Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

**CANADIAN INTERNATIONAL TRADE TRIBUNAL**

# Procurement

## DETERMINATION AND REASONS

File No. PR-2008-023

Joint Venture of BMT Fleet Technology Limited and NOTRA Inc.

v.

Department of Public Works and Government Services

*Determination and reasons issued Wednesday, November 5, 2008*

Canada

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IN THE MATTER OF a complaint filed by the joint venture of BMT Fleet Technology Limited and NOTRA 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*.

**BETWEEN**

| | |
|---|---|
| **JOINT VENTURE OF BMT FLEET TECHNOLOGY LIMITED AND NOTRA INC.** | **Complainant** |

**AND**

| | |
|---|---|
| **THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES** | **Government Institution** |

## 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 responding to the complaint, which costs are to be paid by the joint venture of BMT Fleet Technology Limited and NOTRA Inc. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is $1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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|---|---|
| Tribunal Member: | Pasquale Michaele Saroli, Presiding Member |
| Director: | Randolph W. Heggart |
| Senior Investigator: | Michael W. Morden |
| Investigator: | Josée B. Leblanc |
| Counsel for the Tribunal: | Alain Xatruch |
| Complainant: | Joint venture of BMT Fleet Technology Limited and NOTRA Inc. |
| Counsel for the Complainant: | Leonard Max, Q.C. |
| Government Institution: | Department of Public Works and Government Services |
| Counsel for the Government Institution: | David M. Attwater<br>Susan D. Clarke<br>Ian McLeod |

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

# STATEMENT OF REASONS

1. On August 11, 2008, the joint venture of BMT Fleet Technology Limited and NOTRA Inc. (BMT-NOTRA) 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 the procurement (Solicitation No. W8486-08JB14/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the provision of technical and engineering management services.

2. BMT-NOTRA alleged that PWGSC improperly awarded the contract to a competitor whose proposal did not meet one of the mandatory criteria contained in the Request for Proposal (RFP). Specifically, BMT-NOTRA alleged that the resource proposed by the winning bidder, AMTEK Engineering Services Ltd. (AMTEK), in response to the "Nuclear Advisor" category, did not meet mandatory technical evaluation criterion MT2 of that category (MT2).

3. By way of remedy, BMT-NOTRA requested that the Tribunal rule on the correct definition of "nuclear advisor" in MT2 and that, if BMT-NOTRA's proposed interpretation is accepted by the Tribunal, that the Tribunal rule that the bids were not fairly assessed. It further requested that the proposals be reassessed based on the correct interpretation of "nuclear advisor" and that the contract be re-awarded on that basis. Finally, BMT-NOTRA requested that its complaint costs be reimbursed and that the Tribunal issue a postponement of award of contract order.

4. On August 15, 2008, 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*.[2] The Tribunal also advised the parties that, as a contract had already been awarded, it would not issue a postponement of award of contract order.

5. On September 9, 2008, in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*,[3] PWGSC filed a Government Institution Report (GIR) with the Tribunal. On September 19, 2008, BMT-NOTRA filed its comments on the GIR with the Tribunal.

6. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing would not be required and disposed of the complaint on the basis of the information on the record.

## PROCUREMENT PROCESS

7. On February 26, 2008, PWGSC made the RFP available through MERX.[4] According to PWGSC, it received two proposals in response to the solicitation, one from BMT-NOTRA and the other from AMTEK. On July 7, 2008, three DND representatives evaluated the bids and determined that both were technically compliant. On July 8, 2008, PWGSC's contracting authority conducted a financial evaluation of both proposals, and AMTEK was found to have submitted the lowest-priced responsive bid. These results were confirmed by a PWGSC supply specialist. On July 14, 2008, PWGSC advised BMT-NOTRA that a

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

contract had been awarded to AMTEK. On July 23, 2008, BMT-NOTRA made an objection to PWGSC, alleging that AMTEK's proposed resource for the position of nuclear advisor did not meet the requirements of MT2 and stating as follows:

> I am asking that within the next seven days you provide me with fax response . . . either verifying this information [i.e. that the resource submitted by AMTEK in response to the "Nuclear Advisor" category was the person whom BMT-NOTRA thought he/she was] is correct or advising it is not so. If it is correct then this letter is intended as an initial notification to you that my clients are raising objection to the awarding of the contract to Amtek, on the ground that [the proposed resource] does not have the minimum four years experience as such a Nuclear Advisor in the last ten years, as required by MT2 . . . .[5]

8. On July 31, 2008, PWGSC responded to BMT-NOTRA's objection by stating the following: ". . . [i]t was determined by the evaluation team that all of the resources proposed in Amtek's bid met the resource qualifications in all categories . . ." and ". . . there is no reason for PWGSC to review the award of this contract to Amtek."[6] On August 11, 2008, BMT-NOTRA filed its complaint with the Tribunal.

## TRIBUNAL'S ANALYSIS

9. 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*,[7] the *North American Free Trade Agreement*[8] and the *Agreement on Government Procurement*.[9]

10. Article 506(6) of the *AIT* provides the following: ". . . 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."

11. Article 1015(4)(d) of *NAFTA* and Article XIII 4(c) of the *AGP* similarly provide that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation".

12. Section 3 of the RFP, entitled "**BID PREPARATION INSTRUCTIONS**", reads as follows at paragraph A.12(c): "Attachment 1 to Section 4, Evaluation Procedures, contains additional instructions that bidders should consider when preparing their technical bid." Section 2 of that attachment provides as follows:

> **2. <u>Technical Evaluation</u>**
>
> **2.1 The technical bid must meet the mandatory technical evaluation criteria specified in the tables below. The Bidder must provide the necessary documentation to support compliance.**

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5. Complaint, tab 6 at para. 3.
6. Complaint, tab 7.
7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
8. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].
9. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

> **2.2 Any bid which fails to meet the mandatory technical evaluation criteria will be considered non-responsive. Each criterion should be addressed separately.**

13. Section 3.5 of Attachment 1 to Section 4, which lists the mandatory technical evaluation criteria pertaining to the "Nuclear Advisor" category, reads as follows:

> **3.5 Nuclear Advisor**
>
> **The bidder must meet or exceed all of the Specific Requirements of this solicitation of:**

| | |
|---|---|
| . . . | |
| **MT2** | The Bidder must demonstrate that each proposed resource has a minimum of four (4) years experience as a **Nuclear Advisor with respect to Canadian nuclear regulations and standards** within the last ten (10) years. |
| . . . | |

14. BMT-NOTRA submitted that, as regards the Canadian nuclear industry, there are only two regulatory bodies: (a) the Canadian Nuclear Safety Commission (CNSC); and (b), in the specific case of DND, the Director General Nuclear Safety (DGNS). BMT-NOTRA submitted that there are no other legally obligatory "Canadian nuclear regulations and standards" other than those imposed and supervised by these two bodies. It further submitted that it necessarily follows that, if one is advising an entity which is not involved in or contemplating an activity licensed by one of these two bodies, one is not advising with respect to "Canadian nuclear regulations and standards", as contemplated in MT2.

15. According to BMT-NOTRA, this meant that, in practical terms, the experience referred to in MT2 can only arise if a person or firm is carrying out an activity licensed by either the CNSC or the DGNS. It argued that, for a person to have "experience as a **Nuclear Advisor with respect to Canadian nuclear regulations and standards**", that person must have directly fulfilled the obligation of advising while acting as a resource under a contract which licenses that activity because, if not so licensed, there would exist no obligation to comply with such regulations or standards. BMT-NOTRA submitted that the word "experience" in this context necessarily assumes that the advisor has specifically worked in that role and, presumably, that the licensed activity on which he was advising successfully met compliance obligations under Canadian nuclear regulations and standards. In this regard, BMT-NOTRA contended that the words "four years" clearly implied that the sum total of time during which such licensed activity or activities involved the proposed resource as an advisor must have amounted to an accumulation of 48 months within the 10 years preceding the bid submission.

16. BMT-NOTRA submitted that, based on its understanding of AMTEK's proposed resource's experience from information culled from unnamed ". . . sources . . . active in this solicitation field . . .",[10] up to the fall of 2007, the proposed resource did not have the necessary 4 years of experience. BMT-NOTRA also submitted that it did not believe that the proposed resource obtained any contract involving a licensed activity since the fall of 2007. In its complaint, BMT-NOTRA provided a listing of what it believed to be the proposed resource's specific job experience and its assessment of same against its interpretation of MT2. In this regard, BMT-NOTRA submitted that, when tallied up, the proposed resource fell short of the requisite 48 months of experience.[11]

10. Complaint, tab 2 at para. 5.
11. Complaint, tab 3 at paras. 5, 6.

17. For its part, PWGSC submitted that the term "nuclear advisor" was not specifically defined in the RFP and that no questions had been raised during the bidding period regarding the definition of this term. It submitted that, for purposes of assigning a reasonable interpretation to MT2, the Tribunal should have regard to the tasks and deliverables expected of the nuclear advisor, as listed in section 3.8 of Annex "A", "**STATEMENT OF WORK**" (SOW),[12] to the RFP; the broad scope of the CNSC's regulations and regulatory documents; the DGNS's Defence Administrative Orders and Directives, as well as its Nuclear Safety Orders and Directives; and the breadth of connection connoted by the phrase "with respect to". According to PWGSC, this phrase denotes a connection of the widest possible scope between the work experience of the "nuclear advisor" and "Canadian nuclear regulations and standards".

18. PWGSC submitted that the meaning of the phrase "Canadian nuclear regulations and standards" is readily discernible in the broad context of Canada's nuclear regulatory regime. In this regard, it noted the various responsibilities of the CNSC in administering the *Nuclear Liability Act*,[13] in conducting environmental assessments under the *Canadian Environmental Assessment Act*,[14] in implementing Canada's bilateral agreement with the International Atomic Energy Agency on nuclear safeguard verification and in issuing bylaws, regulations and related regulatory documents (elaborating on such diverse requirements as those relating to thyroid screening and shutdown systems in reactors) under the authority of the *Nuclear Safety and Control Act*.[15] Regarding the DGNS, PWGSC also referred to its responsibilities regarding the issuance of defence administrative orders/directives and nuclear safety orders/directives (e.g. dealing with requirements for the management of nuclear materials and radiation protection; the authorization and control of nuclear activities; the use, handling, storage and maintenance of sources of ionizing radiation; transportation, packaging/labelling requirements; records, inspections, reports and audits; limitation of contamination from nuclear substances; decommissioning and disposal; the safety of nuclear-powered vessel visits to Canada; and nuclear emergency response).

19. PWGSC submitted that the experience of AMTEK's proposed nuclear advisor with respect to the regulations and related regulatory documents of the CNSC and the various directives of the DGNS therefore constituted valid experience with respect to Canadian nuclear regulations and standards.

20. PWGSC submitted that the experience required under MT2 included, but was not necessarily limited to, work of the kind or class identified in the RFP as tasks and deliverables of the nuclear advisor that were relevant or rationally connected to the Canadian regulations and current regulatory documents and directives listed on the CNSC's and DGNS's Web sites. On this basis, PWGSC submitted that the evaluators reasonably found, based on the information contained in AMTEK's proposal, that its proposed resource demonstrated the necessary years of experience as a nuclear advisor with respect to Canadian nuclear regulations and standards.

21. PWGSC submitted that, if BMT-NOTRA's interpretation of MT2 were accepted, MT2 would have instead read as follows:

> "The Bidder must demonstrate that each proposed resource has a minimum of four (4) years experience as a Nuclear Advisor acting as a resource under contract specifically working in the role of an advisor and directly fulfilling the obligation of advising an entity licensed by either the Canadian Nuclear Safety Commission or the Director General Nuclear Safety on successful compliance with Canadian nuclear regulations and standards with which the entity has an obligation to comply."[16]

12. PWGSC noted that this list is not exhaustive and that this section specifically advises bidders that "[t]asks include the following but are not limited to . . . ."
13. R.S.C. 1985, c. N-28.
14. S.C. 1992, c. 37.
15. S.C. 1997, c. 9.
16. GIR at 15.

22. PWGSC claimed that BMT-NOTRA's reading of MT2 is inconsistent with the plain language of the RFP and that the interpretation applied by the technical evaluators reflected a reasonable interpretation of MT2, read in its proper context.

23. In this regard, PWGSC submitted that the Tribunal should not interfere with a decision of the technical evaluators unless the decision was found to be unreasonable on the evidence or other information judged to be authentic.

24. In *Northern Lights Aerobatic Team, Inc.*,[17] the Tribunal stated the following:

> . . .
>
> 51. A procuring entity will satisfy its obligations under [Article 506(6) of the *AIT* and Article 1015(4)(d) of *NAFTA*] when it makes ". . . a reasonable evaluation, in good faith, of the competing bid documents submitted in response to the [solicitation] . . . ." The Tribunal will interfere only with an evaluation that is *unreasonable.*
>
> 52. In *Law Society of New Brunswick v. Ryan*, referring to the Supreme Court of Canada's earlier decision in *Canada (Director of Investigation and Research) v. Southam Inc.*, Iacobucci J., stated as follows:
>
> > A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> In the Tribunal's opinion, the same principle applies with respect to the Tribunal's review of a procuring entity's evaluations under the trade agreements. In the past, the Tribunal has noted that it will substitute its judgement for that of evaluators only when the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.
>
> . . .
>
> [Footnotes omitted]

25. Therefore, the issue before the Tribunal is whether PWGSC's determination that AMTEK's proposed nuclear advisor satisfied MT2 was reasonable under the circumstances. PWGSC's determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling.

26. The Tribunal finds that MT2 can be broken down into four mandatory sub-requirements, with two of them being substantive and the other two being temporal in nature. In the Tribunal's opinion, MT2 requires that a proposed resource have (i) a minimum of four years of experience (temporal) (ii) as a nuclear advisor (substantive) (iii) with respect to Canadian nuclear regulations and standards (substantive) (iv) within the last 10 years (temporal).

17. (7 September 2005), PR-2005-004 (CITT).

27. Based on the nature and extent of the allegations before the Tribunal, the temporal issues would only come into play if the Tribunal were to find PWGSC's interpretation of the substantive requirements to have been unreasonable.

28. The Tribunal notes that the term "nuclear advisor" was not defined in the RFP and, if interpreted broadly, could describe any individual providing advice in relation to nuclear-related matters. The Tribunal is of the view that the term, in the context of its usage in the RFP, would logically be connected to the 25 tasks and deliverables that are set out for the nuclear advisor in section 3.8 of the SOW.

29. Regarding the second substantive requirement that the advice had to be rendered "with respect to Canadian nuclear regulations and standards", it is the Tribunal's view that this requirement shows a clear intention to restrict the meaning of the term "nuclear advisor" for the purposes of this solicitation. This therefore requires the Tribunal to further examine the meaning of the phrases "with respect to" and "Canadian nuclear regulations and standards".

30. In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*,[18] the Supreme Court of Canada considered the phrase "evidence with respect to the commission of an offence" and stated as follows:

> On a plain reading, the phrase "evidence with respect to the commission of an offence" is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant.
>
> This reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added.][19]

31. Based on the above, the Tribunal is of the view that the phrase "with respect to" is intended to convey a connection of the widest possible scope between two related subject matters, which, in this case, are the experience of the proposed nuclear advisor and Canadian nuclear regulations and standards.

32. As for the phrase "Canadian nuclear regulations and standards", while not expressly defined in the RFP, the Tribunal is of the view that it logically takes its meaning by reference to Canada's broader nuclear regulatory regime, including the range of activities of, and the various bylaws, regulations and related instruments issued by, the CNCS and DGNS in their various areas of responsibility.

33. Therefore, considering:

(i) the wide interpretation which has been judicially ascribed to the phrase "with respect to" and other similar terms,

(ii) the range of activities of, and the various bylaws, regulations and related regulatory documents, and orders and directives issued by, the CNSC and DGNS,

18. [1999] 1 S.C.R. 743.
19. [1999] 1 S.C.R. 743 at 750-51.

(iii) the wide-ranging responsibilities of the nuclear advisor as set out in section 3.8 (Tasks and Deliverables) of the SOW, and

(iv) the appropriate standard of review,

the Tribunal finds BMT-NOTRA's interpretation of the phrase "Nuclear Advisor with respect to Canadian nuclear regulations and standards" unduly narrow and unsupported by a reading of this phrase within the broader context of the RFP.[20] The Tribunal instead finds that PWGSC's interpretation reflects a reasonable, contextual reading of the MT2 substantive requirements. Having so found, the Tribunal need not consider whether or not AMTEK's proposed resource met the MT2 temporal requirements.

34. Accordingly, the Tribunal finds that the complaint is not valid.

**Costs**

35. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that this complaint case has a complexity level corresponding to the lowest level of complexity referred to in Appendix A of the *Guideline* (Level 1).

36. The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The complexity of the procurement was medium, in that it involved a moderately undefined project, such as ongoing technical and engineering management services, on an as-required basis. The complexity of the complaint was low, in that the issue was the interpretation of a single provision or criterion. Finally, the complexity of the complaint proceedings was low, as there were no motions, no interveners and no public hearing, a 90-day time frame was respected, and the parties were not required to file information beyond the normal scope of proceedings. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is $1,000.

**DETERMINATION OF THE TRIBUNAL**

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

38. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by BMT-NOTRA. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is $1000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

20. The Tribunal notes that BMT-NOTRA implicitly concedes, in paragraph 6(5) of tab 2 of its complaint, that its interpretation may be considered too narrow and that MT2 may admit of a broader interpretation: "Finally, anticipating a proposition that my definition of 'experience' here is too narrow . . . ."