

Ottawa, Monday, March 8, 1999

File No.: PR-98-033

IN THE MATTER OF a complaint filed by Polaris Inflatable Boats (Canada) 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 valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that any future rigid hull inflatable boat procurements for the Department of National Defence be conducted in a competitive manner, incorporating any compatibility requirements in the specification and/or evaluation criteria.

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

Patricia M. Close

Patricia M. Close

Member

Michel P. Granger

Michel P. Granger

Secretary

Date of Determination: March 8, 1999

Tribunal Member: Patricia M. Close

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Joël J. Robichaud  
Gerry Stobo  
Michèle Hurteau

Complainant: Polaris Inflatable Boats (Canada) Ltd.

Intervener: Zodiac Hurricane Technologies Inc.

Government Institution: Department of Public Works and Government Services

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### STATEMENT OF REASONS

#### COMPLAINT

On November 26, 1998, Polaris Inflatable Boats (Canada) Ltd. (Polaris) 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 intent of the Department of Public Works and Government Services (the Department) to procure (Solicitation No. W8482-9-0731/A), on a sole source basis from Zodiac Hurricane Technologies Inc. (Zodiac), six 24-ft. rigid hull inflatable boats (RHIBs) for the Department of National Defence (DND).

Polaris alleged that, by resorting to single tendering procurement procedures, the Department denied it equal access to fulfilling DND's need for RHIBs. Specifically, Polaris submitted that the Department's justifications to conduct this procurement on a sole source basis, i.e. (1) the proprietary nature of the design details, associated drawings and specifications for the boat, and (2) the requirement for compatibility of hauling and cradle equipment used for some 50 such vessels and related spare parts now with DND, are not convincing and that there are alternatives to limited tendering procedures.

Polaris requested, as a remedy, that this requirement be opened up to competition. It also requested that it be compensated for lost sales and related profits.

On December 2, 1998, the Tribunal informed the parties 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 in respect of the complaint and that, pursuant to section 30.13 of the CITT Act, it had decided to conduct an inquiry into the complaint. That same day, the Tribunal issued an order postponing the award of any contract in connection with this solicitation until the Tribunal determined the validity of the complaint. On December 7, 1998, the Department informed the Tribunal that a contract in the amount of \$990,979 had been awarded to Zodiac on December 3, 1998. Accordingly, on December 11, 1998, the Tribunal rescinded its postponement of award order of December 2, 1998. On December 15, 1998, the Tribunal informed Zodiac that it had been granted intervener status in the matter. On January 21, 1999, the Department filed a Government Institution Report (GIR) with the Tribunal

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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.

in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> On February 9, 1999, Zodiac filed its comments on the GIR with the Tribunal. On February 16, 1999, Polaris 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 October 26, 1998, the Department received a requisition for the purchase of seven Zodiac Model RIB PC<sup>4</sup> 24-ft. RHIBs for DND. The requirement was identified as being covered by the *Agreement on Internal Trade*<sup>5</sup> (the AIT). The requisition was accompanied by a letter dated October 23, 1998, from DND requesting the Department to limit the tendering on this requirement based on the proprietary nature of the technical data package (TDP) and the need to ensure compatibility with the existing equipment. According to the GIR, the Department determined, on the basis of previous knowledge of the proprietary nature of the TDP for this particular model of RHIB and the documents on file,<sup>6</sup> that Zodiac had sole proprietary rights to the RIB PC design drawings and moulds, including those for the hull, deck, console and any other molded part on the RIB PC. Accordingly, on November 19, 1998, an Advanced Contract Award Notice<sup>7</sup> (ACAN) was posted on *Canada's Electronic Tendering Service* (MERX) with a closing date of December 1, 1998.

### **VALIDITY OF THE COMPLAINT**

#### **Department's Position**

The Department submitted that the Zodiac Model RIB PC was first purchased through a competitive procurement process wherein seven firms, including Polaris, were invited to submit proposals and in which the matter of proprietary rights was clearly addressed in the solicitation documents. Therefore, the Department submitted that Polaris had equal opportunity to supply DND with its product, had it chosen to submit a proposal at that time.

Concerning Polaris' contention that the procedural disciplines for promoting equal access for suppliers have not been followed, the Department submitted that, in every subsequent purchase of these boats, accepted limited tendering procedures and policies were followed, including the publication of ACANs. Further, the Department submitted that, in all cases involving such purchases, there has been no challenge received to the contract awards.

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3. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.
  4. The Zodiac RIB PC was first procured in 1988 pursuant to a competitive "designer build" Request for Proposal. There are currently 60 identical boats in the Canadian Armed Forces supply system.
  5. As signed at Ottawa, on July 18, 1994.
  6. Clause 19.5 of Contract No. W8472-7-MP07/01-MC between Zodiac and the Crown, as well as correspondence dated February 6, 1997, from Zodiac to the Department.
  7. A notice of intent to solicit a bid and negotiate with only one firm. This is not a competitive bid solicitation notice. Suppliers, however, on or before the closing date indicated, may identify their interest and demonstrate their capability to perform the contract.

Concerning Zodiac's proprietary rights with respect to the RHIB model Zodiac RIB PC, the Department submitted that Polaris is mistaken in its belief that only the drawings relating to overall form and style are proprietary. On the contrary, the Department submitted that the specifications or individual dimensions of any item, once combined into an entire product, become protected as part of that particular design. On the issue of the proprietary rights of spare parts, the Department submitted that most of the individual parts of the Zodiac Model RIB PC are manufactured by Zodiac using its own designs, materials, tooling, moulds, etc. Consistent with standard business practice, Zodiac will not sell its in-house components to another manufacturer or allow another manufacturer to use its moulds.

Polaris also asserted that limited tendering based on compatibility is unjustified, in that a qualified manufacturer can conform to a given specification. The Department submitted that, although correct in principle, Polaris' assertion does not apply to the circumstances of this procurement, since Zodiac's design is protected from infringement by other manufacturers. Furthermore, the Department submitted that the requirement for the dimensions and weight of each boat to be identical is to ensure compatibility with the existing fleet and related fitted and auxiliary equipment and spare parts and to enhance the safety and health conditions of the operating crew.

With respect to Polaris' argument that another company could develop a generic TDP for boats which meet DND specifications, the Department submitted that, in this particular case, where only six more boats are added to the existing RHIB fleet, such an approach would not make economic sense, that is, pay another firm to develop a generic TDP and solicit bids at a time when the Zodiac Model RIB PC is due for replacement in the near future. In this regard, the Department submitted that DND is currently preparing a new statement of requirements for its next generation of RHIBs. This document, when ready, will be used as part of the competitive process with the intent to standardize future purchases of RHIBs over a specific period of time.

### **Zodiac's Position**

Zodiac concurs with the facts and reasoning set out in the GIR. It submitted that an NMSO merely qualified its products to be purchased by the Department and applicable government agencies if and when they choose to do so. Accordingly, notwithstanding the issuance of an NMSO, it remains for Zodiac to demonstrate the value and superiority of its vessels relative to those of other firms which have been issued NMSOs. Therefore, Zodiac concluded that the selection of Zodiac RHIBs over those of its competitors is based entirely on the superiority of its products, and not on any unfairness or impropriety in the procurement process.

### **Polaris's Position**

Polaris submitted that it has been over 10 years since the original Zodiac Model RIB PC was first procured. During this period, Zodiac has benefited from the DND procurement and support service needs for this type of craft. The current sole-source procurement for 7 additional vessels amounts to 67 units being purchased in more than 10 years.

Polaris submitted that, although, at the time of the issuance of the original award, Zodiac was the only manufacturer in a position to produce these boats, since then, other qualified manufacturers have emerged which would have competed if given the opportunity. Therefore, Polaris submitted, the procurement at issue is a further loss of opportunity for those other Canadian manufacturers.

With respect to the arguments on proprietary rights, while it appreciated the difficulties that they imposed and the limitation within the purchasing structure for DND boats, Polaris submitted that 10 years is an excessive period for non-competitive procurements when other qualified suppliers exist. Furthermore, Polaris submitted that the original contract, along with the subsequent ones, was structured in such a manner as to effectively limit procurements to a single source and provide that source with ongoing substantial amounts in sales revenue. This situation, Polaris submitted, has caused the company a substantial loss of opportunity.

In concluding, Polaris noted that DND is currently in the process of completing its statement of requirements for the next generation of RHIBs and that all qualified manufacturers will have the opportunity to bid.

### **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 of the AIT.

Article 501 of the AIT provides that the purpose of Chapter Five, "Procurement," is "to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

Article 504(3)(b) of the AIT provides that parties and entities will not adopt measures which would have the effect of biasing technical specifications in favour of, or against, particular goods to avoid the obligations of Chapter Five of the AIT.

Article 506(12) of the AIT provides, in part, as follows:

12. Where only one supplier is able to meet the requirements of a procurement, an entity may use procurement procedures that are different from those described in paragraphs 1 through 10 [i.e. competitive procurement procedures] in the following circumstances:

- (a) to ensure compatibility with existing products, to recognize exclusive rights, such as exclusive licences, copyright and patent rights, or to maintain specialized products that must be maintained by the manufacturer or its representative.

What the Tribunal must determine, in this case, is whether the Department and DND met the test of Article 506(12)(a) of the AIT in deciding to conduct this procurement on a sole source basis with Zodiac. As well, the Tribunal will consider whether DND and the Department initiated this solicitation on the basis of a restrictive specification.

The Tribunal observes that DND had available to it, as early as November 1987, a complete generic specification for 24-ft. rigid inflatable boats for the Canadian Patrol Frigate. These are the technical specifications that were used by DND and the Department (at the time the Department of Supply and

Services) to compete the construction and supply of eight RHIBs on March 8, 1988.<sup>8</sup> The Tribunal also observes that the above-mentioned solicitation contained no indication, at the time, that the requirement being competed was the first of many other similar requirements to be procured over the following years or that the generic DND technical specifications used for the solicitation would not be used again to conduct similar procurements, but instead would be replaced by the design of the successful bidder, in the instance, the Zodiac Model RIB PC.

Subsection 20(5) of Solicitation No. 03MC.W8472-7-MP07, dated March 8, 1988, dealing with the rights associated with the drawings, engineering and associated lists (data lists), contained extensive provisions on the ownership and use of such rights<sup>9</sup> by the Government. The Tribunal notes, however, that the said provisions do not commit the Government to the exclusive use of the Zodiac Model RIB PC design for its future requirements. The provisions strictly address the ownership rights of the drawings and other matters, as well as how the Government or allied governments could use the drawings for limited application in specified and tightly circumscribed circumstances.

The Tribunal concludes from the above observations that the Department and DND were not, and are not, in any way committed to a particular design for RHIBs as a result of the exclusive rights that the Government decided to leave in the hands of Zodiac after the March 8, 1988, solicitation. As early as November 1987, DND had generic specifications that it could have used repeatedly to satisfy its requirements for RHIBs. DND chose not to do so, and instead, relied on a particular design, that of the Zodiac Model RIB PC. On that basis, DND proceeded to procure its requirements exclusively from Zodiac. This, in the Tribunal's opinion, is tantamount to a brand name or trademark type of specification and does not meet the requirements of Article 504(3)(b) of the AIT that technical specifications not be biased in favour of or against particular products.

The fact that the Department might have published ACANs in respect of all subsequent RIB PC procurements for DND does not, by and of itself, constitute a valid justification to procure by limited tender. The justification to invoke limited tendering procedures must exist before the ACAN methodology is announced and the fact that an ACAN is not challenged does not, by and of itself, constitute a valid

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8. Solicitation No. 03MC.W8472-7-MP07.

9. Subsection 20(5) reads as follows: The Government of Canada shall have "Limited Rights" only and shall "Hold in Confidence", all Engineering Drawings and Associated Data supplied under this contract that bears the Contractor's "Limited/Proprietary Rights Restrictive Legend". The Government of Canada shall have the right to use, translate into Canada's other official language, duplicate or disclose such technical data, in whole or in part, by or for the Government of Canada, with the express limitation that such technical data shall not, without the express written permission of the Contractor furnishing, such technical data be:

- a. released or disclosed in whole or in part outside the Government of Canada;
- b. used in whole or in part by the Government of Canada for manufacture;
- c. used by a party other than the Government of Canada, except for:
  - (1) Emergency repair or overhaul work only, by or for the Government of Canada, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, provided that the release or disclosure thereof outside the Government of Canada shall be made subject to a prohibition against further use, release or disclosure.
  - (2) Release to other Governments, for the furtherance of mutual defence of Canadian and such other Governments, only for information and evaluation within such Governments or for emergency repair or overhaul work by or for the Governments under the conditions of (1) above.

justification under the trade agreements<sup>10</sup> to invoke and/or implement limited tendering procedures. Simply stated, to put a procurement process to the test of an ACAN, even though this test might be completed without an appeal being lodged by a potential supplier, does not, in itself, constitute a valid justification to invoke limited tendering procedures under the trade agreements.

There remains for the Tribunal only to determine whether there exists, in this instance, a valid “compatibility with existing products” justification upon which to base the views of limited tendering procedures. The Department, in the GIR, recognized that a compatibility issue would not exist if manufacturers were required to conform to generic technical specifications. However, according to the Department, such an approach is not feasible in the circumstances, since Zodiac’s design is protected from infringement by other manufacturers. In the Tribunal’s opinion, DND is not restricted to this particular design. Indeed, it has possessed generic specifications for its RHIB requirements since March 1987. Rather, DND decided to rely on a particular design, that of the Zodiac Model RIB PC, for the past 10 years without any outside constraints to do so.

Interestingly, the GIR announces that DND is about to cease using this particular design and to compete for a new one on the basis of a revised statement of requirements. DND could have made such a decision at any time during the past 10 years, particularly in light of new competitive manufacturers appearing on the Canadian market. It may be true, as mentioned in the GIR, that, at any particular point in time, the economic attractiveness to potential suppliers of such an approach might vary. However, in the Tribunal’s opinion, once the Government has fully defined its requirements and the time horizon over which it will materialize, the economic attractiveness to suppliers of a particular approach must be left to the competitive forces in the market. The Government should not presume the outcome of such competition.

Considering the compatibility issue from the angle of the nature of the existing fleet and related fitted and auxiliary equipment and spare parts, the Tribunal is of the view that these factors do not, by themselves, constitute a valid justification to invoke limited tendering procedures under the AIT or other trade agreements. It may be that potential bidders may have to assume certain transition costs in proposing alternative products so that these can operate with the existing fleet and related fitted and auxiliary equipment, but this is part of normal need definition and normal competitive procurements. Similarly, the safety and health conditions of the operating crew can and probably should be considered in competing requirements. These have to be properly factored and weighed in the solicitation documents and related proposal evaluation and contract award criteria.

In its submissions, Polaris acknowledged that DND is currently defining its needs for the next generation of RHIBs and welcomed the opportunity extended to all qualified suppliers to compete for this requirement. Taking this into consideration and further considering that the current procurement of RHIBs is probably the last of its kind and further noting that the contract for this solicitation has been awarded, the Tribunal will not recommend that it be cancelled.

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10. The AIT, the *North American Free Trade Agreement*, 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), and the *Agreement on Government Procurement*, as signed at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).



**DETERMINATION OF THE TRIBUNAL**

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

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that any future RHIB procurements for DND be conducted in a competitive manner, incorporating any compatibility requirements in the specifications and/or evaluation criteria.

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

Patricia M. Close

Patricia M. Close

Member