

Ottawa, Wednesday, March 11, 1998

File No.: PR-97-034

IN THE MATTER OF a complaint filed by Wang Canada Limited 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, subject to the provisions of Article 1015(4)(c) of the *North American Free Trade Agreement*, the Department of Public Works and Government Services award the contract to Wang Canada Limited.

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

Pierre Gosselin

Pierre Gosselin
Member

Michel P. Granger

Michel P. Granger
Secretary

Date of Determination: March 11, 1998

Tribunal Member: Pierre Gosselin

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Shelley Rowe

Complainant: Wang Canada Limited

Counsel for the Complainant: Nancy K. Brooks

Intervener: SHL Systemhouse

Counsel for the Intervener: David M. Attwater

Government Institution: Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

INTRODUCTION

On December 16, 1997, Wang Canada Limited (Wang) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) of computer maintenance services on a national basis for the Department of National Revenue (Revenue Canada) (Solicitation No.: 46577-6-9971/A).

Wang alleged that, in ruling its bid non-compliant with respect to the extent of the “Component Per Incident” service option offered, the Department has failed to evaluate its bid in accordance with the evaluation criteria set out in the Request for Proposal (RFP). Wang submitted that this ruling constituted a breach of Article 506(6) of the *Agreement on Internal Trade*² (the AIT) in that the basis to conduct the evaluation of bids was not clearly identified in the tender documents. Wang also alleged that the Department acted in contravention of Articles 1015(4)(c) and (d) of the *North American Free Trade Agreement*³ (NAFTA) since, as a result of its determination that Wang’s bid is non-compliant, the contract will not be awarded in accordance with the criteria and essential requirements specified in the tender documents. In the alternative, Wang alleged that the tender documents are ambiguous with respect to the work entailed in meeting the “Component Per Incident” service option mandatory requirement, which is also a breach of Article 506(6) of the AIT. Moreover, Wang alleged that the Department has contravened Article 1013(1) of NAFTA, in that the tender documents failed to contain “all information necessary to permit suppliers to submit responsive tenders,” and, more specifically, Article 1013(1)(g) of NAFTA for failing to include “a complete description of the goods or services to be procured.”

Wang requested, as a remedy, that the Tribunal postpone the award of the contract until the Tribunal determined the validity of the complaint. In addition, if the Tribunal determined that the RFP did not require as a mandatory requirement that the proposal include the cost of labour to remove a failed component and reinstall the repaired or replacement component, Wang requested that the Department award it the contract, or that the Department re-evaluate its offer on the above-mentioned basis and that it be compensated for its costs of submitting this complaint. In the alternative, if the Tribunal determined that the RFP was ambiguous,

1. R.S.C. 1985, c. 47 (4th Supp.).
2. As signed at Ottawa, Ontario, on July 18, 1994.
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).

Wang requested that a new solicitation for the portion of the contract dealing with the “Component Per Incident” only be issued, or that a new solicitation dealing with the financial proposal only be issued, or that a new solicitation for the requirement be issued. Wang finally requested to be compensated for any costs associated with revising its bid to conform with the requirements of the new solicitation and for its costs to submit and pursue this complaint.

On December 19, 1997, 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*⁴ (the Regulations) had been met in respect of the complaint and, pursuant to section 30.13 of the CITT Act, decided to conduct an inquiry into the complaint. On the same day, the Tribunal issued an order postponing the award of any contract in relation to the subject procurement until it determined the validity of the complaint. As well, the Tribunal granted SHL Systemhouse (Systemhouse) leave to intervene in the matter.

On December 23, 1997, Systemhouse filed submissions with the Tribunal, including a motion to the effect that Wang’s complaint was filed late and that, therefore, it should be dismissed. On January 6, 1998, the Tribunal sought the parties’ submissions on this point and, on January 29, 1998, the Tribunal informed the parties that, in its opinion, Wang’s complaint was filed in a timely manner. On February 4, 1998, the Tribunal issued the reasons for its decision.

On February 9, 1998, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On February 20, 1998, Wang filed its comments on the GIR with the Tribunal. On February 26, 1998, the Department filed submissions on Wang’s comments on the GIR. On March 4, 1998, Wang submitted comments in reply. The Tribunal did not receive any submissions from Systemhouse on the GIR.

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 May 1997, the Department received a requisition for the establishment of a contract for the provision of on-site preventive and remedial hardware maintenance services for Crown-owned workstations, servers, laptop PCs, printers, 3270-compatible terminals and controllers, as well as a variety of miscellaneous equipment, located at various Revenue Canada sites across Canada, on an “as and when required” basis. A Notice of Proposed Procurement and RFP including a Statement of Work (SOW) were posted on the Open Bidding Service and in the Government Business Opportunities publication of July 10, 1997, with a closing date for the submission of bids of August 29, 1997.

4. SOR/93-602, December 15, 1993, Canada Gazette, Part II, Vol. 127, No. 26 at 4547, as amended.

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

The RFP and SOW include, in part, the following:

SECTION D: DEFINITIONS:

- e) **Component:** The specific item considered to be an integral part of a unit of equipment. A video adapter, monitor, hard disk drive, token ring adapter card, internal modem, etc. are all considered components.
- g) **Component Per Incident Remedial Maintenance Rate:** The one-time all inclusive charge for returning a failed component to a fully functional state each time a request is made.
- j) **Fully Functional State:** The point at which the user can perform the identical operations that were possible prior to the hardware failure. Fully functional state does not require the successful Bidder to re-install software or user data, except where a loaner is supplied.
- m) **Mandatory:** The Bidder is required to comply with the specific requirement. Failure to comply with a **MANDATORY** requirement will be sufficient to disqualify the Bidder's proposal.
- w) **Service Level Objective (SLO):** The maximum elapsed time between the placement of a service call on a component or unit of equipment, by Revenue Canada Project Authority, and when the component or unit of equipment is to be returned to a fully functional state.
- x) **Service Technician:** A skilled and qualified person who provides remedial maintenance services at client sites and is available for Revenue Canada requirements. It does not include staff who are responsible for parts stocking or dispatching nor does it include supervisory or administrative staff.
- y) **System Per Incident Remedial Maintenance Rate:** The one time all inclusive charge for returning a unit of equipment to a fully functional state each time a request is made.
- aa) **Unit of Equipment:** The primary item and any component(s) considered an integral part of it. A Personal Computer (PC) including the motherboard, processor chip, monitor, keyboard, memory, hard disk drive and any other equipment integrated into the chassis, such as a token ring card, internal modem, etc. is considered one unit of equipment. Associated devices such as external modems, bar code scanners and printers are separate units of equipment.

SECTION E: INFORMATION CONCERNING THE INSTRUCTIONS FOR THE PREPARATION OF THE RFP, THE SERVICE PROPOSAL, AND THE FINANCIAL PROPOSAL:

7.3 FINANCIAL PROPOSAL:

Mandatory

7.3.1 General:

- a) This section of the proposal must provide the pricing information related to the provision of the required maintenance services detailed in APPENDIX "A" - STATEMENT OF WORK. The supplied information will be used as a basis for both cost evaluation and for any resulting Contract.

7.3.2 Detailed Price Submission:

a) **Component Per Incident**

Mandatory

The Bidder **MUST** submit firm per incident rates (inclusive of all labour, parts and additional charges) for Regular and Premium remedial maintenance services, during the standard PPM [Principal Period of Maintenance], for each and all of the components listed in Attachment E.1.

APPENDIX A STATEMENT OF WORK

2.1 Remedial Maintenance Options

The successful Bidder, when requested by the Revenue Canada Authority, will be required to perform the remedial maintenance services described below, at any Revenue Canada site in Canada.

2.1.2 System Per Incident

Mandatory

At the request of the Revenue Canada Authority, the successful Bidder **MUST** return the defective unit of equipment to a fully functional state within the Service Level Objective (SLO) specified in the requested Service Category (defined in Appendix A, Section 2.2) for each service call placed, according to Revenue Canada's Call Management Process (defined in Appendix A, Section 2.9).

2.1.3 Component Per Incident

Mandatory

At the request of the Revenue Canada Authority, the successful Bidder **MUST** return the specified defective component to a fully functional state within the Service Level Objective (SLO) specified in the requested Service Category (defined in Appendix A, Section 2.2) for each service call placed, according to Revenue Canada's Call Management Process (defined in Appendix A, Section 2.9).

2.2.1 Regular Service

Mandatory

At the time of notification of a request for Regular Service, the successful Bidder **MUST** return the specified failing unit of equipment or component, to a fully functional state within an SLO of nine (9) business hours in order for the service call to be considered a pass for the purpose of performance monitoring.

2.9.1 Call Placement

Mandatory

At the time of call placement, the Revenue Canada Authority will provide the successful Bidder with the following information:

- a) A valid Revenue Canada problem record number;
- b) Failing device make, model and serial number;
- c) The nature of the failure;
- d) The location of the device;
- e) Name and telephone number of the Revenue Canada local site contract;
- f) Remedial maintenance option; and
- g) Service category.

Upon receipt of a valid service call, the successful Bidder **MUST** arrive at the site in sufficient time and with appropriate tools, test equipment and replacement parts to repair or replace the failed component or unit of equipment within the requested SLO.

NOTE: Component per incident will normally be used when problem determination has been made at the local level to the failing component. If the initial problem determination is proven incorrect, the successful Bidder's service technician is required to advise the Revenue Canada Authority and state the determined cause of the failure. The successful Bidder will be compensated for the initial call using Time and Material rates, a new service call will be initiated and the SLO performance measurement clock will be reset.

2.9.2 On-going Call Management

Mandatory

In order for the service call to be considered a pass for SLO performance measurement purposes, the successful Bidder must complete one of the following actions:

- a) Repair the defective component or unit of equipment to a fully functional state;
- b) Replace the defective component or unit of equipment with a like component or unit of equipment;
- c) Replace the defective component or unit of equipment with a fully functional loaner until the original component or unit of equipment has been repaired. When a loaner is supplied, the successful Bidder **MUST** transfer all software and user data to the loaner before it is considered fully functional; and
- d) Replace the defective component or unit of equipment with a fully functional Revenue Canada approved component or unit of equipment as defined in Appendix A, Section 2.12.2.

A total of nine updates were issued during the bid solicitation period to respond to questions received from suppliers and to extend the RFP closing date.

Update No. A0002, dated August 11, 1997, included the following question and answer:

Q.1. "With the Per Incident method the over-riding assumption is that all service calls ... will be placed with the service provider. A risk exists that the end-user will be selective with which calls will be placed to the vendor, and, for example, only place those service calls that are expensive to complete. (example: End-user only places monitor and hard-drive calls to the service provider, and does all the keyboard and memory swaps themselves.)

1) Is this currently happening within the RC environment, and 2) how does the Crown propose to ensure that this will not occur with the upcoming contract?

Answer: 1) Yes

2) **The Crown cannot guarantee that such activities will not occur.**

Update No. A0008 dated August 26 1997, includes the following question and answer:

QUESTION 2:

a) Will the Crown please confirm that it will not perform directly, itself, any of the services requested in the RFP for the equipment listed in the RFP. b) If this is not the case, please identify those sites that will perform self-maintenance.

ANSWER 2:

a) The Crown will not confirm that they will not perform directly, itself, any of the services identified in Additional Services, Appendix "A", Section 3. Revenue Canada intends to use the resulting contract, with its single service vendor, to repair all equipment included and added to the equipment listed in Attachment "E.1", "E.2" and "E.3".

b) Revenue Canada expects that any sites currently performing "self maintenance" will use the new component P1 service option, available from the resulting contract, to effect these repairs.

The RFP closed on September 2, 1997. Seven proposals were submitted by seven suppliers. According to the Department, three proposals including Wang's proposal were found to be fully compliant with the mandatory bid evaluation criteria and the point-rated criteria.

On September 29, 1997, the Department sent a letter to Wang requesting clarification on the pricing that it submitted in connection with, *inter alia*, the “Component Per Incident” service option as follows:

- a) Do the rates submitted in Attachment E.1 - Component Per Incident - include the cost of parts, labour, and travel and living (when applicable)? If so, please explain the rationale used for some of the pricing (i.e. \$1.00 and any pricing below \$100.00) on these components. How will this pricing enable Wang to recover its labour, parts and travel and living costs?

On October 1, 1997, Wang responded to the Department as follows:

As with all large maintenance agreements the profitability or returns for the contract are viewed for the total requirement, and not on a “line item” basis. Therefore, individual “line item” prices may not be profitable, but returns for the entire requirement may be acceptable.

The rates provided in attachment E.1 do include all labour, parts, and additional charges (travel and living) as defined in 7.3.2, a) page 31 of 51 of the RFP.

Wang has chosen to price certain items at a low price because it is believed and assumed that the actual volumes for these specific items will be very low. Wang commits that there will not be additional costs (other than applicable taxes) charged to the Crown other than those listed in E.1.

On October 2, 1997, the Department requested confirmation from Wang that the prices/rates quoted in its proposal would remain fixed for the period of any resulting contract. By letter dated October 3, 1997, Wang confirmed that all prices submitted in connection with this RFP would remain fixed for the period of any resulting contract.

According to the Department, Wang’s proposal was, therefore, evaluated as “best value” in accordance with the evaluation criteria in the RFP. Between October and early November 1997, the Department and Wang engaged in several discussions concerning the draft contract which was to be recommended for the Department’s management approval. After a number of iterations, on November 19, 1997, Wang confirmed that it was agreeable to the terms and conditions of the draft contract.

According to the Department, on November 19, 1997, on the occasion of a meeting between Wang and Revenue Canada to prepare for the upcoming contract, Wang advised Revenue Canada officials that it did not intend to undertake the labour for removal and re-installation of a faulty component. On November 20, 1997, the Department met with Wang to discuss the “Component Per Incident” issue. According to the Department, it explained to Wang that its proposal would be declared non-compliant if it did not include labour to physically remove and replace a failed component within a system. However, at the meeting, Wang submitted a letter dated November 20, 1997, proposing that an additional line item be included in the existing pricing model to give Revenue Canada flexibility to utilize this service.

On November 24, 1997, the Department notified Wang in writing that, if it did not acknowledge that the “Component Per Incident” service option included the physical removal of a defective component and re-installation of a repaired or replacement component in the system, its proposal would be declared non-compliant.

On November 25, 1997, Wang’s legal representative wrote to the Department stating that Wang’s proposal was compliant and further stating that the “Component Per Incident” service option was nothing more than a “consolidated parts source.”

On November 26, 1997, the Department sent a facsimile transmission to Systemhouse asking Systemhouse to confirm whether its understanding of the “Component Per Incident” service option defined in the RFP and corresponding SOW included the on-site physical removal and replacement of the failed component in the device or unit of equipment by the bidder’s service technician. Systemhouse was also asked to confirm that its understanding that Revenue Canada would request the “Component Per Incident” service option when problem determination and/or diagnosis with respect to a component would be done by Revenue Canada at a local site level. The same day, Systemhouse replied that its proposal and bid price for the “Component Per Incident” service option had been developed on the understanding that the stated requirement included:

- Systemhouse technician on-site to replace the component;
- Parts and Labour included;
- Revenue Canada Help desk or support person to do the initial diagnosis;
- Systemhouse will be dispatched to replace the failed part.

On December 5, 1997, the Department informed Wang, in writing, that its proposal was non-compliant. On December 16, 1997, Wang filed this complaint with the Tribunal.

VALIDITY OF THE COMPLAINT

Wang’s Position

Wang submits that nothing in the GIR establishes that the physical removal and re-installation of the failed components was a mandatory requirement of the “Component Per Incident” service option. Moreover, it submits that none of the provisions of the RFP and SOW establish that removal and re-installation are required. In the alternative, Wang submits that the GIR reinforces Wang’s position that, at best, the tender documentation was ambiguous with respect to the work entailed in the “Component Per Incident” service option.

Specifically, Wang submits that nothing in clauses 2.1 or 2.1.3 of the SOW refer to a requirement that the successful bidder remove the defective component and re-install a repaired or replacement component. In the absence of language to that effect, Wang submits, it reasonably assumed that Revenue Canada personnel would identify the failed component and make it available to the contractor for either repair or replacement. This interpretation is reasonable, given the definitions in the RFP of the terms “System Per Incident” and “Component Per Incident”. Indeed, if the Department’s interpretation of the term “Component Per Incident” were accepted, the two service options would effectively converge. This, Wang submits, is illogical, particularly in light of the definitions in the RFP of the terms “Component,” “Fully Functional State” and “Unit of Equipment” which, when read together with clauses 2.1.2 and 2.1.3, clearly suggest two distinct service options. The fact that the “Component Per Incident” service option includes self-diagnosis by Revenue Canada also supports this conclusion.

Concerning the Department’s position that “a user cannot perform identical operations that were possible prior to the hardware failure” until the component has been reinstalled into the unit of equipment, Wang submits that a component may be fully functional and may be tested to be fully functional outside of the unit of equipment and that, therefore, it is not necessary to reinstall the component in order to return that component to a fully functional state.

Concerning the Department's arguments about the distinction between the notions of "repairing" and "replacing" a component, the role of service technicians and the production of field service report, Wang submits that none of these arguments support the Department's position that the "Component Per Incident" service option included the costs to remove and reinstall the failed component. Indeed, the Department did not specify, in the RFP, what it meant by "labour" and, therefore, Wang's response to the Department's query on this point indicated that the cost of repairing a defective component was included in its proposal.

Concerning Wang's understanding of the SOW requirement as per clause 7.2.3(i) of the RFP, Wang submits that its proposal never stated that the physical removal and re-installation of the identified components was included as part of the "Component Per Incident" service option. Nevertheless, Wang's proposal was declared compliant by the Department and contract negotiations were undertaken. This, Wang submits, was possible because the Department itself did not interpret the "Component Per Incident" service option as requiring removal and re-installation of the failed components. To argue now, in hindsight, that Wang's proposal is not compliant lacks credibility and reinforces Wang's view that the RFP and the SOW lacked precision and clarity in respect of the work involved in the "Component Per Incident" service option. In this context, Wang submits that the Department's answer to its question on self-maintenance during bidding can easily be construed to support its view that Revenue Canada personnel would remove and re-install the failed components under the "Component Per Incident" service option, a view which, Wang maintains, was in no way conditioned by work requirements performed under previous contracts.

The fact that the drafting of the RFP and SOW was not adequate in respect of the "Component Per Incident" service option is also reflected in the clarification questions of the Department to Wang on this point. Indeed, nowhere in these questions did the Department ask whether the "Component Per Incident" prices bid by Wang included the cost of removing and re-installing failed components. This, Wang submits, is due to the fact that, at the time, the Department was still unaware that it was Revenue Canada's expectation that on-site removal and re-installation be considered a mandatory requirement of the RFP. This only became known to the Department on the occasion of the November 20, 1997, meeting with Wang and Revenue Canada and is reflected in the wording of the Department's clarification letter to Systemhouse of November 26, 1997, where the issue of on-site physical removal and replacement of failed components is clearly stated. Further, Wang submits that the fact that the Department had to pose this question to Systemhouse leads to the inescapable conclusion that Systemhouse's proposal failed to adequately describe whether the on-site removal and re-installation of the failed components were included as part of its proposal.

Concerning Systemhouse's submissions, Wang submits, that these, for the main part, are identical to the submissions of the Department in the GIR. Therefore, it adopts its comments in response to the GIR in reply to Systemhouse's submissions. Concerning Systemhouse's allegations that only Wang misinterpreted the RFP, Wang submits that there is nothing on the record which supports this allegation and, in fact, the Department's letter of November 26, 1997, casts some doubt on this point.

In conclusion, Wang submits that nothing in the GIR establishes the removal and re-installation of failed components as a mandatory requirement of the RFP. The RFP is, therefore, open to Wang's interpretation of the work to be performed under the "Component Per Incident" service option.

Department's Position

The Department submits that the RFP specified as a mandatory requirement that the "Component Per Incident" service option to be provided by the successful bidder include work associated with the

removal and re-installation of a component as necessary. Further, it submits that the RFP clearly indicated that the provision of remedial maintenance options which include the “Component Per Incident” service option is a mandatory requirement of the RFP. As well, the RFP is clear on the consequences on bidders’ proposals which fail to meet all mandatory requirements. These proposals will be declared “non-compliant” and will receive no further consideration.

The Department observes that the requirement to return either a unit of equipment or a component to a “Fully Functional State” is defined in the RFP as “[t]he point at which the user can perform the identical operations that were possible prior to the hardware failure.” In this context, it submits that a user cannot perform such operations until such time that the defective component has either been repaired or removed and replaced by a functional component and that functional/repaired component has been installed in the unit of equipment such that it functions as an integral part of the unit of equipment. The Department also submits that, while the requirement to return a component to a fully functional state may require that the contractor remove the defective component and re-install a functional one within the unit of equipment, in some instances, such repairs may be effected by making adjustments only to the component, reconnecting loose connections, etc. According to the Department, this explains why the “Component Per Incident” service option in the RFP did not specify that a fully functional state could only be effected by removing and replacing an identified component. In this context, the Department notes that the notion of repairing a component as opposed to replacing it is specified clearly in clauses 2.9.1 and 2.9.2. of the SOW.

The Department further submits that there is no ambiguity in the requirements as stated in the RFP. Indeed, there is a clear distinction to be made between Wang’s view that it need only provide a “replacement component” that is, to supply parts and the stated RFP requirement of clause 2.1.3 of the SOW which is to “return the specified defective component to a fully functional state.” These two notions, the Department submits, cannot reasonably be derived from the wording of clause 2.1.3.

Moreover, the Department notes that a request by Revenue Canada to the contractor for “Component Per Incident” service is a “service call” as set out in the clause 2.1.3. of the SOW. When such a “service call” is made, the RFP requires that a service technician be dispatched to handle the call. By definition, the Department submits, the function of the service technician is to perform the remedial maintenance service. This is why, the Department argues, according to the RFP, service technicians cannot be administrators or persons delivering and exchanging parts. This is also why service technicians, when making a service call, are required to arrive at the site with appropriate tools, test equipment and replacement parts in order to do the work necessary to return the defective component to a fully functional state and are required to report on all work activities performed to resolve the problem.

In addition, the Department submits that Revenue Canada’s obligation with respect to carrying out “Component Per Incident” service described in clause 2.9 of the SOW is to identify the suspect component and provide other related information. This entails conducting an initial diagnosis of the nature of the problem, but does not include removal of the failed component or re-installation of the component. This understanding, the Department submits, is shared by Wang in its proposal wherein it states under clause 7.1.3 of the RFP that its understanding of the “Per Incident Component” pricing is to allow the users with technical capabilities to diagnose that problems themselves and use the cost effective component pricing. This wording, the Department contends, has nothing to do with the removal or installation of components by Revenue Canada personnel.

Concerning Wang's allegation that the Department's responses to questions raised during the bidding period in respect of the "Component Per Incident" service option lead it to believe that this option would be used to support "self-maintenance" by Revenue Canada, the Department submits that there is no basis in fact for this position. Indeed, the Department contends that it clearly indicated that the new service option under the "Component Per Incident" remedial maintenance was intended to replace what Wang refers to as "self-maintenance". Though the answer states that Revenue Canada may perform some of the services, it does not commit Revenue Canada to perform any specific services.

In addition, the Department submits that Wang cannot rely on work requirements pertaining to any previous contract to support its interpretation of the work to be done under this RFP. Only this RFP and clarification of this RFP can be considered germane to the subject work requirement, particularly considering the fact that no indication was given by the Department to Wang that it could rely on previous work requirements to interpret the requirements of this RFP.

The Department finally submits that clause 7.3.2 of the RFP requires Bidders to submit firm per incident rates inclusive of all labour, parts and additional charges and, therefore, no consideration can be given to having any part of the work associated with the "Component Per Incident" service option paid under an alternate basis of payment. Accordingly, the Department submits that it acted in good faith and exercised due diligence in conformance with NAFTA when it asked Wang to clarify certain prices that it had submitted and which appeared "low" to the Department.

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

Systemhouse's Position

Most submissions made by Systemhouse mirror the Department's submissions and, therefore, they are not repeated herein. Systemhouse submits that, taken in context, the obligations imposed on the successful bidder are clearly apparent from the plain and ordinary meaning of the various provisions of the tender documents. The fact that Wang may have misinterpreted these does not make these provisions ambiguous. In the alternative, and without prejudice to its further submissions, Systemhouse submits that any ambiguity in the tender documents was apparent, and, therefore, should have been raised shortly after July 10, 1997, to be on time.

Systemhouse further submits that the meaning of "Component Per Incident" is patently clear and that the successful bidder could not reasonably expect Revenue Canada personnel to be available for assistance. Indeed, Revenue Canada Authority was required only to make a problem determination, where possible, and to provide information as per clause 2.9.1 of the SOW. In addition, Systemhouse submits that the successful bidder had to return the failed component to the point where the user could perform the identical operations that were possible prior to the hardware failure. This, Systemhouse submits, is only possible if the component is re-installed by the successful bidder as it is not reasonable to speak of a user as the user of a component rather than of a unit of equipment on which operations are performed.

In addition, Wang submits that the provisions of the RFP respecting price submission by prospective bidders made clear that the successful bidder was required to include all labour costs to bring a dysfunctional component or unit of equipment to a fully functional state.

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, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in NAFTA and the AIT.

Essentially, Wang alleged that, in evaluating its offer in respect of the rates for the “Component Per Incident” service option, the Department, contrary to Article 506(6) of the AIT, introduced an evaluation criteria not set out in the RFP and, on this basis, declared its proposal non-compliant and, contrary to Articles 1015(4)(c) and (d) of NAFTA, the Department now intends to award the contract on a basis not in accordance with the “best value” criteria in the RFP. In the alternative, Wang submitted that, contrary to Article 1013(1)(g) of NAFTA, the RFP was ambiguous at least in respect of the work entailed under the “Component Per Incident” service option, therefore making it impossible for bidders to submit responsive bids.

Article 506(6) of the AIT requires, in part, 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.”

Article 1013(1) of NAFTA provides, in part, that: “Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders ... The documentation shall also include: (g) a complete description of the goods or services to be procured.”

Article 1015(4) of NAFTA provides, in part, that:

(c) unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation;

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation;

There is no dispute among the parties that clause 7.3.2 a) of the RFP relating to the detailed pricing of the “Component Per Incident” service option is a mandatory requirement of the RFP. The parties also agree that failing to meet this requirement alone is sufficient grounds to declare a proposal non-compliant. However, the parties do dispute what are the requirements imposed by the RFP in respect of the “Component Per Incident” service option and, more specifically, what labour costs had to be included in the bidders’ proposals for this service option in order for bidders’ proposals to be considered responsive on this point.

Wang’s behaviour during the bidding, bid clarification and contract negotiation phases proceeded from the understanding that the “Component Per Incident” service option did not include the labour costs for

the removal of a component and installation of a new or repaired component into a unit of equipment. Wang confirmed its understanding of this service on November 20, 1997, at its meeting with the Department.

The Department was of the understanding that the rate for the “Component Per Incident” service option included the labour costs associated with the removal of a component and installation of a new or repaired component into a unit of equipment.

The evidence on the record indicates that this difference in understanding of what labour costs were to be included in the “Component Per Incident” service rate did not become evident to Wang or the Department until after the evaluation of the proposals had been completed and the terms and conditions of the contract were being finalized.

The Tribunal has reviewed the provisions of the RFP as well as the Departmental clarifications and notes that section D of the RFP, which sets out the applicable definitions, establishes two clearly distinct remedial maintenance rates; namely, (1) a rate for “Component Per Incident Remedial Maintenance Rate,” maintenance to return a failed component to a fully functional state; and (2) a rate for “System Per Incident Remedial Maintenance Rate,” maintenance to return a unit of equipment to a fully functional state [emphasis added]. The purpose of both remedial maintenance services is to return the component or unit of equipment, as the case may be, to a “fully functional state,” which is defined in the RFP as “the point at which the user can perform the identical operations that were possible prior to the hardware failure.” However, the two remedial maintenance rates apply to different goods: the “Component Per Incident Remedial Maintenance Rate” service applies to “failed component[s]” and the “System Per Incident Remedial Maintenance Rate” service applies to “unit[s] of equipment.” The Tribunal is of the view that the maintenance rates (inclusive of all labour, parts and additional charges) for each service option must be interpreted in the context of these definitions.

The question that the Tribunal must answer is whether the RFP requires that bidders include the labour cost for the removal of a failed component and the installation of a new or repaired component as part of the “Component Per Incident Remedial Maintenance Rate.” In the Tribunal’s view, there is no such requirement in the RFP.

It is true that under the “Component Per Incident” service option, the initial diagnosis of a problem is to be made by a Revenue Canada representative. However, in the Tribunal’s view, this distinction, in itself, cannot support the proposition that labour costs for removal of a failed component and the installation of a new or repaired component must be included in the “Component Per Incident Remedial Maintenance Rate.”

Moreover, in the Tribunal’s view, although clauses 2.9.1 and 2.9.2, which cover call placement and call management, respectively, provide that a bidder must “arrive at a site in sufficient time and with appropriate tools, test equipment and replacement parts to repair or replace the failed component or unit of equipment;” they do not refer to the removal of a failed component and installation of a new or repaired component.

In the opinion of the Tribunal, it is not necessary to install a component into a unit of equipment in order to determine that the component is “fully functional.” A component can be repaired and tested to be “fully functional,” i.e. that “the user [of the component] can perform the identical operations that were possible prior to the hardware failure” outside of a unit of equipment or it can be replaced by providing a loaner or a new component. The Tribunal is of the view that, according to the terms of the RFP and the

clarifications provided by the Department, these tasks could be performed by Revenue Canada personnel. Alternatively, these tasks could be performed by the contractor outside of the “Component Per Incident” service option.

Having interpreted the RFP as not requiring that a bidder include in the “Component Per Incident Remedial Maintenance Rate” the labour costs associated with the removal of a failed component and installation of a new or repaired component, the Tribunal concludes that the Department’s determination that Wang’s proposal was non-compliant on the basis that it did not include such labour costs constituted a violation of the provisions of Article 506(6) of the AIT and Article 1013(1) of NAFTA. In particular, the Tribunal is of the view that, by interpreting the RFP to include such labour costs and determining that Wang’s proposal was non-compliant, the Department introduced, after bid closing, a new mandatory requirement into the RFP.

It is clear from the information on the record that the Department assessed Wang’s proposal as being the “best value” and intended to award Wang the contract as evidenced by the contract negotiations between the Department and Wang. Were it not for the difference in interpretation of the “Component Per Incident Remedial Maintenance Rate” in the RFP, which only became known when the Department and Wang were finalizing the terms and conditions of the contract, the Tribunal is of the view that the Department would have awarded Wang the contract. In these circumstances, the Tribunal is of the view that, subject to Article 1015(4) of NAFTA, Wang should be awarded the contract.

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 NAFTA and the AIT 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, subject to the provisions of Article 1015 4(c) of NAFTA, the Department award the contract to Wang.

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

Pierre Gosselin

Pierre Gosselin
Member