



Ottawa, Tuesday, May 13, 2003

File No. PR-2002-059

IN THE MATTER OF a complaint filed by Panavidéo inc. 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.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: May 13, 2003

Tribunal Member: Richard Lafontaine, Presiding Member

Senior Investigation Officer: Daniel Chamaillard

Counsel for the Tribunal: Michèle Hurteau

Complainant: Panavideo inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Bernard Letarte

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STATEMENT OF REASONS

COMPLAINT

On February 7, 2003, Panavidéo inc. (Panavidéo) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning a procurement (Solicitation No. W0130-02450L/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the supply and installation of closed-circuit television equipment at different military bases in Quebec.

On the one hand, Panavidéo alleged that PWGSC had rejected its proposal for a minor reason, since it had not provided PWGSC with a list of unit prices for the proposed equipment at the time of its bid. On the other hand, Panavidéo questioned the integrity of the process in analysing the case after PWGSC awarded a contract to a supplier that had proposed products that were different from those required in the specifications and that did not meet the technical requirements.

Panavidéo requested, as a remedy, compensation for loss of profits.

On February 12, 2003, the Tribunal requested that Panavidéo provide information in support of its contention that PWGSC had accepted a contract for “products that were different from those required in the specifications” [translation]. Panavidéo complied with the request on the same day.

On February 18, 2003, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*¹ and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² the Tribunal informed the parties that Panavidéo’s complaint regarding PWGSC’s award of the contract to a supplier that had proposed products that were different from those required in the specifications of the Request for Proposal (RFP) had been accepted for inquiry.³

On March 12, 2003, the Tribunal granted intervener status to ADT Security Services Canada, Inc. (ADT), following its request of March 6, 2003.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

3. The Tribunal did not accept to inquire into the ground concerning the rejection of Panavidéo’s proposal because Panavidéo had not provided PWGSC with a list of unit prices for the proposed equipment. According to the Tribunal, this requirement in the RFP was clear and unequivocal.

On March 17, 2003, PWGSC requested a one-day extension to submit the Government Institution Report (GIR); the Tribunal granted that request.

On March 18, 2003, PWGSC filed the GIR with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On March 25, 2003, in accordance with rule 104 of the *Rules*, Panavidéo filed its comments on the GIR with the Tribunal. As intervener, ADT filed its comments on March 27, 2003.

On April 3, 2003, PWGSC filed additional comments with the Tribunal regarding the comments filed by Panavidéo on March 25, 2003. Panavidéo replied on April 7, 2003.

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 November 14, 2002, PWGSC posted, on MERX, a Notice of Proposed Procurement (NPP) and an RFP for the supply and installation of closed-circuit television equipment at different military bases in Quebec. The RFP stated that bidders had until November 28, 2002, to submit their bids.

The NPP stated, in part, that the procurement was subject to the *Agreement on Internal Trade*.⁵ Under the section entitled “Basis of Selection”, the RFP stated that, to be considered responsive, a bid had to meet all the mandatory requirements and that the lowest-priced responsive bid would be recommended for award of a contract or the establishment of a standing offer, as applicable.

Certain provisions of the NPP and RFP are relevant in this case. The NPP states, in part:

OBJE[C]T: The present request required a specialist supplier in CCTV Equipment camera systems and [supporting] components (X21), the [goal] of the project is to supply and [install] the equipment as described in the statement of work, figures and plan included [herewith].

Primary list of required products (it is possible that other product[s] are included in the statement of work):

Outside dome camera “COLOURS” (WVCS854A) Panasonic or equivalent

Wall outside clear dome camera 7” (POD7CW) Panasonic or equivalent

On page 6, under the section entitled “Priority of Documents”, the RFP states:

The documents specified below form part of and are incorporated into the Contract. If there is a discrepancy between the wording of any documents which appear on the list, the wording of the document which first appears shall prevail over the wording of any document which subsequently appears on the list.

- This document
- Clauses and instructions incorporated by reference in this document
- General Conditions DSS-MAS 9601
- The statement of work (They are only available in [F]rench du[e] to the emergency of the request)
- Contractor’s offer

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

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

On page 14, under the section entitled “Evaluation Criteria - Goods”, the RFP states, in part:

1. The following factors will be taken into consideration in the evaluation of each bid:
 - (a) Technical compliance;
 - (b) Descriptive literature (where applicable).

Appendix A to the RFP provides, in part, under the section entitled “PRICING”:

Your pricing must be as detail[ed] as possible. You must add, ON A SEPARATE DOCUMENT, with your proposal a list of all products with their price.

According to PWGSC, of the six responsive bids, five proposed equivalent equipment, and the sixth proposed Panasonic brand-name products. Following the evaluation of the six responsive bids, PWGSC submitted that the supplier offering the lowest price was ADT. Consequently, the contract was awarded to ADT on January 28, 2003. In a telephone conversation on that same day, PWGSC informed Panavidéo that the contract had been awarded to another firm and that its bid had been declared non-compliant since it had not filed a detailed list of unit prices with its bid.

On February 12, 2003, pursuant to subsection 30.11(1) of the *CITT Act*, Panavidéo filed a complaint with the Tribunal.

POSITION OF PARTIES

PWGSC’s Position

According to PWGSC, Panavidéo submitted that the contract had been awarded to a firm that had offered products that were, according to Panavidéo, different from those required in the RFP, i.e. Panasonic brand-name products, and that the successful bidder had offered Pelco brand-name products. PWGSC submitted that the RFP did not require that bidders offer Panasonic brand-name products. PWGSC pointed out that, even though the RFP referred to numbers of Panasonic brand-name products, it was clear from the RFP and the NPP that equivalent products could be offered. Indeed, according to PWGSC, even though the specifications attached to the RFP identified, in Part 1 entitled “General”, some video products by a Panasonic model number, these specifications indicated very clearly, in Part 2 entitled “Products”, for each of the video equipment components requested, a specific technical description that allowed a bidder to offer any product that met the minimum technical requirements, whether it be Panasonic or another brand name. PWGSC indicated that, for the products in sections 1.1.2.8 to 1.1.2.14 for Building LP-22, there was no technical description in Part 2 of the specifications because the technical description that had already been included for these products in section 1.1.2 of the specifications was sufficient to describe all the specifications and allowed bidders to offer products based on a technical standard. Furthermore, although the Panasonic model numbers appeared in brackets for certain products, they were used as an example and the technical description that preceded them indicated that a product that met this description would be accepted.

In addition, PWGSC submitted that it would have been completely pointless to include, for each product, such a detailed technical description in Part 2, if only Panasonic brand-name products had been required. According to PWGSC, if this had been the case, it only would have had to indicate the required Panasonic models and nothing else.

PWGSC submitted that it was clear from the RFP that bidders could offer products other than Panasonic brand-name products, provided these products met the technical requirements described in Part 2 of the specifications.

According to PWGSC, five of the six bids that were deemed responsive proposed products other than Panasonic brand-name products. Consequently, PWGSC submitted that this demonstrates that any reasonable bidder could have concluded that the RFP allowed for products other than Panasonic brand-name products, provided these products met the minimal technical requirements specified in Part 2 of the specifications. Furthermore, according to PWGSC, the NPP indicated, beyond a shadow of a doubt, that Panasonic brand-name products or “equivalents” would be accepted.

PWGSC submitted that the interpretation of the RFP advanced by Panavidéo is not supported by the specifications and the NPP, because this interpretation would have rendered the RFP non-compliant with Article 504(3)(b) of the *AIT*, since this would have favoured suppliers of Panasonic brand-name products to the detriment of suppliers of other equivalent products.

Should the complaint be found to be valid, PWGSC submitted that Panavidéo should not receive the requested monetary compensation, in view of the fact that the Tribunal concluded that Panavidéo’s bid did not comply with the requirements of the RFP. PWGSC also submitted that no other remedy should be recommended since Panavidéo had not requested any and that the contract had already been nearly fully executed. PWGSC referred to two cases where the Tribunal had taken a similar position with respect to a complaint that was valid, but where the complainant’s bid was non-compliant.⁶ In those two cases, the Tribunal did not recommend remedies in favour of the complainant. According to PWGSC, even if the Tribunal decided that the complaint was valid, no remedy provided in subsection 30.15(2) of the *CITT Act* should be recommended. In this case, as the Tribunal determined that Panavidéo’s bid did not meet the requirements of the RFP, this principle should be applied and neither monetary compensation nor any other remedy should be recommended. PWGSC questions why the Tribunal decided to conduct an inquiry at a time when, even before starting the inquiry, the Tribunal had concluded that Panavidéo’s bid was non-compliant.

In conclusion, PWGSC submitted that the contract had been awarded to a firm that had offered products that met the requirements of the RFP and that, consequently, Panavidéo’s complaint was unfounded and should be dismissed, with costs.

ADT’s Position

On March 27, 2003, ADT submitted that it supported the comments made by PWGSC in the GIR. In addition, ADT submitted that the NPP and RFP clearly indicated that products other than Panasonic brand-name products could be offered, provided they met the technical requirements of the specifications. ADT considers that the complaint is unfounded and should be dismissed.

6. See *Re Complaint Filed by Preston Phipps* (23 January 2002), PR-2001-035 (CITT) [*Preston Phipps*]; see also *Re Complaint Filed by CVDS* (22 January 2003), PR-2002-035 (CITT) [*CVDS*].

Panavidéo's Position

According to Panavidéo, there are three main groups of components described in the specifications, including the video equipment. In the case of this equipment, all major components of the video security system include a product model number. For example, the documents for Building LP-22 in section 1.1.2 give the product names and model numbers. Panavidéo submits that this section is very important, because it specifically describes the core of the video surveillance system, and that the equipment of the other buildings will be connected to that system.

In response to the GIR, Panavidéo submits that, contrary to PWGSC's claim, there was no specific technical description for each component of the video equipment in Part 2 of the specifications in the RFP. It submitted that, in Part 1 of the specifications concerning Building LP-22, 14 products were enumerated in section 1.1.2 under "CCTV Equipment – General" [translation], 10 of which had a Panasonic model number; there was no mention of "or equivalent". Moreover, on examination of section 2.1. to section 2.5. in Part 2 of the specifications, there are 5 technical descriptions. Upon analysis of the technical data in the two parts, Panavidéo submits that 14 products are listed in Part 1, of which only 12 are to be supplied; 10 are identified by Panasonic model numbers and only 3 have a specific technical description in Part 2.

Panavidéo further alleged that the list of products required in the specifications for Building LP-22 contains the core of the video system (WJAD550)—the brand name being Panasonic—and its accessories, to which cameras will be connected. For compatibility purposes, according to Panavidéo, no other camera model would work adequately with this unit. Panavidéo submitted that no technical data appears in the RFP for the main component of the system, which leads one to believe that the model sought was the one listed in Part 1, the WJAD550 model made by Panasonic.

Panavidéo does not believe that it was made clear that equivalent products could be offered, contrary to what PWGSC maintained. According to Panavidéo, even if the NPP stated that equivalent equipment could be offered, the NPP is the only place where the expression "or equivalent" appeared and it is in reference to products that are therein designated. Panavidéo submitted that the RFP does not refer to the possibility of offering equivalent products and should have never been published in its existing format, with such ambiguities and specific requirements.

Panavidéo further submitted that the technical description in Part 1 (Building LP-22) did not adequately describe all the requirements and did not lead bidders to understand or infer that they could offer products based on a technical standard. This specification was not written as a performance specification, since the technical descriptions are incomplete and rely essentially on the product number included. As an example, Panavidéo cited the technical description for the video equipment and the digital registration machine in section 1.1.2.14 of Part 1. According to Panavidéo, this machine is unique and has functions that are distinctive and that other manufacturers cannot reproduce. Furthermore, the cost of this machine is somewhere between \$3,000 and \$25,000. For these reasons, Panavidéo was of the opinion that the solicitation did not allow for equivalent products.

TRIBUNAL'S DECISION

Pursuant to subsection 30.14(1) of the *CITT Act*, the Tribunal must, in conducting its inquiry, 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 procurement at issue 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, in this case, the *AIT*.

Panavidéo claims that the contract was awarded to a firm that had products that were different from those specified in the RFP. Therefore, the Tribunal must decide if the RFP required only specific brand-name products, such as Panasonic, or if it allowed for equivalent products. More specifically, the issue to be determined is whether it was reasonable for a bidder to think that the RFP required certain specific brand-name products rather than equivalent products, despite the indication in the NPP that Panasonic brand-name products or “equivalents” would be accepted by PWGSC.

Articles 504(3)(b) and 506(6) of the *AIT* are relevant in this matter. Article 504(3)(b) provides that the biasing of technical specifications in favour of, or against, particular goods, or in favour of, or against, the suppliers of such goods for the purpose of avoiding the obligations of the *AIT*, is inconsistent with Chapter Five of the *AIT*. Article 506(6) of the *AIT* provides, in part, that tender documents shall clearly identify the requirements of the procurement and the criteria that will be used in the evaluation of bids.

According to the Tribunal, the RFP and the NPP are two separate documents. The Tribunal notes that the NPP does not appear on the list of documents enumerated in the section of the RFP entitled “Priority of Documents” and it points out that the NPP does not list all the products required in the RFP. In case of inconsistency between the RFP and the other documents on the list, the RFP must take precedence. However, according to the Tribunal, the NPP can be used to interpret the RFP, provided, of course, the latter does not expressly contradict the NPP.

According to the Tribunal, the fact that five of the six bids deemed compliant with the technical requirements of the RFP proposed products other than Panasonic brand-name products, as pointed out by PWGSC, does not conclusively indicate that offering products other than Panasonic brand-name products was allowed. However, the fact that these bidders interpreted the RFP as allowing for not only Panasonic brand-name products but also equivalent products is an indication that supports the reasonable nature of this interpretation.

PWGSC alleged that, if it had not accepted equivalent products, it would have breached the *AIT*. Although the Tribunal agrees with this claim, the fact remains that PWGSC could have, nevertheless, breached the *AIT* in this respect.

PWGSC claims that the technical description of the products listed in sections 1.1.2.1 to 1.1.2.7 of Part 1 of the specifications for Building LP-22, and more fully described in Part 2 of those specifications, was sufficient for bidders to offer products other than the products identified by a number. PWGSC also claims that the product description in sections 1.1.2.8 to 1.1.2.14 of the specifications was sufficient in this respect and allowed bidders to offer products based on a technical standard.

As for Panavidéo, it claims that the specifications for Building LP-22 had not been written as a performance specification, because the technical descriptions were incomplete and relied essentially on the product number listed. In its comments, Panavidéo also points out that the RFP should have never been published in its existing format, in view of its many ambiguities.

Upon reading the RFP and the NPP, the Tribunal is of the opinion that there were sufficient indications or ambiguities for the suppliers of equivalent products to question the products requested. However, it is now too late for a complaint or an objection, given the time frames governing the filing of a complaint or the making of an objection. Having said that, one must then question whether it was reasonable

to think that, where technical descriptions were accompanied by a number, it was possible to interpret the RFP to mean that it allowed for equivalent products. According to the Tribunal, one can reasonably arrive at this conclusion after reading the RFP and NPP together. There is no reason to believe that PWGSC had changed its opinion from one document to the other, especially since they both had the same date. Neither was there reason to believe that the products listed in the RFP but not in the NPP could be treated differently, considering that they were generally identified in the same manner.

The Tribunal is not convinced, either, by the example provided by Panavidéo concerning the description of the video equipment and the digital registration machine in section 1.1.2.14 of Part 1 of the specifications for Building LP-22. The Tribunal is of the opinion that the specifications provided sufficiently detailed technical descriptions of the products so that bidders could infer that equivalent products would be accepted. If only one product such as Panasonic had been requested, the product number would have sufficed. It would not have been necessary to add a technical description. Moreover, it would have been superfluous for bidders to provide, where applicable, descriptive literature in accordance with point 1(b) under the section entitled “Evaluation Criteria – Goods” of the RFP. In any event, even admitting that, in certain cases such as in the above-mentioned example, the RFP could have required a specific brand-name product, the Tribunal is not convinced, based on the evidence, that the bid of the successful bidder would not have been compliant with the requirements of the RFP. The Tribunal notes that Panavidéo reports that even the digital registration machines were of the make and models requested.

Therefore, the Tribunal is not convinced that the procurement at issue breached the requirements of the RFP. Consequently, according to the Tribunal, the procurement did not breach the provisions of the *AIT*.

The Tribunal is, therefore, of the view that the complaint is not valid.

The Tribunal notes that, if Panavidéo’s complaint had been found to be valid, this would have placed PWGSC in breach of Article 504(3)(b) of the *AIT*. Ironically, this would have resulted in Panavidéo being successful on the merits despite the non-compliance of the RFP to this provision of the *AIT*.

The Tribunal notes PWGSC’s comment to the effect that Panavidéo had no interest in the matter since the Tribunal had initially rejected its first ground of complaint that PWGSC had unjustly removed its bid because it did not comply with one of the mandatory requirements. Furthermore, PWGSC claims that Panavidéo has not been injured. In this respect, the Tribunal notes that, if the RFP had breached the obligations of the *AIT* and had it not been for the fact that the contract had to all intents and purposes been executed, the procurement could have been the subject of a new solicitation in which Panavidéo could have participated. Panavidéo could have met the requirements of the RFP, had it not been for its failure to include a detailed list of the unit prices of the products that it was proposing in its bid. The interpretation that PWGSC wants to give to *Preston Phipps* and *CVDS* would prevent all non-compliant bidders, whether they be the complainant or not, from participating in a new solicitation, if applicable. It is the Tribunal’s view that those two decisions should not be misconstrued. For example, in *Preston Phipps*, the Tribunal felt that the complainant could in no way meet the requirement. In any event, each decision is based on its own unique evidence.

The Tribunal examined PWGSC’s request for reimbursement of costs in relation to the inquiry. In light of the circumstances of this case, the Tribunal decided not to award PWGSC its costs in relation to the inquiry, in accordance with subsection 30.16(1) of the *CITT Act*. In this respect, the Tribunal is of the view that, if the criteria regarding the required products had been made clearer in the RFP, Panavidéo would probably not have filed a complaint in this matter. Therefore, each party will bear its own costs in relation to this inquiry.

DETERMINATION OF THE TRIBUNAL

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