



Ottawa, Thursday, August 22, 2002

File No. PR-2002-001

IN THE MATTER OF a complaint filed by Primex Project Management Ltd. 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 section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: August 22, 2002

Tribunal Member: Richard Lafontaine, Presiding Member

Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Clarissa Lewis

Complainant: Primex Project Management Ltd.

Counsel for the Complainant: J. Michel Mazerolle

Intervener: Kaycom Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Ian McLeod

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File No. PR-2002-001

IN THE MATTER OF a complaint filed by Primex Project Management Ltd. 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 April 8, 2002, Primex Project Management Ltd. (Primex) 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. W8486-021596/A) by the Department of Public Works and Government Services (PWGSC) for the supply of 15,000 lithium batteries for the Department of National Defence (DND).

Primex alleged that, contrary to Article 1015(4)(d) of the *North American Free Trade Agreement*² and Article 506(6) of the *Agreement on Internal Trade*,³ PWGSC improperly declared its bid non-compliant. Specifically, Primex stated that the reasons provided by PWGSC for rejecting its proposal, namely, that, contrary to article 3.4 of Annex A to the RFP, Statement of Requirements, the proposal failed to provide a statement to the effect that the only hazardous material included in the batteries was the lithium/sulphur-dioxide used in the basic cell construction of the battery and, contrary to article 3.8 of Annex A, the proposal failed to provide a drawing or picture of the inside of the battery showing the types of wires and their placement, were not supported by the wording in the respective sections. Primex also alleged that there was a reasonable apprehension of bias and that the successful bidder received preferential treatment.

Primex requested, as a remedy, that the contract to Kaycom Inc. (Kaycom), the successful bidder, be terminated and awarded to Primex. In the alternative, Primex requested that the identification of Kaycom as the successful bidder and any award of task authorizations to it arising out of the solicitation, as well as the solicitation itself, be terminated and that a new solicitation for the designated contract be issued. In the further alternative, Primex requested that it be awarded compensation for lost profit and all its costs arising from the acts, decisions or conduct of PWGSC, including, but not limited to, its costs in preparing its proposal and its costs in preparing and proceeding with the complaint.

On April 15, 2002, the Tribunal informed the parties that the complaint had been accepted for inquiry under subsection 30.11(1) of the CITT Act and subsection 7(1) of the *Canadian International Trade*

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
 2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
 3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [hereinafter AIT].

Tribunal Procurement Inquiry Regulations.⁴ On April 23, 2002, Kaycom filed comments on the complaint. On April 29, 2002, the Tribunal advised Kaycom that, in order for its comments to be considered, it should request leave to intervene in the proceedings. On April 30, 2002, Kaycom requested leave to intervene in the proceedings and, on May 1, 2002, such leave was granted by the Tribunal. On May 10, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On May 24, 2002, Primex filed its comments on the GIR with the Tribunal. On May 27, 2002, Primex requested that the Tribunal direct PWGSC to provide a copy of the proposal and any attachments (“Technical Proposal, Testing Results, diagrams, pictures, schematics, drawings or other such visual representation”) that might have been submitted by Kaycom. On June 4, 2002, the Tribunal advised Primex that its request was denied. On June 12, 2002, Primex resubmitted its request and provided additional comments about the case. On June 13, 2002, Kaycom responded to Primex’s request by stating that all technical information submitted with respect to the Request for Proposal (RFP) in question is proprietary and confidential. On June 19, 2002, PWGSC responded to the additional comments. On June 25, 2002, Primex responded to PWGSC’s comments. On July 3, 2002, the Tribunal advised Primex that it had decided not to reconsider its decision of June 4, 2002, and that the additional comments made by Primex in support of its request would not be taken into consideration in deciding the merits of the complaint.

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 9, 2002, PWGSC issued an RFP, Solicitation No. W8486-021596/A, for publication on MERX, Canada’s Electronic Tendering Service. The closing date for bids was February 19, 2002. The RFP was for the supply of 15,000 lithium batteries for combat net radios for DND.

Article 3.8 of Annex A reads:

3.8 Wire Layout. The Bidder shall provide, in its proposal, details on the wire types and placements in the batteries in accordance with MIL-PRF-49471B (CR) and MIL-PRF-49471/3A (CR).

A section in the RFP entitled “Notice to Bidders” reads, in part:

The following terms and conditions are applicable to this solicitation:

6. As per articles 3.6 and 3.8 of Annex “A”, construction details, including wire types and placements and test results proofs, shall be provided as part of the proposal.

A section in the RFP entitled “Evaluation Criteria – Goods” reads, in part:

The following factors will be taken into consideration in the evaluation of each bid:

- (a) Mandatory Technical compliance (item description on page 2 and Annex “A” herein).

MIL-PRF-49471B (CR) and MIL-PRF-49471/3A (CR), referred to in article 3.8 of Annex A, are references to military specifications documents (MIL specs) issued by the U.S. government. MIL-PRF-49471B (CR) provides specifications for a range of lithium batteries. MIL-PRF-49471/3A (CR)

4. S.O.R./93-602 [hereinafter Regulations].

5. S.O.R./91-499.

provides particulars specific to the type of lithium battery being procured in the subject solicitation. MIL-PRF-49471B (CR) reads, in part:

3.3.2.1 Electrical connection wires and tabs. All electrical connecting wires and tabs for the cells and the battery shall be covered by an insulation with the following characteristics:

Softening temperature: 302°F (150°C) minimum
Lengthwise shrinkage: 3% maximum after application
Thickness: 0.005 inch minimum

The material should be non-flammable and non-toxic. Certification is required.

3.4.1 Intercell connections. Intercell connections shall be connected in accordance with the contractor's established procedures. These procedures shall insure that intercell connectors are insulated to prevent or preclude short circuiting within a multi cell battery. Certification is required.

On January 30, 2002, amendment No. 001 was provided by facsimile to all suppliers, including Primex, that had previously obtained the RFP.

Amendment No. 001 reads, in part:

Q1 – STR – Para. 3.8 Wire Layout

To date, no manufacturer has produced products and received formal acceptance qualification to MIL-PRF-49471B (CR) 20 Nov 00. Companies have been awarded contracts by the US government, but formal qualification will not be complete until late Sep 02. With the delivery requested we feel that performance specification MIL-PRF-4971 should be acceptable for this RFP.

A1 –

DND is looking for the wiring diagram of the batteries to ensure that, as a minimum, the battery proposed by the contractor [has] the protection devices required under this contract. Also, that the battery fabrication process is such that the cell layout is mechanically sound to pass the drop and other stress tests of the PRF, the wires and interconnections will not short-circuit when tested according to the specifications and that the thermal protection device in each of the battery leg is strategically located for a maximum thermal transfer between the cells and the thermal device.

The bids closed, as scheduled, on February 19, 2002.

Proposals were received from five potential suppliers, including Primex and Kaycom. According to PWGSC, three of the proposals were set aside for failing to provide mandatory information, and the remaining two proposals, those of Primex and Kaycom, were considered for further evaluation by PWGSC and DND.

At the end of the evaluation stage, PWGSC concluded that the proposal submitted by Primex was non-compliant for failing to satisfy the mandatory requirements set out in article 3.8 of Annex A and amendment No. 001 to the RFP. PWGSC also determined that the proposal submitted by Kaycom was compliant with the requirements of the RFP and, on March 8, 2002, PWGSC decided that the contract should be awarded to Kaycom. On March 12, 2002, PWGSC advised Kaycom that it had been awarded the contract.

On March 14, 2002, PWGSC advised Primex, in a telephone conversation, that Kaycom had been awarded the contract and that Primex's bid was technically non-compliant. That same day, Primex sent a letter to PWGSC requesting an immediate debriefing regarding its bid and the decision to award the contract to Kaycom. The letter also objected to the award of the contract to Kaycom and the finding that Primex's

proposal was non-compliant. A formal debriefing was held on March 28, 2002. During the debriefing, PWGSC confirmed that Primex's proposal lacked the required detailed information necessary to demonstrate compliance with the mandatory requirements of article 3.8 of Annex A, but agreed that Primex's proposal was compliant with article 3.4.

On April 8, 2002, Primex filed a complaint with the Tribunal.

POSITION OF THE PARTIES

PWGSC's Position

PWGSC submitted that, while it had initially considered Primex's proposal not responsive to the requirements of article 3.4 of Annex A, it ultimately decided that the proposal was, in fact, responsive to these requirements. Since Primex was informed of this conclusion, PWGSC submitted that any arguments with respect to article 3.4 were moot.

PWGSC further submitted that it acted correctly in finding that Primex's proposal did not respond to the mandatory requirements set out in article 3.8 of Annex A, as further developed in amendment No. 001. PWGSC further stated that there was no basis in fact to the allegation of bias in the procurement process. According to PWGSC, the only direct response in Primex's proposal to the requirements of article 3.8 was a declaration that the electrical wires and tabs fulfilled the requirements of a paragraph of the MIL specs. PWGSC noted that nowhere in its complaint does Primex refer to the issuance of amendment No. 001 or offer any reasons why its proposal should have been considered responsive to the requirements in amendment No. 001.

PWGSC submitted that the requirement in article 3.8 of Annex A called for "details on the wire types and placements in the batteries" and that the RFP then reiterated the requirement for "construction details, including wire types and placements". According to PWGSC, the wording in these provisions mandated that suppliers provide positive details of the types of wires used in their proposed battery, details on the placement of the wires in the battery and details of the construction of the battery.

PWGSC also submitted that the reference to "in accordance with MIL-PRF-49471B (CR) and MIL-PRF-49471/3A (CR)" in article 3.8 of Annex A provided additional specificity to the requirement for details. This provision indicated that, in responding to the requirements of article 3.8, suppliers had to bear in mind the specifications set out in the two listed MIL specs. As an example, PWGSC cited paragraph 3.3.2.1, "Electrical connection wires and tabs", of MIL-PRF-49471B (CR) which made specific reference to certain minimum standards for the insulation for the electrical connecting wires and tabs for the cells and the battery. Thus, according to PWGSC, any responsive proposal was required to provide details that responded to the requirements set out in article 3.8 and the MIL specs.

According to PWGSC, any doubt about the nature of the required response to article 3.8 of Annex A should have been dispelled by consideration of the additional instructions provided to suppliers in amendment No. 001. PWGSC submitted that, in amendment No. 001, it advised the supplying community that a response to the requirements of article 3.8 had to include a "wiring diagram".

PWGSC submitted that its evaluators considered whether the schematic drawings included in Primex's proposal could be responsive to the requirements of article 3.8 of Annex A and amendment No. 001. According to PWGSC, the drawings were abstractions that used symbols, as opposed to actual representations of the construction and content of the batteries. PWGSC further submitted that the

schematics did not constitute a “wiring diagram” that would enable DND to ensure that the battery had the safety requirements identified in amendment No. 001.

With respect to the allegation of bias, PWGSC stated that, while it determined on Friday, March 8, 2002, that the contract should be awarded to Kaycom, actual notice was provided to Kaycom on Tuesday, March 12, 2002. Public notice of the award to Kaycom was issued through MERX on the same day. PWGSC submitted that it was not aware of any notice provided to Kaycom prior to March 12, 2002. With respect to the allegation that Kaycom had been provided information about Primex’s proposal, PWGSC submitted that it was not aware of any information having been provided to Kaycom indicating that Primex had made a proposal or that the proposal had been set aside as non-compliant. PWGSC noted that this was confirmed by Kaycom in its letter of April 23, 2002, that it filed with the Tribunal as an intervener.

Accordingly, PWGSC submitted that Primex’s allegations of bias are completely unsupported by the evidence and are without merit.

Kaycom’s Position

In response to the complaint, Kaycom submitted that it was unaware that Primex’s proposal had been found non-compliant and, therefore, could not have passed any such information. Kaycom further submitted that the only information about other bidders that it had was publicly available on MERX and that it was unaware of which manufacturer Primex was representing until the notice of inquiry was received from the Tribunal.

Primex’s Position

Primex submitted that the RFP required wire placements and types in accordance with the MIL specs and that nowhere in the referenced MIL specs is there a requirement to provide a layout of the type of wires and their placement or of how such details ought to be provided by bidders. Primex submitted that, given the above, the requirement found in article 3.8 of Annex A is an impossibility in and of itself.

According to Primex, it provided PWGSC with a schematic wiring diagram of the battery proposed (despite being under no obligation to do so) and a test report from the manufacturer of the batteries in accordance with the MIL specs. This test report showed that the batteries passed all the tests, including the drop test, output and reverse polarity test.

Primex alleged that Kaycom knew that Primex was found non-compliant before it did and that Kaycom had been awarded the contract based on information provided at a meeting in Singapore to the manufacturer represented by Primex before the contract was awarded. Primex submitted that this was evidence that the procurement process was not followed and was improper and flawed.

Primex submitted that, during the debriefing, the Technical Authority admitted that there was no mention in the MIL specs of wiring types and placements. Primex submitted that the explanation by the Technical Authority that they were “hoping” for a drawing or picture of the wire layout of the batteries, combined with the purported technical non-compliance, raised an apprehension of bias in the procurement process.

Primex further submitted that, because of numerous problems with its own technical parameters and less-than-satisfactory products in the past, PWGSC had a predetermined preference or was strongly influenced to favour a particular bidder.

Primex submitted that its proposal was in perfect conformity with all the requirements set out in the RFP. Primex further submitted that PWGSC issued amendment No. 001 in order to cure the absurd result brought about by article 3.8 of Annex A as worded. According to Primex, this is an acknowledgement of the difficulty imposed by article 3.8 and it provided bidders with insight as to what it was looking for by virtue of article 3.8.

Primex submitted that, by virtue of article 3.8, PWGSC was looking for assurance that the battery presented met all the military standards, specifications and tests.

Primex also argued that PWGSC erroneously claimed that the only “direct” response provided by Primex to the requirements of article 3.8 of Annex A and amendment No. 001 was a declaration that the electrical wires and tabs fulfilled the requirements of a paragraph of the MIL specs. According to Primex, PWGSC selected one small sentence from a 10-page technical specification and test report prepared by the manufacturer of the batteries and submitted by Primex as part of its proposal. Primex submitted that the technical specification and test report in its proposal not only included a wiring diagram, as requested by amendment No. 001, but also contained an extensive description of the battery safety features, the wiring types and placement, and the results of an extensive testing of batteries performed in accordance with the MIL specs. Primex submitted that this satisfied the RFP and article 3.8 of Annex A, to the extent possible.

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. In this connection, section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the trade agreements, in this case, the AIT and NAFTA.

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)(d) of NAFTA stipulates that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.”

There are two issues before the Tribunal in this complaint:

- (1) whether Primex met the requirements of article 3.8 of Annex A and amendment No. 001 to the RFP; and
- (2) whether the outcome of the procurement process was predetermined or biased toward a particular supplier.

PWGSC had initially determined that Primex’s proposal was non-compliant with the requirements of article 3.4 of Annex A. However, PWGSC is now of the view that the proposal is compliant with the requirements of article 3.4. Accordingly, article 3.4 is no longer at issue.

Article 3.8 of Annex A states the following:

3.8 Wire Layout. The Bidder shall provide, in its proposal, details on the wire types and placements in the batteries in accordance with MIL-PRF-49471B (CR) and MIL-PRF-4971/3A (CR).

Article 6 of the section of the RFP entitled “Notice to Bidders” states the following:

As per articles 3.6 and 3.8 of Annex “A”, construction details, including wire types and placements and test results proofs, shall be provided as part of the proposal.

Primex submitted that the MIL specs in question did not mention a requirement to provide a wire layout with wire types and placements nor did it specify how such details ought to be provided by bidders. Primex stated that article 3.8 of Annex A required wire types and placements in accordance with the MIL specs, which did not call for a drawing or picture of wire types and placements. Further, Primex submitted that PWGSC conceded that there was no mention in the MIL specs of wiring types and placements, other than the fuses and protection devices that were “diagrammed” in Primex’s proposal. Primex also argued that the requirement found in article 3.8 was, in and of itself, an impossibility.

PWGSC argued that the significance of the wording “in accordance with MIL-PRF-49471B (CR) and MIL-PRF-4971/3A (CR)” in article 3.8 of Annex A was to provide specificity to the requirement for details. PWGSC further submitted that this provision indicated that, in responding to the requirements of article 3.8, suppliers had to bear in mind the specifications set out in the two MIL specs.

The Concise Oxford Dictionary defines the expression “in accordance with” as meaning “in a manner corresponding to”.⁶ The verb “correspond” is, in turn, defined as “be in harmony or agreement”.⁷ Article 3.8 of Annex A contained an ambiguity brought about by the requirement, on the one hand, to detail wire types and placements and, on the other, to give such details in keeping with the MIL specs which did not call for a wire layout of wire types and placements.

The Tribunal notes that, during the bid solicitation period, Primex did not make a request for clarification regarding the requirements stipulated in article 3.8 of Annex A,⁸ although it now submits that it was impossible to satisfy those requirements.

Amendment No. 001 to the RFP was issued on January 28, 2002. It states, in part, as follows:

Q1 – STR – Para. 3.8 Wire Layout

To date, no manufacturer has produced products and received formal acceptance qualification to MIL-PRF-49471B (CR). . . . With the delivery requested we feel that performance specification MIL-PRF-4971 should be acceptable for this RFP.

A1 -

DND is looking for the wiring diagram of the batteries to ensure that, as a minimum, the battery proposed by the contractor [has] the protection devices required under this contract. Also, that the battery fabrication process is such that the cell layout is mechanically sound to pass the drop and other stress tests of the PRF, the wires and interconnections will not short-circuit when tested

6. 9th ed., *s.v.* accordance.

7. *Ibid.*, *s.v.* correspond.

8. Under “Enquiries – Solicitation Stage”, the RFP states, in part, that “[a]ll enquiries regarding the bid solicitation must be submitted in writing to the Contracting Authority . . . as early as possible within the bidding period. Enquiries must be received no less than 5 calendar days prior to the bid closing date to allow sufficient time to provide a response.”

according to the specifications and that the thermal protection device in each of the battery leg is strategically located for a maximum thermal transfer between the cells and the thermal device.

Primex submitted that amendment No. 001 “provided bidders with insight as to what [PWGSC] was looking for by virtue of Article 3.8.”⁹ PWGSC, for its part, submitted that the amendment provided “additional instructions” regarding article 3.8 of Annex A.¹⁰

On balance, the Tribunal is of the view that amendment No. 001 to the RFP failed to resolve the ambiguity of article 3.8 of Annex A and created its own ambiguity with respect to the wiring diagram and the other details that it mentions. The wording of amendment No. 001 is patently ambiguous.

Firstly, there is a dissonance between the question posed by a bidder and the response given by PWGSC. While the question concerns the acceptability of MIL-PRF-4971, PWGSC makes no mention of this military specification in its response.

Secondly, the amendment requires a “wiring diagram” which, “as a minimum”, shows the protection devices for the batteries proposed. It is patently unclear how this may relate to the “wiring types and placements” cited in article 3.8 of Annex A, compounded by the limiting factor that such diagram or wire layout must be “in accordance with” MIL-PRF-49471B (CR) and MIL-PRF-49471/A3 (CR).

Further, it is unclear whether the amendment requires a wiring diagram which shows the proposed “protection devices” only or whether it also requires, as a minimum, that the wiring diagram illustrate the battery fabrication process in order to show that it meets certain performance requirements.

At this stage of the procurement process, Primex did not seek clarification or file an objection with PWGSC.¹¹

PWGSC submitted that the only direct response in Primex’s proposal to the mandatory requirements in article 3.8 of Annex A, as further developed in amendment No. 001 to the RFP, was a single sentence stating that the electrical connections and wires would fulfil the requirements of the MIL specs. PWGSC further noted that only two schematic drawings appeared to relate to the requirements of article 3.8 and amendment No. 001. PWGSC submitted that, upon examination, the evaluators determined that the schematics did not illustrate the actual wires or connections used in the batteries. Accordingly, the evaluators concluded that the two schematics did not provide the details required under article 3.8 and did not address the concerns set out in amendment No. 001.

In PWGSC’s submission, article 3.8 of Annex A asked for “details on the wire types and placements in the batteries” and such details were not provided. In considering whether the schematic drawings included in Primex’s proposal could be responsive to the requirements of article 3.8 and amendment No. 001 to the RFP, the evaluators noted that they did not illustrate the actual wires or connections, show the wire placements in the batteries or show the actual location of the cells or

9. Primex’s reply to the GIR at 3.

10. GIR at 11.

11. There are provisions in the RFP that permit bidders to seek clarification or “general guidance”. Under “Enquiries - Solicitation Stage”, the RFP states, in part, that “[i]ssues concerning this procurement may be raised prior to bid closing date with the Contracting Authority in order to obtain general guidance. Canada will examine the issues and will decide whether or not to amend the solicitation document.” Alternatively, a potential supplier could file an objection with PWGSC or file a complaint with the Tribunal relating to the lack of clarity in the requirements.

interconnections between the cells. These schematic drawings would be consistent with a number of possible battery designs that would not satisfy the requirements in article 3.8 and amendment No. 001.

In reply, Primex submitted that, while PWGSC relies on one small sentence to support its entire position, it omitted to mention all the other details, data, test results and wiring diagrams, which are also found in its proposal. It further submitted that its Technical Specification and Test Report not only included a wiring diagram, as required by amendment No. 001 to the RFP, but also contained an extensive description of the battery safety features and of the wiring types and placement, and the results of an extensive testing of the batteries performed in accordance with the MIL-PRF documents, thereby satisfying article 6 of the section of the RFP entitled “Notice to Bidders” and article 3.8 of Annex A to the extent possible.

The Tribunal is satisfied that PWGSC acted reasonably when its evaluators reviewed the schematic diagrams provided by Primex and found them to be lacking in several material respects. The Tribunal has previously stated that, unless the evaluators have not applied themselves in evaluating a bidder’s response or have ignored vital information provided in a bid, the Tribunal will not substitute its judgement for that of the evaluators.¹² The Tribunal is not convinced that the evaluators ignored the information before them or that they did not apply themselves in this case. Moreover, Primex has not convinced the Tribunal that the evaluators incorrectly evaluated its proposal.

Furthermore, where the lack of clarity or the ambiguity of a mandatory requirement¹³ is apparent on its face, such as in this case, the Tribunal is of the view that it is incumbent upon a complainant to seek clarification or to object to the requirement. *Inter alia*, the part of the amendment after the first (complete) sentence should have been questioned by Primex as being unclear, as to whether it applied to the diagram or only generally to the proposal to be submitted. It should have been questioned, especially since Primex submits that the only quantifiable way of “validating” that all the requirements set out in the amendment have been met is through the test program prescribed in the MIL specs that it carried out. The Tribunal notes that “test results proofs” were a requirement of article 3.6 of Annex A, which is not at issue.

In File No. PR-99-006,¹⁴ the Tribunal dealt with another ambiguously drafted requirement that made it incumbent on the bidder to seek clarification. In *Quality Services*, a clause of a Request for a Standing Offer could be read several ways on its face by the use of an oblique (“/”) in its wording. In that case, it was held that:

the Tribunal is of the view that the . . . provisions of the RFSO **imposed an onus on QSI to seek clarification** and, as appropriate, approval from the Department before it adopted a particular interpretation of the term . . . over other possible interpretations. . . . By failing to do so, QSI exposed itself to a risk which, in the Tribunal’s opinion, it must assume.¹⁵ [Emphasis added]

In File No. PR-99-040,¹⁶ the Tribunal also dealt with the issue of ambiguity in an RFP. It was alleged that PWGSC had failed to define, in the Request for a Standing Offer, the terms “prime” and

12. See *Re Complaint Filed by ACMG Management Inc.* (5 June 2000), PR-2001-056 (CITT); see also *Re Complaint Filed by Crain-Drummond* (18 August 2000), PR-2000-009 (CITT).

13. Annex A to the RFP is mandatory pursuant to paragraph (a) of the section titled “Evaluation Criteria – Goods”.

14. *Re Complaint Filed by Quality Services International* (28 June 1999) (CITT) [hereinafter *Quality Services*].

15. *Ibid.* at 6.

16. *Re Complaint Filed by Brent Moore & Associates* (4 May 2000) (CITT).

“back-up”, as these applied to the successful bidders. In this determination, the Tribunal placed the onus on the bidder, in the face of a patently unclear requirement, to seek instruction from PWGSC.¹⁷

The Federal Court of Appeal also recently made a decision with respect to the issue of ambiguity in RFPs in *IBM Canada v. Hewlett-Packard (Canada) and the Minister of Public Works and Government Services*.¹⁸ In that decision, in the context of discussing time limits for filing complaints with the Tribunal, the Federal Court of Appeal made clear the importance of potential suppliers complaining as soon as they are aware of a flaw in the process, including problems with the interpretation of solicitation requirements:

They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. The whole procurement process . . . is meant to be as open as it is meant to be expeditious.¹⁹

The Federal Court of Appeal went on to say that to adopt a “wait-and-see attitude” is precisely what the procurement process and Regulations seek to discourage.²⁰

The Tribunal wishes to clarify the distinction between latent and patent ambiguity in RFP requirements and the different consequences of finding each. When there is latent ambiguity,²¹ the potential supplier will not likely become aware of the ambiguity before learning of the results of the evaluation. When there is patent ambiguity, it is (or should be) apparent on the face of the RFP article or amendment concerned, and the potential supplier must seek clarification of what is being required or otherwise file an objection or a complaint in a timely manner.

In this case, both article 3.8 of Annex A and amendment No. 001 were patently ambiguous, and Primex, by not seeking clarification or by not filing an objection or a complaint in a timely manner, assumed the risk of being time-barred from making any subsequent complaint or objection with respect to the lack of clarity of these requirements.

Subsections 6(1) and (2) of the Regulations require potential suppliers to file their complaints or objections within 10 working days of their basis of complaint becoming known.²² In addition to the other findings that it has made in this case, the Tribunal finds that Primex is out of time on any complaint relating

17. *Ibid.* at 6, “If BMA found that situation objectionable, it could have raised the matter with the Department or the Tribunal within the time frame prescribed in section 6 of the Regulations, i.e. within a 10-working-day period after July 29, 1999, the date on which the NPP was published on MERX and the RFSO made available to potential suppliers. However, BMA only filed its complaint with the Tribunal on December 21, 1999.”

18. [2002] F.C.J. No. 1008 (C.A.) online:QL (FCJ).

19. *Ibid.* at 10.

20. *Ibid.* at 13.

21. For other examples of cases dealing with latent ambiguity, see *Re Complaint Filed by Cifelli Systems* (21 June 2001), PR-2000-065 (CITT); *Re Complaint Filed by TELUS Integrated Communications* (2 November 2000), PR-2000-017 and PR-2000-035 (CITT).

22. “6. (1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

to the ambiguity or lack of clarity of the specifications, as it should reasonably have become aware of the basis of its complaint at the latest when amendment No. 001 was issued.

Finally, on the second issue to be decided, the Tribunal is not convinced that there is sufficient evidence on the record to establish, on a balance of probabilities, that the outcome of the procurement process was predetermined and biased toward the selection of a particular supplier. In the Tribunal's view, the allegation that the successful bidder was improperly notified (which the successful bidder and PWGSC deny), the fact that the successful bidder was the designated supplier for the product in question for many years and an allegation that there were unsatisfactory products supplied in the past do not establish a bias in the selection of the supplier in this case.

In light of the foregoing, the Tribunal finds that the allegations are without merit and, therefore, the complaint is not valid.

Each party shall bear its own costs in this matter.

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 not valid.

Richard Lafontaine
Richard Lafontaine
Presiding Member