



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

Ottawa, Wednesday, March 31, 2004

**File No. PR-2003-071**

IN THE MATTER OF a complaint filed by Hickling Arthurs Low 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.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

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Date of Determination and Reasons: March 31, 2004

Tribunal Member: Patricia M. Close, Presiding Member

Senior Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Roger Nassrallah

Complainant: Hickling Arthurs Low Corporation

Government Institution: Department of Industry



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## STATEMENT OF REASONS

### COMPLAINT

On December 22, 2003, Hickling Arthurs Low Corporation (HAL) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement (Solicitation No. IC 938-5/400322) by the Department of Industry (Industry Canada). HAL submitted that Industry Canada improperly rejected its proposal.

Specifically, HAL submitted that the Request for Proposal (RFP) contained a mandatory requirement that read, in part, as follows: “the cost of phase 1 must not exceed \$50,000.00 (GST extra)”. It also submitted that its bid was judged by Industry Canada to have “Not Met” this requirement as “Phase 1 exceed[ed] \$50,000.00”. HAL submitted that it had every intention of meeting both the letter and intent of this mandatory requirement and that it clearly stated in its price proposal that the cost to Industry Canada for phase 1 would be \$50,000.00. HAL further submitted that, shortly after receiving its bid, Industry Canada requested clarification about cost breakdown. HAL explained that many costs could only be nominally allocated to phases and then arbitrarily allocated these costs evenly over the phases. HAL further submitted that these nominal allocations would not affect the cost to Industry Canada for any of the phases, particularly phase 1. HAL submitted that its bid was within the total price ceiling specified by Industry Canada (i.e. \$200,000.00) and clearly indicated HAL’s intention to respect Industry Canada’s need to meet its budgetary requirements.

As a remedy, HAL requested an immediate suspension of the contract award pending a re-evaluation of the bids.

On December 30, 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*.<sup>2</sup> After having been granted an extension on January 20, 2004, Industry Canada filed a Government Institution Report (GIR) with the Tribunal in

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

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

accordance with rule 103 of the *Canadian International Trade Tribunal Rules*<sup>3</sup> on February 2, 2004. HAL filed its comments on the GIR on February 13, 2004.

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

The RFP for this procurement was posted on MERX<sup>4</sup> on July 31, 2003. Three amendments were issued in relation to the RFP to fix some small errors, to extend to September 10, 2003, the deadline for the receipt of tenders and to answer certain questions posed by potential bidders.

Section 10 of Part II of the RFP provided the mandatory requirement of the solicitation. Specifically, section 10.7, as amended,<sup>5</sup> reads as follows:

The total cost of the project must not exceed \$200,000.00 (GST extra); furthermore, the cost of phase 1 must not exceed \$50,000.00 (GST extra). The bidder must provide a full cost breakdown as per Section 13, Financial Proposal, below.

Section 13 of Part II of the RFP reads, in part, as follows:

The total cost of the project must not exceed \$200,000.00 (plus GST), including travel and other expenses. Furthermore, the cost of phase 1 must not exceed \$50,000.00. Proposals not meeting these cost restrictions will be rejected, and will not be evaluated.

The financial proposal is to be submitted as a separate package to the technical proposal, and will be further assessed only if the technical portion of the bidder's proposal is considered to meet all the mandatory requirements, meets the minimum score for individual rated requirement from 11.1 to 11.8 and receives a **MINIMUM OF 75 PERCENT** on the overall rated evaluation criteria.

No points are awarded for the mandatory requirements, but each must be met in order for the bidder's proposal to receive consideration and points for the rated evaluation criteria as described in the bidder's proposal.

A full cost breakdown must accompany each proposal. Costs for each of the five phases (See Section 4, Project Details) must be broken down as follows:

- Personnel costs:
  - number of work days for each team member
  - daily rates charged for each member
- All other expenses

HAL submitted its proposal in response to the RFP on September 9, 2003. On September 17, 2003, Industry Canada sought clarification from HAL regarding the allocation of certain expenses included in its proposal. On the same day, HAL responded to Industry Canada's request by providing a cost allocation for one component of its proposal (i.e. Study Design) and what HAL referred to as a nominal allocation for

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

4. Canada's Electronic Tendering Service.

5. Section 10.7 originally read as follows: "The total cost of the project must not exceed \$200,000.00 (GST extra); furthermore, the cost of phase 1 must not exceed \$50,000.00 (GST extra). The bidder must provide a full cost breakdown as per Section 12, Financial Proposal, below.

another part of its proposal (i.e. Management and Meetings). While the response indicated that the nominal allocation for phase 1 was greater than the \$50,000.00 amount that HAL showed in its payment schedule for phase 1, HAL indicated that the management and meetings would not be billed for this first part of the study.

The contract was awarded to Graytek Management Inc. on December 5, 2003, and the contract award notice was posted on MERX on December 8, 2003. On the same day, in response to its inquiry about the MERX notice, HAL received an e-mail that indicated that its proposal had been evaluated as not meeting the mandatory requirements under section 10.7 of Part II of the RFP, i.e. "Price quote meets requirements". The comment in relation to section 10.7 reads: "Phase 1 exceeds \$50,000.00".

On December 10, 2003, HAL spoke with the contracting officer's supervisor to ask that the contract be suspended and to request a re-evaluation of its proposal. The supervisor explained to HAL that the evaluation of all proposals received had been done in a fair and equitable manner and that the contract had already been awarded.

On December 12, 2003, HAL sent a letter requesting written clarification from Industry Canada regarding the rejection of its proposal. On the same day, Industry Canada responded to HAL's letter and confirmed that its bid was non-compliant. Industry Canada indicated that, although it could have rejected HAL's proposal on the basis that it did not provide a "full cost breakdown", as specifically required under sections 10.7 and 13 of Part II of the RFP, it chose to seek clarification in this regard. Upon consideration of HAL's clarification response, Industry Canada declared HAL's proposal non-compliant on the basis that its cost for phase 1 exceeded the mandatory maximum cost of \$50,000.00, which was also specifically required under section 10.7.

On December 22, 2003, HAL filed a complaint with the Tribunal.

## **POSITIONS OF THE PARTIES**

### **Industry Canada's Position**

Industry Canada submitted that HAL's bid was rejected on the basis that it did not meet the mandatory requirement found in section 10.7 of Part II of the RFP for phase 1 and, therefore, that its bid was properly considered non-compliant. Industry Canada submitted that the RFP clearly states that proposals must meet these mandatory requirements, failing which they would not be given further consideration. Industry Canada also submitted that HAL failed to meet the mandatory requirements for cost restrictions for phase 1 and, thus, that it was justified in declaring HAL's proposal non-compliant.

Industry Canada submitted that, upon reading HAL's financial proposal, which included HAL's resource allocation schedule, it found that the total costs for phase 1 were unclear and that it was difficult to ascertain the total cost for phase 1 without clarification from HAL. On September 17, 2003, according to Industry Canada, HAL indicated that the total cost for phase 1 would be greater than the mandatory requirement of \$50,000.00. Industry Canada submitted that HAL's proposal failed to meet the mandatory requirement for phase 1 and, accordingly, that it declared the proposal non-compliant. Industry Canada submitted that, although HAL included a "Method of Payment" schedule, this document was not a requirement of the RFP and should not be given any consideration.

Industry Canada submitted that five of seven bidders were compliant with respect to the allocation of costs and that, therefore, this mandatory requirement was clearly stated, well understood and capable of being met by the bidders. Industry Canada also submitted that HAL could have sought clarification before bid closing, but failed to do so. Industry Canada submitted that HAL should have raised its concerns regarding the structure at the time the RFP was posted on MERX. The RFP was posted from July 31, 2003, to September 10, 2003, and, according to Industry Canada, HAL knew or reasonably should have known by September 1, 2003, or at least no later than the closing date of the RFP, that it had concerns about the structure. Having only complained about that aspect at the time of the complaint dated December 22, 2003, some three months after the closing date of the RFP, Industry Canada submitted that this ground of complaint should be rejected.

Industry Canada submitted that this complaint should be dismissed by the Tribunal, with costs being awarded to Industry Canada pursuant to section 30.16 of the *CITT Act*.

### **HAL's Position**

According to HAL, Industry Canada requested a firm price contract of \$200,000.00, with the further restriction that the cost to the Crown for phase 1 be limited to \$50,000.00. HAL submitted that it complied with both these requests—the amount that it would charge for the work to the end of phase 1 was \$50,000.00, and the amount for the work to the end of the contract was \$200,000.00. HAL submitted that this required no clarification from Industry Canada during the bidding process.

HAL submitted that it is strange that Industry Canada should claim that its “Method of Payment” schedule is not relevant and should not receive consideration. According to HAL, the intent of its restriction on the cost to the Crown of phase 1 is to control the project cashflow. HAL submitted that it has not asked the Crown to use the nominal figures in its resource allocation schedule to assess its financial proposal, as was claimed by Industry Canada, but rather it is adamant that the Crown use HAL's “Method of Payment” schedule for this purpose. Furthermore, HAL indicated to Industry Canada that it should not rely on the nominal figures provided in its response to the request for clarification for the same reason.

HAL submitted that its resource allocation schedule clearly provides the information requested by Industry Canada and that it responded to Industry Canada's request for additional clarification without prejudice. HAL further submitted that it was surprised by Industry Canada's view that, since five of seven bidders were compliant on the phase 1 cost requirement, the mandatory requirement was clearly stated and well understood. According to HAL, contractors do not go to the time and effort of submitting bids that they think are non-compliant. HAL further submitted that a 30 percent non-compliance rate on a single mandatory criterion is significant and inconsistent with the Crown's desire for a fair and competitive contracting process.

### **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.

In this case, the complaint deals with whether HAL's proposal was improperly rejected because its proposed price for phase 1 exceeded \$50,000.00. Article 506(6) of the *Agreement on Internal Trade*<sup>6</sup> reads, in part, as follows:

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)(a) of the *North American Free Trade Agreement*<sup>7</sup> indicates that, "to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices and tender documentation".

The Tribunal finds that Industry Canada rejected HAL's proposal for the wrong reason. The Tribunal is of the opinion that HAL's proposal, as submitted, clearly indicated<sup>8</sup> that the amount that would be charged to the government up to the end of phase 1 would not exceed the \$50,000.00 limit. Furthermore, Industry Canada rejected HAL's proposal based upon a clarification that the resource allocation<sup>9</sup> of costs for phase 1 included management and meeting costs that were back-loaded to the final phases of the project and for which the government would not be billed until after phase 5. In order to disqualify HAL's proposal on this basis, Industry Canada relied on a clarification that was not provided for in the RFP. As such, the Tribunal finds that Industry Canada violated the requirements of Articles 506(6) of the *AIT* and 1015(4)(a) of *NAFTA*.

With respect to Industry Canada's request for the clarification of HAL's proposal, the Tribunal is of the opinion that such clarification requests can be fraught with difficulties. If the clarification substantially alters the proposal and is accepted as such, then the government runs the risk of a complaint on that ground from another bidder. Clarifications that are not specifically contemplated by the wording of the RFP and that amount to substantive changes to a proposal are, in and of themselves, inconsistent with the trade agreements and are generally not permitted. Similarly, as is indicated by this decision, the government cannot disqualify a bidder on the basis of a clarification that is not reflected in the tender documents, as the information obtained during such a clarification process is not itself part of the original proposal.

In recommending the appropriate remedy, the Tribunal is required to consider all the circumstances relevant to this procurement, including those outlined in subsection 30.15(3) of the *CITT Act*. While the Tribunal has determined that the complaint is valid, the Tribunal is of the opinion that neither HAL nor the integrity of the competitive procurement system has suffered prejudice as a result of the actions of Industry Canada. In this case, the Tribunal is particularly mindful of the fact that Industry Canada could and should have rejected HAL's proposal for a different reason than the one used. Even though Industry Canada improperly rejected HAL's proposal, the Tribunal is of the opinion that HAL's original proposal did not conform to the mandatory requirement of section 10.7 of Part II of the RFP, in that HAL did not provide a proper breakdown of its costs as stipulated in section 13, "Financial Proposal". As noted above, section 13 required that the costs for each of the five phases include personnel costs and "[a]ll other expenses". In this regard, the Tribunal is of the opinion that Industry Canada ought to have disqualified HAL's proposal on this basis. Instead, Industry Canada chose not to rely on this ground for disqualification, even though it had

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

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

8. Public version of HAL's price proposal contained in its financial proposal (Method of Payment) dated September 9, 2003, GIR, Tab 1.

9. Resource allocation in HAL's price proposal, Table 1, GIR, Tab 1.

been clearly alluded to in Industry Canada's letter of December 12, 2003. Based on the foregoing, the Tribunal has decided that no remedy will be recommended in this matter.

With respect to the award of costs, the Tribunal finds that the RFP was clear with respect to the required cost breakdown under section 13 of Part II of the RFP and that, even though Industry Canada violated the trade agreements, the violation was a technical one. The Tribunal is of the opinion that, if the mandatory cost breakdown requirement was not evident to HAL upon reading the RFP, it should have become evident when the clarification was requested. In this regard, this complaint would not likely have been submitted to the Tribunal had HAL carefully reviewed the mandatory costing requirements or paid particular attention to the comments in Industry Canada's letter of December 12, 2003. As such, the Tribunal will not award costs to either party in this matter.

#### **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 valid.

Patricia M. Close  
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Presiding Member