

Ottawa, Wednesday, March 22, 1995

**File No. 94N66W-021-0019**

IN THE MATTER OF a complaint filed by Carsen Group Inc. 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*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department award the complainant the contract at the higher price, which was valid on December 21, 1994.

Charles A. Gracey

Charles A. Gracey  
Member

Nicole Pelletier  
Nicole Pelletier  
Acting Secretary

**File No. 94N66W-021-0019**

Date of Determination:	March 22, 1995
Tribunal Member:	Charles A. Gracey
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Estelle Lane
Counsel for the Tribunal:	Heather A. Grant
Complainant:	Carsen Group Inc.
Government Institution:	Department of Public Works and Government Services

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### **FINDINGS OF THE TRIBUNAL**

#### **Background**

On January 12, 1995, Carsen Group Inc. (the complainant) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) for the supply of 35 borescopes for the Department of National Defence (DND) in Montréal, Quebec (Solicitation No. MLP W8473-4-MQ4B/000/A).

The complainant alleges that it was unfairly treated by the Department when the Department cancelled the procurement because the complainant refused to supply the products in issue at the price quoted in its proposal for the period prior to December 1, 1994; once that date had passed, a second, higher price was applicable. The remedy requested by the complainant is that the Canadian International Trade Tribunal (the Tribunal) award it the contract.

On January 16, 1995, the Tribunal determined that the conditions for inquiry set forth in section 7 of the *North American Free Trade Agreement Procurement Inquiry Regulations*<sup>2</sup> (the Regulations) had been met in respect of the complaint and decided to conduct an inquiry into whether the procurement was conducted in accordance with the requirements set out in Chapter Ten of the *North American Free Trade Agreement*<sup>3</sup> (NAFTA).

#### **Inquiry**

On January 27, 1995, the Department filed with the Tribunal a Government Institution Report (GIR), in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> A supplement to

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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, 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).

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

the GIR was filed on February 20, 1995. The complainant's comments on the GIR were subsequently filed with the Tribunal. An interim report was prepared by the Tribunal's staff and introduced into the record on February 9, 1995. The complainant and the Department subsequently filed representations with the Tribunal on this report.

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 prepared a Request for Proposal (RFP) dated November 4, 1994, with a closing date for receipt of proposals of November 24, 1994.

The procurement was advertised in the November 14, 1994, issue of Government Business Opportunities. The products being procured were optical instruments called borescopes, including "camera and viewing adaptor."

"Standard Instructions and Conditions DSS-MAS 9403 (06/94)" (DSS-MAS 9403) set out in the manual entitled Standard Acquisition Clauses and Conditions (SACC) were incorporated by reference into the RFP and formed part of the solicitation. A specific instruction contained in the standard instructions and conditions provided that bids remain open for acceptance for a period of not less than 60 days from the closing date of the bid solicitation, unless indicated otherwise by the solicitation. The RFP further provided that submission of a bid constituted acknowledgement that the bidder had read and agreed to be bound by these instructions. Price was the only relevant evaluation criterion in this case that was set out in the RFP.

In response to the solicitation, four suppliers submitted eight proposals. The quotation contained in the complainant's proposal included a price structure comprised of two prices for the borescopes and adaptors. One price was applicable if the products were ordered before December 1, 1994, and a second, higher price was applicable if the products were ordered thereafter. The quotation contained the following statement directly below the price quotes: "QUOTATION VALID FOR 30 Days."

According to the contracting officer, some confusion ensued after bid closing in respect of the product description, specifically with respect to the part which read "camera and viewing adaptor." It was unclear to the contracting officer whether a camera was to be part of the requirement. DND clarified with the Department that a camera and adaptor were not required. By December 5, 1994, the Department had sent DND all the proposals that had been received.

On December 15, 1994, DND sent the Department a form entitled "Selection of Tenders." The form listed five bidders. The first three bidders listed were found to be technically unacceptable. The fourth bidder listed was initially considered acceptable. Upon verification, the contracting officer determined that the product offered did not meet the specification set out in the RFP. The fifth bidder listed, namely, the complainant, was then the only supplier offering an acceptable product.

According to the Department, the contracting officer then decided to negotiate for the price which expired on December 1, 1994. The following note to file dated December 21, 1994, describes what the Department intended to do.

*Suite à l'évaluation technique par l'adjudant maître Chartrand de DND (LCMM), la firme Carsen Group a été retenue. Je contacterai cette firme afin de m'assurer que le prix offert avant le 1/12/94 tel que mentionné sur leur soumission sera retenu car nos conditions stipulent que les prix doivent être valides pour 60 jours. Le tout devra être confirm[é] par fax. (sic)*

([Translation] Following the technical evaluation by Master Warrant Officer Chartrand of DND (LCMM), Carsen Group Inc. has been recommended. I will contact this company to verify that the price offered prior to December 1, 1994, as mentioned on its proposal, can be held, as our conditions stipulate that prices must be valid for 60 days. To be confirmed by fax.)

According to the Tribunal's investigation, the contracting officer was attempting to secure a cost saving.

In spite of the contracting officer's efforts to obtain the lower price, the complainant did not agree to hold the lower price for the benefit of the Department. The complainant was later informed that same day by the Department that the procurement would probably be re-tendered with a new product description.

On or about January 5, 1995, the complainant called the Department to advise that it was prepared to hold the price quoted for the period prior to December 1, 1994. However, the Department informed the complainant that, because of the change in product description and in fairness to all bidders, the Department was under an obligation to reissue the solicitation.

### **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 in respect of the designated contract have been or are being observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in NAFTA.

The complainant submitted that it correctly presented its proposal and that its proposal was in accordance with the terms outlined in the SAAC manual. It argued that the price quoted for the period before December 1, 1994, was valid for 60 days if the Department's order was placed prior to December 1, 1994. According to the complainant, the proviso in its quote limiting the period for acceptance of its proposal to 30 days is a computer default setting for all its quotes. Moreover, in its view, this statement is overwritten by its submission of the proposal because, in doing so, it agreed to be bound by the terms and conditions set out in the RFP, including the requirement that the bid remain open for acceptance for a minimum of 60 days from the date of bid closing. The complainant stated that it had signed and returned its quote on the understanding that it would be valid for 60 days.

In response to the complainant's contention that the Department was unfair to insist that the complainant maintain a price valid only prior to December 1, 1994, the Department submitted that the intent of paragraph A.1(3) of DSS-MAS 9403 is to permit the Department to provide for situations where it is necessary to obtain bids that are valid for more than 60 days. With respect to the case at hand, the Department submitted that, although it knew that the complainant's offer was only valid for 30 days, it decided to accept it for evaluation because it was of the view that all the tenders could be evaluated and a contract awarded within 30 days. The Department concluded its response by submitting that it is not obliged to accept a bid if the procurement officer is of the opinion that the bid does not represent the best value for the Crown. According to the Department, in such a situation, the procurement officer can issue a new solicitation according to existing procedures.

Having carefully examined the complaint and the facts of this case, the Tribunal is of the view that the complaint raises the question as to whether the Department has complied with the requirements of NAFTA set forth in Article 1014, "Negotiation Disciplines," and Article 1015, "Submission, Receipt and Opening of Tenders and Awarding of Contracts."

Article 1014 of NAFTA sets out, in part, the following requirements:

1. *An entity may conduct negotiations only:*
  - (a) *in the context of procurement in which the entity has, in a notice published in accordance with Article 1010, indicated its intent to negotiate; or*
  - (b) *where it appears to the entity from the evaluation of the tenders that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation.*

Article 1015 of NAFTA sets out, in part, the following requirements:

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.*

The Tribunal is of the view that, on December 21, 1994, the Department was satisfied that the complainant's offer was the only acceptable offer in terms of technical compliance. In the circumstances, under Article 1015(4)(c) of NAFTA, the Department was obligated, unless it decided that it was not in the public interest, to award the contract to the supplier whose tender was determined to be the most advantageous in terms of the specific evaluation criteria in the tender documentation. Nevertheless, on December 21, 1994, the Department negotiated with the complainant to secure the lower price, even though the lower price clearly ceased to be valid on December 1, 1994, and a higher price was valid at that time. In the Tribunal's view, the Department was not authorized to initiate negotiations, since the limited

circumstances under which negotiations may be conducted, as provided by Article 1014(1) of NAFTA, did not exist in this case.

With respect to the Department's submission that the complainant's bid did not represent the "best value" for the Crown, the Tribunal points out that "best value" was not one of the evaluation criteria set out in the RFP. Therefore, in the Tribunal's view, the Department should not have made a decision to re-tender the procurement without having properly established grounds for so doing. Article 1015 of NAFTA provides that the Department is under an obligation to award the contract to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is the lowest-priced, "unless the [Department] decides in the public interest not to award [it]." The Tribunal is not persuaded by the evidence that the Department decided in the public interest to re-tender the procurement. In the Tribunal's view, the Department merely attempted to hold the complainant to the lower price on the basis that, in the Department's view, its lower price ought to have been valid for 60 days as, in the Department's opinion, was required by the standard instructions and conditions governing the procurement. The Tribunal is of the view that the Department's actions do not support a finding that an examination of the public interest was conducted in deciding to re-tender the procurement at issue.

Therefore, in the Tribunal's view, the Department acted in breach of both Articles 1014 and 1015 of NAFTA by attempting to negotiate for the lower price and in deciding, on an improper basis, not to award the contract to the complainant.

Accordingly, the Tribunal determines that the complaint is valid.

### **Recommendation of the Tribunal**

Where the Tribunal determines that a complaint is valid, it is required, in recommending an appropriate remedy, to consider all the circumstances relevant to the procurement at issue, including a variety of factors set out in subsection 30.15(3) of the CITT Act. Having carefully considered the circumstances relevant to the procurement at issue, in particular that the complainant had presented the only technically responsive proposal, the Tribunal recommends that the Department award the complainant the contract at the higher price, which was valid on December 21, 1994.

Charles A. Gracey  
Charles A. Gracey  
Member