

Ottawa, Monday, June 28, 1999

File No.: PR-99-006

IN THE MATTER OF a complaint filed by Quality Services International 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.

Anita Szlajak  
Anita Szlajak  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

Date of Determination: June 28, 1999

Tribunal Member: Anita Szlajak

Investigation Manager: Randolph W. Heggart

Investigation Officer: Dominique Laporte

Counsel for the Tribunal: Gerry Stobo  
Marie-France Dagenais

Complainant: Quality Services International Inc.

Government Institution: Department of Public Works and Government Services

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### STATEMENT OF REASONS

#### COMPLAINT

On April 19, 1999, Quality Services International Inc. (QSI) 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 the provision of ISO 9000<sup>2</sup> auditing services, on an as and when required basis, to the Canadian General Standards Board (CGSB), a constituent agency of the Department of Public Works and Government Services (the Department).

QSI alleged that the Department improperly decided not to evaluate its proposal because it included a dual rate structure. QSI alleged that it properly interpreted the requirement of the Request for a Standing Offer<sup>3</sup> (RFSO) and that, therefore, its proposal should have been evaluated.

QSI requested, as a remedy, that it be awarded a standing offer. In the alternative, QSI requested a settlement of \$203,000 for loss of company revenue and for loss of personal income and employment.

On April 23, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>4</sup> (the Regulations). On May 18, 1999, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>5</sup> On May 28, 1999, QSI filed its comments on the GIR with the Tribunal.

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1. R.S.C. 1985, c. 47 (4th Supp.).
  2. The ISO 9000 Series are quality standards established by the International Organization for Standardization to facilitate international trade of goods and services.
  3. The bid solicitation document used when seeking standing offers from potential suppliers. A standing offer is an offer from a potential supplier which allows the federal government to purchase frequently ordered commercially or non-commercially available goods and/or services directly from firms at prearranged prices, under set terms and conditions when and if these are required. A contract is formed when the government issues a call-up against the standing offer.
  4. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.
  5. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

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 January 13, 1999, the Department received a requisition from the CGSB for the provision of ISO 9000 auditing services. The services are needed to support CGSB's ISO 9000 listing and certification programs. The requirement is for a period of two years. On March 16, 1999, a Notice of Proposed Procurement (NPP) and an RFSO were posted on Canada's Electronic Tendering Service (MERX). The NPP indicates that the solicitation is covered by the *Agreement on Internal Trade*<sup>6</sup> (the AIT).

The RFSO reads, in part, as follows:

### **Improvement to the Requirement During Bid Period**

Should any Bidder consider that the specifications or Statement of Work (SOW) for this [RFSO] can be improved, the Bidder is invited to make suggestions, in writing, to the Contracting Officer named herein. The Bidder must clearly outline the suggested improvement as well as the reason for the improvement while maintaining a competitive environment. Suggestions will be given consideration provided they are received by the Contracting Officer no later than ten (10) working days prior to the bid closing date specified herein. Canada reserves the right to accept or reject any or all suggestions.

### **Proposed Basis of Payment**

The proposed Basis of Payment is to be submitted as a separate section within the proposal and should include the following elements:

#### **FEES:**

The Supplier will be paid firm hourly rates for auditing services and during travel status, GST/HST extra, FOB destination, as follows:

Lead Auditor/Auditor \_\_\_\_\_/audit hour - up to 500 hours

Travel Status \_\_\_\_\_/hour

Rates per audit hour in excess of 500 hours:

501-1000 audit hrs

1001 audit hrs +

Lead Auditor/Auditor \_\_\_\_\_/audit hour \_\_\_\_\_/audit hour

### **Basis of Selection**

The lowest priced responsive bid(s) will be recommended for issuance of a standing offer, reference **Annex C** for details.

### **Evaluation of Proposals**

Proposals will be assessed using the criteria specified herein based on the information the Bidder has been asked to provide in its proposal, namely:

- a) Technical Proposal
- b) Proposed Basis of Payment

Canada reserves the right to reject any bid which does not comply with this solicitation. Any deviation is to be clearly identified and supported with full details.

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6. As signed at Ottawa, Ontario, on July 18, 1994.

**Instructions to Proposers**

Bids should be submitted in the format requested. If the bidder feels that the terms and conditions of this solicitation will restrict it unnecessarily in any way, it should so state in its bid. Any deviations from the stipulated conditions should be given in detail with an explanation as to why they are being proposed. The Contracting Authority reserves the right to accept any bid as submitted without prior negotiations. It is the responsibility of the bidder to obtain clarification of the requirements contained herein, if necessary, prior to submitting its bid.

**ANNEX B****MANDATORY REQUIREMENTS**

Demonstrate proof of certification as an Auditor or Lead(Senior) Auditor by: CGSB, QMI, National Quality Institute, Toronto, Canada (NQI), RAB or IQA.

**ANNEX C****Method of Bidding and Evaluation Process**

For purposes of evaluation, bid totals per Region bid will be calculated by taking 90% of the audit hourly rate (LeadAuditor/Auditor, up to 500 hours) and 10% of the travel rate (Travel Status) and adding these two (2) amounts. These totals will be ranked from lowest to highest. Up to two (2) Standing Offers per Region, will be authorized, beginning with the lowest compliant bid per Region.

QSI raised questions during the bid submission period. These questions did not relate to the "Proposed Basis of Payment" section in the RFSO. Seven bids were received by the Department by bid closing on March 29, 1999, including one from QSI.

The CGSB completed the technical evaluation of the bids on April 5, 1999. Five proposals, including QSI's proposal, were evaluated as technically compliant, that is, as being fully capable of providing the required services.

On April 6, 1999, the Department conducted the financial evaluation of the proposals. At that time, the Department determined that QSI's cost proposal could not be evaluated because it included two different sets of rates for the single line items for "Lead Auditor/Auditor" in the "Proposed Basis of Payment" section.

On April 14, 1999, the Department notified bidders by facsimile of the outcome of the RFSO process. That same day, QSI telephoned the Department to find out why it had not been issued a standing offer. The Department informed QSI that it was impossible to evaluate its cost proposal because two different rates had been proposed for each of the single line items for "Lead Auditor/Auditor" auditing services and travel status.

**VALIDITY OF THE COMPLAINT****Department's Position**

The Department submitted that the RFSO, that is, the "Proposed Basis of Payment" section, read together with the evaluation procedure set out in Annex C, clearly necessitates the submission by bidders of only one rate for each line item in the RFSO. It also submitted that the evaluation of QSI's cost proposal was not possible because it contained a dual rate structure.

The Department argued that the RFSO clearly sets out one space for one rate to be submitted for each entry for auditing services provided by the lead auditor or auditor for each of the following four entries: audit hours up to 500 hours; audit hours from 501 to 1000 hours; audit hours from 1001 and up; and travel status hours.

The Department submitted that, because QSI decided to provide more than one rate for each of the line items required, it had to construct its own schedule setting out a dual rate structure. This, the Department asserted, constitutes a deviation from the requirements of the RFSO that was consequential because it resulted in a dual rate structure that was impossible to evaluate in accordance with the evaluation methodology set out in the RFSO.

The Department argued that, despite the warning contained in the RFSO, QSI failed to seek clarification of the requirements of the “Proposed Basis of Payment” section. Rather, it submitted its dual rate structure without asking the Department about the acceptability of such an approach. The Department added that no questions were raised by any potential supplier during the bidding period regarding the “Proposed Basis of Payment” section and that QSI was the only firm that proposed two rates for professional services and two rates for travel status. The existence of two sets of rates in QSI’s proposal precluded the Department from evaluating QSI’s cost proposal because the Department was not in a position to choose a set of rates to be used to evaluate the proposal. Furthermore, the Department submitted that any inquiry on its part to QSI regarding a choice between the two rate structures would have resulted in an impermissible bid repair.

The Department submitted that Annex C to the RFSO, which specifically sets out the cost evaluation methodology, is premised on the proposal, by bidders, of one rate for each of the line items for the “Lead Auditor/Auditor” services.

Concerning QSI’s allegation that a “lead auditor” and an “auditor” are not paid the same rate, the Department argued that the responsibilities of a “lead auditor” versus those of an “auditor” are almost indistinguishable. Therefore, the work performed by a “lead auditor”, or team leader of a group of auditors, and that of an “auditor” were to be billed at the same rate.

With respect to QSI’s submission that the standing offers awarded pursuant to the RFSO need not necessarily have been awarded to bidders with the lowest-priced bids, the Department submitted that this provision is not relevant in this instance. The decision not to award a standing offer to QSI did not relate to the specific pricing of one or the other of the rates proposed by QSI, but, rather, was based on the fact that QSI’s proposal could not be evaluated in accordance with the evaluation criteria and methodology set out in the RFSO.

The Department requested the opportunity to make submissions with respect to the award of costs in this matter.

### **QSI’s Position**

QSI submitted that, although it confirmed that one line was provided for the responses, it never agreed that the RFSO therefore required one response only. QSI argued that, although the RFSO contained one line, the RFSO, because it stated “Lead Auditor/Auditor” against that line, can and should be taken to mean that two rates were requested. Further, QSI submitted that it is an accepted principle of law that “the interpretation [of wording in a document] must be strictly made as against those who drafted it”.

QSI submitted that the Department's recognition that "lead auditor" and "auditor" are almost indistinguishable establishes that there is a difference, however slight, in the responsibilities attributed to each position. This distinction, QSI submitted, is recognized in authoritative documents.<sup>7</sup>

QSI submitted that the RFSO was poorly drafted. This led to an ambiguity, which resulted in QSI's proposal being considered unacceptable.

### **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. In this connection, 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.

The Tribunal must determine whether the Department acted in accordance with the provisions of the AIT when it decided not to evaluate QSI's cost proposal because it included a dual rate structure.

Article 506(6) of the AIT provides, in part, that "[t]he 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".

In its proposal, QSI submitted two sets of rates, one set applicable to the lead auditor and the other set applicable to an auditor. This is not in dispute. The Department reports that, of all bidders, QSI is the only one that proposed a dual rate structure in its response.

The Tribunal recognizes that the use of the oblique (" / ") in the "Proposed Basis of Payment" section of the RFSO can lead to different interpretations of the single line item "Lead Auditor/Auditor". While the oblique is without meaning when used on its own, it generally is used to signify "or", "and" or both.

The Tribunal acknowledges that the courts, faced with the issue of interpreting the oblique in a specific situation, have decided that its meaning depends upon the circumstances in which it is used in each case. In *Zellers Inc. v. Group Resources Inc.*,<sup>8</sup> the Ontario Court held that "the oblique stroke is, in and of itself, without meaning and totally dependent upon the circumstance in which it is used for its interpretation".<sup>9</sup>

The Tribunal finds that the Department's use of the oblique is a source of confusion which, in this case, seems to have misled QSI. That said, and as noted above, QSI bears the responsibility to ensure that its tender is compliant with the terms of the RFSO and is completely in accordance with the documentation provided.

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7. ISO 10011-1 and NQI certification/recertification.

8. 21 O.R. (3d) 522, [1995] O.J. No. 5, January 4, 1995.

9. *Ibid.* (QUICKLAW) at 11.

In the present case, the “Proposed Basis of Payment” section of the RFSO can reasonably be interpreted to mean that the Department wanted bidders to provide one set of rates for the lead auditor and one set of rates for the auditor. Although there is a single line in the RFSO against each of the four entries for the rates for the “Lead Auditor/Auditor”, “audit hour - up to 500 hours”, “501-1000 audit hrs” and “1001 audit hrs+”, as well as for hourly rates while on travel status, in the Tribunal’s opinion, that fact does not conclusively establish that the Department wanted one hourly rate only for each one of the “Lead Auditor/Auditor” entries. For example, nothing prevented a bidder from putting two different rates on the single line provided, separated only by an oblique. More importantly, in the Tribunal’s opinion, the terms “lead auditor” and “auditor” connote two different sets of responsibilities, which a bidder might reasonably reflect by proposing two different rates. However, the Tribunal recognizes that the particular method used by the Department to convey this requirement (“Lead Auditor/Auditor”) also can reasonably be interpreted to mean that the Department wanted a single rate for both categories of auditors. On the other hand, the RFSO included under the sections “Improvement to the Requirement During Bid Period” and “Instructions to Proposers” and under Annex C, “Method of Bidding and Evaluation Process”, other provisions relevant to the matter.

The “Instructions to Proposers” section made it clear that it is the responsibility of the bidder to obtain clarification of the requirements in the RFSO, if necessary, prior to submitting a bid. The same section indicated that “[b]ids should be submitted in the format requested”. Annex C to the RFSO indicated that, for evaluation purposes, “bid totals per Region bid will be calculated by taking 90% of the audit hourly rate (Lead Auditor/Auditor, up to 500 hours) and 10% of the travel rate (Travel Status) and **adding these two (2) amounts**” [emphasis added]. It also indicated that the totals derived from the above exercise would be ranked from lowest to highest, with standing offers being authorized beginning with the lowest compliant bid per region. Finally, the “Improvement to the Requirement During Bid Period” section of the RFSO informed bidders that, if they were of the view that the specifications or statement of work could be improved, they could suggest improvements for the consideration and approval of the Department.

In the Tribunal’s opinion, the ambiguity detectable when reading the “Proposed Basis of Payment” section of the RFSO disappears when the section is read together with Annex C to the RFSO. Annex C refers to the audit hourly rate and the travel rate as if they were single rates. In fact, when describing how the evaluation would be done, the reference “adding these two (2) amounts” confirms definitely and unambiguously that the Department required a single rate for the auditor, whether a lead auditor or an auditor, and a single rate for travel status. If, as submitted by QSI, there had to be different rates for lead auditor and auditor, it is unclear to the Tribunal how the methodology for tabulating and ranking proposals set out in Annex C could have been made to work. In the absence of any rate-averaging scheme being set out in the RFSO to be used for evaluation purposes, it is also unclear to the Tribunal how a proposal offering two different sets of rates, such as that of QSI, could be ranked in one position only. The Tribunal is of the view that the Department was not at liberty to choose only one of the rates proposed by QSI for evaluation purposes nor to average the two rates. The Tribunal is satisfied that, in the circumstances, any clarification received from QSI as to what rate to use for the evaluation of its proposal would have resulted in QSI modifying its bid price after bid closing. This is not permissible.

Furthermore, the Tribunal is of the view that the above-mentioned provisions of the RFSO imposed an onus on QSI to seek clarification and, as appropriate, approval from the Department before it adopted a particular interpretation of the term “Lead Auditor/Auditor” over other possible interpretations and, on this basis, modify the format set out in the RFSO. By failing to do so, QSI exposed itself to a risk which, in the Tribunal’s opinion, it must assume. The Tribunal is not suggesting that the Department is without any



responsibility in the matter. Indeed, the Department is the author of the RFSO and is accountable for its contents. However, the Tribunal is satisfied that, when read in its entirety, the Department could reasonably conclude that the RFSO requested one hourly rate, and one rate only, for the auditing services of the lead auditor/auditor.

The Tribunal observes that the use of the oblique in drafting the terms and conditions of solicitation documents lends itself to interpretation difficulties and should be avoided. In circumstances where it cannot be avoided, then the meaning of the oblique should be set out clearly.

The Tribunal finds that, due to its selective reading of the RFSO, QSI adopted an interpretation of the term "Lead Auditor/Auditor" at variance with that set out in the RFSO when read globally. This led QSI to propose a dual rate structure in its proposal. Because of this and because of the evaluation scheme set out in the RFSO, the Tribunal is satisfied that the Department acted properly by not evaluating QSI's financial proposal.

### **DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines that the procurement was conducted in accordance with the provisions of the AIT and that, therefore, the complaint is not valid.

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 determined that the circumstances of this case do not warrant costs against QSI. While the complaint is not valid, it was not without merit.<sup>10</sup>

Anita Szlajak  
Anita Szlajak  
Presiding Member

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