



Ottawa, Thursday, February 20, 2003

File No. PR-2002-029

IN THE MATTER OF a complaint filed by Papp Plastics & Distributing 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 not valid.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: February 20, 2003

Tribunal Member: Richard Lafontaine, Presiding Member

Senior Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Marie-France Dagenais

Complainant: Papp Plastics & Distributing Limited

Counsel for the Complainant: Paul M. Lalonde
Jason Yustin

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Christianne M. Laizner

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STATEMENT OF REASONS

COMPLAINT

On October 7, 2002, Papp Plastics & Distributing Limited (Papp) 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. W8486-03JXAB/A) by the Department of Public Works and Government Services (PWGSC) for the repair of trunk lockers for the Department of National Defence (DND).

Papp alleged that, contrary to Article 506(6) of the *Agreement on Internal Trade*,² PWGSC's evaluation process and award were unfair due to a difference in the evaluation and performance standards between bidders. Specifically, it alleged that it was held to a higher standard through the pre-bid clarification questions and responses not disclosed to other bidders prior to tender. Papp also alleged that other bidders could not supply all the specified hardware as per the DND and PWGSC specifications because it had in its possession and was using the only hasp bracket die (Crown-owned tooling) available to produce specified parts meeting this requirement. According to Papp, this discounts all other bidders' capabilities according to the Request for a Standing Offer (RFSO). Finally, Papp alleged that the tender specifications were neglected and that PWGSC improperly assessed the contractors' capabilities.

As a remedy, PAPP requested that, since existing standing offers had already been awarded, it be compensated 20 percent of the total contract price for lost profit or opportunity and an additional 10 percent for damages in regard to jeopardizing the integrity of the procurement process. According to Papp, PWGSC was already cited for a similar incident for the very same product (trunk lockers) in File No. PR-2001-038.³ Papp also requested that it receive complaint and legal costs.

On October 15, 2002, the Tribunal informed the parties that the complaint had been accepted for inquiry pursuant to subsection 30.13(1) of the CITT Act and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁴ On November 12, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade*

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. *Re Complaint Filed by Papp Plastics & Distributing Limited* (31 January 2002) (CITT).
4. S.O.R./93-602 [hereinafter Regulations].

*Tribunal Rules.*⁵ On November 29, 2002, Papp filed its comments on the GIR. On December 12, 2002, PWGSC requested permission to file a response to Papp's comments on the GIR. Included in this request were submissions on what PWGSC believed to be new issues raised in Papp's comments. The Tribunal accepted these submissions. Papp submitted reply comments to these submissions on December 31, 2002.

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 July 17, 2002, PWGSC published an RFSO on MERX, Canada's Electronic Tendering Service, for the inspection, repair and repainting of Canadian Forces trunk lockers. This work was to be completed on an "as requested basis" for a three-year period from the date of issuing the RFSO.

The solicitation closed on August 28, 2002, and provided that the basis of selection for the award of a standing offer was the lowest aggregate price determined in accordance with the pricing provisions set out in the RFSO. Several provisions of the RFSO, such as the "Basis of Selection", the "Bid Evaluation" and the "Pricing", directed offerors to submit unit prices for listed repairs and informed offerors that these prices would form part of the evaluation criteria.

The RFSO included the following mandatory criteria:⁶

- Price submission in firm unit prices as detailed in this solicitation.
- Ability to perform work on a minimum of 200 trunk lockers per month.
- Compliance to Government Quality Assurance (GQA) requirements as detailed in this solicitation.

The Statement of Work (SOW) directed, in part, that replacement parts conform to the DND specifications provided to bidders, as follows:

3.1 Requirements

b. Repair. Items, found defective, shall be replaced with parts that meet the specifications.

On August 19, 2002, PWGSC received an inquiry from Papp asking whether the price quotations included in its bid should be based on the cost of replacing one rivet, top latch, bottom latch assembly, hasp bracket, stay and dome glide or, alternatively, the cost of replacing more than one of the listed items. Papp also inquired whether the replacement parts had to conform to the original specification and drawing or whether substitutes were acceptable.

On August 22, 2002, PWGSC replied that Papp should quote the cost of replacing only one part, that replacement parts had to conform to the original specification and drawing intent, and that "no substitutions" were acceptable. On the same date, Papp asked whether PWGSC intended to issue an addendum to the other bidders covering these points, indicating its belief that all bidders should know, but that this was PWGSC's call. Also on the same day, PWGSC responded that an addendum or amendment was not necessary.

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

6. Under the heading "Bid Evaluation".

On August 28, 2002, bidding on the RFSO closed and, on September 6, 2002, PWGSC determined that all five bids were compliant.

On September 12, 2002, Papp asked PWGSC to review the file and the questions posed on August 22, 2002. It submitted that it was particularly concerned with whether the parts supplied by other bidders would be Canadian and made to specification. PWGSC informed Papp that its inquiries would be considered and that an award would be made when PWGSC was satisfied that the chosen bidder had the ability to perform the work according to the specifications.

On September 18, 2002, DND reported the results of its site visits to the two lowest qualified bidders, namely, Les Ateliers Non-Tech Inc. and J.S.P. Lamy Safety Supply Inc. On September 23, 2002, two standing offers were awarded to these bidders for trunk locker repairs. Notices of these awards were published on MERX on September 24, 2002. On October 7, 2002, this complaint was filed with the Tribunal.

POSITIONS OF PARTIES

PWGSC's Position

PWGSC submitted that this solicitation is covered by the AIT, but is excluded from coverage under both the *North American Free Trade Agreement*⁷ and the *Agreement on Government Procurement*.⁸

PWGSC stated that the evaluation of the proposals was properly conducted based upon the bidders' "[a]bility to perform work on a minimum of 200 trunk lockers per month." It submitted that firms were told not to make offers unless they were able to perform at least 200 inspections and repairs per month. Furthermore, the RFSO required offerors to indicate the delivery rate per week of inspected, repaired and repainted trunk lockers.

PWGSC stated that both successful companies indicated that they could meet these requirements and that both offerors were evaluated as compliant with the mandatory requirements for delivery and the ability to perform work on these minimum volumes. It also referred to a report of the DND site visit, which confirmed the ability of the offerors to conduct the work. Accordingly, PWGSC submitted that the proposals of the two lowest-priced bidders were properly evaluated as compliant with the mandatory requirements.

PWGSC submitted that Papp's ground of complaint regarding the ambiguity of the RFSO, which required that the bidders have the ability to repair at least 200 trunk lockers per month while indicating that some 10,000 trunk lockers may need repair in the first year, is untimely. PWGSC further submitted that it is clear that none of the bidders misunderstood the requirement.

According to PWGSC, the provisions requiring transportation costs to be paid or prepaid by the contractor were clearly stated, and there was no separate line item for transportation costs in Table One of the RFSO. Furthermore, PWGSC stated that Papp did not take issue with the RFSO provisions with respect to either transportation or preparation and repainting costs prior to bid closing and that it raised no questions regarding these costs until the filing of the complaint. It submitted that the complainant knew or should reasonably have known the basis of this ground of complaint at the time that it reviewed the tender documents, which was no later than August 19, 2002, the date upon which the complainant forwarded a

7. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

8. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

facsimile to PWGSC with questions on the pricing requirements of the RFSO. According to PWGSC, since the complainant did not raise its objection regarding these costs until the filing of this complaint, with respect to this issue, the complaint is outside the time limits prescribed by section 6 of the Regulations.

PWGSC stated that there is no evidence to support the allegation that the successful bidders cannot provide the required trunk locker parts in accordance with the specifications. According to PWGSC, all offerors had the specifications and drawings that set out the requirements for the trunk locker hardware and these were detailed in the SOW that accompanied the RFSO. PWGSC also stated that nothing in the proposals submitted by the successful offerors indicated an intention to vary from the specifications and the drawings in their supply of parts.

PWGSC submitted that the drawings, and all intellectual property in the tool and dies required to manufacture the trunk locker parts, are owned by DND. It also submitted that Papp is not the only source of hasp bracket dies or hasp bracket components that meet the specifications under the RFSO and that there is no exclusive licence arrangement between DND and Papp for the use of this die. PWGSC further submitted that Samsonite is an approved manufacturing source for the trunk locker hardware and that, in the past, Samsonite has contracted with a third company, Globe Stamp Company Limited (Globe), for the production of hasp brackets that meet the technical requirements under the RFSO. Accordingly, PWGSC maintained that there is no basis to Papp's contention that it is the only source of supply for the custom hasp bracket. Moreover, in reply to Papp's allegation that bidders were required to list subcontractors and that an adverse inference could be drawn from the fact that the selected bidders did not comply, PWGSC submitted that the listing of subcontractors was unrelated to sources of supply for the replacement parts.

PWGSC submitted that the evaluation of offerors was properly conducted on the "Quality Assurance" requirements, as set out in the RFSO. PWGSC reiterated that the RFSO, under the heading "Bid Evaluation", stated that it is a mandatory requirement of the solicitation that offerors be compliant with the government quality assurance requirements, as detailed in the solicitation.

PWGSC submitted that there was no need to issue an addendum to all bidders as a result of Papp's questions submitted on August 22, 2002. The answers to these questions were evident based on a plain reading of the RFSO and the accompanying SOW. According to PWGSC, all other bidders submitted quotes based upon pricing required in the RFSO and all bidders were evaluated based on the same criteria. In addition, PWGSC submitted that the evidence does not support the allegation that the successful bidders will provide replacement parts that do not conform to the specifications and, thus, that there is no merit to the allegation that other bidders were held to different performance standards or evaluated differently and that this ground of complaint should be dismissed.

Papp alleged that the weight of the trunk lockers specified in the RFSO, which was stated as 10.5 lbs. rather than 12.0 lbs., was incorrect and caused bidders to significantly underestimate material costs. PWGSC responded to the allegation by stating that this pertains to information contained in the RFSO and that such an allegation is untimely and should be dismissed.

PAPP's Position

With respect to the minimum requirement that bidders be capable of repairing at least 200 trunk lockers per month, Papp accepted that the bid evaluations confirmed that the selected bidders could meet this requirement. However, it noted that, in this matter, the RFSO stated that approximately 10,000 trunk lockers might need to be repaired in the first year alone. Consequently, accepting the numbers shown in the GIR, Papp questioned the capacity of the two selected bidders to meet this requirement. This, according to

Papp, is indicative of the mishandling of this solicitation and of PWGSC's insistence on awarding the standing offers to the selected bidders to the detriment of other bidders, particularly Papp, regardless of their abilities and the requirements, contrary to Articles 501 and 514.2 of the AIT and Articles 1007.1, 1008.1 and 1015.4 of NAFTA. Furthermore, the stated need of up to 10,000 repairs in the first year cannot be reconciled with the much lower requirement of 200 repairs per month. Accordingly, Papp maintains that this solicitation is ambiguous and contrary to Article 506.6 of the AIT and Article 1013.1 of NAFTA.

Papp maintained that PWGSC has selected bidders that do not meet the requirements of the RFSO. In particular, it maintained that these bidders do not have access to a source of supply of replacement parts that meet the technical specifications, because the only tooling currently in existence for the hasp bracket and other parts is in the possession of Papp or Globe. According to Papp, other than itself and Globe, and perhaps Samsonite that may have limited and old inventory of some replacement parts, there exists no other known source of supply for these goods. Papp also stated that the tooling required to manufacture the hasp bracket and the injection moulding for the trunk locker is Crown-owned and under Papp's control, for use in the manufacture of trunk lockers for DND until the end of 2003. It submitted that there are also a number of parts that are not currently available on the market except from Globe. Papp stated that all these parts are custom made, using specially designed tooling that only Globe currently has available. It also noted that there is a very limited supply of compliant cut and sewn handles, hinge assemblies and rubber gaskets from qualified suppliers. Papp stated that the evidence presented by PWGSC with respect to the ability of the selected bidders to supply parts is vague and inconclusive. The evidence does not show that the selected bidders will be supplying compliant parts, but rather consists of an e-mail from DND to PWGSC dated September 18, 2002, and of extracts from the bids of the two winning bidders. Papp further noted that bidders were required to list subcontractors, if any, that would be called upon by the bidder in the performance of the contract.

Papp rejected PWGSC's position that some of its arguments are untimely. With respect to the evaluation methodology where unit prices for two cost categories were multiplied by different factors, Papp maintained that, depending on how bidders allocate their transportation costs, the comparisons could be unfair and inappropriate. Papp also maintained that, on the contrary, it would have been premature to file a complaint before the award of the contract, when it became apparent that, in fact, other bidders had applied their transportation costs on cost categories with lower multipliers (and that no adjustment would be made for this in the evaluations). It maintained that this ground of complaint became known at the time that it was informed of the award of the standing offers to the selected bidders, i.e. on September 25, 2002. Papp stated that, since its complaint was forwarded to the Tribunal on October 4, 2002, it was well within the 10 working days provided for in section 6 of the Regulations.

According to Papp, bidders in this solicitation were to include transportation costs in their quoted prices—in other words, bidders were responsible for transportation to and from DND locations. As seen in the cost grid provided in the RFSO, bidders were required to provide a breakdown of their costs (presumably including transportation costs) in the format provided. However, Papp stated that no line item was included to specifically identify transportation costs. Accordingly, bidders, acting reasonably, had no choice but to include them in whatever line item was most appropriate. According to Papp, this is what it did when it “baked” in pick-up costs into “inspection” and delivery costs into “refurbishing”.

Papp submitted that allocating transportation costs to inspection and refurbishing is the only way to accurately reflect the transportation costs that will necessarily attach to every inspection and repair. It argued that, notwithstanding its appropriate inclusion of transportation costs and its caution to PWGSC about the inclusion of transportation costs, Papp has been unfairly penalized by a skewed and unfair comparison. Although PWGSC maintained that Papp was the author of its own difficulties in having followed an

unsuccessful “bidding strategy”, Papp claimed that it submitted its bid in the only appropriate manner allowed in terms of the required pricing grid and that it is rather PWGSC’s facilitation and acceptance of inappropriate and misleading bidding practices by other bidders that caused this ground of complaint.

Papp maintained that it was incumbent upon PWGSC to ensure that its methodology provided an even-handed and fair selection process and that, in failing to appropriately deal with the perverse effect of the multipliers on the transportation costs, resulting in an uneven evaluation process, PWGSC failed to live up to its obligations under the AIT and NAFTA. Finally, Papp stated that PWGSC incorrectly stated the weight of the trunk lockers in the RFSO. The solicitation documents list the weight as 10.5 lbs., when in fact it is approximately 12.0 lbs. The weight difference, according to Papp, would materially underestimate handling and transportation costs.

TRIBUNAL’S DECISION

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, it must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements. In this instance, the solicitation is covered by the AIT.

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.”

The complaint alleges that PWGSC improperly evaluated other bidders as being compliant in this case, that the evaluation was unfair and that PWGSC was biased in ensuring that bidders met the tender specifications.

In light of the foregoing, the Tribunal will examine the following questions:

- The obligation of or requirement for bidders to demonstrate that they can perform this work
- The obligations of PWGSC, as the contracting authority, to verify that selected contractors have the capability of meeting the requirements of the solicitation
- The obligations of PWGSC to circulate, to other bidders, answers to questions posed during the pre-closing phase of bidding

With respect to the first question, PWGSC submits that both successful bidders indicated that they could meet the requirements of the RFSO and were evaluated as compliant with respect to these requirements. From a contractual point of view, it is clear that the bidders have an obligation to meet these requirements. However, whether or not the bidders have met their contractual obligations and the potential ramifications of any failure to do so are not at issue in this matter.

In the Tribunal’s view, bidders need not demonstrate their ability to perform the work prior to contract award, if not required specifically in the RFSO. Upon its review of the RFSO, the Tribunal is of the view that there was no such requirement in this case. Therefore, in that regard, the Tribunal finds that PWGSC was correct in determining that the bidders met the tender specifications. Moreover, the Tribunal is of the view that the selected bidders were not required to list, as subcontractors, their suppliers of replacement parts. Upon a careful reading of the General Conditions (DSS-MAS-9601) of the *Standard*

Acquisition Clauses and Conditions (SACC) Manual regarding subcontracting and the SOW for this procurement, the Tribunal is of the view that the term “subcontractors” is unrelated to suppliers of replacement parts. The subcontracted work contemplated by the General Conditions is for the inspection, repair and repainting of trunk lockers, not the manufacture of replacement parts or their simple supply.

With respect to the second question, the Tribunal must decide whether it is incumbent upon PWGSC to determine that a bidder has the capability to meet all the requirements of the RFSO. Accordingly, it has carefully reviewed the solicitation documentation and the obligations described in the AIT, with a particular view to ascertaining if there is any requirement that PWGSC verify that the successful bidders have the necessary experience and capability to fulfil the requirements of the RFSO. The Tribunal also notes the fact that Papp has alleged that proper audits and checks were not conducted to ensure that bidders met the tender specifications. Papp submitted that PWGSC improperly assessed the contractor’s capability as being able to meet the tender specifications.

The Tribunal is of the view that there was no formal requirement in relation to the RFSO for PWGSC to confirm that a selected bidder has the proven capacity to perform the work described in the RFSO prior to contract award. In fact, it is of the opinion that, in carrying out plant visits prior to contract award, DND actually went beyond what was required by the RFSO. Although PWGSC relied on DND’s subsequent report, it was not required to do so, based on the terms of the RFSO.

In its complaint, Papp suggested that, under PWGSC’s Supply Manual, it was incumbent upon PWGSC to verify that selected contractors were able to provide the material or services that meet the contract requirements. However, the Tribunal is of the opinion that a careful reading of D5543D of the SACC Manual firmly places the responsibility for quality control on the shoulders of the contractor. In addition, this same document clearly states that PWGSC (i.e. the contracting authority) and DND shall have access to the work “at any time during working hours . . . and **may** make examinations and such tests of the Work as they may think fit under the circumstances.” [Emphasis added] Thus, it is evident to the Tribunal that there was, in this case, no formal obligation for PWGSC to perform on-site verification visits before the award of a contract. Furthermore, the wording of the Supply Manual makes it clear that any verification audits performed after the award of the contract are solely at the discretion of PWGSC and DND. Insofar as the contractors themselves are concerned, both successful bidders indicated in their written proposals that they could meet the requirements of the RFSO. Therefore, the Tribunal finds that there was no obligation on PWGSC’s part to look beyond what was included in the proposals in relation to capability and, therefore, finds that these bidders were properly evaluated as being compliant.

Finally, the other allegations regarding an unfair evaluation process and biased tender specifications are based upon Papp’s request that PWGSC circulate an addendum to all bidders regarding the clarifications with respect to unit prices, substitutions and the hinge pin assembly. With respect to this allegation, the Tribunal notes that the RFSO stipulated unit pricing in four places.⁹

With respect to these grounds of complaint, the Tribunal is of the opinion that, based upon the wording regarding unit pricing, the information answering Papp’s question was evident in the RFSO. As a result, the Tribunal is of the opinion that PWGSC was correct to conclude that there was no need to issue an addendum to all bidders for the purpose of clarifying the RFSO. Furthermore, it is of the view that Papp’s allegation that PWGSC was biased is unsubstantiated.

9. See RFSO, Part 2, pages 1 of 10 and 6 of 10 under the following headings: “Pricing”, “Table One”, “Basis of Selection” and “Bid Evaluation”.

With respect to the allegations regarding transportation costs and repainting and repair costs, as well as the number of trunk lockers to be repaired, the Tribunal is of the view that Papp knew or should have known of these grounds of complaint at the time that it reviewed the tender documentation on August 19, 2002. The Tribunal also believes that this is true with respect to Papp's allegation regarding the weight of the trunk lockers. Accordingly, the Tribunal finds that the grounds of complaint with respect to transportation costs, repainting and repair costs, the number of trunk lockers to be repaired, and the weight of trunk lockers were filed outside of the time limits prescribed by section 6 of the Regulations.

Accordingly, the Tribunal determines that the complaint is not valid.

With respect to the requests by the parties that they receive the costs associated with these proceedings, the Tribunal determines that no costs will be awarded to any of the parties to this complaint.

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