

Ottawa, Wednesday, September 18, 1996

File No.: PR-96-009

IN THE MATTER OF a complaint filed by Addis Enterprises 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.

Desmond Hallissey

Desmond Hallissey

Member

Michel P. Granger

Michel P. Granger

Secretary

File No.: PR-96-009

Date of Determination: September 18, 1996

Tribunal Member: Desmond Hallissey

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Hugh J. Cheetham

Complainant: Addis Enterprises

Government Institution: Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

Introduction

On June 20, 1996, Addis Enterprises (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. W8466-5-AB31/A) for the supply of technical engineering and maintenance services for the Department of National Defence (DND).

The complainant submits that Amtek Engineering Services Ltd. (Amtek) was awarded the contract even though it did not fulfil the mandatory requirements as stated in the Request for Proposal (RFP). It alleges that an individual proposed by Amtek failed to meet the mandatory work experience requirements stated in the RFP. The complainant requested, as a remedy, that the contract be withdrawn from Amtek and that Amtek be given no further consideration.

Inquiry

On June 25, 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) and Chapter Ten of the *North American Free Trade Agreement*⁴ (NAFTA).

On July 22, 1996, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ The complainant filed its comments on the GIR on August 2, 1996.

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. 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).

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

On August 23, 1996, the Department filed additional information in response to the Tribunal's request for an explanation of how it came to the conclusion, prior to contract award, that the individuals proposed by Amtek met the mandatory requirements contained in paragraphs 4.b. and 4.d. of Annex "B" of the RFP. On August 30, 1996, the complainant filed its comments relating to the Department's explanation.

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 December 28, 1995, a requisition was received from DND for technical engineering and maintenance services that would consist of one position with the Maintenance Techniques Division at Canadian Forces Base Borden and two positions at DND Headquarters in Ottawa, Ontario. On March 29, 1996, an RFP with a bid closing date of May 8, 1996, was released and the Notice of Proposed Procurement was published in *Government Business Opportunities*.

The RFP included, *inter alia*, the following:

01. Mandatory Requirement

As per Annex B attached.

In order to demonstrate that the proposed personnel possess the qualifications specified above, bidders must provide:

- a) detailed résumés for each person proposed stating the individual's education, work history and other relevant details, which clearly indicate that the individual meets the qualifications. Failure to provide sufficient details may result in your bid being evaluated as nonresponsive;
- b) a list of relevant projects, including a brief description of the project, the responsibilities of each of the personnel proposed, the project duration, the dollar value and the client [for] whom the work was done.

2. CERTIFICATIONS

The following certifications **MUST** form part of any bid.

- a) "We hereby certify that all the information provided in the attached résumés and supporting material, particularly as this information pertains to education achievements, experience and work history, has been verified by us to be true and accurate. We further certify that, should we be awarded a contract, the personnel proposed will be available to perform the tasks described herein, as and when required by the Project Authority.

Signature of Authorized
Company Official

b) "I _____ (name of proposed personnel), certify that I consent to my resume being submitted on behalf of _____ (name of firm) in response to the Request for Proposal _____ (RFP number)."

Signature of Proposed Personnel

Date

With respect to the evaluation of proposals and the basis of selection, the RFP contained the following information:

Evaluation of Proposals

Proposals will be assessed using the criteria specified herein based on the information the Bidder has been asked to provide in its proposal, namely:

- a) Technical Proposal
- b) Proposed Basis of Payment

Basis of Selection

To be considered responsive, a bid must meet all the mandatory requirements of this solicitation.

Bids not meeting the above will be given no further consideration. The lowest priced responsive bid will be recommended for award of a contract.

Annex "B" of the RFP, entitled "Statement of Qualifications and Experience," contains a section that reads, in part, as follows:

EDUCATION AND EXPERIENCE (MANDATORY)

- 4. The Technical Illustrator's experience must include:
 - b. minimum of 3 years, within the last 10 years experience in the use of desktop publishing and graphics Interleaf system;
 - d. minimum of 1 year experience in preparing Technical Illustrations for reproduction in Canadian Forces Technical Orders (CFTO'S).

Nine proposals, including one from the complainant, were received by the Department before bid closing on May 8, 1996. On May 9, 1996, the proposals were sent by the Department to DND for technical evaluation.

A bid evaluation report dated May 23, 1996, was produced by DND based on its evaluation of the proposals. This report concluded that all proposals complied with the mandatory requirements of the RFP and, on May 23, 1996, the Department issued a contract to Amtek, which had the lowest price. On the following day, the complainant learned that it was unsuccessful in its bid.

Between the time of the contract award and June 20, 1996, when the complainant filed this complaint with the Tribunal, three bidders, including the complainant, expressed concerns to the Department about whether certain candidates proposed by Amtek met the mandatory experience requirements in the RFP. In particular, on May 27, 1996, and then again on May 30, 1996, the complainant wrote to

the Department questioning the qualifications of two of the individuals proposed by Amtek. Various contacts were made by the Department with Amtek, the complainant and other bidders, including the former employer of one of the individuals whose qualifications were being questioned. In the end, the Department was satisfied with Amtek's substantiation of its candidate's qualifications. The complainant and the other bidders were still expressing concerns over the issue, and the Department responded by indicating that the matter was considered closed since the allegations were unproven.

Validity of the Complaint

Complainant's Position

The complainant is of the view that the contract for this requirement may have been awarded based on false or misleading information in Amtek's proposal. The complainant initially questioned the qualification of two candidates proposed because the "Interleaf graphics technical illustrators group in the Ottawa area is small and we are known to each other." In its complaint to the Tribunal, the complainant questions the qualifications of one particular candidate with respect to the requirements in paragraphs 4.b. and 4.d. of Annex "B" of the RFP. It based its allegations on information that it received from a former employer of that candidate (the former employer was also a bidder on this procurement). The complainant was not satisfied with the Department's investigation into its allegations and is of the opinion that the Department has not done enough to verify the qualifications of the candidate in question. In its final submission to the Tribunal on August 30, 1996, the complainant disputes the Department's interpretation of the experience requirement in the RFP and questions the use of the word "function" in the Department's explanation of its rationale for concluding that Amtek's proposal was compliant. The complainant states that, "regardless of all the factual information that [it has] provided to [the Department]," the Department is still trying to justify its decision.

Department's Position

In its response to the complainant's allegations, the Department states that every effort was made to ensure that the contractor did have qualified personnel, in accordance with the mandatory criteria in the RFP. The GIR indicates that the concerns raised about the qualifications of the individual in question were investigated, and additional evidence was provided by Amtek which reconfirmed that the person in question was qualified.

In response to the Tribunal's request for an explanation of how it came to the conclusion, prior to contract award, that the individuals proposed by Amtek met the mandatory requirements contained in paragraphs 4.b. and 4.d. of Annex "B" of the RFP, the Department identified the specific areas of Amtek's proposal and the résumés provided for the candidates as the basis for its conclusion. The Department also stated that, although the RFP made it mandatory that candidates have experience in certain functions, "it was not a requirement that these functions be the primary function undertaken by the candidate during the applicable period when the experience was obtained."

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, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the applicable agreements.

Article 506(6) of the AIT provides, in part, that “[t]he 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.”

Article 1015(4)(d) of NAFTA provides that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.”

Having examined the evidence and arguments presented by both parties and considering the obligations specified in the applicable agreements, the Tribunal has concluded that the complaint is not valid.

In examining the complainant’s allegations and the Department’s conduct in this case, the Tribunal concluded that there were two separate stages of this procurement which had to be reviewed. The first stage was the award of the contract prior to any allegations being brought to the Department’s attention pertaining to a possible misrepresentation, intentional or otherwise, in the successful proposal. The second stage was the Department’s conduct with respect to its actions after being apprised of the suspicions of the complainant and others with respect to the qualifications of one or more of the proposed candidates in Amtek’s bid.

With respect to the first stage, the Department laid out the requirements in the RFP for all potential suppliers to see. The RFP required attestations of authenticity and availability of the candidates proposed by both the bidder and the candidates. “[D]etailed résumés for each person proposed stating the individual’s education, work history and other relevant details, which clearly indicate that the individual meets the qualifications” were also required to be submitted. The Tribunal encourages the Department to ensure that all mandatory criteria are well defined, so as to be easily understood and measurable. Notwithstanding that the word “experience” in this instance was open to some interpretation, the Tribunal is of the view that the Department’s assessment of the proposals with respect to the published criteria in this case was reasonable and, therefore, determines that no violation of the applicable agreements occurred in the initial stage that concluded with the award of the contract to Amtek.

With respect to the second stage, when the Department was presented with information that raised suspicions about the veracity of certain elements of Amtek’s proposal, it contacted Amtek and the former employer of the individual concerned in an attempt to satisfy itself that the contract had been awarded fairly. At the conclusion of its investigation, the Department had a mixture of testimonial evidence from a number of sources. Some of this evidence supported the complainant’s allegations and some of it supported the accuracy of Amtek’s proposal. The Department was not persuaded that this evidence, in total, supported the complainant’s position and decided that it would let the contract award stand. After reviewing the same evidence that the Department examined prior to making its decision to let the contract award stand, the Tribunal is of the view that no violation of the applicable agreements occurred.

Determination of the Tribunal

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was conducted according to the applicable agreements and, therefore, that the complaint is not valid.

Desmond Hallissey

Desmond Hallissey
Member