

Ottawa, Thursday, June 18, 1998

File No.: PR-97-051

IN THE MATTER OF a complaint filed by Safety Projects International 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: June 18, 1998

Tribunal Member: Raynald Guay

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Heather A. Grant

Complainant: Safety Projects International Inc.

Government Institution: Department of Fisheries and Oceans

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FINDINGS OF THE TRIBUNAL

INTRODUCTION

On March 20, 1998, Safety Projects International Inc. (Safety) 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 by the Department of Fisheries and Oceans (the Department) of a safety program management system (Solicitation No. FP802-7-0456).

Safety alleged that the tender documents, particularly the statement of requirements, were written with a specific supplier, Det Norske Veritas (DNV), the eventual contract awardee, in mind. Safety also alleged that, though it requested and was promised, by the Department, a full explanation as to why its offer was not declared the winning offer, the Department has failed, to this point in time, to provide it with any explanation.

Safety requested, as a remedy, that the Tribunal initiate an inquiry into the matter and that it be reimbursed its expenses and profit loss.

On March 23, 1998, 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 in respect of Safety's second ground of complaint, specifically, that the complaint disclosed a reasonable indication that the procurement had not been carried out in accordance with Article 1015(6)(b) of the *North American Free Trade Agreement*³ (NAFTA). This provision requires that an entity, in this case, the Department, "on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier." Accordingly, the Tribunal initiated an inquiry, on March 23, 1998, into this particular complaint.

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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. 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).

Concerning Safety's first ground of complaint, the Tribunal determined that the complaint, as filed, did not disclose a reasonable indication that the evaluation of the bids was conducted in a manner not in accordance with NAFTA, the *Agreement on Internal Trade*⁴ or the World Trade Organization *Agreement on Government Procurement*.⁵ Accordingly, an inquiry was not initiated into this specific allegation.

Subsequent to receipt and review of the complaint, the Department filed with the Tribunal on May 1, 1998, a *Government Institution Report* (GIR). Safety then filed comments on the GIR on May 21, 1998, in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁶

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

A Request for Proposal for the subject solicitation dated October 28, 1997, was issued by the Department. The period for submitting proposals was initially to end on December 11, 1997, but the closing date was extended to December 17, 1998. Five proposals, including one from Safety, were received by the Department on December 17, 1997. The Department informed DNV by letter dated February 16, 1998, that its offer had been accepted. On February 18, 1998, a contract award notice in respect of this solicitation was posted on the government electronic notification system (MERX). On or about February 19, 1998, Safety called the Department to inquire about the results of the solicitation. On February 23, 1998, a Department representative returned Safety's call and informed Safety that a contract had been awarded to DNV. In addition, according to the Department, Safety was offered a debriefing, to take place some time after February 27, 1998, once the departmental official responsible for the procurement had returned from leave on or around March 30, 1998. In a letter dated March 4, 1998, the Department informed Safety that DNV was the contract awardee in this solicitation. By letter dated March 5, 1998, Safety wrote to the Minister of Fisheries and Oceans, complaining that it had not received "even the most basic courtesy of an explanation" from the Department. In a letter dated April 7, 1998, the Minister of Fisheries and Oceans responded to Safety proposing, amongst other things, that a formal debriefing be conducted in mid-April to go over the details of the evaluation process and subsequent award decision. Safety did not follow up on this offer, as it had already filed its complaint with the Tribunal.

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 NAFTA.

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

5. Signed at Marrakesh on April 15, 1994.

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

As indicated earlier, Article 1015(6)(b) of NAFTA requires that entities shall, “on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier.”

Having reviewed the submissions and evidence filed by the parties in this case, the Tribunal is of the view that a formal debriefing by the Department of Safety’s tender, as well as the provision of pertinent information regarding the winning tender, would likely have been sufficient to satisfy the requirements of Article 1015(6)(b) of NAFTA. In this case, no such debriefing took place. In the Tribunal’s view, this occurred largely as a result of an inadvertent breakdown in communication between the Department and Safety subsequent to the award of the contract to DNV, primarily resulting from the week-long absence from the Department of the official responsible for the procurement, combined with Safety’s hasty recourse to the Minister of Fisheries and Oceans.

In the Tribunal’s opinion, a debriefing by the Department would likely have been arranged and carried out within a reasonable period of time, had Safety contacted the official responsible for the procurement upon his return. In support of this view, the Tribunal relies on the fact that debriefings were carried out in respect of two other unsuccessful bidders in early April.

Having said this, the Tribunal notes that, as a result of this inquiry, the Department provided the complainant with significant information in the GIR regarding the procurement process, including the evaluation of the tenders. As a consequence, Safety filed another complaint with the Tribunal regarding the evaluation of the tenders, which has been accepted by the Tribunal for inquiry.

In light of the foregoing, the Tribunal determines, in relation to Article 1015(6)(b) of NAFTA, that the procurement was conducted in accordance with that provision and, therefore, that the complaint is not valid.

Raynald Guay

Raynald Guay

Member