



Procurement
Review
Board
of Canada

La commission
de révision
des marchés publics
du Canada

IN THE MATTER OF:

**A Complaint
By H.J. Reis International Ltd.
of R.R. #2 Carp Road
Carp, Ontario**

**Board File No:
D90PRF6601-021-0001**

AND IN THE MATTER OF:

**The Free Trade Agreement
Implementation Act, Part II, Sec. 15
S.C. 1988, Ch. 65.**

April 9, 1990

DETERMINATION BY THE BOARD

This complaint concerns a procurement action by the Department of Supply and Services (DSS), undertaken with a view to awarding a three-year rental contract for a tractor to be used by the Department of Agriculture (AC) at its Animal Diseases Research Institute on Fallowfield Road in Nepean, Ontario.

A Notice of Proposed Procurement (NPP) was published in the 13 December 1989 issue of Government Business Opportunities (GBO) for a "Tractor, John Deere, Model No. 4255 less trade-in of a tractor IH 186 (3-year rental)". The notice was identified with the symbol "F-01" indicating it was a procurement coming under the Free Trade Agreement and that the procurement action was to follow "open tendering" procedures - which is to say that any interested supplier could submit a bid. The Board's Investigation Report discloses that the estimated value for the lease contract being requested was in the order of \$53,886., which brings it within the jurisdictional ambit of the Procurement Review Board (PRB or the Board) as defined in Sec. 15 of the Canada-United States Free Trade Agreement Implementation (FTAI) Act.

In response to the NPP, three requests for bid packages were received. The Request for Proposal (RFP) specified the article to be rented as "John Deere, Model No 4255 less trade-in of a tractor IH 186". Neither the NPP nor this RFP contained any qualification of the brand name article specified, as either 'or equal' or 'no substitute'.

On the bid closing date, 22 January 1990, two bids had been received: one from Clow Farm Equipment Ltd., offering a Model 4255 John Deere tractor, and another from the complainant, H.J. Reis International Ltd., offering a Case 7110 tractor, at a lower price than the John Deere model.

After communications between DSS and AC, it would appear that DSS decided, about 7 February 1990, that the results of this solicitation ought not to be pursued. Without giving any specific notice of cancellation, a new RFP was issued on 13 February 1990 with a closing date of 1 March 1990.

There were two significant differences between this solicitation and the first one:

- (a) DSS added the words 'no substitute' to the specification, and
- (b) They decided to send the RFP only to the three suppliers who had originally requested bid packages.

The Complaint

It was at this point in the process (on 22 February 1990), that the complainant filed this complaint. Specifically, the complainant stated that its quote met the specifications of the first solicitation and "the results of the original tender should stand." The Board issued its 'Stop Award Order' on 28 February 1990 pursuant to Section 16(1)(b) of the FTAI Act. By request the same day, DSS asked the Board to apply the 'Express Option' to its dealing with this complaint pursuant to Section 40 of the Procurement Review Board Regulations (the Regulations) "as the delay in this procurement could cause Agriculture Canada operational difficulties (since the tractor will be required for use in the spring)". The request was granted the same day (the 'Express Option' requires the Board to render its determination within 45 days after a complaint has been filed -compared to 90 days in the ordinary case).

The Investigation

The allegations of this complaint, along with the government response to those allegations and the complainant's comments on the government response, were investigated by means of interviews and the examination of documents from both DSS and AC. In order to preserve the integrity of any future actions with respect to this procurement, no direct reference is made in this determination to the prices quoted in the bids received by DSS. This information was made available to the Board under separate cover.

A number of individuals were interviewed in person and/or by telephone to confirm various statements made and/or contained in the documentation. These included Ms. A-M. Bellerive of DSS (the Contracting Officer); Ms. S. Roy of DSS (the Contracting Officer's Supervisor); Mr. R. Thompson and Mr. P. Ide of Agriculture Canada (the requisitioning officer and the Director of the Animal Disease Research Institute, respectively); Mr. S. Rogers of H.J. Reis International Ltd., Carp, Ontario; Mr. O. Clow of Clow Farm Equipment Ltd. (a John Deere dealer and the only other bidder), Joyceville, Ontario; and Mr. J. Barkley of DSS (Policy Review and Implementation, Supply Operations Sector).

The report of this investigation, made to the Board by its investigative staff, contains a number of appendices relating to material and documents deemed relevant by them as part of the basis of that report. Particular reference is not made to all of these supporting documents in this determination, but they are available to the parties, as may be required, and, subject to the provisions of the Access to Information Act, to any other person.

Because the investigation produced sufficient information to enable the Board, in its opinion, to resolve the issues raised in this complaint, it was determined that no formal hearing was required. The Board, in reaching its conclusions, has considered the report of its investigative staff and has made its findings and determinations on the basis of the facts disclosed therein, the relevant portions of which are mentioned in this determination.

The Procurement

As will be seen, this case came, in the end, to be decided upon grounds that make it unnecessary to set out in great detail all of the surrounding circumstances of this procurement. These details are contained in the Investigation Report and, in the Board's opinion, they display a

number of inconsistencies in the application of the Department's own policies, practices and procedures, not, however, essential to the making of this determination. Nevertheless, the Board's findings as to the relevant facts are listed herein. The Investigation Report is available as set out above.

The Governmental Institution Report

The DSS report, signed off by the Director General, Central Directorate (I.R. Appendix 18), sets out the DSS view of the chronology of events during the procurement in question. It does not respond to the allegations of the complaint as is required by paragraph 30(2)(e) of the Regulations (which is reflected in Directive 3006, Paragraph 20(d) of the DSS Supply Policy Manual (SPM)) but defers this response by stating:

"...our position is that the claim as submitted by H.J. Reis International Ltd. be further investigated by the Board and that the award of the contract be postponed pending the findings of the investigation."

Our investigation indicates that a statement contained in the events listed by DSS is in apparent contradiction with certain documents on the procurement file. This statement:

1. "16 NOV 1989 It was decided that the No Substitute reasons were not strong enough to bypass any competition. Manager of Agriculture Canada was advised."

implies that some method of 'sourcing' other than 'no-substitute' would be used i.e. 'or equal.' In fact, the note to file by the contracting officer's supervisor (I.R. Appendix 8) appears to indicate that the decision at the time was that the procurement would be "FTA, no sub for John Deere Equip..." and that the contact at AC was advised as such.

Included in the report were three memos from AC to DSS supporting AC's desire to buy the John Deere tractor specified. Two of these memos are to be found in I.R. Appendices 7 and 14 and the third (I.R. Appendix 19) was received by DSS after they had received a written complaint from Reis, February 19, 1990 (I.R. Appendix 20). A conversation between the contracting officer's supervisor and the Chief of the DSS - Industrial and Commercial Products Directorate (ICP), TY Section on February 21, 1990 is referred to in the DSS report as follows:

"Spoke with Chief of SSC-ICP, TY Section; discussed the No Substitute justification. He does not think the reasons were good enough to eliminate equivalents. He said that the customer must tell us how the difference between the two tractors will affect their operation. Agriculture Canada was advised of the above."

A competitive comparison between the Case IH 7110 and the John Deere 4255 tractors was sent by Reis to DSS (I.R. Appendix 21) on February 21, 1990, but was neither included nor mentioned in the Governmental Institution Report although attached to the DSS procurement file.

The Complainant's Comments on the Governmental Institution Report

The complainant's comments on the DSS report (I.R. Appendix 22) were filed with the Board on March 19, 1990 and respond to each of the reasons put forth by AC to support its claim for a 'no substitute' procurement. These points raise doubts as to the validity of the claim by AC that only a John Deere Model 4255 will meet its needs. However, in view of the reasons which are outlined later in this determination, it was unnecessary to pursue this line of investigation.

Findings

1. In response to a requisition issued by AC, which sought "to enter into a lease to own agreement of one John Deere Model #4255 Tractor over a period of three years", an RFP dated November 28, 1989 was issued by DSS for rental with an option to buy. The requirement was published in GBO on December 13, 1989 under the GATT/FTA section.
2. No reference appeared in the requisition, the RFP or the GBO as to 'no-substitute' or 'or equal'; however, the requisition did state that the equipment was "available from: (John Deere Dealers and Government Sales Division) Clow Farm Equipment..."
3. The following clause was contained in the RFP:

"EVALUATION CRITERIA:
The following factors will be taken into consideration in the evaluation of your proposal:

- a. Overall cost of requirement.
 - b. Specification (where applicable).
 - c. Operating Lease.
 - d. Delivery.
 - e. Foreign Content (as applicable).
 - f. Descriptive literature (where applicable)
 - g. Transportation costs (where applicable).
 - h. Completion of the Request for Proposal.
 - i. Warranty offered.
 - j. Exchange fluctuations clause (as applicable).
 - k. Compliance with the terms and conditions as specified herein (including the reverse of page 1)."
4. Bid packages were requested by three potential suppliers and proposals were received from two firms prior to bid closing deadline. One bid proposed the precise model specified in the RFP while the second and lower bid proposed a substitute, a Case IH 7110 tractor.
 5. The contracting officer sent AC a price tabulation of the two proposals and the brochures included with the proposals.
 6. DSS appears to have cancelled the solicitation and did not award a contract. There is nothing on the procurement file that states definitively or provides reasons why the first RFP was cancelled. According to the contracting officer and her supervisor, this was done because of the ambiguity in the first specification i.e. the lack of either a 'no substitute' or an 'or equal' qualifier and the insistence by AC that only the model specified would meet their needs.
 7. DSS re-solicited the requirement on a 'no substitute' basis.
 8. The justification accepted by DSS for 'no substitute' was based on AC statement that their pieces of equipment are not interchangeable with other tractors.
 9. The second RFP was issued with the same specification as the first, but with the phrase '(NO SUBSTITUTES)' added directly underneath the make and model number designation. The trade-in reference and evaluation criteria clause were identical to those contained in the first RFP.

10. The second RFP purported neither to cancel nor to supersede the first.
11. The re-solicitation was issued to a source list composed of the three firms that had requested bid packages on the first RFP.
12. No NPP was published in GBO for the second RFP.
13. GATT Article V.4 reads:

"4. Entities shall publish a notice of each proposed procurement in the appropriate publication listed in Annex II. Such notice shall constitute an invitation to participate in either open or selective tendering procedures."
14. The same two firms submitted bids on the second solicitation. In the case of Reis, it was after they had submitted their complaint to the Board.
15. Article IV.3 of the GATT Agreement on Government Procurement (the GATT Code), which is incorporated into the Canada - U.S. Free Trade Agreement by Article 1303 of the FTA, states:

"There shall be no requirement or reference to a particular trade mark or name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as 'or equivalent' are included in the tenders."
16. DSS Supply Policy Manual Directive 3005 (Government Procurement under the Canada - U.S. Free Trade Agreement) paragraph 8 states:

"The procedures of the GATT Code provided within the guidelines of SPM Directive 3004 apply to FTA procurements and shall form a part of this directive, with the exception of the national treatment provisions, rules of origin, and dispute settlement."
17. DSS Supply Policy Manual Directive 3004, paragraph 38 restates the GATT Code Article referenced in 15 above as follows:

"No requirement shall be described in terms of a particular trademark or name, patent, design or specific producer unless there is no sufficiently precise alternative way of describing the

procurement and provided that words such as 'or equivalent' are included in the bid solicitation."

18. Article 1305 of the Canada - U.S. Free Trade Agreement states:

"Each Party shall, for its procurements covered by this Chapter ...use decision criteria in the ...evaluation of bids and awarding of contracts, that ...are clearly specified in advance."

19. DSS Supply Policy Manual Directive 3004, paragraph 13(a) states:

"Open tendering procedures will normally be used to solicit bids. Under open tendering procedures, any interested supplier may submit a bid. A Notice of Proposed Procurement (NPP) published in the Government Business Opportunities advertises the procurement as a means of soliciting bids. Inclusion on the DSS list of qualified suppliers is not a prerequisite for bidding and source lists will not be used to supplement the advertising of bid opportunities."

Conclusions on the Merits

It will be sufficient for the resolution of this complaint to refer to two procedural requirements of the Canada - U.S. Free Trade Agreement (FTA), neither of which was followed in this procurement. The failure to comply with these requirements is fatal to both solicitations attempted in this case.

The first is Article IV.3 of the GATT Code which the Board interprets as effectively prohibiting 'no substitute' procurements under the FTA.

This obligation has been adopted by Canada for specific application to eligible government procurements by being transposed, almost word for word, into the DSS Supply Policy Manual, Directive 3004.38. It is clear, therefore, that, subject to some later comments on Directive 2005, the Government has set up a policy framework that respects these international obligations. The failure in the present case has been one of not recognizing that 'brand name' specifications are not to be used in procurements covered by FTA unless they are also accompanied by words such as 'or equivalent'. The use, in the second solicitation, of the words 'no substitute' is simply contrary to the Code and fatal to the solicitation.

The second procedural requirement under FTA that was not followed in this case was the requirement to publish an NPP for the second solicitation as required by GATT Code Article V.4. (It should be noted that the GATT Code caters for the situation where it is sometimes necessary to amend or re-issue an NPP (see eg. Art. V.9). Article V.9 isn't applicable in this case because it is restricted to situations in which the need arises before bids are opened. But even in such a case, the GATT Code requires that the re-issued NPP be given the same circulation as the original. Thus, if even in the case of mere amendments, full publication is required, how much plainer can it be that this is required where a new solicitation is issued.)

In the present case, the first solicitation was not treated as being amended. It could not have been so treated, because the bids had been opened. Instead, it was treated in the only way it could have been, as cancelled and replaced by a new solicitation (although no notice of cancellation or replacement appeared in Government Business Opportunities).

The Board concludes, therefore, that for the reasons set out above, DSS has not complied with the requirements of Sec. 17 of the FTAI Act, and that the proper solution is to recommend that a new solicitation for the contract be issued, following the provisions of the GATT Code and FTA, as indicated.

During the course of the first procurement, a good deal of effort was devoted to the development, by Agriculture Canada, of reasons for ruling out the equipment offered by the low bidder and, in effect, justifying a 'no substitute' interpretation of the specification. In its response, the complainant provided comments and material which were at variance with the views held by the government department.

The Board did not have to consider the various contradictory statements attempting to determine, for example, whether particular pieces of equipment owned by Agriculture Canada would also attach on to a Case 7110 tractor and at what, if any, additional cost. If the Board's recommendation to re-solicit this requirement is accepted, some additional time spent in describing the requirement in performance terms and in clearly specifying the evaluation criteria in advance should be worthwhile.

As a final matter, from the evidence in this case, there appears to be some confusion between the terms 'sole source' and 'no substitute'. The DSS Supply Policy Manual, Directive 2005 defines a 'no substitute' requisition as one in which "the customer describes the product by brand

name or model number or by using a restrictive specification, and states that a substitute product is not acceptable." The same directive defines a `sole source' requisition as one "in which the customer specifies that a particular supplier or person is the only one acceptable." Therefore, by definition, one could have a competitive `no substitute' procurement but a `sole source' procurement is always non-competitive.

In the referenced directive, DSS states its policy that it "must advise and encourage the customer department to amend the requisition to permit solicitation of competitive bids, where an alternative product or source exists." The directive also states that "This policy applies to **all** no substitute and sole source requisitions."

This directive clearly infers that there are cases, even under GATT and FTA, where `no substitute' requisitions can be justified. In this sense, this directive is inconsistent with Article IV.3 of the GATT Code and other previously referenced sections of the DSS Supply Policy Manual because it does not highlight the important exception for GATT and FTA procurements. In addition, while `sole sourcing' (single tendering) is, in fact, permitted under GATT and FTA rules, the justifications that must be shown are different from those listed in this Directive 2005.

The Board has also decided, since the complainant has been substantially successful in its complaint, to award it reasonable costs of filing and proceeding with this complaint.

The Board will not award the complainant its costs of preparing its bids in the two flawed solicitations because in the first of these, they may not have submitted a compliant bid (a point which is expressly not determined because of the ambiguity of the RFP); and in the second, because the bid was submitted with the knowledge that this purported to be a `no substitute' solicitation.

Neither will the Board recommend the award of the contract to the complainant on the first solicitation as the complainant has requested, because as explained, the ambiguity in that solicitation may have resulted in its not attracting the range of competition it ought to have attracted, and if it had been properly conducted it could not be known for sure that the complainant would have been the successful bidder on either technical or price considerations.

Proceeding now to its determination:

DETERMINATION

The Board has determined on the basis of its investigation that this procurement by the Department of Supply and Services did not comply with the requirements referred to in Section 17 of the Canada - United States Free Trade Agreement Implementation Act, in that it used a particular trade name as a technical specification without including words such as 'or equivalent', and in that it issued a solicitation without publishing the required Notice of Proposed Procurement.

The Board has also decided:

- (a) to award the complainant its reasonable costs of filing and proceeding with this complaint;
- (b) to recommend that DSS issue a new solicitation for this procurement, if the goods continue to be required;
- (c) to recommend that DSS amend Directive 2005 insofar as it is inconsistent with obligations under the GATT Code and the FTA.

Gerald A. Berger

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Chairman

Procurement Review Board of Canada