

Ottawa, Friday, February 12, 1999

File No.: PR-98-031

IN THE MATTER OF a complaint filed by Service Star Building Cleaning Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

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: Joël J. Robichaud
Gerry Stobo

Complainant: Service Star Building Cleaning Inc.

Government Institution: Department of Public Works and Government Services

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STATEMENT OF REASONS

INTRODUCTION

On November 17, 1998, Service Star Building Cleaning Inc. (Service Star) 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 by the Department of Public Works and Government Services (the Department) (Solicitation No. W0134-7-CYBM/A) of janitorial services at the facilities of the Department of National Defence (DND), 4 Wing Cold Lake, Cold Lake, Alberta.

Service Star alleged that the Department incorrectly cancelled the subject solicitation. It maintained that it had submitted a responsive proposal and was the low bidder.

Service Star requested, as a remedy, that it be awarded the contract.

On November 20, 1998, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² (the Regulations). That same day, the Tribunal issued an order postponing the award of any contract in connection with this procurement. On December 18, 1998, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On January 11, 1999, Service Star filed its comments on the GIR with the Tribunal.

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.

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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.

PROCUREMENT PROCESS

On July 14, 1998, the Department posted a Notice of Proposed Procurement (NPP) for the requirement detailed in a Request for Proposal (RFP) on Canada's Electronic Tendering Service (MERX) and in *Government Business Opportunities*. In the NPP, the requirement was identified as being subject to the provisions of the *North American Free Trade Agreement*⁴ (NAFTA), the *Agreement on Government Procurement*⁵ (the AGP) and the *Agreement on Internal Trade*⁶ (the AIT). The closing date for the receipt of proposals was August 24, 1998.

On August 10, 11 and 12, 1998, a mandatory site visit was held, at which time prospective bidders were shown a number of buildings in each of the four types of areas to be serviced, namely, "Restricted," "Non-restricted," "Outlying" and "Accommodations." On August 14, 1998, Amendment No. 001 to the RFP was issued in response to questions raised by prospective bidders during the site visit. Amendment No. 001 included a new requirement that bidders provide pricing on a "price per square metre per day" basis for each of the sub-areas of the four types of areas.

The RFP at page 12, under "**PRICING INSTRUCTIONS**," reads, in part:

All prices are to be quoted as per the units of issue as stated in this Document. The units of issue and the Pricing Basis as stated in this Document are not to be altered in any way or the Bidder's response will be considered non-responsive. The Bidder is to have completed all parts of the Basis of Pricing. Any Bidder's responses submitted that do not have all parts of the Basis of Pricing completed shall be considered non-responsive and no further evaluation performed.

The proposal evaluation and contractor selection process comprised four steps, namely: 1) compliance with mandatory requirements; 2) assessment of rated criteria; 3) evaluation of prices; and 4) selection of a contractor. Proposals failing to meet all mandatory requirements were to be considered technically non-responsive. Proposals achieving less than 75 percent of the rating points or under 750 points were also to be considered technically non-responsive. For cost evaluation purposes, the total cost was to include "the aggregate of all usage figures multiplied by the prices offered by the Bidder under [Annexes] B, C, D & E including the cost of providing financial security." The total estimated cost was to be determined by "using the aggregate for all the fixed rates over the period of the initial contract plus the total of Option 1 and Option 2 to reach a total assessed bid price." Finally, the selection of a contractor was to be made on best value to Canada, with technical merit being worth 70 percent and the price being worth 30 percent.

At page 14 of the RFP, the "**EVALUATION OF COMPLIANCE WITH MANDATORY REQUIREMENTS**" lists seven mandatory criteria. The "Work Force Reduction Program" condition is not included in that list.

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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).
 5. As signed at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).
 6. As signed at Ottawa, Ontario, on July 18, 1994.

Pages 23 to 24 of the RFP include the following:

BASIS OF PRICING/PAYMENT: Firm pricing for the period of the Contract plus option period.

ITEM	DESCRIPTION	ESTIMATED SQUARE METERS	NUMBER OF CLEANINGS PER WEEK
01.	Restricted Area:		
	Washrooms	...	See Annex "B" attached
	Common	...	
	Offices	...	
02.	Outlying Areas		
	Washrooms:	...	See Annex "C" attached
	Common:	...	
	Offices:	...	
	Quarters:	...	
03.	Non-Restricted Area		
	Washrooms	...	See Annex "D" attached
	Common:	...	
	Offices:	...	
	Lounges:	...	
04.	Accommodations Area		
	Washrooms	...	See Annex "E" attached
	Common	...	
	Quarters	...	
	Offices	...	

Annexes "B" to "E" include detailed cleaning schedules for each of the four types of areas to be cleaned, the buildings involved and a short description of the facilities and areas involved. The annexes also identify the number of times per week that each area must be serviced and the size of the area in square metres. Annex "E" reads, in part:

List of Contents
Accommodation Area
CLEANING SCHEDULE

Building #	Description	Areas	Frequency per/week	Size m ²
BB 31	Trans Accommodations	Washrooms	5	170.2
		Common	3	529.5
		Quarters	2	1254.5

Paragraph 7 of Amendment No. 001 to the RFP included the following:

7. Add the following to the Basis of Pricing/Payment:

item 05: Use the pricing here for "Restricted Area"

Item 06: Outlying Areas - provide price m²/diem:

...

Item 07: Non-Restricted Areas - provide price m²/diem:

...

Item 08: Accommodations Area - provide price m²/diem.

Page 24 of the RFP reads, in part:

DAILY PRICING FOR CLEANING SERVICES FOR

	1998	1999	2000	2001	2002
01. Restricted area: ...					
02. Outlying areas: ...					
03. Non-Restricted areas; ...					
04. Accommodations area: ...					
05. The above prices are based on a price per meter ² /diem (shown below)					
Washrooms:	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____
Common:	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____
Offices:	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____
Lounges:	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____
Quarters:	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____

The price per m²/diem will be used to delete or add buildings or areas within buildings, to the contract and to assess non-performance for work not performed as required.

Item 06 of the RFP, on page 25, addressed emergency rates applicable for work performed outside the scheduled cleaning.

Five proposals were submitted, including one from Service Star. The evaluation team was comprised of the Department's contracting officer, and a personnel administration officer, a financial officer and the manager of cleaning services at 4 Wing Cold Lake, all from DND. Two proposals, including that of Service Star, were initially evaluated as non-responsive for failing to indicate compliance with the "Work Force Reduction Program" mandatory clause in the RFP. Another proposal was evaluated as non-responsive for failing to provide the mandatory bid security and was not considered any further. The two remaining proposals were assessed against the rated requirements, and one proposal failed to meet the minimum 750 points required.

By letter dated October 1, 1998, Service Star informed the Department that it did not agree with what it understood to be the Department's intent to declare its proposal non-responsive for failing to meet the mandatory condition in the RFP dealing with the Work Force Reduction Program. As a result of Service Star's letter of October 1, 1998, the Department re-considered its position relative to the said clause, noting that the box for the check mark did not reproduce on the RFP and that the check list of mandatory requirements did not include a reference to the Work Force Reduction Program, and it determined that it would be unfair, in the circumstances, to declare Service Star's proposal, and that of the other bidder, non-responsive for that reason alone.

On October 15 and 16, 1998, the evaluation team re-assembled and evaluated both proposals against the rated requirements. Both proposals met the minimum rating points required.

Three proposals advanced to step 3 of the evaluation process, evaluation of price. According to the GIR, at this juncture, the Department noted that none of the bidders had provided pricing as requested by the RFP. Service Star, for its part, had included, in its proposal, an annotation dated August 22, 1998, stating that the pricing sheets in the RFP rendered it unable to calculate an annual cost. A second bidder proposed identical prices for the daily rates and the prices per square metre per day. The third bidder eventually withdrew its offer. According to the GIR, on or about October 20, 1998, the Department attempted to evaluate and reconcile the pricing proposals of the three bidders by calculating an annual cost on the basis of the prices per square metre per day for pricing items 05 to 08. These rates were common to all proposals and were intended to be used to arrive at the daily pricing required by items 01 to 04. On this basis, Service Star's proposal was the second lowest offer for the two-year contract less options. In the Department's opinion, the low bid was unusually low, and the Department asked the bidder to either confirm the pricing submitted or withdraw the proposal. On October 21, 1998, the Department requested the bidders of the three proposals to extend their bid acceptance period to November 22, 1998. On October 22, 1998, the low bidder informed the Department that its price was erroneously low and that, therefore, it was withdrawing its proposal. The two remaining bidders agreed to extend their bid acceptance period.

The Department then proceeded to step 4 of the evaluation process to select a contractor. In so doing, the Department noted that the evaluation of Service Star's price proposal using the daily rate provided under items 01 to 04, as compared to an evaluation using the price per square metre per day quoted for items 05 to 08, showed a significant discrepancy over the same period of time.

On October 29, 1998, the Department contacted Service Star by telephone asking, amongst other things, whether Service Star was prepared to confirm pricing by accepting a contract based on calculations using the prices that it bid for items 05 to 08 inclusive. The Department confirmed this information by facsimile the same day. According to the GIR, that same day, Service Star informed the Department by telephone that it was not prepared to accept a contract on the basis of the Department's calculations.

On November 3, 1998, Service Star sent a facsimile letter to the Department requesting a meeting. The Department did not respond to this letter and, on November 6, 1998, it informed all bidders of its decision of November 5, 1998, to cancel this solicitation and to re-tender it with revised pricing criteria.

On December 30, 1998, the Department issued a new solicitation for this requirement with a submission closing date of February 8, 1999.

VALIDITY OF THE COMPLAINT

Department's Position

The Department submitted that it was correct and acted in good faith when it decided to cancel the solicitation and committed to issue a new one in order to correct the deficiency in the pricing requirements and cost evaluation methodology in the RFP. The Department submitted that, during the evaluation process, it became apparent that the absence of a formula in the RFP, setting out how the bidder's total price should be calculated, resulted in ambiguity with respect to the evaluation of responses to the various provisions pertaining to the basis of pricing.

The Department submitted that the significance of the absence of a formula for total price is evidenced by the problems associated with determining Service Star's proposed total contract price for evaluation purposes. Service Star's proposal provided both daily pricing and prices based on a price per

square metre per day for the four types of areas to be maintained. However, these two price structures do not agree with one another.

The Department submitted that, although the RFP intended that daily prices be based on price per square metre per day, the RFP did not provide a “price per square metre per day” formula for calculating total annual contract prices. It is clear that, when the Department attempted to calculate Service Star’s annual contract price using a “price per square metre per day” formula, Service Star’s proposal was the lowest-priced bid. However, Service Star has specifically stated that it does not agree with this method of calculation and would not accept a contract on this basis. In contrast, the Department submitted that a contract priced on the basis of the daily pricing items submitted by Service Star under items 01 through 04 would be in excess of DND’s budget for the project.

The Department further submitted that there exists no basis for the Tribunal to award the contract in dispute to Service Star since, according to Service Star’s own admission, there is no basis to determine a total annual contract price.

The Department submitted that it did not, at any time, inform Service Star that it had been awarded the contract. The fact that the Department was requesting, as late as October 21, 1998, the bidders to agree to extend the bid acceptance period is proof to the contrary. The Department further submitted that it acted in this matter within the rights of the Crown, specifically enumerated in the RFP, by canceling the solicitation in the interest of fairness to all bidders in circumstances in which there was ambiguity with respect to the final contract price for evaluation purposes for one of two responsive bidders. The Tribunal, the Department submitted, provided such direction in File No. PR-98-002.⁷

Service Star’s Position

Service Star organized its comments on the GIR under four headings as follows.

Identification of Responsive Bidders

Service Star submitted that it discovered, in the GIR, that another bidder’s proposal, considered by the Department for award until the end of the evaluation process, had supplied the same numbers throughout the pricing requirements, wherein two separate pricing structures, “daily pricing” and “per square metre per day” rates were clearly required in the RFP and subsequent amendments. This failure to quote prices “as per the units of issue” was, Service Star submitted, a breach of the pricing instructions in the RFP, and the Department should have declared this proposal non-responsive and should not have considered it any further.

Calculation of Cost/Price

Service Star submitted that it quoted, in its proposal, price figures that both met the requirements of the RFP and bore adherence to the stated pricing instruction. Service Star further submitted that the “fixed rates” for daily pricing were the only rates required for cost evaluation purposes. The prices per square metre per day were intended solely to delete or add buildings or areas within buildings to the contract or to assess non-performance and were not supposed to play any role in the evaluation of costs.

7. *Installation Globale Normand Morin & Fils Inc.*, August 21, 1998.

Contract Negotiation and Award

Service Star submitted that it believes that a contract had, in principle, been awarded to it and that negotiations regarding final price calculations were underway. In this context, Service Star submitted that not only was it the sole responsive bidder with the lowest proposed price but, during the negotiations, the Department failed to comprehend that an opportunity for significant savings existed and proceeded to cancel the original tender in a discriminatory manner and in bad faith.

Propriety of Cancellation and Re-tendering

Service Star submitted that the Department's claim that its RFP was ambiguous and that this, in itself, was cause for cancellation cannot be supported. Service Star submitted that it was the only responsive bidder and that its proposal met all the pricing requirements of the RFP, including fixed costs for total pricing and marginal costs for spatial variations. Service Star further submitted that the fact that the Department could not comprehend its own request in the RFP, while regrettable, cannot be cause for the termination of either ongoing negotiations or the tender in total. Service Star further submitted that the Crown cannot invoke the escape clause under the "Rights of the Crown" as it did. For example, it is only proper that the Crown should exhaust the possibility of a particular invocation that it has decided to use, i.e., the right to negotiate with one or more bidders, before embarking upon another one, i.e. the right to cancel and/or re-issue a solicitation. Concerning the Department's reliance in this matter on the Tribunal's determination in *Installation Globale*, Service Star submitted that that case is distinguishable from the matter at hand and, therefore, irrelevant.

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

Article 1015(4)(a) of NAFTA provides that, to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the tender documentation and have been submitted by a supplier that complies with the conditions for participation. Article XIII(4)(a) of the AGP provides, in part, for the same. Article 506(6) of the AIT provides, in part, that 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 1015(4)(d) of NAFTA further provides that awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation. Article XIII(4)(c) of the AGP provides for the same.

What the Tribunal must determine, in this case, is whether the Department improperly cancelled this solicitation.

The RFP requires that bidders submit daily prices for all sub-areas (washrooms, common, offices, lounges, etc.) in each of the four types of areas (restricted, outlying, non-restricted and accommodations) to be cleaned. The RFP, as amended, also requires that bidders submit, for the same areas and sub-areas, prices on a "per square metre per day" basis. In addition, the RFP indicates that the daily prices are based on the

prices per square metre per day and notes that the latter prices will be the ones used to delete or add buildings or areas to the contract and to assess non-performance. The RFP, at page 12, further provides, under “**PRICING INSTRUCTIONS**,” that the “units of issue and the Pricing Basis as stated in [the RFP] are not to be altered in any way or the Bidder’s response will be considered non-responsive.”

The Tribunal notes that paragraph 7 of Amendment No. 001 adds to the original wording of the basis of pricing/payment provisions in the RFP. In this context, the lead-in text to item 05 that “prices are based on a price per meter²/diem” was not altered and continued to apply.

The Tribunal also notes that Service Star quoted both daily prices and prices per square metre per day for all units of issue specified in the RFP. However, in the Tribunal’s opinion, the per diem prices quoted by Service Star were not based on the prices per square metre per day that it quoted. Service Star, itself, recognized this in its comments on the GIR, where it states that its daily prices were meant to cover all fixed costs, while the prices per square metre per day that it quoted were to be used only for additions, deletions and/or non-performance and, therefore, were meant to cover only the marginal costs of such spatial variations.

The Tribunal can find no support in the RFP for Service Star’s interpretation on this point. In the Tribunal’s opinion, the pricing/payment provisions of the RFP clearly indicate that the daily prices are based on the prices per square metre per day and do not suggest the notion of fixed versus incremental costs. Further, there is no support in the RFP for Service Star’s view that the prices per square metre per day would be used only to accommodate spatial variations under the contract and that, therefore, these prices are irrelevant in computing the value of offers for evaluation purposes.

Further, the Tribunal observes that the three proposals still under consideration at the time of the evaluation of prices all contained deficiencies in their formulation of prices. One offer was abnormally low and was eventually withdrawn for that specific reason. The two other offers contained prices at variance with the units of issues or the pricing basis as set out in the RFP. In the Tribunal’s opinion, the Department, in accordance with the pricing instruction of the RFP, should have declared these two proposals non-responsive for that reason alone and should not have considered them any further. This was not done.

Given the particular structure of the evaluation methodology adopted in this instance to assess proposals, the Tribunal understands why the Department only found late in the evaluation process that its RFP was, in the circumstances, unworkable. This, however, does not explain why the Department did not apply the mandatory provisions of its pricing instructions and declare the proposals non-responsive. In the Tribunal’s opinion, in the circumstances, the Department should have decided, at that point, that the mandatory requirements had not been met, making the bids non-responsive. Although the Tribunal understands that the Department was motivated by good faith in trying to rehabilitate this RFP in order to save everyone costs and time, there is a point where it should have recognized that the extent to which it was revising and recalculating submissions was improper.

To be clear on this point, the Tribunal notes that the non-enforcement by the Department of the provisions in the RFP relating to the Work Force Reduction Program in the circumstances is not tantamount to not enforcing a mandatory condition. It is clear from the evidence that the Department intended the “Work Force Reduction Program” provision to be a mandatory requirement of this RFP. However, for reasons explained in the GIR, the Department failed to convey this requirement in its solicitation documents. On this basis, in the Tribunal’s opinion, it was proper for the Department not to apply this requirement to Service

Star's proposal and that of the other bidder, since the Department had failed to include this obligation in its solicitation documents.

Given the nature of the requirement at hand, including variable cleaning schedules for the differing areas and sub-areas to be cleaned, arriving at an annual cost in the instance required a specific formula. No such formula was set out in the RFP, and the Department eventually concluded that this was a fatal deficiency of its RFP. The computing of annual costs was necessary to arrive at the total estimated costs of proposals, which, in turn, was an essential criterion for the selection of a contractor. The Tribunal encourages departments to be very clear when asking bidders to provide costing information based on a formula or methodology which may be particular to the project being tendered.

The evidence shows that the parties' views diverge as to what exactly the Department was attempting to do on October 29, 1998, when it contacted Service Star about certain prices in its proposal. Service Star suggests that the Department was attempting to negotiate the terms of the contract, while, for its part, the Department suggests that it was seeking price clarification and price confirmation. Without deciding the exact nature of the above-mentioned discussion, the Tribunal is satisfied that, by the time the Department decided to cancel the solicitation in dispute, there remained no responsive proposals to consider for award. In the circumstances, the Tribunal determines that the Department did not act contrary to the provisions of NAFTA, the AGP and the AIT by canceling the solicitation and by inviting new proposals.

The Department has requested, in the GIR, the opportunity to make further submissions with respect to the award of costs in this matter. The Tribunal has decided that the circumstances of this case, insofar as they are known to the Tribunal, do not warrant costs against Service Star. Even though Service Star chose to pursue this complaint despite the Department's decision to re-tender the contract, it is entitled to do so. While Service Star's complaint is not valid, it was not without merit.⁸ Therefore, the Tribunal has decided that submissions on this matter are not necessary, and no costs will be awarded.

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 conducted in accordance to the requirements set out in NAFTA, the AGP and the AIT and that, therefore, the complaint is not valid.

Patricia M. Close
Patricia M. Close
Member

8. Canadian International Trade Tribunal, *Flolite Industries*, File No. PR-97-045, *Addendum*, August 7, 1998.