declared non-compliant to protect the integrity of the solicitation process. According to CH, one of the key personnel named in Dollco's proposal (the sole proprietor of PrintSpex) helped prepare the RFSA. CH submitted that such a conflict of interest could only be remedied by declaring Dollco's proposal non-compliant.

CH submitted that bidders have an obligation to be aware of the background of the key personnel and backups named in their proposals. CH submitted as an example that, under the heading "Vendor Performance" in the RFSA, CH could reject a bid where an employee included in the bid is subject to a "Vendor Performance Corrective Measure".

CH submitted that the degree to which competing bidders may be prejudiced and the degree to which the integrity and efficiency of the competitive procurement system may be prejudiced by a conflict of interest are relevant considerations for the Tribunal under the *CITT Act*. CH further submitted that fairness is an established principle under the trade agreements and under contract law, as it applies to tendering. CH submitted that, if it ignored the conflict of interest created by Dollco by proposing this particular individual, competing bidders and the integrity of the competitive procurement system would be prejudiced. CH submitted that the integrity of the bidding system must be protected whether or not a supply arrangement is established under the RFSA.

According to CH, in *K-Lor Contractors Services Ltd.*,³ the Tribunal found that Articles 506(1) and 518 of the *Agreement on Internal Trade*⁴ required “a fair, open and transparent procurement process.”⁵ CH submitted that not disqualifying Dollco’s proposal in the circumstances would be unfair to all competing bidders.

CH also submitted that, in *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*,⁶ the Federal Court of Appeal (the Court) stated that the *AIT* should be interpreted in a manner consistent with the common law duty of fairness, as it applies to the federal procurement system. The Court stated in part:

In my opinion, the various obligations imposed on the parties by the relevant Articles of the Agreement [on Internal Trade] should be interpreted, to the extent that their language permits, in a manner consistent with the common law duty of fairness as it applies to the federal procurement contract process.⁷

CH further submitted that, in *Cougar*, the Court found that a mere apprehension of bias constituted a breach of the duty of fairness and, thus, the *AIT*. The Court added:

If potential bidders lack confidence in the integrity of the way in which government contracts are awarded, they may be discouraged from submitting a bid, to the detriment of the public interest in obtaining the best value for money, and in ensuring that the competition is truly open to all.⁸

CH also referred to *Martselos Services Ltd. v. Arctic College*⁹ in which the Trial Judge found that the relationship between the bidder and Arctic College created a conflict of interest. The Trial Judge held that there was a duty on Arctic College to act fairly towards all tenderers, which included an obligation to avoid even the suspicion of any unfair advantage being enjoyed by a bidder. On appeal, the Northwest Territories Court of Appeal upheld the finding that the relationship between the bidder and Arctic College created a conflict of interest that rendered the bidder ineligible for the contract.

CH submitted that its decision to declare Dollco’s proposal non-compliant was necessary to protect the integrity of the solicitation. It based its decision on fairness to the bidders that were competing against Dollco. CH submitted that the complaint should be dismissed.

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3. *Re Complaint Filed by K-Lor Contractors Services Ltd.* (23 November 2000), PR-2000-023 (CITT).
 4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].
 5. *Supra* note 3 at 6.
 6. (28 November 2000), A—421—99 (F.C.A.) [*Cougar*].
 7. *Ibid.* at para. 23.
 8. *Ibid.* at para. 37.
 9. (1994), 111 D.L.R. (4th) 65 (N.W.T. C.A.).

CH submitted that, in the event that the complaint is upheld, the Tribunal should recommend that CH continue evaluating Dollco's proposal to determine whether it qualified for a supply arrangement under the terms of the RFSA.

CH requested its costs incurred in responding to the complaint.

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, 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 *Canadian International Trade Tribunal Procurement Inquiry Regulations*¹⁰ further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreement, which in this case is 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."

The central issue in this case is whether CH, in disqualifying Dollco's proposal based on a possible conflict of interest, did so in compliance with the RFSA and the *AIT*. The Tribunal started its analysis by examining the RFSA to see if it contained a conflict-of-interest clause. The Tribunal also examined the clauses incorporated by reference to the Standard Acquisition Clauses and Conditions (SACC) Manual.

Having examined the RFSA in detail, the Tribunal is of the opinion that CH did not incorporate directly or by reference any clause relating to conflict of interest. The Tribunal notes that, although CH incorporated several references from the SACC Manual in the RFSA, it did not include or incorporate by reference clause K2210T, which states:

Canada has employed the assistance of private sector contractors in the preparation of this solicitation. Responses to this solicitation from any such contractor or with respect to which such contractor is in any manner directly or indirectly involved will be deemed to be in conflict of interest (real or perceived) and will not be considered. By submitting a bid, the Bidder represents that there is no conflict of interest as stated above.

The directions to contracting personnel for the use of this clause read as follows:

Use this clause in bid solicitations where Canada has employed the assistance of private sector contractors in the preparation of a solicitation or statement of work.

By not incorporating the above clause, or similar language, CH left the RFSA with no explicit means of making suppliers aware of what CH considered to be a conflict of interest. In the absence of any definition of conflict of interest in the tender documents, it is impossible for the Tribunal to determine what CH's intention was at the time that the RFSA was issued with respect to conflict of interest.

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

CH submitted that the *AIT* should be interpreted in a manner consistent with the common law duty of fairness and that a mere apprehension of bias constituted a breach of the duty of fairness. It argued that the Treasury Board Contracting Policy and contract law permit the disqualification of a supplier for a conflict of interest. Section 11 of the *Regulations* directs the Tribunal to determine whether the procurement was conducted in accordance with the applicable trade agreements, in this case, the *AIT*. The Tribunal is of the view that Article 506 of the *AIT* imposes specific obligations on the signatory parties and that the suppliers of those parties expect that procurements will be governed by those obligations so as to achieve the purpose enunciated in Article 501. Article 506 does not contain a specific provision on conflict of interest.

The Tribunal finds that CH's decision to disqualify Dollco's bid was not based on the wording of the RFSA or on any specific provision of the *AIT*. Rather, CH's decision was based on a criterion that was not clearly identified in the tender documents and, therefore, was in violation of Article 506(6) of the *AIT*. The Tribunal is of the view that any consequence of a possible conflict of interest and the definition of what constituted a conflict of interest had to be included in the RFSA for CH to legitimately disqualify Dollco's bid. Moreover, the Tribunal is of the view that, had CH believed that there was a possible conflict of interest, it had the option of remedying its failure to include a clause relating to conflict of interest by cancelling the procurement and issuing a new solicitation with the appropriate clause.

For these reasons, the Tribunal finds that the complaint is valid.

As regards the appropriate remedy, the Tribunal, guided by subsection 30.15(3) of the *CITT Act*, considered all the circumstances relevant to the procurement. It is of the view that the deficiency in the procurement process is serious enough to warrant a remedy. The Tribunal is also of the view that Dollco was prejudiced by CH's actions. It does not accept CH's argument that the prejudice to Dollco was justified in order to avoid any prejudice to competing bidders. However, the Tribunal has not seen any evidence that would indicate that CH was not acting in good faith. Finally, with respect to the extent of the performance of the contract, it notes that this type of procurement, a supply arrangement, is quite flexible and would accommodate the addition of another supplier.

The Tribunal determines that the appropriate remedy in this case is the reinstatement and continued evaluation of Dollco's proposal. In the alternative, it recommends that the supply arrangements be cancelled and the process restarted, with appropriate instructions and clauses relating to conflict of interest in the RFSA.

The Tribunal will also award Dollco its costs in this proceeding.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy that CH reinstate Dollco's proposal and proceed with its evaluation. Should the proposal be found to be responsive, Dollco should become part of the established supply arrangement. Alternatively, the Tribunal recommends that the supply arrangements with all suppliers be cancelled and the process restarted, with appropriate instructions and clauses relating to conflict of interest clearly identified in the RFSA.

Pursuant to subsections 30.16(1) and (2) of the *CITT Act*, the Tribunal awards Dollco its reasonable costs incurred in preparing and proceeding with the complaint.

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