

Ottawa, Tuesday, April 21, 1998

File No.: PR-97-047

IN THE MATTER OF an inquiry into a complaint filed by Valcom Ltd. 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 it was not filed within the prescribed time limits.

**ORDER OF THE TRIBUNAL**

The Canadian International Trade Tribunal concludes that the complaint was not filed within the prescribed time limits and, therefore, pursuant to paragraph 10(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, hereby orders the dismissal of the complaint.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Member

Michel P. Granger

Michel P. Granger  
Secretary

Date of Order: April 21, 1998

Tribunal Member: Robert C. Coates, Q.C.

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Joël J. Robichaud

Complainant: Valcom Ltd.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Susan D. Clarke

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### STATEMENT OF REASONS

#### INTRODUCTION

On February 12, 1998, Valcom Ltd. (Valcom) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (the CITT Act) concerning the procurement (Solicitation No. KW203-7-0514/A) by the Department of Public Works and Government Services (the Department) of data loggers for the Department of Environment (DOE).

Valcom alleged that because the requirements stated in the Request for Proposal (RFP) were based on a competitor's model (Sutron Model 8210/AS or equal), it had to make changes in hardware and software to its product in order to comply. Valcom submitted that it was willing to demonstrate its product in Guelph, Ontario, and that, therefore, its offer should not have been declared non-compliant by the Department solely for failing to send the requested unit to DOE in Halifax. According to Valcom, this was particularly unacceptable since DOE was agreeable to the demonstration being conducted in Guelph.

On February 18, 1998, the Tribunal wrote Valcom to seek clarification as to how it received a letter from the Department dated January 28, 1998, informing it that its offer was non-compliant and when Valcom received the letter. On February 19, 1998, Valcom answered the Tribunal's question, in part, as follows: "[t]he 28 January 1998 letter from [the Department] was received first by facsimile on 29 January 1998 with the original hard copy of the letter received by Canada Post on 4 February 1998."

On February 20, 1998, the Tribunal determined, on the basis of the existing record, that the basis for Valcom's complaint became known to it on or about January 20, 1998, when it was informed in writing by the Department that its proposal would be deemed non-compliant for failing to submit for demonstration purposes a unit of the product which it proposed. However, the same day, Valcom wrote to the Department objecting to this decision. In the Tribunal's view, this constituted an objection pursuant to subsection 6(2) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (the Regulations). On January 28, 1998, the Department responded to this letter, stating that Valcom's refusal to comply with the demonstration requirements in the RFP rendered its proposal non-compliant and that, therefore, the

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

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

Department had awarded the contract to the next responsive bidder on January 23, 1998. In the Tribunal's view, Valcom was informed that its request for relief was denied within the meaning of subsection 6(2) of the Regulations on January 29, 1998, the date on which it allegedly received the Department's January 28, 1998, letter by facsimile. On this basis, the Tribunal determined that Valcom's objection to the Department and its subsequent complaint to the Tribunal both fell within the prescribed time frames.

On February 20, 1998, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set out in section 7 of the Regulations 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 March 20, 1998, the Department filed with the Tribunal a notice of motion for an order dismissing the complaint on the basis that it was not filed within the prescribed time limits. In its submissions, the Department agreed with the Tribunal that the grounds for Valcom's complaint became known to it on January 20, 1998. The Department also agreed that, on the same day, Valcom, made an objection within the meaning of subsection 6(2) of the Regulations to the Department and that, by letter dated January 28, 1998, the Department clearly denied Valcom's request for relief in this matter. However, the Department argued that the evidence clearly showed that Valcom had actual knowledge of the denial of relief on January 28, 1998, rather than on January 29, 1998. The Department filed evidence to show that the January 28, 1998, letter was sent by facsimile to Valcom at 11:12 a.m. AST and that the transmission took place at that time without any difficulties. On this basis, the Department submitted that Valcom should have filed its complaint with the Tribunal no later than February 11, 1998. As it was filed on February 12, 1998, it was filed late.

Finally, the Department argued that the provisions of subsections 6(3) and 6(4) of the Regulations are not applicable to this case as Valcom's filing of its complaint was not delayed due to circumstances beyond its control. As well, the complaint does not concern any aspect of the procurement process of a systemic nature.

On March 31, 1998, Valcom filed with the Tribunal submissions in response to the Department's motion. In its submissions, Valcom stated that, for a small company, it certainly did its best to meet the Tribunal's requirements and now that it knows the rules, it will meet the 10-day requirement the next time around. In addition, Valcom submitted that the Tribunal's documentation describing the procurement review process does not say that a complaint must be filed within 10 working days. Rather, it says that "[g]enerally, a complaint must be filed with the Tribunal no later than 10 working days, etc." Valcom also submitted that the same document indicates that the Tribunal may consider a complaint that is not filed in a timely manner, provided it is filed no later than 30 days after the day on which the basis of the complaint became known to the complainant. In this respect, Valcom invoked "reasons beyond its control" in that it had to find out and study the Tribunal's procedure before it could submit its complaint. Valcom also added that the Tribunal has the discretion to dismiss or not to dismiss a complaint that is filed outside of the prescribed time frames. Finally, Valcom submitted that it only knew or discovered the ground for its complaint on February 6, 1998, upon receiving the letter of the Department's Regional Director for the Atlantic Region, the ultimate authority, in this instance, and that, therefore, its complaint was filed well within the 10 working days time limit.

## **TRIBUNAL'S DECISION**

Section 6 of the Regulations sets out the time limits for filing a complaint with the Tribunal. It provides as follows:

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 reasonable 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.

As already determined, the basis for Valcom's complaint became known to it on January 20, 1998, when the Department informed Valcom by facsimile that its submission was non-compliant and that it would be given no further consideration for lack of delivering, for demonstration purposes, a production model of the product offered. Furthermore, Valcom objected to this decision on January 20, 1998. On the basis of the evidence filed by the Department, the Tribunal concludes that Valcom had actual knowledge of the denial of relief on January 28, 1998, i.e. that it received the Department's letter by facsimile on that day. As such, Valcom had 10 working days after January 28, 1998, to file its complaint with the Tribunal, that is, until February 11, 1998. Valcom's complaint was filed with the Tribunal on February 12, 1998.

In its submission, Valcom submits that the Tribunal has the discretion to determine whether or not to dismiss a complaint that is filed late. Valcom bases this argument on the fact that the text of the publication "Procurement Review Process - A Descriptive Guide", issued by the Tribunal to assist suppliers when filing complaints with the Tribunal, states that, generally, a complaint must be filed with the Tribunal no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known and on the fact that section 10 the Regulations states, in part, that "[t]he Tribunal may, at any time, order the dismissal of a complaint where c) 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." In respect of the first point,

the Tribunal notes that the word “generally” is meant to reflect the fact that under exceptional circumstances described in paragraphs 6(3)(a) and (b) of the Regulations, “a complaint ... may not be filed later than 30 days after the day the basis of the complaint became known ... to the potential supplier.” As such, the word generally does not denote any discretion on the part of the Tribunal in respect of the 10 working days rule. Similarly, section 10 of the Regulations grants the Tribunal the power to dismiss complaints in specific circumstances. It does not indicate that the Tribunal has discretion, in the exercise of this power, when the specific circumstances are met.

In addition, the Tribunal is not persuaded that Valcom was delayed by causes beyond its control. The Tribunal understands that Valcom may not have been completely *au fait* with the procurement review procedures at the Tribunal. However, in the opinion of the Tribunal, Valcom has documented no causes beyond its control which prevented it from acquiring such knowledge. Therefore, the Tribunal determines that Valcom cannot invoke the provisions of paragraph 6(3)(a) and subsection 6(4) of the Regulations in this instance.

Concerning Valcom’s submission that the grounds for its complaint only became known to it on February 6, 1998, when it received the communication from the Department’s Regional Director for the Atlantic Region, the Tribunal is not convinced by this argument. The Tribunal is satisfied that the Department’s letter of January 28, 1998, written by the Acting Regional Director constituted a clear and authoritative rendering of the Department’s decision and constituted a clear denial of relief.

For the above reasons, the Tribunal, pursuant to paragraph 10(c) of the Regulations, hereby orders the dismissal of the complaint.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Member