

Ottawa, Monday, January 11, 1999

File No.: PR-98-028

IN THE MATTER OF a complaint filed by Spacesaver Corporation 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 valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that Spacesaver Corporation be compensated for the opportunity that it lost and the ability to profit therefrom.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Spacesaver Corporation its reasonable costs incurred in relation to filing and proceeding with the complaint.

Peter F. Thalheimer

Peter F. Thalheimer
Member

Michel P. Granger

Michel P. Granger
Secretary

Date of Determination: January 11, 1999

Tribunal Member: Peter F. Thalheimer

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Shelley Rowe

Complainant: Spacesaver Corporation

Government Institution: Department of Public Works and Government Services

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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*.

STATEMENT OF REASONS

On October 27, 1998, Spacesaver Corporation (Spacesaver) 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. T6004-8-0025/A) by the Department of Public Works and Government Services (the Department) for a mobile shelving system for the records office of the Department of Transport (Transport Canada).

Spacesaver alleged that, although it submitted the low bid in this instance, as evidenced by information produced during the public opening of bids, the Department, by interpreting the specifications in a restrictive manner, declared its proposal technically non-compliant. Further, Spacesaver alleged that there is a potential for conflict of interest with regard to the consultant hired by Transport Canada to write the specifications.

Spacesaver requested, as a remedy, that the contract awarded be canceled and be awarded to Spacesaver.

On October 30, 1998, the Tribunal informed the parties 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 the complaint and that, pursuant to section 30.13 of the CITT Act, it had decided to conduct an inquiry into the complaint. On November 12, 1998, the Tribunal informed Foothills Filing Storage Innovations that it had been granted leave to intervene in the matter. On November 27, 1998, the Department filed a submission with the Tribunal in lieu of the Government Institution Report required under rule 103 of the *Canadian International Trade Tribunal Rules*.³

The Department submitted that a consultant was retained by Transport Canada to assist with the preparation of technical specifications for the customized mobile shelving system to be procured in this solicitation. The consultant's mandate was to prepare a generic specification in order to ensure that the procurement process would be as open and competitive as possible. This, the Department submitted, was achieved. However, the Department submitted that it is concerned about the consultant's past relationship with the successful bidder and its implication for the procurement process, particularly, the appearance of independence of those involved in the government's conduct of the procurement process and the appearance of fairness in the process.

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

Accordingly, taking into consideration the fact that a contract had been awarded and that the product was ready for delivery, the Department indicated that it was prepared to offer compensation to Spacesaver. The Department submitted that the compensation should be on the basis of Spacesaver's lost opportunity for the contract by virtue of the fact that Spacesaver submitted the lowest-priced bid and would have been the successful bidder had its proposal been evaluated as being compliant with the specifications.

On December 9, 1998, the Tribunal requested Spacesaver's comments on the Department's submission of November 27, 1998. Spacesaver did not object to the Department's proposed resolution of its complaint.

In light of the Department's submissions, the Tribunal concluded that there was sufficient information on the record to determine the validity of the complaint and disposed of the complaint on the basis of the information on the record without a hearing.

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 *North American Free Trade Agreement*⁴ (NAFTA).

Article 1008(1)(a) of NAFTA provides that each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner. In the Tribunal's view, the Department failed to apply its tendering procedures in a non-discriminatory manner by using, in the preparation of the technical specifications, a consultant who, at the time, had a relationship with the successful bidder.

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 not conducted according to the requirements set out in Article 1008(1)(a) of NAFTA and that, therefore, the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that Spacesaver be compensated for the opportunity that it lost and the ability to profit therefrom.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards Spacesaver its reasonable costs incurred in relation to filing and proceeding with the complaint.

Peter F. Thalheimer

Peter F. Thalheimer

Member

4. 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).