

Ottawa, Friday, May 15, 1998

File No.: PR-97-041

IN THE MATTER OF a complaint filed by Mirtech International Security Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

AND IN THE MATTER OF a motion by the Department of Public Works and Government Services for an order dismissing the complaint on the basis that the complaint has no valid basis.

ORDER OF THE TRIBUNAL

The Canadian International Trade Tribunal hereby grants the motion by the Department of Public Works and Government Services and, pursuant to paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, dismisses the complaint.

Pierre Gosselin

Pierre Gosselin
Member

Michel P. Granger

Michel P. Granger
Secretary

The Statement of Reasons will follow at a later date.

Ottawa, Friday, June 12, 1998

File No.: PR-97-041

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REASONS FOR DECISION

INTRODUCTION

On January 26, 1998, Mirtech International Security Inc. (Mirtech) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (CITT Act) concerning a procurement (Solicitation No. TPD V1PW1-7C006) by the Department of Public Works and Government Services (the Department) for construction services for the installation of integrated access control and alarm systems at Place du Portage, Phases II and IV, in Hull, Quebec, and at Place Vanier, Towers A and B, in Vanier, Ontario.

In September 1997, the Department issued solicitation documents for this procurement. The closing date for the submission of proposals was November 17, 1997. Mirtech submitted its proposal within the prescribed period. The documentation received by the Tribunal indicates that Mirtech was the low bidder. On November 23, 1997, Mirtech was asked by the Department if it had a Quebec contractor's licence, as part of the work was to be performed there. The following day, Mirtech told the Department that it was in the process of obtaining one. Mirtech received its licence on December 4, 1997, and advised the Department that it had obtained it. After that date, and during the proposal evaluation process, the Department twice asked the tenderers to extend the period of validity of the proposals. The reasons for the first request are unknown to the Tribunal, however the second extension (until January 23, 1998) was requested on account of the difficulties caused by the ice storm in Eastern Canada. Mirtech agreed to both extensions.

On January 26, 1998, the Department advised Mirtech that its proposal had been rejected for failure to have the required licence, issued by the Régie du bâtiment du Québec, at the time the proposal was submitted.

The Department awarded the contract for the procurement at issue to La Compagnie Diebold du Canada Ltée (Diebold) on January 23, 1998.

1. R.S.C. 1985, c. 47 (4th Supp.).

In its complaint to the Tribunal, Mirtech declared that the requirement for a tenderer to have a Quebec contractor's licence at the time of submitting a proposal was contrary to the *Agreement on Internal Trade*² (the AIT). Mirtech argued that such a requirement favoured Quebec companies or companies that had already done business in Quebec and that, by implication, already had the necessary Quebec contractor's licence. In other words, companies that had never done business in Quebec would have to spend time, effort and money just to be allowed to bid on a construction project, and this was discriminatory. Additionally, Mirtech claimed that, even if the licensing requirement were valid, it was not properly communicated to tenderers in the solicitation documents.

On January 29, 1998, the Tribunal determined that the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*³ had been met in respect of the complaint and, pursuant to section 30.13 of the CITT Act, decided to conduct an inquiry into the complaint.

On February 25, 1998, the Department brought a motion seeking to dismiss the complaint for lack of a valid basis. The Department argued that Quebec law, which requires a tenderer to be licensed, was applicable. Since Mirtech was not licensed when it submitted its proposal, the Department properly rejected the proposal. In particular, the Department relied upon sections 7 and 46 of the *Building Act*⁴ which regulates Quebec's building industry, which read in part:

7. "contractor" means any person who, for another person, carries out or has carried out building work or draws up or submits tender bids, either directly or indirectly, with the purpose of carrying out or having carried out such work for profit.

46. No person may act as a building contractor, hold himself out to be such or give cause to believe that he is a building contractor, unless he holds a current licence for that purpose.

The Department added that the Crown had explicitly adopted Quebec law in paragraph 6 of the Special Instructions to Tenderers which were part of the solicitation documents. That paragraph stated that "[t]he Contractor shall comply with all laws and by-laws relating to the Work, whether federal, provincial or municipal."

On March 4, 1998, the Tribunal requested additional information from the Department regarding its motion, in particular in relation with the AIT. In its reply dated March 19, 1998, the Department argued that any allegation to the effect that a provision of Quebec law contravenes a provision of the AIT found in Chapter 5 is properly dealt with by the Dispute Resolution Procedures of Chapter 17 of the AIT and not by the Tribunal. In the alternative, it was submitted that the AIT had not been breached.

Mirtech replied to the motion and the additional information filed by the Department on March 31, 1998. In its submission, Mirtech also added new arguments and made it clear that it was not challenging the validity of the Quebec law licensing requirement in relation with the AIT, but was contesting the effect that this requirement could have on the validity of its proposal.

In its reply, Mirtech argued that the Special Instructions to Tenderers called for Quebec law only to be applied to the contractor not to the tenderers. Therefore, the *Building Act* was not applicable, as Mirtech,

2. As signed at Ottawa, Ontario, on July 18, 1994.

3. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

4. R.S.Q., c. B-1.1.

at the time it submitted its proposal, was a tenderer. “Contractor” and “tenderer” were two totally separate notions according to the language and provisions of the solicitation documents. Moreover, according to Mirtech, the fact that the Department’s officials never mentioned that there was a requirement for the tenderers to be licensed supports its view.

Alternatively, Mirtech argued that the Department waived this licence requirement when it requested extensions in the period of validity of proposal, knowing that Mirtech did not hold its Quebec licence at the time its bid was submitted.

In the further alternative, Mirtech submitted that it had satisfied the requirement for a licence by obtaining one on December 4, 1997. It argued that each request by the Department for an extension of the validity of proposal period and acceptance by Mirtech should be seen as a new contract. Since Mirtech had the licence at the time the “new” contracts came into existence, it satisfied the licensing requirement in the *Building Act*.

TRIBUNAL’S DECISION

In the present case, the Tribunal must address two questions. The first issue concerns the correctness of the Department’s decision to reject Mirtech’s proposal for not having a Quebec contractor’s licence and the validity of this decision under the AIT. The second question concerns the conformity of the solicitation documents with the AIT as regards the notification, or the absence of notification, of the requirement for a contractor’s licence.

The combined effect of sections 7 and 46 of the *Building Act* is to require that anyone who wants to make a proposal, i.e. submit a tender, relating to construction work in Quebec first obtain a contractor’s licence. The consequence of not holding that licence was considered by the Quebec Court of Appeal (Court of Appeal) in the case of *Meubles du Québec Inspiration XIX^e Ltée c. Chicoutimi (Ville)*.⁵ In that case two companies submitted proposals to the City of Chicoutimi in order to perform construction work. The lowest proposal was rejected by the City because the low bidder did not have a contractor’s licence at the time it submitted its proposal. The relevant act at issue in that case was the predecessor of the *Building Act* which is at issue in the present case. Although the lowest bidder received its licence a few weeks after bid closing, the Court of Appeal concluded that the City acted appropriately by rejecting the proposal made by the unlicensed company. The Court of Appeal stated that, at the time of the proposal, the company did not have the legal capacity to act as a contractor. For the Court, the proposal was “*illégal et irrégulière*” (“illegal and irregular”).

The Court of Appeal also indicated that there was no obligation to insert in the solicitation documents the requirement that tenderers have a contractor’s licence (even though it would have been preferable to do so) because it was not necessary to state that parties submitting proposals had to comply with the law. The Court of Appeal also stated that obtaining the licence subsequent to submitting the proposal could not, in any *ex post facto* manner, rehabilitate the proposal and make it compliant with the laws of Quebec.

In the Tribunal’s view, the facts and law of the present case are similar to those considered by the Court of Appeal. If a party does not have the legal capacity to submit a proposal for work, then the party to which the proposal is made can justifiably reject it.

5. [1994] R.J.Q. 2157.

The fact that some of the work called for by the solicitation documents was to take place in Ontario does not eliminate the need for Mirtech to have in its possession a Quebec contractor's licence when it submitted its proposal.

The *Ontario-Quebec Agreement on Labour Mobility and Recognition of Qualifications, Skills and Work Experience in the Construction Industry*⁶ provides that:

The government of Quebec also confirms that the only licence or permit required for Ontario contractors before they respond to a call for tender on any construction project open to Ontario contractors is the **licence issued by the Régie du bâtiment du Québec**.⁷ (Emphasis added)

The application of the *Building Act* to Mirtech's proposal is not impacted by the fact that the proposal was directed to the Department, a federal government entity. The *Building Act* applies here to a proposal made by a private party, not by a government. The Crown certainly had to consider the effect of the *Building Act* on Mirtech's proposal, which was to invalidate it.

In an effort to persuade the Tribunal that the licence was only required from the contractor, and not the tenderers, Mirtech noted that the solicitation documents distinguished between tenderers and contractor where it was stated, in section 6.1 of the Special Instructions to Tenderers, that: "[t]he Contractor shall comply with all laws and by-laws relating to the Work, whether federal, provincial, or municipal." Other provisions in the solicitation documents made specific reference to tenderers.

While the Tribunal accepts that section 6.1 is directed to the contractor that will perform the work, it cannot be taken to override the effects of applicable provincial legislation such as the *Building Act*. Solicitation documents cannot modify the scope of validly enacted laws. As was stated by the Court of Appeal, the requirement for a licence existed even if the solicitation documents did not mention it because of the application of the *Building Act*.

Mirtech further advanced that, even if the licensing requirement were to be deemed applicable to the tenderers, its proposal should have been accepted. According to Mirtech, for the Department to have asked it for an extension of the period of validity of its proposal, after it had received its contractor's licence, amounted to a waiver of the requirement to hold a licence at the time it submitted its proposal. The Tribunal does not agree. Even had it wanted to do so, the Department could not have waived that requirement. Indeed, that would amount to favouring Mirtech by accepting an illegal and irregular proposal while other tenderers were submitting valid proposals. It is a well established principle that this cannot be done in the context of a procurement where equity and impartiality are of paramount importance.

Mirtech also contends, in its reply submission, that new tenderer's contracts⁸ came into being each time the Department asked for an extension of the validity of the proposals to which it was agreed. Even if the Tribunal were to accept this argument, the Department would still have been justified in rejecting Mirtech's proposal. It must be underlined that a request for an extension of the duration of the validity of the proposals can only be addressed to the tenderers which have initially submitted valid proposals. The extension cannot be construed as a new request for proposals, open to everyone. To accept that proposition

6. Signed on December 6, 1996.

7. Paragraph 6.2.

8. In *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] S.C.R. 111, the Supreme Court of Canada determined that a contract is created by the issuance of solicitation documents and the presentation of a proposal in response to it.

would mean that each extension created an entirely new bid solicitation or request for proposals. This can never have been the intent of the Department nor the effect in law. Since Mirtech did not initially submit a valid proposal, it could not have benefited, in any case, from the requests for extension to then submit a valid proposal.

Mirtech further argued that the Department's decision constituted a breach of the non-discrimination provisions of the AIT, more specifically, of Article 504(3)(a). The Tribunal does not agree. Article 504 provides, in part, that:

1. Subject to Article 404 (Legitimate Objectives), with respect to measures covered by this Chapter, each Party shall accord to:
 - (b) the suppliers of goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment it accords to its own suppliers of such goods and services.
2. With respect to the Federal Government, paragraph 1 means that, subject to Article 404 (Legitimate Objectives), it shall not discriminate:
 - (b) between the suppliers of such goods or services of a particular Province or region and those of any other Province or region.
3. Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following:
 - (a) the imposition of conditions on the invitation to tender, registration requirements or qualification procedures that are based on the location of a supplier's place of business or the place where the goods are produced or the services are provided or other like criteria.

Despite Mirtech's submission, it cannot be said that the Department imposed conditions in the invitation to tender (the solicitation documents) that were based on the supplier's place of business. The requirement for a contractor's licence flowed from the *Building Act*, enacted by the Quebec legislature, not from the Department. Therefore, the Department did not breach Article 504(3)(a) of the AIT. In this context, it must be remembered that Mirtech made clear in its reply submission that it was not challenging the validity of the requirement, per se, under the AIT.

For the foregoing reasons, the Tribunal is of the view that the Department was justified to reject Mirtech's proposal.

The Tribunal must now determine whether Article 506(6) of the AIT was breached because no mention was made in the solicitation documents about the need to have a Quebec contractor's licence. Article 506(6) specifies that "[t]he tender documents shall clearly identify the requirements of the procurement." As indicated before, the Tribunal agrees that paragraph 6.1 of the Special Instructions for Tenderers was directed specifically to the chosen contractor not to the tenderers. Paragraph 6.1 provided in part that: "[t]he Contractor shall comply with all laws and by-laws relating to the Work, whether federal, provincial or municipal." While accepting that the solicitation documents contemplated a contractor and a tenderer as two separate entities, the Tribunal is satisfied that Article 506(6) of the AIT has not been breached. This article covers the requirements that are established by the party which requests the proposals. The article cannot have the effect to force this party to indicate all the requirements that are not specific to the procurement in question, but that simply apply by operation of law. It is for the tenderers to ensure that they comply with the laws that are applicable to them. This does not have to be stated in the solicitation documents.

Consequently, the Tribunal is of the view that Article 506(6) of the AIT has not been breached. Nevertheless, the Tribunal would like to add that, even though the Department is not legally required to do so, it would be useful for tenderers if the Department were to indicate, in any future solicitation documents that, for construction work in Quebec, tenderers need to have a Quebec contractor's licence.

Given the preceding analysis, the Tribunal concludes that the complaint filed by Mirtech has no valid basis. The Tribunal, therefore, grants the Department's motion and orders the dismissal of the complaint filed by Mirtech.

Pierre Gosselin

Pierre Gosselin

Member