

Ottawa, Friday, June 30, 2000

File No.: PR-99-051

IN THE MATTER OF a complaint filed by ACE/Clear Defense 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 valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the National Gallery of Canada present to the Canadian International Trade Tribunal a proposal for compensation, developed jointly with ACE/Clear Defense Inc., that recognizes the lost opportunity that ACE/Clear Defense Inc. experienced by being unable to make a responsive bid in this case and the possibility that it may have been awarded the contract for this solicitation and to profit therefrom.

Pursuant to subsections 30.15(4) and 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards ACE/Clear Defense Inc. its reasonable costs incurred in preparing a response to this solicitation and in filing and proceeding with this complaint.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination: June 30, 2000

Tribunal Member: Pierre Gosselin

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Gilles B. Legault

Complainant: ACE/Clear Defense Inc.

Counsel for the Complainant: Ronald D. Lunau
Mary Rose Ibos

Interveners: Ener-Gard Energy Products Inc.
3M Canada Company

Counsel for the Interveners: Colin S. Baxter
Kris Klein

Government Institution: National Gallery of Canada

Counsel for the Government Institution: David M. Attwater

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STATEMENT OF REASONS

COMPLAINT

On March 8, 2000, ACE/Clear Defense Inc. (ACE) 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 (Request for Proposal [RFP] #9-C170) for the supply and installation of glass fragment mitigation window film (security film), with a wet-glazed anchorage system, on approximately 125,000 square feet of windows at the National Gallery of Canada (NGC) building.

ACE alleged that, contrary to several provisions of the *North American Free Trade Agreement*² and the *Agreement on Internal Trade*,³ the NGC established a time frame and technical specifications for this RFP that do not comply with those trade agreements. Specifically, ACE alleged that the solicitation is discriminating in its effects, in that it does not provide suppliers, whose products are manufactured in Canada, enough time to satisfy mandatory testing requirements. It also alleged that the technical specifications outlined in Annex B to the RFP do not meet the government's objective of creating equal opportunity to meet tender qualifications, are discriminatory and flawed, in that they introduce eight new U.S. standards not previously used in similar Canadian RFPs and do not provide enough notice for all potential suppliers to comply with the requirements of the RFP. In addition, ACE alleged that the RFP imposes a specific anchorage system, "wet-glazed attachment", which necessitates hidden test requirements on bidders using a different anchorage system, thereby favouring the bidders already using that system.

ACE requested, as a remedy, that the Tribunal postpone the award of the designated contract until the validity of the complaint is determined. ACE also requested that the Tribunal recommend that a new solicitation for the designated contract be issued and that it be conducted in accordance with NAFTA and the AIT. In the alternative, ACE requested compensation for the loss of the opportunity to compete for this procurement. It further requested its costs incurred in preparing a response to the RFP and pursuing its complaint.

On March 15, 2000, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
 2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
 3. As signed at Ottawa, Ontario, on 18 July 1994 [hereinafter AIT].

subsection 7(1) for the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁴ That same day, the Tribunal ordered the NGC to postpone the award of any contract in connection with this solicitation until the Tribunal determines the validity of the complaint. On March 22, 2000, the NGC certified, in writing, that the requirement was urgent and that a delay in awarding the contract would be contrary to public interest. Accordingly, on March 24, 2000, the Tribunal rescinded its postponement of award order of March 15, 2000. On April 10 and 17, 2000, the Tribunal informed the parties that 3M Canada Company (3M) and Ener-Gard Energy Products Inc. (Ener-Gard), respectively, had been granted intervener status in the matter. On April 17, 2000, the NGC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On May 8, 2000, Ener-Gard filed comments on the GIR with the Tribunal. On May 9, 2000, ACE and 3M filed comments on the GIR with the Tribunal. On May 11, 2000, ACE filed comments on 3M's response to the GIR with the Tribunal. On May 15, 2000, the NGC filed further comments on ACE's response to the GIR with the Tribunal and, on May 24, 2000, ACE made its final submissions to 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

In 1997, construction began on the new U.S. embassy in Ottawa, located some 150 metres south of the NGC building. The embassy opened in late 1999. Because of its proximity to the embassy, the building is exposed to an increased risk of terrorist acts. Following media attention to this issue, the NGC, in the fall of 1999, recognized the urgency of installing a window protection system on the south façade of the building. ACE also recognized the urgency in an article published in the October-November 1999 issue of a local magazine. In this context, on January 6, 2000, the NGC sent a submission to the Treasury Board of Canada (TBC) seeking financial authority to implement a counter-measure plan through the application of security film. On January 12, 2000, the TBC approved the allocation of funds for the installation of window security filament on the building. Once funding was in place, the NGC decided to implement the project on an emergency basis to protect and conserve the nation's art collection, as well as the health and safety of visitors and staff in the building. It was also deemed essential that the project be completed prior to the busy season to commence about May 1, 2000.

Around 1997, the House of Commons security organization dictated the use of security film on Parliament Hill buildings. According to the GIR, prior to the renovation of the Justice Building which occurred between late 1998 and the fall of 1999, very little information was known about security film and its manufacturers. ACE was the only known supplier at the time, and many problems were encountered with the security film during renovations at the Justice Building. To address this issue, on January 7, 1999, officials of the Department of Public Works and Government Services met for the purpose of developing a National Master Specification (NMS)⁶ for security film. By September 10, 1999, a proposed new NMS section – section 08555 – “Security Film for Glass” – was ready for publication. The draft NMS includes a series of standards taken from the recent U.S. experience. About September 28, 1999, ACE contacted the NMS Coordinator seeking a copy of the final draft of the proposed NMS section for security film for review

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

5. S.O.R./91-499.

6. National Master Specifications are drafted and used by the Government of Canada and the private sector for defining characteristics and specifications for construction projects.

and comments. ACE commented on the proposed NMS for security film, which included the specifications now in dispute at a meeting held with the NMS Coordinator on October 5, 1999. The final draft of the NMS for security film, which included some of the suggested changes made by ACE, was forwarded to ACE for information purposes about January 31, 2000. It should be noted that the standard was not intended for publication until the year 2000-2001.

To assist in identifying the appropriate standards and testing criteria to be used in this solicitation and to advise and oversee the execution of the work, the NGC, on January 18, 2000, retained the services of a security consulting firm, Weaymouth & Associates, Inc. (Weaymouth). From the outset, the aesthetic impact of the security film was a concern. In this context, the building's architects recommended the use of a sealant bead, as opposed to mechanical means, for attaching the security film to the window frames.

On January 25, 2000, Weaymouth, on behalf of the NGC, issued a letter to seven potential vendors, including ACE, inviting each to pre-qualify for an RFP. Each vendor was invited to demonstrate its product by installing a sample on existing glasswork on the south side of the NGC building. The key concern was that, once installed, the security film would adversely affect the clarity and visible light transmission characteristics of the existing glasswork. After indicating that the NGC had a short window of opportunity to complete this project, the letter stated "[t]he National Gallery wishes to complete this project by the end of May 2000". All seven vendors participated in this demonstration, which took place from January 25 to 28, 2000. Afterwards, all prospective bidders were advised orally that the products that they had demonstrated were acceptable to the NGC and that an RFP would be forthcoming.

On February 3, 2000, copies of the RFP were sent by overnight courier to each prospective bidder.

The RFP, which was issued on February 4, 2000, includes the following excerpts:

3. CLOSING DATE OF PROPOSAL

Monday, February 21, 2000 at Noon, Ottawa Time.

7. PURPOSE

The purpose of this requirement is to invite pre-qualified firms to submit a proposal to supply and install Glass Fragment Mitigation Window Film on certain windows, in accordance with the established requirements as per the attached SPECIFICATIONS, ANNEX B.

8. PERIOD OF CONTRACT

The contract will commence on or about February 27, 2000 and be completed on or before May 30, 2000.

11. BID RECEIVING

ANY LATE SUBMISSIONS WILL BE RETURNED UNOPENED.
NO EXCUSES ACCEPTED.

12. QUESTIONS DURING TENDERING

To ensure accurate and authorized responses to inquiries and other communications, and to control the flow of information relating to this RFP, all enquiries and other communications with the National Gallery throughout the tender period (as defined in the tender document) are to be directed only to the Contracting Officer. She will direct all technical questions to the Security Specialist.

Annex B, "Specifications", reads, in part:

- 1.2 . . . The Manufacturer's Authorized Dealer/Applicator shall install the clear window security film in accordance with the Manufacturer's installation instructions. This will be an on site wet retrofit application, with a wet-glazed attachment system.
- 1.5 The clear security window film system shall be anchored to the window frames using a "wet-glazed" attachment or approved equal. Given the high level of finish in the environment, a mechanical attachment system is not acceptable for this application.

APPLICABLE STANDARDS AND CRITERIAS

The following standards and [criteria] will be used in the evaluation of the clear security window film as to [its] acceptability for use within the National Gallery of Canada. Test results performed by the manufacturer and/or by an independent test laboratory on behalf of a manufacturer, must be submitted at the time of the submission.

Notwithstanding the above paragraph, a manufacturer may submit test results deemed equivalent, but not included in the standards and [criteria] listed below. Should this event occur, a certified and recognized independent third party laboratory, on behalf of the manufacturer, must provide an equivalency statement based on the appropriate standard or criteria, **this is a mandatory requirement for further consideration**. The independent analysis shall confirm that the products being proposed meet or exceed the requested test criteria.

- 1.6 The American Society for Testing and Materials (ASTM) Publications.
- A. D882-95A - Standard for Tensile Properties of Thin Plastic Sheeting
 - B. D1004-93 - Standard Test Method For Initial Tear Resistance of Plastic Film and Sheeting (Graves Area Tear Test)
 - C. D1044 - Standard Method of Test for Resistance of Transparent Plastics to Surface Abrasion (Taber Abrader Test)
 - D. E84 - Standard Method of Test for Surface Burning Characteristics of Building Materials
 - E. D1932-93 - Standard Test Method For Tear Propagation Resistance of Plastic Film and Thin Sheeting by a Single Standard
 - F. D4830-88, Section 7 (Puncture Strength) - Standard Test Method for Characterizing Thermo Plastic Fabrics Used in Roofing and Waterproofing.

In a letter dated February 10, 2000, ACE requested that the NGC extend the bid closing date because the standards used in the RFP had not been previously seen in Canadian federal procurements for window film and, not having been required to comply with these standards in the past, ACE needed more time to seek out testing against these standards. The letter reads, in part: "Having contacted the organizations responsible for compliance testing, we have been informed by them that testing cannot be carried out until April, 2000 at the earliest. Should the RFP close any time prior to April 30, 2000, we would be unable to comply with the RFP terms as they are now set out".

On February 15, 2000, the NGC denied ACE's request for a time extension, given the risk and threat to the NGC building. The letter also reads, in part: "Delaying the project to preferentially allow, one out of seven proponents, additional time to do industry accepted testing would cause the project to miss the window of opportunity that was identified and clearly stated from the project outset".

On February 17, 2000, ACE wrote the Director of the NGC seeking a meeting to discuss the numerous procurement-related issues raised in ACE's letter of February 10, 2000, including ACE's

assertion that the specifications used in the RFP would result in a lower level of protection against bomb blasts than the levels used previously by the Canadian Government.

Four proposals were received by the NGC before bid closing on Monday, February 21, 2000, at 12:00 p.m. At approximately 12:50 p.m. that same day, ACE, because of reasons set out in its comments on the GIR, submitted its bid, which it characterized in its comments on the GIR as a “non-compliant” proposal. The NGC refused to accept the proposal because the deadline for submitting proposals had passed.

On February 22, 2000, ACE wrote again to the Director of the NGC requesting an urgent meeting, indicating that the procurement process was fraught with problems, some of which were now under criminal investigation, and that public health and safety may well be compromised.

On February 23, 2000, the Director of the NGC responded to ACE’s letter of the previous day advising that the NGC would not reconsider its position. The letter reads, in part:

In developing the standards and criteria reflected in the specifications, the Project Team has consulted recognized window film testing facilities, the PWGSC National Master Specification Section, and other government security glass film installations including the one you cite in your letter.

Given the special architectural nature of the Gallery building, it is our opinion that the window security film should meet a recognized standard of protection while at the same time respect the architectural integrity of the building.

ACE filed its complaint with the Tribunal on March 8, 2000.

PARTIES’ POSITIONS

NGC’s Position

The NGC submitted that the speed with which the TBC approved its request for funding attests to the seriousness of the risk at the NGC building. Because of this situation, the NGC proceeded expeditiously, applying the Treasury Board Policy for Emergency Contracting (the Policy).

The NGC submitted that the subject solicitation proceeded under selective tendering procedures consistent with Articles 1011 and 1012 of NAFTA and Article 506(5) of the AIT in that the 17-day bid period provided to potential suppliers was reasonable in the circumstances and in excess of the minimum 10-day period provided in NAFTA for urgent procurements. Further, the NGC noted that, with due diligence, ACE itself would have succeeded in submitting a timely bid, as it attempted to do at 12:50 p.m. on February 21, 2000.

The NGC submitted that the technical specifications used in the RFP were not biased in favour of, or against, particular goods or the suppliers of those goods, contrary to Article 504(3)(b) of the AIT. In fact, the NGC submitted that the specifications were adopted to ensure a competitive tendering process.

The NGC, noting that Article 1007 of NAFTA requires that technical specifications used in the RFP be based, where appropriate, on international standards, national technical regulations, recognized national standards or building codes, indicated that, at the time of preparing the RFP, there were no published Canadian technical regulations, recognized Canadian standards or building codes governing security film. The technical specifications used in the RFP, the NGC submitted, were based on “international standards” that have come to be recognized over the last two years. In the alternative, the NGC submitted that the NMS

for security film, from which the impugned specifications were drawn, constitutes a “recognized national standard” or, if such is not recognized by the Tribunal, is based on those objective standards with the broadest industry and government approval and use.

Furthermore, the NGC submitted that ACE was aware, as early as October 1999, that the said specifications, or their equivalent, would be utilized in upcoming government and private sector construction projects. The NGC argued that, as a company that bills itself as a leader in developing, testing and marketing security film, it was incumbent on ACE to be prepared for future tenders. The NGC submitted that it was not reasonable, as suggested by ACE, that it wait until the NMS specifications were used to seek an extension of time to have its security film tested to the specifications in the RFP. No tendering process can be held hostage by any one potential bidder, regardless of the fact that it is “the only Canadian supplier in the tender process whose product is manufactured in Canada”.

The NGC submitted that, given ACE’s work experience in the United States, it must have had its products tested to those standards used by U.S. authorities, which are identical or equivalent to the standards included in the NMS. At a minimum, the NGC submitted, ACE must have been aware of those standards and the need to have its products tested to those standards in order to compete for future sales.

With respect to the wet-glazed attachment system, the NGC submitted that it was clarified during the bidder’s conference held on February 10, 2000, which ACE attended, that the proposed system (Dow Corning 995 Silicone Structural Adhesive) uses an off-the-shelf commercial product, or equivalent, applied as a simple caulking around the perimeter of the window and requires skills not unique to any supplier. As well, no further testing was required.

Referring to the Tribunal’s reasons in *Flolite Industries*,⁷ the NGC indicated that the circumstances of this case and ACE’s actions in this instance justify an award of complaint costs to the NGC.

In its submission of May 15, 2000, the NGC submitted that the phrase “from the date of publication of a notice in accordance with Article 1010”, found in Article 1012(3)(c) of NAFTA, does not impose a condition precedent to reliance on the Article in times of urgency. Rather, the NGC submitted, the phrase is a timing provision that delineates the start of the period for receipt of tenders. With respect to ACE’s allegation that the NGC failed to publish a notice in accordance with Article 1010 of NAFTA, the NGC submitted that this was a new issue not included in its complaint, that, consistent with Article 1010(5) of NAFTA, the NGC’s letter of January 25, 2000, constituted a notice to all known potential bidders of the qualification system to be used in this instance and that, in any event, ACE had missed the deadline to complain about this alleged breach of NAFTA.

Furthermore, the NGC submitted that the state of urgency was duly substantiated, as shown by the evidence on the record, and it submitted that, contrary to ACE’s assertion, the NGC did not delay the subject solicitation to conduct a review of the procurement process.

With respect to the allegation of discrimination under the AIT, the NGC argued that the expedited procurement process that it used in no way discriminated between goods, services and suppliers from different regions of Canada. The NGC argued that it did not rely on limited tendering procedures to conduct this procurement, but rather on selective tendering procedures covered by Articles 506(1) to (10) of the AIT. Agreeing with ACE that the Tribunal has no jurisdiction to inquire into compliance with the Policy, the NGC

7. *Addendum* (7 August 1998), PR-97-045.

submitted that Article 10.2.8 of the Policy has no application in this instance, as the NGC did not use limited tendering procedures.

With respect to ACE's allegation that the NGC accepted advice contrary to the provisions of Article 1007(4) of NAFTA, the NGC submitted that this new ground of complaint is late and without merit. As well, the NGC added that the allegation that it used undisclosed subcriteria in the evaluation of proposals is also a new ground of complaint, which the Tribunal has no jurisdiction to address.

Ener-Gard's Position

Ener-Gard indicated that it is in complete agreement with all aspects of the GIR, its statements and conclusions. After stating that the urgency of the situation led to a shorter than normal interval for the preparation and submission of proposals, Ener-Gard indicated that most manufacturers were, nevertheless, able to work within the specified time frame. Ener-Gard submitted that the test parameters and specifications that were enunciated in the RFP definitely represent what is standard for this type of application and major manufacturers already had the necessary testing done to meet all these requirements. The fact that ACE never had undergone the testing that is standard within the industry for safety/security film applications is ACE's responsibility and, Ener-Gard submitted, the NGC and its visitors should not be penalized because of this situation.

3M's Position

3M submitted that the specifications and related testing requirements specified in the RFP are not biased. They are correct and proper, given the need to provide security to the public. More specifically, 3M submitted that the American National Standards Institute (ANSI) and ASTM standards, and now the General Services Administration (GSA) standards, are accepted and used by the industry throughout North America. Furthermore, 3M submitted that most security window film manufacturers have had their products tested to the GSA standard using accredited third-party independent test laboratories, located in both Canada and the United States, that are recognized internationally. 3M submitted that the specifications in the RFP incorporate the most appropriate safety standards available in order to protect those in and around the NGC building against a terrorist attack on the nearby U.S. embassy. They are recognized by the industry as fundamental requirements of any safety and security film, regardless of the place of manufacture of the film. 3M argued that it would not be in the best interest of a company, or its potential clients, to ignore the best international test standards that are available today, performed internationally by third-party laboratories.

ACE's Position

ACE submitted that the NGC has not satisfied the requirements of the trade agreements for tendering on an urgent basis in that, the Department, contrary to Article 1010 of NAFTA, did not publish a notice of proposed procurement, a condition, ACE submitted, precedent for reliance upon Article 1012(3)(c) of NAFTA, which allows reducing the bidding period to no less than 10 days in cases of urgency. Furthermore, ACE submitted that the only circumstance that permits a contracting authority to avoid its obligations under Article 1010 of NAFTA is where the contracting authority relies on Article 1016 of NAFTA, "Limited Tendering Procedures", and, ACE submitted, nowhere in the RFP or the GIR did the NGC purport to rely on Article 1016 of NAFTA for this procurement. In any event, ACE added, the NGC has not complied with the specific requirements of Article 1016(3) of NAFTA, which requires that a report, in writing, be prepared on each contract awarded under Article 1016 of NAFTA.

ACE further submitted that a second condition precedent to invoking the shortened time limits under Article 1012(3)(c) of NAFTA is that the state of urgency be “duly substantiated”. ACE submitted that the facts of this case and the evidence relied upon by the NGC in the GIR do not substantiate or support that a state of urgency existed in this instance. In fact, ACE submitted, the NGC could reasonably have known as early as 1997, when construction began at the new embassy, that there was a security risk to the NGC building due to its proximity to the embassy. In addition, ACE submitted that the evidence tendered by the NGC suggests that “political pressure”⁸ was the real motivation and that considerations of aesthetics were deemed to perhaps be more important than succumbing to this “political pressure”. Furthermore, ACE noted that the NGC did, in fact, delay the subject contract until March 6, 2000, to allow the conduct of an internal review of the procurement process by a consulting firm.

ACE submitted that the timing of the RFP effectively prevented it from providing a proposal that would be compliant, in that it was not able to complete the testing for the ASTM specifications of the RFP in the 10-day time period allowed by the RFP in which to prepare and submit proposals. This, ACE submitted, is contrary to Articles 504(3)(c) and 506(5) of the AIT. Furthermore, ACE noted that nowhere in the Letter of Intent, the RFP or the GIR did the NGC rely on Article 506(11)(a) of the AIT in order to avoid the obligations of Articles (1) to (10) of the AIT.

ACE also submitted that whether one or more of the competing bidders considers the timing in which to submit proposals to be adequate is irrelevant. The purpose of the trade agreements, ACE argued, is to establish objective rules of universal application, so that the procurement process will be fair and accessible to all bidders, not only some bidders.

Furthermore, ACE noted that the GIR does not provide evidence that appropriate authorization, i.e. senior level authorization, was acquired before emergency contracting was invoked and that this is a breach of the trade agreements.

With respect to the issue of the standards used in the RFP, ACE submitted that the NGC failed to identify the international standards upon which the technical standards were founded, and how they are acceptable “international standards”. ACE submitted that the NMS remains subject to final approval and publication, and that the fact that it participated in its drafting should not be held against it. In this context, ACE clarified that, contrary to the NGC’s assertion in the GIR that it did not make comments on the specific standards at issue, it nevertheless provided general comments for consideration on the final draft of the NMS. In any event, ACE submitted that knowledge of the contents of the draft NMS does not, of itself, resolve the issue of ASTM testing under the terms of the RFP. Specifically, ACE submitted that the equivalency testing alternative allowed in the RFP was unfair and discriminatory because the time for equivalency testing was insufficient and the NGC did not have to accept the equivalency testing even if it was obtained.

ACE submitted that 3M and the other manufacturers that recommended evaluators to the security consultant were potential suppliers in this RFP and had a commercial interest in the outcome of the RFP. In this context, ACE submitted that the advice and recommendations that they supplied to the security consultant violated Article 1007(4) of NAFTA.

8. Source: GIR, Tab 9, letter from Moshe Safdie, 13 March 2000.

Furthermore, ACE submitted that the establishment of subcriteria for each evaluation area not included in the solicitation documents, as was done in this instance, violated Articles 1013(1) and 1015(4) of NAFTA and Article 506(6) of the AIT.

With respect to the “wet-glazed” attachment issue, ACE submitted that this requirement was introduced late in the RFP, nullified its prequalification to bid and biased the RFP in favour of bidders already familiar with the technique.

In its submission of May 11, 2000, ACE indicated that 3M failed to address how the NGC has complied with the provisions of the relevant trade agreements. Specifically, ACE argued that 3M has provided no evidence to support its assertion that: (1) the only international test standard available for blast mitigation capabilities of safety and security film is the ASTM F1642-96 standard, the ASTM, in any event, not being listed as an accredited organization with ANSI; (2) the ASTM standards contained in the RFP are appropriate international standards as defined by NAFTA; or (3) the ASTM standards have been approved and sanctioned by the Canadian Government or the Standards Council of Canada, which is approved by the International Organization for Standardization.

In its final submissions of May 24, 2000, ACE indicated, with respect to the NGC’s alleged violation of Article 1010 of NAFTA, that the issue was not raised as a ground of complaint, but rather as part of ACE’s reply to the NGC’s defence for invoking Article 1012(3)(c) of NAFTA. ACE refused to acknowledge that the NGC’s letter of January 25, 2000, was an “invitation to participate”, as described in Article 1010(5) of NAFTA. Regardless, ACE submitted, it remains that the NGC did not publish a notice of invitation, as required by Article 1010 of NAFTA and Article 506 of the AIT, and this, ACE submitted, applies even when selective tendering procedures are used.

Furthermore, ACE submitted that it does not take issue with the fact that a threat to public safety existed at the NGC building due to possible terrorist activity directed at the U.S. embassy. However, it takes issue with the selection of a procurement process that flouts the trade agreements, particularly given the absence of any demonstration of why normal, minimum time limits prescribed by NAFTA were inappropriate in this instance.

With respect to the introduction by the NGC of undisclosed evaluation criteria, ACE submitted that it only discovered this ground of complaint in the GIR and that, therefore, it was justified to provide a response to this new information in its submissions of May 9, 2000.

TRIBUNAL’S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration 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 provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

The Tribunal determines, first, that the solicitation at issue relates to a contract for construction services within the meaning of Article 518⁹ of the AIT and Appendix 1001.1b-3-A,¹⁰ codes 5171 (Glazing work and window glass installation work) and 5169 (Other installation work). Furthermore, the Tribunal finds that the estimated value of this procurement is in the range of \$1 million to \$3 million. Article 1001(1)(c)(ii) of NAFTA provides that, for government enterprises (the NGC is a government enterprise listed in Annex 1001.1a-2 of NAFTA), contracts for construction services are covered by Chapter Ten of NAFTA only if such contracts are equal to or in excess of \$12.9 million. Because the subject procurement is valued at less than that threshold, the Tribunal determines that this solicitation is not a designated contract under NAFTA. As the Tribunal does not have the jurisdiction to address the merit of the complaint under NAFTA, the Tribunal will limit its consideration, on the merit, to determining the validity of the complaint under the AIT, which covers contracts for construction services equal to or in excess of \$100,000.

Article 501 of the AIT states that the purpose of Chapter Five is to establish a framework that will ensure equal access to procurements for all Canadian suppliers. Against this backdrop, Article 506(5) specifically 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(11) further provides that, in certain limited circumstances, an entity may use procurement procedures that are different from those described in Articles 506(1) to (10), provided that this is not done to avoid competition between suppliers or to discriminate against suppliers of any other Party. One such circumstance set out in Article 506(11)(a) reads: “where an unforeseeable situation of urgency exists and the goods, services or construction cannot be obtained in time by means of open procurement procedures” [emphasis added].

In the Tribunal’s view, determinative is the question of whether “an unforeseeable situation of urgency” existed in this instance, allowing the NGC to use procurement procedures other than those described in Articles 506(1) to (10) of the AIT. If the answer to this question is in the negative, the Tribunal will then determine whether, in conducting this procurement, the NGC complied with the provision of Article 506(5) and, considering the complexity of the procurement at issue, whether it provided suppliers a reasonable period of time to submit a bid.

The Tribunal finds that, to the extent that an urgent situation could have existed at the NGC building, this situation was not unforeseeable. The evidence before the Tribunal demonstrates clearly that the NGC knew about the critical circumstances as early as October-November 1999, several months before this solicitation was initiated. In the Tribunal’s opinion, there was nothing unforeseeable to the existence of increased risk and threat to the area surrounding the U.S. embassy due to terrorist acts against the embassy.

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9. “In this Chapter: . . . **construction** means a construction, reconstruction, demolition, repair or renovation of a building, structure or other civil engineering or architectural work and includes site preparation, excavation, drilling, seismic investigation, the supply of products and materials, the supply of equipment and machinery if they are included in and incidental to the construction, and the installation and repair of fixtures of a building, structure or other civil engineering or architectural work, but does not include professional consulting services related to the construction contract unless they are included in the procurement”.
 10. “Definition of Construction work: Pre-erection work; new construction and repair, alteration, restoration and maintenance work on residential buildings, non-residential buildings or civil engineering work. This work can be carried out either by general contractors who do the complete construction work for the owner of the project, or on own account; or by subcontracting parts of the construction work to contractors specializing, e.g., in installation work, where the value of work done by subcontractors becomes part of the main contractor’s work”.

The embassy has been in the planning and construction phases for a number of years, and its proximity to the NGC building was a commonly known fact for all those years. Furthermore, it is common knowledge that, over the years, U.S. properties have been the target of terrorist attacks, and thus, the existence of an increased risk on the NGC building was foreseeable. Therefore, the condition of Article 506(11)(a) of the AIT was not met in this instance.

The Tribunal finds that, in setting out a 17-day period in which to bid on the solicitation and by refusing to extend the bidding period at ACE's express request to allow it to conduct required tests, the NGC failed to properly appreciate the complexity of this procurement (specifically the testing requirements relating to the use of new standards) and, as a result, set out an unreasonable period of time in which to submit responsive bids. In sum, the requirements were contrary to Article 506(5) of the AIT and could not be justified under Article 506(11)(a).

The parties do not dispute that the NGC is entitled to use recognized standards to conduct this requirement. In the Tribunal's opinion, it is even admitted by the parties that there currently exist no widely recognized Canadian standards for the application of security film. The evidence on record shows that, in the United States, over the past few years, standards for security film have gained wider acceptance and that, in Canada, work is well underway towards the promulgation of a new NMS for security film. In the Tribunal's opinion, the NGC recognized this state of affairs when it developed the RFP, in that it allowed equivalents to the standards set out in the RFP. In the circumstances, and given the Tribunal's earlier conclusion, it is the Tribunal's view that it was incumbent on the NGC to provide a reasonable period of time to potential suppliers to demonstrate, as required, the equivalency of their products.

In the Tribunal's opinion, it was not reasonable for the NGC, on the one hand, to recognize that an "equivalent" might be proposed, while, at the same time, failing to provide sufficient time to establish such equivalence as may be needed.

The NGC has argued that ACE was aware or should have been aware, even before this procurement was initiated, that the standards set out in the RFP, which were used for the first time for federal government procurements, would be used for this particular procurement. It was argued, therefore, that ACE should have initiated the testing of its product to meet standards equivalent to those specified in the RFP before the issuance of the solicitation. The Tribunal notes that, in arguing extensively that ACE should have initiated testing before the solicitation was started, the NGC implicitly recognized that the time frame provided in the RFP to prepare and submit responses was too short to complete the testing of equivalents that might be required to submit responsive bids. The NGC's argument is also difficult to accept because ACE had no way of knowing for certain: (1) which standards the NGC would adopt for this solicitation before the RFP was published; (2) that the NGC would adopt standards not used before in federal government procurements; and (3) when the invitation to bid would be issued, let alone the duration of the bidding period afforded potential suppliers to prepare responsive bids.

Furthermore, considering the costs involved in conducting tests to meet new standards and the imminent publication of the NMS for security film, in the Tribunal's opinion, it was not unreasonable for ACE, in the absence of a concrete procurement, not to initiate the testing of its products before some certainty existed relative to these important matters. In addition, the Tribunal is not persuaded that ACE should have been capable of meeting the stringent time frame in which to bid in this instance because of its prior experience in U.S. projects, because the standards set out in the RFP had not been used previously in

federal government procurements, and nothing indicated for sure that they would be used in this instance, until the RFP was issued.

Now, having regard to ACE's allegation that the NGC's selection of a particular anchorage technique ("wet-glazed") imposed an additional and unacceptable burden on ACE, the Tribunal is of the opinion that this allegation is without merit. It may be that, due to corporate circumstances prevailing at ACE, this particular technique represented a greater difficulty for ACE. However, given the NGC's aesthetics concerns, the commonality and simplicity of the anchorage technique, the Tribunal does not find this requirement unreasonable in the circumstances.

ACE also alleged that the NGC's requirement in the RFP for wet-glazed anchorage is tantamount to undoing the qualification that it achieved on or about January 28, 2000. However, the Tribunal is of the view that the qualification exercise that took place from January 25 to 28, 2000, had to do with the clarity and visible light transmission characteristics of the security film and not any particular anchorage technique. Therefore, in the Tribunal's opinion, ACE was never prequalified, in this instance, for any particular anchorage technique, and this allegation is without merit.

With respect to ACE's allegation that, contrary to Article 506(6) of the AIT, the NGC introduced, in the evaluation of offers, subcriteria not set out in the RFP, the Tribunal notes that ACE has filed no evidence on the record to support this ground of complaint, and the Tribunal has not examined the matter further.

Considering that the contract has been substantially performed, the Tribunal, in determining a remedy, has attempted, to the greatest extent possible, to place ACE back into the position in which it was before this solicitation started. Therefore, the Tribunal will award ACE its reasonable costs incurred in filing and pursuing the complaint and in preparing a response to this solicitation. Furthermore, considering that, due to an unreasonably short delay, ACE was unable to submit a responsive bid, the Tribunal will recommend that ACE be compensated for this lost opportunity and the possibility to profit therefrom.

DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the NGC present to the Tribunal a proposal for compensation developed jointly with ACE that recognizes the lost opportunity that ACE experienced by being unable to make a responsive bid in this case and the possibility that it may have been awarded the contract for this solicitation and to profit therefrom.

Pursuant to subsections 30.15(4) and 30.16(1) of the CITT Act, the Tribunal awards ACE its reasonable costs incurred in preparing a response to this solicitation and in filing and proceeding with this complaint.

Pierre Gosselin
Pierre Gosselin
Presiding Member