



**IN THE MATTER OF:**

**Complaint  
By Marathon Management Company  
of 67A Steelcase Road West  
Markham, Ontario**

**Board File No:  
D92PRF66W-021-0018**

**Complaint upheld**

**AND IN THE MATTER OF:**

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

**22 June 1992**

**DETERMINATION BY THE BOARD**

**The Complaint**

On March 27, 1992, the Procurement Review Board (PRB or the Board) received a complaint (see Investigation Report (I.R.) Appendix 1) by Marathon Management Company (Marathon) of Markham, Ontario. The complaint was in relation to the procurement by the Department of Supply and Services (DSS) of 4,267 hunting knives for use by the Department of National Defence (DND). The complainant alleged that DSS incorrectly awarded the contract to a bidder whose bid price was three times higher than the one they offered. They also alleged that their offer was improperly rejected because they were never asked to submit a sample and a technical examination of their knife was not conducted.

The remedy requested by Marathon was that the contract be withdrawn and awarded to them or that a new Request for Proposals be issued.

With the receipt of supplementary information on March 30, 1992, the complaint met the requirement for filing pursuant to subsection 21(1) of the *Procurement Review Board Regulations* (Regulations).

On March 31, 1992, the Board accepted the complaint for investigation as it met the criteria for acceptance (subsection 28(1) of the Regulations). Pursuant to paragraph 16(1)(a) of the *Canada - United States Free Trade Agreement Implementation Act* (Act), the receipt of the complaint for investigation was acknowledged to the complainant. DSS was officially notified and it, along with the contract awardee, was sent a copy of the complaint. Since the contract had been awarded on March 27, 1992, prior to filing, the provisions of paragraph 16(1)(b) of the Act, dealing with the postponement of award, could not be considered. A notice of complaint was published in the Canada Gazette, Part I and Government Business Opportunities (GBO).

DSS filed the Governmental Institution Report (G.I.R.) (subsection 30(1) of the Regulations) with the Board on April 16, 1992. A copy of the relevant portions of the report was sent to the complainant, pursuant to paragraph 30(3)(a) of the Regulations, who in turn filed comments (subsection 31(1) of the Regulations) with the Board on April 28, 1992. The complainant's comments were forwarded to DSS, pursuant to subsection 31(2) of the Regulations.

### **The Investigation**

The allegations contained in this complaint, the government response to those allegations, and the complainant's comments on the government's response were investigated by means of interviews and the examination of documents.

A number of individuals were interviewed in person and/or by telephone to confirm various statements made and/or contained in the documentation. These included: Mr. Joe LeGrow, Contracting Officer, DSS; Mr. Jim Reeves, Sub-Section Head, DND-Directorate of Clothing, General Engineering and Maintenance (DCGEM); Mr. Tariq Shaikh, Life Cycle Materiel Manager DND (DCGEM) (Technical Authority); and Mr. Leon Wein, Marathon.

A copy of the Preliminary Investigation Report was sent to DSS and the complainant for their comments. Both parties responded with written replies which were then exchanged between them. These comments have been added to the Preliminary Investigation Report and form part of the Investigation Report as submitted to the Board.

The Report of this investigation contains a number of appendices relating to material and documents deemed relevant by the investigative staff as part of their 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*, 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 an oral hearing was not required, nor was one requested by either of the parties. The Board, in reaching its conclusions, has considered the Report of its investigative staff and the comments made 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 Directorate of Procurement and Supply Common User (DPSCU) of DND is responsible for the stock replenishment of some 250,000 line items listed in the Canadian Forces Publication (CFP) 137 (a catalogue with item descriptions listed by NATO stock numbers). Once an item status report identifies a low level of inventory for a subject item, a requirement to procure the item in satisfaction of unit demands and for depot stock is prepared. This is done by using the relevant description in the CFP 137 catalogue and any supplementary information as determined by the technical authority.

A requisition (see I.R. Appendix 2) was signed off to DSS by DND-DPSCU on December 19, 1991. It was for hunting knives described as follows:

*0001 N7340-21-844-5956 KNIFE, HUNTING. HIGH CARBON STAINLESS STEEL BLADE; ROCKWELL C HARDNESS TESTS MINIMUM C54 TO C60, STRAIGHT BEVELLED EDGE, 4 INCH LG CLEAR OF HANDLE. WOODEN TAPERED HANDLE, PLAIN BACK. 8.25 INCH O/A LENGTH; C/W SHEATH AND 27.000 INCH LG. LEATHER LANYARD. KNIFE WEIGHT 107 GMS, SHEATH WEIGHT 70 GMS, WITH RIVETED HANDLE AND GROMMET FOR LANYARD HOLE.*

*O/A WEIGHT 180.0 GMS*

*NSCM*

*P/N*

*38104*

*RBK3*

The number N7340-21-844-5956 represents the NATO Stock Number. The first four digits, 7340, is the Federal Supply Classification Code for the Food Preparation and Serving Equipment Group which lists hunting knives as one of the covered items for Cutlery and Flatware. NSCM is the acronym for the National Supply Code of Manufacturers. The manufacturer that corresponds to #38104 is Grohmann Knives (1974) Ltd. (the contract awardee). P/N stands for part number and RBK3 is the part number for the Grohmann knife that matches the item description.

With the exception of the Rockwell C Hardness tests, there is no indication whether the various measurable specifications given are minimums or maximums, whether certain tolerances are permitted or not, nor what constitutes high carbon stainless steel, nor what type of wood was required.

There is also no reference in the requisition or the Request for Proposal (RFP) as to the end-use for these knives. According to DND, they are used by paratroopers to cut riggings of the parachute that has failed to properly deploy or that becomes tangled upon landing. DND also indicated to the staff of the Board that this particular knife is specified because of its high degree of acceptance in the field by the end-users. This investigation revealed that DND considered the above purchase description the minimum acceptable. This finding has been qualified, however, by the government in their reply to the Preliminary Investigation Report, as will be seen later.

The estimated value of the requirement was in the \$90,000 to \$120,000 range which, inter alia, prompted the procurement to be treated as falling within the FTA Chapter on Government Procurement. A Notice of Proposed Procurement (NPP) was prepared (see I.R. Appendix 3) and published in the GBO of January 16, 1992 under the GATT/FTA section for Food Preparation and Serving Equipment.

An RFP dated January 9, 1992 with a closing date of February 26, 1992 was formulated by DSS (see I.R. Appendix 4). The RFP included the following item description:

001 7340-21-844-5956

KNIFE, HUNTING.

- HIGH CARBON STAINLESS STEEL BLADE;
- ROCKWELL C HARDNESS STEEL BLADE; ROCKWELL C HARDNESS TESTS MINIMUM C54 TO MAXIMUM C60,
- STRAIGHT BEVELLED EDGE, 4 INCH LG CLEAR OF HANDLE.
- WOODEN TAPERED HANDLE, PLAIN BACK. 8.25 INCH O/A LENGTH;
- C/W SHEATH AND 27.00 INCH LG. LEATHER LANYARD.
- KNIFE WEIGHT 107 GMS, SHEATH WEIGHT 70 GMS,
- WITH RIVETED HANDLE AND GROMMET FOR LANYARD HOLE.
- O/A WEIGHT 180.0 GMS

NSCM: 38104

P/N: RBK3 GROHMANN KNIVES/1974/ LTD. OR EQUAL.

Immediately following the item description are further instructions for bidders:

*FIRMS OFFERING AN ALTERNATE MODEL ARE REQUIRED TO IDENTIFY THE MANUFACTURER AND MODEL NUMBER OF THE PRODUCT OFFERED:*

*MANUFACTURER: \_\_\_\_\_.*

*MODEL NUMBER: \_\_\_\_\_.*

*IF AN ALTERNATE PRODUCT IS OFFERED, BIDDERS MUST SUPPLY WITH THEIR PROPOSAL, FULL TECHNICAL/DESCRIPTIVE LITERATURE. A DECISION ON WHETHER OR NOT A PRODUCT IS TO BE CONSIDERED EQUIVALENT WILL BE MADE BASED ON THE INFORMATION PROVIDED.*

*LITERATURE IS ENCLOSED: \_\_ YES \_\_ NO*

*BIDDERS ARE ALSO REQUIRED TO COMPLETE THE FOLLOWING:*

*TYPE OF STEEL USED FOR THE BLADE:*

*ROCKWELL C HARDNESS TEST RESULTS FOR THE PRODUCT OFFERED:*

*TYPE OF EDGE:*

*LENGTH OF BLADE CLEAR OF HANDLE:*

*TYPE OF HANDLE:*

*TYPE OF BACK:*

*OVERALL LENGTH OF KNIFE:*

*SHEATH WITH RIVETED HANDLE AND GROMMETT [SIC] FOR LANYARD OFFERED:*

*LENGTH OF LEATHER LANYARD:*

*KNIFE WEIGHT:*

*SHEATH WEIGHT:*

*OVERALL WEIGHT:*

*NOTE: SAMPLES ARE NOT TO BE SUBMITTED. IF REQUIRED, THEY WILL BE REQUESTED AFTER BID CLOSING.*

The RFP also specified the evaluation criteria to be considered at the bid evaluation stage:

*EVALUATION CRITERIA: The following factors will be taken into consideration in the evaluation of your proposal:*

- 1. Inspection requirement - Mandatory*
- 2. Packaging requirement - Mandatory*
- 3. Delivery requirement - Desirable*
- 4. Descriptive literature - Mandatory*  
*(where applicable)*
- 5. Transportation costs - Desirable*  
*(where applicable)*

*Failure to comply with this request may render your proposal as non-responsive.*

The following Inspection and Packaging clauses found in the Standard Acquisition Clauses and Conditions Manual were included by reference in the RFP:

*D5301D INSPECTION - DND*  
*01/06/91*

*The Contractor is responsible for performing or having performed all inspections and tests necessary to*

*substantiate that the materiel or services provided conform to the drawings, specifications and Contract requirements of the specified manufacturer's part number.*

*All materiel supplied under this Contract may be subject to inspection by a Department of National Defence quality assurance representative at destination.*

Finally, the RFP also contained clauses pertaining to materiel, equivalent substitutes, and two clauses on the awarding of any resulting contract. On page 13:

*B1000D 01/06/91*

*MATERIEL*

*Materiel supplied shall be new and conform to the applicable drawing, specification and/or part number that is in effect on \_\_\_\_\_.*

Referenced on page 12:

*B3000T SUBSTITUTES - EQUIVALENT*

*01/06/91*

*"EQUIVALENT SUBSTITUTES" WILL BE CONSIDERED ONLY IF THE TENDERER (1) DESIGNATES THE TRADE REFERENCE OF THE SUBSTITUTES, (2) STRIKES OUT THE TRADE REFERENCE SPECIFIED AND THE WORDS "OR EQUAL", AND (3) PROVIDES COMPLETE SPECIFICATIONS AND DESCRIPTION LITERATURE FOR THE SUBSTITUTES.*

On page 8, under a section entitled "*GOVERNMENT PROCUREMENT UNDER CANADA-U.S. FREE TRADE AGREEMENT*":

- 7. Contract(s) will be awarded to competent/qualified supplier(s) who provide the best value to the Crown with respect to the evaluation criteria in the bid solicitation.*

On page 14:

*Any contract resulting herefrom will normally be awarded to the tenderer whose quotation produces the lowest total cost at point of destination.*  
t540a

According to DSS, this procurement was considered to be one in which the lowest responsive bidder would be awarded the contract. No point scheme was therefore developed to determine best value.

Ten requests for bid packages were received in response to the NPP. At the time of closing, 11 proposals from 9 suppliers had been duly received by DSS. A tabulation of offers was prepared by DSS (see I.R. Appendix 5). On March 2, 1992, a facsimile was sent by DSS to Marathon (see I.R. Appendix 6) requesting information that was missing in their proposal. A facsimile dated March 3, 1992 was received by DSS from Marathon (see I.R. Appendix 7) which supplied the missing information. At this point, the tabulation, along with the literature from the six lowest bids, was submitted to DND along with a covering letter dated March 3, 1992. In this letter (see I.R. Appendix 8), DND was requested to proceed with the technical evaluation of the bids, and indicated:

*If other than the lowest proposal is recommended for acceptance, you must provide specific and valid reasons for rejection of any lower proposals and the reply must be signed by an authorized officer of your Department.*

On March 6, 1992, DND, through DSS, requested samples of knives referred to in both proposals from Grohmann. According to a note to file (see I.R. Appendix 9), the reason for the request was to compare the finish of the handle on both knives. This note also states that samples from other firms would not be required because "*proposal information is sufficient.*" These samples were requested from Grohmann and forwarded to DND from DSS on March 12, 1992 (see I.R. Appendix 10). On March 17, 1992, DND sent the evaluation results to DSS (see I.R. Appendix 11). DND indicated the following about the Marathon bid:

*Company is offering an ordinary hunting knife, which has no co-relation with DND requirements nor description. Following things are not acceptable.*



1. *Does not have high Carbon Steel.*
  2. *Tapered wood handle as mentioned manufacturer P/N in the bid.*
  3. *weight is less than specified.*
  4. *wooden handle w/two riveted is a must requirement.*
- NOT approved.*

The form indicated four other proposals were not approved for various reasons: two because the blade offered was 3 inches not 4 inches as specified; one because neither technical literature nor a sample was provided; and one (a second proposal by the contract awardee) because the wooden handle of the knife offered was unfinished. The only proposal indicated as acceptable was the one offering exactly the P/N specified in the requirement.

According to DND, the methodology used to determine whether a product offered would be acceptable consisted of comparing the data in the literature submitted to the purchase description in the RFP and determining if each feature of the proposed product matched the required elements in the purchase description. The degree of required match was unspecified; however, the DND technical authority stated they used the item description as an acceptance/rejection criterion. As mentioned before, the investigators were informed by DND that all features of the item description were considered by DND to be mandatory.

However, in comments on the Preliminary Investigation Report, DSS stated:

*The Government agrees with contents of the report except for the following statement, "All features of the item description were considered by the Department of National Defence (DND) to be mandatory" (page 11, paragraph 1).*

*[DND] thinks there may be a misunderstanding. With regard to the Item Description, [DND] points out that several characteristics were very important for the **intended use** [emphasis added] of the item (high carbon stainless steel and wooden handle).*

*In discussing the various dimensions called up in the Item description, DND intended to use them as criteria for determination of "equal" and acceptance or rejection of bids*

*received, for example, the length of the blade, four inches clear of handle. If a bid was received offering 3 15/16 inches length, this would not be a basis for rejection, while a bid offering three inches in length would be rejected. The same would apply to the overall length of the knife and the various weights quoted.*

*It therefore cannot be stated that DND considered all features to be mandatory.*

Nowhere in the solicitation or in any other communication with bidders before award was there any reference to the intended use of the knives or to the relative importance of the stated characteristics in the description. Nor was a scoring system developed for the evaluation.

On March 27, 1992, DSS sent a facsimile to Marathon (see I.R. Appendix 12) advising them that they were unsuccessful. This communication stated that in order "*TO ASSIST BIDDERS IN DETERMINING WHAT WOULD CONSTITUTE AN EQUIVALENT, SPECIFIC FEATURES OF THE HUNTING KNIFE WERE HIGHLIGHTED, I.E. TYPE OF STEEL, TYPE OF EDGE, LENGTH OF BLADE, TYPE OF HANDLE, SHEATH AND LANYARD AND WEIGHTS.*"

It should be noted that the Glossary of Procurement Terms, which is part of the DSS Supply Policy Manual, defines an "equivalent item" as:

*Items are equivalent when, without actually being identical, they have sufficient in common as to be capable of being used for the same purpose.*

The facsimile note also outlined the specific reasons why Marathon's proposal was not accepted:

*1) THE OVERALL WEIGHT OF THE KNIFE REQUIRED IS 180 GRAMS. THE KNIFE OFFERED BY YOUR FIRM WEIGHED 107 GRAMS. THIS IS ONLY 59.5% OF THE WEIGHT REQUIRED, AND IS CONSIDERED TOO LIGHT FOR THE USES INTENDED BY DND.*

*2) THE BLADE WAS TO HAVE BEEN MADE OF HIGH CARBON STAINLESS STEEL. YOUR FIRM OFFERED A BLADE OF HIGHLY POLISHED STAINLESS STEEL. THIS IS NOT THE SAME QUALITY AS REQUIRED.*

*3) THE KNIFE HANDLE WAS TO HAVE BEEN MADE OF WOOD. YOUR FIRM OFFERED A HANDLE OF POLYAMIDE (ANTLER IMITATION). THIS TYPE OF HANDLE DOES NOT HAVE THE SAME PROPERTIES AS A WOODEN HANDLE.*

4) *THE KNIFE HANDLE WAS TO BE TAPERED. YOUR FIRM IS OFFERING A STRAIGHT HANDLE.*

*BECAUSE OF THESE FACTORS, THE KNIFE OFFERED BY YOUR FIRM WAS NOT ACCEPTED BY DND AS BEING AN EQUIVALENT PRODUCT. THIS REQUIREMENT WAS SUBJECT TO THE FREE TRADE AGREEMENT AND IT IS IMPERATIVE THAT ALL BIDDERS BE EVALUATED ON AN EQUAL BASIS. THERE ARE TOO MANY DEVIATIONS TO THE REQUIREMENT IN THE PRODUCT YOUR [SIC] OFFERED FOR IT TO BE CONSIDERED AN EQUAL.*

It should be noted that the weight of the knife requested by DSS was 107 grams which is what Marathon was offering. On April 3, 1992 (after the complaint had been filed with the Board), DSS sent a facsimile (see I.R. Appendix 13) to Marathon correcting the reference to weight as follows:

*IN ADDRESSING THE WEIGHT IN MY FAX TO YOU, I STATED THAT THE WEIGHT OF THE KNIFE YOU OFFERED DID NOT MEET DND'S REQUIREMENTS. THIS WAS INCORRECT. THERE WERE TWO (2) DIFFERENT WEIGHTS INVOLVED (WEIGHT OF THE KNIFE AND OVERALL WEIGHT OF KNIFE AND ACCESSORIES).*

*THE PRODUCT YOUR FIRM OFFERED DID IN FACT MEET THE WEIGHT REQUIREMENTS OF THE KNIFE (107 GRAMS); HOWEVER, THE OVERALL WEIGHT OFFERED WAS 161 GRAMS, VERSUS 180 GRAMS SPECIFIED IN THE REQUEST FOR PROPOSAL. THIS IS WHAT I MEANT TO ADDRESS IN MY FAX TO YOU.*

*THIS WAS A [SIC] ERROR ON MY PART ONLY IN THE FAX SENT TO YOU ON 27 MARCH 1992 AFTER THE EVALUATION PROCESS WAS COMPLETED. ALL FOUR FACTORS SPECIFIED BY DND IN ITS EVALUATION WERE CORRECTLY TAKEN INTO ACCOUNT DURING THE FINAL SELECTION PROCESS.*

The second reason for rejection related to the type of steel used in the blade. The complainant was offering "*highly polished stainless steel*". There is no reference in Marathon's proposal or technical literature as to the carbon content of the steel being offered. There was no clarification sought from Marathon by DSS on this point. In later correspondence (April 3, 1992) to DSS (see I.R. Appendix 14), Marathon stated:

*In response to your fax of today, you mentioned that we offered highly polished stainless steel, not high carbon stainless steel as required.*

*There was no mention in the specifications, or the tender that a high carbon stainless steel was required. If we would of [sic] read*

*that high carbon stainless steel required, we are sure we would of [sic] offered the correct knife. We feel this is a false statement which you are mentioning after the fact.*

The specification does list high carbon stainless steel as a product feature. However, there was no indication as to the percentage composition or that this feature was mandatory until the comments were received from DSS on the PIR.

The third reason for rejection was that "*the knife handle was to have been made of wood*". The investigation revealed that, although not mentioned in any of the bid documentation, the handle of the specified knife is made of rosewood although, according to both DND and DSS, any type of wood would have met this specification. However, although unspecified in the RFP, the finish of the wood was considered by DND to be "*very important*", as demonstrated by their rejection of a lower priced bid for the identical Grohmann knife but with an unfinished rosewood handle (see I.R. Appendix 11).

Marathon's proposal states that its handle is made from polyamide. The fourth edition of the *Plastics Engineering Handbook of the Society of the Plastics Industry, Inc.* describes polyamide as being a class of polymer (plastic) better known as nylon.

The fourth reason the proposal was deemed to be non-responsive was that "*the knife handle was to be tapered*". According to DND and DSS, the determination that the Marathon proposal failed to meet this criterion was based on the photocopies of technical literature provided by Marathon with their bid (see I.R. Appendix 1).

## **Discussion**

This case is an example of a government department knowing what it wants to buy but having to go through a competition in order to comply with the government's rules and, in so doing, turning the exercise into a charade. In the process, they wasted people's time and effort and perhaps the government's money.

The specification was, in fact, a description of a particular manufacturer's product. On the other hand, the specification did add "*or*

*equal*" and there were several clauses in the RFP that dealt with the submission of alternatives or equivalents.

However, the RFP did add the "*Evaluation Criteria*" section which, inter alia, included the "*inspection requirement -- Mandatory*" which states that the supplier is responsible for doing everything "...*necessary to substantiate that the material or services provided conform to the drawings, specifications and contract requirements of the specified manufacturer's part number.*"

The "*Evaluation Criteria*" section ends with the phrase: "*Failure to comply with this request **MAY** [emphasis added] render your proposal as non responsive.*"

In addition to not knowing what "request" DSS is talking about, the Board has, on many occasions, stated that a particular evaluation factor is either mandatory or it is not. The continued inclusion of such confusing phrases in solicitation documents does nothing to improve transparency in government procurement.

On the issue of equivalency, the Glossary of Procurement Terms, which forms part of the DSS Supply Policy Manual, defines "equivalent item" as:

*Items are equivalent when, without actually being identical, they have sufficient in common as to be capable of being used for the same purpose.*

First, nowhere in the RFP is there any mention of the proposed use of these knives.

Second, nowhere in the solicitation is there any reference to the methodology that would be applied in judging the submission of alternatives.

Third, nowhere in the solicitation was there any reference to the relative weight that would be attached to certain attributes but not necessarily to others.

It was only after the transmittal of the Board's Preliminary Investigation Report that it was learned that the DND official felt that "*there may be a misunderstanding*" regarding the mandatory nature of all of the features of the knife; that "*several characteristics were very important for the*

*intended use* [emphasis added] *of the item (high carbon stainless steel and wooden handle)*", but that "[i]t therefore cannot be stated that DND considered all features to be mandatory."

The FTA is very clear on these matters. In addition to the more general statement that all suppliers are provided with "*equal opportunity to be responsive to the requirements of the procuring entity in the tendering and bidding phase*", it goes on to state that governments will "*use decision criteria in the...evaluation of bids and awarding of contracts that...are clearly specified in advance.*"

Since these elements are absent in this case, the Board will find for the complainant and will order the payment to it of its reasonable costs of bidding and of filing and proceeding with this complaint. Further the Board will recommend that the contract be cancelled, in whole or in part, depending on the state of delivery of the goods to the government and that a new and proper solicitation be prepared for this and future stock replenishment.

**DETERMINATION**

The Board has determined, on the basis of its investigation, that this procurement by the Department of Supply and Services did not comply with the requirements referred to in section 17 of the *Free Trade Agreement Implementation Act*. Indeed, by failing to use decision criteria in the evaluation of bids and awarding of contract that were clearly specified in advance, the Government failed to provide all potential suppliers an equal opportunity to be responsive to the requirement of the procuring entity in the evaluation stage.

The Board recommends that the contract be terminated, in whole or in part, depending on the state of delivery of the goods to the government, and that a new and proper solicitation be prepared, as required, for this and future stock replenishment.

The Board has also decided:

- a) to award the complainant reasonable costs for filing and proceeding with this complaint; and
- b) to award the complainant reasonable costs of preparing its bid.

**Gerald A. Berger**  
Gerald A. Berger