



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

Ottawa, Monday, July 14, 2003

File No. PR-2003-005

IN THE MATTER OF a complaint filed by Ready John 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.

Meriel V. M. Bradford
Meriel V. M. Bradford
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: July 14, 2003

Tribunal Member: Meriel V. M. Bradford, Presiding Member

Senior Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Eric Wildhaber

Complainant: Ready John Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Sandra Leduc



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STATEMENT OF REASONS

COMPLAINT

On April 14, 2003,¹ Ready John Inc. (Ready John) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.² The complaint concerned a Standing Offer Agreement (Solicitation No. W0105-03E005/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of chemical toilets at Canadian Forces Base (CFB) Gagetown in New Brunswick.

Ready John alleged that Plaggenborg's Ltd. (Plaggenborg), the successful bidder, was not in a position to submit a proposal that could comply with a mandatory requirement of the solicitation and, thus, should not have been issued the standing offer.

Specifically, Ready John alleged that Plaggenborg was not in a position to satisfy the following requirement: "The Contractor is to have in their possession a minimum of 250 units." Ready John submitted that, with respect to Plaggenborg's proposal, this requirement should be interpreted together with Plaggenborg's similar obligation under another standing offer for chemical toilets for CFB Gagetown. Accordingly, Ready John submitted that Plaggenborg had to demonstrate that it had a minimum inventory of 500 chemical toilets and that, based on its knowledge, Plaggenborg did not have this number of units in inventory. As a remedy, Ready John requested that only bidders that abided by the tender requirements be considered.

On April 17, 2003, 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 Regulations*.³ On May 20, 2003, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On May 30, 2003, Ready John filed its comments on the GIR. On June 6, 2003, Ready John filed its

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1. The date on which the additional information requested by the Tribunal was received.
 2. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
 3. S.O.R./93-602 [*Regulations*].
 4. S.O.R./91-499 [*Rules*].

supplementary comments on the GIR. On June 12, 2003, PWGSC requested the Tribunal's permission to file further submissions. This request was denied on June 23, 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 January 14, 2003, a Notice of Proposed Procurement, in relation to a Request for Standing Offer (RFSO), was posted on MERX.⁵ The closing date for this solicitation was February 24, 2003.

The technical requirements of the solicitation were set out in a DND document dated November 14, 2002, entitled "Specification", and made available to suppliers through MERX. Section 14.1.1 of the Specification reads as follows:

1. Number of Toilets: The Contractor is to have in their possession a minimum of 250 units. Toilets will be inspected prior to award.

On February 18, 2003, Ready John sent a letter to PWGSC regarding the solicitation in issue and noted, in particular, the requirement of section 14.1.1 of the Specification. Ready John also made reference to another existing standing offer for chemical toilet services at CFB Gagetown and suggested that PWGSC consider the requirements of both procurements when assessing any proposals submitted with respect to the new solicitation. Also on February 18, 2003, PWGSC forwarded Ready John's letter to DND. On the same day, DND confirmed to PWGSC that it would verify that the low bidder met the requirement referred to in Ready John's letter.

On the closing date of the solicitation, two proposals were received, one from Ready John and the other from Plaggenborg. According to PWGSC, these were forwarded to DND for evaluation on February 25, 2003. On February 27, 2003, DND met with representatives of Plaggenborg and A1 Portable Toilets Ltd. (A1) for the purpose of verifying Plaggenborg's ability to comply with section 14.1.1 of the Specification. According to PWGSC, during the visit, Plaggenborg explained the arrangement that it had with A1 to ensure that it would be in possession of all the units necessary to meet its obligations under the two CFB Gagetown standing offers. On February 27, 2003, DND conducted a site visit and verified that Plaggenborg had a sufficient number of units to service both standing offers. As the lowest compliant bidder, Plaggenborg was issued the standing offer on March 4, 2003.

On March 14, 2003, Ready John wrote to PWGSC objecting to the issuance of the standing offer to Plaggenborg. On March 31, 2003, PWGSC wrote to Ready John indicating that it had confirmed that the successful bidder had the legal right to take possession of sufficient units to satisfy the requirements of both standing offers. On April 4, 2003, Ready John wrote to PWGSC disputing the conclusions of PWGSC's letter of March 31, 2003. On April 14, 2003, Ready John filed its complaint to the Tribunal.

5. Canada's Electronic Tendering Service.

POSITION OF PARTIES

Ready John's Position

Ready John submitted that Plaggenborg does not meet the requirement for possession of 250 units. Ready John further submitted that the leasing arrangement into which Plaggenborg entered does not satisfy the requirement that Plaggenborg have "possession". According to Ready John, the choice of the word "possession" was intended to guarantee a minimum number of units on short notice for delivery to DND. Ready John submitted that the lease agreement incorporates an element of uncertainty with respect to both the number of units available and their availability on short notice. According to Ready John, the letter from the manufacturer only adds more uncertainty because the units referenced are available to any customer of the supplier or the manufacturer. Ready John submitted that the lease agreement and the letter from the manufacturer do not guarantee the availability of 250 units on short notice.

With respect to PWGSC's statement that Plaggenborg could have filed a complaint if the standing offer had been issued to Ready John instead of Plaggenborg, Ready John argued that this was irrelevant and did not justify PWGSC's action. Ready John further submitted that, if it had known that Plaggenborg was awarded the other standing offer on the basis of a lease to satisfy the requirement of "possession" of 250 units, it would have filed a complaint with respect to that procurement.

Ready John submitted that Plaggenborg does not meet the requirement of section 14.1.1 of the Specification and that, in issuing the standing offer to Plaggenborg, PWGSC failed to enforce the tendering requirement found in section 14.1.1 and failed to issue the standing offer on a fair and competitive basis.

PWGSC's Position

PWGSC submitted that Plaggenborg's proposal was correctly evaluated and that Plaggenborg was issued the standing offer on a fair and competitive basis. PWGSC submitted that it is a fundamental principle under the trade agreements that PWGSC must set out all its requirements in the solicitation documents and that only these published requirements are to be applied to proposals for evaluation purposes.

According to PWGSC, the requirement of section 14.1.1 of the Specification reads: "The Contractor is to have in their possession . . . 250 units." PWGSC submitted that, on its face, the requirement refers to "possession [of] a minimum of 250 units", but it does not state any further requirements with respect to other contractual obligations. It does not use the word "own", which is a much narrower concept than the term "possession", neither does it include the phrase "in its inventory". PWGSC further submitted that Ready John is suggesting that section 14.1.1 should have been applied to Plaggenborg's proposal with a special condition, namely, that Plaggenborg's contractual obligations under another standing offer should have been factored in the evaluation with the result that Plaggenborg would have been required to have 500 units, whereas Ready John would have been required to have only 250 units. PWGSC submitted that, if this approach had been used in the evaluation process to disqualify Plaggenborg's bid, Plaggenborg would have been justified in objecting.

With respect to Ready John's claim that, in previous procurements, it had been required to have 500 units "in its inventory", PWGSC submitted that this is irrelevant to this complaint. PWGSC submitted that the Tribunal has established in previous decisions that bidders should treat all solicitations as

independent and that, accordingly, any practices undertaken during previous solicitations, or suppliers' perceptions of such practices, have no application to subsequent solicitations.

Furthermore, PWGSC submitted that, even if section 14.1.1 of the Specification were interpreted to take into account Plaggenborg's other obligations, the facts indicate that Plaggenborg's proposal complied with this requirement. According to PWGSC, it did obtain verification that Plaggenborg had secured possession of sufficient units to satisfy the requirements of both standing offers. In particular, PWGSC submitted that, by having obtained the legal right to take possession on request of the required number of units, Plaggenborg had provided full and reasonable satisfaction of the published requirement concerning the possession of a minimum of 250 units.

In conclusion, PWGSC submitted that Ready John's position that section 14.1.1 of the Specification should be interpreted by factoring in existing contractual obligations and injecting concepts of "own" and "inventory" is not sustainable and should be dismissed. Furthermore, according to PWGSC, the facts demonstrate that Plaggenborg has shown that it can satisfy the requirements of both the standing offer that is the subject of this complaint and the existing standing offer for chemical toilet services at CFB Gagetown.

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.

The primary issue in this case is the mandatory requirement found in section 14.1.1 of the Specification: "The Contractor is to have in their possession a minimum of 250 units. Toilets will be inspected prior to award." In this regard, it would appear that the Tribunal has two questions to decide. The first is whether PWGSC was correct in concluding that the leasing arrangements made by Plaggenborg, the successful bidder, were sufficient to constitute compliance with the requirements of the RFSO. The second is whether PWGSC, in evaluating the proposals for this solicitation, had to consider a similar requirement found in another standing offer for the possession of 250 units and whether that additional requirement meant that Plaggenborg had to have in its possession a combined total of 500 units.

On the matter of whether there is a requirement for the contractor to have in its possession 250 units or 500 units, the Tribunal finds that the requirements of this procurement had to be considered on their own and that the requirements of another procurement are not relevant. The Tribunal notes that this procurement was for CFB Gagetown on its own behalf, whereas the other procurement was for outside Canadian Forces and NATO units at CFB Gagetown. In the Tribunal's opinion, it is entirely reasonable to have two separate contracts. Accordingly, the Tribunal is of the view that the requirement in section 14.1.1 of the Specification is for a minimum of 250 units.

With respect to the meaning of the "possession" requirement in section 14.1.1 of the Specification, the Tribunal notes that it is the contractor, and not the bidder, that is to have the required number of units in its possession and that an inspection would be carried out prior to awarding the contract.

In the view of the Tribunal, to meet the stated “possession” requirement in section 14.1.1 of the Specification, the contractor must be able to control the allocation of units to this procurement in the event of an award of contract. The means by which this requirement may be met include, **but are not limited to**, holding title to the units. The Tribunal is of the view that other acceptable means consistent with dictionary meanings of the word “possession” exist and may include leasing arrangements or an accepted offer to purchase.

In this case, there is evidence that, prior to the award of the standing offer, DND verified that Plaggenborg had secured a lease agreement with A1, which allowed it to meet the requirement of section 14.1.1 of the Specification. In addition to this lease agreement, Plaggenborg confirmed that A1 had obtained a secure supply of units, which it could also use to meet its leasing obligations to Plaggenborg. DND informed PWGSC of these arrangements prior to issuing the standing offer to Plaggenborg, the lowest compliant bidder.

With respect to the fact that the requirement of section 14.1.1 of the Specification is a stipulation on the contractor rather than on the bidder, the Tribunal is of the opinion that the need to expand on this distinction does not enter into effect in this case. In the opinion of the Tribunal, the previous discussion showed that Plaggenborg, as the bidder and eventual contractor, demonstrated its compliance with the requirement even before it was issued the standing offer. Following the decision to issue the standing offer to Plaggenborg, a confidential letter from DND to PWGSC confirmed that Plaggenborg had the number of units required to meet the requirements of the procurement.

The Tribunal is aware that there is some doubt as to the interpretation of the wording of the requirement of section 14.1.1 of the Specification that may have led to the complaint regarding the enforcement of the requirements. Indeed, DND had to verify Plaggenborg’s ability to meet the requirement of section 14.1.1 and, through the Tribunal complaint process, the confidential evidence documenting compliance with the requirement was made available in the GIR. Some of this evidence was only provided to PWGSC following Ready John’s initial objections to PWGSC and, after PWGSC requested confirmation that Plaggenborg had the “**legal right to take possession of sufficient units** to satisfy the requirements of both Standing Offers....” [emphasis added]. This is different wording from that used in section 14.1.1.

Following the decision to award the contract to Plaggenborg, a confidential letter from DND to PWGSC confirmed that Plaggenborg had the number of units required to meet the requirements of this procurement.

In addition, the leasing contract between Plaggenborg and A1 and the letter of confirmation from its supplier were sent to PWGSC by Plaggenborg in response to PWGSC’s request for confirmation that Plaggenborg would have the “legal right to take possession of sufficient units to satisfy the requirements of both Standing Offers....” following the award of the standing offer in this case.

Given the lack of clarity in the wording of the requirement and because evidence of ability to comply with the requirement of section 14.1.1 of the Specification was obtained after the standing offer was issued, the Tribunal is of the opinion that each party should bear its own costs for the inquiry into 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.

Meriel V. M. Bradford

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Presiding Member