

Ottawa, Wednesday, October 13, 1999

File No.: PR-99-017

IN THE MATTER OF a complaint filed by Liftow Limited under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47, 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.

Arthur B. Trudeau

Arthur B. Trudeau

Member

Michel P. Granger

Michel P. Granger

Secretary

Date of Determination: October 13, 1999

Tribunal Member: Arthur B. Trudeau

Investigation Manager: Randolph W. Heggart

Investigation Officer: Dominique Laporte

Counsel for the Tribunal: Philippe Cellard

Complainant: Liftow Limited

Government Institution: Department of Public Works and Government Services

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STATEMENT OF REASONS

On July 16, 1999, Liftow Limited (Liftow) 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) of a TCM forklift truck model FB25-6, or similar, for the National Research Council of Canada (NRC).

Liftow alleged that the Department disregarded the mandatory delivery requirement by awarding a contract to J.H. Ryder Machinery Limited (J.H. Ryder) which, allegedly, was not capable of meeting the July 30, 1999, delivery deadline. Liftow requested, as a remedy, that it be awarded the contract .

On July 21, 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. On August 16, 1999, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*³. On August 27, 1999, Liftow 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 April 19, 1999, the Department received a requisition from NRC for the purchase of a forklift truck with a trade-in. The equipment was required on an urgent basis since the existing forklift truck had become a safety hazard. On May 25, 1999, a Notice of Proposed Procurement (NPP) and a Request for Proposal (RFP) for the requirement were posted on Canada's Electronic Tendering Service (MERX). The requirement was identified in the NPP as being covered by the *North American Free Trade Agreement*⁴, and the *Agreement on Internal Trade*⁵ and stated that delivery was required by July 30, 1999.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter *CITT Act*].
2. S.O.R./93-602 [hereinafter *Regulations*].
3. S.O.R./91-499.
4. 32 I.L.M. 289 [hereinafter NAFTA].
5. As signed at Ottawa, Ontario, on 18 July 1994 [hereinafter *AIT*].

At page 2, the RFP, which was dated May 19, 1999, and indicated a closing date of June 21, 1999, reads, in part: "Description: Delivery: required by 30 July 1999 or sooner". In addition, Section 1:A of the RFP, entitled "INSTRUCTIONS TO BIDDERS/CONTRACTORS", reads, in part:

DELIVERY: ON OR BEFORE 30 JULY 1999

MANDATORY SPECIFICATIONS:

1. ELECTRIC FORKLIFT WITH PNEUMATIC TIRES

The RFP also indicated, in part, the following at page 7:

Basis of Selection

To be considered responsive, a bid must meet all the mandatory requirements of this solicitation. Bids not meeting all of the mandatory requirements will be given no further consideration. The lowest priced responsive bid will be recommended for award of a contract or issuance of a standing offer, as the case may be.

DELIVERY

The very best delivery we can make is _____.

According to the GIR, two proposals were received: one from J.H. Ryder for \$35,577.50, including GST, and one from Liftow for \$36,583.30, including GST. The proposals were evaluated against all the requirements of the RFP including delivery date. The proposal submitted by J.H. Ryder reads, in part: "DELIVERY ... LATE JULY 1999". A quotation attached to J.H. Ryder's proposal and part thereof reads, in part: "Delivery: To be arranged at time of order."

According to the GIR, the Department requested J.H. Ryder to clarify the delivery date in its submission. On June 29, 1999, the Department received a facsimile from J.H. Ryder confirming delivery by July 30, 1999. Because J.H. Ryder's proposal was evaluated as the lowest priced responsive proposal, J.H. Ryder was awarded a contract on June 29, 1999. The contract reads, in part: "Delivery: The contractor shall make the complete delivery by 30 JULY 1999 OR SOONER."

According to the GIR, on July 6, 1999, during a telephone conversation between the Department and Liftow, the contracting officer stated that the delivery date was not a mandatory requirement of the RFP. However, the particulars of J.H. Ryder's proposal and the evaluation of that proposal were not discussed.

On July 16, 1999, Liftow filed its complaint with the Tribunal.

On July 26, 1999, J.H. Ryder advised the contracting officer of a difficulty in meeting the contractual delivery date of July 30, 1999. On the same occasion, J.H. Ryder proposed a revised delivery date of September 25, 1999, for the vehicle specified in the solicitation and the delivery, by July 30, 1999, of a substitute forklift truck as a loaner until delivery of the contracted unit. It indicated that the loaner met or exceeded all physical and performance specifications set out in the contract, except for the tires which were solid cushion versus pneumatic. On July 28, 1999, J.H. Ryder confirmed the above offer in a facsimile addressed to the Department and asked to be advised of the suitability of this offer. According to the GIR, the Department's officials responsible for the administration of the contract accepted the offer, which was confirmed by the Department in a letter dated July 29, 1999. The letter reads, in part, as follows: "You

[J.H. Ryder] also mentioned in our conversation that the contracted unit would be delivered in approximately four weeks time from now.” On August 5, 1999, J.H. Ryder confirmed that the revised delivery date was September 25, 1999, as indicated in its original facsimile of July 28, 1999, to the Department. According to the GIR, on July 30, 1999, the Department received confirmation that the loaned forklift truck had been delivered.

VALIDITY OF THE COMPLAINT

Department’s Position

The Department submitted that J.H. Ryder offered, in its proposal, a delivery date of “late July 1999”, which date was clarified by J.H. Ryder, upon request by the Department, as being July 30, 1999. Accordingly, the Department submitted that it has correctly evaluated the proposals with respect to the delivery requirement.

Further, the Department acknowledged that the comments made to Liftow by one of its officials, to the effect that the delivery date was not a factor in the evaluation of proposals, were made in error. These comments, the Department argued, which were made subsequent to the evaluation of proposals and the award of a contract, had no bearing on the evaluation of proposals and did not correctly reflect how the proposals were evaluated. The evaluation of proposals clearly included an assessment of the required delivery date, as evidenced by the Department’s request for clarification on this point and J.H. Ryder’s response.

The Department added that it first received notice from J.H. Ryder, on July 23, 1999, that there was a difficulty in meeting the established delivery date in the contract and that, therefore, this information is not pertinent in determining whether the evaluation of proposals was conducted in accordance with the requirements and evaluation criteria set out in the RFP.

The Department finally indicated in the GIR that contract administration personnel determined that acceptance of J.H. Ryder’s offer of a loaner which met or exceeded the physical and performance specifications outlined in the contract was a reasonable and prudent solution, given NRC’s urgent requirement for the forklift truck and the inability to obtain such a vehicle from another supplier at that time.

Liftow’s Position

Liftow submitted that, based on its knowledge of the industry, it was aware that most companies typically do not stock the type of forklift truck required in the RFP and that the lead time to build such a truck would be a minimum of 12 weeks. Liftow pointed out that the revised September 25, 1999, delivery date accepted by the Department is typical of the time required to deliver a new factory order. Liftow submitted that, as a result of this delay and the Department’s acceptance of J.H. Ryder’s offer of a loaner, NRC is being forced to use, in the interim, a forklift truck in an application that has the potential of being unsafe.

Liftow further noted that it was never asked by the Department if it could still deliver, in a shorter time, a new unit which meets all the mandatory specifications.

Liftow submitted that J.H. Ryder's bid should have been deemed as non-responsive as soon as the Department was informed that J.H. Ryder defaulted on the mandatory delivery date by eight weeks. Liftow argued that to accept a substitute, a used forklift truck, which does not meet the specifications, in order to meet the delivery date, is not only unsafe but also unfair to the other bidders who could meet the delivery date with the proper forklift truck. To be fair and equitable to all suppliers and in hindsight, Liftow submitted that the evaluation criteria should have indicated that a loaner not meeting mandatory requirements would be acceptable on an interim basis until the contracted vehicle was delivered. No such reference was made in the RFP.

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* and *NAFTA*.

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." Paragraph 1015(4)(d) of *NAFTA* reads, in part: "award shall be made in accordance with the criteria and essential requirements specified in the tender documentation". Therefore, the Tribunal must decide whether the RFP clearly indicated that a specific delivery date was required and whether the Department acted according to the *AIT* or *NAFTA* when it awarded the subject contract to J.H. Ryder.

The Tribunal finds that the RFP indicates without ambiguity in two separate places (on pages 2 and 3) that the delivery was required on or before July 30, 1999. The Tribunal is of the opinion that the Department correctly evaluated the bids against the mandatory delivery date when it requested additional clarification from J.H. Ryder and finds that the Department did not act contrary to the provisions of the *AIT* or *NAFTA* when it awarded the subject contract on the basis of the confirmation of the delivery date by J.H. Ryder.

In respect of the subsequent events relating to the contracting process of the subject contract, i.e. J.H. Ryder's difficulty to meet the delivery date once the contract was awarded, as well as the loaner issue, the Tribunal has reviewed the information provided by the parties and is of the view that, in the present case, the Tribunal does not have jurisdiction to look into the matter. The Tribunal determines that this portion of the complaint does not concern any aspect of the procurement process within the meaning of Article 514(2)(a) of the *AIT* or Article 1017(1)(a) of *NAFTA*. According to these articles, the procurement process begins after an entity has decided on its procurement requirement and continues through the contract award. The Tribunal finds that the difficulty encountered by J.H. Ryder in meeting the delivery date and the subsequent negotiations with the Department took place on July 26, 1999, almost one month after the subject contract had been awarded. Therefore, the Tribunal considers that these events were not related to the bid evaluation process and constitute a contract administration issue.

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 Liftow. While Liftow'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, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was conducted in accordance with the requirements set out in the *AIT* and *NAFTA* and that, therefore, the complaint is not valid.

Arthur B. Trudeau

Arthur B. Trudeau

Member

6. *Flolite Industries* (7 August 1998), PR-97-045 (C.I.T.T.).