



Ottawa, Wednesday, November 12, 2003

File No. PR-2003-039

IN THE MATTER OF a complaint filed by Goodfellow Cleaners 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 the Department of Public Works and Government Services cancel the standing offer issued to Britannia Cleaners and Coin Wash Ltd. resulting from the solicitation issued on July 18, 2003, and issue a standing offer to Goodfellow Cleaners based on its response to the initial solicitation, which closed on June 30, 2003.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Goodfellow Cleaners its reasonable costs incurred in preparing and proceeding with the complaint.

Richard Lafontaine

Richard Lafontaine
Presiding Member

Michel P. Granger

Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination:	November 12, 2003
Date of Reasons:	November 17, 2003
Tribunal Member:	Richard Lafontaine, Presiding Member
Senior Investigation Officer:	Cathy Turner
Counsel for the Tribunal:	John Dodsworth
Complainant:	Goodfellow Cleaners
Intervener:	Britannia Cleaners and Coin Wash Ltd.
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Ian McLeod Christianne M. Laizner Susan D. Clarke



Ottawa, Monday, November 17, 2003

File No. PR-2003-039

IN THE MATTER OF a complaint filed by Goodfellow Cleaners 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 August 13, 2003, Goodfellow Cleaners (Goodfellow) 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. W0002-02W050/A) by the Department of Public Works and Government Services (PWGSC) for the provision of dry cleaning and laundry services on behalf of the Department of National Defence (DND).

Goodfellow alleged that PWGSC had improperly retendered the procurement, contrary to the provisions of the *Agreement on Internal Trade*.² It submitted that, prior to any contract award and before the solicitation process was formally cancelled, PWGSC had sought additional bids without cancelling the original requirement.

Goodfellow requested, as a remedy, that the Tribunal recommend that PWGSC cancel the standing offer issued to Britannia Cleaners and Coin Wash Ltd. (Britannia Cleaners) and that a standing offer be issued to Goodfellow based upon its response to the Request for a Standing Offer (RFSO). In the alternative, it requested that the Tribunal recommend that PWGSC compensate it in an amount equal to the profit that it would have made during the period of the standing offer, including option years, had it been issued a standing offer. In addition, Goodfellow requested its costs incurred in preparing and proceeding with the complaint.

On August 26, 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*.³ On August 28, 2003, PWGSC informed the Tribunal, in writing, that a standing offer of \$180,000 had been issued to Britannia Cleaners. On September 10, 2003, the Tribunal granted intervener status to Britannia Cleaners. On September 22, 2003, PWGSC filed a Government Institution Report (GIR) with the Tribunal

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

2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

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

in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ Goodfellow filed its comments on the GIR with the Tribunal on October 2, 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 June 12, 2003, an RFSO for the provision of dry cleaning and laundry services for DND was issued on MERX, Canada's Electronic Tendering Service. The RFSO had a bid closing date of June 30, 2003.

The RFSO reads, in part, as follows:

Basis of Selection

To be considered responsive, a bid must meet all of the mandatory requirements of this solicitation. Bids not meeting all of the mandatory requirements will be given no further consideration. The lowest priced responsive bid will be recommended for award of a contract or issuance of a standing offer, as the case may be.

LIABILITY OF THE CROWN

THIS STANDING OFFER DOES NOT OBLIGE THE CROWN TO AUTHORIZE OR ORDER ANY GOODS OR SERVICES WHATSOEVER OR TO SPEND THE ESTIMATED EXPENDITURES OR ANY MONIES WHATSOEVER. FURTHERMORE, THE CROWN'S LIABILITY UNDER THIS OFFER SHALL BE LIMITED TO THE ACTUAL AMOUNT OF GOODS OR SERVICES CALLED UP OR REQUISITIONED WITHIN THE PERIOD SPECIFIED HEREIN.

Terms and Conditions – Standing Offer

Pursuant to the *Department of Public Works and Government Services Act*, S.C. 1996, c.16,

- (b) the Instructions set out in Part A of the Standard Instructions and Conditions 9403-6 (24/05/02) are hereby incorporated by reference into and form part of the Request for a Standing Offer. Submission of a Standing Offer constitutes acknowledgement that the Offeror has read and agrees to be bound by such instructions, and
- (c) the Particulars of the Standing Offer set out in Part B and, for the purchase of goods, the Conditions set out in Part C of Standard Instructions and Conditions 9403-6 (24/05/02) are hereby incorporated by reference into this Request for Standing Offer as though expressly set out herein, subject to any other express terms and conditions herein contained.

Section 4 of the Instructions set out in Part A of the Standard Instructions and Conditions 9403-6 (24/05/02) (the standard instructions) reads, in part, as follows:

4. DPWGS Obligation

A request does not commit DPWGS to authorize the utilization of a Standing Offer ... DPWGS reserves the right to reject or authorize for utilization any offer in whole or in part, with or without further discussion or negotiation.

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

Section 5(1)(a) of the Instructions set out in Part A of the standard instructions reads, in part, as follows:

5. Process

(1) The Standing Offer is normally processed as follows:

- (a) An RFSO is obtained by offerors (suppliers) through the Government Electronic Tendering Service (GETS), provided by MERX.

Section 6(2) of the Instructions set out in Part A of the standard instructions reads, in part, as follows:

6. Submission of Offers

- (2) The evaluation of proposed standing offers may result in authorization to utilize one or more standing offers in whole or in part, taking into consideration the lowest price per item and/or destination or group of items and/or destinations or on a lowest aggregate price basis. The lowest or any proposed Standing Offer will not necessarily be authorized.

According to PWGSC, two bids were received. One bid was found to be non-compliant for reasons not relevant to this complaint. Goodfellow's bid was determined to be compliant with the mandatory requirements in the RFSO.

According to PWGSC, an initial review of the prices offered by Goodfellow raised concerns that they were excessive. As a result, PWGSC undertook a detailed comparison of Goodfellow's prices with those then in place under the existing standing offer. According to PWGSC, it confirmed, through this detailed examination, that Goodfellow's prices were indeed far higher than those currently in effect since August 2000.

On July 10, 2003, the PWGSC contracting officer conveyed to Goodfellow PWGSC's concerns that its prices were extremely high, compared to those currently in effect, and asked Goodfellow to review those price levels and offer some reductions. Goodfellow later advised the contracting officer that it had reviewed the proposal and that it was unable to offer better prices. According to PWGSC, on the recommendation of the contracting officer and following consultations with DND, it determined on July 17, 2003, that Goodfellow's prices were excessive and did not represent fair value to the Crown. According to PWGSC, it was decided that the solicitation should be terminated and retendered.

According to PWGSC, on July 18, 2003, it sent solicitation documents by fax to both suppliers that had bid on the original solicitation, to a supplier that had held the standing offer in previous years and to the supplier that was the holder of the current standing offer. The fax sent to Goodfellow did not indicate that it was also being sent to other potential suppliers. Bids for the retender closed on July 22, 2003, and according to PWGSC, two bids were received; Goodfellow did not submit a second bid.

On July 30, 2003, Goodfellow sent an e-mail to PWGSC enquiring about the status of its proposal submitted on June 30, 2003, in response to the original RFSO. PWGSC responded on July 31, 2003, advising Goodfellow that a standing offer had been issued to Britannia Cleaners. There was a further exchange of e-mails between Goodfellow and PWGSC on August 1 and 7, 2003. On August 13, 2003, Goodfellow filed its complaint with the Tribunal.

POSITION OF PARTIES

PWGSC's Position

PWGSC submitted that Goodfellow's allegations are based on the text of one provision of the RFSO, which states that "[t]he lowest priced responsive bid will be recommended for award of a contract or issuance of a standing offer, as the case may be." It further submitted that Goodfellow had failed to note that the RFSO also expressly incorporates into its terms a number of standard instructions from PWGSC's Standard Acquisition Clauses and Conditions Manual (SACC Manual) and that, among these incorporated terms, is the direction to bidders that "[t]he lowest or any proposed Standing Offer will not necessarily be authorized." In addition, PWGSC submitted that the RFSO also states that "[s]ubmission of a Standing Offer constitutes acknowledgement that the Offeror has read and agrees to be bound by such instructions". PWGSC contended that, as read together, these provisions of the RFSO provide the following direction: "If a standing offer is awarded under this RFSO, it is to be awarded to the lowest priced responsive bid. However, the Crown reserves the right not to award a standing offer to any bidder and to cancel the solicitation."

PWGSC acknowledged that the bid submitted by Goodfellow, in response to the initial solicitation, was the only responsive bid to the mandatory requirements of the RFSO; however, it argued that it has a fundamental duty to ensure that any proposal that is accepted for a contract or standing offer represents fair value to the Crown. It submitted that, in this instance, an initial examination of Goodfellow's bid raised concerns over its price levels. As a consequence, PWGSC submitted that it undertook a detailed analysis of Goodfellow's bid, comparing the item prices proposed to the item prices then currently in effect under the existing standing offer for the same services. It further submitted that, in consultation with DND, it had concluded that Goodfellow's prices were far in excess of the existing prices and would not provide fair value to the Crown. Accordingly, pursuant to the terms of the RFSO, PWGSC did not authorize Goodfellow's bid for the standing offer.

According to PWGSC, Goodfellow knew on July 10, 2003, that PWGSC had serious concerns about the price levels offered in its bid. PWGSC further submitted that, in that context, Goodfellow responded immediately to the fax from PWGSC on July 18, 2003, by contacting PWGSC to express its objections. According to PWGSC, Goodfellow understood on July 18, 2003, that the solicitation had been cancelled and retendered. PWGSC submitted that Goodfellow declined to participate in the retender process, being of the view that PWGSC was obliged to accept its proposal in the initial solicitation.

Finally, PWGSC submitted that, in accordance with the principles set out by the Federal Court of Appeal in *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*,⁵ the Crown should be awarded its costs in this matter.

Goodfellow's Position

Goodfellow argued that it was subjected to discrimination since it had submitted a technically responsive proposal, which was the only technically responsive proposal. It submitted that PWGSC had arbitrarily determined that its prices were too high. Goodfellow submitted that the process was a competitive process and that its prices reflected that situation.

5. 2003 FCA 199.

In its response to the GIR, and regarding the provisions of the RFSO, Goodfellow contended that the “Basis of Selection” clause, which was specifically added to the solicitation, carries more weight than the “Submission of Offers” clause in the SACC Manual and that the inclusion of the “Basis of Selection” clause in fact superseded the SACC Manual clause.

Regarding PWGSC’s argument that Goodfellow refused the opportunity to respond to its concerns about high prices,⁶ Goodfellow argued that the opportunity was not in fact refused. According to Goodfellow, it reviewed the prices and it determined that the prices had to remain as originally submitted, as the solicitation had too many unknown variables to allow a change in pricing. In addition, Goodfellow submitted that PWGSC’s request was simply to lower all prices and that there was no indication as to which prices were considered too high or by what amount. It also submitted that there was no offer to negotiate or discuss the requirement or the prices.

According to Goodfellow, it definitely did not understand that its bid had not been accepted, that the initial solicitation had been cancelled and retendered, and that it was required to submit a new bid. Goodfellow argued that PWGSC had not informed it of the cancellation either verbally or in writing. According to Goodfellow, it was acting under the premise that (a) the initial solicitation was still valid, as it had not been cancelled, nor was any notice given indicating this to be the case; (b) this was not a retender, but rather an attempt by PWGSC to get Goodfellow to submit lower prices for the existing solicitation; and (c) this was not a retender, as Goodfellow thought that all solicitations under the *AIT* were to be tendered using MERX. Goodfellow submitted that, according to its experience, there is a formal process for cancelling submissions, for example, posting on MERX.

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(2) of the *AIT* provides:

A call for tenders shall be made through one or more of the following methods:

- (a) the use of an electronic tendering system that is equally accessible to all Canadian suppliers;
- (b) publication in one or more predetermined daily newspapers that are easily accessible to all Canadian suppliers; or
- (c) the use of source lists, provided that, in respect of any source list:
 - (i) registration on the source list is consistent with Article 504;
 - (ii) all registered suppliers in a given category are invited to respond to all calls for tenders in that category; and
 - (iii) a supplier that meets the conditions for registration on the source list is able to register at any time.

6. GIR, Part III, para 10.

Article 506(6) of the *AIT* provides that, “[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The 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.”

Article 506(10) of the *AIT* provides:

An entity that uses a source list shall:

- (a) include information in its policies, procedures and practices describing the circumstances and manner in which the source list is used and any qualification criteria that a supplier must meet in order to register on the source list;
- (b) provide written confirmation of registration to any supplier that requests registration on the source list or indicate the qualification criteria that were not met; and
- (c) on request by any Party, provide that Party with the tender notice and the list of suppliers that will be invited to bid on a specific tender.

The RFSO provides, under the heading “Basis of Selection”, that the “lowest priced responsive bid will be recommended for award of a contract or issuance of a standing offer, as the case may be.” The RFSO also provides, under the heading “Liability of the Crown”, that a standing offer “does not oblige the Crown to authorize or order any goods or services whatsoever or to spend the estimated expenditures or any monies whatsoever.” In addition, the RFSO incorporates by reference the instructions set out in Part A of the standard instructions. Moreover, in this regard, the RFSO provides that the submission of a standing offer constitutes an acknowledgment that the offeror has read and agrees to be bound by such instructions. Section 4 of Part A of the standard instructions provides that PWGSC reserves the right to reject any offer. Section 5(1)(a) of Part A of the standard instructions indicates that an RFSO is normally obtained by offerors through the Government’s Electronic Tendering Service, provided by MERX. Section 6(2) of Part A of the standard instructions also provides that the “lowest or any proposed Standing Offer will not necessarily be authorized.”

Goodfellow contended that the “Basis of Selection” clause carries more weight than section 6(2) of Part A of the standard instructions, since it was specifically added to the RFSO, and that it therefore superseded that section. However, the Tribunal is of the view that the two clauses and section 4 of Part A of the standard instructions can be read together and reasonably be interpreted to mean that, if a standing offer is issued pursuant to the RFSO, it is to be issued to the lowest priced responsive bid, but that the Crown need not issue a standing offer to any bidder. In the Tribunal’s view, the clauses refer to different issues: one is with respect to which bid will be recommended for issuance of a standing offer; the others concern the authorization or rejection of standing offers. Accordingly, in the Tribunal’s opinion, the lowest priced responsive bid is to be recommended, but not necessarily authorized, in much the same way that, pursuant to the RFSO, PWGSC need not make any expenditures against the standing offer, if it is authorized.

The Tribunal is satisfied that Goodfellow’s proposal was the lowest priced and only responsive bid to the initial solicitation. Given its concern that Goodfellow’s bid did not constitute “fair value” to the Crown, PWGSC did not issue the standing offer to Goodfellow. PWGSC arrived at this conclusion by comparing Goodfellow’s prices to those then in place under the incumbent supplier’s standing offer. After soliciting new bids, the standing offer was issued on July 31, 2003, to Britannia Cleaners. In this context, the

Tribunal must decide if PWGSC's determination that Goodfellow's bid did not constitute fair value to the Crown, if PWGSC's decision not to issue the standing offer to Goodfellow and if the manner in which the standing offer was issued to Britannia Cleaners were consistent with the criteria of the RFSO and the requirements of the *AIT*.

The Tribunal notes that PWGSC, in cancelling the procurement, purported to rely on section 6(2) of Part A of the standard instructions, which states that the "lowest or any proposed Standing Offer will not necessarily be authorized." However, the Tribunal must read this clause in the context of the entire RFSO, including the "Basis of Selection" clause, and finds that section 6(2) only allowed PWGSC not to proceed with an authorization, i.e. not to buy any dry cleaning services. Nothing in section 6(2) or in section 4 of Part A of the standard instructions expressly authorized PWGSC to cancel and retender the solicitation. Moreover, the rest of the RFSO is silent on the issue of cancellation and retender.

The Tribunal notes PWGSC's submission that PWGSC has an obligation to ensure that a potentially successful proposal represents fair value to the Crown. The Tribunal is aware that the Treasury Board Contracting Policy addresses the issue of determining fair value to the Crown when only one valid bid is received.⁷ However, this policy and related procedures, intended as direction to the contracting authority, were not incorporated into the RFSO. In other words, as also alluded to in Goodfellow's e-mail of August 1, 2003, to PWGSC, the RFSO makes no mention of fair value to the Crown, nor does it publish the criteria by which fair value to the Crown would be determined. In this connection, the Tribunal is of the view that, pursuant to Article 506(6) of the *AIT*, PWGSC is required to clearly identify in the RFSO what criteria will be used to determine whether prices represent fair value to the Crown and, indeed, whether fair value to the Crown is itself a criterion. The evaluation criteria and the methods of weighing and evaluating them must be clearly identified in the bid documents and not introduced in a subsequent process or in an *ad hoc* manner, such as was done in this case. Therefore, the Tribunal finds that, contrary to Article 506(6) of the *AIT*, the RFSO failed to provide for the cancellation and retender of the initial solicitation, it failed to clearly identify fair value to the Crown as a criterion that would be used in the evaluation of offers, and it also failed to identify the methods of evaluating fair value to the Crown.

Moreover, the Tribunal finds that Goodfellow was not properly informed that the RFSO was cancelled and sent directly to a number of suppliers, including some that had not submitted bids in the initial solicitation. The Tribunal notes that Goodfellow indicates in its letter of August 13, 2003, that it only found out that the RFSO was being "retendered" when it received a fax on July 18, 2003, to which was attached a copy of what appears to the Tribunal to be the draft RFSO, indicating a closing date of June 26, 2003 (rather than June 30, 2003, as indicated in the solicitation issued on June 12, 2003). The Tribunal also notes that this was subsequent to PWGSC's attempt to have Goodfellow lower its prices and, in the Tribunal's view, could reasonably have been understood by Goodfellow as being part of a continuing effort by PWGSC directed only at Goodfellow. Therefore, the Tribunal also finds that PWGSC did not comply with Article 506(2) of the *AIT*. Of note is PWGSC's departure from the process that it had followed for the initial solicitation as outlined in Part A of the standard instructions incorporated into the RFSO. Moreover, the Tribunal is not satisfied that the source list PWGSC claims to have used for retendering the RFSO met the conditions set out in Article 506(10) of the *AIT*.

In light of the foregoing, the Tribunal determines that Goodfellow's complaint is valid.

7. Article 10.8.9 of the Treasury Board Contracting Policy.

Goodfellow requested, as a remedy, that the Tribunal recommend that PWGSC cancel the standing offer issued to Britannia Cleaners and issue a standing offer to Goodfellow based on its response to the RFSO. In the alternative, Goodfellow requested that the Tribunal recommend that PWGSC compensate it in an amount equal to the profit that it would have made during the period of the standing offer including option years had it been issued a standing offer. In addition, Goodfellow requested its costs incurred in preparing and proceeding with the complaint.

The Tribunal considered all the circumstances relevant to this procurement, including those outlined in subsection 30.15(3) of the *CITT Act*, and finds no reason to believe that PWGSC was not acting in good faith. However, PWGSC's methods were seriously flawed. PWGSC subverted the whole competitive solicitation process by cancelling the RFSO and by using procedures and criteria that either were not disclosed in the RFSO or were inconsistent with the requirements of the *AIT*. Therefore, given the seriousness of the deficiencies in the procurement process and the degree to which Goodfellow and the integrity and efficiency of the competitive procurement system were prejudiced in this case, and pursuant to subsection 30.15(2) of the *CITT Act*, the Tribunal recommends that the standing offer issued to Britannia Cleaners resulting from the July 18, 2003, solicitation be cancelled and that PWGSC issue a standing offer to Goodfellow based on its response to the initial solicitation, which closed on June 30, 2003. The Tribunal did not recommend the cancellation and retender of the procurement because such a recommendation would not adequately remedy the prejudice suffered by Goodfellow in this case.

Further to its request in this regard, the Tribunal awards Goodfellow its reasonable costs incurred in preparing and proceeding with its 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 PWGSC cancel the standing offer issued to Britannia Cleaners resulting from the solicitation issued on July 18, 2003, and issue a standing offer to Goodfellow based on its response to the initial solicitation, which closed on June 30, 2003.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Goodfellow its reasonable costs incurred in preparing and proceeding with the complaint.

Richard Lafontaine
Richard Lafontaine
Presiding Member