



Ottawa, Thursday, February 6, 2003

File No. PR-2002-036

IN THE MATTER OF a complaint filed by Noël Import/Export 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 valid in part.

Pursuant to subsection 30.15(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that Noël Import/Export be compensated for the profit that it would have reasonably made if it had been awarded a contract for 13 inflatable ice and water rescue craft.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Noël Import/Export its reasonable costs incurred in preparing and proceeding with the complaint.

Ellen Fry

Ellen Fry
Presiding Member

Michel P. Granger

Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination: February 6, 2003
Date of Reasons: February 12, 2003

Tribunal Member: Ellen Fry, Presiding Member

Senior Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Michèle Hurteau

Complainant: Noël Import/Export (represented by Oceanid, LLC)

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Susan D. Clarke



Ottawa, Wednesday, February 12, 2003

File No. PR-2002-036

IN THE MATTER OF a complaint filed by Noël/Import Export 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 November 8, 2002, Noël Import/Export (Noël) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. 5P214-020253/B) by the Department of Public Works and Government Services (PWGSC) of 13 inflatable ice and water rescue craft to be delivered to the Quebec Region of the Parks Canada Agency (Parks Canada).

Noël alleged that PWGSC improperly awarded the contract to a company whose product design infringes a patent held by Oceanid, LLC (Oceanid) and that PWGSC awarded the contract to a bidder whose proposed craft failed to meet the mandatory requirement of “[p]roven capacity for rescue operation[s] on different type[s] of ice: thin, fractured, slush, open water.” Noël requested, as a remedy, that the contract be retendered and/or that it be compensated for lost profits and marketing expenses.

On November 14, 2002, 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*.² On December 10, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ Noël filed its comments on the GIR on December 20, 2002. On January 10, 2003, the Tribunal requested further information from PWGSC on how it assessed the compliance of the winning bidder’s proposal. PWGSC responded to this request on January 16, 2003, and Noël made its comments on January 21, 2003. In this submission, Noël raised a new allegation of preferential treatment by PWGSC relating to a delay of the contract award and delivery dates in order to allow the contract awardee, AirSolid, to complete its prototype boat for evaluation. On January 30, 2003, PWGSC requested that the Tribunal accept its response to this new allegation. On the same day, the response was accepted and sent to Noël for comment by February 3, 2003. A response by Noël received on February 4, 2003, was determined to be late and returned.

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.

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

PROCUREMENT PROCESS

On July 11, 2002, PWGSC received a requisition from Parks Canada for the procurement of 13 inflatable ice and water rescue craft to be delivered to the Quebec Region. The requisition specified the model "OCEANID Fortuna Rescue Craft" and indicated "*AUCUN SUBSTITUT*" (No Substitutes). On July 16, 2002, Parks Canada advised PWGSC that, to the best of its knowledge, Oceanid was the only manufacturer of this type of rescue craft. On July 18, 2002, after having considered Parks Canada's request, PWGSC issued an Advance Contract Award Notice (ACAN) on Canada's Electronic Tendering System (MERX).

On July 26, 2002, PWGSC received a written objection to the ACAN from Tulmar Safety Systems Inc. (Tulmar). After a review of Tulmar's product information, PWGSC and Parks Canada determined that more than one supplier of ice and water rescue craft existed and that the requirement should be tendered competitively.

On August 7, 2002, PWGSC issued a Notice of Proposed Procurement (NPP) for the requirement on MERX and a Request for Proposal (RFP), with a closing date of September 17, 2002.

The French version of the RFP reads, in part, as follows:

Description

Fournir treize (13) embarcations pneumatiques de sauvetage aquatique et sur glace de marque Oceanid modèle RDC ou équivalent. Longueur approximative: 15 pieds.

Critères obligatoires :

Les embarcations devront obligatoirement répondre aux conditions suivantes:

- l'embarcation devra être éprouvé[e] en sauvetage sur glace et être capable de répondre à plusieurs conditions de glace : mince, fracturée, type slush, espace sans glace (chenal)

Travaux publics et services gouvernementaux Canada se réserve le droit d'effectuer des essais avec l'embarcation proposé[e] par le plus bas soumissionnaire qui rencontrera les critères techniques ci-dessus mentionnés.

The same section of the English version of the RFP reads, in part, as follows:

DESCRIPTION

To supply thirteen (13) inflatable ice and water rescue crafts [*sic*] from the company Oceanid or equivalent. Approximate length [*sic*]: 15 feet.

Mandatory Criteria:

- Proven capacity for rescue operation[s] on different type[s] of ice: thin, fractured, slush, open water.

Public Works and Government Services Canada may ask for trials with the proposed rescue craft by the lowest bidder which will meet the above mentioned technical criteria.

On August 16, 2002, PWGSC issued amendment No. 001 on MERX. The amendment reads, in part, as follows:

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 or issuance of a standing offer, as the case may be.

PWGSC received four proposals by the bid closing date of September 17, 2002. The proposals were submitted by AirSolid, Noël (the Quebec distributor of Oceanid's product) and two other bidders. Only the proposals from AirSolid and Noël were determined to be compliant with the RFP. AirSolid's proposal had the lowest price.

A test trial of AirSolid's proposed craft was scheduled and conducted on September 26, 2002. Parks Canada forwarded a report of the test trial to PWGSC and recommended that PWGSC award the contract to AirSolid.

On September 30, 2002, PWGSC issued a contract to AirSolid in the amount of \$48,671.09 (GST included). According to PWGSC, the delivery of the 13 rescue craft was split into two separate shipments, 6 rescue craft on October 16, 2002, and 7 rescue craft on November 8, 2002.

On October 1, 2002, Noël attempted to call PWGSC and Parks Canada regarding the contract award process and descriptions of the AirSolid craft. According to Noël, none of these calls were returned. On October 16, 2002, Noël made further inquiries and voiced its objections to PWGSC. On October 28, 2002, Noël received a call from PWGSC advising it that there were differences between Oceanid's craft and the winning bidder's craft.

On October 30, 2002, a complaint was submitted to the Tribunal by Oceanid on behalf of Noël. With the receipt of additional information on November 8, 2002, the complaint was considered filed.

POSITION OF PARTIES

Noël's Position

Noël stated that the rapid deployment craft (RDC), Fortuna, is a unique product design that is recognized by both Canadian and U.S. patent offices as being worthy of intellectual property protection. According to Noël, the manufacturer has spent large sums of money on the design, development and patent, legal and maintenance fees, as well as on marketing fees, travel and trade shows in Canada, knowing that it had patent protection.

Noël also alleged that AirSolid was given preferential treatment in this contract process, notably in not having to prove the reliability of its product in mixed media conditions of ice and water, not having to tow it on water, ice or snow, and not having to demonstrate its stability in violent waters such as low head dams, all of which were performance requirements. Noël also alleged preferential treatment in that AirSolid was given flexible delivery dates into November when Noël was capable of delivering the craft at the contract award date without delay.

Noël indicated that its RDC Fortuna rescue craft is used by a number of emergency response teams. Moreover, its craft is a time-tested and proven rescue craft designed to be deployed in a number of serious life-threatening situations by emergency response professionals. Noël raised the additional ground of complaint that AirSolid had been given preferential treatment, in the sense that it was afforded opportunities not offered to Noël, including the delay of the award and delivery of the boats to allow a prototype to be built for evaluation.

PWGSC's Position

PWGSC submitted that the Tribunal has no jurisdiction to make a determination about alleged patent infringement in the context of procurement inquiries pursuant to section 30.11 of the CITT Act and that a claim of patent infringement should be properly filed with the Federal Court of Canada or a provincial court of record of competent jurisdiction. It further submitted that its procurement officials are not technically or legally competent to assess a claim of alleged patent infringement, which necessarily involves complicated legal and technical issues under the *Patent Act*.⁴ It stated that, in the absence of a decision or order by a court of competent jurisdiction, it has no authority to withhold a contract award from the bidder that submitted the lowest technically responsive proposal to this solicitation. Therefore, it argued that the complaint ought to be dismissed as being outside the Tribunal's jurisdiction.

PWGSC submitted that the RFP requirement for rescue craft included the requirement for the "Oceanid" rescue craft "or equivalent". It submitted that this equivalency was based on form, fit, function and quality, rather than on Oceanid's rescue craft design specifications. PWGSC submitted that the mandatory technical criteria were entirely performance based and did not contain specific Oceanid rescue craft design characteristics.

PWGSC submitted that, in assessing the compliance of AirSolid's proposal with the mandatory criterion that is the subject of the complaint, it relied on the statements found in AirSolid's proposal,⁵ added together with the tests conducted by Parks Canada. PWGSC submitted that, by making those statements, AirSolid indicated that its craft was capable of carrying out winter rescues on fragile or broken ice, rescues in swift water or near dams, and rescues in hard-to-reach places such as caves, large pipes and quarries when the access is impossible with a vehicle. Furthermore, PWGSC indicated that Noël's proposal did not contain any greater degree of information to show the proven capacity of Oceanid's craft in rescue operations.

PWGSC submitted that it tested the craft in a variety of situations such as maintaining its stability, capsizing and righting it, recovering victims and transporting people.⁶ PWGSC submitted that, by carrying out a simulation, Parks Canada demonstrated that the craft was doing the job and was of solid construction. According to PWGSC, the pictures taken during these trials show that the craft had ample reserves of buoyancy.

In response to the new issue raised by Noël in its letter of January 21, 2003, concerning the alleged preferential treatment extended to AirSolid, PWGSC argued that there is no merit to the allegation that it delayed the contract award and the delivery dates to allow AirSolid to build a prototype boat. PWGSC provided a chronology of events between the closing date of the solicitation and the date on which the contract was awarded, which, in its view, demonstrated that it did not delay the contract or the delivery dates.

TRIBUNAL'S DECISION

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations 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

4. R.S.C. 1985, c. P-4.

5. PWGSC's submission of January 16, 2003, that forms part of the confidential record.

6. *Ibid.*

Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

Article 506(6) of the *Agreement on Internal Trade*⁷ provides, in part, that “[t]he 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”, and Article 1015(4)(d) of the *North American Free Trade Agreement*⁸ states in part that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation”.

In this case, the complaint contained the following two grounds of complaint:

1. PWGSC improperly awarded the contract to a company whose product design is a patent infringement of Oceanid’s Fortuna rescue craft.
2. The craft proposed by the winner of this solicitation did not fulfil the mandatory requirement that its craft have a “[p]roven capacity for rescue operation[s] on different type[s] of ice: thin, fractured, slush, open water.”

On January 21, 2003, Noël raised a new allegation of preferential treatment relating to a delay of the contract award and delivery dates in order to allow the contract awardee, AirSolid, to complete its prototype boat for evaluation. As this ground was filed on January 21, 2003, and was based on information contained in the GIR, which was sent to Noël on December 12, 2002, the Tribunal finds that it was filed outside the time frame allowed by the Regulations and it, therefore, dismisses this ground of complaint.

With respect to the first ground of complaint, the Tribunal agrees with PWGSC that it does not have jurisdiction to adjudicate a dispute concerning whether a patent has been infringed. However, the Tribunal notes that, should there be a complaint of a violation of the procurement provisions of the trade agreements in a situation where there is an alleged patent infringement, such a complaint would be within the Tribunal’s jurisdiction. The evidence does not indicate that such a situation has arisen in this case. Therefore, the Tribunal does not have jurisdiction to inquire into this ground of complaint.

With respect to the second ground of complaint, the RFP states that PWGSC “may ask for trials with the proposed rescue craft by the lowest bidder which will meet the above mentioned technical criteria”. (*Travaux publics et services gouvernementaux Canada se réserve le droit d’effectuer des essais avec l’embarcation proposé[e] par le plus bas soumissionnaire qui rencontrera les critères techniques ci-dessus mentionnés.*). One of the technical criteria referred to is the mandatory criterion at issue.

In other words, the RFP requires PWGSC to determine, first, whether the proposed rescue craft meets all the mandatory criteria (including the criterion at issue). Once this is established, the RFP requires PWGSC to identify the lowest-priced compliant bid. It is only after PWGSC has identified the lowest bid that meets all the mandatory criteria that PWGSC is entitled to request trials if it so desires.

Consequently, the evaluation process, as established in the RFP, does not permit PWGSC to use the trials as an element in determining whether the criterion at issue has been met. This interpretation of the wording of the RFP is reinforced by the fact that the RFP entitles PWGSC to request trials only for the lowest bidder whose proposed rescue craft meets the mandatory technical requirements. If the trials had been intended to be used to determine whether the mandatory technical requirements had been met, the

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].

8. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

Tribunal would have expected the RFP to allow PWGSC to require trials for all bidders, not just for the lowest bidder.

The RFP does not indicate what role the results of any trials are to play in the evaluation of the lowest bid, but it is reasonable to consider that the intent is to use the trials to confirm that PWGSC was correct in concluding, from the bid documentation, that the mandatory criteria were met.

Based on the foregoing analysis, the Tribunal needs to consider whether PWGSC correctly determined that AirSolid's bid met the criterion at issue based on information from AirSolid's bid documentation alone.

The Tribunal notes that there are substantive differences between the requirements described in the French version of the criterion at issue and those described in the English version. The French version reads "l'embarcation devra être éprouvé[e] en sauvetage sur glace et être capable de répondre à plusieurs conditions de glace: mince, fracturée, type slush, espace sans glace (chenal).", whereas the English version reads "[p]roven capacity for rescue operation[s] on different type[s] of ice: thin, fractured, slush, open water." Thus, the French version has a two-pronged requirement: first, proven capacity for rescue operations on ice, in general, and second, that the product be capable of responding to the specific types of ice conditions listed and to open water. The English version simply requires proven capacity for rescue operations in the specific types of ice conditions listed and in open water.

The Tribunal finds that PWGSC was incorrect in determining that AirSolid's bid met this criterion. Demonstrating proven capacity requires more than an assertion by the bidder that the craft possesses the required capacity. It requires information to indicate that the required capacity has been proven—for example, through a field test or in operations where the required capacity has been used. PWGSC would have been incorrect in viewing the information⁹ contained in AirSolid's bid as being sufficient to indicate proven capacity. This finding applies to the criterion as it appears in both English and French.

The Tribunal notes that PWGSC's submissions are consistent with this conclusion. As outlined above, PWGSC's submissions indicate that PWGSC combined the information obtained from AirSolid's bid with the information obtained from the water trials in order to determine that the criterion at issue was met. PWGSC does not argue that the bid alone demonstrates that the criterion was met.

It may not be unreasonable to consider that, if taken together, the bid and the water trials would demonstrate that the criterion at issue has been met. However, as discussed above, the evaluation process established by the RFP did not permit PWGSC to follow this approach when evaluating bids.

Accordingly, the Tribunal considers that PWGSC violated Article 506(6) of the AIT by using a method of evaluating the criteria that was not identified in the tender documents and, similarly, violated Article 1015(4)(d) of NAFTA by failing to award the contract in accordance with the criteria and essential requirements specified in the tender documentation.

Therefore, the Tribunal finds this ground of complaint to be valid.

The Tribunal notes that the inconsistency between the French and English versions of the RFP outlined above is not the only such inconsistency in key provisions of the RFP. A second inconsistency identified by the Tribunal is the fact that the description of the procurement requirement in the French

9. PWGSC's submission of January 16, 2003, that forms part of the confidential record.

version reads “[f]ournir treize (13) embarcations pneumatiques de sauvetage aquatique et sur glace de marque Oceanid **modèle RDC** ou équivalent” (emphasis added), whereas the English version reads “[t]o supply thirteen (13) inflatable ice and water rescue crafts [*sic*] from the company Oceanid or equivalent.” In other words, the French version specifies Oceanid’s model of water rescue craft that is the basis of the procurement requirement (together with equivalent products), whereas the English version does not.

In this instance, the differences between the French and English versions were not a ground of complaint and did not affect the results of the Tribunal’s inquiry into the complaint. However, the Tribunal notes that these differences mean that a bidder using only one language version of the RFP could have construed the requirements differently from a bidder using the other language version. Accordingly, the Tribunal is of the opinion that PWGSC should take the necessary steps to ensure that, in the future, the French and English versions of its procurement documentation are consistent.

The Tribunal notes that, according to PWGSC’s assessment, only two bidders, AirSolid and Noël, complied with the mandatory requirements of the RFP. However, the Tribunal has found that PWGSC was incorrect in determining that AirSolid’s proposal complied with the mandatory requirement at issue. On the other hand, the RFP states that the rescue craft should be an “Oceanid or equivalent” product and is, therefore, premised on the fact that the Oceanid product proposed by Noël is compliant. The Tribunal considered the foregoing in deciding the remedy to recommend.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing and pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is valid in part.

Pursuant to subsection 30.15(2) of the CITT Act, the Tribunal recommends that Noël be compensated for the profit that it would have reasonably made if it had been awarded a contract for 13 inflatable ice and water rescue craft.

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

Ellen Fry
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Presiding Member