



Ottawa, Thursday, January 31, 2002

File No. PR-2001-038

IN THE MATTER OF a complaint filed by Papp Plastics & Distributing Limited 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 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 valid in part.

Pursuant to subsections 30.15(2) and 30.15(3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that Papp Plastics & Distributing Limited be compensated for lost profit in the amount of 10 percent of its bid price.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Papp Plastics & Distributing Limited its reasonable costs incurred in relation to preparing and proceeding with the complaint.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination: January 31, 2002
Date of Reasons: February 22, 2002

Tribunal Member: Pierre Gosselin, Presiding Member

Investigation Manager: Paule Couët

Investigation Officer: Ronald B. Harrigan

Counsel for the Tribunal: Dominique Laporte

Complainant: Papp Plastics & Distributing Limited

Government Institution: Department of Public Works and Government Services

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



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AND IN THE MATTER OF 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 November 1, 2001, Papp Plastics & Distributing Limited (Papp Plastics) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. W8486-000814/B) by the Department of Public Works and Government Services (PWGSC) for the supply of trunk lockers on behalf of the Department of National Defence (DND).

Papp Plastics alleged that PWGSC improperly evaluated a proposal from another bidder as being compliant, contrary to the applicable trade agreements. It further submitted that PWGSC failed to provide information to all bidders in respect of inquiries, and the replies thereto, received during the solicitation period. Papp Plastics requested, as a remedy, that it be compensated for its lost profit opportunity, representing 10 percent of its bid price, and its lost overhead contribution from machine time. It also requested that it be reimbursed its MERX² costs, its bid preparation costs, its complaint costs, and applicable interest and taxes. Papp Plastics also requested that it be awarded an additional amount as a penalty against PWGSC for compromising the integrity of the procurement process.

On November 6, 2001, the Tribunal informed the parties that the complaint had been accepted for inquiry pursuant to subsection 30.13(1) of the CITT Act and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³ On December 3, 2001, PWGSC filed a letter (PWGSC's letter) with the Tribunal that, it stated, was in lieu of the Government Institution Report required by rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On December 13, 2001, Papp Plastics filed its comments on PWGSC's letter with the Tribunal. On December 17, 2001, PWGSC requested permission to file a response to Papp Plastics' comments on PWGSC's letter. On December 19, 2001, PWGSC provided an explanation and submissions of what it believed to be new issues raised in Papp Plastics' comments. On December 21, 2001, PWGSC filed its response to Papp Plastics' comments stating that no further comments were necessary. On January 2, 2002, Papp Plastics submitted comments in reply.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. Canada's Electronic Tendering Service.
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 April 12, 2001, a Request for Proposal (RFP) for the procurement of 4,000 trunk lockers was issued by PWGSC; a Notice of Proposed Procurement was published on MERX shortly thereafter. The period for the submission of proposals closed on May 14, 2001.

In addition to the RFP and associated specifications issued by PWGSC through MERX, bidders received an information package, i.e. the design data list (DDL), directly from DND. The DDL included a document entitled "Specification for Trunk Locker NSN 8460-21-891-3561".⁵

The following portions of the RFP are relevant to this case:

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.

Enquiries – Solicitation Stage

To ensure consistency and quality of information provided to bidders, the Contracting Authority will provide, simultaneously to all companies to which this solicitation has been sent, any information with respect to significant enquiries received and the replies to such enquiries without revealing the sources of the enquiries.

The following portion of the "Manufacturing Data for Trunk Locker NSN 8460-21-891-3561" (Manufacturing Data) issued by PWGSC is relevant to this case:

3. REQUIREMENTS

3.4.5 **Handle cover.** The handle cover shall be constructed from cloth, cotton duck, type 1, OG 107 in colour and shall conform to the requirements of D-80-001-024/SF/001. Refer to Drawing 389361.

The following portion of the Specification issued by DND is relevant to this case:

3. REQUIREMENTS

3.4.5 **Handle cover.** The handle cover shall be constructed from expanded vinyl – black, 30 ounce weight with a woven backing 65 per cent polyester/35 per cent cotton. Refer to Drawing 389361 (see DL at paragraph 2.1).

On May 8, 2001, Papp Plastics sent a facsimile to PWGSC requesting clarification with respect to the required colour for the handle cover. On May 10, 2001, in a facsimile to Papp Plastics, PWGSC confirmed that the required colour for the handle cover was OG 107, olive green. The question and answer were not provided to all companies to which the solicitation documents had been sent.

Five proposals were received in response to the solicitation, including one from Papp Plastics. According to PWGSC's letter, all five proposals were found compliant on paper. Samsonite Canada Inc. (Samsonite) was identified as having the lowest price and was asked to submit a pre-award sample. The

5. DND (30 April 1996), PWGSC's letter, Exhibit 3 [hereinafter Specification].

Samsonite sample was judged by the government's technical authority to be in compliance with the required specifications. It was not noted that the Samsonite sample had a black handle cover instead of an olive green handle cover.

On July 18, 2001, Samsonite was awarded the contract for a total of \$369,450.14 (GST included).⁶

On October 24, 2001, Papp Plastics received a response to a request, pursuant to the *Access to Information Act*,⁷ that it had made to PWGSC on September 27, 2001. This response confirmed that the vinyl-backed material for the handle assembly of the trunk lockers provided by Samsonite was black with a white net backing, rather than olive green.

On November 1, 2001, Papp Plastics filed this complaint with the Tribunal.

POSITION OF PARTIES

PWGSC's Position

In its letter, PWGSC acknowledged that certain errors were made through inadvertence and that, consequently, it may be appropriate for Papp Plastics to be awarded compensation in this matter. PWGSC explained that the Specification issued, in error, by DND as part of the DDL to interested bidders was an earlier version of the specifications and differed from the Manufacturing Data provided through MERX. Under this earlier version, the colour required for the handle cover was black, rather than the olive green specified in the Manufacturing Data sent as part of the MERX bid package.

PWGSC submitted that any compensation ought to be limited to Papp Plastics' reasonable complaint costs and its loss of profit opportunity. It submitted that the amount of compensation for the loss of profit opportunity should be calculated as 10 percent of the contract price, i.e. \$35,078.20, and, given that there were five potential suppliers, that the potential profit be divided by the number of potential suppliers, resulting in \$7,015.64. PWGSC cited several Tribunal decisions for using this approach.⁸ It further submitted that all other claims for compensation set out in the complaint were without merit.

In its submissions of December 19, 2001, PWGSC stated that, with respect to the technical specification dated February 29, 2000, provided as part of Papp Plastics' reply to PWGSC's letter, this document was pertinent to a different and subsequent procurement process and was neither issued nor used in the procurement process that is the subject of this complaint. It submitted that this document was irrelevant.

PWGSC further submitted that the allegations of deliberate misconduct or negligence by PWGSC officials were without merit and that the correspondence supplied by Papp Plastics provided no evidence of bad faith.

PWGSC further submitted that any award of complaint costs ought to be consistent with the approach adopted by the Tribunal in File No. PR-2000-059.⁹

6. Complaint, tab 11.

7. R.S.C. 1985, c. A-1.

8. *Re Complaint Filed by Foundry Networks* (23 May 2001), PR-2000-060 (CITT); *Re Complaint Filed by Mason-Shaw-Andrew Management Consultants* (17 December 1999), PR-99-026 (CITT).

9. *Re Complaint Filed by P&L Communications* (30 May 2001) (CITT) [hereinafter *PLCom*].

Papp Plastics' Position

In its complaint, Papp Plastics submitted that PWGSC and the DND technical authority failed to properly evaluate the pre-award sample according to the RFP and, consequently, accepted a non-compliant product. This gave an unfair competitive advantage to Samsonite over Papp Plastics. It also submitted that PWGSC failed to follow the process described in the RFP with respect to "Enquiries – Solicitation Stage", in that information with respect to significant enquiries and replies thereto was to be provided simultaneously to all companies to which the solicitation documents had been sent.

Papp Plastics submitted that, in addition to the compensation requested, as a remedy, the Tribunal should award it an additional amount as a "fine" or "penalty" against PWGSC for compromising the integrity of the procurement process.

In its comments on PWGSC's letter, Papp Plastics submitted that the conduct to which PWGSC admitted was not inadvertent, but rather persistent and wilful or, in the alternative, amounted to grossly negligent disregard for its obligations under the applicable trade agreements.

Papp Plastics submitted that PWGSC misstated and omitted facts crucial to a proper understanding of the case and then proceeded to provide information on events prior to this solicitation.

Regarding the Manufacturing Data and the Specification issued to potential bidders, Papp Plastics submitted that PWGSC did not use a new set of technical documents that, inadvertently, failed to make a required correction, but instead PWGSC and DND deliberately used an old set of documents that they knew or should have known contained a material inconsistency. It stated that it first brought the problem about the specified colour for the handle cover to PWGSC's attention in 1999.

Papp Plastics submitted that the continued obfuscation of the facts of this process in PWGSC's submissions raises considerable doubt as to the good faith of the officials involved in carrying out this solicitation. It provided copies of correspondence exchanged within PWGSC, and between PWGSC and DND, which were obtained under the *Access to Information Act*. Papp Plastics submitted that this correspondence confirmed that the entire PWGSC line directorate had knowledge of specification errors and omissions prior to tender, that direction had been given to ensure that the specifications were corrected and that this direction was not carried out for the purposes of the solicitation at issue.

Papp Plastics claimed that additional accommodation was granted for Samsonite to submit alternate proposals. It submitted that the RFP did not invite or allow for alternate proposals. As such, Papp Plastics submitted that Samsonite's bid was not compliant on paper.

Papp Plastics submitted that it was the second lowest bidder and that, as it had already successfully completed an identical requirement in the past, it would have had no difficulty producing an acceptable pre-award sample and, in turn, clearly been awarded the contract at issue.

With respect to compensation for lost profit opportunity, Papp Plastics submitted that its loss, in this case, was 100 percent of the expected profit and not the profit divided by the number of bidders, as argued by PWGSC. If PWGSC's approach is to be retained, Papp Plastics submitted that the profit should not be divided by five (the initial number of bidders), but instead should exclude Samsonite from the calculation, as its bid was non-compliant.

With respect to overhead contribution, that is, machine time, Papp Plastics submitted that, to recover the enormous capital output required to compete in this type of manufacturing environment, the plastics industry relies on booking machine time to cover costs. It further submitted that this constitutes an important contribution to overhead costs associated with this type of machinery, which is in addition to the normal 10 percent industry markup, and but for PWGSC's breaches, that Papp Plastics would have benefited from this overhead contribution.

With respect to compensation for the injury caused to the integrity of the procurement process, Papp Plastics submitted that PWGSC's persistent pattern of conduct in this matter, designed to undermine fair competition and to favour Samsonite, has harmed the integrity of the procurement process and constitutes wilful disregard for the governing trade rules. It further submitted that the same reasoning that justified such an award in File No. PR-99-035¹⁰ applies equally to the present case.

In its reply of January 2, 2002, Papp Plastics submitted that PWGSC was given an opportunity to respond to its allegations of bad faith and gross negligence, that PWGSC's decision not to do so should lead to the adverse inference that PWGSC is unable to provide contrary evidence, and that Papp Plastics' submissions in this regard are sound.

Papp Plastics submitted further documentation as evidence that PWGSC and DND deliberately used old versions of the technical documents that they knew contained a material inconsistency with respect to the colour of the handle cover.

With respect to PWGSC's argument that the allegations regarding past procurement processes were untimely and irrelevant to the matters at issue, Papp Plastics submitted that these allegations go to PWGSC's good faith and to the wilful nature of its conduct, in that they point to a bias in favour of Samsonite.

Papp Plastics submitted that the Tribunal should not award it compensation in accordance with the principles set out in *PLCom*. It submitted that there has been a persistent pattern of wilful conduct undermining the principles of the trade agreements and a subsequent attempt to cover up and deny the conduct and, as such, that those actions are consistent with the kind of prejudice encountered in *Dr. Luik*.

TRIBUNAL'S DECISION

Section 30.14 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, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

10. *Re Complaint Filed by Dr. John C. Luik* (28 March 2000) (CITT) [hereinafter *Dr. Luik*].

For the purpose of this inquiry, it is sufficient that the *Agreement on Internal Trade*¹¹ applies and it is unnecessary for the Tribunal to make a final determination as to whether the *North American Free Trade Agreement*¹² or the *Agreement on Government Procurement*¹³ applies.

Article 506(6) of the AIT provides that tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

In this instance, PWGSC admitted that certain errors were made while proceeding with this procurement. It stated that the Specification sent in error by DND in the DDL was an earlier version of the Manufacturing Data and that the documents differed, in that some changes were not incorporated. In addition, PWGSC submitted that a question posed by Papp Plastics and the associated answer were not provided to all the potential bidders.

The Tribunal accepts PWGSC's submissions that errors were made and, on this basis, finds that PWGSC breached the provisions of Article 506(6) of the AIT, in that it failed to identify clearly the requirements of the procurement and failed to evaluate Samsonite's proposal in accordance with the evaluation criteria. In the Tribunal's view, the requirements of the tender documents with respect to the colour of the handle cover were contradictory, as one set of documents required olive green and the other, black. Regarding the evaluation of proposals, PWGSC's facsimile dated May 10, 2001, by which it confirmed that the required colour for the handle cover was olive green, makes it clear that it was aware of the colour requirements, but that it nevertheless failed to disqualify Samsonite's proposal on that basis.

Dealing with the question posed by Papp Plastics with regard to the colour of the handle cover, the Tribunal is of the view that it constituted a significant inquiry and, as such, the question and answer should have been provided to all bidders. The Tribunal is also of the opinion that, had the answer regarding the colour of the handle cover been made available to all bidders through a solicitation amendment, the discrepancy between the Manufacturing Data and the Specification would have become evident during the bidding period.

Regarding Papp Plastics' argument that additional accommodation was granted to Samsonite, which allowed it to submit alternate proposals, the Tribunal finds that this ground of complaint is late. The Tribunal notes that this ground of complaint was only raised by Papp Plastics on December 13, 2001, when it filed its comments on PWGSC's letter. This is well beyond the time period prescribed under subsection 6(1) of the Regulations.

The Tribunal has carefully reviewed the evidence submitted by Papp Plastics with regard to the allegations of wilful conduct and bad faith of government officials during the procurement process. Although the Tribunal finds that a number of errors were made by PWGSC and DND in the conduct of this procurement, which clearly show a significant lack of diligence, the evidence does not indicate that these errors were made deliberately and in bad faith.

With respect to compensation, the Tribunal is of the view that, had PWGSC properly evaluated Samsonite's proposal with respect to the pre-award sample, it would have found the proposal

11. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].

12. 32 I.L.M. 289 (entered into force 1 January 1994).

13. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

non-compliant. The Tribunal notes that PWGSC has not contradicted Papp Plastics' assertion that it was the second lowest bidder. As Papp Plastics had successfully completed a previous contract for trunk lockers, it is reasonable to conclude that Papp Plastics would have been able to provide a compliant pre-award sample and would have, consequently, been awarded the contract.

In its complaint, Papp Plastics submitted that the lost profit opportunity amounted to 10 percent of its bid price. In PWGSC's letter, it is agreed that this percentage should be used to calculate the potential profit in the context of the lost opportunity calculations. Therefore, the Tribunal concludes that Papp Plastics is entitled to lost profit in the amount of 10 percent of its bid price.

With respect to Papp Plastics' request that it be compensated by an amount of \$58,275.00 for its lost overhead contribution from machine time, the Tribunal does not recommend such compensation, since the Tribunal limits its recommendation to lost profit, and this claim relates directly to Papp Plastics' business costs. For the same reasons, the Tribunal does not recommend that Papp Plastics be compensated for its bid preparation costs or its MERX costs.

As for the additional amount requested as compensation for the prejudice caused to the integrity of the procurement process, the Tribunal finds that such compensation, which has in the past only been granted under very exceptional circumstances,¹⁴ is not justified in the present case. The Tribunal awards Papp Plastics its reasonable costs incurred in relation to preparing and proceeding with this complaint.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the requirements of the AIT. However, as the Tribunal is not persuaded by Papp Plastics' arguments on certain other grounds, it finds that the complaint is valid in part.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that Papp Plastics be compensated for lost profit in the amount of 10 percent of its bid price.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards Papp Plastics its reasonable costs incurred in relation to preparing and proceeding with the complaint.

Pierre Gosselin
Pierre Gosselin
Presiding Member

14. See *Dr. Luik*.