



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2006-019

Pelican Products, Inc. (Canada)

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Tuesday, October 17, 2006*

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IN THE MATTER OF a complaint filed by Pelican Products, Inc. (Canada) 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*.

**BETWEEN**

**PELICAN PRODUCTS, INC. (CANADA)**

**Complainant**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT  
SERVICES**

**Government  
Institution**

**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.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Pelican Products, Inc. (Canada). The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Serge Fréchette  
Serge Fréchette  
Presiding Member

Susanne Grimes  
Susanne Grimes  
Acting Secretary

Tribunal Member:	Serge Fréchette, Presiding Member
Director:	Marie-France Dagenais
Senior Investigator:	Cathy Turner
Counsel for the Tribunal:	Nick Covelli
Complainant:	Pelican Products, Inc. (Canada)
Government Institution:	Department of Public Works and Government Services
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## STATEMENT OF REASONS

### COMPLAINT

1. On July 25, 2006, Pelican Products, Inc. (Canada) (Pelican) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement (Solicitation No. W0002-07CS02/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of storage and transport cases.

2. Pelican alleged that PWGSC accepted a bid to supply storage and transport cases from Amcan Technologies Incorporated (Amcan) involving a case that was a different size from that of the item specified in PWGSC's Request for Proposal (RFP). Pelican requested, as a remedy, that the Tribunal recommend that PWGSC allow Pelican the opportunity to provide a quote of its own for the alternate-sized case that was offered by Amcan.

3. On July 28, 2006, 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*.<sup>2</sup>

4. On July 31, 2006, PWGSC informed the Tribunal that a contract had been issued to Amcan. On August 22, 2006, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> Pelican did not file any comments on the GIR.

5. 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, in accordance with rule 25 of the *Rules*, disposed of the complaint on the basis of the written information on the record.

### PROCUREMENT PROCESS

6. According to PWGSC, the RFP was issued on June 21, 2006, with a bid closing date of July 7, 2006. PWGSC submitted that, in response to the RFP, 11 proposals were received.

7. While the RFP identified DND's requirements by reference to Pelican model numbers, it advised bidders that equivalents to the specified products would be accepted. According to PWGSC, on July 7, 2006, a preliminary evaluation was conducted to ensure that the 11 proposals satisfied the contractual mandatory requirements (as opposed to the technical requirements) of the RFP. PWGSC submitted that financial proposals were thereafter calculated using the bidders' proposed unit prices and the unit quantities specified in the RFP.

8. According to PWGSC, the technical evaluation of the lowest-priced proposal was completed by the DND technical authority on July 10, 2006, and the proposal, which proposed equivalent products to the specified Pelican products, was found to be compliant. On July 11, 2006, PWGSC awarded a contract to Amcan.

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

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

3. S.O.R./91-499 [*Rules*].

9. On July 12, 2006, Pelican filed an objection with PWGSC regarding the contract award to Amcan. On July 17, 2006, PWGSC provided a response to Pelican and indicated that the items offered by Amcan were acceptable. On July 25, 2006, Pelican filed its complaint with the Tribunal.

## POSITIONS OF THE PARTIES

### Pelican's Position

10. Pelican submitted that one of the three cases proposed by Amcan neither meets nor is fully interchangeable with Pelican case model No. 1660, item 2 of the RFP. According to Pelican, the product proposed by Amcan is smaller than the Pelican model. Pelican also submitted that Amcan does not supply a case organizer that is an alternate to Pelican organizer model No. 1659, item 4 of the RFP.

### PWGSC's Position

11. PWGSC submitted that the RFP allowed bidders to propose products equivalent to the specified Pelican products. PWGSC submitted that an equivalent product need not be identical in all respects to the specified product to which it must be equivalent and that to require otherwise would turn the procurement into a "no substitute" procurement, in breach of the applicable trade agreements.

12. PWGSC submitted that the technical authority's assessment of equivalence properly involved more than a comparison of the physical dimensions of the competing cases and that dimensional differences between the cases are not necessarily determinative of equivalence where the other features of form, fit, function and quality are equal. According to PWGSC, the technical authority was satisfied that the technical and product literature included with Amcan's proposal showed that its proposed products met the mandatory performance criteria specified in item 2 of the RFP because they were equivalent in form, fit, function and quality to the specified Pelican products.

13. PWGSC further submitted that Amcan does indeed supply a case organizer, as required by item 4 of the RFP.

14. Finally, PWGSC requested its costs incurred in responding to the complaint.

## TRIBUNAL'S ANALYSIS

15. 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, are the *Agreement on Internal Trade*<sup>4</sup> and the *North American Free Trade Agreement*.<sup>5</sup>

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4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.intrasec.mb.ca/index\\_en/ait.htm](http://www.intrasec.mb.ca/index_en/ait.htm)> [AIT].

5. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [NAFTA].

16. Article 506(6) of the *AIT* provides the following:

In 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.

17. With respect to the tender documentation, Article 1013(1) of *NAFTA* reads as follows:

1. . . . The documentation shall also include:

. . .

(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders . . . .

18. Article 1015(4)(d) of *NAFTA* provides that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation . . . .”

19. In *Northern Lights Aerobatic Team, Inc.*,<sup>6</sup> the Tribunal stated the following:

. . .

51. A procuring entity will satisfy its obligations under these provisions [Article 506(6) of the *AIT* and Article 1015(4)(d) of *NAFTA*] when it makes “. . . a reasonable evaluation, in good faith, of the competing bid documents submitted in response to the [solicitation] . . . .” The Tribunal will interfere only with an evaluation that is *unreasonable*.

52. In *Law Society of New Brunswick v. Ryan*, referring to the Supreme Court of Canada’s earlier decision in *Canada (Director of Investigation and Research) v. Southam Inc.*, Iacobucci J., stated as follows:

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).

In the Tribunal’s opinion, the same principle applies with respect to the Tribunal’s review of a procuring entity’s evaluations under the trade agreements. In the past, the Tribunal has noted that it will substitute its judgement for that of evaluators only when the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.

[Footnotes omitted]

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6. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT).

20. With respect to item 2, the RFP states the following: “THESE CASES MUST BE TESTED TO MIL C-4150J (MILITARY STANDARDS), IP-67 (INGRESS PROTECTION) AND ATA (AIR TRANSPORTATION ASSOCIATION)”. The item description also provides a space where bidders can enter their part number and manufacturer name and code. For each of the items requested, the RFP states the following: “LITERATURE MUST BE PROVIDED WITH YOUR PROPOSAL AT BID CLOSING FOR SUBSTITUTE BID ITEMS.” The RFP also contains a reference to clause B3000T, “Equivalent Products”.<sup>7</sup> Thus, the RFP clearly contemplated that cases other than the specified Pelican model could be proposed and accepted, on condition that certain information provided with the bid demonstrated that the proposed case was substitutable for, or equivalent to, the specified Pelican model.

21. There was no dispute between the parties that Amcan proposed a case other than the specified Pelican model. Thus, the issue is whether Amcan’s bid nevertheless satisfied item 2 of the RFP in terms of providing information that reasonably led PWGSC to conclude that the case proposed by Amcan was substitutable for, or equivalent to, the specified Pelican model.

22. According to the evidence, Amcan’s proposal met all the information requirements of item 2 of the RFP. It included the model number and brand name of the proposed case. Amcan provided descriptive literature, including complete specifications and features for the case, and background information on the development and advances of the “new generation” of the case. In addition, Amcan provided the requisite test reports.

23. The technical authority was satisfied that this technical and product literature demonstrated that Amcan’s case met or exceeded the specifications listed in MIL C-4150J and IP-67 and complied with the ATA. While the depth and width of Amcan’s case were smaller than those of the Pelican model, the technical authority was satisfied that the foam inserts could be customized to fit the equipment that would be stored and transported in it. It was on this basis that the technical authority concluded that Amcan’s case was equivalent in performance to the Pelican case and that it therefore complied with the performance criteria of item 2 of the RFP. There is no evidence that the assessment is unreasonable, e.g. that the technical authority did not apply itself in evaluating Amcan’s proposal, that it ignored vital information, that it wrongly interpreted the scope of the requirement, that it based its assessment on undisclosed criteria that it otherwise failed to conduct the assessment in a procedurally fair way. On the contrary, the evidence suggests that the technical authority carefully assessed Amcan’s proposal in good faith. Therefore, the Tribunal will not second-guess the technical authority’s judgement.

24. As for item 4 of the RFP, the evidence is clear that Amcan did indeed offer a case organizer.

25. Accordingly, the Tribunal finds that PWGSC did not breach Article 506(6) of the *AIT* or Articles 1013(1) and 1015(4)(d) of *NAFTA*.

26. In light of the foregoing, the Tribunal determines that Pelican’s complaint is not valid.

27. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal’s preliminary view is that this complaint case has a complexity level corresponding to the first level of complexity referred to in

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7. GIR, exhibit 4.



Appendix A of the *Guideline* (Level 1). The procurement was of low complexity, as it involved the provision of off-the-shelf items. The complaint itself was of medium complexity, as it dealt with the issue of equivalent products. The complaint proceedings were of low complexity and involved no motions and no interveners. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

#### **DETERMINATION OF THE TRIBUNAL**

28. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

29. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Pelican. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Serge Fréchette  
Serge Fréchette  
Presiding Member