

Ottawa, Friday, May 9, 1997

File No.: PR-96-040

IN THE MATTER OF a complaint filed by Hervé Pomerleau inc.
under subsection 30.11(1) of the *Canadian International Trade
Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

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

Date of Determination: May 9, 1997

Tribunal Member: Raynald Guay

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Joël J. Robichaud

Complainant: Hervé Pomerleau inc.

Government Institution: National Research Council of Canada

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FINDINGS OF THE TRIBUNAL

INTRODUCTION

On March 18, 1997, Hervé Pomerleau 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 National Research Council of Canada (NRC) for the financing, design, construction and management of a facility adjacent to the Biotechnology Research Institute (BRI) in Montréal, Quebec.

The complainant alleged that NRC did not adhere, during the bid evaluation process, to the evaluation criteria that it has itself developed and which were set out in the Request for Proposal (RFP). Further, the complainant alleged that the interpretation of the evaluation criteria used by NRC was substantially different from that obtained from a member of NRC's personnel during the bid preparation phase.

The complainant requested, as a remedy, that NRC adhere to the bid evaluation criteria set out in the RFP and award it the contract if its bid is the one having the lowest price. In the alternative, the complainant requests that the Canadian International Trade Tribunal (the Tribunal) cancel the award of any contract in this case and restart the procurement process, but this time with clear and precise evaluation criteria. Finally, the complainant requests that it be reimbursed for costs incurred in preparing its bid and for loss of profits involved in this contract.

INQUIRY

On March 20, 1997, 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 the matter to determine whether the procurement was conducted in accordance with the requirements of Chapter Five of the *Agreement on Internal Trade*³ (the AIT).

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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. Signed at Ottawa, Ontario, on July 18, 1994.

On April 2, 1997, NRC filed a Government Institution Report (GIR) with the Tribunal, pursuant to rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On April 14, 1997, the complainant filed its comments on the GIR with the Tribunal.

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 rendered a decision on the basis of the information on file.

PROCUREMENT PROCESS

In July 1996, NRC issued a Notice of Proposed Procurement for a facility adjacent to the BRI. The notice invited companies to show their interest by responding to an RFP for the financing, design, construction and management of an NRC laboratory facility in Montréal. The tender documents further specified that the request for letters of interest constituted the first phase in a two-part process to draw up a list of potential bidders. Eight companies submitted letters of interest to NRC in response to the notice. Following an evaluation, five companies, including the complainant, were invited to bid on the project.

In December 1996, NRC issued a second notice requesting these companies to submit detailed technical and financial bids. The criteria to be used for evaluating the bids were set out in the RFP, which reads, in part, as follows:

1.3 The evaluation will be carried out on a two part basis as outlined in Section 7.0. The first evaluation will be on a pass/fail and the successful completion of the first phase will result in the evaluation of the second phase. Those Proponents who are not successful in the first evaluation will not have phase two evaluated.

5.4.3 NRC reserves the right to reject any or all proposals submitted, or to accept a proposal with or without negotiation. A contract will not necessarily be issued as a result of these submissions.

5.7 ... Responses will be assessed for completeness, appropriateness, and will be rated as per the system outlined in Section 7, Evaluation Criteria.... Potential Proponents who respond to the RFP will be evaluated based on the factors and criteria stipulated in Sections 6 and 7 that follow.

6.7 Financial Evaluation

The following headings^[5] constitute the required financial information to be used to determine best value for the NRC. All information is mandatory and will be used for evaluation.

[Emphasis added]

7.1 The responses to this RFP will be evaluated in two parts. The first evaluation will be an evaluation to the responses to sections 6.5, the Laboratory Facility and 6.6, Management and Design. This evaluation will cover all responses dealing with Section 2, Project Requirements, Section 3, Functional Requirements, and Section 4 Accommodation Standards. This evaluation will be on the total response to these sections and will be on a pass/fail basis according to the 70 point criteria as per Section 1, Article 5.4.2. NRC at its sole discretion reserves the right to reject any proposal not meeting this criteria.

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

5. The headings mentioned in the RFP are: Construction Costs, Rental Rate, Land Lease, Building Repurchase, Financing, Proposed Lease, Additional Costs To Be Billed to Tenants and Statement of Operations.

7.2 Those Proponents passing part one of the Evaluation will have their response to section 6.7 evaluated. The evaluation of the financial terms will be based on the Net Present Value [NPV] of the financial information provided by the Proponent. NRC reserves the right to negotiate with the successful Proponent.

In addition, the RFP specifies, at Section 5.2, that requests for information on the RFP must be addressed to the Head, Procurement Services, at NRC. Section 5.3 further specifies that all questions relating to the RFP must be in writing. It is also stated that the contact listed in Section 5.2 will be the only person providing answers to questions and that any attempt to secure information or solicit answers to a question from a source other than the contact listed in Section 5.2 will result in the bidder being disqualified from the RFP process.

NRC received five detailed technical and financial bids, including the one from the complainant. These bids were studied by a team of six assessors. According to NRC, the results of the technical evaluation and the NPV of the financial bids were used to determine the best value for NRC. The results of the evaluation of the bids were communicated orally to all bidders on February 21, 1997, and in writing on March 3 and 4, 1997.

On March 12, 1997, at the complainant's request, the President of NRC and the Director General of Administrative Services and Property Management met with the complainant to discuss the RFP. According to NRC, the discussion did not, at any time, touch on the fact that a member of NRC's personnel had indicated that the bid that successfully passed the first phase and had the lowest price would be the successful one.

On March 18, 1997, the complainant filed the complaint with the Tribunal.

VALIDITY OF THE COMPLAINT

Complainant's Position

In its comments on the GIR, the complainant limited its comments to two issues. It maintains, firstly, that NRC refers on a number of occasions in its comments to the clause in the RFP which provides that NRC may accept the proposal of its choice, irrespective of the cost, or that it may refuse any one or all proposals. In this context, the complainant drew the Tribunal's attention to the decision of the Federal Court of Appeal which, according to the complainant, clearly invalidated this clause, namely, *Canamerican Auto Lease and Rental Limited v. Canada*.⁶ This decision, moreover, was cited by the Procurement Review Board of Canada in File No. D89PRF6608-021-0005.

The complainant further maintains that the evaluation criteria are clearly set out in Section 7.0 of the RFP and make no reference whatsoever to the establishment of a ratio obtained by dividing the financial evaluation (phase 2) by the points obtained (phase 1). Moreover, the GIR is silent on this issue. According to the complainant, the fact that NRC used such a ratio in this case changes the rules of the game that had been clearly established by NRC in the RFP. In addition, the complainant maintains that, if NRC had intended to use this ratio for selecting a bidder, it should have clearly and unequivocally stated this in the RFP. The complainant maintains that NRC has not done so and, consequently, did not fulfil its obligations under the AIT.

6. [1987] 3 F.C. 144.

In conclusion, the complainant maintains that it is the lowest responsive bidder and that it should, therefore, be awarded the contract for the project. In changing the selection criteria by introducing a ratio, NRC plainly alters the results of the procurement, does not meet the requirements of government policies and national agreements and seriously prejudices the complainant by depriving it of a contract to which it is entitled.

NRC's Position

In its response to the complaint, NRC maintains that it is clear from the RFP that the successful bid would be selected on the basis of best value for NRC and that cost was not, therefore, the only factor to be considered. In addition, NRC maintains that nothing in the RFP supports the belief that the contract would be awarded to the company whose bid provided the lowest NPV. With regard to the complainant's claim that a member of NRC's personnel had informed it, when it was preparing its bid, that the successful bid would be the one that successfully passed the first phase of the evaluation and whose cost would be the lowest, NRC maintains that the Head of Procurement Services was the only contact with whom to communicate for all requests for information on the RFP and that he never received such a request during the RFP period. In addition, NRC maintains that, to its knowledge, this request was not submitted to any other of its employees. NRC submits, however, that, if this was the case, then the complainant has breached the conditions of the RFP and, as a result, should be disqualified from the procurement process and its complaint to the Tribunal dismissed. NRC finally submits that the complainant did avail itself of the option of submitting questions in writing to NRC, as was permitted, and that none of the questions submitted and answers provided mentioned the award of the contract to the lowest bidder.

NRC further maintains that, although it is true that the President of NRC and the Director General of Administrative Services and Property Management met with the complainant to discuss the RFP and the choice of the successful bidder, NRC representatives, during this meeting, reiterated the principles governing the selection of the successful bidder. Further, NRC maintains that it chose the bid that represented the best value, as set out in the RFP, which was not the case with respect to the complainant's bid.

NRC concludes by emphasizing that it met the specific requirements set out in the RFP, as well as the intent of the RFP, and that to restart the procurement process without a valid reason, now that the results of the original RFP are known, would be unjust to the successful bidder. Considering the fact that the procurement process for the BRI met all the relevant requirements of government policies and the applicable agreements and that all interested parties were treated equitably, NRC recommends that the Tribunal dismiss the complaint and authorize it to proceed with the project as anticipated.

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 AIT.

The complainant emphasizes that NRC refers on a number of occasions in its comments to Section 5.4.3 of the RFP, which, the complainant maintains, was clearly invalidated by the Federal Court of Appeal. It further maintains that the evaluation criteria clearly set out in Section 7.0 of the RFP make no

reference whatsoever to the establishment of a ratio obtained by dividing the financial evaluation by the points obtained during the first phase of the bid evaluation process.

The Tribunal notes, first, that the tender documents clearly state at Section 5.4.3 that NRC reserves the right to accept any bids or reject any or all of them. This having been said, the Tribunal notes, moreover, that at no time did NRC resort to the use of these provisions, either in accepting the successful bid or in rejecting the complainant's bid. As a result, the Tribunal will not deal with the validity of this issue.

With regard to the evaluation criteria set out in Section 7.0 of the RFP, the Tribunal notes that there is a clear reference to a two-part bid evaluation process. The Tribunal notes, in addition, that Section 7.2 clearly states that the provisions governing the second phase of the bid evaluation process are set out in Section 6.7, which reads, in part, as follows: "The following headings constitute the required financial information to be used to determine best value for the NRC. All information is mandatory and will be used for evaluation."

In the Tribunal's opinion, it emerges clearly from the provisions cited that NRC would be seeking, during the bid evaluation process, to determine the bid that was offering it the best value. It is true that the tender documents do not indicate, in detail, the way in which this best value would be established. It remains, however, that the NRC's method of proceeding in this matter, namely, to divide the points obtained in the first phase of the bid evaluation process by the prices expressed on the basis of the NPV, is consistent with the bid evaluation method set out in Section 6.7. Further, this method of establishing best value is very common and, in the Tribunal's view, was predictable in this case. The Tribunal finally notes that nowhere in the RFP is there a mention, or even a suggestion, that the company submitting the lowest bid and having previously successfully passed the first phase of the bid evaluation process would be awarded the contract. The Tribunal believes that the complainant should have either interpreted the meaning of "best value" in the context of the second phase of the bid evaluation process or, at the very least, confirmed the accuracy of its interpretation with the official NRC representative through the question/answer mechanism.

The Tribunal, therefore, concludes that NRC acted properly in determining the successful bidder on the basis of best value. This method of proceeding was anticipated in the tender documents, and NRC had to adhere to it.

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was conducted in accordance with the AIT, specifically Article 506(6) and, as a result, that the complaint is not valid.

Raynald Guay

Raynald Guay

Member