



Ottawa, Monday, February 17, 2003

File No. PR-2002-038

IN THE MATTER OF a complaint filed by Les Entreprises P. Cormier pursuant to 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 pursuant to 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.

Pursuant to subsection 30.15(2) of the *Canadian International Trade Tribunal Act*, and considering all the circumstances relevant to this procurement, the Canadian International Trade Tribunal recommends that the contract be terminated and that a new solicitation be issued.

Furthermore, pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Les Entreprises P. Cormier its reasonable costs incurred in preparing and proceeding with the complaint.

Richard Lafontaine  
Richard Lafontaine  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

Date of determination and reasons: February 17, 2003

Tribunal Member: Richard Lafontaine, Presiding Member

Senior Investigation Officer: Daniel Chamaillard

Counsel for the Tribunal: Michèle Hurteau

Complainant: Les Entreprises P. Cormier

Government Institution: Department of Public Works and Government Services

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



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## STATEMENT OF REASONS

### COMPLAINT

On November 19, 2002, Les Entreprises P. Cormier (EPC) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning the procurement (Solicitation No. 21120-031789/A) by the Department of Public Works and Government Services (PWGSC) for the acquisition of blue thermal blankets for the Correctional Service of Canada (CSC).

EPC alleged that PWGSC did not follow the contract award process regarding this solicitation and applied an unfair evaluation process. On October 2 and 5, 2002, EPC received from PWGSC facsimiles informing it, firstly, of a change in the solicitation and, secondly, of the postponement of the deadline for responding to the request of October 2, 2002. It stated that, during a telephone conversation, on about October 7, 2002, PWGSC informed it that the change in the solicitation resulted from an error on the part of PWGSC. EPC also submitted that PWGSC had said that the extension to October 15, 2002, in order to respond to the request of October 2, 2002, had been given to bidders to accommodate a company that had to check with a company in Asia, whose offices were closed during this period. EPC further submitted that PWGSC had then explained that it had to respond to the communication of October 2, 2002, regarding the change and that, if one of the bidders answered in the affirmative, i.e. that this change would affect the unit price, PWGSC had to issue a new solicitation. According to EPC, PWGSC added that, as a rule, it had to issue a new solicitation immediately (after discovering such an error), but that, in the circumstances, its approach would save a lot of work and speed up the award process.

EPC also complained that the written communications that PWGSC had sent to it on October 2 and 5, 2002, were in English only, contrary to the *Official Languages Act*.<sup>2</sup>

As a remedy, EPC asked to be compensated for loss of contract.

On November 25, 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*.<sup>3</sup> On December 23, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal pursuant to rule 103 of the *Canadian International Trade*

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].  
2. R.S. 1985 (4th Supp.), c. 31.  
3. S.O.R./93-602 [hereinafter Regulations].

*Tribunal Rules*.<sup>4</sup> On January 8, 2003, pursuant to rule 104 of the Rules, EPC filed its comments on the GIR with the Tribunal.

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 March 5, 2002, PWGSC received a request from CSC for the acquisition of blue thermal blankets of 100 percent cotton. This acquisition was subject to the *North American Free Trade Agreement*,<sup>5</sup> the *Agreement on Government Procurement*<sup>6</sup> and the *Agreement on Internal Trade*.<sup>7</sup>

On May 18, 2002, PWGSC issued a Notice of Proposed Procurement in respect of this acquisition through MERX<sup>8</sup> and a Request for Proposal (RFP) with a closing date of July 2, 2002. According to the RFP, the requirement was for a one-year contract for a firm quantity of 17,145 units, with an option to extend the contract for an additional year for the same firm quantity, and an estimated quantity of 5,000 units on an "as and when requested" basis for a period of 12 months or 24 months if the optional second year was exercised. According to the RFP, the basis of selection for the award of the contract was the bid with the lowest aggregate price. In addition, the RFP provided information on obtaining technical data and on locations for viewing the sealed sample or sampler at the offices of PWGSC. As part of a technical evaluation, the RFP required the bidder to provide a sample of its proposed product in order to confirm the bidder's capability of meeting the technical requirements.

Before the closing date of July 2, 2002, PWGSC received seven bids in response to the RFP. According to PWGSC, the bid submitted by Five Star Enterprises of Canada Ltd. (Five Star) was the proposal with the lowest aggregate price, whereas that of EPC had the highest price.

On July 16, 2002, PWGSC asked Five Star to provide a sample no later than August 7, 2002. On August 6, 2002, PWGSC received from Five Star a sample blanket for determining compliance with the requirements of the RFP.

On September 9, 2002, PWGSC's technical authority issued an inspection report indicating that the sample was approved. However, the report contained the following statement:

The pre-award sample and its technical data [have] been reviewed and . . . both are in compliance with the requirement.

Note: The woven count in Table 1 has been found different from the sealed sample, thus the sample has been evaluated in accordance with the sealed sample, and [it meets the requirements].

Please proceed with the procurement action accordingly.

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4. S.O.R./91-499 [hereinafter Rules].

5. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

6. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm)> [hereinafter AGP].

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

8. Canada's Electronic Tendering Service.

On October 2, 2002, PWGSC sent a facsimile to all bidders, stating that Table 1 of the RFP contained an error in the technical specifications of the thread counts and asking bidders whether this change would affect the unit prices quoted in their bids.

On October 4 and 5, 2002, PWGSC contacted all bidders to inform them that the deadline for responding to the request of October 2, 2002, was extended to October 15, 2002.

All bidders responded to the request of October 2, 2002. They indicated that there would be no change in their unit prices, except for EPC, which stated that the change would affect its unit price.

On October 21, 2002, PWGSC's contracting officer asked PWGSC's technical authority whether the change in the technical specifications was major or minor. The latter stated that the blanket dimensions were 230 cm x 180 cm and that it was estimated that the increase in the thread count would affect only a small percentage of the total surface of the blanket (approximately 6.5 percent). It therefore determined that the change was not considered to be major. In light of this information, PWGSC determined that the change in the technical specifications was minor and, as all bidders except EPC had indicated that the change would not affect pricing, the issuance of a new solicitation was not warranted.

On October 23, 2002, a contract in the amount of \$227,473.44 was awarded to Five Star for the period from November 1, 2002, to October 31, 2003, for a firm quantity of 17,145 units and an estimated 5,000 units as and when required.

On October 31, 2002, EPC contacted PWGSC and objected to the award of the contract, as it understood that, if only one bidder was to indicate a change in its price, a new solicitation would be issued. PWGSC's contracting officer said that a new solicitation was not warranted, as the change in the specifications was minor.

EPC alleged that, on November 7, 2002, it again contacted PWGSC and that the latter said that it had done nothing wrong.

On November 19, 2002, EPC filed a complaint with the Tribunal.

## **POSITIONS OF PARTIES**

### **PWGSC's Position**

According to PWGSC, EPC alleged that, after having notified the bidders of a correction to one of the technical specifications, PWGSC had wrongly awarded a contract for thermal blankets of 100 percent cotton, instead of issuing a new solicitation.

PWGSC submitted that a new solicitation was not warranted, considering all the circumstances, claiming that it had acted properly in notifying the bidders of the error and in asking them if the change would affect the unit prices quoted in their bids.

PWGSC alleged that it had told EPC during a telephone conversation, on about October 7, 2002, that the purpose of this request was to determine whether the change in the thread count would affect the unit price. PWGSC argued that it was reasonable to conclude that there were two possible explanations for the fact that EPC had stated, in its response to the request of October 2, 2002, that its unit price would change. First, the higher thread count would require a larger quantity of thread, and the price of EPC's bid would therefore be increased. Furthermore, EPC, concerned that its bid price was not the lowest, wanted an

opportunity to submit a new bid at a competitive price and thought that its response to the request of October 2, 2002, would force PWGSC to issue a new solicitation. According to PWGSC, the price of EPC's bid was 48.4 percent higher than that of the lowest bidder, Five Star.

In addition, PWGSC stated that it had acted reasonably and responsibly in asking its technical authority to determine the importance of the correction to the thread count. The change affected mainly a small portion of the blanket's surface area, which had a tighter weave, namely, the stabilization bars at each end and the centre stabilization bar, rather than the body of the blanket, which was an open weave. Thus, in view of the fact that the change was minor and that the six bidders with the lowest prices had indicated that this change would not affect their unit prices, PWGSC thought that it would be unfair to those six bidders to allow the bidder with the highest price to submit a new bid at a lower price than the bids already submitted.

PWGSC submitted that it was therefore reasonable to conclude that no major change had been made to the RFP and that a new solicitation, which would cause the six bidders with the lowest prices needless expense and inconvenience, was consequently not warranted, given, notably, the price difference between the lowest bids and the highest bid; there was no reason to allow the complaint. PWGSC also asked for permission to make representations regarding the award of costs.

As for the allegation that PWGSC had sent two facsimiles in English only, contrary to the provisions of the *Official Languages Act*, PWGSC claimed that the Tribunal did not have jurisdiction to consider the matter, since a complaint pursuant to that act can only be filed with the Commissioner of Official Languages, pursuant to section 58 of that act. Moreover, EPC first raised this issue during a telephone conversation on November 7, 2002, more than 10 working days after receiving the facsimiles in English. Consequently, PWGSC submitted that the complaint had been filed outside the time limit prescribed in section 6 of the Regulations and should not be allowed.

### **EPC's Position**

EPC submitted that PWGSC's claim that the changes that it had requested were minor was incorrect. According to EPC, in this type of contract, the number of blankets, the thread, the patterns, the trim and even the colour of the blanket are important factors in establishing a price. EPC alleged that PWGSC would not have contacted it to get its opinion about the impact of the changes on its unit price had the changes been so minor.

EPC further submitted that each company had had an opportunity to review its file with respect to the validity of its bid and to raise or lower its price, and its ranking, as a result of the changes in one of the technical specifications, outside the 90-day time limit. Given the small number of bidders and the fact that EPC was the only one wanting to change its price, PWGSC had to contact EPC to obtain further information about the price change.

According to EPC, PWGSC was also mistaken in thinking that the change would result in a cost increase. EPC claimed that the product initially required was not a "standard" product that would have complied with the sealed sample, unlike the technical specifications of the RFP, and that the price was therefore different. Several factors can explain this difference, such as the adjustment of machinery or the purchase of thread. Like any material that is purchased in large quantity, thread can be obtained at the wholesale price, and this lowers the unit price.

As for the Tribunal's jurisdiction to consider complaints pursuant to the *Official Languages Act*, while EPC admitted that the Tribunal did not have jurisdiction to consider the matter, it pointed out that PWGSC should have noted that EPC's correspondence was in French.

EPC also alleged that PWGSC was not able to extrapolate that the evaluated price of EPC's bid was 48.4 percent higher than the price of the lowest bidder, since the information available did not take its price change into account. According to EPC, it was to respond to the request of October 2, 2002, with simply a "yes" or a "no" as to whether the change in the thread count would affect its unit price.

EPC therefore submitted that PWGSC had said that it was going to consider the responses to the request of October 2, 2002, and if one of the bidding companies informed it of a price change, PWGSC had to issue a new solicitation, in order to legitimize and abide by the procurement process.

Finally, EPC found amazing that PWGSC did not learn of the difference between the technical specifications and the sealed sample until it came time to evaluate the sample. In closing, EPC alleged that one of the clauses of the RFP, i.e. regarding the bid validity period, had been breached, which meant that the matter had been unfairly handled by PWGSC.

## 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, it 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, are the AIT, NAFTA and the AGP.

Article 506(6) of the AIT 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."

Article 1015(4)(a) of NAFTA provides that, "to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation". Moreover, Article 1015(4)(d) of NAFTA provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation". Article XIII(4)(c) of the AGP is similar.

In this complaint, the Tribunal must rule on the following three issues:

- (1) whether the change in the requirements of the RFP was minor;
- (2) whether the outcome of the procurement process violated the trade agreements;
- (3) whether the Tribunal had jurisdiction to consider complaints pursuant to the *Official Languages Act*.

PWGSC claimed that the change in one of the technical specifications was minor, in that it affected only 6.5 percent of the surface area of the blanket. The Tribunal does not agree. The RFP provided that firms that had not supplied this item to PWGSC were to deliver, before the award of the contract, a sample manufactured in strict compliance with the requirements of the RFP, and that non-compliance of the sample with the technical requirements would result in the firm's bid being declared non-responsive.

On August 6, 2002, PWGSC received, from the lowest bidder, a sample to be used to determine compliance with the requirements of the RFP. On September 9, 2002, the technical authority prepared an inspection report on the sample submitted and indicated that the sample had been approved. However, the report contained, in part, the following statement:

The pre-award sample and its technical data [have] been reviewed and . . . both are in compliance with the requirement.

Note: The woven count in Table 1 has been found different from the sealed sample, thus the sample has been evaluated in accordance with the sealed sample, and [it meets the requirements].

It was only when the technical authority prepared this inspection report that PWGSC became aware of a difference between the sealed sample and the technical requirements. According to the Tribunal, this evidence indicates, at the very least, that the proposal of the lowest bidder did not comply with the requirement of the RFP and was therefore non-responsive. Moreover, under the heading "Order of Precedence," the RFP states that, in the event of any inconsistency in contract documents, the specifications shall take precedence over the sealed sample. Also, in its comments on the GIR, EPC wondered how the lowest bidder had been able to produce a sample identical to the sealed sample. In the Tribunal's view, any change made after the evaluation of bids had to be made in the context of a new RFP, or it would lead to a lack of transparency, contrary to the provisions of the trade agreements. The Tribunal therefore finds that this contract was unfairly awarded since, when making its evaluation, PWGSC did not comply with the mandatory requirements of the RFP and it changed the rules of the game without giving all parties the opportunity to comply with the new requirements, contrary to the provisions of the trade agreements.

Furthermore, the Tribunal is of the view that it does not have jurisdiction to consider complaints pursuant to the *Official Languages Act*. However, the use of only one official language, in given circumstances, could place a potential supplier at a disadvantage and be contrary to the trade agreements. For example, NAFTA provides that the procurement process must be non-discriminatory. The AIT, for its part, is intended to guarantee all Canadian suppliers equal access to government procurement. In this case, EPC, while perfectly entitled to receive its correspondence from the government institution in the official language of its choice, has not alleged that the use of English *per se* did it harm.

Pursuant to subsection 30.15(3) of the CITT Act, the Tribunal considers, in its determination, all the circumstances relevant to the procurement to which the designated contract relates, including the seriousness of any deficiency found by the Tribunal, the degree to which the complainant and all other interested parties were prejudiced, the degree to which the integrity and efficiency of the procurement process was prejudiced, whether the parties acted in good faith, and the extent to which the contract was performed.

It is the Tribunal's opinion that the evaluation was not carried out according to the mandatory criteria of the RFP and the lowest bid was non-responsive. In its view, this was a serious deficiency. Moreover, the Tribunal finds that, in changing the criteria after the opening of the bids, the integrity and efficiency of the procurement process were seriously prejudiced.

The Tribunal notes that EPC ranked last among the bidders in terms of its price. Moreover, it could not know the results of the evaluations of the samples provided by the six competitors that remained in the race. And it is now too late to have them evaluated according to the criteria of the RFP, since the interested parties have access to the information of this inquiry. In any event, the Tribunal is of the view that it would not be appropriate to recommend that PWGSC acquire goods that have been the subject of a technical error and that it never intended to purchase in the first place. The Tribunal is also of the view that the change in the technical specifications for the thread count might have resulted in a lower price from EPC.



According to the Tribunal, the evidence does not show that PWGSC acted in bad faith in using the approach that it did in this case. It simply did the wrong thing without intending to do so.

The contract in question was awarded on October 23, 2002, for the period from November 1, 2002, to October 31, 2003, for a firm quantity of 17,145 units and an estimated quantity of units as and when required. The RFP provides for an optional additional year. According to the Tribunal, there may be, at the very least, a little more than two thirds of the contract left to be performed.

After considering all the evidence in the file, the Tribunal believes that PWGSC violated the trade agreements. In light of the foregoing, in the Tribunal's opinion, there is no reason to recommend the payment of compensation, as sought by EPC. Rather, the Tribunal recommends that the contract be terminated and that a new solicitation be issued.

## **DETERMINATION**

Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is valid.

Pursuant to subsection 30.15(2) of the CITT Act, and considering all the circumstances relevant to this procurement, the Tribunal recommends that the contract be terminated and that a new solicitation be issued.

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

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