Procurement Review Board of Canada
La commission de révision des marchés publics du Canada

IN THE MATTER OF:	
A Complaint By Nico-Arret Inc. of 1032 Berthe Louard Montréal, Québec	**Board File No: E91PRF6641-021-0003**
	Complaint upheld
AND IN THE MATTER OF:	
The Free Trade Agreement Implementation Act, Part II, Sec. 15 S.C. 1988, Ch. 65.	

3 May 1991

DETERMINATION BY THE BOARD

This complaint concerns a procurement by the Department of Supply and Services (DSS) of 860,500 hand-held Canadian flags mounted on sticks. They were being procured for the Department of the Secretary of State (SEC) which will use them in connection with forthcoming Canada Day celebrations. They are to be delivered in various quantities to various locations specified in the bidding documents.

The complainant is Nico-Arret Inc. (Nico-Arret) of Montréal and they are protesting the award of the contract to Canadiana Textile Screen Prints Ltd. (Canadiana) for $91,374.50 on the grounds that:

(a) their price was substantially lower than Canadiana's;
(b) although their pre-award samples were not to specification, they had offered to provide a finished product within four days; and
(c) the reasons for rejecting their bid were unjustified and irresponsible.

The complainant requested relief in the form of cancellation of this request for proposal.

The Issue of Jurisdiction: Late Filing

Before proceeding with the facts of this procurement, an issue that goes to the jurisdiction of the Board must be dealt with. This is that the complaint was "...filed...later than 10 days after the basis of the complaint is known or should reasonably have been known."[1]

The Department of Supply and Services in its Governmental Institution Report, points out that: "DSS advised the complainant of the award and the reasons for non-acceptance of its proposal by facsimile message of February 7, 1991...The complaint was not submitted to the PRB until February 19, 1991. DSS respectively [sic] submits that the PRB has no jurisdiction over this complaint, as it was filed beyond the required time limit."

The Board has, however, authority "...where good cause is shown or where it determines that a complaint raises issues significant to the procurement system [to] consider any complaint that is not filed within the time limits set out in this section."[2]

The Board met on 20 February 1991 (see I.R. Appendix 2) and decided that good cause for the late submission of the complaint could be shown, but that more particularly the complaint raised issues significant to the procurement process, namely discretion exercised on mandatory requirements.

On the first point, the delay was caused when material requested of the Board by the complainant (a kit of information useful in the preparation of complaints, and not readily available from other sources) was delayed by bad weather in Montréal on its way by courier to Nico-Arret. It was despatched on February 14, 1991, a Thursday, the same day the request was received, but the Board learned later that the courier did not deliver the package until Monday 18 February, 1991. The complaint was drawn up by Nico-Arret the next day -- Tuesday, February 19, 1991 -- and faxed to the Board that day. It was, for these reasons, one day late (the 10-day filing period having ended on Sunday, although extended to the next business day, Monday 18 February 1991).

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1 Procurement Review Board Regulations 23(1)

2 Procurement Review Board Regulations 23(4)

On the second point, the Board felt that there was a matter of significance to the procurement process that was raised by this complaint, namely the exercise of discretion in the acceptance or rejection of bids, where there were failures to meet mandatory requirements.

This decision was communicated to the parties to this complaint by facsimile messages sent by the Board 21 February 1991 (see I.R. Appendix 2).

The procedural requirements for filing this complaint having been met, the Board directed that it be investigated. The contract awardee (Canadiana) was duly informed of the complaint. They did not apply to intervene in these proceedings.

The Investigation

The allegations in the complaint, as well as the government's response to those allegations and the complainant's comments on the government's response, were the subject of an investigation conducted by means of interviews and an examination of the documents in the contract file kept by DSS.

A number of individuals were interviewed in person or by telephone in order to confirm various statements made or contained in the documentation. These individuals included Mr. P. Battaglini, DSS, Consumer Products and Traffic Management Branch (contracting officer) and Mr. G. Cookshaw, DSS, Office of the Corporate Secretary (Coordinator of PRB complaints), both of Hull, Québec; Mr. Pierre Beauchamp, Nico-Arret (President) of Montréal, Québec; and Mr. C. Milton, Canadiana (President) of Mississauga, Ontario.

Following a new procedure, of which notice was given by the Board in the GBO during the week of 18 February 1991, a copy of the Preliminary Investigation Report was sent to both the governmental institution and the complainant for their comments, prior to submission to the Board. Both these parties submitted brief written comments, and these have been added to the Investigation Report, and taken into account by the Board in reaching this determination.

As well, the report of this investigation contains a number of other appendices relating to material and documents deemed relevant by the investigative staff as part of the basis of that report. Particular reference is not made to all of these supporting documents in this determination, but they have been made available to the parties, and, subject to the provisions of the Access to Information Act, they are available 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 the comments thereon by the parties, 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

The procurement involves the acquisition of 860,500 hand-held Canadian flags made of "Tyvek" material, in two sizes (3 in. x 6 in. and 4½ in. x 9 in.) mounted on sticks. The competition for the contract began with the publication of a Notice of Proposed Procurement (NPP) in Government Business Opportunities (GBO) on 7 December 1990, and the closing date was 16 January 1991. Delivery was stated as being March 25, 1991.

The bidding documents said that pre-award samples of the flags being offered must be submitted with the bids "...as part of the technical evaluation to confirm a bidder's capability of meeting the technical requirements." They also said that "Failure to submit the sample with the bid...**may** result in the bid being declared non-responsive." (emphasis added)

The RFP also said that the Minister would "...consider entering into a contract for the implementation of the most acceptable proposal which will be determined having regard to the evaluation factors set out in this RFP..."

The RFP also said "Proposals will be evaluated on a combination of the factors of price and delivery and where necessary negotiations on deliveries will be carried out..."

There were nine evaluation factors set out as follows:

- Price -- FOB Plant and FOB Destination
- Technical Requirements -- MANDATORY
- Inspection Requirements -- MANDATORY
- Packaging Requirements -- MANDATORY
- Delivery Requirements -- DESIRABLE
- Statement of Eligible Goods -- MANDATORY
- Former Public Office Holders Condition -- MANDATORY
- South African Condition -- MANDATORY CANADIAN SUPPLIERS ONLY
- Pre-award sample -- MANDATORY

And the RFP repeated the warning:

> "*It is MANDATORY that all relevant information required be completed and supplied as detailed throughout this proposal. Failure to comply with this condition **may** render your proposal as non-responsive.*" (emphasis added)

It will be seen from the foregoing that although the RFP refers to seeking the "...most acceptable proposal...having regard to the evaluation factors..." (of which there were nine), it also says that "...proposals will be evaluated on a combination of the factors of price and delivery..." which were only two of the evaluation factors.

An examination of the nine factors shows that all of them are mandatory except for **price** and **delivery**. This can only mean that there was "room" for the bidder to make its own proposal, on those two factors only. Failure to meet any of the mandatory requirements should result in the bidder being non-responsive.

But the RFP is somewhat misleading here in what it says about these mandatory requirements. It says in two places (noted above) that failure to meet a mandatory requirement only "**MAY**" result in the bid being declared non-responsive. The department was thus trying to reserve to itself the right to determine whether failure to meet the mandatory requirements would or would not result in non-responsiveness. This is not acceptable. Either a factor is mandatory or it isn't.

The RFP does not explain **on what basis** the department will use that failure to rule a bid non-responsive and on what basis it will refrain from doing so. This does not comply with the requirements of Article 1305(2)(c)(iii) of the Free Trade Agreement, which demands that:

"*1305 (2) Each Party shall, for its procurements covered by this Chapter:*

(c) use decision criteria in the...evaluation of bids and awarding of contracts, that:

(i) ...
(ii) ...
(iii) are clearly specified in advance."

On the closing date, eight bids had been received, and the department divided them into two groups. The four highest priced bids were set aside because the prices offered were all more than double the highest of the other four bids and therefore were judged not to represent fair value to the Government.

The four lowest bids were ranked as follows:

1.	Complainant - low bidder	- submitted a sample of each flag, but not to specification
2.	Second bidder -	- submitted sample of only one of the two items required
3.	Third bidder - (winner)	- submitted no samples according to DSS (but the firm has stated in writing to the Board that it did)
4.	Fourth bidder -	- submitted no samples.

Although the submission of the "Statement of Eligible Goods" form was mandatory, only the third lowest bidder of the `Final Four' (the contract awardee) submitted it with its bid.

At this point, DSS considered two options for proceeding with this procurement (see I.R. Appendix 13):

1) Cancel the competition and solicit new proposals;
2) Request bidders 2, 3, and 4 to provide the samples they had failed to submit with their bids (along with other material lacking in their bids), and then present those three plus Nico-Arret to the Secretary of State's Department for technical evaluation.

A file memo dated 17 January 1991 records, after setting out the two options noted above, that "The issues for either option is -- fairness to the bidders, and the ability to award a contract allowing sufficient lead time for the successful bidder to meet the required delivery." The memo goes on to refer to "delivery" as "urgent". The Board believes that at this point, "Delivery", which had been a "desirable" requirement, had, after bid closing, been treated as if it had become a mandatory feature.

Option number 2 was chosen and DSS sent out letters to the second, third, and fourth ranked bidders inviting them to speedily submit the samples they had failed to submit in response to the mandatory requirement for pre-award samples in the RFP. From two of these bidders, they also requested the submission of "Statement of Eligible Goods" forms which had not been submitted...also a mandatory requirement of the RFP. DSS included a new mandatory time for return of the samples and added that failure to submit them by that time and date "...may result in your bid being declared non-responsive." The ultimate contract awardee notified the department that it would be one day late in delivering samples, was one day late, and the department exercised its discretion by not declaring the bid non-responsive.

Nico-Arret was not contacted to provide the "Statement of Eligible Goods" form which it also did not submit with their bid.

The depiction of this scheme for bidders 2, 3 and 4 as "fair" boggles the mind. The Board determines this to be unacceptable because all three of them missed mandatory requirements in their bids, and two of them missed at least two mandatory requirements (the Statement of Eligible Goods form as well as the pre-award samples). Moreover, the ultimate contract awardee missed the mandatory return date for delivering samples. Plainly, these three bids ought to have been ruled non-responsive at the outset just as Nico-Arret's bid ultimately was.

The government's explanation of the rationale behind offering these three bidders an opportunity to repair their bids is set out in the Governmental Institution Report (see I.R. Appendix 36) as follows:

> "*It is acknowledged that not all firms submitted samples with their bid and those which did not were given an opportunity to submit samples after the closing date. However, each firm was permitted to submit only <u>one</u> sample of each item. Any firm which had submitted samples was not given a second opportunity to make*

> *changes and re-submit corrected samples. To have allowed the complainant or any other firm to re-submit new samples would have given an opportunity to correct any defects found in its first samples, thereby benefiting from a technical review by the Crown. This would have provided an unfair advantage not afforded to other firms. By allowing only one sample of each item, all firms were given an equitable opportunity to demonstrate their compliance to the mandatory technical requirement.*"

The differing treatments afforded these bidders was noted in the Preliminary Investigation Report that was sent to the parties for comment before submission to the Board. In further explanation of their position, the Department offered the following:

> "*7) On page 12, (second paragraph), the report is misleading. The complainant did not receive a notice from DSS regarding the submission of samples because, in the absence of no notice with their bid, DSS had no choice but to view that the samples submitted best represented what the company could produce. Once the samples were evaluated by SEC and found non-compliant to the specifications, the complainant's bid was non-responsive. To notify the complainant of this decision would have suggested that they could submit corrected samples. This would have constituted bid repair, which is unacceptable to DSS.*"

If what was done here doesn't constitute "bid-repair", the Board is hard pressed to understand what does.

Ultimately, DSS, in conjunction with the Secretary of State's Department, selected Canadiana to receive this contract.

The issue in this case turns upon the significance of the government having fixed **mandatory** requirements and then exercising an uncontrolled discretion on an unannounced basis to reject one bidder and then, through the inconsistent application of that discretion, to give three others a second chance. It is of no avail to argue that notwithstanding that impropriety, each bidder got a chance to submit only one sample (because three of them got two chances to submit that sample). And even using their reasoning, they overlook the fact that only the complainant got **its** samples in (however inadequate) before the bidding closed. The others got their second chance

after the bidding was over, and this constitutes an unfair and unevenly applied opportunity for altering their bids. Indeed, the contract awardee, in addition to stating in writing to the Board that it submitted samples with its bid (which DSS says it didn't receive), provided details in its proposal (which DSS did receive) of the inadequacies of the samples it said it submitted and implied how they would modify those samples to make them to specification. The Board does not understand why the government treated the bids of Nico-Arret and Canadiana in such a different manner.

And the Board can only speculate as to how many more of the other 13 companies that asked for bid sets but did not bid, might have bid if they had known that they could have had extra time to submit pre-award samples.

Thus the Board determines that the requirements of Article 1305 of the Free Trade Agreement have not been complied with and will award the complainant its reasonable costs relating to the filing and proceeding with the complaint.

This contract should never have been awarded. All four firms were non-responsive. The government should have gone out on a new solicitation. But they didn't. Three firms were given a second chance. At this stage, unfortunately, the Board cannot undo what has been done because the goods have been delivered, but it can at least award the complainant its costs of bidding, thereby putting the complainant in the position it was before this procurement began.

DETERMINATION

The Board determines that this complaint by Nico-Arret Inc. is upheld because the procurement by the Department of Supply and Services does not comply with the requirements of Section 17 of the Free Trade Agreement Implementation Act in that they used decision criteria in the evaluation of bids and awarding of the contract, that were not clearly specified in advance.

The Board awards the complainant its reasonable costs relating to:

(a) the filing and proceeding with this complaint, and
(b) the preparation of its bid.

G.A. Berger
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Chairman
Procurement Review Board of Canada