CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, April 20, 1995

File No. 94N66T-021-0020

IN THE MATTER OF a complaint filed by Martin Marietta Canada 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*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(4) and 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the complainant its reasonable costs incurred in preparing a response to the solicitation and in relation to filing and proceeding with its complaint.

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
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Secretary

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Date of Determination:	April 20, 1995
Tribunal Member:	Charles A. Gracey
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Robert Desjardins
Complainant:	Martin Marietta Canada Ltd.
Government Institution:	Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

Background

On January 16, 1995, Martin Marietta Canada Ltd. (the complainant) submitted a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) for the supply of a Vessel Traffic Service (VTS) simulator for delivery to the Canadian Coast Guard College in Sydney, Nova Scotia (Solicitation No. HAL T1502-4-0035/000/A).

The complainant alleges that the Department improperly conducted and evaluated the procurement at issue. It believes that its proposal is compliant and that, in altering the evaluation criteria during the proposal evaluation stage and allowing an alteration of the price of bids during clarifications, the Department has breached government policy. It requests, as a remedy, a recommendation that the contract award be made void, that the existing proposals be re-evaluated and that a new contract be awarded on the basis of the original requirements. As a minimum, it wishes that recommendations be made to avoid future occurrences of this sort.

On January 20, 1995, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set forth in section 7 of the *North American Free Trade Agreement Procurement Inquiry Regulations*[2] (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*[3] (NAFTA).

Inquiry

On February 24, 1995, the Department filed with the Tribunal a Government Institution Report (GIR), in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[4]

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.

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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 March 29, 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

On August 18, 1994, the Department received a requisition from the Department of Transport for a VTS simulator. The Department prepared a "Notice of Proposed Procurement" (NPP) which appeared in the August 3, 1994, edition of Government Business Opportunities and again in the August 10, 1994, edition in order to amend the closing date for receipt of bids.

A "Contract Planning and Advance Approval" (CPAA) form was prepared by the contracting officer on July 25, 1994, and approved by the Acting Regional Director of Supply on July 26, 1994.

The Department also prepared a Request for Proposal (RFP) dated July 26, 1994, with the solicitation closing at "1400 adt" on September 30, 1994. The RFP contained mandatory and rated requirements grouped into a number of categories. It indicated that a maximum of three mandatory requirements could be determined to be non-compliant and the overall proposal still considered responsive. It also indicated that, once it was determined that sufficient mandatory requirements were met, the next step was an assessment of rated requirements. The selection of the winning proposal was to be made on the basis of the best overall value to the Crown in terms of technical merit and cost. This determination was to be based on a "dollar per point evaluation" (bid price [exclusive of options] divided by rating points).

Five suppliers submitted proposals which included separate pricing and technical information.

An evaluation team, consisting of four Department of Transport employees and the contracting officer, convened in Sydney on October 19 and 20, 1994, to examine the technical portion of the proposals. At that time, one proposal was used as a model for the evaluation. After working through this model proposal, a decision was made that points would only be granted if each of the requirements was specifically identified and addressed. The evaluation team then disbanded and, individually, over the next few weeks, evaluated all the proposals. According to the contracting officer, he was the only member who knew the prices submitted by each bidder, and these were not disclosed to the other members until the final evaluations were complete.

The evaluation team re-convened in Ottawa, Ontario, from November 14 to 18, 1994, and performed a comparative analysis of the individual evaluations. A consensus was reached that none of the five proposals being examined met sufficient mandatory requirements to be considered responsive.

In light of the results obtained, certain modifications to the evaluation criteria, consisting of changing all the mandatory items to rated requirements, weighting the score of the items, previously denoted as mandatory, to 75 percent of the total mark and establishing a minimum pass mark of 70 percent for each category, were recommended for approval. Accordingly, a revised CPAA document was prepared for approval.

Applying the new evaluation method, the team re-evaluated the proposals and determined that the proposals of two companies appeared to be able to surpass the 70 percent pass mark overall and in each of the categories: that of the complainant and that of Norcontrol Limited, the contract awardee.

A number of clarifications were requested by the Department from these two firms in order to complete the re-evaluation. The letters requesting the clarifications contain no indication of a change in evaluation method and, according to the complainant, upon receipt of the letters, it was of the view that this was a normal series of clarifications that the Department might seek on a proposal that it considered responsive. The letters do contain a request for the bidders to supply a price for an additional option described in an attachment. This option represented a 50 percent increase in the number of work stations required.

A letter, dated November 25, 1994, was prepared and sent to all five bidders. This letter indicates that none of the proposals received met sufficient mandatory items to be considered responsive. The letter also pointed out that it was the Department's intention to proceed with a modified evaluation. The bidders were asked to advise the Department whether they wished to withdraw or whether they wanted their proposals to be considered further, and if so, that they were extending the period of acceptance for their offers to January 10, 1995. All five bidders responded to the letter and agreed to extend their respective period of acceptance. There was not, however, complete agreement in terms of the change in evaluation method. In fact, two bidders, including the complainant, objected to the change and a third, that had not been requested to provide clarifications or a price for the additional option, expressed an interest in submitting a new price under the changed conditions.

The evaluation team completed the re-evaluation, using the modified evaluation method, and a contract was awarded on December 28, 1994. The complainant learned, during a telephone conversation with the contracting officer on January 5, 1995, that the VTS simulator contract had been awarded to Norcontrol Limited.

Validity of the Complaint

Section 30.14 of the CITT Act requires that, in conducting an 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.

In the GIR, the Department presents its position that the complaint has not been filed in a timely manner. It argues that the complainant, according to subsection 6(1) or (4) of the Regulations, should have filed its complaint within 10 working days or 30 days, respectively, after the day on which the basis of the complaint became known or reasonably should have become known. It maintains that this is not a complaint under subsection 6(2) of the Regulations, in that the complainant did not make an objection contemplated by that subsection nor was it denied relief.

The Tribunal has determined that the complainant knew the basis of its complaint when it received, on November 28, 1994, the letter from the Department dated November 25, 1994, which stated that all bids were not responsive and that the Department had the intention of changing the evaluation method and

continuing with the procurement. The Tribunal regards the complainant's letter to the Department dated November 28, 1994, as making an objection pursuant to subsection 6(2) of the Regulations. The statement in the letter, "[c]onsidering MMCL's [the complainant's] belief that we have offered the CCG [Canadian Coast Guard] a fully compliant alternative we do not believe that it would be appropriate to proceed with bid evaluations based on criteria different from that in the original Request For Proposal," is interpreted by the Tribunal as an objection. The letter does not refer to the clarifications allowing bid prices to be changed.

The Tribunal regards that denial of relief, related to the objection raised in the complainant's letter, occurred as a result of the Department's letter to the complainant, dated January 5, 1995, and received by the complainant on January 10, 1995. As a result, the Tribunal determines that the complaint, in relation to the alteration of the evaluation criteria during the proposal evaluation stage, filed with the Tribunal on January 20, 1995, is timely in accordance with subsection 6(2) of the Regulations. The Tribunal also determines that, since the original letter of objection to the Department contained no reference to the requested clarifications allowing bid prices to be changed, that portion of the complaint has not been filed within time limits prescribed in section 6 of the Regulations and is, hereby, dismissed.

Although the Tribunal has reservations about the fact that the Department's procurement file does not document the evaluation process in sufficient detail to enable an accurate reconstruction of events solely from the records, the Tribunal is satisfied, based on its investigation, that the evaluation, conducted by the Department in accordance with the terms in the original RFP, was performed in a manner that is consistent with the requirements of Chapter Ten of NAFTA. The Department states that it did not seek clarification from the complainant on some 18 areas of non-compliance, since those areas were definitely non-compliant, and clarification was not needed. Indeed, the Tribunal finds that the Department was not under any obligation to seek clarification. In the Tribunal's view, the Department's finding that all bidders were not responsive is procedurally in compliance with Chapter Ten of NAFTA. The Department's conduct, after this point, is another matter.

In the GIR, the Department submits that the contracting officer, pursuant to Article 1014(1)(b) of NAFTA, decided to enter into negotiations with all firms submitting proposals.

Article 1014 of NAFTA, "Negotiation Disciplines," reads as follows:

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.

2. An entity shall use negotiations primarily to identify the strengths and weaknesses in the tenders.

3. An entity shall treat all tenders in confidence. In particular, no entity may provide to any person information intended to assist any supplier to bring its tender up to the level of any other tender.

4. No entity may, in the course of negotiations, discriminate between suppliers. In particular, an entity shall:

(a) carry out any elimination of suppliers in accordance with the criteria set out in the notices and tender documentation;

(b) provide in writing all modifications to the criteria or technical requirements to all suppliers remaining in the negotiations;

(c) permit all remaining suppliers to submit new or amended tenders on the basis of the modified criteria or requirements; and

(d) when negotiations are concluded, permit all remaining suppliers to submit final tenders in accordance with a common deadline.

The Tribunal interprets Article 1014 of NAFTA to pertain to a situation where a decision cannot be made as to the most advantageous proposal amongst a number of responsive proposals. This flows from Article 1014(4)(a), which requires that the Department eliminate suppliers in accordance with the criteria set out in the notices and tender documentation prior to continuing with the negotiations.

The Department, in the case at hand, did not negotiate with suppliers, as contemplated by Article 1014 of NAFTA. The negotiation contemplated under Article 1014 envisages that suppliers be permitted to submit new or amended tenders during the negotiation process and to submit final tenders once negotiations have concluded. The Department decided to change the evaluation method and then required the suppliers to either withdraw their proposals or extend their bid acceptance period, if they wished to be considered further.

Although the Department, in the GIR, presents the opinion that "[a]ll firms agreed" to the change, the Tribunal finds that, although all firms extended their bid acceptance period, two suppliers expressed, in writing, their disagreement to the change in the evaluation method. In addition, the Tribunal finds that the Department had no intention of permitting the submission of new or amended tenders and, thus, was not conducting negotiations in accordance with the provisions of Chapter Ten of NAFTA. Indeed, in this situation, where there were no responsive bidders and where the initial procurement was substantially modified, the Tribunal finds that the Department had no choice but to re-issue the solicitation in accordance with the requirements of Chapter Ten of NAFTA. The contracting officer was aware of the seriousness of the situation when, in the revised CPAA, he wrote that "[p]olicy would dictate that the client should now rewrite the specification and that the solicitation be re-invited." The Tribunal points out that, by not re-issuing the solicitation, the Department was not only outside departmental policy but outside NAFTA.

In the GIR, the Department presents the position that it changed the evaluation method, without re-tendering, in order to provide appropriate service to the client and because time was of the essence. Chapter Ten of NAFTA does not contemplate "service to the client" as sufficient cause to abrogate competitive procurement procedures. Under certain circumstances, in cases of extreme urgency brought about by unforeseeable events, Article 1016(2)(c) of NAFTA permits the Department to derogate from Articles 1008 through 1015 and, where a state of urgency is duly substantiated, Article 1012(3)(c) permits the Department to reduce the period for receipt of tenders to no less than 10 days from the date of publication of the NPP. The Tribunal finds that no such cases of urgency were presented by the Department and, in fact,

in an apparent contradiction to this position, the approved revision of the CPAA altered the delivery date from August 4 to December 31, 1995.

In the Tribunal's opinion, if the Department wished, as expressed in the revised CPAA, to keep this solicitation "alive," the Department should have re-issued the solicitation in accordance with the provisions of Chapter Ten of NAFTA. By not publishing an NPP, as required by Article 1010(1) of NAFTA , and by not establishing a period for receipt of tenders, as required by Article 1012(2), the Department violated these provisions. As well, by awarding a contract not in accordance with the criteria and essential requirements specified in the tender documentation, the Department violated Article 1015(4)(d).

In light of the foregoing, the Tribunal determines that the complaint is valid.

Recommendation of the Tribunal

To act completely outside the procurement process dictated by the requirements of Chapter Ten of NAFTA amounts to a serious deficiency. In the present instance, the complainant and all other potential suppliers were prejudiced to the extent that they were deprived of an opportunity to submit a new proposal on a procurement in which they had already expressed an interest by previously submitting proposals. Although it is not certain who would have been successful in a re-tender, there was certainly a loss of opportunity. When potential suppliers are not offered a reasonable opportunity to compete by preparing and submitting proposals against a set of requirements that are known in advance, the integrity of the procurement system can be severely prejudiced.

The complainant requested, as a remedy, a recommendation that the contract award be made void, that the existing proposals be re-evaluated and that a new contract be awarded on the basis of the original requirements. As a minimum, the complainant wishes that recommendations be made to avoid future occurrences of this sort. The Tribunal is of the view that no contract should have been awarded in the circumstances. Since the procurement has, nevertheless, progressed to the point of approximately 50 percent completion, according to the contract schedule, and, since the Tribunal determined that the original evaluation resulted fairly in all bidders being found not responsive, it will not make a recommendation to terminate the contract. However, pursuant to subsections 30.15(4) and 30.16(1) of the CITT Act, the Tribunal awards the complainant its reasonable costs incurred in preparing a response to the solicitation and in relation to filing and proceeding with its complaint.

Charles A. Gracey
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Member