

Ottawa, Wednesday, May 26, 1999

File No.: PR-98-052

IN THE MATTER OF a complaint filed by Marathon Management Company 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 subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Marathon Management Company its reasonable costs incurred in relation to filing and proceeding with this complaint.

Patricia M. Close  
Patricia M. Close  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

Date of Determination: May 26, 1999

Tribunal Member: Patricia M. Close

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Michèle Hurteau

Complainant: Marathon Management Company

Government Institution: Department of Public Works and Government Services

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### STATEMENT OF REASONS

#### COMPLAINT

On March 15, 1999, Marathon Management Company (Marathon) 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 procurement by the Department of Public Works and Government Services (the Department) of self-inflating air mattresses and carrying bags (Solicitation No. W8486-9-1191/A) for the Department of National Defence (DND).

Marathon alleges that, by failing to provide the DCAI 5-4 technical data package (TDP) within a reasonable time frame prior to the tender closing, the Department disallowed fair, equal and accurate bidding.

Marathon requests, as a remedy, that the Department reopen the tender for bid or cancel the tender and produce a new Request for Proposal (RFP) with an appropriate coordination of technical packages to all bidders within a reasonable time frame.

On March 16, 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>2</sup> (the Regulations). On March 16, 1999, the Tribunal ordered the Department to postpone the award of any contract in connection with the procurement until the Tribunal determined the validity of the complaint. On March 25, 1999, the Department certified, in writing, that the acquisition of the air mattresses and bags was urgent and that a delay in awarding the contracts would be contrary to the public interest. Accordingly, on March 29, 1999, the Tribunal rescinded its postponement of award order of March 16, 1999. On April 12, 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>3</sup> On April 23, 1999, Marathon filed its comments on the GIR with the Tribunal.

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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.

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 21, 1999, the Department received a requisition from DND for the procurement of 8,400 self-inflating air mattresses and carrying bags<sup>4</sup> which were to be manufactured in accordance with DND technical specification D-87-001-415/SF-001 (the specification).

A Notice of Proposed Procurement (NPP) and an RFP for this requirement were posted on Canada's Electronic Tendering Service (MERX) on February 22, 1999. The requirement was identified as being covered by the *Agreement on Internal Trade*<sup>5</sup> (the AIT). The NPP reads, in part: "The technical data package and a sealed sample may be viewed at the following Public Works and Government Services Canada regional offices: Quebec, Quebec; Montreal, Quebec; Mississauga, Ontario; Winnipeg, Manitoba; Edmonton, Alberta; Vancouver, BC and Halifax, NS." TDPs were sent out by DND, under separate cover, to all firms which requested the solicitation documents. The RFP specified that the bid closing date was March 10, 1999. The NPP also indicated that delivery was required as soon as possible. Bidders were requested to provide their very best delivery schedule.

The line item detail in the RFP, under item 1, reads, in part: "BAG CARRIER 0000\* BAG, CARRIER FOR MATTRESS with built-in air pump to be in accordance with specification D-87-001-415/SF-001 dated 97-01-01 with the following exceptions." Item 2 reads, in part: "MATTRESS SELF01NFL\* MATTRESS, PNEUMATIC, SELF-INFLATING to be in accordance with specification D-87-001-415/SF-001 dated 97-01-01."

Page 9 of the RFP, under "**Delivery Requested**," specifies the following: "It is requested that delivery of both items be made as soon as possible. Bidders must provide their very best delivery schedule." The RFP then requested bidders to indicate, for both items, the date and quantity of the first delivery, and the weekly rate at which the balance of the order would be delivered.

Page 11 of the RFP, under "**Technical Data and/or Sealed Sample(s)/Sealed Pattern(s)**," specifies as follows: "Technical data and sealed sample(s)/sealed pattern(s) (if applicable) may be viewed at the following offices."

The RFP then lists the full addresses of the regional offices mentioned in the NPP, including Mississauga.

On February 25, 1999, Marathon contacted the Department, by telephone, indicating that it was experiencing a delay in obtaining the TDP. On or about March 9, 1999, Marathon informed the Department during a telephone conversation that it received a copy of the specification at 4:00 p.m. on March 8, 1999, and, therefore, requested an extension of the March 10, 1999, bid closing date. The contracting officer informed Marathon that, because the request was received less than 24 hours prior to bid closing, there was

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4. According to the Department, these items were identified as being part of "Operation Abacus," which is DND's commitment to respond to the Y2K threat, as mandated by the Government of Canada. The requirement is considered a top priority.
  5. As signed at Ottawa, Ontario, on July 8, 1994.

insufficient time for a notification of an extension to be prepared, transmitted and posted on MERX. Marathon requested that the Department document its refusal in writing. The Department accepted to do so, provided Marathon request the time extension in writing. On March 9, 1999, Marathon requested a time extension by facsimile and, on March 10, 1999, the Department denied Marathon's request in writing for the reasons that it had stated previously. That same day, the RFP closed. Three bids were received.

## **VALIDITY OF COMPLAINT**

### **Department's Position**

The Department submits that Marathon had full access to the applicable specification and that its allegation that it did not submit a bid because it lacked access to the specification is without merit. It is the Department's contention that, at any time during the bidding period, bidders could view the technical data, photograph the drawings and take notes with respect to the specification. More importantly, the Department argues that, had Marathon visited the Department's regional office in Mississauga or communicated with the office by phone or facsimile and identified its concerns, it would have been provided with a full copy of the technical specification. Therefore, the Department submits, Marathon cannot fairly maintain a complaint in circumstances in which it did not take the necessary steps to obtain the information required to prepare its bid.

In its submission, the Department states that Marathon chose to wait for receipt through the mail of a copy of the specification from DND. This was not necessary, and Marathon failed to take all reasonable steps to remedy the delay by visiting the Department's regional office or contacting the procurement officer in Ottawa, Ontario. Had it done so, the Department submits, it would have been immediately sent a copy of the specification by courier.

The Department denies Marathon's allegation that it made three requests for an extension of the bidding period. The only request received in that respect is Marathon's written request of March 9, 1999. The Department argues that any extension of the bidding period at that late time would have prejudiced other bidders that relied on the bidding period deadline in the RFP for the preparation and submission of their bids.

With respect to Marathon's allegation that the length of the bidding period in this instance was insufficient, the Department states that it took appropriate steps to take into account the time needed to disseminate information to bidders by ensuring that a full copy of the specification was available to bidders at the Department's regional offices and that, consequently, the 16-day bidding period was reasonable, as required by Article 506(5) of the AIT.

The Department submits that the complaint should be dismissed as being without merit. It further submits that there is no basis to award relief and requests the opportunity to make further submissions with respect to the award of costs in this matter.

### **Marathon's Position**

Marathon submits that never, in its experience, have copies of the TDP been available for pick-up or photocopying at the Department's regional offices. Marathon indicated that, in its experience, the Mississauga regional office does not have a "photocopying" policy.

Concerning the Department's assertion that, had a request been made by Marathon, a copy of the TDP would have been sent by courier immediately, Marathon indicates that it contacted the Department on February 25, 1999, inquiring about the delay in receiving the TDP from MERX and that the only response that it received was that it take its complaint to MERX. Furthermore, Marathon submits that the contracting officer indicated that she had no intention of extending the deadline of the bidding period because DND needed the items immediately and because she was certain to receive an adequate number of bids. Marathon states that the Department was indifferent to its situation and completely unhelpful in solving the problem.

With respect to the Department's denial that Marathon contacted the Department by telephone to express its concerns about the late arrival of the TDP on March 1, 1999, Marathon admits to an error in its initial statement of the date of the occurrence. In fact, the communication took place on February 25, 1999, and not on March 1, 1999.

With respect to the length of the period in which to submit bids, Marathon disputes the Department's assertion that the period lasted 16 days. If one does not count weekends, a common business practice, and takes into consideration the requirement to send the solicitation documentation by courier, the actual bidding period in this instance was more realistically 13 days. More importantly, Marathon states that it did not receive the TDP until March 8, 1999, 36 hours prior to the tender closing date. This, Marathon argues, is unacceptable and represents an overt competitive disadvantage to Marathon. According to Marathon, it is the Department's responsibility to ensure the full and fair disclosure of all information equally and fairly to all bidders.

### **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 shall determine whether the procurement was conducted in accordance with the requirements set out in the AIT.

Article 504(3) of the AIT prohibits, among other things, "(c) the timing of events in the tender process so as to prevent suppliers from submitting bids." More specifically, Article 506(5) of the AIT provides that "[e]ach Party shall provide suppliers with a reasonable period of time to submit a bid, taking into account the time needed to disseminate the information and the complexity of the procurement." Article 506(6) of the AIT also provides, in part, that the tender documents shall clearly identify the requirements of the procurement.

The Tribunal must decide whether the Department acted in accordance with the above-mentioned provisions of the AIT in conducting this procurement.

The Tribunal is satisfied that the TDP is essential to the clear identification of DND's requirements in this instance. In the Tribunal's opinion, it was important that bidders have access to these documents in sufficient time before bid closing to be able to formulate responsive bids.

The Tribunal also notes that both the NPP and the RFP indicated that the TDP was part of the specification and also clearly indicated that these documents were available for "viewing" at a number of departmental regional offices, including the Mississauga regional office located within the same area code as

Marathon's place of business. Furthermore, the Tribunal observes that TDPs were sent by DND to all bidders that requested the RFP through MERX. The evidence shows that Marathon ordered the RFP from MERX and received the TDP by mail on March 8, 1999, 11 days after it ordered the RFP and 36 hours prior to the tender closing. The evidence also shows that, on February 25, 1999, Marathon contacted the Department.

The Tribunal finds that the formal measures put into place by the Department to make the solicitation documents, including the TDPs, available to bidders were sufficient. Not only were the TDPs available on request from DND through MERX but the NPP and the RFP also clearly indicated that the specification was available for viewing in the Department's regional offices. However, the Tribunal is not satisfied that the Department took steps to assist Marathon in receiving the TDP in a timely manner.

The Tribunal is of the view that the contracting officer was insensitive to Marathon's problem and unhelpful in solving it. The fact that bidders do business directly with MERX to obtain solicitation documents does not, in the Tribunal's opinion, remove all responsibility from the Department in this respect, and requests for assistance by bidders should not be ignored or pushed aside, as was apparently done in this instance. In the Tribunal's opinion, the offers of assistance made by the Department when assessed in light of the tight time frame for the procurement were insufficient.

This being said, the Tribunal fails to understand why, in the circumstances, Marathon did not raise the matter again with the Department or visit the Mississauga regional office to view the TDP when it realized that the delay in receiving the TDP was becoming critical to formulating a bid. Although Marathon had ordered the RFP from MERX and was expecting the TDP from DND by mail, the Tribunal is of the view that, with the passage of time, Marathon could have attempted to mitigate the adverse impact caused by the late delivery of the TDP. In the Tribunal's opinion, no delivery system can reasonably be expected to function perfectly at all times, and bidders cannot rely entirely on such systems when difficulties become apparent.

The Tribunal is of the view that the formal tender distribution system put in place for this RFP could have been made to work if Marathon and the Department both had shown more initiative in the circumstances or if more time had originally been provided in the RFP to submit bids. In the Tribunal's opinion, the lack of time is the real issue with this solicitation. The Tribunal is of the view that, given the technical nature of this procurement and the logistics involved in getting the TDP to the potential suppliers and the tight time frames, it was incumbent upon the Department, the author of the RFP and of the bidding period therein, to pay particular attention to any difficulties in the delivery of the tender documents. Otherwise, it would appear that the time period set out in the RFP to complete this procurement was unreasonably short. For these reasons, the Tribunal determines that the complaint is valid.

There is no indication in the NPP or the RFP that this procurement was urgent to the point that it could not have accommodated a longer bidding period or a reasonable extension of the bidding period when the problem surfaced and Marathon requested a time extension. There is no mandatory delivery date set out in the RFP or minimum quantity required for delivery by the time the first delivery is to be made. In the Tribunal's opinion, if an urgent situation existed, it should have been reflected in the NPP and in the terms and conditions of the RFP.

The Tribunal understands that extending the period in which to submit bids at the last minute may be difficult, given the time requirements to input changes into the MERX system and knowing that bidders take the bid closing time as one of the factors in finalizing their offers. This, however, is not sufficient reason

to refuse to extend the bidding period or, more importantly, to set out unreasonable and unnecessary tight time frames at the outset.

### **DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines that the complaint is valid on the basis that the procurement was not conducted in accordance with the requirements set out in the AIT.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards Marathon its reasonable costs incurred in relation to filing and proceeding with this complaint.

Patricia M. Close

Patricia M. Close

Member