

Ottawa, Wednesday, February 4, 1998

File No.: PR-97-034

IN THE MATTER OF a complaint filed by Wang Canada Limited 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 SHL Systemhouse for an order dismissing the complaint on the basis that it was not filed within the prescribed time limit.

REASONS FOR DECISION

INTRODUCTION

On December 16, 1997, Wang Canada Limited (Wang) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) for national computer maintenance services for the Department of National Revenue (Revenue Canada) (Solicitation No. 46577-6-9971/A).

Wang alleged that, in ruling that its bid was non-compliant with respect to the extent of the “Component Per Incident” service option offered, the Department has failed to evaluate its bid in accordance with the evaluation criteria set out in the Request for Proposal (RFP). Wang submitted that this ruling constituted a breach of Article 506(6) of the *Agreement on Internal Trade*² (the AIT), in that the basis to conduct the evaluation of bids was not clearly identified in the tender documents. Wang also alleged that the Department acted in contravention of Articles 1015(4)(c) and (d) of the *North American Free Trade Agreement*³ (NAFTA) since, as a result of its determination that Wang’s bid is non-compliant, the contract will not be awarded in accordance with the criteria and essential requirements specified in the tender documents. In the alternative, Wang alleged that the tender documents are ambiguous with respect to the work entailed in meeting the “Component Per Incident” service option mandatory requirement, which is also a breach of Article 506(6) of the AIT. Moreover, Wang alleged that the Department has contravened Article 1013(1) of NAFTA, in that the tender documents failed to contain “all information necessary to permit suppliers to submit responsive tenders,” and, more specifically, Article 1013(1)(g) of NAFTA for failing to include “a complete description of the goods or services to be procured.”

On December 19, 1997, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁴ (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 the same day, the Tribunal granted SHL Systemhouse (Systemhouse) leave to intervene in the matter.

1. R.S.C. 1985, c. 47 (4th Supp.).
2. As signed at Ottawa, Ontario, on July 18, 1994.
3. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).
4. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

On December 23, 1997, Systemhouse filed submissions with the Tribunal, including a motion to the effect that Wang's complaint was filed late and that, therefore, it should be dismissed. On January 6, 1998, the Tribunal requested that the parties make submissions on the motion. Wang made its submissions on January 9, 1998, and Systemhouse did likewise on January 14, 1998. The Department filed submissions on January 23, 1998. Systemhouse filed submissions in reply on January 28, 1998.

In its motion, Systemhouse submitted that it is clear from the Department's letter dated November 24, 1997, to Wang that, on November 20, 1997, Wang had objected to the interpretation of "Component Per Incident" held by the Department. It also submitted that it is clear from the same letter that the Department denied any relief to Wang on its objection and that it asked Wang to acknowledge that the "Component Per Incident" service option in the RFP included the physical removal and replacement of the failed component in the system. Otherwise, the letter went on, Wang's proposal "will be considered non-compliant." Wang was asked to reply to this letter by the close of business on the following day. Systemhouse submitted that, in its reply of November 25, 1997, Wang repeated its contention of November 20, 1997, and did not provide the acknowledgment requested by the Department. Thus, Systemhouse submitted, on November 25, 1997, Wang reasonably should have known that its objection had been denied and that its proposal was considered non-compliant. Systemhouse also submitted that the fact that Wang reiterated its objection to the Department on December 3, 1997, and that the Department chose to respond to this communication on December 5, 1997, merely reiterating and confirming its denial of November 24, 1997, does not change the fact that Wang made an objection orally to the Department on November 20, 1997, and that the Department denied relief to Wang in this matter on November 24, 1997. Accordingly, Systemhouse submitted that, since Wang's complaint was filed with the Tribunal on December 16, 1997, more than 10 working days after November 25, 1997, the complaint was filed outside the time limit set out in section 6 of the Regulations and was, therefore, filed late.

In its submissions, Wang argued that it did not have actual or constructive knowledge that its representations to the Department regarding the "Component Per Incident" service option were denied until it received the Department's letter of December 5, 1997. Therefore, its complaint filed on December 16, 1997, was filed within the time limit set out in subsection 6(2) of the Regulations. It submitted that, upon receiving the Department's letter of November 24, 1997, it initiated various communications, orally and in writing, with the Department to determine the Department's definitive position in respect of the interpretation of the "Component Per Incident" service option and its impact in determining the compliance of Wang's offer.

In its submissions of January 14, 1998, Systemhouse submitted that Wang's response to the motion is replete with unsubstantiated allegations that are absolutely without corroboration in the documentation forming the record in this inquiry and are inconsistent with a reasonable interpretation of events as illustrated in that documentation. Further, it submitted that, for purposes of subsection 6(2) of the Regulations, an objection can be denied only once and that the reiteration of an earlier denial should not reset the clock. Systemhouse submitted that this interpretation is consistent with the bid protest procedures which are explicitly designed with tight time frames to deal with matters of procurement on an expeditious basis. Systemhouse also submitted that, to the extent that Wang is alleging that the tender documents were ambiguous on their face, a position that Systemhouse does not support, these documents were made available to Wang on or shortly after July 10, 1997, and that such ambiguity should have become known to Wang shortly thereafter. This ground cannot, therefore, be timely filed at this time.

Concerning Wang's alternative position that subsection 6(4) of the Regulations should apply in this instance, Systemhouse submitted that Wang has not offered any explanation as to why the "failure to file the

complaint was attributable to a cause beyond [its] control” or that the complaint raised concerns “of a systemic nature.”

For its part, the Department submitted that the denial of relief to Wang occurred on December 5, 1997, on which date the Department advised Wang, in writing, that its proposal was non-compliant.

TRIBUNAL’S DECISION

Section 6 of the Regulations sets all the time limits for filing a complaint with the Tribunal. Section 6 provides, in part, 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 reasonably should have become known to the potential supplier.

The Tribunal notes that all parties, in their submissions, have focused their attention on Wang’s communication of November 20, 1997, with the Department and have interpreted this as being an objection by Wang pursuant to subsection 6(2) of the Regulations. Subsection 6(2) provides that an objection must be made within 10 days after the day on which the complainant knows or reasonably should have known the basis of its complaint. A review of the chronology of events set out by the parties indicates that, by November 20, 1997, Wang had already been advised that it would be awarded the contract and was in the process of discussing the implementation of the contract with Revenue Canada. In view of the circumstances under which such communication took place, the Tribunal is unable to view this communication as an objection. Rather, the Tribunal views the communication as being for the purpose of clarification of both parties’ understanding of the terms of Wang’s offer.

Moreover, the Tribunal does not accept that the letter dated November 24, 1997, from the Department to Wang constitutes a denial of relief. In the Tribunal’s view, the Department, in its response to Wang by letter dated November 24, 1997, presented Wang with at least two options. Wang could “acknowledge that the Component Per Incident service includes the physical removal and replacement of the failed component in the system.” Alternatively, Wang’s proposal would be considered non-compliant. In the Tribunal’s view, this letter cannot be construed as a declaration that Wang’s bid was non-compliant. This is supported by the fact that, following the letter, there were further communications between the Department and Wang concerning the interpretation of the term “Component Per Incident.” The letter combined with the subsequent communications indicate to the Tribunal that it was less than certain what position would ultimately be taken by the Department vis-à-vis its interpretation of the “Component Per Incident” service option.

In the Tribunal’s view, the Department’s definitive decision that Wang’s offer was non-compliant was only conveyed to Wang on December 5, 1997, and, until that time, it was not clear to Wang what the

outcome of its communications with the Department would be. Indeed, the Tribunal believes that there was still a possibility that the Department may have accepted Wang's arguments and declared its offer compliant.

As a result, the Tribunal is of the opinion that, in the circumstances, Wang could not have known nor should it have reasonably known the grounds of its complaint before it received the letter from the Department dated December 5, 1997. Accordingly, prior to December 5, 1997, no grounds existed for Wang either to file a complaint within the time limit set out in subsection 6(1) of the Regulations or to make an objection within the time limit set out in subsection 6(2) of the Regulations.

Accordingly, the Tribunal finds that Wang knew or should reasonably have known its grounds of complaint on or about December 5, 1997, and that, therefore, Wang's complaint of December 16, 1997, was filed within the time limit set out in subsection 6(1) of the Regulations.

For the foregoing reasons, the motion is denied.

Pierre Gosselin

Pierre Gosselin
Presiding Member