Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Ottawa, Thursday, July 31, 2003

File No. PR-2003-015

IN THE MATTER OF a complaint filed by Patlon Aircraft & Industries 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, as a remedy, that Patlon Aircraft & Industries Limited be compensated for the profit that it would have reasonably made if it had been awarded a contract for 1,000 protective suits.

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

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

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Date of Determination:	July 31, 2003
Date of Reasons:	August 12, 2003
Tribunal Member:	Zdenek Kvarda, Presiding Member
Senior Investigation Officer:	Cathy Turner
Counsel for the Tribunal:	Marie-France Dagenais
Complainant:	Patlon Aircraft & Industries Limited
Counsel for the Complainant:	Richard A. Wagner
Intervener:	NBC Team Ltd.
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Ian McLeod Christianne M. Laizner Susan D. Clarke

Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Ottawa, Tuesday, August 12, 2003

File No. PR-2003-015

IN THE MATTER OF a complaint filed by Patlon Aircraft & Industries 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 May 2, 2003, Patlon Aircraft & Industries Limited (Patlon) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning the procurement (Solicitation No. W7702-020598/A) by the Department of Public Works and Government Services (PWGSC) for the provision of protective suits for civilian first responders for Defence Research and Development Canada (DRDC-Suffield), an agency operating within the Department of National Defence (DND).

Patlon alleged that PWGSC conducted an improper sole source procurement contrary to the provisions of the applicable trade agreements.

Patlon submitted that the solicitation does not meet the requirements for use of limited tendering procedures, that PWGSC failed to issue an Advance Contract Award Notice (ACAN) and that PWGSC has created an environment that is favourable to the supplier to which the contract was awarded, thereby biasing and prejudicing the competitiveness of future solicitations.

Patlon requested, as a remedy, that the Tribunal recommend that PWGSC terminate the contract and conduct a competitive solicitation in accordance with the applicable trade agreements. In the alternative, Patlon requested that the Tribunal recommend that PWGSC purchase the same number of equivalent protective suits from Patlon. In the further alternative, Patlon requested that the Tribunal recommend that PWGSC compensate it in an amount equal to the profit that it would have made if it had been awarded the contract. Finally, it requested the award of its costs for preparing and proceeding with the complaint.

On May 7, 2003, 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*.[2] On May 8, 2003, PWGSC informed the Tribunal, in writing, that a contract had been awarded to NBC Team Ltd. (NBC). On May 12, 2003, the Tribunal granted intervener status to NBC. On June 2, 2003, PWGSC

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].

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filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[3] Patlon filed its comments on the GIR with the Tribunal on June 13, 2003. On June 25, 2003, PWGSC requested permission to respond to new arguments and evidence raised in Patlon's comments on the GIR and provided those comments with its request. The Tribunal granted that request and, on July 7, 2003, Patlon filed its response to PWGSC's submission with the Tribunal. On July 8, 2003, the Tribunal forwarded Patlon's response to PWGSC for information.

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 February 17, 2003, PWGSC awarded a contract to NBC for the provision of 1,000 SARATOGA™ Hammer Suits.[4] On February 19, 2003, it published a Notice of Contract Award on MERX, Canada's Electronic Tendering Service. On February 27, 2003, Patlon sent a letter to PWGSC requesting details on the goods that were purchased and objecting to the contract being issued without a competitive solicitation or ACAN. Having received no response, it sent a follow-up letter to PWGSC on March 17, 2003. PWGSC provided an interim reply to Patlon on April 1, 2003, advising that the matter was under review and that Patlon would be advised once the review was completed. A final response from PWGSC was sent to Patlon on April 22, 2003, advising that the products purchased from NBC were SARATOGA™ Hammer Suits and that the reason that they were purchased on a sole source basis was that an alternative product was not acceptable. On May 2, 2003, Patlon filed its complaint with the Tribunal.

POSITION OF PARTIES

PWGSC's Position

PWGSC submitted that part of the federal government's chemical, biological, radiological and nuclear training program provides advanced training for provincial, regional and municipal civilian first responders (police, fire and emergency medical) in the handling of chemical, biological and radiological warfare agents in the case of a terrorist attack. It submitted that the training includes the use of protective suits in a live chemical and radiological agent environment. It argued that training emergency first responders in the same type of protective suits that they have acquired for their own use is a critical issue. It further argued that, since many chemical, biological and radiological warfare agents are lethal even in the event of small exposures, expert knowledge and experience in the use of the particular equipment possessed by the first responder is not merely essential but a matter of life and death. PWGSC contended that it is critical that first responders have the highest level of confidence in their equipment and in their training using the equipment, which includes not merely familiarity with correct techniques for the "donning and doffing" of the suits but also expertise in the use of these suits, while carrying out tasks in a live agent environment.

PWGSC submitted that DRDC-Suffield is aware that there are a large number of first responder units in Canada that are currently equipped with SARATOGA™ Hammer Suits and, therefore, initiated the

3. S.O.R./91-499.
4. These are protective suits manufactured in the United States by Tex-Shield, a U.S. division of Blucher GmbH. NBC holds the exclusive rights for sales of SARATOGA™ Hammer Suits in Canada. See GIR at 4, para. 2.

subject procurement for a stock of the suits for future training purposes. PWGSC also submitted that, if, in the future, DRDC-Suffield receives requests for training by a sufficient number of first responder units equipped with another type of protective suit, it will consider acquiring, for the same reasons, a supply of that type of suit for training purposes, provided such suits are acceptable for use in a live agent training environment.

With regard to Patlon's allegation that there is no valid basis upon which to invoke limited tendering procedures, PWGSC submitted that the procurement was conducted in a manner consistent with the *Agreement on Internal Trade*,[5] pursuant to the limited tendering provisions of Article 506(12)(b), which reads as follows: "where there is an absence of competition for technical reasons and the goods or services can be supplied only by a particular supplier and no alternative or substitute exists". It submitted that there is no safe or effective "alternative or substitute" to the procurement of the SARATOGA™ Hammer Suits for the purpose of training the many first responder units that are equipped with SARATOGA™ Hammer Suits and that, in addition, for these "technical reasons", there is an "absence of competition" between brands for the supply of protective suits for these specific purposes. It further submitted that, since NBC holds the exclusive rights for sales of SARATOGA™ Hammer Suits in Canada, the required protective suits "can be supplied only by a particular supplier". It therefore submitted that the procurement of SARATOGA™ Hammer Suits for the training purposes previously outlined was both a matter of common sense and consistent with the ordinary meaning of the provision of Article 506(12)(b) of the *AIT*.

Regarding Patlon's allegation that PWGSC failed to issue an ACAN for the procurement, PWGSC submitted that ACANs and the policies for their issuance are derived exclusively from the policies of PWGSC and the Treasury Board of Canada. It argued that ACANs and the ACAN policy, while consistent with the principles of the trade agreements, are not required by the agreements and, hence, any issue about whether the issuance or non-issuance of an ACAN was in accordance with internal government policies falls outside the Tribunal's jurisdiction.[6]

With respect to Patlon's statement that "it is not 'critical' or 'fundamental' that first responders be trained in the Saratoga [Hammer] Suit",[7] PWGSC submitted, in its comments of June 25, 2003, that Patlon has submitted its "opinion" and that the Tribunal should not accept an opinion submitted by a supplier acting in its own self-interest in substitution for the judgement of the senior officials of DRDC-Suffield who have both the responsibility and expertise in this matter.

Finally, PWGSC submitted that, in accordance with the principles set out by the Federal Court of Appeal in *The Attorney General of Canada v. Georgian College of Applied Arts and Technology*,[8] the Crown should be awarded its costs in this matter.

Patlon's Position

Patlon submitted that there are various types of nuclear, biological and chemical protective suits available on the market. It is a supplier of the Kärcher Safeguard™ 3002-A-1 Suit (the Safeguard™ Suit) which, it submitted, is equivalent to the SARATOGA™ Hammer Suit and competes with this suit in many

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [*AIT*].
6. *Re Complaint Filed by FLIR Systems Ltd.* (25 July 2002), PR-2001-077 (CITT) at 14.
7. Patlon's comments on the GIR, para. 17.
8. (2 May 2003), A—505—02 (F.C.A.).

markets. It contended that PWGSC knew or should have known that there are several suppliers of nuclear, biological and chemical protective suits on the market.

Patlon submitted that the only rationale provided by PWGSC regarding its decision to sole source the procurement to NBC is that the particular suit specified by DRDC-Suffield was required to train municipal, provincial and federal first responders in Canada who are currently equipped with the SARATOGA™ Hammer Suit and that it was not able to accept an alternative product. It argued that the desire to maintain compatibility or interchangeability with existing products is not a valid basis upon which to invoke limited tendering procedures purporting to solicit from only one supplier.[9] Patlon argued that PWGSC has not cited any of the exceptions under the applicable trade agreements that would allow a sole source procurement nor has it provided any other valid justification for its decision to sole source in this case. It also argued that, in this case, there is no justification for PWGSC not to issue an ACAN.

With regard to the training conducted by DRDC-Suffield that necessitates the use of the protective suits, Patlon argued that the training is not in relation to how to put on, wear or maintain the protective suit, rather the training is in relation to the identification, isolation, control and clean-up of nuclear, biological and chemical materials and substances and that, therefore, the type of protective suit worn by the personnel is of little consequence to the training.

Patlon argued that, even if there was a requirement that the protective suit be virtually identical to the SARATOGA™ Hammer Suit, it should be left to suppliers to determine the extent to which they can provide a protective suit that meets such a requirement. It submitted that, in this respect, the Tribunal has stated that the decision to assume conversion or transitional costs remains strictly within the domain of the supplier, which may or may not reflect such costs in a proposal under the competitive tendering process, but which must be provided with the opportunity.[10]

Regarding future procurements, Patlon submitted that, by failing to use an open competitive process, PWGSC is biasing and prejudicing the competitiveness of future solicitations by establishing a precedent that there is no alternate product. It submitted that this practice is contrary to the applicable trade agreements.

While PWGSC submitted that there is a necessity to train first responders in the same type of nuclear, biological and chemical suits that they have acquired, Patlon submitted, in its comments on the GIR, that there is no necessity to train the people using the same brand of suit, since there are other virtually identical suits of the same type. Patlon submitted that the SARATOGA™ Hammer Suit and the Safeguard™ Suit are the same type of protective suit and that they are virtually identical in look, form, fit and function. It submitted that there are no differences in donning and doffing the suits, as implied by PWGSC. It argued that, being of the same type, the Safeguard™ Suit can be used by a person who uses a SARATOGA™ Hammer Suit and vice versa. Further, as acknowledged by PWGSC in the GIR,[11] Patlon submitted that DRDC-Suffield regularly trains first responders using a protective suit other than the one that the first responders own. It further submitted that some first responders who own SARATOGA™ Hammer Suits received training using the military protective suit. It argued that there is no evidence that such first

9. *Re Complaint Filed by Array Systems Computing Inc.* (16 April 1996), PR-95-023 (CITT) at 8; *Re Complaint Filed by Sybase Canada Ltd.* (30 July 1997), PR-96-037 (CITT) at 11.
10. *Re Complaint Filed by Sybase Canada Ltd.* (30 July 1997), PR-96-037 (CITT) at 11; *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (8 March 1999), PR-98-033 (CITT) at 6.
11. GIR at 6, para. 17.

responders were exposed to any critical risks or that they are now at risk due to being trained using a suit that is not the SARATOGA™ Hammer Suit, but of a similar type. It also argued that there is no suggestion or evidence that the first responders who own SARATOGA™ Hammer Suits, but who received training using the military protective suit, must now be retrained using the SARATOGA™ Hammer Suit. Therefore, Patlon submitted that it is not "critical" or "fundamental" that first responders be trained using the SARATOGA™ Hammer Suit, but only that they be trained in that **type** of protective suit, especially one that, like the Safeguard™ Suit, is virtually identical to the SARATOGA™ Hammer Suit.

Patlon argued that there is no evidence to support PWGSC's assertion that NBC holds the exclusive rights to sell SARATOGA™ Hammer Suits in Canada. It submitted that the actual agreement,[12] when read closely, does not support a conclusion of exclusivity to NBC. It submitted that Canada is not NBC's exclusive territory. Patlon argued that, even if NBC has exclusive rights to sell SARATOGA™ Hammer suits in Canada, such exclusivity does not justify a sole source procurement. It submitted that, as set out in a previous Tribunal decision,[13] exclusive rights to sell a brand of a product does not mean that there is only one source for the product and does not prohibit PWGSC or DND from buying a comparable product from other sources. Patlon argued that other sources for the product include not only other persons with the right to sell the same brand of product but also producers of identical or substitutable products bearing other brand names. Therefore, Patlon submitted that exclusive sales rights for a brand of a product cannot justify a sole source procurement. It submitted that PWGSC, in essence, chose to buy a brand name of a product rather than a product itself and that such a sole source procurement is contrary to the trade agreements.

In response to PWGSC's assertion that there is no safe or effective alternative or substitute to the procurement of the SARATOGA™ Suits for the purpose of training the many responder units equipped with those suits, Patlon argued that there are perfectly safe and effective substitutes for the SARATOGA™ Hammer Suit, these being the Safeguard™ Suit and other protective suits of the same type. It also argued that there are other potential sources of supply for the SARATOGA™ Hammer Suit. Accordingly to Patlon, the phrase "absence of competition for technical reasons" in Article 506(12)(b) of the *AIT* means that there are no competitors offering competitive goods due to the unique technical aspects of the goods being procured. It submitted that the end use of a product cannot be a "technical reason" that results in an absence of competition, unless another product cannot fulfil the end use. It argued that the Safeguard™ Suit and other protective suits fulfil the same end use as the SARATOGA™ Hammer Suit. Patlon further submitted that a brand name cannot be a "technical reason" that results in an absence of competition, given that a brand name does not relate to the technical aspects of a product, but only to its name. Patlon submitted that, as set out in *Wescam*, it is incumbent on PWGSC to determine whether technical reasons exist. It argued that there is no evidence that PWGSC or DND actually compared the Safeguard™ Suit or other protective suits with the SARATOGA™ Hammer Suit prior to deciding to sole source this procurement. Accordingly, Patlon submitted that no determination concerning technical reasons was undertaken as required.

Patlon submitted that the trade agreements all have, as a basic principle, the requirement for an open and fair tendering system and limit recourse to limited tendering procedures. It submitted that, when a decision is made to proceed by way of limited tendering, an important tool to ensure that the principle is not violated is to issue a pre-award notice, which is primarily the use of an ACAN. Patlon submitted that the Tribunal has jurisdiction to determine if PWGSC followed its own internal policies concerning ACANs as evidence of whether it complied with the trade agreements. It argued that, in this case, PWGSC's failure to

12. GIR (confidential), Exhibit 1.
13. *Re Complaint Filed by Wescam Inc.* (19 April 1999), PR-98-039 (CITT) [*Wescam*] at 8.

use an ACAN is evidence of non-compliance, especially given that PWGSC had used an ACAN for a similar solicitation and knew that Patlon was a potential supplier.[14]

In its response to PWGSC's June 25, 2003, submission, Patlon submitted that the letter from DRDC-Suffield attached to PWGSC's submission does not specifically deal with the SARATOGA™ Hammer Suits nor does that letter state that it is "critical" that training be conducted in the same suit. Patlon submitted that the letter refers to a broad range of equipment (detectors, decontaminants, protective suits, respirators, etc.) and states only that it is "extremely desirable that the participants train using the same equipment".[15] It submitted that there is no specific reference to the protective suits alone. Patlon further submitted that the letter does not support PWGSC's proposition that it is critical that trainees be trained using the protective suits that they have acquired and, in fact, albeit somewhat reluctantly, admits that, if the suits were identical, this would have little effect on training.

Patlon argued that PWGSC's June 25, 2003, submission and exhibits attached thereto do not establish that NBC is the exclusive supplier of SARATOGA™ Hammer Suits to Canada and that some other person could sell such suits to Canadian purchasers, such as PWGSC. It also argued that the issue of exclusivity is a minor point and that the main point is that there are other suppliers of protective suits similar or identical to the SARATOGA™ Hammer Suit that should have had the opportunity to bid on the solicitation or, at the very least, have had an opportunity to respond to an ACAN.

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 conducted in accordance with the applicable trade agreements, which, in this instance, is the *AIT*.

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: . . . (b) where there is an absence of competition for technical reasons and the goods or services can be supplied only by a particular supplier and no alternative or substitute exists".

In order for a limited tendering procedure to qualify under Article 506(12)(b) of the *AIT*, the following two key elements must be present: (1) there is only one supplier that can meet the requirements of the procurement; and (2) no alternative or substitute exists. The Tribunal has previously interpreted the provisions with respect to limited tendering very narrowly. This is consistent with the purpose of the trade agreements that emphasize that competition is the norm. The Tribunal has also required that, in instances when PWGSC has invoked a limited tendering procedure, the onus is on PWGSC to demonstrate that such a procedure is justified. It is of the opinion that PWGSC has failed in this regard.

In the Tribunal's view, it would have been quite reasonable and possible, in this case, for DND's requirement to be written in terms of performance criteria and opened up to competition. Based on the

14. Patlon's comments on the GIR, Exhibit 2.
15. PWGSC's comments in a letter dated June 25, 2003, at 2.

evidence before it, the Tribunal is of the view that there may indeed have been other equivalent suits available on the market that could have satisfied the requirement. The Tribunal is of the view that it is only through an open competition that this question can be resolved. It notes that the training provided at DRDC-Suffield is in relation to the handling of chemical, biological and radiological emergencies, rather than to the use of the protective suits. While the Tribunal is cognizant of the critical nature of the training and of the importance of protective gear, the requirement was for a stock of protective suits for future training purposes, and there was no urgent need for the suits at the time of purchase. If DND or PWGSC found that describing the suits in terms of performance requirements would not be efficient or effective in this case, the requirement could have been described in terms of the brand name (SARATOGA^{TM} Hammer suit) or equivalent and accompanied by the criteria to determine equivalency.

In conclusion, the Tribunal is of the opinion that a competitive process should have been followed and, ideally, performance specifications should have been used to describe the required protective suits. Consequently, it finds that the procurement was not conducted in accordance with the *AIT*.

In light of the forgoing, the Tribunal finds that the complaint is valid.

Regarding Patlon's allegation that PWGSC failed to publish an ACAN for the procurement, the Tribunal finds that, while an excellent tool for heading off problems like this one, ACANs are not required by the *AIT*.

Patlon requested, as a remedy, that the Tribunal recommend that PWGSC terminate the contract and conduct a competitive solicitation in accordance with the applicable trade agreements. In the alternative, Patlon requested that the Tribunal recommend that PWGSC purchase the same number of equivalent protective suits from Patlon. In the further alternative, Patlon requested that the Tribunal recommend that PWGSC compensate it in an amount equal to the profit that it would have made if it had been awarded the contract. Finally, Patlon requested the award of its costs for preparing and proceeding with the complaint.

With respect to the appropriate remedy, the Tribunal, as guided by subsection 30.15(3) of the *CITT Act*, has considered all the circumstances relevant to the procurement. The Tribunal is of the view that the deficiency in the procurement process is serious enough to warrant a remedy. It is also of the view that Patlon and the integrity of the competitive procurement system were prejudiced by the actions of PWGSC and DND. However, the Tribunal has not seen any evidence that would indicate that PWGSC was not acting in good faith.

Given the timing and the nature of the contract and given the evidence before it, the Tribunal is of the opinion that delivery of the goods has already been made, or is well underway, such that the termination of the contract and re-solicitation of goods would be redundant. With regard to Patlon's request that the Tribunal recommend that PWGSC purchase the same number of equivalent protective suits from Patlon, the Tribunal is of the view that it would not be appropriate to force DND to obtain more protective suits than legitimately needed. However, the Tribunal will recommend that Patlon be compensated for lost profits.

Finally, the Tribunal awards Patlon its reasonable costs incurred in preparing and proceeding with the complaint.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that Patlon be compensated for the profit that it would have reasonably made if it had been awarded a contract for 1,000 protective suits.

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

Zdenek Kvarda
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Presiding Member