

Ottawa, Tuesday, June 25, 1996

File No.: PR-95-038

IN THE MATTER OF a complaint filed by Équipement Industriel Champion 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 not valid.

Raynald Guay

Raynald Guay

Member

Michel P. Granger

Michel P. Granger

Secretary

File No.: PR-95-038

Date of Determination: June 25, 1996

Tribunal Member: Raynald Guay

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Heather A. Grant

Complainant: Équipement Industriel Champion Inc.

Government Institution: Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

Introduction

On March 25, 1996, Équipement Industriel Champion Inc. (the complainant) filed 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) (Solicitation No. KIN W8466-5-DM11/00/A) for the supply of a two-post, 26,000-lb. motor vehicle lift for the Canadian Forces Base Kingston, Kingston, Ontario.

The complainant alleges that it was the only bidder on this solicitation and that the Department improperly rejected its offer because, in the Department's view, the price that it submitted was too high. The complainant requested, as a remedy, that it be awarded the contract.

Inquiry

On March 27, 1996, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal 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 Five of the *Agreement on Internal Trade*³ (the AIT).

On April 24, 1996, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ The complainant filed its comments with the Tribunal on May 2, 1996. On May 17, 1996, the Department filed observations on the complainant's comments.

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, as amended.
3. As signed at Ottawa, Ontario, on July 18, 1994.
4. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912, as amended.

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 November 21, 1995, the Department received a requisition from the Department of National Defence in Ottawa, Ontario, for the supply of a two-post, 26,000-lb. motor vehicle lift. The estimated value of the procurement was \$32,368. On February 27, 1996, a Notice of Proposed Procurement was published on the Open Bidding Service. A Request for Proposal (RFP) dated February 26, 1996, was prepared by the Department. The RFP incorporates, by reference, the Standard Instructions and Conditions in DSS-MAS 9403 (06/94) which include, *inter alia*, the following under subsection 1(2) of "INSTRUCTIONS (APPLICABLE TO BID SOLICITATION)": "Bids may be accepted in whole or in part. The lowest or any bid will not necessarily be accepted." The solicitation closed on March 14, 1996. The complainant was the only bidder. The price quoted was \$44,000 plus taxes.

The contracting officer assessed the price offered by the complainant in relation to the estimated value in the requisition and compared the price to a previous purchase of identical goods made some six months earlier and destined for the same location. Moreover, the contracting officer asked the complainant for price support for its bid. On March 18, 1996, the Department received price support from the complainant in the form of a Canadian list price and breakdown, including the cost of the lift, plus installation and transportation costs. The contracting officer then called the manufacturer of the lift and inquired about the purchase price of the lift for a distributor in Canada. The manufacturer confirmed, in writing, on March 20, 1996, that the "prices (lift only excluding tax, duty, install etc.) are the same to DND as they are to this 'distributor' [the complainant]." At that point, the contracting officer determined that, in her view, the bid price was excessive. On March 19, 1996, the complainant called the Department to inquire about the status of the contract. On that occasion, the contracting officer attempted to negotiate a lower price with the complainant. This attempt was not successful. According to the Department, the complainant was informed that its bid price was not considered fair value to the Crown, that it was not in the public interest to award this contract and that the requirement was being considered for re-tender. On March 25, 1996, the complainant filed this complaint with the Tribunal.

Validity of the Complaint

Complainant's Position

In its comments on the GIR, the complainant submitted that the price proposed in its offer is fair and equitable for the Government of Canada. The complainant noted that the contracting officer had compared its offer to an offer proposed by another supplier for another solicitation, which supplier had to assign the contract to the manufacturer of the goods for lack of ability to pay its bills. For its part, the complainant submitted that it has been in business for 25 years and that it is proud of its reputation for efficiency, reliability, honesty and service. The complainant stated that the price of the lift in its offer is substantially the same as the one mentioned by the U.S. manufacturer to the contracting officer on or about March 20, 1996. Furthermore, its gross margin of profit is only in the order of 10 percent. The remainder of the price differential is attributed to the cost of accessories, transportation charges, installation costs, duty and

incidental and administrative charges. The complainant stated that it is not unreasonable to conclude from the previous bidder's experience that, contrary to the complainant, the said bidder underestimated the delivery and installation charges for the lift support, the floor and the lift itself, hence its business difficulties. The complainant concluded by restating that the price quoted was competitive, fair and equitable for the Government of Canada.

Department's Position

In its response to the complaint and the complainant's comments on the GIR, the Department submitted that one of its fundamental duties is to ensure that the Crown obtains value for money in its procurements. The Department added that it did not award this contract to the complainant because it was evaluated as not being fair value to the Crown in accordance with articles 10.8.9 and 10.8.10 of the Treasury Board Contracting Manual⁵ and paragraphs 7.441 and 7.445 of the Department's Supply Manual.⁶

Indeed, the Department established, on the basis of price support obtained from the complainant and price information obtained from the manufacturer of the lift, that the price offered by the complainant was some 28 percent higher than a recent price paid by the Department for identical goods. Though the shipping point would have been different, the Department established that the delivery charges only have a minimum

5. Articles 10.8.9 and 10.8.10 read, in part, as follows:

10.8.9 ... In determining the fairness of the single valid bid, the following apply:

(a) Where market prices for a work, product or service similar to those being solicited are readily available, the bid price may be compared with recent prices paid, prices in current price lists or catalogues, or recent prices paid by other organizations.

(b) Where market prices are not readily available or applicable, the previous price paid for an identical or similar work, product, or service (adjusted for inflation), can be compared with the proposed bid or prices.

10.8.10 When only one valid bid has been received, that bidder may also be asked to provide price substantiation. If the information provided is not acceptable to the contracting authority, then price negotiation should take place.

6. 7.441 ... *Where the contracting officer is not satisfied that the bid represents fair value, price support should be requested from the bidder. If this does not show that the price is fair and reasonable, then negotiations should be considered.*

Price support can take the form of comparing the proposed prices to the current market prices and/or to the recent previous prices paid.

7.445 ... *If no responsive bid represents fair value, contracting officers should examine the solicitation to determine possible causes. Subsequently, the contracting officer may reissue the solicitation, or negotiate with the objective of obtaining an acceptable price or pricing basis.*

impact on prices. Consequently, the price was determined not to represent fair value and, following unsuccessful negotiations, the Department decided to cancel the solicitation.

Concerning the complainant's allegation that its bid price was compared to that of an offer which resulted in an unfulfilled contract, the Department indicated that, due to business reasons, the said contract was assigned to another company, and the contract is being carried out at the originally agreed price.

In summary, the Department submitted that, in the contracting officer's judgement, the price differential demanded by the complainant was much higher than a reasonable distributor margin. The complainant was given the opportunity to negotiate the bid, but chose not to do so. The complainant will be given another chance to quote when and if the requirement is re-tendered.

Tribunal's Decision

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. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides, *inter alia*, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the AIT.

Article 506(6) of the AIT provides that, "[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504.^[7] The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

The complainant submitted that the Department improperly rejected its offer because its price was too high. For its part, the Department submitted that the price offered by the complainant did not represent fair value to the Crown and that, for that reason alone, it was entitled to reject the complainant's offer. Consequently, the question that must be decided by the Tribunal is whether or not, in the circumstances, the Department had the authority to reject the complainant's offer, given that it was the only responsive bid.

The Standard Instructions and Conditions in DSS-MAS 9403, which were included by reference in the RFP, provide for the acceptance or rejection of an otherwise compliant bid. As already stated above, these instructions and conditions provide, *inter alia*, that bids may be accepted in whole or in part and that the lowest or any bid will not necessarily be accepted.

The Department may, in evaluating a bid, properly consider the price being offered. In this case, the Department assessed whether or not, in its view, the complainant's bid was fair value to the Crown and concluded that it was not. In the Tribunal's view, such an assessment was consistent with the procedures and requirements prescribed in respect of the contract at issue. In the AIT, there is no express provision obliging the Department to award a contract to the only compliant bidder.

7. Article 504 of the AIT pertains to reciprocal non-discrimination among Parties to the AIT.

Determination of the Tribunal

The Tribunal, having examined the evidence and the arguments by the parties and considered the obligations specified in the AIT, determines that the complaint is not valid.

Raynald Guay _____
Raynald Guay
Member