

Ottawa, Wednesday, January 26, 2000

File No.: PR-99-032

IN THE MATTER OF a complaint filed by Quatratech Services 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.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination: January 26, 2000

Tribunal Member: Patricia M. Close

Investigation Manager: Randolph W. Heggart

Investigation Officer: Dominique Laporte

Counsel for the Tribunal: Philippe Cellard
John Dodsworth

Complainant: Quatratch Services Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the
Government Institution: Susan Clarke
Christianne Laizner

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STATEMENT OF REASONS

On October 12, 1999, Quatratch Services Inc. (Quatratch) 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 by the Department of Public Works and Government Services (the Department) for the services of a senior life cycle technologist in order to support combat data systems equipment (Solicitation No. 66002-9-PET3/000/C) for the Department of National Defence (DND).

Quatratch alleged that, contrary to the provisions of the *Agreement on Internal Trade*,² the Department has considered for award a proposal from ADGA Group Consultants Inc. (ADGA) which, at the time of bid closing on September 8, 1999, failed to meet several mandatory requirements of the solicitation documents relating to the status, availability, qualification and security classification of the personnel proposed. These actions, Quatratch alleged, unjustly favoured ADGA.

Quatratch requested, as a remedy, to be awarded the contract and to be awarded compensation for lost revenue and for its costs for preparing a bid and for filing and pursuing this complaint.

On October 20, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³ 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 October 21, 1999, the Department informed the Tribunal that a contract had been awarded to ADGA on October 15, 1999. Accordingly, on October 26, 1999, the Tribunal issued an order rescinding its postponement of award order of October 20, 1999. On November 4, 1999, the Tribunal granted the status of intervener to ADGA. On November 19, 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 December 6, 1999, Quatratch filed its comments on the GIR with the Tribunal and, on the same date, ADGA filed its comments on the complaint. On December 10, 1999, Quatratch filed comments on ADGA's submissions.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter *CITT Act*].
2. As signed at Ottawa, Ontario, on July 8, 1994 [hereinafter *AIT*].
3. SOR/93-602 [hereinafter *Regulations*].
4. SOR/91-499.

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

In June 1999, the Department issued a Request for Supply Arrangement on Canada's Electronic Tendering Service (MERX) in order to put in place supply arrangements (SAs) to procure professional, engineering and technical support services for DND. On August 1, 1999, the Department issued SAs to 68 qualified contractors across Canada. On July 21, 1999, the Department received a requisition from DND for the services of a senior life cycle technologist in order to support combat data systems equipment. On August 12, 1999, the Department sent a Request for Proposal (RFP) to the 18 contractors that had been issued an SA for the required occupational category.

The RFP reads, in part:

INSTRUCTIONS TO BIDDERS:

7. In order to be declared compliant with this Request for Proposal:
 - b) The bidder must submit résumés of the personnel proposed in sufficient detail to clearly demonstrate that they meet or exceed all of the required qualifications detailed in the Statement of Work. The bidder shall clearly demonstrate in the résumé(s) submitted that the qualifications of the individual(s) proposed meet the mandatory requirements of Annex "B" of the Request for Supply Arrangement (RFSA) 66002-9-PET3/000/C, as well as any additional required qualifications detailed in the SOW.
8. AVAILABILITY AND STATUS OF PERSONNEL

Availability of Personnel

The Bidder certifies that, should it be authorized to provide services under any contract resulting from this solicitation, the person(s) proposed in its bid will be available to commence performance of the work within ten (10) **working days** from contract award, unless otherwise specified herein, and will remain available to perform the work in relation to the fulfillment of this requirement. **Proposals received where the proposed personnel [cannot] commence providing the required service(s) within ten (10) working days of the date of contract award will be declared non-compliant.**

Articles 1.0, "Security Requirements", and 12.0, "Personnel Status", of the SA contain, *inter alia*, the following provisions:

1.3 ...

SECURITY REQUIREMENT:

W8486-0-ZA01-C, W8482-9-FV00-C and W8485-7-UUFC-C

- (ii) Contractor personnel who require access to DESIGNATED/CLASSIFIED information/assets or sensitive work sites shall ***be a citizen of a NATO Member Country and*** EACH hold a valid personnel security screening at the requisite level of ENHANCED RELIABILITY, NATO CONFIDENTIAL or SECRET, granted or approved by CIISD.

12.0 PERSONNEL STATUS

- 12.1 The personnel of the Contractor providing the services shall be independent of direct control by servants of Canada and all contracts pursuant to a SA shall provide that Contractor personnel are not in any respect employees or servants of Canada.

The Statement of Work (SOW) reads, in part:

1.4 Security Requirements

The Contractor must demonstrate compliance with security requirements in accordance with article 1.0 of the Supply Arrangement (SA) as some of the work, data and equipment described herein are classified to Level II SECRET.

3.2 Special Qualifications

The Contractor shall provide the services of one Senior Life Cycle Technologist who meets the mandatory qualifications stated in para. 8.0, Annex B of the RFSA. The following additional special qualifications are also required:

- a. At least three years demonstrated experience out of the last eight years performing in-service LCMM activities for Naval Equipment (demonstrate by giving details of previous work experience);
- b. At least two years demonstrated experience within the last eight years supporting Naval Combat Data Systems consisting of Data Processing Sets, Data Bus Equipment and Display Equipment.

On September 8, 1999, the bid closing date, the Department received proposals from ADGA and Quatratch. On September 13 and 14, 1999, DND conducted its evaluation of the technical proposals and both proposals were found technically compliant. On September 15, 1999, the Department reviewed the financial proposals and determined that ADGA had the lowest bid. On the same day, it informed both bidders by telephone of the results of the evaluation.

On September 16, 1999, Quatratch sent a letter to the Department expressing the opinion that ADGA's proposal should be declared technically non-compliant based on the status, availability and qualifications of the personnel proposed and requesting the Department to investigate this complaint prior to final award of the contract. On September 17, 1999, during a telephone conversation, the Department provided its explanations in respect of the issues raised by Quatratch in its letter. On September 30, 1999, the Department received a facsimile from Quatratch raising a fourth ground of complaint relating to the security classification of the personnel proposed by ADGA. On October 12, 1999, Quatratch filed its complaint with the Tribunal and, on October 15, 1999, the Department awarded the contract to ADGA.

VALIDITY OF THE COMPLAINT

Department's Position

The Department submitted that the evaluation of proposals was completed impartially and in accordance with the evaluation criteria set out in the RFP. The Department further submitted that ADGA's proposal was evaluated properly and fairly and that it was awarded the contract because it was the lowest compliant bidder. In respect of the first issue raised by Quatratch relating to the status of the personnel proposed by ADGA, the Department submitted that article 12.1 of the SA is not a requirement to be applied in the evaluation of the bids, but rather is only intended to clarify the nature of the legal relationship between the Crown and the contractor's personnel. The Department further indicated that, at the time of his commencement of work under the contract, the individual proposed by ADGA was no longer an employee of the Crown and had obtained his release from the Canadian Forces.

In addressing Quatratch's allegation that the individual proposed by ADGA could not satisfy the requirement of section 8 of the RFP because he would not be available to commence work within 10 working days of contract award, the Department stated that this allegation was without merit. The Department indicated that, in fact, the candidate proposed by ADGA had submitted his request for release from the Armed Forces and was available to begin work the next working day after the contract award.

On the question of the evaluation of the proposals, the Department submitted that ADGA's proposed candidate was properly evaluated as having the experience required in accordance with paragraph 3.2 of the SOW. The Department submitted that the evaluation team concluded that the proposed candidate's extensive experience performing life cycle materiel management (LCMM) duties in the Project Management Office for the Maritime Coastal Defence Vessel (MCDV) combat and tactical systems would meet the in-service LCMM activities requirement. Furthermore, the Department indicated that the definition of "in-service stage"⁵ provides that the stage starts when the equipment is placed into service, but does not specify where these activities must be conducted. In addition, the Department submitted that, as the MCDVs, with respect to which the proposed individual had obtained his LCMM experience, had been "in-service" since about 1996, ADGA's claim of "in-service" LCMM experience was further validated.

In respect of the compliance of ADGA's proposed candidate with the security requirements contained in the solicitation documents, the Department submitted that the SOW, which incorporates the provisions set out in article 1.0 of the SA, uses the term "Contractor" and, therefore, applies only to the contractor's personnel. The Department argued that this requirement does not constitute an evaluation criterion in respect of the security clearance held by the proposed personnel at the time of bidding and that, therefore, Quatratch's submission that ADGA's proposal should have been disqualified on that basis is without merit. The Department further indicated that ADGA's proposed candidate received the security clearance approval at the "SECRET" level on October 29, 1999, and was awaiting approval of his clearance at the NATO "CONFIDENTIAL" level. Furthermore, the Department stated that, up until his receipt of the security approval, ADGA's candidate was restricted from having access to some of the information, assets and work sites.

Quatratch's Position

In respect of the personnel status issue, Quatratch submitted that, contrary to article 12.1 of the SA, the candidate proposed by ADGA was, at the time of bidding, a government employee still working for the Canadian Forces. Quatratch stated that, as all the terms, conditions and qualifications have to be met and demonstrated at time of closing, ADGA's proposal should have been declared non-compliant on that ground.

Regarding the availability of the personnel to commence the work within the prescribed time period stated in section 8 of the RFP, Quatratch submitted that ADGA's proposed candidate would not be, in fact, available to work within 10 working days from contract award, as he was still, at the time of Quatratch's submission, employed with the Canadian Forces. Quatratch further argued that the release process from the Canadian Forces takes about 30 days and can be shortened to approximately 20 days under special circumstances. Therefore, Quatratch submitted that, taking into account that it had been notified of the contract award on September 15, 1999, the individual proposed would not have been available to commence the work under the contract within 10 working days of contract award.

5. Department of National Defence, *Life Cycle Management Systems Guidance Manual*, 1993 at GL-E-5.

In respect of the experience of the personnel proposed, Quatratch stated that ADGA's candidate did not fulfill the special qualifications required in paragraph 3.2 of the SOW, i.e. three years experience performing in-service LCMM activities for Naval Equipment. Quatratch further submitted that a person other than ADGA's candidate has been in charge of the day-to-day provisioning and support of the MCDVs over the last four years. In addition, Quatratch argued that the Department should have conducted a thorough investigation of the qualifications of the individuals rather than a review of the curriculum vitae of the candidates.

About the security requirement issue, Quatratch argued that ADGA's proposed candidate did not hold a valid personnel security screening at the time of the solicitation closure, as required by article 1.3(ii) of the SA, and that, therefore, ADGA's proposal should have been declared non-compliant.

ADGA's Position

ADGA agrees with the Department's position set out in the GIR. On the question of the personnel status, ADGA submitted that the purpose of article 12.1 of the SA is to ensure that private contractor's employees do not fall within the jurisdiction of public sector unions. ADGA further argued that, as its candidate resigned from the Canadian Forces before the commencement of the work under the contract, he has, at no time, worked simultaneously for the Government of Canada and ADGA.

Regarding the availability of the personnel, ADGA replied that the release process from the Canadian Forces can in fact be done within 10 working days.

In addressing Quatratch's position that ADGA's candidate does not meet the mandatory qualifications required by subparagraph 3.2a. of the SOW, ADGA submitted that LCMM management experience refers to the process of materiel management in any step of the process, from purchase or procurement to disposal. ADGA noted that the individual proposed had the appropriate experience in the field of equipment procurement as a result of his position in the Armed Forces.

In respect of the security requirement issue, ADGA submitted that security clearances are not always required at the time of bidding. ADGA argued that article 1.3 of the SA did not form part of the bid requirement, but only required the proposed candidate to obtain security clearances before entering secured areas.

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". In the present case, the Tribunal must decide whether the Department awarded the contract in accordance with the criteria and essential requirements set out in the solicitation documents.

The Tribunal has carefully reviewed the evidence, as well as the submissions made by the parties, and is of the view that the Department did not violate the provisions of the *AIT* when it declared ADGA's proposal compliant.

Dealing, first, with the personnel status issue, the Tribunal is of the view that the Department did not breach its obligations in respect of the evaluation of the proposals. The Tribunal notes that article 12.1 of the SA clearly applies to "Contractor personnel" and is, therefore, applicable to the parties only once a contract is awarded. In the Tribunal's opinion, this article did not constitute an evaluation criterion that had to be taken into account by the Department at the time of bid evaluation.

On the question of the availability of the personnel, the record indicates that the Department informed both bidders on September 15, 1999, that it would be awarding a contract in the near future. Given that the original contract was extended for a one-month period, i.e. until the end of September, to allow the orderly completion of the solicitation at issue, and given the time needed to review the objections submitted by Quatratch, in the Tribunal's opinion, it was reasonable for the Department to award the contract on October 15, 1999. As well, while section 8 of the RFP provides that the persons proposed must be available to begin work within 10 working days from contract award, neither this clause nor the solicitation documents set any specific contract award date. The Tribunal finds no evidence indicating that the Department delayed the award of the contract to accommodate or to give preferential treatment to a particular bidder. Finally, the Tribunal is satisfied from the examination of the record that ADGA's proposal clearly stated that the proposed individual had made arrangements to be available to commence work within the time frame mentioned above.

With respect to Quatratch's allegation that ADGA's proposal should have been declared non-compliant on the basis that the proposed individual did not meet the experience required by paragraph 3.2 of the SOW, the Tribunal is of the view that there is no indication that the Department conducted the evaluation of proposals in a manner contrary to the provisions set out in the *AIT*. The Tribunal is satisfied that DND conducted a complete review of ADGA's proposal and that it documented its decisions in a satisfactory manner. On the precise question of whether the proposed candidate's LCMM duties in the Project Management Office for the MCDV combat and tactical systems meet the in-service LCMM activities requirement, the Tribunal finds the Department's conclusion reasonable and, therefore, will not disturb the Department's judgement on this point.

Concerning Quatratch's allegation that ADGA's candidate did not hold, at the time of bidding, the security clearances required by the solicitation documents, the Tribunal notes that both paragraph 1.4 of the SOW and article 1.3 of the SA use the term "Contractor" and, therefore, are only applicable once the contract is awarded. In addition, the application of article 1.3 of the SA is strictly limited to the contractor's personnel who require access to designated or classified information, assets or sensitive work sites, and DND was in a position to determine when the candidate was required to access designated or classified information. Furthermore, ADGA's bid clearly states the military security clearance that its proposed candidate had at the time of bidding and that arrangements had been made to transfer his security clearance. Given these points, the Tribunal is of the opinion that the Department did not breach its obligations under the *AIT*.

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 Quatratech. While Quatratech's complaint is not valid, it was not without merit.⁶ Therefore, submissions on this matter are not necessary, and no costs will be awarded.

DETERMINATION OF THE TRIBUNAL

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

Patricia M. Close
Patricia M. Close
Presiding Member

6. *Flolite Industries, Addendum* (7 August 1998), PR-97-045 (CITT).