



Ottawa, Thursday, October 23, 2003

**File No. PR-2003-035**

IN THE MATTER OF a complaint filed by Virtual Wave 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.

Ellen Fry  
Ellen Fry  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

Date of Determination and Reasons:	October 23, 2003
Tribunal Member:	Ellen Fry, Presiding Member
Senior Investigation Officer:	Cathy Turner
Counsel for the Tribunal:	Marie-France Dagenais
Complainant:	Virtual Wave Inc.
Government Institution:	Department of Indian Affairs and Northern Development



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## STATEMENT OF REASONS

### COMPLAINT

On July 25, 2003, Virtual Wave Inc. (Virtual Wave) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning the procurement (Solicitation No. A1632-11/20-03-6002) by the Department of Indian Affairs and Northern Development (INAC) for the provision of litigation research analysis, research services and related document management support services.

Virtual Wave alleged that INAC used unknown new criteria or measures to disqualify its offered resources. Virtual Wave submitted that it had been advised by an authorized representative of INAC that three of its nine proposed resources qualified for a standing offer under the solicitation; however, it was subsequently advised that the decision had been amended and that the proposed resources did not qualify for a standing offer as previously communicated.

Virtual Wave requested, as a remedy, that the Tribunal recommend that INAC issue contracts to Virtual Wave for researchers equivalent to the contracts given to three other contractors that each received a contract in the amount of \$481,500. In the alternative, Virtual Wave requested that the Tribunal recommend that INAC compensate it in an amount equal to the profit that it would have made if it had been awarded three contracts. Finally, it requested the award of its costs for preparing and proceeding with the complaint.

On July 31, 2003, 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*.<sup>2</sup> On August 25, 2003, INAC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> Virtual Wave filed its comments on the GIR with the Tribunal on September 5, 2003. On September 18, 2003, the Tribunal requested that INAC provide additional information and documentation. On September 24, 2003, INAC filed the requested information and documentation with the Tribunal. On October 1, 2003, Virtual Wave filed its comments on INAC's submission. On October 2, 2003, the Tribunal forwarded Virtual Wave's response to INAC for information.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499.

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 April 11, 2003, the solicitation was posted on MERX, Canada's Electronic Tendering Service. Bids closed on May 23, 2003. INAC received 25 bids for the Research Analysis category and 26 bids for the Research Services category. Virtual Wave submitted a bid for each category. Bids were evaluated between June 12 and 20, 2003. At the beginning of the procurement process, INAC decided to involve an independent fairness monitor to participate as a full member of the Bid Evaluation Committee due to the complexity of the solicitation, the number of bidders and resources expected to be tendered, and the total dollar value of the standing offers to be issued. On June 25, 2003, the Fairness Monitor's Report was prepared and sent to INAC. On July 3, 2003, a formal award recommendation letter<sup>4</sup> from the Bid Evaluation Committee Chairperson was sent to the head of the Contracting Services Section of INAC recommending the issuance of standing offers to the successful bidders. According to INAC, on July 4, 2003, letters were sent to the unsuccessful bidders advising them of the evaluation results.<sup>5</sup>

On July 10, 2003, according to Virtual Wave, it contacted the INAC contracting officer to confirm its standing offer award, since it had not received a letter declaring its bid unsuccessful. According to Virtual Wave, the INAC contracting officer confirmed that Virtual Wave was successful for three of its nine proposed resources. According to INAC, on July 15, 2003, the contracting officer advised the same authorized representative of Virtual Wave that it was not awarded a standing offer under the solicitation. On July 25, 2003, Virtual Wave filed its complaint with the Tribunal.

## **POSITION OF PARTIES**

### **Virtual Wave's Position**

Virtual Wave submitted that the INAC contracting officer verbally provided award results to its representatives and that the level of accuracy in the conversation regarding the numbers and names of resources could reasonably be assumed to have been a direct reflection of information given to the officer by the Bid Evaluation Committee. Virtual Wave submitted that, in two separate telephone conversations with two different Virtual Wave representatives, the INAC contracting officer advised that the decision to award standing offers had been amended and that Virtual Wave had not won awards. It further submitted that, when asked about the discrepancy, the contracting officer advised that the information given to Virtual Wave on July 10, 2003, was provided as it had been given to the officer and that the officer was unable to explain what had occurred to change the decision. Virtual Wave argued that this revised decision suggested that its offer had been exposed to new criteria or some other unknown measure that disqualified a greater number of its resources.

With regard to the contents of the award recommendation letter, Virtual Wave submitted that the letter is clear in its recommendation that "[b]ased on the terms set out in the [Request for Proposal], we recommend that all compliant respondents that scored 65 points and above the point-rated criteria receive

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4. GIR, Appendix G.

5. INAC submitted that Virtual Wave did not receive one of these letters, as the contracting officer was verbally misled, by the program officials, to believe that this firm had qualified for the award of a standing offer.

standing offers. This means that the following bidders should be disqualified for the service(s) indicated, based on their score.” Virtual Wave contended that INAC’s reasoning that the contracting officer was given erroneous information and that the officer was confused implies that the officer was incompetent, which Virtual Wave does not accept. Virtual Wave also contended that the contracting officer gave no misinformation from the award recommendation letter to the other bidders. It submitted that it does not believe that the award recommendation letter formed part of the original instructions given to the contracting officer on the awards that led to the misinformation. Virtual Wave submitted that it believes that the letter was generated later to justify the application of new criteria and to shift the blame to a lower-level employee. It also submitted that INAC’s description of the situation as an “administrative peccadillo” is an attempt to avoid providing a truthful explanation and that it is the nature and cause of this “peccadillo” that seems to have only affected Virtual Wave’s bid.

Virtual Wave submitted that admitting to “administrative errors” does not relieve INAC of its responsibility to the bidders or to Virtual Wave for losses incurred as a result of its admitted incompetence. Further, it submitted that the number of mistakes involved in the handling of its bid, the possible inequities involved in its evaluation and INAC’s failure to comply with the *Agreement on Internal Trade*<sup>6</sup> lead it to believe that the whole process was flawed.

In response to INAC’s submission of September 24, 2003, and regarding INAC’s request for its costs in preparing its submission to the Tribunal, Virtual Wave submitted that, while remuneration is at the Tribunal’s discretion, it acted in good faith from the outset and, as such, is only using the resources provided by the Tribunal’s complaint process. Virtual Wave contended that, had INAC been transparent, accurate and efficient from the outset, it would not have incurred any costs, as it would not have created any grounds for the complaint.

In its October 1, 2003, submission, Virtual Wave requested an amendment to its previously requested relief as follows: the cost of preparing its bid, the cost of preparing the complaint and its associated comments, the direct costs incurred as a result of the miscommunication by INAC’s contracting officer and damages as determined by the Tribunal for the lost opportunity.

### **INAC’s Position**

INAC submitted that the solicitation and the resulting bid evaluation and selection process were clear and concise. It further submitted that the bid evaluation criteria were also clear and objective, measuring the bidder and its resources, as well as the price proposed by each bidder. It argued that the attestation of the independent Fairness Monitor provides evidence that these criteria were fairly and equitably applied to all bidders. INAC submitted that Virtual Wave’s bids for both the Research Analysis category and the Research Services category did not meet the pass mark of 65 out of 100 rated points. It further submitted that it did not change or amend the evaluation criteria nor did it apply different criteria to any aspect of the evaluation of the proposed resources by any bidder.

INAC submitted that the award recommendation letter correctly identified the unsuccessful bidders and that Virtual Wave was correctly identified in that letter as being unsuccessful in both the Research Analysis category and the Research Services category. However, it also submitted that there was some inconsistent wording in the letter that could have led to the impression that Virtual Wave qualified under both categories.

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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].

INAC submitted that, if inaccurate information was initially provided to Virtual Wave's representative, this mistake was corrected as soon as it was discovered and that the error was further explained during an in-person meeting with the representative. It further submitted that the incorrect information did not impact on the results of the solicitation.

INAC contended that it responded to requests for information from all suppliers, including Virtual Wave, and it acknowledged that some information pertaining to the qualification or non-qualification of certain resources proposed by Virtual Wave was somehow misunderstood. INAC submitted that this misinformation was clarified, in a timely manner, as soon as it was discovered. Also, it submitted that based on the evidence provided, the complaint is therefore unfounded.

In response to the Tribunal's request for additional information and documentation, INAC submitted that Appendix "F" to the GIR, the successful bidders worksheet, was prepared on July 3, 2003, by the contracting officer in order to provide to the program officials a list of the proposed standing offer holders for verification. It further submitted that, being uncertain of the status of Virtual Wave's bid, the contracting officer placed question marks after Virtual Wave's name, and without any breakdown of dollars assigned, as a reminder to clarify the outcome in relation to Virtual Wave.

INAC submitted that the discussion between key personnel about the correct interpretation of the results of this bid evaluation process, as it related to Virtual Wave, could have been more precise; however, it submitted that there is no evidence to support the view that there has been any change in the decisions of the Bid Evaluation Committee, nor is there any evidence of a change to the decision of the Bid Evaluation Committee.

Finally, INAC requested its costs in preparing its submission to the Tribunal.

## 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 *AIT*, the *North American Free Trade Agreement*<sup>7</sup> and the *Agreement on Government Procurement*.<sup>8</sup>

The Tribunal notes that two solicitations were being conducted simultaneously by INAC to establish standing offer agreements with qualified bidders for the provision of litigation research analysis, research services and related document management support services. One solicitation was reserved as an aboriginal set aside. The other procurement, which was not an aboriginal set aside, is the subject of this complaint.

With regard to Virtual Wave's allegation that INAC incorrectly evaluated specific resources as not meeting the mandatory criteria relating to experience in the specific area of aboriginal litigation, the Tribunal is of the opinion that this ground of complaint was not filed within the time limit prescribed by

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7. 32 I.L.M. 289 (entered into force 1 January 1994).

8. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)>.

section 6 of the *Regulations*. Consequently, the Tribunal does not have jurisdiction to inquire into this ground of complaint. In the Tribunal's view, Virtual Wave should reasonably have known about this ground of complaint on July 29, 2003, the date on which Virtual Wave received a debriefing from INAC, including a copy of the Fairness Monitor's Report, in relation to its bid. However, this ground was only raised in Virtual Wave's reply to the GIR, which was received by the Tribunal on September 5, 2003.

After carefully considering the evidence before it, the Tribunal is convinced that Virtual Wave was given the wrong information by the contracting officer on July 10, 2003. That error was not corrected until July 15, 2003, at which time the contracting officer gave Virtual Wave fundamentally different information regarding the status of its bid. However, the Tribunal is not convinced by the evidence that this error was due to an application of criteria not stated in the Request for Proposal. The documentary evidence provided by INAC, including the award recommendation letter, the Fairness Monitor's Report and the contracting officer's note to file are all consistent with INAC's position that this was a miscommunication rather than an improper evaluation. The Tribunal considers that the evidence provided by Virtual Wave was also consistent with this conclusion.

The Tribunal notes that, by giving a fairness monitor a vote in the evaluation process, INAC potentially diminished the objectivity of the subsequent Fairness Monitor's Report and, thus, decreased its usefulness as an independent indication of whether the evaluation process was properly followed. However, despite this problem, the overall weight of the evidence is clear.

For the above reasons, the Tribunal finds that INAC did not violate the trade agreements, as alleged by Virtual Wave. In light of the foregoing, the Tribunal finds that the complaint is not valid.

INAC has requested its costs in preparing its submission to the Tribunal. Based on the evidence, the Tribunal considers that the misinformation given to Virtual Wave was a genuine error, and the evidence does not indicate bad faith on the part of INAC. The Tribunal also notes that INAC indicated that it has undertaken a review of the relevant circumstances to implement procedures to ensure that this type of situation does not recur. Nonetheless, the fact remains that to communicate erroneously to Virtual Wave that it was a successful bidder was an error of a fundamental nature that led to the complaint being filed and subsequently being accepted by the Tribunal for inquiry. Given that Virtual Wave was initially told that it was a successful bidder and was later told that it was not, it had reason to become suspicious about the integrity of the procurement process and to initiate a complaint. Accordingly, the Tribunal does not award INAC its costs of responding to the complaint.

## **DETERMINATION OF THE TRIBUNAL**

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

Ellen Fry  
Ellen Fry  
Presiding Member