

Ottawa, Monday, December 5, 1994

File No. 94N66W-021-0010

IN THE MATTER OF a complaint filed by Pamico Energy Canada, A Division of 392826 Alberta Ltd., under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended by S.C. 1993, c. 44;

AND IN THE MATTER OF 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 section 30.14 of the *Canadian International Trade Tribunal Act* and section 10 of the *North American Free Trade Agreement Procurement Inquiry Regulations*, the Canadian International Trade Tribunal determines that the complaint has no valid basis. Accordingly, the complaint is dismissed.

Lyle M. Russell

Lyle M. Russell
Member

Michel P. Granger

Michel P. Granger
Secretary

File No. 94N66W-021-0010

Date of Determination: December 5, 1994

Tribunal Member: Lyle M. Russell

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Joël J. Robichaud

Complainant: Pamico Energy Canada
A Division of 392826 Alberta Ltd.

Government Institution: Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

Background

On September 28, 1994, Pamico Energy Canada, A Division of 392826 Alberta Ltd. (the complainant) filed, under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act), a complaint concerning the issuance, by the Department of Public Works and Government Services (the Department), of a standing offer, File No. 660TD-4-0050-10-I, for the supply of 14,960,000 L of Grade F-40 aviation fuel to be delivered by tank wagon, in accordance with the terms and conditions set out in the Request for Standing Offer (RFSO), File No. 660TD-4-0050-10, dated December 21, 1993, for CFB Comox of the Department of National Defence (DND).

The complainant alleges that it "has suffered severe discrimination" and that it "has met all of the specifications of DND, is aware of DND arrangements and requirements of other petroleum suppliers to DND, knowledgeable of the industry, and strongly objects to the manner in which this procurement has been handled." The remedy requested by the complainant is that the Tribunal should "instruct DND and/or Public Works to award this supply contract to Pamico Energy Canada" or impose "a settlement" and "instruct DND to include Pamico Energy as approved suppliers for future needs."

On September 30, 1994, the Canadian International Trade Tribunal (the Tribunal) determined that the requirements set forth in section 7 of the *North American Free Trade Agreement Procurement Inquiry Regulations*² (the Regulations) had been satisfied. Having made that determination, the Tribunal decided to inquire into whether the procurement was conducted in accordance with the requirements set out in Chapter Ten of the *North American Free Trade Agreement*³ (NAFTA).

The Tribunal issued a Postponement of Award Order on September 30, 1994.

1. R.S.C. 1985, c. 47 (4th Supp.).

2. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547.

3. *North American Free Trade Agreement*, done at Ottawa, Ontario, on December 11, and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).

Inquiry

The two parties to this inquiry are the complainant and the government institution, in this case, the Department.

On October 28, 1994, as part of the inquiry, the Department filed with the Tribunal a Government Institution Report, in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*,⁴ which report was made available to the complainant. The complainant's comments on this report were filed with the Tribunal and sent to the Department.

No party requested a hearing. 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 file.

Procurement Process

The Department was attempting to secure a temporary source of supply for Grade F-40 aviation fuel for CFB Comox while the normal six-kilometre delivery pipeline was being inspected and/or repaired. This fuel was to be delivered by tanker wagon instead of by the usual barge. Since the requirement was deemed to be urgent, the Department, in accordance with its internal policy, sent an RFSO directly to four known and approved suppliers. The complainant, which became aware of the requirement, requested and was sent the solicitation documents which consisted of a two-page request that referenced the terms and conditions of RFSO File No. 660TD-4-0050-10. The complainant submitted a bid on July 13, 1994. Since the complainant had not been previously approved as meeting DND Specification D-QA-001-015/SF-001 (Specification for Quality Control and Inspection Requirements for Suppliers of Aviation Fuels and Into-Plane Services), a mandatory requirement of the above-referenced RFSO, it was given the opportunity to qualify prior to any further action being taken with regard to the procurement.

Validity of the Complaint

Section 30.14 of the CITT Act requires that, in conducting its inquiry, the Tribunal limit its considerations to the subject-matter of the complaint and that, at the conclusion of the inquiry, it determine whether the complaint is valid on the basis of whether the prescribed procedures and other requirements have been or are being observed. Pursuant to section 11 of the Regulations, the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in NAFTA.

The complainant alleges that it has "met all of the specifications of DND" and, therefore, should have been approved as a supplier and awarded the standing offer. It also alleges that the Department and/or DND "preclude suppliers of petroleum products other than the so called 'Canadian Majors' from access to the business without good cause." The implication is that the Department and/or DND has applied tendering procedures in a discriminatory manner which would be contrary to the requirements of Articles 1008 and 1015(4)(c) of NAFTA.

The Department's position with respect to the complaint, as found in the Government Institution Report (GIR), is that "DND evaluated Pamico's proposal to determine its compliance

4. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912.

with the technical and quality specifications. As a result of DND's review, it has been confirmed that Pamico did not demonstrate its compliance with the quality requirements of the RFSO." The complainant was advised by the Department of this decision on September 7, 1994.

Having carefully examined the complainant's allegations dealing specifically with the RFSO, the Tribunal is of the view that such allegations raise the question as to whether the Department has complied with the requirements of NAFTA set forth in Article 1008, "Tendering Procedures" and Article 1015(4)(c), "Submission, Receipt and Opening of Tenders and Awarding of Contracts."

Article 1008 of NAFTA sets out, in part, the following requirements:

1. *Each Party shall ensure that the tendering procedures of its entities are:*
 - (a) *applied in a non-discriminatory manner; and*
 - (b) *consistent with this Article and Articles 1009 through 1016.*

Article 1015(4)(c) of NAFTA sets out, in part, the following requirement:

4. *An entity shall award contracts in accordance with the following:*
 - (c) *unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation.*

In both a facsimile dated September 8, 1994, and in the GIR, there are precise reasons presented by the Department as to why the complainant failed to meet the quality requirements necessary for obtaining approval as a supplier. The reasons, as found in the GIR, are as follows:

The procedures included in the Pamico QPM and other quality documentation are not complete. These procedures are intended to provide instructions to the worker on the ground. In many instances Pamico fails to provide complete instructions. Some examples are:

Page R 1 of Pamico's QPM requires the calibration of injection systems to be recorded but does not specify the form or log book. There are no examples of any forms or log book.

There is no link between additive handling on page R 7 and tank wagon (TW) loading on page R 1 of Pamico's QPM. The loading procedures do not instruct the loader that testing as described at page R 7 of Pamico's QPM must be performed.

Page R 7 of the Pamico's QPM requires a sample to be taken from the TW and analyzed by a laboratory. There should be a cross reference between this page and page R 17 of the QPM to identify to the loader what type of sample he must take and the testing it must be subjected to.

The Pamico QPM contains errors. Examples are:

On page R 17, the type of sample to be drawn from a TW after filling and before discharge is identified to be a delivery line sample. This is not acceptable. In these cases a sump sample must be taken from the TW.

On page R 11, three types of aviation turbine fuels are described, type A, B and C. To our knowledge there is no product specification either Canadian, American, British, Australian or Russian which identifies a type C fuel.

The complainant has failed to provide any evidence or argument in either its complaint or its comments on the GIR as to how or why these detailed reasons are incorrect other than to say that "all of the demands made by DND are covered in our procedures with one exception, that is ... an Organizational Chart. This information is privileged and is provided only after Contract Award."

The requirements for quality control contained in the RFSO are standard requirements when procuring this kind of fuel for DND and are clearly stated in the RFSO. The Department went to some lengths to explain the requirements to the complainant and provided it with a number of chances to meet the required DND specifications, including the opportunity to amend its quality program manual. For these reasons, the Tribunal concludes that the Department's actions with respect to the complainant were not discriminatory and that the Department did not violate the provisions of Articles 1008 and 1015(4)(c) of NAFTA in determining that the complainant's bid was non-responsive. Furthermore, the Department, having determined that the complainant was not fully capable of undertaking the contract, acted properly in not issuing the standing offer to the complainant.

Determination of the Tribunal

In light of the foregoing, pursuant to section 30.14 of the CITT Act and section 10 of the Regulations, the Tribunal determines that the complaint has no valid basis. Accordingly, the complaint is dismissed.

Lyle M. Russell

Lyle M. Russell

Member