



Ottawa, Wednesday, June 5, 2002

File No. PR-2001- 071

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

AND FURTHER TO 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 subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Zdenek Kvarda  
Zdenek Kvarda  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

The statement of reasons will follow at a later date.

Date of Determination: June 5, 2002  
Date of Reasons: June 25, 2002

Tribunal Member: Zdenek Kvarda, Presiding Member

Investigation Manager: Paule Couët

Counsel for the Tribunal: John Dodsworth

Complainant: Équipement Industriel Champion Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Christianne M. Laizner  
Ian McLeod



Ottawa, Tuesday, June 25, 2002

File No. PR-2001- 071

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

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

## STATEMENT OF REASONS

### COMPLAINT

On March 7, 2002, Équipement Industriel Champion Inc. (EIC) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning the procurement (Solicitation No. W0138-016059/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the supply and installation of a hydraulic parallelogram lift of 50,000 lbs. capacity to hoist heavy trucks at Canadian Forces Base (CFB) Bagotville, Quebec.

EIC alleged that, contrary to the provisions of the trade agreements, PWGSC and DND accepted as compliant a proposal submitted by Excelco Industries (Excelco), a division of Aliance Parfum Inc., which does not conform to certain mandatory requirements of the Request for Proposal (RFP). Specifically, it alleged that the proposed Omer lift had a scissor-type platform; had a platform width of 29.5 in.; did not have a “Dead Drop” type of safety mechanism with one release point; did not include “a continuous safety stop tape switch” located under the platform for personnel working under the hoist; and was not CSA<sup>2</sup> certified.

EIC requested, as a remedy, that the Tribunal recommend that the contract awarded to Excelco be terminated and that it be awarded, instead, to the vendor with the lowest responsive proposal.

On March 15, 2002, 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*.<sup>3</sup> On March 18, 2002, PWGSC informed the Tribunal, in writing, that a contract in the amount of \$92,000.74 had been awarded to Excelco. On April 12, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> On April 22, 2002, EIC filed comments on the GIR with the Tribunal. On May 1, 2002, PWGSC filed a response to EIC’s comments on the GIR with the Tribunal and, on May 7, 2002, EIC filed final comments.

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
  2. Canadian Standards Association.
  3. S.O.R./93-602 [hereinafter Regulations].
  4. S.O.R./91-499.

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 January 22, 2002, the RFP was published on MERX.<sup>5</sup> It includes the following provisions relevant to this case:

### 1.1 Requirements

The following types of hoist are not acceptable for the following reasons:

- the “Scissors lift” lack of space, unable to remove wheel and to circulate freely under hoist from the side.

### 1.2 Lift Specifications

#### Mandatory

- a Hydraulic hoist parallelogram type
- e minimum of 30 inches platform width
- j at least one safety mechanism that must be “Dead Drop” type with one release point
- l must include a continuous safety stop tape switch located under platform for personnel working under the hoist

### 1.7 Delivery Date:

It is a mandatory condition of this tender that all delivery must be completed by March 31, 2002. Failure to indicate agreement to comply with this delivery condition may render your bid non-responsive and no further consideration would then be given.

We certify that delivery will be met: YES \_\_\_ NO \_\_\_

Please advise best delivery date: \_\_\_\_\_

### 1.8 Late delivery:

The parties agree that time indicated for delivery is of the essence of this document. In the event the contractor fails to deliver the supplies within the time specified in this document, the contractor understands that the contract will be cancelled.

### 1.12 Electrical Equipment

1. All electrical equipment supplied under the Contract must be certified or approved for use in accordance with the Canadian Electrical Code, Part 1, prior to delivery, by an agency accredited by the Standards Council of Canada.

### 3.5 Evaluation of Bids

1. Canada will evaluate the bids received and such evaluation will be based on the following factors:
  - (a) compliance with the terms and conditions of this bid solicitation;
  - (b) the lowest evaluation price for a technically compliant proposal to Canada for the Work, having regard to qualifications, exceptions or alterations to the technical requirements;
  - (c) the bidder is a bona fide agent of the manufacturer of the equipment specified in our proposal;
  - (d) the lift must comply to ANSI/ALI B153.1;

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5. Canada's Electronic Tendering Service.

- (e) assessment of all technical documentation and information for technical compliance;
- (f) delivery date - no later than March 31, 2002; and
- (g) equipment offered must already have been on the market for at least two years.

### 3.6 Basis of Selection

To be considered responsive, a bid must meet all of the mandatory requirements of this solicitation. Bids not meeting all of the mandatory requirements will be given no further consideration. The lowest priced responsive bid will be recommended for award of a contract.

The solicitation closed, as scheduled, on February 26, 2002. Two proposals were submitted, one each by EIC, which proposed a "Rotary Advantage" lift, and by Excelco, which identified its proposed lift as "OMER 240/50-CB<sup>6</sup>-26-FM".

Excelco's proposal stated, in part, that the width of the platform would be 30 in. and answered "yes" to the statements that it proposed a lift that would meet both the required specification for "at least one safety mechanism that must be 'Drop Dead' type with one release point" and the required specification that the lift "must include a continuous safety stop tape switch located under the platform for personnel working under the hoist".<sup>7</sup> In addition, Excelco's proposal contained trade literature from the Omer lift manufacturer, Stertil-Koni USA (Stertil-Koni), that illustrated its parallelogram vehicle lift. Excelco also certified that delivery would be met and indicated its best delivery date as March 31, 2002.

On February 26, 2002, PWGSC conducted an initial evaluation of the two proposals and determined that they were both compliant. That same day, it forwarded the proposals to DND for confirmation of its technical evaluation. On February 28, 2002, DND advised PWGSC that it concurred with its technical assessment. That same day, having determined that Excelco had bid the lowest price, PWGSC advised Excelco that it was the successful bidder as follows:<sup>8</sup>

We hereby confirm Contract No. W0138-016059/001/BAA which authorizes you to take immediate action to provide the equipment described in your bid dated February 25, 2002. The total value of the contract is \$85,982.00, plus GST and QST exempt.

Mandatory delivery: on or before March 31, 2002; **otherwise, the contract will be cancelled.**

[Translation]

On February 28, 2002, EIC was informed that a contract had been awarded to Excelco.

On March 1, 2002, EIC sent a facsimile to PWGSC, contending that the Omer lift did not meet certain mandatory requirements set out in the RFP. That same day, PWGSC referred EIC's comments to Excelco and requested a response to each point. Excelco forwarded PWGSC's inquiry to Stertil-Koni, which provided, in part, the following comments<sup>9</sup> to Excelco and PWGSC on March 4, 2002:

Item 1.2 OMER is the inventor of [Parallelogram] lifts and has been producing parallelogram lifts for over 25 years. . . . Therefore, we are capable of providing any runway width that the customer requests specifically either 29.5", 30", 32" or 35". If your customer desires 30" then that is what we will provide.

Item 1.2 (letter J). . . . The Stertil Koni/Omer lift incorporates a dead drop type safety mechanism with one release point.

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6. Continuous Base.

7. GIR, Exhibit 4, para. 1.2 at 4-5.

8. GIR, Exhibit 7.

9. GIR, Exhibit 10.

Item 1.2 (letter L). Our standard foot protection mechanism is a metal bar connected to electric safety switches, the lift has emergency stop bars fitted on the upper platform and on an and upon contact shall result in immediate cessation of lift activity.

The safety bar is situated along the surface area of the runway and does exactly the same thing as the tape switch. However, because your customer wishes to have a tape switch then we will mount a tape switch in addition to the safety bars. **Please assure him that the lift that will be delivered will be provided with a tape switch along the side of both runways.**

**Please note that I have authorized ETL<sup>10</sup> to certify the Stertil-Koni/Omer lift as CSA certified. The ETL inspector tells me that this will be completed within the next two weeks.** Please assure your customer that prior to delivery of the lift to his facility in Bagotville, **the lift will have a CSA certification label on the control panel.**

We understand that if the lift is not CSA certified it will be refused.

On March 5, 2002, PWGSC provided the above comments to DND for its review. That same day, DND reconfirmed its determination to PWGSC that Excelco's proposal was compliant. EIC was informed of this decision on March 6, 2002.

## POSITION OF PARTIES

### PWGSC's Position

PWGSC submitted that, along with DND, it acted correctly in determining that the proposal submitted by Excelco was compliant with each of the requirements and specifications in the RFP identified by EIC in its complaint.

Specifically, with respect to the "parallelogram-type lift", PWGSC submitted that the manufacturer's trade material, attached by Excelco to its bid, clearly described the Omer lift as being of a parallelogram design. This was supported by illustrations in the material<sup>11</sup> and was further confirmed by the manufacturer in its letter of March 4, 2002.

With respect to the platform width, PWGSC submitted that Excelco stated explicitly, in its proposal, that the width of the platform of the proposed lift would be 30 in. This was also confirmed in the March 4, 2002, letter by Stertil-Koni. It added that the 29.5-in. dimension shown on the manufacturer's website referred to by EIC is merely an example of a common width and does not limit the range of widths that the company can supply.

On the question of the "Dead Drop" type of safety mechanism, PWGSC submitted that Excelco's proposal affirmed that such a mechanism was proposed and that this fact was confirmed by the manufacturer in its March 4, 2002, letter.

With respect to the tape switch, PWGSC submitted that Excelco's proposal is clear that such a mechanism is included. Furthermore, it noted that the manufacturer confirmed that, in this instance, its standard metal bars would be supplemented with a tape switch.

With respect to the CSA certification, PWGSC submitted that EIC has misrepresented the requirement set out in section 1.12.1 of the RFP. It submitted that the CSA certification is only required at

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10. ETL is an independent nationally recognized testing laboratory sponsored by the Automotive Lift Institute (ALI) and approved by the U.S. Occupational Safety and Health Administration.

11. GIR, Exhibit 4.

the time of delivery, not at the time of bid closing. It added that the CSA is an agency that is accredited by the Standards Council of Canada. It submitted that, by including the text of section 1.12.1 in its proposal, Excelco accepted this requirement.

PWGSC reserved the right to make further submissions on costs.

In its comments of May 1, 2002, PWGSC submitted that the reference to the "Dead Drop" type of safety mechanism in the RFP is generic in character. To have specified a brand name product would have been inconsistent with the trade agreements.

With respect to the tape switch, PWGSC submitted that it was advised by Excelco and Stertil-Koni that, while the tape switch does not fall within the certification for the ALI standard, it does, in fact, comply with the ANSI/ALI B153.1 standard specified in paragraph 1.3 of the RFP.

Concerning the CSA issue, PWGSC submitted that it was advised by Excelco and Stertil-Koni that the CSA certification work had been done and that the only outstanding step was the delivery of French labels, expected on May 3, 2002.

PWGSC confirmed that, due to shipping delays, the Omer lift had not been delivered by March 31, 2002, as required. It submitted that it considered cancelling the contract. However, DND indicated that the acquisition of a lift with minimum delay was an urgent, safety-related matter. Accordingly, PWGSC negotiated a new delivery date of April 29, 2002, with Excelco in exchange for financial compensation. The lift was delivered to CFB Bagotville on April 26, 2002.

### **EIC's Position**

EIC submitted that, although all lifts have some sort of safety mechanism, the "Dead Drop" system is a patented mechanism exclusive to Rotary Advantage and that, as such, Omer cannot provide this system.

EIC submitted that the manufacturer would not be able to deliver the Omer lift proposed with a tape switch included because the proposed Omer lift is not certified with this feature. It added that it is impossible to change the features of a lift that is already ALI certified without obtaining a new certification, which typically costs US\$50,000 and requires one year to obtain.

EIC further submitted that it would be impossible for Excelco to deliver a CSA-approved lift as per the mandatory delivery date of March 31, 2002, because acquiring such certification requires a minimum time period of six months.

EIC submitted that the Omer lift offered by Excelco has a continuous base. This feature is contrary to section 1.1 of the RFP, which requires that the lift design not prevent free circulation under the hoist from side to side.

EIC finally indicated that its president visited CFB Bagotville on April 19, 2002, and witnessed that the Omer lift had not yet been delivered and installed.

In its final comments filed with the Tribunal on May 7, 2002, EIC re-emphasized that the Omer lift offered by Excelco has cross beams that do not allow free circulation as requested in the original bid. It further submitted that, generally, the comments made by the manufacturer of the Omer lift are unreliable.

## TRIBUNAL'S DECISION

Subsection 30.14(1) 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 further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, include the *North American Free Trade Agreement*<sup>12</sup> and the *Agreement on Internal Trade*.<sup>13</sup>

Article 1015(4)(a) of NAFTA requires that, to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the tender documentation. Furthermore, Article 1015(4)(d) of NAFTA requires that awards be made in accordance with the criteria and essential requirements specified in the tender documentation. Article 506(6) of the AIT requires that tender documents clearly identify the requirements of the procurement and the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

EIC alleged that PWGSC and DND breached the above provisions, in that they evaluated Excelco's proposal as compliant and awarded it the contract even though the Omer lift that it proposed did not meet a number of the mandatory requirements of the RFP.

The Tribunal finds that this allegation is without merit.

After careful examination of the evidence, the Tribunal concludes that Excelco, in its proposal, committed clearly to all the mandatory requirements of the RFP that are in dispute. Specifically, Excelco indicated that the width of the platform that it proposed would be 30 in. In addition, it clearly indicated that the proposed lift would have a "Dead Drop" type of safety mechanism with one release point and that the proposed lift would include a continuous safety stop tape switch located under the platform for personnel working under the hoist. Excelco's proposal also included manufacturer's literature that clearly indicated that the proposed Omer lift was a parallelogram vehicle lift. Finally, it clearly committed, in its proposal, to the RFP certification requirements.

The Tribunal notes that Stertil-Koni, the manufacturer of the Omer lift, supported the commitments made by Excelco in its proposal; however, this information was not necessary for PWGSC and DND to determine that Excelco's proposal was compliant.

EIC submitted that a number of representations made by Excelco in its proposal constitute variations from the Omer lift that it offered. The Tribunal agrees with EIC on this point. However, it notes that there is no provision in the RFP that prohibits potential suppliers from offering modified models or variations of existing models. It is of the view that the modified lift proposed by Excelco satisfied the requirements of the RFP.

EIC further alleged that the modifications proposed by Excelco would affect the certification status of the product that it offered, as a minimum, delaying its delivery by several months. The Tribunal is not persuaded by EIC's arguments on this point and notes that the lift was delivered to CFB Bagotville on April 26, 2002.

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12. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

13. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].



On the question of the delivery, the Tribunal is aware that delivery did not take place by March 31, 2002, as requested in the RFP. However, it is satisfied that Excelco clearly and unconditionally committed to the March 31, 2002, delivery date in its proposal. Therefore, in the Tribunal's opinion, PWGSC was entitled to rely on this commitment in declaring Excelco's proposal compliant to the delivery date. It is obvious that Excelco encountered difficulties in achieving timely delivery. In the Tribunal's opinion, these difficulties pertain to contract performance, which falls outside the Tribunal's bid protest jurisdiction.

Finally, EIC asserted that, because the Omer lift proposed by Excelco has cross beams, it cannot allow free circulation under the hoist from side to side as required by the RFP. The Tribunal is of the view that the design of the lift proposed by Excelco is that of a parallelogram lift, not that of a scissor-type lift, and that it was reasonable for PWGSC and DND to conclude that it would allow for free circulation under the hoist from side to side.

For the above reasons, the Tribunal concludes that PWGSC and DND did not breach the provisions of the applicable trade agreements in declaring Excelco's proposal compliant and in awarding it the contract.

#### **DETERMINATION OF THE TRIBUNAL**

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

Zdenek Kvarda  
Zdenek Kvarda  
Presiding Member