

Ottawa, Wednesday, September 29, 1999

File No.: PR-99-018

IN THE MATTER OF a complaint filed by Am-Tech Power Systems Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Michel P. Granger

Michel P. Granger
Secretary

Date of Determination: September 29, 1999

Tribunal Member: Arthur B. Trudeau

Investigation Manager: Randolph W. Heggart

Investigation Officer: Dominique Laporte

Counsel for the Tribunal: Tamra Alexander

Complainant: Am-Tech Power Systems Ltd.

Counsel for the Complainant: Colin R. Dubeau

Government Institution: Department of Public Works and Government Services



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STATEMENT OF REASONS

COMPLAINT

On July 14, 1999, Am-Tech Power Systems Ltd. (Am-Tech) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. EHA36-9-6029) by the Department of Public Works and Government Services (the Department) regarding the supply and installation of a base building emergency generator for the Communications Security Establishment.

Am-Tech alleged that the Department improperly declared Am-Tech's joint bid (the subject bid) with Les entreprises électriques Yvan Dubuc (Dubuc) as being non-compliant. Specifically, Am-Tech submitted that the Department erred in deeming the subject bid non-compliant on the basis that the memorandum of understanding (the Memorandum) for the formation of the joint venture between Am-Tech and Dubuc made the bid conditional and on the basis that Dubuc was not a principal under the bid bond.

Am-Tech requested, as a remedy, that the contract be awarded to Am-Tech and Dubuc. In the alternative, Am-Tech requested that all bids submitted for the procurement be re-evaluated. As a further alternative, Am-Tech requested that Am-Tech and Dubuc be compensated by an amount specified by the Tribunal. In any event, Am-Tech requested its costs incurred in proceeding with this complaint.

On July 15, 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*.² That same day, the Tribunal issued an order postponing the award of any contract in relation to this procurement until the Tribunal determined the validity of the complaint. On July 16, 1999, the Department wrote to the Tribunal indicating that a contract had already been awarded to another bidder on June 23, 1999. Accordingly, on July 21, 1999, the Tribunal rescinded its postponement of award order of July 15, 1999. On August 10, 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 20, 1999, Am-Tech filed its comments on the GIR with the Tribunal and, on August 27, 1999, the Department filed additional submissions with the Tribunal in response to Am-Tech's comments on the

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.

GIR. The Department's response was transmitted to Am-Tech on August 30, 1999. No further submissions were received.

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 May 5, 1999, the Department received a requisition for the supply and installation of an emergency diesel generator, which was to be completed by November 30, 1999. As a result, on May 31, 1999, the Department issued an invitation to tender to six pre-qualified companies, including Dubuc, but not to Am-Tech. On June 7, 1999, Dubuc informed the Department by telephone of its intention to form a joint venture with Am-Tech.

The invitation to tender, under paragraph 1.1 of the section entitled "Special Instructions to Tenderers", reads, in part:

The following documents are incorporated by reference into, and form part of, the tender and contract documents:

.1 General Instructions to Tenderers R0001T.

Sections 2, 3 and 10, "Completion of Tender", "Signing Procedures" and "Tender Security Requirements" of the "General Instructions to Tenderers" contain, *inter alia*, the following provisions:

2.1 The tender shall be:

- .3 correctly completed in all respects;
- .4 signed in accordance with the signing procedures set out herein;
- .5 accompanied by tender security as specified herein.

3.1 The tender shall be signed in accordance with the following requirements:

.4 Joint Venture - The signatures of the authorized signatories of each member of the joint venture shall be affixed and their names and titles typed or printed in the space provided. Each of the participating signatories shall sign the document in the manner applicable to their particular business arrangement.

10.1 The Tenderer shall submit tender security with the tender in the form of a bid bond or a security deposit.

On June 14, 1999, the bid closing date, a public opening was held. Four tenders were received and among those was the subject bid.

Sections 1.2 and 1.10 of the subject bid read, in part, as follows:

1.2 Business Name and Address of Tenderer

NAME: LES ENTREPRISES ELECTRIQUES YVAN DUBUC LTEE & AM-TECH
POWER SYSTEMS LTD. - JOINT VENTURE M.O.U. ATTACHED

1.10 Execution of Tender

The Tenderer shall refer to Clause 3 of the General Instructions to Tenderers.

SIGNED, ATTESTED TO AND DELIVERED on the 14th day of June 1999 on behalf of LES ENTREPRISES ELECTRIQUES YVAN DUBUC LTEE & AM-TECH POWER SYSTEMS LTD. - JOINT VENTURE MEMORANDUM OF UNDERSTANDING ATTCH.

AUTHORIZED SIGNATORY(IES)
[Signature of Am-Tech's President]

The Memorandum, signed by untitled representatives of Am-Tech and Dubuc, was attached to the tender documents. The Memorandum reads, in part, as follows:

It is hereby agreed and understood that for the purpose of completing that project Les entreprises électriques Yvan Dubuc Ltée and Am-Tech Power Systems Ltd. will enter into a "joint venture" holding both Corporations fully responsible for the successful completion of the project as specified and under the Laws of Canada should the tender be successful.

A bid bond with London Guarantee Insurance Company as surety and Am-Tech as principal was attached to the tender documents.

On June 23, 1999, the Department awarded the contract to Black Electric Ltd. and, on the same day, it informed Am-Tech that its bid was non-compliant. On July 7, 1999, counsel for Am-Tech sent a letter to the Department asking for particulars with respect to why the subject bid was non-compliant. On July 9, 1999, the Department sent counsel for Am-Tech a letter explaining why the subject bid was non-compliant.

VALIDITY OF THE COMPLAINT

Department's Position

The Department submitted that the subject bid was correctly evaluated as being non-compliant on the basis that it was not submitted in accordance with the mandatory signing requirements for joint venture tenders set out in the "General Instructions to Tenderers". The Department submitted that subparagraph 3.1.4 of the "General Instructions to Tenderers" required the signature of each member of the joint venture to be affixed. As the subject bid was submitted in the name of Dubuc and Am-Tech, a joint venture with a memorandum of understanding attached, but was signed by the President of Am-Tech only, the Department stated that it properly rejected the bid.

Furthermore, the Department stated that the subject bid did not meet the mandatory requirements of the "General Instructions to Tenderers" with respect to tender security and bid bond requirements. The Department takes the position that the bid bond, submitted with Am-Tech alone as principal, did not provide bid security on behalf of the tenderer, being the joint venture, as required in the "General Instructions to Tenderers". The Department argued that, contrary to Am-Tech's allegation, the bid bond does not purport to bind the two companies, as there is no reference to Dubuc and is only executed by Am-Tech. In addition, the Department submitted, in its response to Am-Tech's comments on the GIR, that subparagraph 2.1.3 of the "General Instructions to Tenderers" makes it a mandatory condition that tenders be correctly completed in all respects.

On the question of the Memorandum, the Department submitted it would not be enforceable as against each of Am-Tech and Dubuc in the context of the enforcement of the terms of the bid or any subsequent contact. The Department also argued that the Crown is not a party to the Memorandum and that no rights flow to the Crown from it. The Department added that, as the Memorandum indicates the

agreement of Dubuc and Am-Tech to form a joint venture at an unspecified later date if the tender was successful, it is clear that the joint venture was not in existence at the time of the bid. Therefore, the Department argued, any suggestion by Am-Tech that it had the authority to bind Dubuc by virtue of an existing joint venture agreement is without merit. With respect to the jurisprudence cited by Am-Tech, the Department stated that it was irrelevant to the subject bid, since the cases cited relate to the tests to be applied in determining whether the parties intended to create joint ventures or partnerships in the absence of specific documentation. The Department submitted that, in circumstances in which joint tenderers purport to bid as a joint venture, their tender will be invalidated by documentation which clearly and specifically contradicts the existence of a joint venture arrangement by indicating that the formation is to occur in the future and is conditional on subsequent events.

In respect of Am-Tech's allegation that the Memorandum is merely an expression of the expectations between Am-Tech and Dubuc and ought not to be treated as a condition precedent to the tender or to the contract becoming binding, the Department replied that this statement supports its position that Am-Tech had no authority to bind Dubuc at the time of bidding in the context of the tender and the bid bond. The Department further stated that, contrary to Am-Tech's submission that the Memorandum is only an addendum without prejudice to the bid, it is an integral element of the tender which sets out the nature of the relationship between the joint bidder companies. On the question of the ambiguity of the tender documents, the Department submitted that, as this point was never raised by the complainant prior to the bid closing date, that ground of complaint was not submitted in time.

Am-Tech's Position

Am-Tech submitted that, as a joint venture is essentially a single-purpose partnership, the principle is that one partner has the authority to bind. Therefore, Am-Tech's execution of the subject bid consequently binds itself and Dubuc. In respect of the conditional aspect of the subject bid, Am-Tech submitted that the submission of a joint bid was part performance under the Memorandum which rendered it enforceable. Therefore, as the Memorandum was enforceable, it did not render the subject bid conditional. In response to the mandatory signing procedure issue raised in the GIR, Am-Tech submitted that the Department cannot purport to rely on ambiguous signing requirements and suggested that the requirements should have been construed in favour of the complainant, such that either one of the co-bidders could have executed the bid.

Am-Tech argued that the Memorandum was simply an addendum to the bid documents. It ought to have been interpreted merely as an explanation of certain elements of the bid and merely as an expression of the expectations between the co-bidders. In respect of the bid bond, Am-Tech suggested that, as it was submitted as a part of the larger package of bid documents included in the joint bid, execution by Am-Tech binds both of the joint bidders in the circumstances. Finally, Am-Tech argued that, when considered in its entirety and when substance is given precedence over the form to which the joint bid was submitted, the tender was properly executed as a joint venture.

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 *Agreement on Internal Trade*.⁴

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”. Therefore, the Tribunal must decide whether the solicitation documents clearly indicated that specific signing procedures and security requirements were required in the case of a bid submitted by a joint venture and whether the Department acted according to those procedures when it disqualified the subject bid.

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 the subject bid non-compliant with the signing procedures for joint ventures and the tender security requirements. The Tribunal notes that, in the subject bid, the “Tenderer” is clearly identified as Am-Tech and Dubuc - joint venture. The Tribunal finds that the invitation to tender clearly indicates in two separate places (under paragraph 1.1 of the “Special Instructions to Tenderers” and paragraph 1.2 of the “General Instructions to Tenderers”) that the general instructions form part of the solicitation documents and that the submission of a tender constitutes acknowledgement that the tenderer has read and agrees to be bound by these documents. In respect of the signing procedures, the Tribunal is of the opinion that subparagraph 3.1.4 of the “General Instructions to Tenderers” specifically required the signatures from each member of the joint venture to be affixed to the tender. The solicitation documents, under subparagraph 2.1.3 of the “General Instructions to Tenderers”, as well as under paragraph 1.10 of the bid document, clearly refer to this mandatory requirement.

With respect to the tender security requirements, the Tribunal finds that paragraph 1.6 of the bid document stated, without ambiguity, that the tender security had to be submitted in accordance with section 10 of the “General Instructions to Tenderers” and that failure to provide it in the form prescribed would disqualify the bid. As the bid bond was required to be submitted by the “Tenderer” and as it was submitted in the name of Am-Tech only, the Tribunal is of the opinion that the Department properly concluded that bid security was not provided on behalf of the Tenderer, as required in section 10 of the “General Instructions to Tenderers”. Furthermore, the Tribunal considers that subparagraphs 2.1.3 and 2.1.5 of the “General Instructions to Tenderers” make it clear that, to be declared compliant, the tender shall be correctly completed in all respects and accompanied by tender security as specified.

As the Tribunal determined that the Department did not violate any provisions of the AIT in declaring that the subject bid did not comply with the mandatory requirements of the invitation to tender, it is not necessary for the Tribunal to deal with the issue of the Memorandum or with the issue of the timeliness of that aspect of the complaint relating to ambiguous signing requirements.

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 Am-Tech. While Am-Tech’s complaint is not valid, it was not without merit.⁵ Therefore, submissions on this matter are not necessary, and no costs will be awarded.

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

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

DETERMINATION OF THE TRIBUNAL

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

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member