

Ottawa, Friday, February 12, 1999

File No.: PR-98-029

IN THE MATTER OF a complaint filed by Doran Canadian Expo Consortium 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

Date of Determination: February 12, 1999

Tribunal Member: Patricia M. Close

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Hugh J. Cheetham
Philippe Cellard

Complainant: Doran Canadian Expo Consortium

Government Institution: Department of Public Works and Government Services

Ottawa, Friday, February 12, 1999

File No.: PR-98-029

IN THE MATTER OF a complaint filed by Doran Canadian Expo Consortium 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*.

STATEMENT OF REASONS

INTRODUCTION

On November 19, 1998, Doran Canadian Expo Consortium (Doran) 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 a procurement (Solicitation No. C3141-8-0202/A) by the Department of Public Works and Government Services (the Department) for the Department of Canadian Heritage (Canadian Heritage). The solicitation is for the design and construction of Canada's pavilion at Expo 2000 which will be held in Hannover, Federal Republic of Germany.

Doran alleged that the Department changed and/or unevenly applied the evaluation criteria set out in the Request for Statement of Qualifications (RFSOQ) at the time of the evaluation of the statements of qualifications (SOQs), thereby breaching its own evaluation rule and causing a prejudice to Doran. Specifically, Doran questioned the application of the rules regarding the composition of the bidding entities, in particular, the award of points to subcontractors. Doran also questioned the qualifications of the judging committee, the format of the RFSOQ and the honorarium to be paid to the top-ranked proponents.²

Doran requested, as a remedy, that the current process be stopped and re-opened on a "level playing field."

On November 24, 1998, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*³ (the Regulations). On December 30, 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 January 15, 1999, Doran filed its comments on the GIR with the Tribunal.

-
1. R.S.C. 1985, c. 47 (4th Supp.).
 2. The entities that submit SOQs, RFSOQ at 21.
 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

In August 1998, the Department received a requisition from Canadian Heritage for the design and construction of a pavilion within an existing building at the Hannover Fairgrounds and to develop audio-visual, multimedia and film presentations for Expo 2000 and to dismantle all elements of the pavilion and to return the hall to its original condition once the exposition is finished. The requirement is covered by the *Agreement on Government Procurement*⁵ (the AGP), the *North American Free Trade Agreement*⁶ (NAFTA) and the *Agreement on Internal Trade*⁷ (the AIT).

The procurement process used for this requirement consisted of two stages: (1) the SOQ; and (2) the selection of a design-builder.⁸ In the first stage, the subject of this complaint, proponents were to submit their SOQs identifying, *inter alia*, the proposed builder, design team and audio-visual/multimedia and film production (AV/MM and FP) team. The SOQs were to be evaluated in order to identify the four highest-ranked proponents. These four proponents would receive a \$15,000 honorarium. In the second stage, the four short-listed proponents were to be requested, and any qualified but non-short-listed proponents were to be entitled, to submit comprehensive design proposals.

On August 21, 1998, the Department posted a Notice of Proposed Procurement for the requirement detailed in the RFSOQ on Canada's Electronic Tendering Service (MERX) and in *Government Business Opportunities* (GBO).

The objective of the first stage of the procurement process is set out in the RFSOQ as follows:

1.2.1 STAGE I

- (1) This Request for Statement of Qualifications (SOQ) initiates Stage I of the selection procedure. The objective is to identify, evaluate and rate the accomplishments and capabilities of the Proponent as well as the qualifications, experience and creative talent of key individuals within their proposed Design Team and Audio-Visual/Multimedia and Film Production Team.
- (2) As described in Section 1.3 of Annex 'B', Proponents will be asked to provide the following:
 - (a) Evidence of their capability to deliver the scope of work outlined in this document within the determined time frame;
 - (b) A description of the experience and creative talent of key members of their Design Team and Audio-Visual/Multimedia and Film Production Team;

...

5. As signed in Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).

6. 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).

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

8. The design-builder is defined as the successful proponent, RFSOQ at 20.

- (5) In Stage I the Proponent's Design Team, the Builder, and the Audio-Visual/Multimedia and Film Production Team will be evaluated.

Section 1.3, "**HONORARIUM**," provides that:

- (1) [The Department] will enter into a contract with each eligible Proponent, which will provide for payment of an honorarium of \$15,000, inclusive of all taxes, to offset a portion of the cost of the preparation of the design proposal. In order to be eligible for such an honorarium the Proponent's proposal must be acceptable and fully compliant with the terms and conditions of the contract and must have met all the criteria for the Evaluation Process set out in the contract. Payment will be made after the execution of the contract with the successful Proponent.

Part 1 of Annex "B" to the RFSOQ reads, in part, as follows:

PART 1: EVALUATION CRITERIA

1.1 INTRODUCTION

- (1) Section 1.2: "Rated Requirements" describes the requirements that will be used to evaluate and rate the capability of the Design-Builder to deliver the required scope of work within the determined time frame as well as the experience and creative talent of the Design Team and the Audio-Visual/Multimedia and Production Team.
- (2) The weighted ratings will be as follows:

Relevant Experience and Expertise:

Builder ^[9]	15[%]
Design Team ^[10]	15[%]
Audio-Visual/Multimedia and Film Production Team ^[11]	15[%]

Description of Comparable Projects:

Builder	10[%]
Design Team	10[%]
Audio-Visual/Multimedia and Film Production Team	20[%]

On September 21, 1998, the Department published Amendment No. 001 to the RFSOQ. The amendment deleted original section 1.4 of the RFSOQ and replaced it, in part, with the following:

1.4 LIMITATION OF SUBMISSIONS

- (1) Only one submission per firm will be accepted, whether it is submitted by the firm as an individual Proponent or as part of a joint venture Proponent. If more than one submission is received from a firm acting either individually or in joint venture, all such submissions shall be rejected and no further consideration shall be given to the firm or to any joint venture Proponent of which the firm forms part.
- (2) An Architect shall associate itself with, and be nominated by, only one Proponent in its Statement of Qualifications. If an Architect is named by more than one Proponent, each such Proponent shall be disqualified from further participation in the procurement process.

9. The construction component of the design-builder, including all sub-contractors making up the construction team, RFSOQ at 20.

10. The architect, exhibit designer and proposed major consultants, RFSOQ at 20.

11. The executive producer, director/director of photography, producer, researcher/writer, multimedia specialist, music composers, on-location production crew and post-production technical personnel, RFSOQ at 20.

- (3) A Consultant (sub-consultant or specialist consultant) may be proposed as part of a Design-Build Team by more than one Proponent.

On September 24, 1998, the Department published Amendment No. 002 to the RFSOQ to revise the closing date for the submission of SOQs and to provide clarification. Specifically, item number 3 of Amendment No. 002 addressed, in part, Questions 23 and 24 and the answers provided by the Department:

Question 23:

Consultants (sub consultant or specialist consultant) Page 9 1.4(5) of RSQ may be proposed as part of a Design-build Team by more [than] one proponent. Are key members of the AV/MM and FP team such as director, multimedia specialist, etc. considered to be consultants, sub-consultants or specialist consultants?

Answer to Question 23:

Yes, the key members of the AV/MM and FP team such as director, multimedia specialist, etc. can be considered to be consultants, sub-consultants or specialist consultants.

Question 24:

Is the work of a member of the AV/MM and FT team considered to be a sample of the creative ability of the Team even though the member is a sub-contractor (consultant)?

Answer to Question 24:

The work of an individual member of a team may be submitted as an example of that member's ability to fulfil his/her role within the team. However, in matters where a firm's experience is in question, the term "Firm" refers to the company submitting the proposal and a subcontractors' [sic] experience will not be considered in determining the firm's experience. The company submitting the proposal may, however, consist of several firms putting one proposal together as a contractual joint venture. A joint venture is an association of two or more parties who combine their money, property, knowledge, skills, time or other resources in a joint business enterprise agreeing to share the profits and the losses and each having some degree of control over the enterprise. In the case of a contractual joint venture, the experience of each of the firms included in the contractual joint venture would be considered.

The RFSOQ included, under Annex "B" to the RFSOQ, limitations to the length of the submissions to be made by proponents.¹²

The final date for the submission of responses to the RFSOQ was October 2, 1998. Ten submissions were received, including one from Doran.

The evaluation board, comprised of two officials from the Department and three officials from Canadian Heritage, including the chairperson, met on October 13, 1998, and undertook the evaluation of the SOQs.

On October 19, 1998, the Department informed all proponents of the results of the evaluation of the SOQs. The firms which submitted qualifying proposals that were not ranked in the top four, including Doran, were advised of their right to submit a proposal in the second stage of the selection process.

12. See paragraphs 1.2.1.1(2), 1.2.1.2(7) and 1.2.1.3(5) of Part 1 of Annex "B" and paragraph 2.2(2) of Part 2 of Annex "B."

VALIDITY OF THE COMPLAINT

Department's Position

Concerning Doran's allegation that the criteria applied to evaluate the experience and expertise of the proponents' design and AV/MM and FP teams were either changed during the evaluation of the SOQs or applied differently among the submissions, the Department submitted that the experience of all members of Doran's design and AV/MM and FP teams, identified as key members of its joint venture, was evaluated, whether those key members were members of its joint venture or sub-consultants or sub-contractors. The Department further submitted that there is no basis to support Doran's interpretation that the experience and talent of sub-consultants proposed as key members of teams would not be evaluated. The Department submitted that its responses to Questions 23 and 24 clearly indicated that the experience and expertise of sub-consultants or sub-contractors submitted as "key members" of teams would be evaluated in the context of the evaluation of the AV/MM and FP teams.

Concerning Doran's allegation that the companies, forming part of the Doran joint venture, were prevented from participating in another proponent's team as sub-contractors, the Department submitted that there is no such limitation in the RFSOQ and, therefore, no merit to these grounds for complaint. In any event, Doran did not raise this issue until after the final date for the submission of SOQs on October 2, 1998, and, therefore, the complaint in this regard is untimely.

Concerning Doran's allegation that one film production company has succeeded in taking two of the four pre-qualified positions in the first stage of the evaluation, the Department submitted that two different companies were involved. The Department added that individuals with these companies were proposed as key members of teams by different proponents, but these companies were not proponents themselves. As such, contrary to Doran's allegation, these firms were not eligible to receive the honoraria reserved for successful proponents. Further, the Department submitted that there is no merit to Doran's allegation that "the very companies with the greatest experience interpreting Canada and Canadians to EXPO audiences" were eliminated since all 10 proponents were given the opportunity to submit design proposals.

Concerning the qualifications of the evaluation board members, the Department submitted that this allegation is late, unspecific and without foundation, and constitutes an attempt by Doran to have the Tribunal substitute its own judgment for that of the evaluation board.

Concerning the format restrictions in the RFSOQ, the Department submitted that these limitations were clearly stated in the RFSOQ and that such limitations are a common practice generally supported by the industry. In addition, all proponents complied with the limitations, which were applied fairly and consistently to all proponents by the Department. In any event, under the Tribunal's rules and regulations, it is too late to complain on these grounds.

Concerning Doran's allegation that the payment of an honorarium to the four top-ranked proponents was inequitable, the Department submitted that these grounds for complaint were untimely. In any event, such payment is a common industry practice in design-build procurement.

Doran's Position

In its comments, Doran emphasized that the core of its complaint is that the Department failed to establish a level playing field for this solicitation and the evaluation of responses. Concerning the evaluation

of the experience of the sub-consultants, Doran submitted that, contrary to the Department's interpretation, the Department's answer to Question 23 did not make clear that the experience and expertise of sub-contractors would be evaluated in the context of the evaluation of the AV/MM and FP team, but indicated that sub-contracted entities could be considered as sub-consultants and, therefore, be proposed by more than one proponent. With regard to Question 24 and the answer thereto, Doran submitted that its interpretation of the matter is that "subcontracted persons or consultant entities would 'not be considered in determining the firm's experience' though the work of such subcontracted persons or entities could be submitted to show their ability to fulfil his/her role within the team." Doran further submitted that the idea now proposed by the Department in the GIR, that this does not preclude evaluation of the past experience of a sub-contractor who is identified in a proponent's submission as a "key member" of one of the proponent's teams, is mentioned nowhere in the original RFSOQ. According to Doran, it was clear from the RFSOQ and the written and oral clarifications that the Department provided that, although proponents could subcontract specialists such as detail draftspersons, hardware suppliers, local labourers etc., the three major areas of design, build and AV/MM and FP needed to be represented by a responsible proponent, whether individually or as part of a joint venture, and that this proponent could participate in only one submission.

Doran submitted that it never contended that the Department evaluated its SOQ differently from those of other proponents. Rather, it alleged that all submissions were evaluated without reference to the rules in the RFSOQ as clarified by the Department.

Doran submitted that, contrary to the Department's assertion, it found nothing objectionable with the Department's practice, in this instance, to offer an honorarium to the four top-ranked proponents. What it finds objectionable is the Department's proposition that proponents other than the top-ranked proponents can realistically make the business decision to bid on this requirement.

Concerning the qualifications of the members of the evaluation board, Doran submitted that the identities and qualifications of the members of the evaluation board were a closely guarded secret which only surfaced in the GIR. Therefore, it was impossible for Doran to doubt or oppose the situation before the closing date to submit responses to the RFSOQ. Doran also submitted that the information now made available to proponents shows that only two of the four voting members of the evaluation board have enjoyed "so much as a nodding acquaintance with the International Expo venue."

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, the AIT and the AGP. Doran indicated that its complaint was made in regard to NAFTA.

The central issue of this case is whether the Department properly rated and, by way of consequence, ranked the SOQs, specifically with regard to the experience of sub-consultants (sub-contractors).

Doran complained specifically that certain proponents were awarded full points for design and AV/MM and FP teams, even if those teams were comprised of sub-contractors. The Department did not contest that fact. It indicated that rating points for experience were awarded to sub-consultants or

sub-contractors in evaluating the proponents' teams. This, the Department submitted, was done for all proponents, including Doran, in conformity with the very terms of the RFSOQ and as was clarified through the question and answer process.

The Tribunal agrees with the Department's position that the terms of the RFSOQ permitted the award of points for the design and AV/MM and FP teams, even if they comprised sub-contractors. It is to be noted that the rated requirements dealing with the design and AV/MM and FP teams, contrary to those dealing with the builder, did not contemplate the evaluation of a firm's experience, but rather the assessment of the experience of key members of the different teams.¹³ The answer to Question 24, when it addressed matters concerning a firm's experience, did not, therefore, impact the way in which the assessment of the experience of the design and AV/MM and FP teams was to be made. Consequently, in order to get full points, there was no need for the key members of the design and AV/MM and FP teams to be part of a firm, i.e. the proponent or a member of a joint venture proponent. The answer to Question 23 pointed that out by indicating that key members of the AV/MM and FP team can be considered to be consultants, sub-consultants or specialist consultants.

Concerning the honorarium, the Tribunal notes that Doran finds nothing objectionable with the practice. The question as to whether a proponent, unsuccessful in qualifying for such an honorarium, can still make the realistic business decision to bid on the requirement is not one for the Tribunal to decide.

Concerning the qualifications of the members of the evaluation board, the Tribunal is of the view that there is no evidence on the record on which to base Doran's allegation that the members were not qualified to conduct the evaluation.

Concerning the alleged unfairness of the length restrictions in the RFSOQ in formulating a response, the Tribunal notes that these limitations were clearly stated in the RFSOQ and, therefore, were known or should reasonably have been known by Doran on or about August 21, 1998, the date on which the RFSOQ was posted on MERX and published in the GBO. If Doran found these limitations objectionable, it should have raised the matter with the Department and/or the Tribunal within the time frames prescribed in section 6 of the Regulations. This was not done, and it is now too late for Doran to raise the matter with the Tribunal.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the evaluation of the SOQs was conducted in accordance with the requirements set out in the RFSOQ and the relevant provisions of NAFTA and that, therefore, the complaint is not valid.

Patricia M. Close
Patricia M. Close
Member

13. RFSOQ at 44-54.