

Ottawa, Wednesday, August 12, 1998

File No.: PR-98-003

IN THE MATTER OF a complaint filed by Premium DataScan Services, 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.

Peter F. Thalheimer
Peter F. Thalheimer
Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination: August 12, 1998

Tribunal Member: Peter F. Thalheimer

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Heather A. Grant

Complainant: Premium DataScan Services, Inc.

Government Institution: Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

INTRODUCTION

On May 15, 1998, Premium DataScan Services, Inc. (Premium) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement (Solicitation No. V1734-7-0014/A) by the Department of Public Works and Government Services (the Department) of data entry and verification services to be applied to the record of employment forms of the Department of Human Resources Development (HRDC).

Premium alleged that the Department improperly accepted as compliant the proposal of Info Québec-France Inc. (the awardee) even though it failed to meet two mandatory requirements of the Request for Proposal (RFP). These requirements were: (1) to be ready to start services no later than April 1, 1998; and (2) to demonstrate, in the proposal, an understanding of the scope and objectives of the requirement. Premium alleged that it was aggrieved by these actions.

Premium requested, as a remedy, that it be reimbursed its costs and loss of profit and that the option to extend the term of the contract not be exercised.

On May 21, 1998, 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*² (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 June 16, 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 June 29, 1998, Premium 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.

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 December 10, 1997, a requisition was received by the Department to data capture and verify between 5.0 and 7.2 million record of employment documents on behalf of HRDC for a one-year period with an option to renew for two additional one-year periods. The current contract for this requirement was due to expire on March 31, 1998. A Notice of Proposed Procurement and an RFP for the requirement were posted on Canada's Electronic Tendering Service (MERX) and in *Government Business Opportunities* (GBO) on January 9, 1998. The requirement was identified as being covered by the *North American Free Trade Agreement*⁴ (NAFTA), the *World Trade Organization Agreement on Government Procurement*⁵ (AGP) and the *Agreement on Internal Trade*⁶ (AIT).

The RFP includes, in part, the following:

Section 1: A. INSTRUCTIONS TO BIDDERS/CONTRACTORS

SECURITY REQUIREMENT

- (1) The Contractor shall, at all times during the performance of the Contract, hold a valid Designated [origination] Screening (DOS) with approved Document Safeguarding at the level of PROTECTED B, issued by the Industrial Security Division (ISD) of the Department of Public Works and Government Services Canada.
- (2) Contractor personnel who required access to DESIGNATED information, assets or sensitive work sites shall EACH hold a valid ENHANCED RELIABILITY screening, granted or approved by ISD.
- (3) The Contractor SHALL NOT perform any DESIGNATED Automatic/Electronic Data Processing and/or production until ISD has issued written approval. After approval has been granted, these tasks may be performed at the level of PROTECTED B.
- (4) The Contractor shall comply with the provisions of:
 - (a) The Security Requirements Check List (SRCL), attached at Appendix "O"
 - (b) The Industrial Security Manual (June 1992).

Period of Contract

It is a mandatory requirement that services commence on April 01, 1998 and continue to be provided without interruption for a twelve month period ending on March 31, 1999.

Basis of Selection

To be considered responsive, a bid/offer must (a) meet all the mandatory requirements of this solicitation and (b) obtain the required minimum of **70(%)** per cent of the points for the criteria which are subject to point rating specified in this solicitation. The rating is performed on a scale of **100** points.

Bids not meeting (a) or (b) above will be given no further consideration... The responsive bid with the lowest price per rated point will be recommended for award of a contract or issuance of a standing offer, as the case may be.

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

TECHNICAL PROPOSAL:

MANDATORY CRITERIA

- (1) Company must be ready to start services no later than April 01, 1998.
- (4) Turnaround time shall not exceed twenty (20) calendar days as specified herein.

POINT-RATED CRITERIA

POINTS

- | | | |
|-----|---|----|
| (2) | Demonstrated understanding of scope and objectives
Provide sufficient detail to demonstrate your grasp of the requirement and your competence to meet it. Describe the team, reporting structure, and clearly demonstrate the competence, and ability of the proposed team to complete the work, risk of non-performance, commitment to this field of work | 50 |
| (4) | For turn-around time completed within 15-19 days | 07 |
| | For turn-around time completed within 12-15 days | 03 |

TOTAL: 100 POINTS

APPENDIX "A" - STATEMENT OF WORK2.3.5 **VERIFICATION:**

Each [record of employment] must be one hundred percent (100%) verified.⁷

On February 13, 1998, the Department issued Amendment No. 004 to the RFP which included, in part, the following:

QUESTION: - Mandatory Criteria - Technical Proposal

If a bidder is a one person company, where the owner is the only employee, and is unable to hire additional workforce until award of the contract and answers "yes" to the mandatory requirement to start this work no later than April 1, 1998. Will this bidder meet the mandatory requirement Point (1), simply by answering "yes" or do you have a method or procedure to verify that this bidder is truly able to start this work on the stated date. What happens on April 1, 1998 if this bidder is unable to start this workload?

ANSWER:

The statement is intended to identify the start date of the contract and a Company must be prepared to begin at that time for further consideration in the process. Assessment of the competence and ability of the proposed team to complete the work will be done from the feedback provided by the Bidder. The Department in conjunction with PWGSC will consider all necessary information to determine the successful bidder.

On February 19, 1998, the Department issued Amendment No. 005 to the RFP extending the closing date for the submission of proposals to March 2, 1998. As well, the amendment deleted item 4 of the rated criteria concerning turnaround time and the 10 evaluation points related thereto. It established a new basis for the selection of the successful bidder with the rating to be performed on a scale of 90 points instead of 100 points.

7. "One hundred percent verified" refers to the double entry of all fields of information.

According to the Department, 13 proposals were submitted by 11 suppliers.

On March 16, 1998, HRDC completed the technical evaluation of the proposals. According to the Department, 8 of the 13 proposals submitted were evaluated as meeting the criteria set forth in the RFP. On March 25, 1998, after consultation and agreement with HRDC and the incumbent contractor (the incumbent), the Department informed bidders that the incumbent's contract would be extended by one month in order to provide time to complete the evaluation of the proposals. According to the Department, no bidder objected to this time extension.

While HRDC was completing the technical evaluation of the proposals, the Department was working on the financial evaluation of the proposals. In this regard, on March 3, 1998, the Department asked the awardee to confirm its unit prices. That same day, the awardee confirmed its prices by facsimile to the Department. On March 23, 1998, the Department asked the awardee to confirm that the rate quoted included all costs to perform double entry of all fields of each record of employment submitted for processing. Again, the awardee confirmed this by facsimile to the Department. On April 21, 1998, the Department contacted the awardee again, this time indicating its concern that the costs of all other bids received for double entry were significantly higher than the costs quoted by the awardee. On this basis, the Department required the awardee to review its submission and to confirm that it had not made an error in establishing its costs and that it could undertake the work as specified. That same day, the awardee responded by facsimile stating that there was no error in its price.

The awardee having been identified as the bidder with the lowest price per rated point proposal, HRDC chose to undergo a site visit of its facilities. The visit took place on March 25, 1998. A report on the site visit dated April 22, 1998, indicates, amongst other things, that the awardee has the capacity to do the work and to maintain the records of employment in a secure environment and, on this basis, recommends the awardee for contract award.

On April 29, 1998, following receipt of the site visit report and completion of the financial evaluation of the proposals, a contract was issued to the awardee for one year in the amount of \$547,400. The work was to commence on May 1, 1998.

In a letter dated April 30, 1998, the Industrial Security Division (ISD) of the Department informed the awardee that it had the authorization to hold "Designated" information and assets at the "Protected B" level at the location corresponding to its business address.

VALIDITY OF THE COMPLAINT

Premium's Position

Premium submits that the RFP calls for one of the largest data entry and data verification workloads ever contracted by a federal department in Canada and, therefore, that it requires a capacity far in excess of what the majority of Canadian data entry firms can provide. As such, the requirement demands the services of a professional and very capable service supplier. Though the largest and most capable firms in Canada responded to the RFP, according to Premium, two firms which can best be described as being in start-up mode, which include the awardee, participated in the solicitation and were recommended for contract award in spite of a state of non-readiness. Premium submits that the service requirement necessitates that consistent production volumes be accommodated from the first day of the contract in order to meet client-mandated production turnaround criteria.

Premium also submits that the RFP clearly indicates that the winning supplier could not begin work before obtaining security clearance; that personnel without a security clearance could not work on the contract; that personnel could not be security cleared by the ISD until the winning supplier received its security clearance; and that it was a mandatory requirement of the RFP that the successful company commence work by April 1, 1998. In this regard, Premium submits that serious bidders had 57 working days (from January 9, 1998, the date on which the RFP was posted on MERX and in the GBO, to April 1, 1998, the date established in the RFP as the date on which the work was to commence) to attain the necessary facility security clearance and enhanced reliability clearances for personnel to initiate work.

Premium further submits that the RFP was restricted to bidders which would have "Protected B" clearance and adequate numbers of personnel cleared to "Enhanced Reliability" as of April 1, 1998. Premium also submits that it can be stated with certainty that the awardee was not "prepared to commence work" even on May 1, 1998, as the awardee had only received its facility clearance on April 30, 1998. Accordingly, it could not have obtained personnel clearance for May 1, 1998.

Premium submits that, contrary to the Department's assertion, the fact that the evaluation period was extended by one month did not change the mandatory requirement in the RFP that bidders have the required security clearances as of April 1, 1998. On this ground alone, Premium submits that the awardee's proposal was clearly non-compliant.

Concerning the Department's assessment of the awardee's understanding of the scope and objectives of the requirement (point rated criteria, item 2), Premium submits that the methodology used by the Department to assess this criterion is highly unusual for an RFP of this value and complexity. Specifically, Premium submits that for the awardee not to have security clearance by late April 1998 does not show a commitment to the field of business. Premium adds that, as of March 25, 1998, the date of the site visit, the awardee did not have facility security clearance or security-cleared personnel and this, Premium submits, should have signalled to the Department that a significant risk of non-performance existed.

In respect of the scope of the work to be done, Premium submits that the awardee completely "missed the target" for a workload which requires full key verification. Indeed, Premium strongly suggests that any production plant would have difficulty averaging more than 12,000 keystrokes per machine hour. This was brought to the Department's attention by many authoritative sources. Further, considering the number of resources offered by the awardee (and, hence, its price), Premium submits that the assessment of the awardee's proposal on this point cannot be considered a matter of judgment alone. In fact, Premium submits that, since the one supplier which was neck-to-neck with the awardee withdrew its bid when it became fully aware that its price had to include full verification (i.e. double entry), this should have warned the Department about the credibility of the awardee's proposal.

Premium submits that the awardee's proposal clearly failed to demonstrate a proper understanding of the scope, the team and plant capacity required. For these reasons, Premium submits that the awardee's proposal should have failed at the time of evaluation.

Department's Position

The Department submits that, consistent with the obligations of the trade agreements (NAFTA, the AGP and the AIT), the RFP was structured to permit maximum possible competition and was not limited to bidders holding "Protected B" and "Enhanced Reliability" screening levels at the time of bidding. The security requirement stipulates that the contractor is required to hold certain security levels while

performing work under the contract. The Department submits that the awardee did hold the required security clearance at the time of commencement of the contract on May 1, 1998. The Department adds that the awardee, in its proposal, set forth detailed information regarding the company, including an itemized list of computer and other equipment, a list of personnel, the number of shifts per 24-hour period and security measures for carrying out the scope of work. Further, contrary to Premium's allegations, the site visit performed by HRDC confirmed that the awardee had the physical facilities, equipment and personnel necessary to carry out the requirements of the contract.

The Department further submits that its decision to extend the contract by one month was necessary because the evaluation of the proposals, in particular the carrying out of site visits and the assessment of the financial proposals, could not be concluded by April 1, 1998. In fact, numerous submissions made by the incumbent during the evaluation of the proposals raised matters which the Department chose to consider before contract award.

Concerning the awardee's evaluation with respect to point rated criteria, item 2, the Department submits that Premium would have the Tribunal substitute lower scores for those assigned by the evaluators. In the Department's view, where the procurement has been carried out in a procedurally fair manner, as was the case here, the Tribunal must defer to the judgment of the technical evaluators on specific scores.⁸ Further, the Department disputes the factual contentions made by Premium with respect to item 2 above. In HRDC's experience, the minimum rate per employee is 12,000 keystrokes per hour, while the range for data entry by staff is in the order of 15,000 to 21,000 keystrokes per hour. The Department submits that it evaluated the awardee's offer in accordance with the process described in the RFP and that a site visit was conducted to confirm the ability of the awardee to perform the work. In addition, the Department submits that it took appropriate action consistent with Article 1015(4)(b) of NAFTA to ensure that the pricing submitted by the awardee was all inclusive. Finally, a financial viability analysis of the awardee was performed and financial guarantees were secured before a contract was awarded.

In conclusion, the Department submits that the awardee's proposal was correctly evaluated in accordance with the criteria set out in the RFP. Accordingly, the Department requests that the Tribunal dismiss the complaint and award it its costs of defending the complaint.

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 also provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the relevant provisions set out in NAFTA, the AGP and the AIT.

Essentially, Premium alleges that the Department and HRDC improperly awarded a contract in this instance because the awardee was not in a position to commence work on April 1, 1998, as was required by the RFP and, furthermore, that the Department and HRDC overrated the awardee's proposal in terms of the awardee's understanding of the scope and objectives of the requirement.

8. See Canadian International Trade Tribunal, *Mirtech International Security Inc.*, File No. PR-96-036, June 3, 1997.

Article 1015.4(d) of NAFTA provides that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.” The AGP provides for the same at Article XIII(4)(c). As well, Article 506(6) of the AIT provides, in part, that, in the evaluation of bids, a Party must use the criteria set out in the tender documents.

The Tribunal must, therefore, decide whether the Department awarded the contract in this solicitation in accordance with the criteria and essential requirements set out in the RFP.

A mandatory requirement of the RFP is that a “[c]ompany must be ready to start services no later than April 01, 1998.” It is also a mandatory requirement of this solicitation that “services commence on April 01, 1998.” The RFP further specifies that the contractor shall, at all times during the performance of the contract, hold a valid designated origination screening with approved document safeguarding at the level of “Protected B” issued by the ISD. In addition, contractor personnel who require access to “Designated” information, assets or sensitive work sites shall each hold a valid “Enhanced Reliability” screening, granted or approved by the ISD.

Having reviewed the record, the Tribunal has concluded that the Department’s communication to bidders, dated March 25, 1998, by which the Department informed them that the incumbent’s contract would be extended by one month in order for the Department to finalize its evaluation of the proposals, in effect amended the April 1, 1998, commencement date of the contract, as set out in the RFP. Accordingly, the Department did not breach its obligations in respect of its evaluation of the proposals in accordance with the tender documentation.

In the Tribunal’s view, it is not reasonable to suggest that a contract could have been awarded and initiated before the evaluation of the proposals was complete. While it is evident that the Department’s intention was to evaluate the proposals and award the contract in time for it to be initiated on April 1, 1998, the Department was unable to meet this deadline. Accordingly, it communicated its intention to extend the incumbent’s contract by one month so that it could complete its evaluation of the proposals. This course of action was communicated to all bidders prior to April 1, 1998, and no objection was raised by any of the bidders. As this amendment necessarily altered the date of commencement of the contract, this, in turn, changed the date against which the proposals could be evaluated in terms of their preparedness for commencing the contract.

In any event, having said this, the Tribunal is satisfied from the examination of the record that the awardee was indeed prepared to commence work on April 1, 1998. The report of HRDC’s site visit on March 25, 1998, is particularly instructive on this point. The report of the government official who carried out the visit concludes: “[i]t was my opinion that [the awardee] had the capacity to do our work as well as maintain our forms in a secure environment. A dozen or so employees were present and [the President of the awardee] was eager to receive our decision in order to get started on the work asap.”

With respect to Premium’s allegation that the awardee did not have facility and personnel security clearances as of April 1, 1998, as required by the RFP, the Tribunal notes that the security requirements in the RFP clearly apply to the contractor and not to all bidders. Accordingly, these requirements were only applicable once the contract was awarded. There is a clear distinction established in the tender documents between the obligations of the bidder and those of the the contractor.

Concerning the rating of the awardee’s proposal by the Department and HRDC in terms of the awardee’s understanding of the scope and objectives of the requirement, the Tribunal is satisfied that the

Department and HRDC thoroughly considered this matter before awarding the contract to the awardee. The Department and HRDC reviewed and verified the awardee's responses, in particular in terms of its pricing, for greater clarity and assurances that the awardee understood the requirements of the contract. While Premium may have evaluated the awardee's proposal differently, the Tribunal is satisfied that the Department and HRDC conducted themselves according to the criteria and method for evaluation set out in the RFP. Furthermore, the Tribunal is of the view that the Department carried out its evaluation in accordance with its obligations under the trade agreements. For these reasons, the complaint is not valid.

Although the complaint has been determined not to be valid, in the Tribunal's view, there was a reasonable basis for Premium to bring the complaint in the first instance. Accordingly, no costs are awarded to the Department for defending the complaint. The Tribunal observes, however, that it would have been helpful if the Department had substantiated the reasons why it believes costs might have been warranted in the circumstances.

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

With respect to the Department's request for costs, the Tribunal is not prepared to award costs to the Department.

Peter F. Thalheimer
Peter F. Thalheimer
Member