



Ottawa, Monday, July 8, 2002

File No. PR-2002-002

IN THE MATTER OF a complaint filed by Tendering Publications Limited 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.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that, within six months from the date of this determination, the Department of Public Works and Government Services issue a Request for Proposal to compete its current requirement for the existing government electronic tendering services, GETS II, or, in the alternative, issue a Request for Proposal for a replacement service. Should a competition for the delivery of the existing government electronic tendering services result in the selection of a supplier other than the current contractor, then the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services terminate the existing contract and award a new contract to the winning supplier.

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

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

The statement of reasons will follow at a later date.

Date of Determination: July 8, 2002  
Date of Reasons: July 15, 2002

Tribunal Member: James A. Ogilvy, Presiding Member

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Marie-France Dagenais

Complainant: Tendering Publications Limited

Counsel for the Complainant: Paul M. Lalonde

Government Institution: Department of Public Works and Government Services

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

Intervener: Bank of Montreal

Counsel for the Intervener: Dalton J. Albrecht



Ottawa, Monday, July 15, 2002

File No. PR-2002-002

IN THE MATTER OF a complaint filed by Tendering Publications Limited 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 9, 2002, Tendering Publications Limited o/a BIDS (BIDS) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>1</sup> The complaint concerns the two-year extension of an existing contract (Contract No. EN531-5-0215/001/EW) by the Department of Public Works and Government Services (PWGSC) for the operation of a national electronic tendering service.

BIDS alleged that PWGSC did not follow public procurement procedures in awarding a contract extension to the Bank of Montreal. The extensions authorized by the original contract had already been exercised, and the extension at issue constituted an exclusive contract and was contrary to Article 506 of the *Agreement on Internal Trade*.<sup>2</sup>

BIDS requested, as a remedy, that PWGSC set aside its exclusive distribution arrangement with the Bank of Montreal, that compensatory and punitive damages be awarded for the breach of the public procurement procedures and that the Tribunal issue an order postponing the award of any contract until the Tribunal determined the validity of the complaint.

On April 15, 2002, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>3</sup> That same day, the Tribunal issued an order postponing the award of any contract in relation to this procurement until it determined the validity of the complaint. On April 19, 2002, PWGSC informed the Tribunal that the contract had been amended and that the contractor was identified as the Bank of Montreal. On May 2, 2002, the Tribunal granted intervener status to the Bank of Montreal. On May 13, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> On May 24, 2002, BIDS filed comments on the GIR with the Tribunal. On June 5, 2002, PWGSC made a submission to the Tribunal, in which it requested permission to respond to new arguments and other points raised by BIDS. The Tribunal denied permission to respond, but

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
3. S.O.R./93-602 [hereinafter Regulations].
4. S.O.R./91-499.

requested comments from PWGSC on the applicability of Chapter Ten of the *North American Free Trade Agreement*.<sup>5</sup> On June 17, 2002, PWGSC responded. BIDS was given the opportunity to respond to this additional submission, but did not.

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

MERX<sup>6</sup> is a web-based system that advertises government contracting opportunities to potential bidders. Subscribers can browse the MERX database to search for procurement opportunities and notices of proposed procurement by the federal government. This service, also called the Government Electronic Tendering Service (GETS), currently in its second generation known as GETS II, provides all tender distribution and related functions through a single supplier, currently the Bank of Montreal. This contractor is responsible for: (1) notices and document input and validation; (2) government services, such as publishing foreign opportunities and distributing *Government Business Opportunities* through e-mail or facsimile; and (3) notice and document distribution services.

In June 1992, Canada introduced an electronic tendering system known as the Open Bidding Service (OBS) under a contract with ISM Canada Ltd. (later assigned to IBM Canada Ltd.). During the period of the contract, other users, including several provinces, began publishing notices on the system. In the fall of 1994, a federal-provincial committee known as the Electronic Tendering Working Group (ETWG)<sup>7</sup> commenced work on a Request for Proposal (RFP) for the replacement of the OBS. In June 1996, an RFP was issued on the OBS for its replacement. Each of the 13 members of the ETWG (federal, provincial and two territorial governments) was to issue a separate contract for its own jurisdiction.

In January 1997, PWGSC awarded a contract to Cebra Inc. (Cebra) to operate GETS II. Section 4.1 of the contract specifies:

The period of this Contract shall be from the date of Contract award to May 31, 2000. This period includes one-month of dual operation, during the month of May 1997, with the electronic tendering service continuing to be offered under an existing contract with ISM Information Systems Management Corporation.

Section 4.3 of the contract specifies, in part:

The Contractor hereby grants Canada an irrevocable option to extend this Contract, including the License Agreement, for up to two (2) additional one-year periods under the same terms and conditions, and at the rates stipulated in this Contract.

As it turned out, Cebra was unable to get its system, known as MERX, fully operational and accepted until January 1999.

Several contract amendments were issued between January 14, 1997, and March 1, 2002, including the exercising of the options to extend the contract period by two additional one-year periods and, in

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

6. Canada's Electronic Tendering Service.

7. The ETWG was established pursuant to Article 516 of the AIT for, among other reasons, the development of ways to maximize the use of a common electronic tendering system.

December 2001, the assignment of the contract to the Bank of Montreal, which had integrated the services previously offered by Cebra, a wholly owned subsidiary of the Bank of Montreal, into its E-Business Division.

In the spring of 2000, PWGSC contracted with Consulting and Audit Canada to do a study and provide a report on options concerning a replacement strategy for GETS II.

In November 2000, PWGSC completed an initiative called "GETS Vision" in advance of the contract expiry date of May 31, 2002, for the current system. Under the new approach, tender information would be made available by electronic means only, at no cost to potential bidders. According to the proposed vision for the third generation service, GETS III, the notices and document input and validation and the government services would be government-managed services, and the notice and document distribution services would be provided by value-added service providers (VASPs). It was envisaged that VASPs would provide the services based on market demand and would compete among themselves for market share. The approach would rely on having a licence-based arrangement with the VASPs.

In March 2001, a letter of interest was published to request the input of the potential service providers. This was followed by a feasibility study. In April 2001, after consulting with both Tribunal staff and PWGSC's legal counsel, PWGSC concluded that the informal arrangement envisaged with VASPs would not be workable because of the risks involved relating to obligations under various trade agreements and that a more formal contractual arrangement would be required.

According to PWGSC, in May 2001, it became clear that the development of the new GETS approach and the tendering and implementation of a replacement system would not be possible before the expiry date of the existing contract. Consequently, negotiations were initiated with the Bank of Montreal, the current contractor, for an extension of the existing contract in order to allow time for the development of the new GETS concept. On March 22, 2002, the contract was extended by a period of two years to May 31, 2004, to allow increases to the charges for various subscriber rates and to make administrative changes to the contract.

According to PWGSC, other options were considered to replace GETS II, but were rejected for various reasons, including unacceptable risks associated with cost, time and the ability to achieve the required functionality.

In a letter dated April 1, 2002, BIDS made an objection to PWGSC regarding the contract extension and requested that an RFP be issued. On April 9, 2002, it filed this complaint with the Tribunal.

## **POSITION OF PARTIES**

### **PWGSC's Position**

PWGSC submitted that it acted in good faith at all times and that the contract was extended in accordance with the law and government policy. It submitted that such an extension was necessary to maintain a fully operational GETS in accordance with the requirements of the trade agreements, pending the tendering of a new GETS. PWGSC submitted that it did not amend the current contract in contravention of the trade agreements or in order to avoid the obligations of the trade agreements. It submitted that it has every intention of proceeding to the tendering of the new GETS system.

PWGSC submitted that there was insufficient time to finalize and implement the proposed approach to GETS III prior to the expiry of the contract and that, therefore, it took the “stopgap” or “bridging” measure of amending the contract and extending its term to May 31, 2004. This, according to PWGSSC, was to allow time for full implementation of the proposed GETS III model and to ensure that GETS II continues in operation.

PWGSC submitted that, while it is sympathetic to BIDS’ concerns, the continued maintenance of GETS II without interruption is vital to government operations and to Canada’s obligations to maintain a tendering publication system under the trade agreements. It submitted that, to the best of its knowledge, BIDS wishes only to provide notice and document distribution services and not the other services performed by the existing contractor. PWGSC submitted that this is evident in BIDS’ letter of January 31, 2002, in which it expresses an interest in distributing tender information that it would obtain in a feed from the government. It asserted that the current contractor provides a wide range of services over and above distributing tender information, which include assembling the notice and document information and editing this information prior to its distribution; providing a list of foreign opportunities; producing *Government Business Opportunities*; and providing access to certain government documents. Since PWGSC is not currently equipped to provide a single feed as seemingly required by BIDS and, in the absence of a functioning GETS III model, it submitted that the complaint is premature.

PWGSC also submitted that the Tribunal does not have jurisdiction to conduct an inquiry with respect to the contract extension at issue. It submitted that the inquiry is in respect of a legal extension of an existing contract, required as a necessary “stopgap” measure to maintain GETS II, which, therefore, is a contract law and contract administration matter, is outside the procurement process and, as such, is outside the Tribunal’s jurisdiction. PWGSC also submitted that the Tribunal would not have the authority to award a parallel contract as requested by BIDS.

PWGSC submitted that the legal authority to extend the contract through an amendment comes from the General Conditions (DSS-MAS 9676) of the *Standard Acquisition Clauses and Conditions Manual*, which were incorporated by reference into the original contract. It submitted that the relevant clause reads, in part:

1. No design change, modification to the Work, or amendment to the Contract shall be binding unless it is incorporated into the Contract by written amendment or design change memorandum executed by the authorized representatives of the Minister and of the Contractor.
2. While the Contractor may discuss any proposed changes or modifications to the scope of the Work with the Technical Authority, Canada shall not be liable for the cost of any such change or modification until it has been incorporated into the Contract in accordance with subsection 1.

PWGSC submitted that the contractual requirement set out in the above clause was satisfied, as the amendment to extend the contract was duly executed in the required manner. It referenced the Tribunal’s decision in File No. PR-99-017<sup>8</sup> as an indication that the Tribunal does not have jurisdiction with respect to matters of contract administration that occur after the contract has been awarded in accordance with all required rules and procedures.

Finally, PWGSC requested that the complaint be dismissed and that it be awarded costs.

In response to the Tribunal’s request for comments on the applicability of Chapter Ten of NAFTA, PWGSC submitted that NAFTA does not apply to the contract amendment and that there is no evidence that

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8. *Re Complaint Filed by Liftow* (13 October 1999) (CITT) [hereinafter *Liftow*].

the contract amendment was entered into for the purpose of avoiding the obligations of NAFTA. It asserted that the evidence indicates that it has had and continues to have the intention of competing its requirement for a replacement of GETS II. PWGSC submitted that the two-year time frame is necessary to complete the entire process. In addition, PWGSC submitted that contract negotiations are, by their very nature, private and that it would have been inappropriate for PWGSC to disclose any information prior to the signing of the amendment.

### **BIDS' Position**

In its comments on the GIR dated May 24, 2002, BIDS submitted that, contrary to PWGSC's position, the contract extension is subject to the disciplines of the AIT and NAFTA. It submitted that, by amending the contract to add the extension, the matter goes beyond simple contract administration and that PWGSC engaged in a limited tendering process.

BIDS submitted that, contrary to PWGSC's assertion, the present case cannot be equated to the situation in *Liftow*, but that it is more analogous to File No. PR-99-053.<sup>9</sup> It suggested that *Liftow* relates to the contractor attempting to change the delivery date for an existing contract, whereas *Rolls-Royce* relates to the extension of a contract by amendment.

BIDS submitted that the justification for a two-year extension as a "stopgap" or "bridging" measure is untenable and unreasonable and that the reasons provided by PWGSC are self-inflicted. It submitted that, in fact, the reason for the two-year extension is that the Bank of Montreal would not agree to an extension period that was less than two years.<sup>10</sup> BIDS also suggested that the reasons provided do not constitute proper justification for sole-sourcing the requirement. It submitted that the special circumstances needed to allow limited tendering do not exist and that PWGSC does not even attempt to argue, in the GIR, that any such instances apply to the current situation.

BIDS submitted that it is a potential supplier that has been denied an opportunity to bid on a requirement that should have been competed. It denied PWGSC's contention that it is only interested in distributing tendering documentation and confirmed its interest in bidding on the entire set of services currently performed by the Bank of Montreal.

Finally, BIDS submitted that the evidence indicates that PWGSC acted in a manner to avoid the obligations of the trade agreements and to thwart the Tribunal's postponement of award power. It suggested that the secretive nature of the extension negotiations and the disclosure of the extension only after the signing of the amendment are indicative of PWGSC's desire to have the extension in place before any potential suppliers could raise an objection.

### **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 Regulations further provides that the Tribunal is required to determine whether the procurement was

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9. *Re Complaint Filed by Rolls-Royce* (4 August 2000) (CITT) [hereinafter *Rolls-Royce*].

10. See GIR, Exhibit 6.

conducted in accordance with the applicable trade agreements, which, in this instance, are NAFTA and the AIT.

In January 1997, PWGSC awarded a contract to Cebra to operate GETS II. The contract was for an initial period of three years, ending on May 31, 2000. The contract had an option clause that allowed the government to unilaterally extend the contract period for two additional one-year periods with the same terms and conditions. The government exercised this option twice, thereby extending the contract to May 31, 2002. No other option clause existed in the contract, directly or by reference, to allow for a similar unilateral extension of the contract beyond May 31, 2002. In December 2001, the contract was assigned to Bank of Montreal. On March 22, 2002, the contract was amended and, among other things, the period of application was extended to May 31, 2004. These facts are not in dispute.

PWGSC argued that the General Conditions, which were incorporated by reference into the contract, provided the legal authority to make amendments to the contract. The Tribunal disagrees. In the Tribunal's opinion, the referenced conditions and terms outline the manner by which binding amendments can be made to the contract, while the contract is being performed; they do not authorize the extension of the term of application of the contract. If this were the case, then, in the Tribunal's opinion, such conditions and terms would render many of the obligations of the trade agreements meaningless.

PWGSC also argued that the Tribunal's determination that the change in the delivery date in *Liftow* constituted a contract administration matter, and therefore not within the Tribunal's jurisdiction, applied in this case. With respect to *Liftow*, the Tribunal determined that the complaint did not concern any aspect of the procurement process within the meaning of Article 514(2)(a) of the AIT and Article 1017(1)(a) of NAFTA. That case did not deal with the extension of the applicability of a contract for services and can, therefore, be differentiated from the case at hand. The Tribunal agrees with BIDS' statement that the current case is more like *Rolls-Royce*, which deals with the extension of the application period of a contract. In *Rolls-Royce*, the contract extension was viewed by PWGSC as limited tendering, and an Advance Contract Award Notice was published to announce PWGSC's intention to extend the contract to the incumbent contractor. In that case, it was not disputed that an extension beyond the contract expiry date was a new procurement. Another case that the Tribunal views as similar is File No. PR-2000-063,<sup>11</sup> which also deals with the extension of a contract. In *FM One Alliance*, the Tribunal determined that even an extension that was allowable under an option clause was a new procurement, subject to the obligations of the trade agreements, if the option clause was not exercised according to the conditions specified therein.

Having regard to the facts of this inquiry, the Tribunal finds that the contract extension that is the subject of this complaint is a new procurement and, therefore, PWGSC was required to conduct the procurement according to the obligations of the applicable trade agreements. The Tribunal is of the view that PWGSC did not have the discretion to extend the term of the contract beyond May 31, 2002, either unilaterally or through negotiations, without regard to the required procurement procedures of both the AIT and NAFTA.

Given that the extension was found to be a new procurement, it is clear that a number of requirements were not observed. Article 1008(1)(b) of NAFTA provides that each party shall ensure that the tendering procedures of its entities are consistent with Article 1008 and Articles 1009 to 1016. The procedures described in Articles 1009 to 1015 were not followed with respect to the designated contract. For example, Article 1010 requires that an invitation to participate be published for all procurements covered by NAFTA. That was not done in the present case. With respect to limited tendering, Article 1016 provides for

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11. *Re Complaint Filed by FM One Alliance* (27 June 2001) (CITT) [hereinafter *FM One Alliance*].



circumstances and conditions where limited tendering procedures can be used. Although BIDS raised the aspect of limited tendering in its submissions, PWGSC argued that Article 1016 did not apply in this case and presented no circumstances or conditions intended to justify a limited tendering procedure. Therefore, in the Tribunal's view, PWGSC breached Article 1008(1)(b) in attempting to extend and thus renew a contract with the Bank of Montreal for the provision of services for an additional two-year period. In a similar manner, it can be shown that PWGSC breached Article 506(1) of the AIT. Consequently, the Tribunal determines that BIDS' complaint is valid.

It is clear to the Tribunal that, in May 2001, PWGSC knew that the development of the new GETS approach and the tendering and implementation of a replacement system would not be possible before the pending expiry date of the contract. No evidence was presented to the effect that PWGSC considered competing GETS II, the existing service, but rather began negotiating immediately with the contractor for an extension of the contract. The Tribunal has no difficulty believing that PWGSC fully intended and intends to compete the replacement for the GETS II model. However, it does not believe that the two-year extension was a carefully thought-out time period determined to allow for the development of an alternative model. The Tribunal is of the opinion that the two-year extension was dictated by the contractor, which was in a superior negotiating position, since it knew that GETS II was not being tendered. A further indication that the choice of time period was not established by any rigorous analysis is reflected in a note that reads as follows: "The Bank of Montreal would not agree to an extension that was less than two years. It should be noted that the full two years may be required to implement any new version of GETS."<sup>12</sup> As well, it is clear that, in as early as May 2001, PWGSC knew that it would not have a replacement model ready for implementation by May 31, 2002, and yet it did nothing to prepare to compete the existing requirement. Coupled with the two-year extension, this provides, in effect, three years to issue the new contract. The Tribunal considers this time frame to be excessive.

The Tribunal has no difficulty understanding PWGSC's insistence that the continued maintenance of GETS, without interruption, is vital to government operations and to Canada's obligations to maintain a tendering publication system under the trade agreements. However, this fact alone does not permit PWGSC to ignore the other obligations of the trade agreements.

In determining a remedy, the Tribunal has considered subsections 30.15(2) and (3) of the CITT Act. Since the Tribunal is uncertain whether BIDS would have won a competition for the GETS II model and since the Tribunal believes that BIDS will be provided with an opportunity to compete either for the existing service or for a portion of the new model in the near future, it will not recommend compensation for lost profit or lost opportunity. For the same reasons, it will not recommend the immediate award of any type of parallel contract.

## **DETERMINATION OF THE TRIBUNAL**

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

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that, within six months from the date of this determination, PWGSC issue an RFP to compete its current requirement for the existing government electronic tendering services, GETS II, or, in the alternative, issue an RFP for a replacement service. Should a competition for the delivery of the existing government electronic tendering

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12. See GIR, Exhibit 6.

services result in the selection of a supplier other than the current contractor, then the Tribunal recommends that PWGSC terminate the existing contract and award a new contract to the winning supplier.

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

James A. Ogilvy  
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