CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, May 4, 2000

File No.: PR-99-040

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

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

DETERMINATION OF THE TRIBUNAL

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

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The reasons for the Tribunal's determination will be issued at a later date.

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Date of Determination:	May 4, 2000
Date of Reasons:	May 12, 2000
Tribunal Member:	Patricia M. Close
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	Michèle Hurteau
Complainant:	Brent Moore & Associates
Counsel for the Complainant:	Ronald D. Lunau
Intervener:	Intertask Limited
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Christianne M. Laizner

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STATEMENT OF REASONS

On December 21, 1999, Brent Moore & Associates (BMA) 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 Communications Coordination Services Branch (CCSB), a constituent of the Department of Public Works and Government Services (the Department), of meeting management services, on an as required basis, executed by means of Departmental Individual Standing Offers (DISOs)[2] to which the CCSB, on behalf of various designated federal government departments and agencies, would have sole access.

BMA alleged that, in conducting this procurement, the Department failed to define, in the Request for a Standing Offer (RFSO) (Solicitation No. EP045-9-1001/A), the terms "prime" and "back-up" as these apply to the successful bidders. Furthermore, BMA alleged that, by insisting on a "right of first refusal" on the part of the ranked successful bidders, the Department introduced a call-up procedure different from that described in the RFSO.

BMA requested, as a remedy, that the Department allow the users of the DISOs to access the qualified firms of their choice in the National Capital Region by issuing call-ups without giving right of first refusal to firms in ranked order. Alternatively, BMA sought compensation that recognizes the opportunity that it lost. In addition, BMA requested its reasonable costs incurred in preparing a response to this solicitation and for the filing and processing of this complaint.

On January 5, 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 subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[3] On January 13, 2000, the Tribunal informed the parties that Intertask Limited (Intertask) had been granted intervener status in the matter.

On January 31, 2000, the Department filed a notice of motion requesting that the Tribunal dismiss the complaint because it did not have jurisdiction to hear this matter by virtue of the fact that the procurement at issue does not relate to a "designated contract", as required by subsection 30.11(1) of the CITT Act and as defined in subsection 3(1) of the Regulations. On February 25, 2000, the Tribunal dismissed the Department's motion and issued its reasons on March 29, 2000. On April 3, 2000, the

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. A DISO is defined as a standing offer against which only the Department may issue call-ups on behalf of specified identified users. Source: Supply Manual, article 5.156.
3. S.O.R./93-602 [hereinafter Regulations].

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Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[4] On April 13, 2000, Intertask and BMA filed 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 30, 1999, the CCSB requested that DISOs be put into place for the acquisition of meeting management services for a one-year period and two additional one-year option periods. According to the GIR, the DISOs were designed to be instruments of last resort for urgent requirements by the CCSB's client departments.

On July 29, 1999, a Notice of Proposed Procurement (NPP) was published on Canada's Electronic Tendering Service (MERX) for the requirement contained in the RFSO. The NPP reads, in part: "It is anticipated that a maximum of three (3) Departmental Individual Standing Offers (DISO) will be authorized for the National Capital Region i.e. one (1) prime standing offer and two (2) back-up standing offers as a result of this Request for Standing Offer".

The following are excerpts from Section I, "General Terms and Conditions", of the RFSO:

> **Standing Offers (Multiple)**
>
> It is anticipated that a maximum of three (3) Departmental Individual Standing Offers (DISO) will be authorized for the National Capital Region i.e. one (1) prime standing offer and two (2) back-up standing offers as a result of this Request for Standing Offer.
>
> **Project Authority**
>
> As specified in each call-up.
>
> The Project Authority is responsible for all matters concerning the technical content of the work under this requirement. Any proposed changes to the scope of work are to be discussed with the Project Authority, but any resulting changes can only be authorized by an amendment, issued by the Contracting Authority.
>
> **Contracting Authority**
>
> Public Works and Government Services Canada
> Communications Coordination Services Branch
>
> The Contracting Authority is responsible for the establishment of the Standing Offer, its administration, and any contractual issue relating to individual call-ups.

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

Section II, "Submission Instructions", of the RFSO reads, in part:

> **Presentation of the Offer**
>
> The selection will be made on the basis of best overall value to the Crown based on technical merit and cost, that is, points (of qualified bidders) divided into the costing offer for the lowest cost per point. For evaluation purposes, a Costing Scenario of 100 days for each task identified in the Basis of Payment will be used.
>
> It is anticipated that a maximum of three (3) standing offers will be authorized for the National Capital Region i.e. one (1) prime standing offer and two (2) back-up standing offers as a result of this Request for Standing Offer.

The following call-up procedures are included in Section III, "Requirement", of the RFSO:

> The Project Authority will provide the Offeror with a description of the task(s) to be performed.
>
> The offeror(s) will submit the following in writing to the CCSB representative and the Project Authority:
>
> - An understanding of the project deliverables and associated schedules; and
> - A detailed price breakdown in accordance with the costs identified in the Basis of Payment detailing the level of effort (hours to be charged) for the completion of the Project.

The RFSO closed on August 16, 1999, and all offers submitted were sent to the members of the evaluation committee on August 18, 1999. On October 15, 1999, following completion of the evaluation, four DISOs with a call-up limitation of $250,000 were authorized for the National Capital Region (one prime standing offer and three back-up standing offers). The Department informed BMA, by letter, that same day. The letter stated, in part:

> Four (4) standing offers are authorized for the National Capital Region:
>
> 1) prime standing offer to Pacific Rim Incentives Ltd.
> 2) back-up standing offers in ranking order: Wilson Young & Associates Inc., The Intertask Group of Companies Inc., and Brent Moore & Associates.

On October 27, 1999, BMA attended a debriefing session with the Department. On October 28, 1999, all successful suppliers were sent a copy of their standing offer document.

POSITION OF PARTIES

Department's Position

The Department submitted that the RFSO made it clear that firms would be selected on the basis of the best overall value to the Crown. The prime standing offer would represent the best overall value to the Crown, and it was anticipated that back-up standing offers could be established. The Department submitted that, consistent with the Tribunal's determination in *Polaris Inflatable Boats (Canada) Ltd.*,[5] it structured the procurement to ensure that there be a transparent and objective manner not only to select who would receive standing offers but also to determine how call-ups under the standing offers would be awarded.

In response to BMA's allegations that the RFSO was unclear because it contained no specific definitions for "prime" and "back-up" standing offers and that the application of the call-up procedures differed from that described in the RFSO, the Department submitted that, upon the issuance of the RFSO,

5. (8 March 1999) PR-98-032 [hereinafter *Polaris*].

all bidders were aware of these two elements. BMA did not raise this ground of complaint within the prescribed time frames and, the Department submitted, it is not timely to do so now.

In the alternative, the Department submitted that the meaning of the words "prime" and "back-up" is apparent from the context and that they required no special definition or clarification in the RFSO. The plain and ordinary meanings of the said words applied in the circumstances of this procurement (i.e. "prime" means "first in rank, authority or significance" or "principal" ; "back-up" is commonly understood to mean "one that serves as a substitute or alternative").[6] The Department further observed that BMA's own proposal contained several references to "back-up" to indicate the availability of a secondary or reserve resource in the event of the failure or unavailability of the prime resource and, thereby, confirmed its understanding of the common usage of the word.

The Department submitted that the call-up procedures described in the RFSO were identical to those set forth in BMA's standing offer. Furthermore, the Department submitted that, having regard to the plain and ordinary wording of the call-up procedures in the RFSO, there is no merit to BMA's assertion that the prime and back-up standing offers would be on equal footing and that the decision on call-ups would be left to the client department, based on its own evaluation of appropriateness and level of effort proposed by each holder of a standing offer. The Department argued that BMA's view, that the status of "back-up standing offers" should necessarily be interpreted as anything but standing offers that would be used in the event of unavailability, withdrawal or otherwise failure of the "prime standing offer", is entirely unsupported by the provisions of the NPP, the RFSO and the standing offers. In fact, the Department submitted that BMA's allegation necessarily rests on the erroneous assumption that there should be no distinction between the terms "prime" and "back-up".

The Department submitted that BMA's proposed remedy that client departments select any qualified supplier irrespective of its ranked order and subsequently instruct the Department to issue a call-up to the selected supplier would contradict: (1) the Department's position as the only organization authorized to award call-ups under the DISOs; (2) the Department's intention to access the supplier offering the best value to the Crown, as provided for in the evaluation and selection methodology outlined in the RFSO; (3) the award of prime and back-up standing offers, as required by the NPP and the terms of the RFSO; and (4) the application of a competitive process to the award of standing offers and call-ups.

BMA asserted that, from the beginning of the process, it was led to understand that the Department was issuing multiple standing offers to willing and able suppliers and would allow a client department access to firms of the client's choice. In this respect, the Department submitted that at no time during the bidding period or following the closing of bids, in response to BMA's inquires, did a departmental representative provide BMA with verbal or other information which could have led BMA to believe that client departments would be able to select suppliers of their own choice from a list of standing offer holders. That BMA may have derived this impression from previous procurements by the Department is not disputed, but it was never the case in this instance. In fact, the NPP and RFSO clearly indicated that different categories of holders of DISOs would be established as a result of this RFSO. The Department also requested the opportunity to make submissions on the award of costs.

BMA's Position

BMA submitted that its complaint relates to the manner in which the Department is applying the call-up process, which, in its view, is inconsistent with the terms of the RFSO. In answering the

6. *Webster's Ninth New Collegiate Dictionary*, 1983, *s.v.* "prime" and "back-up".

Department's assertion that its complaint was filed late, BMA submitted that its complaint is timely by virtue of subsection 6(2) of the Regulations. BMA indicated that it discovered that the Department intended to award call-ups according to a "right of first refusal" methodology on or about October 27, 1999, in a debriefing session with the Department. BMA objected to this approach in a letter dated November 3, 1999, and the Department responded to BMA's objection on December 6, 1999, asserting not only that proposals were evaluated equitably but that all standing offers were awarded in strict accordance with the provisions found in the RFSO. BMA filed its complaint with the Tribunal on December 21, 1999, which date, BMA submitted, falls within the 10-working-day prescribed time frame.

BMA submitted that the manner in which the Department is issuing call-ups in this instance is not consistent with or authorized by the RFSO, reduces or eliminates competition, creates distortion in the industry, denies project authorities the ability to contract with the qualified supplier of their choice and causes economic damage to "back-up" suppliers. BMA submitted that, contrary to the Tribunal's direction in *Polaris*, which requires that an RFSO include not only the criteria upon which a standing offer will be awarded to a qualified bidder but also the criteria upon which a qualified bidder may be awarded the final contract pursuant to a call-up by a government client, the "right of first refusal" process proposed in this instance did not qualify as a criterion that sets out a government client's specific needs, did not provide an understanding as to how bids will be evaluated once the standing offer is issued and, in any event, was not set out in the RFSO.

BMA argued that the terms "prime" and "back-up", as employed in the RFSO, were, at best, vague and did not provide sufficient notice to bidders that a "right of first refusal" process would be employed by the Department in issuing call-ups. This is particularly true, as this marks a significant departure from the Department's previous practices.

BMA asserted that it is the contracting authority's obligation not only to provide the best possible information in the tender documents but to do so in a manner that is clear and intelligible to all bidders, and this onus cannot be put on bidders.

Furthermore, BMA submitted that, even if the words "prime" and "back-up" could reasonably be construed as providing adequate notice of a ranking order between two classes of bidders, they clearly did not provide for a system of ranking the "back-up" suppliers amongst themselves.

Intertask's Position

Intertask submitted that it and BMA were only informed of the Department's intention to alter the method of issuing call-ups against the standing offer after bid closing during separate debriefing sessions.

Intertask submitted that it saw no need to seek clarification or object to the words "prime" and "back-up" in the RFSO, since this RFSO was virtually identical to the one issued in 1996.[7] Intertask argued that it understood these words, as well as the tone, content and everything else in the RFSO, to indicate an intent to continue the administrative practices and precedents followed by the CCSB. Intertask submitted that it proceeded with this RFSO with the understanding that, if a client proposed to change its rules of procurement after more than 26 years, it would have the good business sense and usual professional courtesy to advise its partners, in specific terms, at the outset of the competitive process. This, Intertask submitted, was not done.

7. Solicitation No. EN918-6-BB03/A.

Furthermore, Intertask argued that the RFSO said nothing about call-ups being issued in strict accordance with the ranked order resulting from the evaluation of the proposals, nor would Intertask interpret the terms "prime" and "back-up" to have this meaning in this RFSO or any other RFSO context.

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, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the *Agreement on Internal Trade*.[8]

With respect to BMA's allegation that the Department failed to define, in the RFSO, the terms "prime" and "back-up" as these apply to the successful bidders, the Tribunal finds that this ground of complaint was not filed within the prescribed time frame and, as such, the Tribunal will not address it on its merits. In the Tribunal's opinion, it was clear that the RFSO did not include specific definitions for the terms "prime" and "back-up". If BMA found that situation objectionable, it could have raised the matter with the Department or the Tribunal within the time frame prescribed in section 6 of the Regulations, i.e. within a 10-working-day period after July 29, 1999, the date on which the NPP was published on MERX and the RFSO made available to potential suppliers. However, BMA only filed its complaint with the Tribunal on December 21, 1999.

Article 506(6) of the AIT requires, in part, that tender documents clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria. In this context, the Tribunal will determine whether, by insisting on a right of first refusal on the part of the ranked successful bidders, the Department introduced in this procurement a call-up procedure different from the one described in the RFSO.

BMA submitted that the terms "prime" and "back-up" employed in the RFSO were, at best, vague and did not provide sufficient notice to bidders that a "right of first refusal" process would be employed by the Department in issuing call-ups. For its part, Intertask argued that it understood these words and the tone, content and everything else in the RFSO to be an intent on the part of the Department to continue its past practice and to allow all qualified bidders equal access to upcoming call-ups.

The Tribunal finds that the RFSO indicated, in a number of locations, that "prime" and "back-up" standing offers would be issued as a result of this solicitation. The Tribunal is also satisfied that, in the absence of specific definitions in the RFSO of the terms "prime" and "back-up", these terms must be given their plain and ordinary meanings, i.e. "prime" meaning "first in rank or principal" and "back-up" meaning "one that serves as a substitute or alternative".

The RFSO also clearly indicated that the selection of bidders would be made on the basis of best overall value to the Crown, by dividing the points for technical merit by cost. In this context, the Tribunal is of the view that the RFSO clearly indicated to potential suppliers that their proposals would be ranked as "prime" and "back-up" on the basis of the best overall value to the Crown.

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

The Tribunal has difficulty understanding how BMA and Intertask, when considering the RFSO at hand, could conclude that the DISOs, specifically designed for exclusive use by the Department, were no different from the previous Regional Individual Standing Offers (RISOs) that were accessible directly by client departments. Furthermore, the Tribunal finds it hard to comprehend that these two potential suppliers, which have been closely associated in one way or another with this type of procurement, assumed that the terms "prime" and "back-up", as they relate to standing offers, and not having been included in solicitation documents for the previous RISOs, had no particular practical meaning insofar as call-ups were concerned. Although it may be a natural tendency for suppliers that have done business with the Department for a long period of time to read and interpret solicitation documents with past experience in mind, in the Tribunal's opinion, each solicitation document stands on its own, and every and all of its terms must be given meanings.

The Tribunal finds that the implication of being named as "prime" under the RFSO would be that any call-ups would first be offered to the "prime". Should the "prime" be unable or unwilling to fulfil the contract, then, for the purpose of the call-up in question, a new "prime" would have to be named from the "back-up". In keeping with the RFSO, the new "prime" would be selected on the basis of best overall value to the Crown. The effect would be a ranking of the firms that form part of the standing offer. The Tribunal is of the view that, although the Department could have better described what would happen if the "prime" were unable or unwilling to fulfil a contract (call-up), the RFSO does contain the essential elements to allow the Department to apply the "right of first refusal" approach as it did.

BMA asserted that the call-up method to be used in this instance is contrary to the Tribunal's determination in *Polaris*. In *Polaris*, the Tribunal held, in part, that "the manner in which the Department uses the standing offer method of supply for competing the government requirements for RHIBs [rigid hull inflatable boats] does not meet the requirement of . . . Article 506(6) of the AIT, in that the RFSO does not fully describe the goods to be procured or set out the criteria governing the selection of a particular product and, consequently, the award of contracts".[9] In other words, *Polaris* stands for the proposition that RFSOs must not only include clear criteria governing the issuance of standing offers but also clear criteria governing the award of call-ups pursuant thereto. Adopting this proposition in the instance, the Tribunal notes that "the best overall value to the Crown" criterion set out by the Department in the RFSO meets this test.

The Department 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 BMA. While BMA's complaint is not valid, it was not without merit.[10] Therefore, submissions on this matter are not necessary, and no costs will be awarded.

9. *Supra* note 5 at 9.
10. *Flolite Industries, Addendum* (7 August 1998), PR-97-045 (CITT).

DETERMINATION OF THE TRIBUNAL

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

Patricia M. Close
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Presiding Member