

Ottawa, Thursday, April 9, 1998

File No.: PR-97-040

IN THE MATTER OF a complaint filed by Société de coopération pour le développement international 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 has determined that the complaint is not valid.

Raynald Guay

Raynald Guay
Member

Susanne Grimes

Susanne Grimes
Acting Secretary

Date of Determination: April 9, 1998

Tribunal Member: Raynald Guay

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Philippe Cellard

Complainant: Société de coopération pour le développement international

Counsel for the Complainant: Jean-François Routhier

Government Institution: Canadian International Development Agency

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FINDINGS OF THE TRIBUNAL

INTRODUCTION

On January 29, 1998, Société de coopération pour le développement international (Socodevi) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the Request for Formal Proposals (RFP) No. SEL 97-0037, issued by the Canadian International Development Agency (CIDA), regarding consulting services for the implementation of the Socio Economic Reactivation of the Peace Zones Project (PREAPAZ) in Guatemala.

Socodevi claimed that CIDA's RFP, and particularly Requirement No. 11, did not clearly indicate that Guatemalan companies could not be subcontracted for the provision of the services to be provided by locally engaged personnel. Socodevi also alleged that the rejection of its bid by CIDA, for the sole reason that it was proposing to provide services locally through Guatemalan subcontractors, was contrary to the provisions of Articles 501 and 506 of the *Agreement on Internal Trade*² (the AIT). Moreover, Socodevi alleged that the notice for the RFP issued by CIDA did not meet certain of the conditions set out in Article 506 of the AIT, namely, the inclusion of a statement indicating that the procurement is subject to the provisions of Chapter Five of the AIT.

Socodevi requested, as a remedy, that the Canadian International Trade Tribunal (the Tribunal) postpone the award of the contract at issue until the Tribunal determined the validity of the complaint, that it order CIDA to evaluate the Socodevi proposal on its merits and, as appropriate, in the event that the proposal were found to be in accordance with the provisions of the RFP and were selected, that CIDA negotiate with Socodevi for the conclusion of a contract. Alternatively, Socodevi requested that CIDA defray the costs and fees that it incurred in preparing its proposal and the loss of profits that it would have earned from this contract, i.e. \$135,000.

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1. R.S.C. 1985, c. 47 (4th Supp.).
 2. As signed at Ottawa, Ontario, on July 18, 1994.

INQUIRY

On February 2, 1998, the Tribunal determined that the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*³ (the Regulations), had been met in respect of the complaint and decided to conduct an inquiry into the complaint to determine whether the procurement was conducted in accordance with the requirements set out in Chapter Five of the AIT.

On February 3, 1998, the Tribunal, pursuant to subsection 30.13(3) of the CITT Act, issued an order postponing the award of any contract regarding this procurement until the Tribunal could determine the validity of the complaint. On March 2, 1998, CIDA filed a Government Institution Report (GIR) with the Tribunal, pursuant to rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On March 13, 1998, Socodevi 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 disposed of the complaint on the basis of the information on the record.

PROCUREMENT PROCESS

On June 12, 1997, CIDA posted on the Open Bidding Service a notice for an RFP regarding the implementation of CIDA's PREAPAZ project in Guatemala. The notice did not contain a statement indicating that the procurement was subject to the provisions of Chapter Five of the AIT.

The RFP contained certain requirements regarding the technical and financial proposals to be filed by the bidders.

The RFP included, in part, the following:

PART II -- SPECIFIC REQUIREMENTS

2.1 INTRODUCTION

The purpose of this request for proposals is to select a Consultant to enter into negotiations with CIDA for a contractual agreement for the provision of services as Canadian Executing Agency.

2.8 FINANCIAL COMPONENT

The financial proposal shall be provided in a **separate sealed envelope**, and must include a comprehensive and detailed breakdown of the costs required to deliver the major work packages described in the technical proposal. The costs shall be classified either as fees or reimbursable expenses.

To provide a common basis for the evaluation and comparison of proposals, CIDA requires uniformity in the classification and presentation of costs. Consultant must adhere to CIDA's cost presentation requirements described hereafter. The proposer must provide an estimate of total costs by COST ELEMENT and by key position/person for the project.

3. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, vol. 127, No. 26 at 4547, as amended.

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

2.8.4 COMPLETION OF ESTIMATES OF TOTAL COSTS BY COST ELEMENT - see APPENDIX ‘F’

FINANCIAL EVALUATION FEES

Requirement 10 — FEES FOR PERSONNEL IN CANADA AND ON SHORT-TERM FIELD ASSIGNMENTS

For personnel *in Canada* and on *short-term field assignments* (less than four (4) consecutive months in the field):

- **list separately** all employees including support staff and outside consultants, who will be assigned to the project in Canada and those in the field for less than four (4) consecutive months;
- **quote** an all inclusive daily rate for each person/position identified above which shall include direct salary, and all applicable mark-ups (fringe benefits, overhead and profit). To estimate the total cost, each person/position’s rate must be multiplied by the total number of days for which that person/position has been identified;
- **identify** the basis upon which the quoted rate has been established (hours per day and days per week).

Requirement 11 — FEES FOR PERSONNEL ON SHORT[-]TERM RELOCATION AND LONG-TERM ASSIGNMENTS

For personnel *on short[-]term relocation* (four or more, but less than twelve (12) consecutive months in the field) and *long-term field assignments* (twelve (12) consecutive months or more in the field):

- **list separately** all cooperants/technical advisers and personnel of CIDA’s executing agencies, outside consultants and locally engaged professionals, who will be assigned to the project in the field on short[-]term relocation;
- **list separately** all cooperants/technical advisers and personnel of CIDA’s executing agencies, employees, outside consultants and locally-engaged professionals on long-term assignments in the field; and
- **quote a monthly rate**, including all mark-ups for each position for time directly related to the project and for each year of involvement for multi-year projects. The quoted rate must include direct salary, fringe benefits, overhead and profit.

APPENDIX "F" -- SAMPLE FORMAT
ESTIMATE OF TOTAL COST BY COST ELEMENTS

The Consultant shall indicate the Level of Effort, Daily Rates and Total cost for each position

Total \$Cdn

Personnel in Canada and on short-term field assignment

(all inclusive daily rates) *(less than four (4) consecutive months)*

Consultant's employees (list all positions/names)

Sub-contractor(s) (Outside consultants)

Personnel on short-term relocation assignment

(four (4) or more, but less than twelve (12) months)

Consultant's employees/advisers

Sub-contractor(s) (Outside consultants)

Personnel on long-term field assignment

Consultant's employees/advisers

Sub-contractors (Outside consultants)

Locally-engaged professionals

Total fees _____

Reimbursable expenses

Travel costs

Relocation costs

Operating costs

Capital costs

Counterpart personnel (support staff)

Total reimbursable expenses _____

Note: The Consultant must disclose:

- The Consultant shall list all the persons to be included in the project individually in each category.

PART III - STANDARD INFORMATION

3.6 PROPOSAL EVALUATION

3.6.1 EVALUATION PROCEDURES

Only certain costs are considered in the financial evaluation. All Consultant personnel fees, salaries and wages are considered, including fees for locally-engaged professionals and local and Canadian outside consultants, as defined in Part II. Reimbursable expenses will **not** be included in comparative evaluations and are **always** subject to negotiation with the selected Consultant.

The financial proposal with the lowest cost will be awarded the maximum number of points (200). The scores for all other financial proposals are calculated on a pro-rata basis. For example, if the proposed cost of Consultant A exceeds the lowest proposed cost (Consultant B) by 10%, Consultant A will receive 200 minus (10% of 200) or 180 points.

The financial score added to the technical score, referred to as the **adjusted technical score**, determines the final ranking.

3.7 NEGOTIATION AND CONTRACT AWARD

3.7.2 AREAS FOR NEGOTIATION

. LEVEL OF EFFORT

CIDA reserves the right to negotiate the level of effort as expressed in skills and/or time proposed by the Consultant.

The bid evaluation process was conducted between August 27, 1997, and the end of October 1997. CIDA declared Socodevi's financial proposal non-compliant because it did not address all the requirements identified in the RFP. It was pointed out that Socodevi had not provided information on the level of effort and the monthly rate for locally engaged subcontractors on field assignment. On December 19, 1997, CIDA informed all bidders, in writing, of the results of the selection process. On January 29, 1998, Socodevi filed a complaint with the Tribunal.

VALIDITY OF THE COMPLAINT

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration 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 provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in Chapter Five of the AIT.

Article 501 of the AIT provides, in part, that the purpose of Chapter Five is to establish a framework that will ensure equal access to procurements for all Canadian suppliers in order to contribute to the reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency. To this end, 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."

Socodevi's financial proposal included, under section 1.2 "Personnel on long-term field assignment" and the heading "Sub-contractors," the names of three Guatemalan organizations and a fourth entry, "Other Consultants." In terms of the four referenced entries, the Socodevi financial proposal was silent with regard to the number of months, contained the notation "N/A" with regard to the monthly rates and included a global amount for the services to be rendered.

When CIDA advised Socodevi that its bid had not been selected, it informed Socodevi that its financial proposal did not meet the RFP requirements relating to the listing of staff members on long-term field assignment, the level of effort they were to provide and the rates.

In the GIR, CIDA stated that the requirements at issue were clear and that Socodevi had not met them. This being the case, CIDA stated that it could not determine the level of effort and the rate for the work subcontracted and that, therefore, it could not fully and equitably compare the financial section of the Socodevi proposal with that of other proposals received by CIDA in response to the RFP.

For its part, in its complaint to the Tribunal, Socodevi alleged that the RFP did not clearly indicate that it could not subcontract to Guatemalan companies for the services to be provided by local personnel.

In its comments on the GIR, Socodevi specified that, on the one hand, the requirements at issue were not clear and, on the other, that, in any event, these requirements were not applicable to subcontracting.

The question which the Tribunal must therefore decide is whether, in accordance with Article 506(6) of the AIT, the RFP clearly stated the requirements of the procurement for which the RFP was being issued. The Tribunal will examine, in order, the requirements related to the listing of personnel on long-term field assignment, those relating to the level of effort and those relating to rates. It will then deal with the applicability of these requirements to subcontractors.

It is clear to the Tribunal that Socodevi had to list all the persons who came under the categories set out in Appendix F. Socodevi should have listed the designated employees of the proposed subcontracting companies. The last paragraph of the Note, in the last section of Appendix F, does not leave any room for doubts. It reads as follows: "[t]he Consultant shall list all the persons to be included in the project individually in each category." This direction is consistent with the paragraph of Requirement 11 which deals with the listing of personnel on long-term field assignments. The fact that, in Appendix F, the request "list all positions/names" follows a specific category in the appendix would not modify the Tribunal's conclusion. In fact, this request is not incompatible and does not, in any way, modify the last paragraph of the Note. On the contrary, since it is found at the end of the first category, the reference may be viewed as an instruction as to how to proceed for all categories.

The sample format for Appendix F required the level of effort to be indicated. In its response to the GIR, Socodevi claimed that the single and only occurrence of the "level of effort" concept is found in Appendix F. This would involve dismissing section 3.7.2 of the RFP, reproduced in part in the "Procurement Process" section of these findings. This section indicated that the level of effort may be expressed in skills and/or time. Since the personnel covered by Appendix F must be listed, the level of effort must, therefore, be expressed in time.

With regard to rates, it is true that, with regard to personnel on long-term field assignment, Requirement 11 mentioned a monthly rate, while Appendix F required a daily rate. This is contradictory and

CIDA could not have been able to require an indication of a monthly rate if a daily rate had been mentioned, or vice versa. In any event, it was clear that a rate had to be indicated, whether this was daily or monthly. Just as for the level of effort, Socodevi neither indicated a rate for the employees of the three Guatemalan subcontracting companies nor for the “Other Consultants.”

Socodevi claimed that CIDA could have evaluated the level of effort of the subcontracting companies based on its technical proposal. Even if this argument were to be accepted, the fact remains that it was impossible for CIDA to determine the rate for the different employees of the subcontracting companies.

Although the Tribunal considers that CIDA could have shown more consistency in the development and presentation of its RFP, in its view, the RFP requirements relating to the listing of the personnel on long-term field assignments, the level of effort to be provided and the rates were clear and, consequently, in compliance with Article 506(6) of the AIT.

In this case, Socodevi claimed that the conditions on the level of effort and rates could not be applicable since subcontractors were being proposed. The Tribunal cannot support this claim.

Socodevi claimed that the essential characteristic of subcontracting is that it be performed for a fixed or fixable price, to accomplish a specific task (“Output”) without any relationship of subordination between the provider of the work and the subcontractor. Socodevi did not, however, support this claim by citing any authority. The consultation of general and legal dictionaries and the *Québec Civil Code*⁵ (the Code) did not support the position taken by Socodevi in terms of the requirement for subcontracting to be performed for a price fixed by the contract.

*Le Nouveau Petit Robert*⁶ defines “*sous-traitance*” (“subcontracting”) as “[o]pération contractuelle par laquelle un entrepreneur (donneur d’ordre) confie à un autre entrepreneur (sous-traitant, sous-entrepreneur) le soin de réaliser, pour son compte et selon ses directives, tout ou partie d’un travail destiné à ses propres clients”⁷ (“contractual arrangement by which a contractor [the contract giver] awards to another contractor [subcontractor] the task of performing, on its own behalf and according to its instructions, the whole or portion of a piece of work for its own clients”).

The *Dictionnaire de droit québécois et canadien*,⁸ for its part, defines “*sous-traitance*” as “[o]pération par laquelle un entrepreneur conclut avec un autre entrepreneur un contrat de sous-entreprise ou sous-traité”⁹ (“contractual arrangement by which a contractor concludes a subcontracting contract”) and “*contrat de sous-entreprise*” (“subcontract”) as “[c]ontrat conclu par un entrepreneur avec un autre entrepreneur qui s’engage à exécuter en tout ou en partie le contrat d’entreprise que le premier a signé avec le client”¹⁰ (“contract concluded by a contractor with another contractor, which binds itself to perform, in whole or in part, the contract of enterprise that the first contractor has signed with its client”).

5. Montréal, Wilson & Lafleur, 1998.

6. Montréal, DICOROBERT, 1993.

7. *Ibid.* at 2128.

8. Montréal, Wilson & Lafleur, 1994.

9. *Ibid.* at 545.

10. *Ibid.* at 544.

Neither definition mentions that the price must be fixed by the contract. It should be noted, however, that the definitions in the *Dictionnaire de droit québécois et canadien*, just like the claim made by Socodevi regarding subcontracting, refer back to the contract of enterprise or for services in the Code.

Article 2098 of the Code defines a contract of enterprise or for services as “a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.”¹¹ Article 2099 of the Code specifies that: “[t]he contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.”¹²

Articles 2106 and 2109 of the Code, which deal with the price of a contract of enterprise or for services, are particularly interesting in this case for the Tribunal. Article 2106 reads as follows: “[t]he price of the work or services is fixed by the contract, by usage or by law or on the basis of the value of the work carried out or the services rendered.”¹³ Article 2109 indicates that “[w]here the price is fixed by the contract, the client shall pay the price agreed.”¹⁴ The latter article proves, contrary to the claims by Socodevi, that the essential characteristic of subcontracting is not that the work be performed for a price fixed by contract. Consequently, the RFP requirements relative to the level of effort and the rates were not incompatible with subcontracting and complied with Article 506(6) of the AIT.

As indicated above, the Tribunal is of the opinion that the requirements relating to the listing of personnel on long-term field assignments, the level of effort to be provided and the rates were clear. There were, therefore, no violations of Article 506(6) of the AIT. Even taking for granted that these requirements contained some irregularities, Socodevi has not demonstrated to the Tribunal that these alleged irregularities misled it.

In the Tribunal’s view, it is revealing that, in its financial proposal, Socodevi indicated, under section 1.1 “Personnel in Canada and on short-term field assignment” and heading “Sub-contractors,” the name of an organization and the number of days, the daily rate and the estimated expenses. This indicates that Socodevi understood CIDA’s requirements in regard to the level of effort and the rate for subcontractors. It was not, therefore, the specific wording of these requirements that caused Socodevi to fail to meet them and, as a consequence, forced CIDA to reject its proposal.

In its comments on the GIR, Socodevi, in addition to presenting arguments that sought to demonstrate the alleged lack of clarity of the RFP requirements regarding the listing of personnel on long-term field assignments, the level of effort and the rates, made certain comments on the evaluation of the financial proposals, on which the Tribunal feels compelled to comment briefly. It is true, as Socodevi observed, that the evaluation grid contained in Appendix C of the RFP does not contain criteria for evaluating the financial proposals while there are some for technical proposals. However, the evaluation method for financial proposals is well described in section 3.6.1 of the RFP, an excerpt of which is reproduced in the “Procurement Process” section of these findings. Socodevi based its argument on the first part of the said

11. *Supra* note 5 at 477.

12. *Ibid.*

13. *Ibid.* at 479.

14. *Ibid.*

excerpt, to complain of the rigour demonstrated by CIDA in rejecting its proposal. This excerpt reads as follows: “[o]nly certain costs are considered in the financial evaluation.” The immediately following passage, in the view of the Tribunal, contradicts Socodevi’s position, as it provides that “[a]ll Consultant personnel fees, salaries and wages are considered.” (Emphasis added)

Socodevi maintained that, considered as a whole (technical and financial components), its proposal answers in substance the RFP requirements and that, therefore, CIDA should be more flexible in its approach to the financial evaluation. This, Socodevi maintained, is a case for the openness that the provider of work must display and for sustainable development.

However, could CIDA evaluate Socodevi’s financial proposal if it did not contain some basic information required by the RFP?

The Tribunal is of the opinion that, under the circumstances, CIDA could not evaluate Socodevi’s financial proposal since some of the information required was missing. CIDA could not, for its own convenience or interests, legitimate as they may be, vary the mandatory requirements of the RFP after the bid closing date. Such behavior may appear rigid and, in fact, it is. In the opinion of the Tribunal, however, it constitutes one of the basic requirements for any competitive bidding system.

It was up to CIDA to indicate in its RFP what information was required for the evaluation of the bids. As long as the RFP requirements are not in themselves contrary to the AIT, which is not alleged here, and as long as they are clear, as required by the AIT (and the Tribunal determined that they are), CIDA must demand compliance to these requirements when they are mandatory. In fact, the terms used in the RFP (“require,” “requirement,” “must,” “shall”) indicate the mandatory nature of the conditions very clearly.

The complaint filed by Socodevi stressed that CIDA’s notice for the RFP did not include a statement indicating that the procurement was subject to the provisions of Chapter Five of the AIT. Socodevi did not elaborate on this point in its response to the GIR. This omission by CIDA did not prejudice Socodevi. The Tribunal, nevertheless, notes that CIDA has made a commitment to ensure that, in future, RFPs subject to the AIT will contain the statement required in Article 506(4)(g) of the AIT.

DECISION OF THE TRIBUNAL

In light of the above, the Tribunal determines that the complaint is not valid.