



IN THE MATTER OF:

**A Complaint
By Blowey-Henry (Wholesale) Ltd.
of 11905 - 111 Avenue
Edmonton, Alberta**

**Board File No:
E90PRF6638-021-0002**

AND IN THE MATTER OF:

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

May 8, 1990

DETERMINATION BY THE BOARD

This complaint concerns the solicitation for a Regional Individual Standing Offer (RISO), issued out of the DSS District Supply Office at Calgary on 26 February 1990, to Simco Furnishings Alberta Ltd. (Simco) of 1800 - 4th Street West, Calgary, Alberta.

The RISO is in support of a programme of adjustment assistance for refugees, operated by the Canada Employment and Immigration Commission, and enables them to call upon the supplier, as need arises, for certain household furniture and equipment to be used in support of needy refugees in the Red Deer vicinity in Alberta.

The Complainant, Blowey-Henry (Wholesale) Limited had been successful in winning this RISO, which is competed annually (there were no options to renew), in several previous years. However, owing to the introduction in 1989 of the Free Trade Agreement (FTA), the government changed its method of calling for tenders for this RISO from "selective tendering" (i.e. using source lists which included the name of Blowey-Henry (Wholesale) Ltd.) to the FTA policy of "open tendering" - which means publishing open notices of the tender call, on which any interested supplier may submit bids.

It is Blowey-Henry's complaint that: (a) they had no notice of this change of policy, were thus unaware of the competition taking place, and were thereby deprived of a fair opportunity to compete for the RISO, and (b) they should have been personally notified of this procurement.

The Government Institution Report in response to this complaint reflects no more than a brief chronology of the procurement actions taken that resulted in the award to Simco, and does not otherwise respond fully to the substance of this complaint. However, the investigation showed that six interested suppliers requested bid sets in response to a Notice of Proposed Procurement (NPP) that was published in the Government Business Opportunities (GBO) booklet on 3 January 1990. This NPP was published as required under the provisions of the FTA between Canada and the U.S., which were implemented by the Free Trade Agreement Implementation (FTAI) Act, Part II, SC 1988 ch. 65.

At the time of bid closing on 15 February 1990, only one bid had been received -from Simco - and, upon an evaluation that showed the bidder to be compliant, and its prices reasonable in relation to those paid in the previous year, DSS awarded the RISO to Simco on 26 February 1990.

The complainant's response to the DSS report did not comment at all upon the method of procurement used by DSS. Rather, they purported to draw an unspecific and otherwise unsupported inference from the alleged close comparability of the winner's prices and their own, "...about the integrity of a system that produces results of this nature."

The Investigation

The allegations contained in 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 DSS. The original contract file was sent to the investigation officer.

A number of individuals were interviewed by telephone to confirm various statements made and/or contained in the documentation. These include Mr. Michael Clare, DSS (the Contracting Officer); Mr. Richard Tuttosi, DSS (Chief of Purchasing and the Contracting Officer's supervisor) both, of Calgary; Ms. Goreta Salm, DSS (Corporate Relations Office,

Alberta/NWT Region) of Edmonton and; Ms. Maureen Farrington, DSS (Public Affairs Directorate), of the National Capital Region.

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 in the present case. 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 Complaint

The initial complaint deals with, in effect, the implications of a change in practice in soliciting bids. Specifically it alleges that:

- (a) the complainant was not given notice of a change in practice, and that
- (b) they should have been personally notified of this solicitation.
- (c) As well, the complainant has raised an allegation about the system's integrity.

The change in practice referred to is the change-over from selective to open tendering that was adopted as one of the consequences of the Free Trade Agreement that came into effect on 1 January 1989. The new practice of open tendering is demonstrably more open and transparent to all suppliers than was the old practice ... yet here we have a complainant apparently arguing that DSS was unfair to them by not staying with its older, less open, practices - or at least notifying them personally of this particular solicitation.

Taking this second point (about personal notification) first, the issue would have been whether the government ever made a representation,

express or implied, that it would always notify Blowey-Henry when it intended to run the annual competition for this RISO. The answer to this question would turn round the legal significance attached to being on a government source list, coupled with the consequences of the government having, on several previous occasions, given personal notice to Blowey-Henry of these competitions, and whether those occasions constituted a sufficient course of conduct to establish a reasonable expectation that it would continue and not be changed by one party, to the detriment of the other, without reasonable notice.

The issue thus raised by the complainant does not require to be answered on this occasion because, as will appear from the facts as discovered during the course of this investigation, the procurement was not conducted with the use of source lists, and the question whether a practice had grown up that constitutes, in law, a course of conduct raising the expectation referred to above, does not arise. Rather, the real issue is that raised in the complainant's first point - whether they were given notice of the change in procedures.

Turning now to that point, the investigation discloses that the government in fact took a number of steps to notify its suppliers, including both those on its sources lists and potential suppliers in the business community generally, of the changes it was making in its procurement policies, practices and procedures.

In particular, in the early part of 1989 (January, February, and March), DSS through its Public Affairs Directorate, its SIDMB (Statistical Information and Data Management Branch) and through its Canadian Government Publishing Centre, conducted an information campaign on the introduction of Free Trade and the implications it would have on government procurement practices and procedures. This campaign was conducted across Canada, regardless of whether it dealt with procurements by Headquarters or Regional Offices.

Under this campaign, numerous steps were taken to ensure that the widest range of interested suppliers could be made aware of the new procedures. DSS provided the details of this campaign which included:

- a) A special Free Trade edition of "The Supplier" (a DSS newsletter for suppliers used as the main vehicle to communicate the new initiatives, procedures and policies to suppliers). It was issued in February 1989

to 90,000 suppliers listed on DSS source lists. The complainant's name was included.

- b) In February/March 1989, a direct mailing to 150,000 Canadian suppliers listed on a Dun and Bradstreet mailing list was performed. It addressed the changes in DSS procedures, particularly the introduction of Free Trade and the use of the GBO for soliciting bids. According to DSS, both Blowey-Henry and its head office, Moussa and Sons Enterprises Ltd. were included on the list.
- c) During the early part of 1989, a single sheet "flyer" was included with every bid package sent to suppliers (approximately 350,000 of these were sent out). Again, it addressed the Free Trade issue and had a tear-off portion to subscribe to the GBO. Trade Associations also received a copy of this flyer. About July 1989, Regional Offices issued a one-page flyer to suppliers on regional source lists, basically addressing the fact that source lists would not be used from now on for FTA requirements.
- d) A sample promotion issue of the GBO was sent to all suppliers source-listed with DSS around the end of March or early April 1989.
- e) Advertisements in newspapers on a daily, weekly or monthly basis were also carried out, including the Financial Post and the Globe & Mail Report on Business.
- f) Seminars for suppliers and trade associations, etc. were organized and conducted at several locations in Canada. These were handled through DSS's Centre for Supplier Promotion.
- g) During the January 1 - June 30, 1989 "break-in" period, the use of DSS source lists to supplement open tendering procedures was allowed. Every direct mailing included a message to suppliers suggesting they subscribe to the GBO since, effective July 1, 1989, DSS would no longer use source lists to solicit bids for most requirements falling under GATT or FTA.

It will be seen therefore, that the changeover to the new procedures actually began last year, and it is because of this last point, (i.e. the temporary supplementing of NPP's with source lists) that the complainant did receive actual notice (by means of the bid set) in early 1989 of the solicitation for the standing offer that they won that year. It also seems

likely that they would have received one of the flyers sent out with bid sets, explaining the changes taking place that year in the method of bid solicitation.

Now, plainly, none of the foregoing goes the length of proving that the complainant received actual notice of these changes. However, it does show that the government took a wide variety of steps, in fact, a multi-media, multi-faceted campaign, apt for the purpose and likely to be effective, to bring the details of these changes to the attention of the widest possible membership of the Canadian supplier community. There is no express provision of the law, including the GATT Code on government procurement, nor any policy or procedure that describes what the government must do in making changes of this sort in its procedures. Thus there is no prescribed rule or obligation that the government could be said not to have complied with. Nevertheless, and recognizing, of course, that it was in the government's own interest to circulate news of these changes as widely as possible, the Board is of the view that the government took all reasonable steps to bring these changes to the attention of all those likely to be affected by them, and thereby satisfied any possible moral obligation that there might be argued to be, to do so in a case such as this.

Before leaving this issue, it is important to note that it would be inappropriate to give the complainant special notice of a solicitation because that would violate the requirements of Article 1305.2 of the Free Trade Agreement which requires that the government provide equal access to pre-solicitation information and an equal opportunity to compete. To provide a special notice to one competitor, as this complainant wants, would be to treat the other competitors unequally, which would be improper.

Finally the Board considers it should comment on the last allegation in the complaint - that there was a close comparability between Blowey-Henry's prices and those offered by the winner, and that this infers something "...about the integrity of a system that produces results of this nature." The Board's investigators inquired into, but found no evidence to support a conclusion that prices offered on the previous standing offer held by the complainant were communicated to the contract awardee or to any other bidder. It is not desirable for reasons of confidentiality to disclose the details of these price lists in this decision; however, the Board's own examination of them does not lead it to feel that there is any sufficiently close comparability in these prices to support any justifiable inference that the contract awardee knew of them at the time they made their winning offer. Out of 20 items listed, two prices are the same, and all the others

differ - some being lower, others higher. It is for this reason, and because the complainant supplied no support beyond conjecture for this allegation, that the investigation on this point was not pursued further.

The Board concludes, therefore, that none of the allegations raised in this complaint have been made out, and accordingly:

DETERMINATION

The Board has determined, on the basis of its investigation, that no valid basis for this complaint exists and, pursuant to section 33 of the Procurement Review Board Regulations, it hereby dismisses the complaint.

Gerald A. Berger

Gerald A. Berger

Chairman

Procurement Review Board of Canada