



Ottawa, Wednesday, September 24, 2003

File No.: PR-2003-030

IN THE MATTER OF a complaint filed by Lemmex Group 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.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian
International Trade Tribunal awards the Department of Public Works and Government Services its
reasonable costs incurred in relation to preparing and filing the Government Institution Report, which costs
are to be paid by Lemmex Group Inc.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: September 24, 2003

Tribunal Member: Pierre Gosselin, Presiding Member

Senior Investigation Officer: Daniel Chamaillard

Counsel for the Tribunal: Eric Wildhaber

Complainant: Lemmex Group 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 June 30, 2003, Lemmex Group Inc. (Lemmex) 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 procurement (Solicitation No. CCAB-3-0039) by the Department of Public Works and Government Services (PWGSC) for the supply of a contract administration training course.

Lemmex alleged that PWGSC unfairly evaluated its proposal in finding that the proposal did not comply with a particular mandatory requirement.² As remedy, it requested that its bid submitted in response to the Request for Proposal (RFP) be re-evaluated or, alternatively, that the solicitation be re-tendered. Lemmex also requested compensation for lost profit opportunity.

On August 5, 2003, PWGSC filed a Government Institution Report (GIR) with the Tribunal. Lemmex filed its response to the GIR on August 18, 2003.

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 RFP, with an extended bid closing date of May 5, 2003, was issued on April 10, 2003. The purpose of the procurement is to secure the services of a consultant to develop, implement and deliver a course on contract administration for the Real Property Operations Branch of PWGSC.

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

2. Mandatory requirement M-7 of the evaluation criteria included in Annex C to the RFP.

Annex C to the RFP contains a number of mandatory requirements. Mandatory requirement M-7 reads as follows:

Proposed resources must have professional certification, or an academic certificate, in the field of adult education / training, **OR** at least 3 years equivalent experience in adult education / group training / facilitation.

Lemmex submitted its proposal on May 3, 2003. On June 2, 2003, PWGSC notified Lemmex that the contract was awarded to another potential supplier. On June 4, 2003, Lemmex requested a debriefing from the contracting authority. On June 11, 2003, PWGSC informed Lemmex that its proposal was found non-compliant with mandatory requirement M-7 of the RFP.

On June 25, 2003, Lemmex attended a debriefing meeting with PWGSC, during which the Project Manager informed Lemmex that he concurred with the result of the evaluation and would not reconsider the evaluation of Lemmex's proposal. The Project Manager further informed Lemmex that the number of days of actual training experience³ was the deciding factor and that the evaluation team should not have to read between the lines to discover the additional experience that a resource may have.

Lemmex submitted its complaint to the Tribunal on June 27, 2003. On June 30, 2003, Lemmex filed additional information, and its complaint was therefore considered filed.

POSITIONS OF PARTIES

Lemmex's Position

Lemmex is of the opinion that the evaluation process applied during the review of its proposal was not conducted in a fair and equitable manner. Lemmex proposed a particular individual as the primary resource because of that individual's relevant expertise, training experience (formal and informal), design/development expertise, bilingualism and, finally, the individual's professional qualifications specific to contracting and real property initiatives throughout a lengthy career with the federal government. Further, this resource held several senior positions during his 30-year career with the federal government; each position required the ability to mentor, coach and train people on a daily basis. According to Lemmex, his ability to transfer knowledge using various teaching methods and mastering interpersonal skills was critical. Lemmex stated that this resource's experience would equate to 20 years rather than the 3 years that are necessary under mandatory requirement M-7 of the RFP.

PWGSC disqualified this resource for not having demonstrated that he possessed the equivalent of at least 3 years' experience in adult education/group training/facilitation. Lemmex contended that PWGSC based its evaluation solely on the actual number of training days shown in the schedule. Lemmex submitted that PWGSC failed to take into account the resource's experience as a facilitator or adult educator, as also specified under mandatory requirement M-7 of the RFP. Lemmex alleged that PWGSC did not consider this resource's professional qualifications and expertise, as is evidenced by the Project Manager's comment at the June 25, 2003, debriefing meeting "that the evaluation team should not have to read between the lines".

Lemmex submitted that PWGSC failed to consider the detailed description of the scope of each offering by the primary resource highlighted in column format on pages 17 to 23 of Lemmex's proposal.

3. See Attachment I to the complaint.

According to Lemmex, PWGSC only considered the number of training delivery days as experience, which resulted in the proposal being found non-compliant with mandatory requirement M-7 of the RFP.

PWGSC's Position

According to PWGSC, the RFP required bidders to demonstrate compliance with its requirements in accordance with Section II of the RFP, which states “[i]t is essential that the elements contained in your bid be stated in a clear and concise manner. Failure to provide complete information as requested will be to your disadvantage.”

PWGSC submitted that its finding of non-compliance with mandatory requirement M-7 of the RFP is consistent with Lemmex's proposal not demonstrating that the proposed resource had at least 3 years' equivalent experience in adult education/group training/facilitation.

PWGSC submitted that Lemmex's proposal did not state that its primary resource had professional certification, or an academic certificate, in the field of adult education/training. Accordingly, the evaluation team had to determine whether the proposal demonstrated that the primary resource proposed by Lemmex had 3 years' equivalent experience in adult education/group training/facilitation, by evaluating the actual time engaged in these disciplines.

According to PWGSC, the highlights of the proposed primary resource's experience reveal that he was allegedly involved in up to 48 days of training between 1997 and 2003 and that his profile provides little further information on his experience in adult education/group training/facilitation. At best, this individual held the position of Director General at the Royal Canadian Mounted Police and led the introduction of special programs and key policy initiatives in the areas of staff training and development. PWGSC further submitted that this information is ambiguous.

PWGSC submitted that the three evaluators unanimously decided that Lemmex's proposal did not demonstrate that the proposed primary resource had the necessary 3 years' experience, as the proposal was not clear on what role this resource played for a significant percentage of his claimed experience. PWGSC further submitted that 50 percent or more of the alleged experience in adult education/group training/facilitation occurred in the few months prior to bid closing.

According to PWGSC, even accepting that the primary resource had 48 days of course delivery experience and possibly additional unspecified preparation time, the three evaluators were not satisfied that this equated to 3 years' equivalent experience in adult education/group training/facilitation. In PWGSC's view, the fact that the primary resource's course delivery experience extended over 3 years does not mean that this individual had 3 years' equivalent experience. PWGSC contended that, if it were otherwise, providing a training session once a year for 3 consecutive years could be construed as 3 years' experience.

PWGSC submitted that, for these reasons, the complaint ought to be dismissed. PWGSC also requested its costs.

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*⁴ further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

The central issue in this case revolves around mandatory requirement M-7 of the RFP, which reads as follows:

Proposed resources must have professional certification, or an academic certificate, in the field of adult education / training, **OR** at least 3 years equivalent experience in adult education / group training / facilitation.

In consideration of this requirement, the parties have presented opposing views as to whether Lemmex's proposed primary resource had the necessary experience required to meet the second part of the requirement, which provides "**OR** at least 3 years equivalent experience in adult education / group training / facilitation."

The Tribunal disagrees with PWGSC's submission that the key element of the evaluation was quantitative (i.e. 48 days of actual training). The salient issue is whether the experience acquired by the primary resource qualified as adult teaching experience equivalent to professional certification or an academic certificate, as provided for in mandatory requirement M-7 of the RFP.

The Tribunal is of the view that the term "equivalent experience" must be interpreted in connection with the first part of the requirement, which required a professional certification, or an academic certificate, in the field of adult education/training. The Tribunal believes that this is an essential element in considering what type of experience would be equivalent to a professional certification or academic certificate. Accordingly, the Tribunal is of the opinion that the term "equivalent experience" has a qualitative component to it, in that the primary resource's experience had to clearly demonstrate 3 years' experience in the field of adult education/group training/facilitation, as a substitute for the certification. In the Tribunal's view, it would be reasonable to expect such experience to be gained primarily through a 3-year full-time engagement in the identified fields or the accumulated equivalent through part-time engagements.

PWGSC evaluators were not convinced that sufficient experience was demonstrated in Lemmex's bid in respect of the proposed primary resource. The Tribunal recognizes that the primary resource has expertise in certain areas relevant to the RFP. However, the Tribunal finds that it was reasonable for PWGSC to assess that the overall experience acquired by the primary resource in adult education/group training/facilitation was not the result of actual practice of these disciplines or part of his full-time employment, but rather was acquired incidentally to his employment with the federal government.

The Tribunal will not, as a rule, substitute its judgement for that of the evaluators, unless it finds that the evaluation process was conducted improperly. The Tribunal is satisfied that the evaluation team applied reasonable discretion in declaring Lemmex's proposal non-compliant and that it considered all material information before it at the time of the evaluation. Furthermore, the Tribunal does not agree with Lemmex's assertion that PWGSC's evaluation team would necessarily have had to possess subject-matter expertise and training experience in order to make a fair and reasonable evaluation.

4. S.O.R./93-602.

In consideration of the above, the Tribunal finds that the complaint is not valid.

Given that the complaint is not valid and that the Tribunal believes that the requirements were clear and that Lemmex's proposal did not clearly demonstrate that the resources it put forward had the requisite experience, the Tribunal will award PWGSC its reasonable costs.

DETERMINATION OF THE TRIBUNAL

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

Pursuant to section 30.16 of the *CITT Act* the Tribunal awards PWGSC its reasonable costs incurred in relation to preparing and filing the GIR, which costs are to be paid by Lemmex.

Pierre Gosselin

Pierre Gosselin
Presiding Member