CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, May 8, 1998

File No.: PR-97-045

IN THE MATTER OF a complaint filed by Flolite Industries 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.

Patricia M. Close
Patricia M. Close
Member

Michel P. Granger
Michel P. Granger
Secretary

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Date of Determination:	May 8, 1998
Tribunal Member:	Patricia M. Close
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Gerry Stobo
Complainant:	Flolite Industries
Government Institution:	Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

INTRODUCTION

On February 10, 1998, Flolite Industries (Flolite) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] (the CITT Act), concerning the procurement (Solicitation No. W8485-7-SC15/A) by the Department of Public Works and Government Services (the Department) of a quantity of videoprobes and adapters for the Department of National Defence (DND).

Flolite alleged that certain mandatory specifications of the product required by the Department were not met by the contract awardee, the Carsen Group Inc. (Carsen), that mandatory directives in the Request for Proposal (RFP) to accept only "proven systems" were not followed by the Department in evaluating Carsen's offer and that the RFP included misleading specifications relating to the length of the videoprobes required. This, Flolite submitted, resulted in the arbitrary award of the contract to Carsen, which proposed a product that does not meet all the mandatory requirements of the RFP.

Flolite requested, as a remedy, that the contract be revoked and that other appropriate remedial actions be taken.

On February 11, 1998, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[2] (the Regulations) had been met regarding the part of the complaint dealing with the misleading specifications only and, pursuant to section 30.13 of the CITT Act, it decided to conduct an inquiry in this regard to determine whether the applicable provisions of the *North American Free Trade Agreement*[3] (NAFTA) and the *Agreement on Internal Trade*[4] (AIT) had been followed by the Department. On March 12, 1998, the Department filed a Government Institution Report (GIR) with the Tribunal in

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. 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).
4. As signed at Ottawa, Ontario, on July 18, 1994.

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accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[5] On March 24, 1998, Flolite filed its comments on the GIR with the Tribunal. On April 1, 1998, the Department made observations on Flolite's comments on the GIR and, on April 6, 1998, Flolite submitted comments in reply.

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 August 18, 1997, the Department received a requisition from DND for the supply of "Everest Imaging XL615SYS" videoprobes to be used for borescoping aircraft engines that have inlets of 6 mm or greater. On September 17, 1997, a Notice of Proposed Procurement and an RFP for the subject goods were posted on the Open Bidding Service and in *Government Business Opportunities* with a bid closing date of October 28, 1997.

The RFP includes, in part, the following:

Item 1. Description

"Everest Imaging" videoprobe model XL615SYS

Items 1 to 3 - "Everest Imaging" reference model numbers specified "OR EQUIVALENT"

The videoprobes will be used for borescoping aircraft engines.

The item descriptions contained in the RFP are defined by trade references against existing models known to meet the user's requirement. Equivalent models will be considered, provided they satisfy the following mandatory requirements:

a) the videoprobe is to be portable

   portability definition - must be carried/operated in one hand by one person, maximum weight 15 kg, ideally one case

b) allows for interchangeable tip adapters to be used for borescoping engine inlets which are 6mm or greater

c) easily operated with no special training requirements

   - the unit is to be a simple on/off switch type system, to be used for viewing purposes only; operation of unit can be achieved through instructions contained in the operator's manual

d) no hard drives required

   - this statement identifies that no data storage requirement exists

If considered necessary as part of the evaluation process, the Crown reserves the right to request a product demonstration of the quoted system.

Under the heading "Evaluation of Proposals/Basis of Selection," the RFP reads, in part:

3. In order for a bid to be considered responsive, the bidder shall:

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

3b) demonstrate that it meets all of the requirements identified in the RFP package as "Mandatory". Proposals not meeting all of the requirements as "Mandatory" will be considered non responsive and no further consideration will be given to the bid.

The RFP further reads, in part, under the heading "Factors for Evaluation":

3. ABILITY TO MEET THE TECHNICAL REQUIREMENT (MANDATORY)

3a) For Items Identified by Trade Reference, Model or Part Number:

Ability to offer the stores specified "or equivalent". Equivalent substitutes for the stores specified herein will be considered provided the trade reference and the words "or equivalent" are crossed out and replaced by the trade reference of the stores offered. Equivalents will be evaluated in terms of form, fit, performance/function and quality. Equivalents must provide service equal to or better than the stores specified. The bidder warrants that all proposed substitutes will be fully interchangeable with the trade reference specified.

Three amendments were issued during the bid solicitation period, but none concerned the length of the probe.

Four proposals were submitted by three suppliers. After the technical evaluation conducted by DND was completed, those from Flolite and Carsen were determined to be fully compliant.

The product offered by Carsen was the lowest-priced compliant product offered. Since it was offered as an equivalent to the equipment trade-referenced in the RFP, a demonstration was conducted, as indicated in the RFP, to determine the product equivalency in terms of fit, form and function. The equipment successfully passed the demonstration test on December 4, 1997, the results of which were reported in a memorandum dated December 12, 1997.

On December 19, 1997, Flolite wrote to the Department, objecting to its decision to consider the product offered by Carsen as an equivalent product. Flolite's objection was based, in part, on the length of the videoprobe offered by Carsen. On January 27, 1998, the Department responded in writing to Flolite's objection, in part, as follows:

Length:

Once again, evaluation was done on the basis of form, fit and function, as it is not practical to expect that every offered item will be identical to the trade referenced item in every respect. In function, the videoprobe will be used for the T-56 Hercules engine, and in most cases only the first 20 inches of the probe are used. The difference in probe length between the trade referenced item and the item eventually purchased is not significant for this function.

VALIDITY OF THE COMPLAINT

Flolite's Position

Flolite submits that it understands the Department's definition of "equivalent" in the GIR to signify "application specific as opposed to specification identical" and abides by it.

Flolite submits that the Department omitted in the GIR any reference to one of the users of this product, Quality Engineering Test Establishment (QETE) and to its particular requirements, which included a minimum length of 1.5 m for the inspections that it does of the new M61 20-mm cannon currently used on

the CF-18 aircraft. Moreover, Flolite submits that, since the videoprobe acquired by the Department from Carsen is 1.3 m long and, according to QETE, not long enough to perform the above-mentioned inspection, one must, therefore, conclude that the Department has accepted a product that is not an "equivalent" product to the trade name specified, at least in respect of this specific application.

Flolite also submits that, when it prepared its offer, it was aware of the QETE's particular need and concluded that any length under 1.5 m could not be considered an "equivalent" product. As well, Flolite submits that QETE must have come to the same conclusion since it allowed its requirements to be included in the general RFP and did not go through a separate RFP. Flolite submits that, since the QETE requirements are included in this RFP, the Department imposed a severe length constraint upon the bidders, which prevented Flolite from quoting a shorter product at a substantially lower price.

In its final comments, Flolite submits that, although the QETE requirements were not expressly mentioned in the RFP, this is due to an error by the Department which, by omission, generated misleading RFP information in respect of DND's full requirements.

Department's Position

The Department submits that this procurement was conducted in accordance with the dispositions of the trade agreements and Departmental policy, specifically Articles 1007(3)[6] of NAFTA and VI(3) of the *Agreement on Government Procurement*[7] (the AGP), which contain the same clause in substantially similar wording; Article 6.090[8] (01/01/96) of the Department's Supply Manual 97-2 SECTION 6B: DEFINING THE REQUIREMENT; the Supply Manual 97-2 Glossary of Procurement Terms which defines "[e]quivalent [i]tem" as "[i]tems are equivalent when, without actually being identical they have sufficient in common as to be capable of being used for the same purpose;[9]" and Articles 1015(4)(a) of NAFTA and XIII(4)(a) of the AGP which provide that: "[t]o be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation."

In this instance, the Department submits that the "essential" requirements for consideration of equivalent products were clearly stated as mandatory requirements of the RFP. In addition, under the heading "Evaluation of Proposals/Basis of Selection" found in Paragraph 3 of Part 2, the RFP clearly sets forth the basis on which equivalency would be evaluated. Therefore, Flolite cannot say that the RFP contained a misleading specification.

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6. "Each party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as 'or equivalent' are included in the tender documentation."
7. As signed in Marrakech on April 15, 1994 (in force for Canada on January 1, 1996).
8. "A bid solicitation should not specify a product with no substitute. The salient physical, functional or other characteristics essential to the client's needs should be stated. Products known to be equivalent to a 'brand name' can also be cited, but caution must be exercised to ensure that there is no conflict between the brand names specified and the description provided."
9. The Procurement Review Board of Canada has previously upheld this definition in *Marathon Management Company*, File No. D92PRF66W-021-0018, June 22, 1992.

The Department adds that there was no mandatory requirement in the RFP establishing a maximum in terms of diameter and a minimum in terms of the length of the probe. Moreover, the Department submits that "equivalent" does not mean "identical." Rather, it submits that, where two devices do the same work in substantially the same way and accomplish substantially the same result, they are equivalent, even though they may differ in name, form or shape.

In its final submissions, the Department states that the QETE issue was not raised in Flolite's complaint. Nevertheless, the Department submits that the RFP specifically states that the required videoprobes would be used for borescoping aircraft engines. The RFP, the Department submits, reflects DND's requirements based on the information that the latter provided to the former and the videoprobes were procured in accordance with these requirements. Therefore, the Department submits that the QETE requirements regarding inspections pertaining to cannons on CF-18 aircraft are not relevant to this complaint.

For the above reasons, the Department submits that the complaint should be dismissed and it requests the costs of defending this complaint.

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 procedure and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements of the applicable trade agreements.

What the Tribunal must determine in this instance is whether, in evaluating Carsen's offer, the Department deviated from the evaluation methodology set out in the RFP. Flolite alleged that such was the case in that the Department accepted as "equivalent" a product which failed to meet the minimum length requirement.

The Tribunal is satisfied that the evaluation methodology set out in the RFP clearly indicated that the Department was prepared to accept an Everest Imaging videoprobe model XL615SYS or equivalent, as demanded by DND. In addition, the RFP clearly indicated that, to be considered an "equivalent" product to the trade model referenced in the RFP, any other product had to provide service equal to or better than the trade name product mentioned in the RFP in terms of form, fit, performance/function and quality. The Department reserved the right to request a product demonstration as part of the evaluation. The RFP also clearly indicated that the key function to be performed in this instance was the borescoping of aircraft engines and listed a number of mandatory requirements to be met in order for the proposed product to be declared compliant.

Flolite alleged that the borescope offered by Carsen is not long enough to perform certain inspection requirements on the new M61 20-mm cannon currently used on the CF-18 aircraft. This may or may not be the case. However, the Tribunal does not have to concern itself with this question since the borescoping of cannons was not a requirement stated in the RFP. The borescoping requirement was for aircraft engines and DND determined, on the basis of a demonstration which it held on December 4, 1997, that the product offered by Carsen was fit for that function. This is not disputed by Flolite.

Flolite alleged that the specification, as stated, imposed a severe length limitation for the borescope on bidders and that, if such had not been the case, it too could have quoted a shorter product at a substantially lower price. In this respect, the Tribunal observes that the only mandatory technical requirements in respect of the borescope were those expressly stated in the RFP along with the equivalency test also stated in the RFP. Flolite, as any other bidder, was only required to meet these requirements, irrespective of whether it was offering the product specifically referenced in the RFP or any other equivalent product. Flolite was not required to submit the trade name product unmodified, or at all. This is a decision that it took and for which it must assume responsibility. In the same manner, the Tribunal is of the view that, by referring to QETE requirements for cannon inspection, Flolite assumed a condition not at all stated in the RFP. It may be that QETE requirements were discussed at one time or another with Flolite before the RFP was issued. However, such discussions were clearly not reflected in the RFP, and Flolite should not have assumed, at the time of bidding, that such requirements were tacitly included in the RFP or were omitted by error.

It is true that, when a specification is written using a "trade name or equivalent" basis, it is more difficult for bidders to predict the outcome. Indeed, bidders offering the trade name reference should consider which of the key features of the trade name product are expressly required by the RFP and whether a different, less expensive model could be proposed that still meets the mandatory technical requirements as stated in the RFP. In this case, the Tribunal is satisfied that the Department has acted in accordance with NAFTA and the AIT.

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 in accordance with the AIT and NAFTA and, therefore, that the complaint is not valid.

Patricia M. Close

Patricia M. Close
Member

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, August 7, 1998

File No.: PR-97-045

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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*.

ADDENDUM

On May 8, 1998, the Canadian International Trade Tribunal (the Tribunal) rendered a decision with respect to a complaint filed by Flolite Industries (Flolite) under section 30.14 of the *Canadian International Trade Tribunal Act*[10] (the CITT Act). Flolite alleged that the Department of Public Works and Government Services (the Department) had accepted a proposal offering a product that did not meet all the mandatory requirements of the Request for Proposal. Following an investigation, the Tribunal concluded that the complaint was not valid.

On May 29, 1998, the Tribunal received a letter from the Department stating that the Tribunal had omitted to address the issue of costs which had been requested by the Department in the course of the investigation. The letter went on to state that, in the circumstances of this case, costs of defending the complaint should have been awarded.

Subsection 30.16(1) of the CITT Act provides that the Tribunal may award "costs of, and incidental to, any proceedings before it in relation to a complaint." When a complainant is successful, the Tribunal usually awards the complainant its reasonable costs, in a manner consistent with the Tribunal's *Procurement Cost Guidelines*.

The Department's sector which deals with procurement is staffed by a contingent of highly skilled officials whose function is to purchase goods and services for the government. It is this sector, aided from time to time by government lawyers, which is responsible, in part, for preparing bid documentation, evaluating bids, awarding contracts and, where necessary, responding to complaints filed with the Tribunal.[11] Responding to a challenge against its procurement activities is a function which is inherent to the Department's role and responsibility.

Sometimes, a complaint received by the Tribunal is so apparently without merit that the Tribunal does not even commence an investigation. At other times, a complaint demonstrates a reasonable indication of a breach at the initiation stage, but, upon further investigation, it becomes clear that it lacks merit. Also, a complaint may be seemingly meritorious, but, for "technical" reasons, the Tribunal cannot conclude that

10. R.S.C. 1985, c. 47 (4th Supp.).
11. From time to time, individual government departments will undertake their own procurement activities without relying on the Department's assistance.

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there has been a breach of any of the relevant agreements, or there is simply insufficient evidence to satisfy the Tribunal that an agreement has been breached.

In the Tribunal's experience, most complaints have a degree of merit and are pursued by the complainants in a forthright and candid manner. Though complainants present their cases in the most favourable light possible, the Tribunal rarely sees them acting in a way which would indicate that the complaints are improper or abusive or that the complainants lack candour.

Complainants may range from very small to very large enterprises. A complainant devotes time, money and resources in preparing a bid. When it feels aggrieved and decides to launch a complaint, it devotes more time, money and resources. It is not unusual for a complainant to retain outside counsel to assist it navigate the world of procurement law and procedures. In addition to the costs and time that it has expended, it may have lost the opportunity to win a government contract.

The Department, as mentioned earlier, is represented by salaried employees whose work responsibilities include all aspects of the bid preparation, bid evaluation, contract award and bid dispute process. The complainant, on the other hand, often not only faces a difficult business decision in deciding whether to complain but must also incur additional costs in pursuing its complaint.

Generally speaking, little purpose would be served by awarding costs to the Department and thereby adding to the burden that a complainant already bears, except in those cases where a complainant's conduct demands it. This may arise, for example, where it becomes clear that a complaint was frivolous or vexatious, where a complainant was not candid and forthright before or during the investigation, or where a complainant acted in a way which amounts to an abuse of process. This is not an exhaustive list of the circumstances in which the Tribunal may award complaint costs to a government department, but it does indicate the type of conduct that would generally warrant the granting of costs.

In the present case, Flolite presented its case in a forthright, professional manner. While Flolite was ultimately unsuccessful, in the Tribunal's opinion, it acted in good faith. The Tribunal sees no reason why, in the circumstances of this case, costs should be awarded to the Department. Consequently, the Department's request for costs is denied.

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