

Ottawa, Wednesday, September 14, 1994

File No. 94N6666-021-0003

IN THE MATTER OF a complaint filed by Ébenisterie Alfredo Limitée 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* and section 10 of the *North American Free Trade Agreement Procurement Inquiry Regulations*, the Tribunal determines that the complaint has no valid basis and, therefore, is dismissed.

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

File No. 94N6666-021-0003

Date of Determination:	September 14, 1994
Tribunal Member:	Desmond Hallissey
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Estelle Lane
Counsel for the Tribunal:	Shelley Rowe
Complainant:	Ébenisterie Alfredo Limitée
Counsel for the Complainant:	Ronald C. Lefebvre Corporation House
Government Institution:	Department of Public Works and Government Services
Intervener:	Les Intérieurs Classiques du Québec Limitée
Counsel for the Intervener:	Joseph Ionata Ionata, Lazaris

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FINDINGS OF THE TRIBUNAL

Background

On June 13, 1994, after filing an objection with the Department of Public Works and Government Services (the Department) and receiving a denial of relief, Ébenisterie Alfredo Limitée (the complainant) filed, under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act), a complaint concerning the establishment, by the Department on its own account, of a national individual standing offer for the procurement of modular office furniture in accordance with the Canadian General Standards Board (CGSB) specifications set out in Solicitation No. EM 66735-3-S153/00/A dated March 7, 1994. In particular, the complaint concerns keyboard arms on computer tables with pull-out shelves, with a light oak or walnut finish. The complainant makes the following allegations: (1) the Department failed to provide all potential suppliers with an equal opportunity to be responsive to the specifications in the Request for a Standing Offer (RFSO) by providing some bidders with privileged information; and (2) the Department accepted bids that did not meet the specifications in the RFSO by accepting a keyboard arm as equivalent to the Jacmorr keyboard arm without stating "or equivalent" in the RFSO. For those reasons, the complainant requested, as a remedy, that there be a rebid for the standing offer for the procurement of the two computer tables in issue.

On June 17, 1994, the Canadian International Trade Tribunal (the Tribunal) determined that the requirements set forth in section 7 of the *North American Free Trade Agreement Procurement Inquiry Regulations*² (the Regulations) had been satisfied, namely, (1) that the complainant was a "potential supplier" under the CITT Act, (2) that the complaint was in respect of a "designated contract" under the CITT Act and the Regulations and (3) that the information provided by the complainant disclosed a reasonable indication that the procurement had not been carried out in accordance with Chapter Ten of the *North American Free Trade Agreement*³ (NAFTA). Having made that determination, the Tribunal decided to inquire into whether the procurement was conducted in accordance with the requirements set out in NAFTA.

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, on 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).

Inquiry

The three parties to this inquiry are: (1) the complainant, represented by Mr. Ronald C. Lefebvre of Corporation House; (2) the government institution, in this case, the Department; and (3) Les Intérieurs Classiques du Québec Limitée (the intervener), which was granted the status of intervener on July 18, 1994, represented by Mr. Joseph Ionata of Ionata, Lazaris.

On July 13, 1994, as part of the inquiry, the Department filed with the Tribunal a Government Institution Report, in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*,⁴ which report was made available to all parties. The complainant's comments on this report were filed with the Tribunal and sent to all parties.

The intervener's submission regarding the complaint was filed with the Tribunal on August 5, 1994, and sent to all parties.

An interim report prepared by the Tribunal staff under subsection 8(1) of the Regulations was also introduced into the record and sent to all parties. The representations filed with the Tribunal concerning the interim report were sent to all parties.

In a letter received by the Tribunal on August 17, 1994, counsel for the intervener requested that the Tribunal dismiss the complaint as being trivial, frivolous and not made in good faith. Counsel submitted that the complainant's arguments were fallacious and without any merit, since it had failed to provide any proof documenting the brand of keyboard arm used by potential suppliers in preparing their bids, made insinuations to the Department about the inferior quality of the product being offered by the intervener and only filed the complaint after it failed to convince the Department to award it the standing offer for the procurement of the computer tables in issue. After having considered these submissions, the Tribunal determined that there was sufficient information on the record to warrant the continuation of the inquiry into whether the procurement was conducted in accordance with NAFTA and to dispose of the complaint on its merits.

Given that there is 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 RFSO consists of 28 items identified by a Stocked Item Supply (SIS) number and reads, in part, as follows:

B9010D 01/06/91

Requirement

To supply and deliver the item(s) listed on Annex "A" attached hereto and forming part of this document.

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

Annex "A" mentioned previously lists the specifications for the items in issue as follows:

(2) SPECIFICATIONS

THE FOLLOWING CANADIAN GENERAL STANDARDS BOARD SPECIFICATIONS APPLY FOR EACH ITEM INDICATED/LES SPÉCIFICATIONS DE L'OFFICE DES NORMES GÉNÉRALES DU CANADA S'APPLIQUENT AUX ARTICLES SUIVANT[S].

...

*CGSB SPEC. 44.215, (JUNE 1988)/
SPÉC. ONGC 44.215, (JUN 1988)
-899-3652 -899-7621*

The RFSO includes the following stores certification clause:

B4024T01/06/91

Stores Certifications

The items offered conform strictly in accordance with the specifications, the quality assurance provisions and the packaging requirements detailed herein.

YES _____ NO _____.

The deviations are as follows:

The RFSO also includes a clause informing bidders of how the Department would deal with requests for more information, which reads as follows:

REQUESTS FOR MORE INFORMATION

Due to the requirement for equity to all vendors, only written or faxed inquiries will be accepted and responded to by the contracting officer. If questions are of significant importance, a general notice will be sent out to all vendors who have requested the solicitation. Queries must be received before five (5) days of the solicitation closing date to ensure a response.

Please do not telephone the contracting officer for more information.

Incorporated by reference into the RFSO are "Standard Instructions and Conditions DSS-MAS 9403-6 (08/92)." The full text of these standard instructions and conditions is found in a manual entitled Standard Acquisition Clauses and Conditions. The relevant portion of this manual for the purpose of this inquiry reads, under "Conditions," as follows:

5. *Material will be new production of current manufacture conforming to the current issue of the specifications, standards, drawings or part numbers as applicable, unless otherwise indicated herein.*

The June 1988 version of CGSB Specification 44.215 (the specification), which applies to "TABLE MODULAR WITH SHELVES," was not included in the RFSO and was not, therefore,

sent to any bidder, but was available on request from the CGSB. Section 3 of the specification details "GENERAL REQUIREMENTS" and reads, in part, as follows:

- 3.3 *The table shall be manufactured in accordance with the drawings that form a part of this specification and are listed in Appendix A.*
- 3.5 *Interchangeability -- All components of the tables, as defined in this specification and in the accompanying drawings (Appendix A), are designed to be interchangeable regardless of source of manufacture.*

Appendix A mentioned in paragraph 3.3 of the specification consists of a "LIST OF DRAWINGS THAT ARE PART OF SPECIFICATION 44.215 for TABLE WITH PULL-OUT SHELVES 4824" and includes drawing number "C.484 Furniture Modular" along with the number and name of nine other drawings. Item 10 on the list of materials in Drawing No. C.484, dated June 1988, indicates "JACK MORR [sic] KEY'BD ARM" and contains, in the area reserved for revisions, the following: "A1 REDRAWN WAS D-484." A second version of the drawing obtained from the CGSB shows "MIANDA K1-F KEY'BD ARM" as item 10 and includes the following revision: "A2 KEY'BD ARM WAS JACKMORR [sic] PANEL P-18 REF. REMOVED FROM DWG ... 89-08-08." A third version of the drawing also obtained from the CGSB shows "WATERLOO KEY'BD ARM" as item 10 on the list of materials and adds the following revision: "A3 KEY'BD ARM WAS MIANDA K1-F ... 90-02-20."

Section 4 of the specification, "DETAIL REQUIREMENTS," reads in part as follows:

4.2 ***Construction***

- 4.2.5 *Keyboard Shelf Adjustable Mechanism -- The keyboard shelf adjustment mechanism shall be a low profile design that will not inhibit knee clearance. The mechanism shall provide a min 4 in (100 mm) vertical adjustment of the keyboard shelf and a tilting capability of 15° upward (Note 2).*

Note 2 to paragraph 4.2.5 reads as follows:

NOTE 2: The Jacmoor [sic] Manufacturing Ltd. Keyboard Arm Support has been found satisfactory for this purpose.

According to the Department, the intervener was in Ottawa, Ontario, on April 8, 1994, and, during a visit to the SIS organization, was told by the SIS Product Manager that the Waterloo keyboard arm was acceptable in terms of the specification. According to the contracting officer, he did not become aware of this exchange until after bids had closed on April 18, 1994. According to the intervener, it asked the SIS Product Manager if the Waterloo keyboard arm was acceptable and was told that this would have to be verified. The intervener maintains that it did not receive an answer to its question before bid closing.

CGSB records indicate that one of the bidders, the intervener, requested and received the specification from the CGSB prior to bid closing. According to the intervener, it received a version of the specification which had been revised by hand and dated June 1992. Along with that version, it received two copies of the drawing, the original with revision A1 and the third version with revisions A1, A2 and A3.

Seven proposals were received in response to the RFSO, and a tabulation report was prepared. The bids of the complainant and the intervener both certified full compliance with the specification in the stores certification clause.

The assessment of the bids by the departmental evaluation team resulted in the intervener ranking first overall after the point-rating evaluation, with the complainant ranking second. It was then proposed to award a standing offer to each of the two lowest responsive bidders: 23 items to the intervener, which was the lowest bidder for 23 items, and 5 items to the complainant, which was the lowest bidder for 3 items and which was tied for 2 other items with bidders other than the intervener. The 5 items proposed to be awarded to the complainant did not include the computer tables with pull-out shelves, which represent approximately one third of the total estimated value of the procurement and which are the subject of this complaint. On May 11, 1994, during plant visits to the two proposed suppliers' premises, both suppliers were told of the outcome of the RFSO evaluation.

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 have been or are being observed. Pursuant to section 11 of the Regulations, the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in NAFTA.

The complainant alleges that "the Stocked Item Supply officer was accepting bids which were not to specification." The complainant argues that, if other cheaper brands of keyboard arms are accepted, "that are not mentioned in the specification," this will affect its ability to be competitive and that the Department "should have advised all the bidders of this." According to the complainant, the problem created by this situation was that "[b]idders who bid with other keyboard brands had the advantage of lowering their price." The complainant repeats its primary allegation once more by stating that "Stocked Item Supply buyers are accepting to buy something which was not specified in the CGSB Specification that was referred to in the Request for Proposal." The complainant suggests that, if other than Jacmorr keyboard arms were acceptable, "just using the phrase 'or equivalent' signifies that more than one brand will be accepted."

The complainant further alleges that the bidding process was unfair because some bidders were "given privileged [sic] information." This allegation was initially based on the May 27, 1994, letter sent to the complainant by the contracting officer which states, according to the complainant, "that other suppliers who had approached him and asked if they could supply an arm other than what was in the CGSB Specification, were told yes."

In response to the complainant's allegations, the Department has taken the position that:

- 1) the specification "does not say that [an unspecified Jacmorr keyboard arm] is the only acceptable keyboard arm;"
- 2) "SIS did not formally advise all suppliers requesting a copy of the RFSO of this enquiry" by the intervener pertaining to the acceptability of a Waterloo keyboard arm "[b]ecause the enquiry was not formally made and ... it was understood that SIS would accept other arms meeting the requirement;"

- 3) it "was only accepting products offered by suppliers that met the functional requirements as stated on page 6 of the specifications;"
- 4) the lowest-priced offering, by the intervener, included a "keyboard arm which meets the functional requirement," and that the intervener "submitted an invoice of the arm [used in a prototype of the keyboard table] and stated that [it] quoted using the Jacmoor [sic] F350 model;"
- 5) "the words 'or equivalent' were not used in any of the references to CGSB specifications" since the specification does not require a particular brand of keyboard arm, but only provides an example of one found acceptable; and
- 6) the complainant and the intervener are "offering the same keyboard arm and the arm meets the specification."

The intervener maintains that it did not receive any information prior to bid closing that was not available to other suppliers, that the specification refers to the Jacmoor keyboard arm only as an example of one that meets the quality and functional requirements and that the complainant has failed to provide any authentic proof that it based its bid on a keyboard table using an arm other than the Jacmoor keyboard arm. The intervener states that it did not use a product other than that approved by the CGSB to prepare its bid.

The Tribunal has reviewed the provisions of Chapter Ten of NAFTA entitled "Government Procurement" and has determined that the allegations in the complaint raise issues as to whether the Department has complied with the following articles of NAFTA: Article 1008, "Tendering Procedures," Article 1013, "Tender Documentation," and Article 1015, "Submission, Receipt and Opening of Tenders and Awarding of Contracts."

Tendering Procedures and Tender Documentation

Article 1008 of NAFTA sets out the following requirements: (1) the Department must ensure that its tendering procedures are applied in a non-discriminatory manner and consistent with Articles 1009 to 1016; (2) the Department must not provide any supplier with information with regard to a specific procurement that would have "the effect of precluding competition" and (3) the Department must provide all suppliers with equal access to information with respect to a procurement prior to the issuance of any notice or tender documentation. Under Article 1013(2) of NAFTA, the Department is required to reply promptly to any reasonable request for explanations of the tender documentation and for relevant information, on condition that the information does not give that supplier an advantage over its competitors in the procedure for the award of the contract. The complainant has alleged that the Department failed to provide all potential suppliers with an equal opportunity to be responsive to the specifications in the RFSO by providing some bidders with privileged information. In the Tribunal's view, this allegation is only valid if the evidence on the record shows that the Department provided information to the intervener with regard to the RFSO to which not all suppliers had "equal access" prior to the issuance of any notice or tender documentation and which had "the effect of precluding competition" and/or giving the intervener "an advantage over its competitors in the procedure for the award of the [standing offer]."

Having reviewed the evidence on the record, the Tribunal is not persuaded that the Department has failed to comply with any of these requirements, as alleged by the complainant. The information on the record indicates that the intervener did receive from the CGSB a

hand-altered specification dated June 1992 and two versions of Drawing No. C.484, one dated June 1988 and one containing revisions made after that date. This information was available to all suppliers, had they requested it from the CGSB and, therefore, the Tribunal finds that this was not privileged information to which only one supplier had access.

In accordance with the standard instructions and conditions which are expressly incorporated into the RFSO, the current issue or version of the specifications is applicable unless otherwise indicated in the RFSO. It is the Tribunal's finding that the inclusion of the June 1988 date to the specification in the RFSO requires that suppliers use that specific version when bidding on this requirement. The Tribunal also concludes that, since the specification is the source of the reference to drawing number "C.484 Furniture Modular," the specification refers to a version of the drawing with a date of June 1988 or earlier.

It is understandable that the intervener, being the only supplier to receive the package from the CGSB, would be confused as it stated in its comments relating to the complaint received by the Tribunal on August 5, 1994. The intervener stated that this confusion is what prompted its question on April 8, 1994, regarding the acceptability of the Waterloo keyboard arm. The evidence as to whether an answer was given to the intervener, and in whose presence, is conflicting.

According to the Government Institution Report, an oral response was given by the SIS Product Manager to the intervener that the Waterloo keyboard arm was acceptable. According to the contracting officer, he was unaware of such a response. According to the intervener, it was not given an answer to the question. If the intervener had been given information by the SIS Product Manager before bid closing, it would have been at some risk in using that information without confirming it with the contracting officer, since the terms of the RFSO clearly state that enquiries should be addressed, in writing, to the contracting officer.

The Tribunal is of the opinion that the intervener did not receive any information relating to the keyboard arm prior to bid closing that gave the intervener an advantage over the complainant and/or that had the effect of precluding competition. The intervener claims that it did not receive an answer to its enquiry as to the acceptability of the Waterloo keyboard arm prior to bid closing, and the Tribunal believes the intervener. It is not likely that the SIS Product Manager (who is not the contracting officer) was in a position to give a definitive answer to such an enquiry on April 8, 1994, since, according to the Government Institution Report, SIS had to order a copy of the specification from the CGSB on June 10, 1994, "[i]n order to see what had been sent out to suppliers." Prior to bid closing, the question of the acceptability of the Waterloo keyboard arm was not verified by the intervener, or anyone else, with the contracting officer who was, according to the terms of the RFSO, the only acceptable authority for enquiries relating to the procurement. The feasibility of the intervener bidding a price lower than that of the complainant for the items that are the subject of the complaint, even when both were using the Jacmorr keyboard arm, is supportable on the basis that it bid a lower price on 21 out of 26 other items for the same RFSO.

For the above reasons, the Tribunal concludes that there has not been a violation of either Article 1008(2)(a) or Article 1013(2) of NAFTA. The Tribunal does believe, however, that the Department brought a significant amount of unnecessary inconvenience into this procurement action which could have been prevented, had a little bit of time been taken to verify the specifications beforehand.

Submission, Receipt and Opening of Tenders and Awarding of Contracts

With respect to the final allegation, that the Department has accepted or is about to accept a bid that is not to specification, the Tribunal observes that, pursuant to Article 1015(4) of NAFTA, in order for a tender to be considered for award by the Department, it must conform to the "essential requirements of the notices or tender documentation" and that awards must be made in accordance with "the criteria and essential requirements specified in the tender documentation."

The complainant alleges that the intervener based its bid price on a product which was not specified, i.e. something other than a Jacmorr keyboard arm. The complainant supports that position by presenting a letter dated June 22, 1994, sent to it by Jacmorr International Inc., which states in part:

*APRES NOTRE DISCUSSION DU JEUDI 2 JUIN DERNIER, ET SUITE A NOTRE RENCONTRE AVEC "INTERIEUR CLASIQUE", CELUI CI NOUS A CONFIRMER QU'IL AVAIT OBTENU LE CONTRAT DU GOUVERNEMENT FEDERAL.
[Les Intérieurs Classiques du Québec Limitée] MA CONFIRMER QUE DEUX AUTRES MANUFACTURIERS SONT INSCRITS AUX SPECIFICATIONS DU FEDERAL, ET QUE NOTRE BRAS RETRACTABLE EST LE PLUS DISPENDIEUX, ET QUE SON CHOIX SE TOURNERA VERS LA COMPETITION. (sic)*

([Translation] Further to our conversation last Thursday, June 2, and to our meeting with Les Intérieurs Classiques du Québec Limitée, the company informed us that it had obtained the federal government contract.

It confirmed that two other manufacturers met the federal specifications, that our keyboard arm is the most expensive and that it would be turning to the competition.)

In its response to the Government Institution Report, counsel for the complainant alleges the following with respect to what the intervener was bidding:

What it allowed Les Intérieurs Classiques to do was to pretend to bid with a Jacmorr arm (the prototype), all the time basing their bid on the proposed use of the Waterloo arm, which is ... cheaper.

This allegation is not supported by any evidence other than the previously mentioned letter from Jacmorr International Inc. to the complainant.

The intervener, on the other hand, maintained in a facsimile dated May 30, 1994, in response to a request from the Department, that:

[p]rices for the keyboard table (-3652 & -7621) were based on using the Jacmorr arm. However, we did ask you and Bob Simard to confirm approval of the Waterloo and/or other keyboard arms (as per the drawings) so that we would have more options in case of any problems.

The intervener reiterated its position on June 9, 1994, in a facsimile to the contracting officer by stating, in part:

I would like to take this opportunity to reconfirm our commitment to use the Jacmorr keyboard arm for the computer table (-3652 & -7621). The prototype you saw during your visit to our plant was manufactured using the Jacmorr arm.

Another facsimile from the intervener to the contracting officer dated the same day states, in part, that it "used this prototype to calculate [its] bid price."

In the Tribunal's view, the letter from Jacmorr International Inc. to the complainant is not sufficient to demonstrate that the intervener based its proposal and pricing on anything but the prototype that was built using the Jacmorr keyboard arm, particularly since the intervener maintains that it prepared its bid using the Jacmorr keyboard arm and certified that the items that it was proposing to supply conformed to the specifications. All parties agree that the Jacmorr keyboard arm is acceptable in terms of the specification. Therefore, the Tribunal concludes that the Department did not violate the provisions of Article 1015(4) of NAFTA in determining that the intervener's bid was responsive and that the intervener should be awarded the standing offer for the computer tables in issue as the lowest-priced bidder.

Determination of the Tribunal

Accordingly, pursuant to section 30.14 of the CITT Act and section 10 of the Regulations, the Tribunal determines, based on the foregoing reasons, that the complaint has no valid basis and, therefore, is dismissed.

Desmond Hallissey

Desmond Hallissey

Member