

Ottawa, Monday, July 28, 1997

File No.: PR-97-005

IN THE MATTER OF a complaint filed by Hovey Manufacturing (Canada) Ltd. 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.

Lyle M. Russell

Lyle M. Russell  
Member

Michel P. Granger

Michel P. Granger  
Secretary

Date of Determination: July 28, 1997

Tribunal Member: Lyle M. Russell

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: John Syme

Complainant: Hovey Manufacturing (Canada) Ltd.

Intervener: M & B Mag Ltd.

Government Institution: Department of Public Works and Government Services

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## FINDINGS OF THE TRIBUNAL

### INTRODUCTION

On April 28, 1997, Hovey Manufacturing (Canada) Ltd. (Hovey) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) for the supply of tent components to the Department of National Defence (DND) (Solicitation No. W8486-6-AA01/A).

Hovey alleged that, contrary to the terms of the Request for Proposal (RFP), the contract for item 005 (purlin, tent, tent expandable modular systems [TEMS]) was not awarded to the lowest price bidder, which was Hovey. Hovey also alleged that the Department awarded the contract on the basis of delivery data without asking DND if Hovey's proposed delivery date was acceptable. As well, the Department did not contact Hovey to determine if any improvement in delivery lead time was possible. Finally, Hovey stated that the contract was awarded on the basis of a quoted delivery date, which it believes to be unattainable.

Hovey requested, as a remedy, that the contract, as awarded, be rescinded and that it be awarded the contract. In the alternative, Hovey requested \$112,500 in compensation costs to cover its loss of revenue and the cost of maintaining, amongst other things, special tooling.

### BACKGROUND

On April 29, 1997, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (the Regulations) had been met in respect of the complaint and decided to conduct an inquiry into whether the procurement was conducted in accordance with the requirements set out in Chapter Five of the *Agreement on Internal Trade*<sup>3</sup> (AIT). On May 26, 1997, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> On May 27, 1997, the Tribunal granted M & B Mag Ltd. (M & B) leave to

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. As signed at Ottawa, Ontario, on July 18, 1994.
4. SOR/91-499, August 14, 1991, *Canada Gazette*, Part II, Vol. 125, No. 18 at 2912, as amended.

intervene in this matter. On June 4, 1997, Hovey filed its comments on the GIR with the Tribunal. On June 23, 1997, a Staff Investigation Report (SIR) was filed on the record and sent to parties for comments. Hovey, M & B and the Department filed comments on the SIR on June 24, June 25 and June 27, 1997, respectively.

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 December 6, 1996, the Department received a requisition from DND which contained 8 items of tent components, including item 005 for 10,000 purlins to be delivered by May 1, 1997. The solicitation, with a closing date of February 27, 1997, was posted on the Open Bidding Service on January 31, 1997, and published in the February 5, 1997, edition of *Government Business Opportunities*. The Request for Proposal (RFP) included by reference the Standard Instructions and Conditions contained in DSS-MAS 9403 (10/96). The said instructions and conditions provide, in part, under **A. INSTRUCTIONS 1. Submission of Bids**, (1)(d) that “[i]t is the bidder’s responsibility to: provide a comprehensive and sufficiently detailed bid, including all requested pricing details, that will permit a complete evaluation in accordance with the criteria set out in the bid solicitation.”

The RFP under **Basis of Selection, Price/Evaluation**, states, in part, that:

To be considered responsive, a bid must meet all the mandatory requirements of this solicitation. Bids not meeting all the mandatory requirements will be given no further consideration. The lowest priced responsive bid(s) will be recommended for award of contract(s).

Under **Evaluation**, the RFP reads, in part, as follows:

The following factors will be taken into consideration in the evaluation of your proposal:

Price(s) FOB Destination(s) & FOB Plant	Mandatory
Delivery Requirement	Desirable

Finally, the RFP reads under **Delivery Requested**: “May 1, 1997.”

Eight proposals were received, four of which contained offers for item 005, including two offers from Hovey. The first offer from Hovey was for a delivery date of the first shipment of goods within 140 days of the date of the contract, the balance being delivered over the following 13 weeks. A second higher offer from Hovey, called option “A,” was based on a delivery date of the first shipment within 90 days of the date of the contract.

Hovey’s proposal, including option “A,” also contained a one-page addendum. The addendum, dated February 26, 1997, and signed by Hovey’s President, reads as follows:

Re: RFPW8486-6-AA01/A

Items No. 5 and 7

Without prejudicing the above bid, we respectfully submit the following.

A) Lead time for contract award on the above two items is critical for all parties as aluminum prices quoted from all mills are conditional, i.e. "prices quoted are subject to price adjustment at time of delivery".

B) We have quoted two prices based on two different lead times. Although both lead times do not meet the requested delivery of May 1, 1997, the two options are submitted based on current market conditions.

On March 6, 1997, the contracting officer conferred with DND and confirmed that a May 1, 1997, delivery date was required. On March 7, 1997, the Department sent a notice to bidders, including Hovey and M & B, indicating that the required quantities for item 005 had changed from 10,000 to 14,000 and invited the companies to re-quote the price, FOB destination. No mention was made in these notices of the required delivery date. Hovey responded on March 10, 1997, stating, among other things, that aluminum prices had increased since the original bid closing and that they would maintain their original pricing. M & B submitted a slightly reduced unit price for the larger quantity. The change in M & B's price placed its offer between Hovey's two offers. A contract for item 005 valued at \$385,307 was awarded by the Department to M & B on March 13, 1997.

On March 25, 1997, Hovey was informed that a contract for item 005 had been awarded to M & B for the price stated above. The same day, Hovey sent a facsimile to the Department stating that its bid was \$10,000 lower than that of M & B and requesting to be informed of the delivery lead time of the winning bid. The same day, the Department answered Hovey's query by facsimile stating that "the competing firm offered a lead time of 4 weeks."

Hovey met with representatives from the Department on April 7, 1997. During that discussion, the Department informed Hovey that its delivery date of 140 days after receipt of order was unacceptable to DND. On April 17, 1997, Hovey met again with representatives from the Department. During that discussion, Hovey was questioned about its proposal. Hovey explained that, the addendum in its bid referred to a quote from its suppliers regarding price adjustment (i.e. Hovey's price was not subject to adjustment). Hovey also explained that it submitted two bids because a premium would have to be paid to obtain the required amounts of aluminum in order to meet a 90-day delivery schedule.

On April 21, 1997, Hovey sent a letter of complaint to the Tribunal.

## **VALIDITY OF THE COMPLAINT**

### **Hovey's Position**

In its submission, Hovey disagrees strongly with the Department's assertion that its response was non-responsive because its price quotation was conditional. It submits that its letter on market conditions very clearly refers to "lead time for contract award" being of concern due to conditional prices from the mills. Hovey submits that it was expressing concern that, if the Department did not speedily award a contract, the successful bidder would be faced with price increases from suppliers. After stating that it "made no suggestion that [its] price was conditional," Hovey adds that it is obvious that, if it had quoted a conditional price, the lead time for contract award would be irrelevant.

## **The Department's Position**

In its submission, the Department states that neither of the bids submitted by Hovey were considered responsive because the prices that it quoted were conditional, that is, subject to price adjustment at the time of delivery. The Department states that the RFP did not contain provisions permitting the inclusion of economic price adjustment in bids nor is it the Department's practice to do so for contracts of this type.

Concerning the fact that neither Hovey nor DND was consulted before the Department awarded the contract, the Department submits that it is inappropriate to enter into discussion with bidders where proper conditions do not exist. For example, given the fact that the complainant's offers were never considered responsive due to the conditional nature of the prices proposed, it could never have been considered the lowest bidder, a necessary condition in this instance, before negotiating an improved delivery time.

Concerning the allegation that the delivery schedule in the RFP was impossible to meet in the circumstances, the Department submits that delivery was requested by May 1, 1997, approximately 49 days after bid closing. The range of delivery lead times offered for item 005 went from at least 28 days to at least 140 days after receipt of contract. When contacted by the Department, DND officials indicated that a delivery lead time of at least 140 days was unacceptable. The Department also suggested that, even if Hovey's bids had been responsive, it would not have been awarded a contract because of the minimum 140-day delivery time. The Department notes finally that Hovey's bid for a 90-day delivery lead time made it third lowest in price and, for this reason, there is no prejudice to Hovey.

Moreover, the Department states that M & B commenced delivery on April 24, 1997, and is expected to complete delivery by July 3, 1997, as per the terms of the contract. It submits that the suggestion by Hovey that a low bid is being bypassed due to a promise of an improved delivery is unfounded. The low bid submitted by Hovey was declared non-responsive and a contract was awarded to the lowest responsive bidder. There were no premiums paid by the Department.

## **M & B's Position**

In its submission, M & B states that, though listed in the RFP as a desirable rather than a mandatory factor, delivery was nevertheless "a very urgent need." In addition, it submits that, by offering an option "A" in its proposal, Hovey clearly indicated that to improve its 140-day delivery time would cost more money. Accordingly, the proper comparison between Hovey and M & B should be on the basis of Hovey's option "A" proposal. On this basis, Hovey's bid for each purlin is \$1.60 above the M & B price. Finally, M & B submits that the aluminum tube and plugs required for the purlins were available from at least six sources, all eager for an order over 100,000 lb. and able to commence shipment two to three weeks after order. On this basis, its offer to commence shipment four weeks after order was entirely realistic.

## **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 *Agreement on Internal Trade*<sup>5</sup> (the AIT).

Article 506(6) of the AIT provides that, in evaluating tenders, a party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. It also provides 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.

Price is clearly a mandatory requirement of the RFP and, in the circumstances, failure to quote a firm price would be sufficient to make an offer non-responsive. After careful examination of the evidence, the Tribunal is of the opinion that Hovey's offer is not a conditional offer. The addendum to Hovey's proposal indicates that it is made without prejudice to Hovey's bid and, in the opinion of the Tribunal, it should be interpreted as an explanation of Hovey's particular pricing arrangements with its suppliers. The Tribunal also notes that this issue went unnoticed at the time of the evaluation of Hovey's offer and that it was raised by the Department only after bid evaluation had been completed and Hovey's objection had been received by the Department.

A review of the record also shows that the Department's decision to accept M & B's offer over that of Hovey involved principally price and delivery considerations. This is precisely what Hovey finds objectionable. According to Hovey, it submitted the lowest priced proposal, but the Department based its award decision substantially on delivery, a "desirable" factor in the circumstances. Moreover, the Department reached its decision without giving Hovey an opportunity to improve its delivery schedule.

The Tribunal notes that the RFP is clear in stating that a number of mandatory and desirable evaluation factors will be taken into consideration in the evaluation of proposals. Though only failure to meet a mandatory factor would make an offer non-responsive, it cannot be concluded that desirable factors such as delivery would be given no weight whatsoever in the evaluation of proposals. Indeed, the RFP specified a delivery date of May 1, 1997, and this clearly was an element that bidders had to consider when formulating their proposals. Moreover, the Tribunal observes that delivery lead time was a factor that significantly influenced the prices proposed by Hovey. In the opinion of the Tribunal, having clearly stated in the RFP that delivery was an evaluation factor, the Department had to consider delivery in reaching its award decision. Accordingly, the Tribunal determines that the Department acted properly when it considered delivery in evaluating proposals. The Tribunal notes that the Department was under no obligation to give Hovey an opportunity to improve its delivery lead time. Indeed, the Department could not have done so without providing Hovey with an advantage over the other bidders, thereby putting at risk the integrity and impartiality of the competitive bidding process.

For the above reasons, the Tribunal determines that Hovey's complaint is not valid.

Finally, the Tribunal notes that the RFP, as structured, is not without difficulty. Indeed, though it clearly indicates, among other things, that delivery will be considered in evaluating proposals, it does not specify the method by which this criterion will be weighted or what influence it will play in the overall evaluation of proposals. The Tribunal is satisfied that the Department acted reasonably in this respect.

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5. As signed at Ottawa, Ontario, on July 18, 1994.

Nevertheless, failing to specify the method by which delivery would be factored into the evaluation of proposals is a serious shortcoming of the RFP. This deficiency, however, was clearly visible on the face of the RFP, but was not brought to the attention of the Department and/or the Tribunal within the prescribed time frames to make an objection and/or file a complaint.

#### **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, therefore, that the complaint is not valid.

Lyle M. Russell

Lyle M. Russell

Member