

Ottawa, Wednesday, August 30, 2000

File No.: PR-2000-026

IN THE MATTER OF a complaint filed by Dynasty Components 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 motion by the Library of Parliament for an order dismissing the complaint on the basis that the complaint was filed outside the time limit imposed by the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

ORDER

The Canadian International Trade Tribunal hereby grants the motion by the Library of Parliament and, pursuant to paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, dismisses the complaint.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The Statement of Reasons will follow at a later date.

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| Date of Order: | August 30, 2000 |
| Date of Reasons: | September 29, 2000 |
| Tribunal Member: | Zdenek Kvarda, Presiding Member |
| Investigation Officer: | Paule Couët |
| Counsel for the Tribunal: | Marie-France Dagenais |
| Complainant: | Smartnet, Dynasty Components, a division of DCI, and MediaLog Systems Inc., a joint venture |
| Counsel for the Complainant: | Ronald C. Lefebvre |
| Government Institution: | Library of Parliament |
| Counsel for the Government Institution: | David M. Attwater |

Ottawa, Friday, September 29, 2000

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IN THE MATTER OF a complaint filed by Dynasty Components 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 motion by the Library of Parliament for an order dismissing the complaint on the basis that the complaint was filed outside the time limit imposed by the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

STATEMENT OF REASONS

On July 19, 2000, Smartnet, Dynasty Components, a division of DCI, and MediaLog Systems Inc., a joint venture (the joint venture), 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 a procurement (Serial No. RFP-99-600) by the Library of Parliament (the Library) for the provision of a new electronic news monitoring service for approximately 1,000 clients working within the Parliamentary Precinct in Ottawa, Ontario.

The joint venture alleged that, contrary to the provisions of Article 506(6) of the *Agreement on Internal Trade*,² the Library has used, in the evaluation of proposals, a criterion (reliance on Lotus Notes) which was not set out in the Request for Proposal (RFP).

The joint venture requested, as a remedy, that the Tribunal instruct the Library to cancel the RFP and invite new tenders for this requirement, in a manner that is unequivocal with regard to the technical and financial requirements and the criteria that will be used to evaluate proposals. The joint venture also requested its costs for preparing a response to this solicitation and for filing and pursuing this complaint.

On July 25, 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 That same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. On August 16, 2000, the Library filed a motion with the Tribunal requesting that the complaint be dismissed, as it was filed outside the time limit set out in subsection 6(1) of the Regulations. On August 18, 2000, the joint venture filed submissions with the Tribunal on the motion. On August 24, 2000, the Library filed comments in response. On August 25, 2000, the joint venture filed comments on the Library's response with the Tribunal.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].

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

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

MOTION

On June 13, 2000, the Library informed Dynasty Components, a division of DCI (Dynasty) that its proposal would not be placed on the short list for further consideration. The letter reads, in part, as follows:

Based on technical and financial components of the Request for Proposal (RFP) it was determined that Sagemaker and Densan would be placed on the short list for final consideration. Further evaluation will continue that will ultimately determine the successful contractor.

We thank you for your submission and we will be pleased to answer any technical questions you may have about your proposal.

On June 16, 2000, Dynasty, on behalf of the joint venture, wrote the Library requesting a debriefing to understand why its proposal had been rejected. On June 26, 2000, Dynasty received a letter from the Library dated June 23, 2000. The letter reads, in part:

the reason Dynasty was not selected for the short list is as follows:

“DCI was excluded because it requires Lotus Notes. This is not something the House of Commons Network Services are willing to support”

In addition the financial proposal, although it was not evaluated because DCI did not meet the technical requirements was substantially higher than the short listed companies.

If you still require a debriefing session we will be able to do so following the completion of the evaluation process which we expect will take up to the beginning of September.

On July 19, 2000, the joint venture filed this complaint with the Tribunal.

On July 20, 2000, the Tribunal wrote counsel for the joint venture requesting additional information as to when and how the joint venture discovered its grounds of complaint. On July 21, 2000, counsel informed the Tribunal as follows:

DCI/Medialog found out about their grounds for complaint on **July 12**. They found out from Corporation House [counsel for the joint venture] when Medialog's [named individual] asked if the Library of Parliament was entitled to discriminate against Lotus Notes and those who proposed the use of Lotus Notes as part of the **electronic news monitoring service** they were offering the Library of Parliament in response to RFP-99-600.

In its motion, dated August 16, 2000, the Library submitted that the joint venture did not make an objection to the Library over the reason for which its proposal was excluded from further consideration. The joint venture ceased all communications with the Library after being advised of the reason for which its proposal was rejected. Therefore, the Library submitted that, pursuant to subsection 6(1) of the Regulations, the joint venture had 10 working days after it knew the basis of its complaint to file a complaint with the Tribunal. The Library submitted that the facts on which the complaint is founded (non-compliance due to reliance on Lotus Notes) became known to the joint venture on June 26, 2000, when it received the Library's letter of June 23, 2000, informing it of the reason for which its proposal was not short-listed and given further consideration. Accordingly, the Library submitted, the joint venture had until July 11, 2000, to file a complaint with the Tribunal on this ground. This was not done until July 19, 2000. Therefore, the complaint was filed outside the time limit imposed by subsection 6(1) of the Regulations. For the above reasons, the Library submitted that the complaint should be dismissed pursuant to paragraph 10(c) of the Regulations.

In its reply to the motion, filed on August 18, 2000, the joint venture submitted that it understood from the Tribunal's decision to initiate an inquiry into the matter that it had filed its complaint within an acceptable time frame. The joint venture added that the Tribunal had obviously taken into consideration the good faith of the joint venture and that it had “no later than 30 days after the day on which the basis of the complaint became known” to raise an issue of a systemic nature.

The joint venture submitted that it would be unfortunate if the Tribunal now backed away from its wise decision. The joint venture submitted that it is comprised of small young companies whose principals are unfamiliar with the intricacies of government procurement and the bid challenge process. However, it has had the rare courage to stand up for its rights.

Furthermore, the joint venture submitted that the Library's dismissal of its proposal and its refusal to provide any explanation of substance before September 2000 was arrogant and condescending behaviour.

In its comments of August 24, 2000, the Library submitted that the joint venture has not challenged, nor undermined in any way, the facts upon which the Library's motion was founded or the application of subsection 6(1) of the Regulations. The Library submitted that the joint venture's reliance on subsection 6(3) of the Regulations is an acknowledgement that the joint venture failed to file its complaint within the time limit set out in subsection 6(1) of the Regulations.

The Library, commenting on the application of subsection 6(3) of the Regulations to this case, submitted, with regards to paragraph 6(3)(a), that it was completely within the control of the joint venture to inform itself at any time of its rights under the CITT Act and, with regards to paragraph 6(3)(b), that the complaint does not raise matters of a systemic nature. The Library submitted that, pursuant to paragraph 10(c) of the Regulations, the Tribunal may dismiss the complaint at any time and thus, may dismiss the complaint at this time, based on its motion.

In its final comments, the joint venture submitted that its complaint does raise an issue of significant importance to the entire procurement process. What could be more important to equity and fair play, the joint venture queried, than the fact that the requirements of a solicitation and the criteria for evaluation should be clearly identified in the tender documentation?

TRIBUNAL'S DECISION

Section 6 of the Regulations⁴ sets out the time frames that govern the making of objections and the filing of complaints. Furthermore, section 10 of the Regulations provides that the Tribunal may, at any time, order the dismissal of a complaint where "the complaint is not filed within the time limits set out in these Regulations or in any rules made pursuant to subsection 39(1) of the Act".

4. 6. (1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

(3) A potential supplier who fails to file a complaint within the time limit set out in subsection (1) or (2) may file a complaint within the time limit set out in subsection (4), if the Tribunal determines, after considering all of the circumstances surrounding the procurement, including the good faith of the potential supplier, that

(a) the failure to file the complaint was attributable to a cause beyond the control of the potential supplier at the time the complaint should have been filed in order to meet the requirements of subsection (1) and (2); or

(b) the complaint concerns any aspect of the procurement process, of a systemic nature, relating to a designated contract, and compliance with one or more of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade and the Agreement on Government Procurement.

(4) A complaint under subsection (3) may not be filed later than 30 days after the day the basis of the complaint became known or reasonably should have become known to the potential supplier.

On July 25, 2000, the Tribunal accepted the complaint for inquiry, as it was persuaded on the basis of the record as it existed then that, *inter alia*, the complaint was filed within the time frame set out in subsection 6(1) of the Regulations. The Tribunal made this preliminary decision based on its understanding that the joint venture had not pursued the rejection of its proposal by the Library because it did not yet possess a full understanding of the basis of its complaint and because the Library was not able to provide it with a debriefing until the beginning of September 2000.

The Tribunal now finds, however, on the basis of a more complete record, that the joint venture knew the basis of the complaint on June 26, 2000, when it received the Library's letter of June 23, 2000, informing it that its proposal had been rejected because it required Lotus Notes. The Tribunal also finds that the joint venture learned on July 12, 2000, that the Library's decision in respect of its offer allegedly constituted a breach of the trade agreement and that such action could properly form the basis of a complaint to the Tribunal.

The Tribunal is satisfied that the joint venture never made an objection within the meaning of subsection 6(2) of the Regulations in this instance. Furthermore, in the Tribunal's opinion, the provisions of subsections 6(3) and (4) of the Regulations were not invoked by the joint venture in its complaint nor do they apply to this case. Indeed, it was within the control of the joint venture to inform itself, at any time, of its rights under the CITT Act, the Regulations and the relevant trade agreement. Furthermore, although the joint venture pointed out that the matter raises an issue of significant importance to the procurement process, in the Tribunal's opinion, the issue is not of a systemic nature. The Tribunal notes that, in this respect, it has made, on numerous occasions in the recent past, decisions dealing with the statement of requirements in solicitation documents, including the evaluation criteria and the use thereof in the evaluation of proposals, and that, as such, the law on this point is quite current.

In light of the above, the Tribunal finds that the joint venture filed its complaint with the Tribunal outside the time limit set out in subsection 6(1) of the Regulations and that, therefore, the complaint was filed late. Accordingly, pursuant to paragraph 10(c) of the Regulations, the Tribunal dismissed the complaint.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member