CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, June 7, 1999

File No.: PR-98-050

IN THE MATTER OF a complaint filed by Douglas Barlett Associates 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 valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that Douglas Barlett Associates Inc. be compensated one third of the profit that it would have made, if any, if it had submitted a proposal for a price one dollar lower than that of Roy & Breton Inc.

Pursuant to subsections 30.15(4) and 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Douglas Barlett Associates Inc. its reasonable costs incurred in preparing a response to Solicitation No. EF937-8-0022/A and in relation to filing and proceeding with its complaint.

Peter F. Thalheimer
Peter F. Thalheimer
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Date of Determination:	June 7, 1999
Tribunal Member:	Peter F. Thalheimer
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Philippe Cellard
Complainant:	Douglas Barlett Associates Inc.
Counsel for the Complainant:	Marc C. Doucet
Government Institution:	Department of Public Works and Government Services

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STATEMENT OF REASONS

COMPLAINT

On March 1, 1999, Douglas Barlett Associates Inc. (DBA) 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 the procurement (Solicitation No. EF937-8-0022/A) by the Department of Public Works and Government Services (the Department) of office furniture for the Department of National Revenue (Revenue Canada).

DBA alleged that its proposal on the original solicitation was improperly set aside by the Department and that the re-solicitation was issued on the basis of a restrictive specification and in a manner which does not reflect normal practice in like circumstances.

DBA requested, as a remedy, to be compensated for lost profit.

On March 3, 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*[2] (the Regulations). On March 30, 1999, the Department filed a letter with the Tribunal in lieu of the Government Institution Report required by rule 103 of the *Canadian International Trade Tribunal Rules*.[3] On April 16, 1999, DBA filed comments on the Department's letter of March 30, 1999, 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 December 18, 1998, a Request for Proposal (RFP) with a solicitation closing date of January 27, 1999, was issued.

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.

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According to the Department, there were a French and an English version of the specification.

The English version of the specification, under "Scope," reads, in part, as follows: "The specification herein applies to the supply and manufacture of a desking system with a metal work surface supporting structure." The specification also indicates that the requirements contained therein are the minimum required features and components to be accepted under this solicitation.

The same document, under "Certification," reads: "All products proposed within this project shall [comply] and be certified under Canadian Government Standard Board (CGSB) Qualification Program List (QPL) to Government Purchase Description GPD-2."

On February 3, 1999, DBA wrote to the Department indicating that it understood that Roy & Breton Inc. (Roy & Breton) was the successful bidder. DBA also indicated that the RFP called for a desking system with a "metal work surface supporting structure," a product for which, it appeared to DBA, Roy & Breton was not certified.

According to DBA, on February 4, 1999, the Department advised it that Roy & Breton was the successful bidder in this solicitation. In answering DBA's query as to how this was possible, since Roy & Breton was not qualified for "GPD-2 Desking Systems with metal work surface supporting structure" but only for "laminate work surface supporting structure" (a different category of product than the one specified in the RFP), the Department indicated that the French version of the specification did not include the requirement for the "metal work surface supporting structure."

On February 10, 1999, the Department wrote to DBA formally answering DBA's letter of February 3, 1999. In the letter, the Department recognized that, due to an error on its part when the specification was translated, it turned out that the English and French versions of the specification were different in respect of the work surface supporting structure. Considering that the confusion was of its own making and that, in answering a question which DBA asked on January 4, 1999, the Department had indicated that Revenue Canada had no preference for metal versus laminated wood products and that any products certified under CGSB GPD-2 would be acceptable, the Department indicated that DBA and other bidders would be given the possibility to present new proposals for another certified product that complied with the revised specification. The letter added that DBA could not modify, in any way, the actual proposal that had been delivered to the Department's office on January 27, 1999.

The revised specification issued on February 10, 1999, by the Department no longer contained a requirement for the work surface supporting structure to be made of metal. The revised specification also included the following note:

> **N.B.: <u>If the new proposal that you intend to submit is for the exact same product as your original proposal, the modified proposal will be rejected.</u>**

On February 11, 1999, DBA wrote to the Department indicating that it found the Department's approach to solving the problem unacceptable. On February 15, 1999, the Department awarded a contract in the amount of $436,542.88 to Roy & Breton.

VALIDITY OF THE COMPLAINT

Department's Position

The Department acknowledged that there was a discrepancy between the English and French versions of the specification. When the Department discovered the discrepancy after DBA inquired into the reasons for not being awarded the contract, the Department decided to clarify the specification by changing the English version to conform with the French version. According to the Department, this had the advantage of making the RFP less restrictive by allowing all products qualifying under CGSB GPD-2 to be eligible.

On February 9, 1999, the Department issued a document entitled "Clarification of Specification and Request for Proposal" to the three bidders that had submitted proposals. According to the Department, the clarification was ambiguous, in that it invited suppliers to submit new proposals for a different product without making clear that their original proposals were still considered valid. The Department submitted that its intention, at that time, was to prevent suppliers from re-bidding the same product that they had bid originally with different terms and conditions. Furthermore, the Department indicated that its intention was to correct its error as expeditiously and as fairly as possible by giving bidders the opportunity to either maintain their original bids unchanged or submit new bids for a different product to meet the revised specification.

The Department conceded that DBA should be compensated for its bid preparation costs and the reasonable costs incurred in filing and proceeding with the complaint, subject to having the opportunity to make submissions with respect to the amount.

DBA's Position

In its letter of April 16, 1999, DBA argued that the clarification that the Department issued on February 9, 1999, did not conform with the intent of the tendering process, in that it simply had the effect of rendering compliant a tender which the Department had already received and which was not compliant with the English version of the specification.

DBA submitted that it is entitled to its loss of profit because its tender was fully compliant with the English version of the specification and was, in fact, the lowest tender meeting that version of the specification.

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 *North American Free Trade Agreement*[4] (NAFTA) and the *Agreement on Internal Trade*[5] (the AIT).

4. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).
5. As signed at Ottawa, Ontario, on July 18, 1994.

The Tribunal is of the opinion that, without the Department or any potential supplier being aware of the fact, due to an inadvertent error on the part of the Department when the specification was translated, this solicitation was initiated with different English and French versions of the specification. The English version of the specification restricted competition to "metal work surface supporting structure" products meeting CGSB GPD-2. The French version allowed any products, metal or laminated wood, which met the same standard. This difference is not disputed.

The discrepancy between the English and French versions rendered it impossible to know initially what the exact requirements were for this solicitation. This discrepancy amounted, in the Tribunal's view, to a breach of Article 1013(1) of NAFTA, which provides, in part, that, "[w]here an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders." Specifically, the documentation shall include: "(g) a complete description of the goods or services to be procured and any other requirements, including technical specifications, conformity certification and necessary plans, drawings and instructional materials;" and "(h) the criteria for awarding the contract." Similarly, Article 506(6) of the AIT provides, in part, that 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. This article has also been breached.

Article 1015(4)(c) of NAFTA provides that, "unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation." Article 1015(4)(d) also deals with the award of contracts and provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation."

When, at the time of bid evaluation, the Department discovered the situation, in the Tribunal's opinion, the Department was unable to determine a single winner for this solicitation as it intended, since two winners could have been chosen, one in accordance with the French version of the specification and another in accordance with the English version of the specification. In the Tribunal's view, any breach of Article 1015(4) of NAFTA flowed from the initial breach of Article 1013(1).

The Department admits that its attempt to correct the situation, through a revised specification, was flawed, in that it failed to communicate clearly to bidders that their original proposals were still valid. The Tribunal finds, however, that there existed a more fundamental problem with the Department's attempt to correct the situation. By preventing bidders from offering, in their new proposals, the same product as in their initial proposals, the Department overlooked the fact that the French version of the specification was less restrictive than the English version of the specification, which was limited to metal products. In the Tribunal's opinion, this is a material difference, in that Roy & Breton was able to structure and price its original proposal with the full knowledge of who its competitors might be, while DBA could fairly assume, in preparing its original offer, that the competition was restricted to manufacturers of metal products and, therefore, structure and price its proposal accordingly.

In the Tribunal's opinion, it follows that DBA was never given an equal chance to compete for this requirement and that it was deprived of a fair opportunity to win this contract.

For the above reasons, the Tribunal finds that the Department did not conduct the procurement in accordance with the requirements of the trade agreements. Therefore, the complaint is valid.

In the Tribunal's view, it is clear from the file and the revised specification that the French version of the specification was the version that properly reflected the requirements for the procurement at issue. If the initial English version of the specification had contained the same requirements as the French version, it is uncertain whether DBA would have won. It could have lowered the price for the product that it proposed or it could have submitted another product. Other bidders could also have decided to make proposals. At the very least, DBA, in order to have been the successful bidder, would have had to make a proposal at a price lower than the price submitted in Roy & Breton's compliant proposal.

The Tribunal is prepared to award DBA compensation for the lost opportunity to receive and profit from this contract. Given that there were three firms bidding on the contract and that, in a fair contest, it seems that any one of them might have been the successful bidder, it is the Tribunal's view that DBA would have had a one-in-three chance to win the contract were it not for the discrepancy between the two linguistic versions of the specification. Consequently, the Tribunal awards DBA compensation for one third of the profit that it would have made, if any, if the bid it would have made had, in fact, been the one selected. Because DBA would have had to underbid Roy & Breton, the Tribunal feels that the profit calculation should be based on DBA making a bid for a price one dollar lower than that of Roy & Breton.

The Department is prepared to reimburse DBA its reasonable costs incurred in pursuing this complaint and in submitting a response to this solicitation. The Tribunal will award DBA its reasonable costs incurred in pursuing this complaint. Due to the Department's errors, DBA incurred costs in the preparation of its response to this solicitation without having an equal opportunity to be successful. Therefore, in addition to its recommendation for compensation for the opportunity that DBA lost to profit from this procurement, the Tribunal will award DBA its reasonable costs incurred in filing its proposal.

DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that the Government compensate DBA one third of the profit that it would have made, if any, if it had submitted a proposal for a price one dollar lower than that of Roy & Breton.

Pursuant to subsections 30.15(4) and 30.16(1) of the CITT Act, the Tribunal awards DBA its reasonable costs incurred in preparing a response to Solicitation No. EF937-8-0022/A and in relation to filing and proceeding with its complaint.

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