

Ottawa, Friday, November 5, 1999

File No.: PR-99-016

IN THE MATTER OF a complaint filed by Métro Excavation inc.
and Entreprise Marissa inc. under subsection 30.11(1) of the
Canadian International Trade Tribunal Act, R.S.C. 1985
(4th Supp.), c. 47;

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.

Arthur B. Trudeau
Arthur B. Trudeau
Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination:	November 5, 1999
Tribunal Member:	Arthur B. Trudeau
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Dominique Laporte
Counsel for the Tribunal:	Philippe Cellard
Complainants:	Métro Excavation inc. and Entreprise Marissa inc.
Counsel for the Complainants:	Sylvain Trudel
Intervener:	Verreault Navigation inc.
Counsel for the Intervener:	Peter E. Kirby
Government Institution:	Department of Public Works and Government Services

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STATEMENT OF REASONS

INTRODUCTION

On July 8, 1999, Métro Excavation inc. and Entreprise Marissa inc. (Métro/Marissa) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. EE517-9-0001/A) by the Department of Public Works and Government Services (the Department) for the Department of Fisheries and Oceans for the supply of annual maintenance dredging services in a sedimentary part of the St. Lawrence Seaway, downstream from Quebec City, in the channel section commonly known as the "North Traverse".

Métro/Marissa maintain that their proposal fully abides by the spirit of the specifications and that, consequently, the Department's rejection of their proposal contravenes Article 504(3) of the *Agreement on Internal Trade*² and constitutes an unjustified exclusion from the bidding process. Métro/Marissa further maintain that the Department's constant refusal to consider seriously and objectively their proposal and the Department's statements in this case show that the Department is contravening Articles 504(2)(a) and (b)³ and 504(3) of the *AIT*, in that it is discriminating between the goods and services offered by Métro/Marissa and those offered by Verreault Navigation inc. (Verreault). Métro/Marissa initially maintained that the Department had written its technical specifications in such a way as to favour the goods and services of the successful bidder to the detriment of the goods and services of Métro/Marissa. In their comments on the Government Institution Report, however, Métro/Marissa revised their position and maintain that they are not disputing the legitimacy of the Department's requirement for a certain type of dredge.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter *CITT Act*].

2. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter *AIT*].

3. Article 504(2) of the *AIT* reads as follows:

With respect to the Federal Government, paragraph 1 means that, subject to Article 404 (Legitimate Objectives), it shall not discriminate:

(a) between the goods or services of a particular Province or region, including those goods and services included in construction contracts, and those of any other Province or region; or
(b) between the suppliers of such goods or services of a particular Province or region and those of any other Province or region.

Métro/Marissa assert that the contract was rightfully theirs, as they were the lowest qualifying bidders, and request, as a remedy, that the contract be awarded to them.

On July 15, 1999, the Tribunal informed the parties that it had decided to conduct an inquiry into the complaint, as it met the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁴ On August 3, 1999, the Tribunal granted Verreault intervener status. On August 31, 1999, the Department filed with the Tribunal a Government Institution Report in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On September 21, 1999, Métro/Marissa and Verreault filed their comments on the Government Institution Report.

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 June 3, 1999, a Notice of Proposed Procurement (NPP) was posted on Canada's Electronic Tendering Service (MERX). The NPP stated that the procurement was covered by the *AIT*. The general instructions of the solicitation stipulated, *inter alia*, as follows:

- | | |
|---|--|
| 2 General
<u>Information</u> | .1 Type of equipment required Self-carrying trailing suction hopper dredge.

Work period..... July 21, 1999, to October 31, 1999 |
| 12 Protection
<u>and Precautions</u> | .1 Completion of the work in such a way that normal operations of users of the St. Lawrence Seaway are not disrupted |

[Translation]

In the "Measurement" section, under item 6 of the heading "Horizontal Limits," the solicitation states, *inter alia*, that the width of the channel is 305 m in the North Traverse.

The "Dredging" section of the solicitation stipulated as follows:

- | | |
|--------------------------------------|---|
| 1.5 Impediment
<u>to shipping</u> | .1 No dredge, derrick, barge, towing vessel, pipeline shall disrupt shipping traffic at any time. |
| 1.9 Floating
<u>equipment</u> | .1 The Contractor shall provide all dredging equipment having a sufficient capacity to dredge, transport and deposit the full volume of materials mentioned in the contract and within the work period specified herein. If the Contractor intends to use auxiliary dredging equipment, it must state this in the bid documents. All equipment needed to perform the dredging contract must be to the satisfaction of the Engineer.

.3 The Contractor must show in its bid, with supporting documents, that the equipment that it proposes is capable of completing the work within the period stated in the specifications. |

[Translation]

4. S.O.R./93-602 at 4547 [hereinafter *Regulations*].

5. S.O.R./91-499 at 2912 [hereinafter *Rules*].

The bid closing date was June 21, 1999. Two bids were received in response to this solicitation, namely, that of Métro/Marissa, the lowest bidders, and that of the intervener, Verreault. After evaluating the proposal of Métro/Marissa, the Department determined that their proposal did not meet the specifications, since, in its opinion, the proposed equipment was not a self-carrying trailing suction hopper dredge. On June 23, 1999, the Department awarded the contract to Verreault and, on June 25, 1999, sent a letter to Métro/Marissa which read, in part, as follows:

Your firm does not meet one of the main requirements of the specifications with respect to the type of equipment. Section 01005 - item 2 of the general instructions of the specifications states that the type of equipment required is a self-carrying trailing suction hopper dredge. The equipment you propose (barges and tugs) does not constitute a self-carrying dredge.

Your bid, therefore, cannot be accepted.

[Translation]

On June 25, 1999, Métro/Marissa sent a letter expressing their disagreement with the Department's decision:

We have only just received the decision for the award of the above-mentioned contract.

We do not understand and do not accept your decision, as we maintain more than ever that we fully respected the spirit of the specifications.

[Translation]

On July 5, 1999, representatives of Métro/Marissa met with the Department's personnel and delivered a letter specifying the type of equipment used for dredging and the planned changes to be made to it. On July 7, 1999, the Department signed a contract with Verreault.

VALIDITY OF THE COMPLAINT

Position of Métro/Marissa

Métro/Marissa maintain that the Department's decision to reject their proposal, on the ground that the proposed vessel, the *John F. Kennedy*, does not constitute a self-carrying trailing hopper dredge, is based on an erroneous, inequitable and arbitrary finding of fact. In support of their claims, Métro/Marissa maintain that the *John F. Kennedy* is indeed a dredge, as it is duly registered as such with the Registrar of Ships of the Canadian Coast Guard. Métro/Marissa also submit that, in a letter that they sent to the Department accompanying their proposal, they described the propulsion system of the *John F. Kennedy*, as well as the suction system and the means of transporting dredged materials. Métro/Marissa allege, *inter alia*, that their dredge and the other related equipment constitute a more modern and effective way of fulfilling the requirements of the specifications than the *Port Méchin* proposed by Verreault. Métro/Marissa argue that, at a meeting with the Department, the latter justified its decision based solely on partial references, showing what a self-carrying suction dredge is with only drawings of examples in support of this. It is the opinion of Métro/Marissa that other sources show that a self-carrying suction dredge may be of the kind that they are proposing.

Métro/Marissa further maintain that they informed the Department of the advantages of their dredge, as well as of the experience of their personnel. Métro/Marissa maintain that there is nothing in the solicitation document restricting the use of a tug in addition to the self-carrying dredge, or even preventing it from being multidirectional or the dredged materials from being moved on barges towed by tugs. In their comments on

the Government Institution Report, Métro/Marissa note that the Department only briefly inspected their dredge and did not inspect the rest of the equipment in their possession. Métro/Marissa maintain that their dredge can collect and transport dredged materials on board, but that they chose to use barges with a bottom-gate opening towed by tugs, which have the advantage, they argue, of not disrupting the operation of the dredge. Métro/Marissa therefore conclude that their dredge is also self-carrying. Métro/Marissa argue that it appears from the solicitation documents that the *John F. Kennedy*, once modified, would become a self-carrying trailing suction hopper dredge and that it must, therefore, be qualified as such.

Position of the Department

Contrary to the allegations of Métro/Marissa, the Department maintains that it did not unjustifiably reject the complainants' proposal. The Department maintains that the proposals were evaluated on the basis of the documents provided by the bidders on the bid closing date and following a visual inspection of the proposed equipment. The Department maintains that it acted in good faith and equitably and that the decision to reject the proposal of Métro/Marissa was made based on the fact that the proposal did not meet one of the main requirements stated in the specifications, namely, the need to have a self-carrying trailing suction hopper dredge.

The Department states that the requirement in the solicitation document for a self-carrying trailing suction hopper dredge was reasonable and justified, given the shipping conditions and the environmental considerations relating to the North Traverse. The Department maintains, in fact, that, because of the direction of the winds, the tide changes and the current caused by the tidal effect and by the meeting of fresh and salt water, this sector represents special shipping conditions that can quickly change. The Department also states that the North Traverse is used by large-tonnage, less manoeuvrable vessels that take up more space in the waterway.

The Department defines a self-carrying trailing suction hopper dredge as a vessel designed to dredge, collect and transport the dredged materials on board and to dump them at marine dumping sites. In citing, in support of this, various sources in the field of shipping, the Department states that the term self-carrying means that the vessel collects the sediment on board rather than in containers off the dredge. The Department also maintains that the self-carrying trailing suction hopper dredge has the advantage of being able to operate in heavy seas and in relatively strong currents, in peak sea traffic and in poor weather conditions. The Department maintains that the use of a suction dredge (pumps mounted on barges) has been tried in the past and that the results have been disastrous, as the dredging could not be completed on time and was done along a narrower breadth of the waterway. The Department also states that a self-carrying trailing suction hopper dredge is not required elsewhere in the St. Lawrence Seaway.

As for the fact that the proposed equipment did not meet the requirements of the solicitation, the Department maintains that the June 21, 1999, letter that accompanied the proposal of Métro/Marissa explained that the dredged sediments would be transported by barge to the marine dumping sites. The Department concludes that Métro/Marissa did not intend to use the *John F. Kennedy* to transport dredged materials, thereby confirming that the description of the equipment used does not comply with the description of a self-carrying trailing suction hopper dredge. Still according to the Department, there is nothing to indicate that Métro/Marissa intend to convert the *John F. Kennedy* to a self-carrying trailing suction hopper dredge, which would necessitate major alterations. As for the certificate of registration of the *John F. Kennedy* submitted by Métro/Marissa, the Department concludes that the certificate stated that it was simply a dredge, not a self-carrying trailing suction hopper dredge, while also specifying that the vessel

was not equipped with any mode of propulsion. In response to the argument that the solicitation allowed for the use of tugs and barges, the Department notes that the section to which Métro/Marissa refer concerns auxiliary equipment, which does not at all replace the basic requirement that the work be done with a self-carrying trailing suction hopper dredge.

The Department maintains that the additional documents submitted by Métro/Marissa after the bid closing date cannot be taken into consideration and, therefore, could not be evaluated.

Position of the Intervener, Verreault

Verreault maintains that the proposal of Métro/Marissa did not meet one of the mandatory requirements of the solicitation, namely, the use of a self-carrying trailing suction hopper dredge. Verreault maintains that several sources in the field of dredging show that the characteristics specific to self-carrying trailing suction hopper dredges are as follows: a vessel-type hull; three main functions, one of which is dredging; the transportation and dumping of dredged materials; the capacity to operate in heavy seas; and the collection of the dredged materials that have passed through a hopper throughout the operation. Also, according to one source cited by Verreault, what most distinguishes the self-carrying dredge from other types of dredges is that, during the dredging operation, it is not limited to one position, but can be easily moved. Concerning the proposal of Métro/Marissa, Verreault maintains that it consists in installing two engines and two pumping systems on a barge and that the fact that reference is made to three tugs clearly shows that, whatever engines are installed on the *John F. Kennedy*, they will not be designed to render it capable of sailing on its own in the middle of waterways. At best, maintains Verreault, the motors might give the *John F. Kennedy* some manoeuvrability, but tugs would be needed to bring it into position and manoeuvre it over the dredging site. Verreault finds the absence of a hopper on the *John F. Kennedy* to collect the dredged materials revealing, because of the fact that the vessel would not have been used for dredging while it was moving.

Verreault maintains that the nature of the work to be done in the North Traverse, and the conditions specific to the North Traverse, require the use of a self-carrying trailing suction hopper dredge, the only equipment capable of dredging effectively while moving. Verreault further maintains that the proposal of Métro/Marissa, which proposes using six floating devices, rather than a single device as proposed by Verreault, encumbers the operation considerably and increases the risk of an accident in the channel.

REASONS FOR THE 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 that the Tribunal is required to determine whether the procurement was conducted in accordance with the *AIT*.

Article 506(6) of the *AIT* reads, in part, as follows: "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". The Tribunal must, therefore, decide whether the Department correctly applied the provisions of the solicitation governing the evaluation and, in so doing, complied with the provisions of Article 506(6) of the *AIT*. To this end, the Tribunal must determine whether the Department was justified in determining that the equipment proposed by Métro/Marissa did not meet one of

the mandatory requirements of the solicitation, namely, the use of a self-carrying trailing hopper dredge to do the work. After carefully analysing the parties' submissions, the Tribunal determines that the Department correctly concluded that the proposal submitted by Métro/Marissa did not meet one of the mandatory requirements of the solicitation, namely, the use of a self-carrying trailing suction hopper dredge, as required by item 2 of section 01005 of the general instructions to the specifications. The Tribunal finds that the Department correctly determined that the proposal of Métro/Marissa had to be evaluated on the basis of the documents submitted before the bid closing date and that, therefore, the additional documents and information provided subsequently could not be considered. It is the Tribunal's opinion that the June 21, 1999, letter to the Department from the President of Métro/Marissa clearly indicates the intention to use barges pulled by tugs to transport the dredged materials to the dumping site. The Tribunal, therefore, considers that the Department was justified in concluding that Métro/Marissa did not intend to use the *John F. Kennedy* to transport the dredged materials to the dumping sites.

As for whether the equipment proposed by Métro/Marissa could be described as a self-carrying trailing hopper dredge, the Tribunal is of the opinion, based on various definitions from sources in the field of shipping and sea dredging,⁶ that what characterizes a self-carrying trailing dredge is its capacity to dredge while moving freely, to carry the dredged materials on board and to dump them later. After examining the proposal of Métro/Marissa, the Tribunal finds that the Department correctly determined that the *John F. Kennedy* was not a self-carrying trailing hopper dredge, since it was not supposed to transport the dredged materials on board. While the bid documents allowed the use of auxiliary equipment, it is the Tribunal's opinion that this did not change the basic requirement of the specifications that a self-carrying trailing hopper dredge be used to do the dredging work.

Métro/Marissa initially argued that the Department had written its technical specifications in such a way as to favour Verreault's goods and services to the detriment of their own, contrary to the provisions of Article 504(3) of the *AIT*. Had this ground for complaint not been subsequently withdrawn by Métro/Marissa, the Tribunal notes that it would not have been filed within the prescribed time limits. Section 6 of the *Regulations* stipulates the time limits within which a potential supplier must make its objection to a government institution or file a complaint with the Tribunal. Generally, a potential supplier must make its objection or file its complaint within 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to it. In the context of the solicitation at issue, it was published on June 3, 1999. The Tribunal is of the opinion that, given the fact that the requirement for a self-carrying trailing hopper dredge was clearly stated in the solicitation, Métro/Marissa should have filed, if such was their intention, a complaint with the Tribunal or made an objection to the Department within 10 working days of June 3, 1999.

6. G.E. Breerwood, "Dredging Equipment, Methods and Contracts", in *Dredging 94*, Vol. 1, 509 at 510; *Dredging for Development*, 4th ed., International Association of Dredging Companies and The International Association of Ports and Harbors, 1997; Department of U.S. Army Corps of Engineers, *Engineering and Design, Dredging and Dredged Material Disposal*, Engineering Manual No. 1110-2-5026, 1983; D. Yell and J. Riddell, *Dredging, ICE design and practice guide*, The Institution of Civil Engineers at 3-3 and 3-4; and *Ports and Dredging*, No. 110, IHC Holland, 1981.

DETERMINATION OF THE TRIBUNAL

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

In the Government Institution Report, the Department asked for an opportunity to make further submissions with respect to the award of costs in this matter. The Tribunal determines that the circumstances of the case do not warrant costs against Métro/Marissa. While the complaint is not valid, it was not without merit.⁷

Arthur B. Trudeau

Arthur B. Trudeau

Member

7. *Flolite Industries, Addendum* (August 7, 1998) (CITT).