

Ottawa, Friday, August 21, 1998

File No.: PR-98-002

IN THE MATTER OF a complaint filed by Installation Globale Normand Morin & Fils 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

Under section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Under subsections 30.15(2) and 30.15(3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services re-evaluate the bids submitted as of February 23, 1998, in the manner indicated in the original Request for a Standing Offer and award the contract as provided for in the Request for a Standing Offer and in Chapter Five of the *Agreement on Internal Trade*.

Under subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Installation Globale Normand Morin & Fils Inc. its reasonable costs incurred in filing and proceeding with its complaint.

Richard Lafontaine

Richard Lafontaine

Member

Michel P. Granger

Michel P. Granger

Secretary

Date of Decision: August 21, 1998

Tribunal Member: Richard Lafontaine

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Heather A. Grant

Complainant: Installation Globale Normand Morin & Fils Inc.

Counsel for the Complainant: Claude M. Lapointe

Government Institution: Department of Public Works and Government Services

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## FINDINGS OF THE TRIBUNAL

### INTRODUCTION

On May 1, 1998, Installation Globale Normand Morin & Fils Inc. (Globale) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (the CITT Act) concerning Request for a Standing Offer (RFSO) No. E0231-7-0032/A issued by the Department of Public Works and Government Services (the Department) for the moving of office equipment and furniture, as the need arose, for the Department of Human Resources Development (DHRD).

Globale alleged that the Department's amendments made to the RFSO after the closing date for the submission of bids, and especially the reduction in the estimated number of hours of work for the move co-ordinator (the co-ordinator) from 12,000 to 1,200 hours, are discriminatory. Globale also alleged that the Department did not comply with the procurement process when the RFSO was issued nor when the amendments were made. Globale adds that the evaluation criteria described in the RFSO are ambiguous and that they were applied inconsistently.

As a remedy, Globale requested that it be awarded the contract, should it be entitled thereto, or, failing this, that the Department pay it damages, including all the losses incurred and the loss of anticipated profits.

On May 7, 1998, the Tribunal determined that the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (the Regulations) had been met with respect to the complaint and decided to conduct an inquiry.

On May 8, 1998, the Tribunal ordered, pursuant to subsection 30.13(3) of the CITT Act, that the award of any contract relating to this procurement be postponed until it determined the validity of the complaint. On June 1, 1998, the Department filed a notice of motion with the Tribunal for an order dismissing the complaint on the grounds that it had not been filed within the prescribed time. On June 11, 1998, the Tribunal informed the parties that, in its view, Globale's complaint had been filed within

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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.

the prescribed time. On June 29, 1998, the Tribunal issued its reasons for decision. On July 10, 1998, the Department filed with the Tribunal a Government Institution Report pursuant to rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> On July 22, 1998, Globale filed with the Tribunal its comments on the Government Institution Report.

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 Notice of Proposed Procurement and the RFSO were posted on January 21, 1998, on Canada's Electronic Tendering Service (MERX). The closing date was February 23, 1998. This procurement had originally been discussed by representatives of the Department and DHRD in the summer of 1997. However, these discussions were suspended in late August 1997 for reasons that were not connected in any way with the complaint. Reports included in the record show that the issue of the co-ordinator's hours of work had been identified at the time by the Department and DHRD and that these parties had agreed to reduce the number of hours. In December 1997, DHRD decided to reactivate the file and, in January 1998, it was assigned to a new contracting officer.

The RFSO reads, in part, as follows:

#### **BASIS OF PRICING**

##### **1. YEAR 1**

##### **A) Labour only, Monday to Saturday**

i) Move Coordinator: \$ \_\_\_\_\_/hour

Estimated number of hours: 12,000

[Note: The RFSO includes identical entries for the two option years.]

#### **THE SUPPLIER UNDERSTANDS AND AGREES:**

- a) that a contractual obligation will come into force only if there is an authorized Call-up Against a Standing Offer and only to the extent designated in the Call-up.
- b) that this document does not oblige the Designated User to authorize or order any goods/services whatsoever or to spend the estimated expenditure or any monies whatsoever.

#### **EVALUATION CRITERIA**

The Minister of Public Works and Government Services or his/her designate, will evaluate the bids received, and such evaluation will include consideration of the following:

- (b) Compliance with all terms and conditions referenced in this Request for Standing Offer.

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

- (c) Lowest aggregate total price to one Supplier only, based on Pricing 1, and Pricing for Option years 1 and 2. To arrive at the lowest aggregate price, the unit rates will be multiplied by the estimated quantities for that item. Those items that do not show estimated quantities will not be evaluated.

According to the Department, a total of 11 proposals were received. An initial review of the proposals received showed that Globale had structured its prices in such a way that, according to a note to file dated February 26, 1998, the Department had to obtain details from Globale's representative in order to determine whether its proposal met the requirements of the RFSO. On February 26 and 27, 1998, the Department contacted Globale to request these details. According to the Department, Globale provided the requested details in a telephone conversation on February 27, 1998, and later sent written confirmation of its prices by facsimile on March 2, 1998.

A note to file, dated March 2, 1998, refers to an error concerning the estimated number of hours for the services of the co-ordinator indicated in the RFSO. According to the Department, after contacting DHRD on March 4, 1998, to notify it of the error in section A) i) of the RFSO, and since the necessary corrections were not made in the initial RFSO after the error was reported in the summer of 1997, it was decided to take immediate corrective action.

On March 5, 1998, the following memorandum was sent by facsimile to all the bidders:

The following clarification is provided whereby we request that you review the rate you have offered and confirm that your rate either remains as quoted or changes as a result of this note mentioned below.

Regarding the pricing basis for year 1, 2, & 3, the number of hours for the move coordinator was incorrectly shown as 12,000, it should have read 1,200 for each year.

Confirm in writing to the undersigned by 4:00pm March 6<sup>th</sup> if this changes your rate for this item.

According to the Department, on March 6, 1998, all the bidders had replied. Only Globale objected to the requested details. According to the Department, only one bidder amended its hourly rate, although this amendment, again according to the Department, did not have any impact on the final ranking of the bids.

In its facsimile dated March 6, 1998, in reply to the Department's enquiry on March 5, 1998, Globale indicated, in part, the following:

We fail to understand why you wish to change the rules of the game after the bid closing date and, what is more, after having examined the bids. Especially since you told us over the telephone that this would not have the effect of changing the results in any way.

This is illegal and inappropriate and if you wish to proceed with your plan, which could have the effect of favouring one company over another, rest assured that we will take all legal measures that may be necessary.

Furthermore, our facsimile dated March 2, 1998, is unchanged.

[Translation]

On March 11, 1998, Globale again wrote to the Department to request that the proposals be evaluated in accordance with the initial specifications in the RFSO.

On March 31, 1998, the Department replied to Globale's letter dated March 11, 1998, and stated, in part, the following:

In order to comply with the policies of our department, we have had to correct a blatant error which came to our attention only after the closing date, as the bids were being evaluated. The error relates to the number of hours in point No. 1, which we have changed from 12,000 to 1,200, which represents the actual need for the services of the move co-ordinator during a one-year period... We will now proceed to the evaluation of the bids received and we will issue a standing offer in accordance with the terms set out in our tender document.

[Translation]

On April 3, 1998, Globale replied to the Department's letter dated March 31, 1998, stating, in part, the following: "*Nous apprécions et sommes très heureux de constater que vous procédez dans l'évaluation des appels d'offres selon le document original*" ("We appreciate and are very pleased to note that you are proceeding with the evaluation of the bids in accordance with the original document").

On April 28, 1998, the Department issued a standing offer to Checker Movers, the bidder which, in the Department's opinion, had submitted the lowest acceptable bid.

## **VALIDITY OF THE COMPLAINT**

### **Globale's Position**

Globale submits that, although the Department recognized its error concerning the number of hours for the co-ordinator, the fact remains that it failed, over a period of more than seven months, to amend its tender document, which was amended only after the closing date for the submission of bids and the actual opening of the bids. Globale submits that, because the Department failed to take action at the appropriate time, it suffered certain and irreparable harm.

Contrary to the Department's arguments, Globale submits that the amendment, as worded, had the effect of causing it to lose its favourable position in relation to the other bidders. In itself, according to Globale, the amendment made by the Department after the opening of the bids is irregular and prejudicial to Globale's rights.

Globale also submits that the Department placed itself in a conflict of interest situation by indirectly changing the method of calculating the bids after having examined its bid. Furthermore, the calculation method used by Globale is protected by "industrial secrecy" and the Department's amendment had the effect of causing Globale to lose the benefits offered by that method.

Globale concludes by arguing that, because the Department did not display diligence in the circumstances, making the amendment at that time had the effect of rendering the bidding process incomplete, dubious, prejudicial and discriminatory.

### **Department's Position**

The Department recognizes that the number of hours estimated for the co-ordinator's services shown in section A) i) of the RFSO was 12,000. It also admits that this was an error on its part. After noting

that the role and duties of the co-ordinator are defined in the RFSO, the Department submits that an analysis of the RFSO shows that the number of hours of work shown for the co-ordinator was wrong. In this regard, the Department indicates that, when the file was reactivated in December 1997, it was assigned to a new contracting officer and that the RFSO was inadvertently published without the error being corrected.

The Department submits further that the measures that it took to correct the number of hours for the co-ordinator's services in the RFSO were necessary to ensure that the procurement complied with Article 506(6) of the *Agreement on Internal Trade*<sup>4</sup> (the AIT), which reads, in part, as follows: "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." The measures taken were designed to provide all bidders with realistic and accurate data concerning the co-ordinator's services. The Department adds that, in accordance with the principle of fairness, each bidder was invited to amend its proposal.

The Department also maintains that Globale was invited to provide details in order to verify whether its financial proposal was acceptable.

Moreover, the Department maintains that the evaluation criteria used to determine which bidder submitted the best overall bid were not changed as a result of the measures that it took. Concerning Globale's contention that the measures taken by the Department were harmful to Globale because of its unique price structure, the Department replied that it treated all the bidders fairly and that it acted, at all times, with a view to ensuring the integrity of the procurement process. The Department submits that the bidders had to propose prices in accordance with the RFSO. According to the Department, Globale chose to submit its prices as it did and is now trying to take advantage of the Department's error. The Department argues that, if it had not corrected the error, this would have entirely distorted the prices proposed by the other bidders, thereby causing them harm and undermining the integrity of the procurement process. That is the reason, in the Department's submission, that all bidders were permitted to amend their proposals on an individual basis.

Finally, the Department argues that, contrary to Globale's allegation, the prices proposed by the bidders were not, at any time, disclosed to the other bidders during the procurement process. The Department concludes by submitting that it completed this procurement process in accordance with the provisions of the AIT and requests that it be reimbursed for the costs incurred in defending its position.

### **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 AIT.

Article 506(6) of the AIT reads, in part, as follows: "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."

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

The Tribunal must, therefore, determine whether the Department applied the provisions of the RFSO governing the evaluation of bids and, in doing so, whether it complied with the provisions of Article 506(6) of the AIT.

The facts in this case are not very numerous and were agreed to by all the parties. The Department erroneously estimated and indicated, in the RFSO, that the number of hours of work for the co-ordinator was 12,000 hours per year instead of 1,200 hours. Although this error was recognized by the Department in the summer of 1997, the postponement of the procurement and the fact that the file was assigned to a new contracting officer when it was reactivated in December 1997 meant that the RFSO, issued on January 21, 1998, still contained the error. None of the bidders noted the error or, at the very least, brought it to the Department's attention during the bid submission period. After the closing date for the submission of bids, the Department found that Globale had structured its prices in a manner that was unique and open to interpretation. Thus, on February 26 and 27, 1998, the Department asked Globale to clarify its bid in this respect. Globale provided the necessary explanations on February 27, 1998. It was only on or about March 2, 1998, when the bids were compiled, that the Department realized that its error had still not been corrected. According to the Department, in order to ensure that the RFSO complied with the provisions of Article 506(6) of the AIT, to give all bidders an equal opportunity to obtain this contract and to reflect better the actual needs of DHRD, the client department, it informed the bidders, in writing, on March 5, 1998, that the number of hours estimated for the co-ordinator had been reduced to 1,200 hours per year. In addition, the Department asked the bidders to inform it whether this change altered the rate proposed for the item in question. On March 6, 1998, Globale objected in writing to the amendment, indicating that it failed to understand why the Department would change the rules of the game after the bid closing date and after having examined the bids.

The Tribunal is satisfied that the Department acted reasonably when it asked Globale on February 26 and 27, 1998, to clarify its proposal. However, the Tribunal feels that the Department substantially amended the rules governing the evaluation of the bids when it changed the number of hours for the co-ordinator. Contrary to what was stated by the Department, the reduction in the co-ordinator's hours of work changed the weighting of the evaluation criteria set out in the RFSO and, as a result, altered the method of evaluating the bids set out in that document. This was done after the bid closing date and even after the bids had been opened by the Department.

In this case, the Tribunal does not have to consider whether such a change could have been made with the consent of all the parties. It is clear, in this case, that Globale never consented to the change and, in fact, objected to it.

In the circumstances, the Tribunal is of the opinion that the Department had either to proceed with the evaluation of the bids in accordance with the method described in the original RFSO or, if the Department considered it appropriate, to cancel this tender and to issue another. However, the Department decided to change the number of hours applicable to the co-ordinator. In the Tribunal's opinion, the Department, in doing so, breached the provisions of Article 506(6) of the AIT. Consequently, the Tribunal determines that the complaint is valid.

In order to identify the most appropriate corrective action in this situation, the Tribunal has carefully reviewed the reasons given by the Department for making the change in the co-ordinator's number of hours of work. The Tribunal notes first that, in accordance with the provisions of Article 506(6) of the AIT, the evaluation criteria and the weighting of these criteria provided for in the RFSO were clearly indicated therein.



This no doubt explains why none of the 11 bidders requested clarifications on this point before making their bids. It is true that the conditions of the procurement, especially with respect to the co-ordinator's hours of work, could cause confusion with respect to the actual needs of DHRD. In the circumstances, however, it was well known to the potential suppliers and clearly indicated in the RFSO that the designated user (in this case, DHRD) was not obliged to authorize or order any goods or services whatsoever or to spend the estimated expenditure or any monies whatsoever. In this regard, the Tribunal is of the opinion that the number of hours applicable to the co-ordinator can reasonably be interpreted much more as a factor to be used in the weighting of the bids than an expression of the client's needs. In the Tribunal's opinion, the bidders were not misled by the number of hours of work applicable to the co-ordinator in preparing their bids. This is perhaps the result, admittedly after the fact, of only one bidder changing its price, although the Department gave all the bidders an opportunity to do so.

Finally, after considering the Department's intention to give all bidders an equal opportunity to obtain the contract, the Tribunal notes that a note to file by the Department indicates, in part, the following: "Because of the unique way that Installation Globale has quoted, it puts every other bidder in a disadvantage."

The Tribunal is of the opinion that the terms and conditions of the RFSO were the same for all the bidders. It seems that Globale possibly structured its prices differently from the other bidders. In the Tribunal's opinion, however, it was not reasonable to penalize it for this, since all the bidders were permitted to structure their prices as they thought fit, as long as they met the requirements of the RFSO, which, in the Department's opinion and after verification, Globale had done. By changing the weighting method for evaluating the bids and by providing the bidders, including Globale, with an opportunity to change their financial proposals individually, the Tribunal is of the opinion that the Department, no doubt inadvertently, acted in a discriminatory manner against Globale.

#### **DETERMINATION OF THE TRIBUNAL**

Under section 30.14 of the CITT Act, the Tribunal determines that the complaint is valid.

Under subsections 30.15(2) and 30.15(3) of the CITT Act, the Tribunal recommends, as a remedy, that the Department re-evaluate the bids submitted as of February 23, 1998, in the manner indicated in the original RFSO and award the contract as provided for in the RFSO and in Chapter Five of the AIT.

Under subsection 30.16(1) of the CITT Act, the Tribunal awards Globale its reasonable costs incurred in filing and proceeding with its complaint.

Richard Lafontaine  
Richard Lafontaine  
Member