

Ottawa, Thursday, December 3, 1998

File No.: PR-98-025

IN THE MATTER OF a complaint filed by M.D. Heat Techs 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

Susanne Grimes

Susanne Grimes

Acting Secretary

Date of Determination: December 3, 1998

Tribunal Member: Raynald Guay

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Gilles B. Legault

Complainant: M.D. Heat Techs Inc.

Government Institution: Department of Public Works and Government Services

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STATEMENT OF REASONS

INTRODUCTION

On September 28, 1998, M.D. Heat Techs Inc. (M.D. Heat) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement (Solicitation No. W-5834-8-0804/A) by the Department of Public Works and Government Services (the Department) of services for the maintenance, inspection, repair and annual maintenance of the heating systems located in 27 buildings at the Canadian Forces Support Unit Ottawa and its satellite locations for the Department of National Defence (DND).

M.D. Heat alleged that, by declaring its offer non-responsive for failing to meet mandatory condition 1b) of the Request for Proposal (RFP), "Relevant Experience of the Firm," the Department, contrary to the provisions of the *Agreement on Internal Trade*² (the AIT), improperly applied the evaluation criteria of the RFP or applied them in a discriminatory manner.

M.D. Heat requested, as a remedy, that the contract awarded to Prop-Air be rescinded and awarded to M.D. Heat. In the alternative, it requested compensation in the amount of \$125,000 based on M.D. Heat's assumption of the contract total (\$150,000) less its estimated operating expenses.

On September 30, 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, pursuant to section 30.13 of the CITT Act, decided to conduct an inquiry into the complaint. On October 27, 1998, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On November 10, 1998, M.D. Heat filed its comments on the GIR with the Tribunal. On November 19, 1998, the Department informed the Tribunal, in writing, that it was prepared to pay M.D. Heat \$400, the amount that it claimed for costs incurred in relation to securing its incorporation.

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

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 May 1, 1998, the Department posted a Notice of Proposed Procurement for the requirement on Canada's Electronic Tendering Service (MERX), which was detailed in an RFP.

Mandatory condition 1b), "Relevant Experience of the Firm" of the RFP, reads as follows:

The bidder should have relevant experience in undertaking projects of similar size, scope and complexity. The bidder must describe at least three (3) recent past and current projects, providing the following information:

- name and title of the client, and phone/fax number;
- scope;
- duration of the project, with start date/completion date;
- value of the project;
- names, titles and telephone number of the business references (references may be checked).

THIS INFORMATION SHOULD BE INCLUDED WITH YOUR BID SUBMISSION. IF NOT INCLUDED WITH YOUR BID SUBMISSION, IT IS MANDATORY THAT YOU SUBMIT WITHIN TWO (2) WORKING DAYS UPON WRITTEN REQUEST.

Five proposals were submitted, including one by M.D. Heat, which, at the time of the tabulation of prices, was the lowest-priced proposal. According to the Department, on May 21, 1998, it received information concerning a possible conflict of interest regarding M.D. Heat's proposal. The Department informed M.D. Heat of the matter and referred it to the DND designated official. The DND designated official examined the case and, by letter dated July 6, 1998, informed the Department that there existed conflict of interest implications regarding M.D. Heat's proposal, but that this ruling was not final. In order to allow sufficient time for the resolution of the alleged conflict of interest issue and to afford the Department time to determine the eligibility of M.D. Heat's proposal, the Department requested and received confirmation of all bidders' acceptance to extend the 60-day bid validity period in the RFP to September 30, 1998.

On July 20, 1998, upon further investigation and review, the DND designated official informed the Department that it was satisfied that no real or potential conflict of interest situation existed in respect of M.D. Heat. Consequently, M.D. Heat's proposal was considered eligible and the Department resumed the evaluation.

On August 5, 1998, the Department requested M.D. Heat to provide the required documentation in respect of mandatory condition 1b) of the RFP. More precisely, the Department requested M.D. Heat to provide the required details on at least three recent past and current projects.

On August 6, 1998, M.D. Heat responded, in part, as follows:

Although we have done several small furnace installation work and some consulting, we do not have any Contract references of the magnitude required by this document. (Emphasis added)

The response read further, in part, as follows:

We have struggled to gain acceptance for this Contract, and now we are struggling once again because we cannot provide three references of equal magnitude to this Contract. (Emphasis added)

The response also included separate résumés for the two principals of the company. The information described the work experience of M.D. Heat's principals as employees and included the names of their respective employment supervisors.

The Department and DND reviewed M.D. Heat's proposal against the mandatory conditions and evaluated the proposal as non-responsive to mandatory condition 1b) for failing to describe in the proposal, including M.D. Heat's response of August 6, 1998, at least three recent past and current projects.

On August 31, 1998, the Department awarded a contract for this solicitation to Prop-Air, the lowest responsive bidder.

VALIDITY OF THE COMPLAINT

M.D. Heat's Position

M.D. Heat submitted that it put a great deal of thought, effort and toil into winning this contract, only to have it unjustly taken away by the Department. It submitted that, although its principals have been doing the exact work required by the RFP for 25 years while being employees of the Public Service of Canada, the Department now states that they do not have the required experience to carry out the work, even though the government had hired them for the past 25 years. More specifically, M.D. Heat maintained that it has met and surpassed the mandatory requirement set out in the RFP. In response to the GIR, M.D. Heat recognized that it sent, in error, to the Tribunal résumés different from the ones included in its proposal. However, M.D. Heat maintained that the résumés submitted with its proposal were far more complete than the ones submitted to the Tribunal with its complaint. Further, M.D. Heat submitted that it did not seek clarification of mandatory condition 1b) because it felt that it had more than enough experience to handle the contract. In this context, it felt that it was not appropriate to challenge a requirement that, it believed, it met.

Department's Position

The Department submitted that the onus is on the bidder to prepare and submit all information required to properly evaluate its proposal in accordance with the requirements of the RFP. In this regard, the Department submitted that M.D. Heat's response of August 6, 1998, did not contain a description of recent past and current projects of the firm as required by the RFP. In fact, in its response, M.D. Heat admitted that it could not comply with that requirement.

Moreover, the Department submitted that the mandatory requirements were clearly stated in the RFP. In order to properly assess the ability of a firm to successfully carry out and manage the responsibilities of the scope of work detailed in the RFP, the Department submitted that it was necessary to evaluate the past experience of the firm as detailed in mandatory condition 1b) of the RFP.

The Department indicated that at no time prior to the closing date of the solicitation did M.D. Heat seek clarification of the mandatory requirements set out in the RFP or challenge the appropriateness of the

requirement regarding the firm's relevant experience or request that the RFP be amended in order to allow employment experience to be evaluated as an equivalent to firm project experience as required by the RFP.

In the circumstances, the Department submitted that it could not evaluate the individual work experience of the principals of M.D. Heat as being equivalent to the firm experience required in the RFP. Such an approach would have been inconsistent with the mandatory requirements of the RFP and would have been unfair to the other bidders in the process.

The Department further submitted that, in addition to seeking and obtaining the consent of all bidders to extend the bid validity period so that M.D. Heat's proposal might be considered, it provided M.D. Heat every opportunity to comply with this RFP including requesting additional information on August 5, 1998, and considering that information during its evaluation of M.D. Heat's proposal.

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 concluded in accordance with the requirements set out in the AIT.

Article 506(6) of the AIT provides, in part, that 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. Further, Article 501 provides that all Canadian suppliers shall have equal access to procurements.

The Tribunal, therefore, has to determine whether the Department properly applied the evaluation criteria set out in the RFP in declaring M.D. Heat's proposal non-responsive and whether, in so doing, it discriminated against M.D. Heat.

It is clear from the evidence that mandatory condition 1b) of the RFP, which deals with the relevant experience of potential bidders, is a mandatory requirement which requires, among other things, that bidders "describe at least three (3) recent past and current projects." It is also clear that M.D. Heat does not meet this requirement, given its admission in its response of August 6, 1998, that its principals do not "have any Contract references of the magnitude required by the RFP" and that it "cannot provide three references of equal magnitude to this Contract." In these circumstances, the Tribunal is of the view that the Department complied with the provisions of Article 506(6) of the AIT when it declared M.D. Heat's proposal non-responsive for failing to meet mandatory condition 1b) of the RFP.

The Tribunal is of the view that, in situations such as this one, where former public servants might be interested in competing for government work that they previously performed, the Department should consider formulating criteria, especially in respect of a firm's experience, that would permit taking into account proposals such as that of M.D. Heat. This was not done in this instance. M.D. Heat, for reasons set out above, did not seek clarification or amendment of the requirement before the bidding period closed on May 20, 1998, and, consequently, the Department could not change or ignore this condition.

M.D. Heat submitted that mandatory condition 1b) is meaningless, in that a firm with no direct experience in the maintenance of heating systems has obtained the contract for this solicitation, while M.D. Heat's principals, who have performed the very work for 25 years as public servants have been declared incapable of doing it. M.D. Heat suggested that this condition was introduced at the last moment with the knowledge that it was a new company and that it would not be able to provide the information requested.

In this regard, the Tribunal observes that the experience of individuals in performing work as employees is not necessarily equivalent to the experience of a firm performing the same work, whether or not the firm is a legal entity. M.D. Heat's case is a good example of a situation where technically qualified principals only recently formed a company with little business experience of its own. The Tribunal is not persuaded that the Department acted unreasonably in requesting that firms demonstrate a minimum of experience, as a firm, in order to qualify for this requirement, and it is satisfied that the requirement for firm experience was not introduced as a discriminatory measure against M.D. Heat. In fact, the Tribunal has found no evidence that M.D. Heat has been discriminated against by the Department, and M.D. Heat, itself, in its response of August 6, 1998, characterized the Department's behaviour in dealing with mandatory condition 1b) of the RFP as "very professional and understanding."

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 requirements set out in the AIT and that, therefore, the complaint is not valid.

Raynald Guay

Raynald Guay

Member