



Ottawa, Friday, July 12, 2002

File No. PR-2001-066

IN THE MATTER OF a complaint filed by Papp Plastics & Distributing 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 subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

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

Ellen Fry
Ellen Fry
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

The statement of reasons will follow at a later date.

Date of Determination: July 12, 2002
Date of Reasons: July 18, 2002

Tribunal Member: Ellen Fry, Presiding Member

Investigation Manager: Paule Couët

Counsel for the Tribunal: John Dodsworth

Complainant: Papp Plastics & Distributing Ltd.

Counsel for the complainant: Paul M. Lalonde

Government Institution: Department of Public Works and Government Services

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

Ottawa, Thursday, July 18, 2002

File No. PR-2001-066

IN THE MATTER OF a complaint filed by Papp Plastics & Distributing 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 February 28, 2002, the Canadian International Trade Tribunal (the Tribunal) received a complaint from Papp Plastics & Distributing Ltd. (Papp) concerning an Advance Contract Award Notice (ACAN) (Solicitation No. W8486-013531/B) for the purchase by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), of plastic polycarbonate lenses for the facepieces of the NCBW Model C4 chemical-biological masks.

Papp alleged that PWGSC improperly awarded the contract on a sole-source basis. In addition, it alleged that PWGSC imposed new qualifications after the ACAN was posted, used biased tender specifications, conducted an unfair tendering and evaluation process, and gave preferential treatment to certain bidders.

On March 5, 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 *Canadian International Trade Tribunal Act*¹ and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² That same day, the Tribunal issued an order postponing the award of any contract in relation to this procurement until the Tribunal determined the validity of the complaint. On March 7, 2002, PWGSC informed the Tribunal that a contract in the amount of \$76,954.40 had been awarded to NBC Team Ltd. (NBC), of Fort Erie, Ontario. Accordingly, on March 18, 2002, the Tribunal issued an order rescinding its postponement of award order of March 5, 2002. On April 2, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On April 5, 2002, the Tribunal wrote to PWGSC to obtain copies of documentation referred to in the GIR. On April 8, 2002, PWGSC filed the requested documentation with the Tribunal. On April 22, 2002, Papp filed comments on the GIR with the Tribunal. On May 2, 2002, PWGSC requested permission to file a response to the comments, on the basis that new arguments were raised, and filed its response the same day. On May 8, 2002, Papp filed its reply to PWGSC's comments.

On May 27, 2002, the Tribunal wrote to PWGSC to obtain additional information. On June 3, 2002, PWGSC filed the additional information with the Tribunal. On June 10, 2002, Papp responded to the Tribunal that it was content to have the case decided on the existing 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 [hereinafter Rules of Procedure].

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

Background

In the mid-1980s, the Defence Research Establishment Ottawa developed a new protective mask for use in nuclear, biological or chemical environments, i.e. the C4 mask. The development of the mask was funded by DND. In 1990, a production contract was awarded to SNC Defence Products Ltd., now SNC Industrial Technologies Inc., for 175,000 C4 masks. Production was completed in late 1993. In 1996, Irvin Aerospace Canada Ltd. (Irvin) expressed an interest in acquiring the licence for the production of the C4 masks. On October 31, 1996, PWGSC published a Letter of Interest whereby anyone having an interest in the licensing of nuclear, biological or chemical environment technologies could submit comments for consideration by DND. No supplier expressed an interest in the proposed licence arrangement.

On October 30, 1997, a licence agreement was concluded between the Crown and Irvin.

On May 22, 2001, PWGSC issued an ACAN for the procurement of lenses for the facepieces of the C4 masks from Irvin. The ACAN gave notice of a non-competitive procurement strategy on the basis of “exclusive rights”. Subsequently, on May 25, 2001, Papp objected to the ACAN, claiming that it could produce the lenses. In its response dated June 5, 2001, PWGSC stated that the C4 masks were sold by Irvin under a sole licence agreement between the Crown and Irvin and that, therefore, Irvin had exclusive rights for the manufacture and sale of the C4 masks and all components. The letter also stated that, if Papp was interested in bidding on the renewal of the licence agreement, it should advise DND.

According to the GIR, in September 2001, an agreement was reached between Irvin and NBC to assign the licence agreement to the latter. The Crown agreed to the assignment of the licence agreement. The assignment agreement was executed on September 7, 2001.

Procurement Process

On January 28, 2002, PWGSC issued an ACAN for the procurement of lenses for the facepieces of the C4 masks from NBC. The ACAN gave notice of a non-competitive procurement strategy on the basis of “exclusive rights” and was scheduled to close on February 11, 2002. On February 8, 2002, Papp objected to the award of the contract to NBC on a sole-source basis and claimed that it had the capability to manufacture the lenses. On the same day, PWGSC replied to Papp stating that the licence agreement for the manufacture and sale of the C4 masks had been assigned to NBC at Irvin’s request and that NBC was the sole licensee for the manufacture and sale of the C4 masks and all components. Correspondence was exchanged between February 13 and 25, 2002, between PWGSC and Papp. On February 28, 2002, Papp filed its complaint with the Tribunal.

The following sections of the ACAN are relevant:

Non-Competitive Procurement Strategy: Exclusive Rights

LENS, FACEPIECE, CHEMICAL-BIOLOGICAL MASK., NONCOVER/FILTER LENS, PLASTIC POLYCARBONATE MATL, CLEAR, SPECIAL SHAPED, FOR USE IN THE MASK NCBW MODEL C4, Quantity: 8000. It is proposed to direct this requirement to NBC Team

Ltd. of Fort Erie, Ontario, who have an exclusive license agreement for the sale of the C4 Mask and its Components.

Suppliers who consider themselves fully qualified and available to provide the services/goods described herein, may submit a statement of capabilities in writing to the contact person identified in this Notice on or before the closing date of this Notice. The statement of capabilities must clearly demonstrate how the supplier meets the advertised requirements.

POSITION OF PARTIES

Papp's Position

Papp submitted that the solicitation at issue is only for plastic polycarbonate lenses for the facepieces of the C4 masks, not for complete masks or complete facepieces. It further submitted that PWGSC has not demonstrated that the current requirement falls under the licence agreement and that, at the very least, there remains significant ambiguity in this regard.

Papp further submitted that PWGSC failed to demonstrate that the exclusive rights provisions of the *North American Free Trade Agreement*⁴ and the *Agreement on Internal Trade*⁵ apply to the solicitation at issue. It argued that both NAFTA and the AIT set out open, competitive tendering procedures as the general rule and that, accordingly, any derogation from that rule should be construed narrowly. It further argued that, according to Article 506(12)(a) of the AIT, the fact that exclusive rights exist is not sufficient and that the exclusive rights must demonstrably put the supplier in the position of being the only supplier able to fill the need. It also argued that PWGSC did not demonstrate that "no reasonable alternative or substitute exists", in accordance with Article 1016(2)(b) of NAFTA. Papp submitted that PWGSC failed to provide clear information with respect to the requirement and failed to provide any of the alleged "detailed technical capabilities" or to provide it with a sample for testing. It further submitted that this failure is contrary to the transparency requirements of the AIT and NAFTA.

Citing PWGSC's letter of February 13, 2002, Papp submitted that PWGSC identified a number of requirements that were not part of the ACAN. It added that, given PWGSC's position as to the impossibility of awarding the contract to anyone but the licensee under the licence agreement, the invitation to file the information requested was a reckless inducement to waste time and resources.

Papp submitted that, if the requirements set out in the letter of February 13, 2002, constitute requirements that must be met by suppliers, it appears that it is impossible for the current supplier, NBC, to be in conformity, due to NBC's late incorporation, the alleged absence of ISO certification and evidence of government contracts within the last five years. It further submitted that PWGSC discriminated in favour of NBC. Papp further submitted that PWGSC is using the exclusive rights to circumvent the obligations of the trade agreements.

Papp also submitted that PWGSC adopted specifications that create an unnecessary barrier to trade, contrary to Article 1007 of NAFTA, by failing to stipulate performance criteria rather than design or descriptive characteristics and to allow for the supply of equivalents. It further submitted that PWGSC's behaviour in this matter is indicative of bad faith and of a wilful and high-handed disregard for the

4. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].

obligations of the trade agreements and that, as such, these actions are injurious to the integrity and efficiency of the competitive procurement system as a whole.

Papp requested, as a remedy, that it be qualified as a potential supplier and that the contract be re-tendered. In the alternative, it requested, as a remedy, that it be compensated in an amount that represents its lost profits and that this amount be 10 percent of the value of the contract awarded. Papp further requested that it be awarded damages to compensate for the injury caused by PWGSC to the integrity and efficiency of the competitive procurement process.

In its reply of May 8, 2002, to PWGSC's response to its comments on the GIR, Papp submitted that the confusing use of the terms "facepiece", "eyepiece" and "lens" in the various documents contributed to the ambiguous nature of the tendering documents that PWGSC used in this case.

Further, Papp submitted that the fact that a licence agreement applies to the lenses does not necessarily mean that only NBC is capable of producing a competing or alternative product. It is possible for a supplier to manufacture a competing lens independently of the licence agreement, without using the licensed intellectual property. As such, Papp submitted that to suggest that the Crown must compete the requirement does not mean that the Crown must necessarily breach the licence agreement.

With respect to PWGSC's letter of February 13, 2002, Papp submitted that PWGSC now claims that this letter was meant to inform Papp of the requirements that will form part of a future solicitation for the lenses and to initiate a review of Papp's compliance with the requirements of this future solicitation. If this is indeed the implication, then Papp submits that a new and perhaps even more troubling breach of the trade agreements has come to light, that is, a breach of Article 1008 of NAFTA.

PWGSC's Position

PWGSC submitted that the award of the contract to NBC on a sole-source basis is justified by virtue of the exclusive licence held by NBC with respect to the manufacture and sale of the C4 masks and components, which was assigned to NBC by Irvin. At present, NBC is the sole licensee for the manufacture and sale of the masks and components.

PWGSC submitted that the intellectual property in the C4 masks and all components is owned by the Crown. Under the terms of the licence agreement, Irvin held a sole licence for the manufacture of the C4 masks and components for five years, until October 30, 2002, and once the licence agreement was assigned to NBC in September 2001, NBC held a sole licence for the manufacture of the C4 masks and components.

PWGSC argued that the award of the contract at issue to NBC on a sole-source basis was entirely consistent with Article 506(12)(a) of the AIT and Article 1016(2)(b) of NAFTA. It submitted that the Crown properly granted exclusive licence rights to Irvin under the licence agreement in 1996 and that these exclusive licence rights were assigned by Irvin to NBC with the Crown's consent. PWGSC argued that, at the time of the procurement, NBC held the exclusive licence rights and, accordingly, was the one supplier able to meet the procurement requirement.

PWGSC requested its costs in this matter.

In its reply of May 2, 2002, in response to Papp's comments on the GIR, PWGSC submitted that, in response to Papp's allegation that the licence agreement for the C4 masks does not apply to the

lenses/eyepieces, the licence agreement for the C4 masks applies to all components that make up the C4 masks. The lens, or eyepiece, as it is referred to in the relevant documentation, is an integral part of a C4 mask and is specifically identified by part number/technical drawing and by the tooling equipment required for its production. PWGSC provided a written confirmation by DND that the lenses referred to in the contract with NBC are an integral component of the C4 masks and that the licence agreement and amending agreements apply to the lenses. With respect to its alleged failure to demonstrate that the NAFTA and AIT “exclusive rights” exception applies, PWGSC argued that “exclusive rights”, in the context of a licence agreement for intellectual property rights, are, by definition, held by only one supplier and that only a non-exclusive licence agreement may be granted to more than one supplier, which is not the case in the procurement at issue. It argued that NBC holds the exclusive rights for the manufacture of the C4 masks and components, including the lenses/eyepieces.

In response to Papp’s allegations of ambiguity and incompleteness of the tendering documentation and discrimination by favouring a particular supplier and awarding the contract to a non-compliant bidder, PWGSC submitted that, as a premise, the requirements of Article 506(6) of the AIT and Article 1013 of NAFTA do not apply to limited tendering conducted pursuant to Article 506(12)(a) of the AIT and Article 1016(2)(b) of NAFTA, which limited tendering provisions are applicable to the procurement at issue. It further submitted that Papp erred in suggesting that the information requested by PWGSC constituted requirements of the solicitation. In fact, PWGSC contended that the only requirements of this solicitation were set out in the ACAN. It further submitted that the letter of February 13, 2002, clearly required proof of intellectual property rights as the requirement for the solicitation at issue and, in addition, required other information from Papp in contemplation of qualifying suppliers for future purchases. PWGSC was considering the fact that any future procurement of the C4 masks and components, after October 30, 2002, would not be subject to the exclusive licence arrangement. It argued that there was no basis for the allegation that NBC was non-compliant with the requirements of the solicitation.

With respect to its alleged use of “exclusive rights” to circumvent the obligations of the trade agreements, PWGSC submitted that this argument is frivolous, vexatious and unsupported by the evidence. It explained what the process has been since 1996, as outlined earlier.

In reference to Papp’s allegation of improper reference to a particular product or supplier, contrary to Article 1007 of NAFTA, PWGSC submitted that this NAFTA requirement for the content of technical specifications only applies when technical specifications are used in the context of open or selective tendering. Such requirements do not apply in the context of limited tendering pursuant to Article 1016, in which technical specifications are not employed. PWGSC argued that the trade agreements do not require the use of “technical specifications” for limited tendering.

PWGSC submitted that there is no basis for allegations of bad faith and improper conduct in respect of its obligations under the trade agreements. It reiterated that the procurement satisfied the conditions for limited tendering enumerated in Article 506(12) of the AIT and Article 1016(2)(b) of NAFTA.

TRIBUNAL’S DECISION

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was

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

The Tribunal accepts PWGSC's evidence that lenses are covered by the exclusive licence. It also accepts the evidence that the exclusive licence was properly assigned to NBC. This was not a situation where Irvin's licence had expired and the Crown selected a company to have the licence for the next period. If that had been the case, there might have been an issue with respect to whether a proper competitive process was followed. On the contrary, the situation in this instance is that NBC was simply assigned the licence for the remainder of the term of Irvin's licence. Although, under the terms of the licence agreement, the Crown's consent was required to permit Irvin to assign the licence, it is stated in the licence agreement that such consent shall not be unreasonably withheld.⁶ Consequently, the Tribunal considers that the Crown did not have the latitude to open the remainder of the term of Irvin's licence to a competitive process.

The key issue is whether PWGSC was entitled to sole source the procurement at issue.

Article 506(12) of the AIT provides, in part, that "[w]here only one supplier is able to meet the requirements of a procurement, an entity may use procurement procedures that are different from those described in paragraphs 1 through 10 in the following circumstances: (a) . . . to recognize exclusive rights, such as exclusive licences, copyright and patent rights".

Article 1016(2) of NAFTA provides, in part, that "[a]n entity may use limited tendering procedures in the following circumstances and subject to the following conditions, as applicable: . . . (b) where, . . . for reasons connected with the protection of patents, copyrights or other exclusive rights, or proprietary information . . . the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists."

In considering this issue, the Tribunal refers to its decision in File No. PR-96-037,⁷ which provided, in part, as follows :

It is the Tribunal's view that exceptions to the open competitive process should be read narrowly. Where evidence is presented to suggest that a limited tendering procedure is not justified, the onus will fall upon government departments to show that the use of these exceptions is, in fact and in law, appropriate. As stated in a decision by the Procurement Review Board of Canada, . . . Econaire (1984) Inc. and Environmental Growth Chambers, Ltd: . . . "It is not for the complainant to demonstrate any case for a competitive solicitation. Competitive solicitations are the norm – the standard requirement of the rule. The true requirement is for the government to demonstrate the case for a sole sourcing."⁸

While the situation in *Sybase* was somewhat different from that in the present complaint, the Tribunal is of the view that the principles outlined above are equally applicable here.

Consequently, the Tribunal is of the view that, in order to be entitled to sole source this procurement, under the terms of Article 506(12) of the AIT, PWGSC must demonstrate that only NBC can meet the requirements of the procurement and that sole sourcing is necessary to recognize the exclusive rights under the licence agreement, as amended and assigned. Similarly, in order to be entitled to sole source this procurement under the terms of Article 1016(2) of NAFTA, PWGSC must demonstrate that, for reasons connected with the protection of the exclusive rights under the licence agreement, as amended and assigned,

6. See GIR, Exhibit 3, section 16, paragraph A.

7. *Re Complaint Filed by Sybase Canada* (30 July 1997) (CITT) [hereinafter *Sybase*].

8. *Ibid.* at 9-10.

the lenses can be supplied only by NBC and that no reasonable alternative or substitute exists. With respect to both the AIT and NAFTA, the existence of exclusive rights does not automatically mean that PWGSC is entitled to sole source, since, in some instances, it may be possible to open a procurement to competition without infringing on exclusive rights.

Papp took the position that, based on available information, it could supply the lenses and might be able to do so without infringing the licence agreement. It argued that, while specific tooling might be required to produce the lenses, it has the engineering capability to design and manufacture this type of product. It argued that PWGSC should have provided a sample of the lens and the technical specifications, as requested by Papp, in order for it to be able to verify that it could produce the lenses without infringing the licence agreement.⁹ As Papp stated in its comments on the GIR, “A sample and the technical specifications are necessary to confirm Papp’s ability to produce the goods or, alternatively, to confirm that only a supplier possessing the intellectual property subject to the License Agreement can produce the good.”¹⁰ The evidence indicates that PWGSC did not provide the requested sample and technical specifications.

However, the Tribunal accepts PWGSC’s evidence and submissions that the Crown owns the sole mould for the lenses, as well as the special production tooling required to fit the lenses properly into the C4 mask facepieces; that these items are in NBC’s possession pursuant to the licence agreement and the first amending agreement; and that the dimensions of the lens of the C4 mask are also part of the technical package included under these agreements. Consequently, the Tribunal accepts PWGSC’s submission that a lens manufactured by a supplier that did not use this Crown-owned intellectual property would not be suitable as an alternative for the lens of the C4 mask, noting the potential implications for the safety of personnel using the mask.

Therefore, the Tribunal considers that PWGSC has demonstrated that it is entitled to sole source this procurement under the terms of both Article 506(12) of the AIT and Article 1016(2) of NAFTA. Accordingly, the Tribunal determines that the complaint is not valid.

However, despite the fact that it has found that the complaint is not valid, the Tribunal considers that it is appropriate to award costs to Papp.

In reaching its determination concerning costs, the Tribunal considered, firstly, that there are two important pieces of information that, if communicated to Papp by PWGSC, might well have avoided the complaint. The record does not indicate that these pieces of information were communicated to Papp prior to the filing of the complaint. These pieces of information are:

- The fact that the licence agreement was assigned to NBC for the remainder of the term of the original licence, not as a new licence, and that this type of assignment was provided for under the terms of the original licence agreement as noted above.
- PWGSC’s justification for using a sole-source approach, as discussed above.

9. Complaint, Tab 4.

10. Papp’s comments on the GIR, part II, para. 17.

Indeed, PWGSC's letter of February 13, 2002, to Papp could reasonably have led Papp to conclude that, in PWGSC's view, Papp might be able to fulfil the requirements of the procurement, despite the exclusive licence and, hence, that a sole-source approach might not be justified. PWGSC submitted that the following portion of its February 13, 2002, letter relates to the procurement at issue: "Please provide me with documentation to prove that you have the intellectual property rights to manufacture the eyepieces in question and that you have experience in manufacturing eyepieces used in NBC [nuclear, biological and chemical] masks that will protect the soldier from NBC fallout, without impeding his vision." At this point, PWGSC knew that the lenses were covered under the licence agreement and, therefore, that Papp could not use the intellectual property rights covered by that licence agreement. Therefore, it would be reasonable to infer that, when PWGSC asked Papp in this letter to prove that it had the required intellectual property rights, PWGSC must have been referring to intellectual property rights other than those under the licence agreement. In other words, on February 13, 2002, PWGSC appeared to recognize the possibility that Papp might have sufficient intellectual property rights to manufacture the eyepieces, albeit rights different from those granted under the licence agreement.

In reaching its determination concerning costs, the Tribunal also considered the process by which information and documentation were provided by PWGSC during the course of this inquiry. According to paragraphs 103(2)(c) and (e) of the Rules of Procedure, the GIR is required to include "all other documents relevant to the complaint", as well as "any additional evidence or information that may be necessary in order to resolve the complaint."

At the heart of the subject matter of the present complaint are the rights under the licence agreement and its assignment to NBC. Therefore, it is clear that the licence agreement, the assignment agreement and any amendments to these agreements are highly relevant to the complaint. Under subrule 103(2) of the Rules of Procedure, PWGSC should have provided all these documents as part of the GIR. However, the GIR, in fact, included only part of the licence agreement and, although it included the assignment agreement, a portion of the assignment agreement was not made public. The GIR did not include any amendments to the licence agreement.

On reviewing the GIR, the Tribunal learned that there was a first amending agreement to the licence agreement. The Tribunal then requested a copy of the first amending agreement, together with the portions of the licence agreement and assignment agreement that were not made public. When PWGSC responded to this request, it did not mention the existence of the second amending agreement, a further agreement to the licence agreement. This did not come to the Tribunal's attention until about three weeks later when PWGSC referred to the second amending agreement in responding to new issues raised in Papp's response to the GIR.

Accordingly, in the Tribunal's view, PWGSC did not fully comply with subrule 103(2) of the Rules of Procedure to provide the documentation to the Tribunal that was relevant to the complaint. This delay in providing the Tribunal with the relevant documentation gave rise to a longer and more complex inquiry process than would otherwise have been necessary.

Therefore, based on the considerations outlined above, the Tribunal decided to award costs to Papp.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is not valid.

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

Ellen Fry

Ellen Fry
Presiding Member