

Ottawa, Friday, April 30, 1999

File No.: PR-98-045

IN THE MATTER OF a complaint filed by Ruitter Construction Ltd. 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.

Raynald Guay

Raynald Guay

Member

Michel P. Granger

Michel P. Granger

Secretary

Date of Determination: April 30, 1999

Tribunal Member: Raynald Guay

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Gerry Stobo
Tamra Alexander

Complainant: Ruitter Construction Ltd.

Government Institution: Department of Public Works and Government Services

Ottawa, Friday, April 30, 1999

File No.: PR-98-045

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

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

STATEMENT OF REASONS

COMPLAINT

On February 8, 1999, Ruiter Construction Ltd. (Ruiter) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning a procurement (Solicitation No. TPD W1PW1-8-J004/000/A), by the Department of Public Works and Government Services (the Department) for the provision of construction services for the renovation and fit-up of the Communications Security Establishment (CSE) offices, located at 1500 Bronson Avenue, Ottawa, Ontario.

Ruiter alleged that, contrary to the provisions of the *Agreement on Internal Trade*² (the AIT), the Department did not: (1) clearly identify, in the solicitation documents, that the year 2000 compliance letter was required; (2) specify that the letter would be used in the evaluation of offers; (3) specify the method of weighting and evaluating the letter; and (4) specify that failure to submit the letter would lead to the disqualification of the offer. Ruiter also alleged that the Department did not provide sufficient time to bidders to disseminate the information needed to comply with the requirements of the solicitation documents.

After noting that the contract for this solicitation had been awarded to another contractor, M.P. Lundy Construction (Ontario) Ltd. (M.P. Lundy), and that, therefore, it was too late to have the contract assigned to it, Ruiter requested, as a remedy, that the Department provide it with a construction service contract on a project of similar size as the 1500 Bronson Avenue project or with service requirements of comparable value for design build, construction management and project management services. In the alternative, Ruiter requested that it be compensated for the profit that it would have earned on the 1500 Bronson Avenue project.

On February 11, 1999, the Tribunal informed the parties that the complaint had been accepted, in part, for inquiry, as it met the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*³ (the Regulations). Ruiter's ground of complaint alleging insufficient time to bid was not accepted for inquiry as, in the Tribunal's opinion, it was not filed within the time limits for filing a complaint set out in section 6 of the Regulations. This ground of complaint was known

-
1. R.S.C. 1985, c. 47 (4th Supp.).
 2. As assigned at Ottawa, Ontario, on July 8, 1994.
 3. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

or should reasonably have been known to Ruiters at the time that the tender documents were received by Ruiters sometime in September 1998.

At the time that the complaint was transmitted to the Department, the Tribunal requested the Department to make submissions to the Tribunal as to whether the CSE is a government entity covered by the AIT. On February 18, 1999, the Department wrote to the Tribunal indicating that, in its view, "since the CSE forms part of the Department of National Defence [DND] and DND's procurements are covered by the AIT, the CSE must also be subject to the AIT." On March 9, 1999, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On March 22, 1999, Ruiters 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.

PROCUREMENT PROCESS

On September 29, 1998, the Department posted a Notice of Proposed Procurement for the requirement detailed in the Invitation to Tender (ITT) on Canada's Electronic Tendering Service (MERX).

The ITT documents provided through MERX consisted of the mandatory site visit instructions, special instructions to tenderers (the Special Instructions), the tender form, the list of subcontractors and the plans and specifications "A" (the Specifications).

The Special Instructions include in section 1, "Tender Documents," a list of documents that form part of the tender and contract documents, which include, *inter alia*, "General Instructions to Tenderers" (the General Instructions). The documents listed as tender documents in subsection 1.1 of the General Instructions include the Specifications under paragraph 1.1.3 and the General Instructions under paragraph 1.1.4. The Special Instructions, at subsection 1.1, read, in part:

Submission of a tender constitutes acknowledgement that the Tenderer has read and agrees to be bound by these documents and the other documents listed in 1.1 of the General Instructions to Tenderers.

The same provision is included in subsection 1.2 of the General Instructions.

Subsection 2.1 of the General Instructions reads:

The tender shall be:

- .1 submitted on the Tender Form provided through the OBS [MERX]; substitute and facsimile copies will not be accepted;
- .2 based on the tender documents listed above;
- .3 correctly completed in all respects;
- .4 signed in accordance with the signing procedures set out herein;
- .5 accompanied by tender security as specified herein.

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

Subsection 13.1, "Acceptance of Tender," of the General Instructions reads:

Her Majesty may accept any tender, whether it is the lowest or not, or may reject any or all tenders.

The Specifications include an index, followed immediately by section 01016, "General Instructions." Paragraph 21 of section 01016 is entitled "**Year 2000**" and sets out the year 2000 requirements on the part of the general contractor, in part, as follows:

Year 2000

- .1 All products for this project must be supplied with the clear understanding that they will be unaffected by the Year 2000 computer system problems.
- .2 Furthermore, if the products contain any computer logic, a letter from the general contractor must be attached to his bid stating that all equipment and materials will be Year 2000 compliant.

Paragraph 28 of section 15010 of the Specifications, "Mechanical General Requirements," and paragraph 22 of section 16010 of the Specifications, "Electrical - General Requirements," include the same requirements.

Addendum No. 5 to the Specifications, dated October 14, 1998, modified each of the year 2000 compliance requirements of sections 01016, 15010 and 16010 of the Specifications by adding a "Test Record" requirement. The addendum did not delete the requirement that the general contractor submit the required year 2000 compliance letter.

The Specifications identify equipment containing computer logic as follows: section 16261, uninterruptible power systems; section 16721, fire alarm systems; and section 16431, secondary switchgear.

The ITT closed on October 30, 1998. Twelve firms submitted tenders to the Bid Receiving Unit (BRU), including Ruiters and M.P. Lundy. That same day, the BRU, in accordance with public opening procedures, read out the 12 tender prices. The BRU did not review the tenders for compliance and did not perform any evaluation of bids. That same day as well, the BRU contacted the bidders that attended the public opening of bids, including Ruiters, to advise them that the price read out for a particular bidder at the public opening of bids was incorrect and, as a result, Ruiters' tender was the lowest-priced bid.

On November 2, 1998, the Department sent a facsimile to Ruiters concerning a meeting to discuss security clearance. The facsimile reads, in part: "The meeting is arranged to discuss subject matter [Meeting for Security Clearance] with CSE [Security] Officer as follow[s] (prior to contract award)."

On November 4, 1998, the above-referenced meeting took place between the Department's project manager, Ruiters, subcontractors and the CSE security officer to discuss the security requirements of the project. According to the GIR, the meeting was arranged because the project manager was aware that Ruiters' bid was the lowest and that the high security environment for the project would necessitate a lengthy process for the security requirements. According to the Department, although the project manager anticipated that Ruiters would be evaluated as meeting all the requirements of the tender, at no time was Ruiters advised that a contract award had been made.

The Department's contracting personnel subsequently determined that Ruiters' bid did not contain the required year 2000 compliance letter. The second-lowest bid, from M.P. Lundy, did contain the required letter. On November 24, 1998, the Department awarded the contract in the amount of \$6,385,919, GST included, to M.P. Lundy. On November 25, 1998, the Department wrote to Ruiters, in part, as follows:

“Please be advised that your tender for the above noted project could not be considered by the Department because your firm failed to submit a letter certifying that equipment and materials containing any computer logic would be Year 2000 compliant (clause 21.2 section 01016 General Instructions).”

According to the GIR, four bidders for the project submitted the required year 2000 compliance letter with their tenders.

VALIDITY OF THE COMPLAINT

Department’s Position

The Department noted that the solicitation which is the subject of this inquiry is an ITT for a construction contract. ITTs, the Department indicated, do not include rated evaluation and selection criteria. The basis of selection for contract award is generally the lowest-priced bid submitted which complies with the requirements of the tender documents.

With respect to Ruiters’ contention that, as the lowest bidder, its bid should have been accepted regardless of its admitted failure to submit with its bid the year 2000 compliance letter, the Department submitted that Ruiters failed to meet all the requirements of the tender documentation.

The Department also submitted that Ruiters’ contention that the Department did not properly specify that the year 2000 compliance letter was to be submitted is unfounded. The requirement for the year 2000 compliance letter, the Department submitted, is explicitly stated three times, in different sections, in the tender documents under the heading “**Year 2000**” in bold print.

With respect to Ruiters’ suggestion that the General Instructions should have been revised to include a requirement for the year 2000 compliance letter, the Department submitted that no such amendment was required or appropriate. The Department submitted that the General Instructions clearly listed all the documents which applied and clearly required that tenders be based on the tender documents and be “correctly completed in all respects.”

Concerning Ruiters’ assertion that the Department should have included the request for the year 2000 compliance letter in the Special Instructions, the Department submitted that the Special Instructions set out the documents that form part of the tender and the contract documents. The Department also indicated that the tenderer was required to acknowledge having read and having agreed to be bound by all of these documents.

Moreover, as far as Ruiters’ allegation that the year 2000 compliance letter was not required by the Department’s Supply Manual “Solicitation Checklist,” the Department submitted that, although clause 6.332 of the Supply Manual contains year 2000 compliance warranty clauses, in the circumstances of this procurement, it was necessary to include an additional requirement for a year 2000 compliance letter from the general contractor. These separate obligations for year 2000 compliance, the Department submitted, were considered at the time of preparing the tender.

On the question of addendum No. 5 to the tender documents, the Department submitted that the year 2000 compliance requirement was never deleted. In fact, the Department submitted the addendum No. 5 supplemented the requirement by adding a test record requirement in each of three sections of the Specifications.

Finally, the Department is of the view that failure to submit the year 2000 compliance letter is significant. The general contractor, the Department submitted, is the entity with whom the Crown enters into privity of contract. The general contractor is responsible for the successful completion of the contract and that is the reason why a certification letter was required of the general contractor.

Ruiter's Position

With respect to the Department's policies and procedures regarding bid solicitation, Ruiter submitted that, over the years, contractors have become familiar with the Department's procedures and directives, including the written instructions on how tenders should be submitted, how revisions to submission requirements are specified and where special instructions are found. In this context, Ruiter submitted that requirements to include any information or documentation (i.e. the year 2000 compliance letter) not specified in the General Instructions should be specified in the Special Instructions. In this instance, Ruiter submitted that the Department failed to reflect the requirement for a year 2000 compliance letter in the Special Instructions. This change in the Department's practice, Ruiter submitted, led it and 7 of the 12 bidders that submitted tenders for this solicitation to believe that the letter was not required. At a minimum, Ruiter submitted that the requirement was certainly not clearly identified to bidders.

Furthermore, Ruiter submitted that its analysis of the solicitation documents in respect of the requirements for (1) a site visit, (2) use of bid depository, (3) tender security, (4) the list of equipment and materials to be submitted by mechanical contractors, and (5) the year 2000 compliance letter — and the bidders' responses relating thereto — indicates that the requirements specified in the Special Instructions and General Instructions were understood by all tenderers as mandatory requirements, while the two requirements not specified in the Special Instructions and General Instructions did not generate the same understanding amongst tenderers. The Department, Ruiter submitted, should clearly state in its solicitation documents those requirements which will lead to the disqualification of proposals.

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 provides, in part: "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." Therefore, the Tribunal must decide whether the solicitation documents clearly indicated that a year 2000 compliance letter had to be submitted by the general contractor with the bid and whether the Department acted according to the provisions of Article 506(6) of the AIT when it disqualified Ruiter's bid for failing to submit the required year 2000 compliance letter.

The Tribunal finds that the requirement to submit a year 2000 compliance letter with the bid was not deleted by the amendments to the solicitation. In fact, the Tribunal is of the opinion that the requirement was reinforced through addendum No. 5 to the solicitation. The Tribunal also observes that Ruiter did not submit with its bid the year 2000 compliance letter. This fact is not in dispute.

The Tribunal finds that the Specifications indicate clearly in three separate places (paragraph 21 of section 01016, paragraph 28 of section 15010 and paragraph 22 of section 16010), under the heading “**Year 2000**” in bold print, that, if products offered by a bidder contain any computer logic, “a letter from the general contractor must be attached to his bid stating that all equipment and materials will be Year 2000 compliant.” Furthermore, the Tribunal finds that the Specifications are identified as a component document of the solicitation. Similarly, section 1 of the Special Instructions indicates clearly that the General Instructions document is also a component part of the solicitation documents. The Tribunal finds that the General Instructions clearly indicate, at subsection 1.2, that the submission of a tender constitutes acknowledgement that a bidder/tenderer has read and agrees to be bound by various documents, including the Specifications. Furthermore, the Tribunal is of the opinion that paragraph 2.1.3 of the General Instructions makes it clear that, to be declared compliant, a tender/bid shall be “correctly completed in all respects.”

On this basis, the Tribunal determines that the solicitation documents clearly indicated that bidders had to submit the year 2000 compliance letter with their bids. Furthermore, the Tribunal determines that the Department properly disqualified Ruiters’ bid, as it failed to include the required year 2000 compliance letter and, therefore, was in breach of paragraph 2.1.3 of the General Instructions that a tender shall be “correctly completed in all respects.” Accordingly, the Tribunal finds that the Department acted in accordance with the applicable provisions of the AIT when it disqualified Ruiters’ proposal and, therefore, that the complaint is not valid.

Ruiters submitted that the Department’s practice over the years may have created, within the bidder community, expectations as to where certain contract requirements might be found, thereby influencing the way bidders read solicitation documents and the importance that they attached to certain sections over others. The Tribunal recognizes that there certainly is merit in structuring solicitation documents in a predictable manner so as to facilitate their understanding by bidders, thereby allowing for the submission of the largest possible number of competitive bids. As well, the Tribunal believes that the Department can only benefit by emphasizing, in its solicitation documents, those essential requirements that may be new or limited to a particular project.

Nonetheless, in the Tribunal’s opinion, bidders must read all of the solicitation documents and comply with all their terms. In the absence of clear and precise instructions from the Department, bidders should never ignore or read selectively provisions of the solicitation. Provisions such as those contained in subsection 1.2 and paragraph 2.1.3 of the General Instructions can have serious consequences on bidders and on the qualification of bids.

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 do not warrant costs against Ruiters. While Ruiters’ complaint is not valid, it was not without merit.⁵ Therefore, submissions on this matter are not necessary, and no costs will be awarded.

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

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines, having considered the subject matter of the complaint, that the procurement was conducted in accordance with the requirements set out in the AIT and that, therefore, the complaint is not valid.

Raynald Guay _____

Raynald Guay

Member