



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2007-009

Information Builders (Canada) Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Monday, July 16, 2007*

*Reasons issued
Tuesday, July 31, 2007*

TABLE OF CONTENTS

DETERMINATION OF THE TRIBUNAL.....i

STATEMENT OF REASONS1

 COMPLAINT1

 PROCUREMENT PROCESS.....2

 TRIBUNAL’S ANALYSIS.....2

 Remedy.....5

 Costs5

DETERMINATION OF THE TRIBUNAL5

IN THE MATTER OF a complaint filed by Information Builders (Canada) 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*.

BETWEEN

INFORMATION BUILDERS (CANADA) INC.

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 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 conduct a competitive procurement process, in accordance with the applicable trade agreements, for the requirement that is the subject of this complaint, the Request for Proposal to be published no later than 90 days after the issuance of this determination. Should the competitive process result in a supplier other than Cognos Inc. prevailing, the Canadian International Trade Tribunal also recommends that the current contract with Cognos Inc. be terminated and a new contract be awarded.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Information Builders (Canada) Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. 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 the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

James A. Ogilvy

James A. Ogilvy
Presiding Member

Hélène Nadeau

Hélène Nadeau
Secretary

The statement of reasons will be issued at a later date.

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STATEMENT OF REASONS

COMPLAINT

1. On April 17, 2007, Information Builders (Canada) Inc. (IBI) 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 a procurement (Solicitation No. A0416-065014/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Indian Affairs and Northern Development (DIAND) for the provision of business intelligence software.

2. IBI alleged that there had been a violation of the *Agreement on Internal Trade*,² the *North American Free Trade Agreement*³ and the *Agreement on Government Procurement*,⁴ as there was no basis for exercising limited tendering for this requirement. IBI submitted that PWGSC incorrectly dismissed information that IBI provided when it challenged the Advance Contract Award Notice (ACAN) that announced this procurement and that, as a result, PWGSC incorrectly dismissed IBI's challenge of the ACAN.

3. IBI requested, as a remedy, that the Tribunal recommend that PWGSC terminate the contract with the successful bidder and issue a competitive solicitation. In the alternative, IBI requested compensation for lost opportunity, which would include lost revenue and profits from the sale of software licences and associated software maintenance and support services, as well as subsequent installation, implementation, education and professional consulting services. IBI requested that such compensation should also include interest on the above lost revenue amounts from the date of the award of the ACAN to the actual compensation payment date. IBI further requested its reasonable costs incurred in preparing its complaint, plus interest on the preparation costs from the date on which such costs were incurred to the actual date of reimbursement.

4. On April 25, 2007, 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*.⁵

5. On April 27, 2007, PWGSC informed the Tribunal that a contract had been awarded to Cognos Inc. (Cognos). On May 7, 2007, the Tribunal granted intervener status to Cognos. On May 22, 2007, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁶ On June 1, 2007, IBI filed its comments on the GIR. On June 13, 2007, PWGSC filed a submission on IBI's comments on the GIR. On June 18, 2007, Cognos filed its comments on IBI's and PWGSC's submissions. On June 20, 2007, IBI filed its response.

6. 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 written information on the record.

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.ait-aci.ca/index_en/ait.htm> [AIT].

3. *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].

4. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].

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

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

PROCUREMENT PROCESS

7. On March 14, 2007, PWGSC published an ACAN stating its intention to award a contract to Cognos. On March 27, 2007, IBI submitted a Statement of Capabilities to PWGSC advising that it could provide the goods and services required. The ACAN closed on March 29, 2007.

8. On March 30, 2007, PWGSC informed IBI that it was not compliant with the requirements stated in the ACAN and that it intended to contract with Cognos. On the same day, the contract was awarded to Cognos.⁷ On April 3, 2007, IBI made an objection to PWGSC regarding its decision to declare IBI's proposal non-compliant. On April 4, 2007, PWGSC advised IBI that it would respond to its concerns shortly. According to PWGSC, on April 16, 2007, it advised IBI that it was in the process of trying to arrange a time to have a demonstration of IBI's proposed solution.

9. On April 17, 2007, IBI filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

10. 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 *AIT*, *NAFTA* and the *AGP*.

11. Article 506(12) of the *AIT* reads as follows:

Where 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:

- (a) to ensure compatibility with existing products, to recognize exclusive rights, such as exclusive licences, copyright and patent rights, or to maintain specialized products that must be maintained by the manufacturer or its representative;
- (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;

...

12. Articles 1016(2)(b) and 1016(2)(d) of *NAFTA* read as follows:

An entity may use limited tendering procedures in the following circumstances and subject to the following conditions, as applicable:

- (b) where, for works of art, or for reasons connected with the protection of patents, copyrights or other exclusive rights, or proprietary information or where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

7. A Contract Award Notice was posted on MERX, Canada's electronic tendering service, on April 9, 2007.

(d) for additional deliveries by the original supplier that are intended either as replacement parts or continuing services for existing supplies, services or installations, or as the extension of existing supplies, services or installations, where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services, including software to the extent that the initial procurement of the software was covered by this Chapter.

13. Articles XV(1)(b) and XV(1)(d) of the *AGP* read as follows:

The provisions of Articles VII through XIV governing open and selective tendering procedures need not apply in the following circumstances, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of the other Parties or protection to domestic producers or suppliers:

(b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

(d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies, or installations, or as the extension of existing supplies, services, or installations where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services.

14. PWGSC submitted that a prime operational requirement was for DIAND to provide appropriate business intelligence tools for the use of DIAND database resources in the hands of First Nations users in remote communities. The limited bandwidth and uncertain reliability of the communication links between DIAND's database and those communities required a particular type of design. PWGSC submitted that the solution being offered by IBI did not meet the mandatory requirements of the ACAN.

15. IBI contends that its software solution meets all the requirements identified in the ACAN. IBI submitted that the ACAN did not explicitly identify all the technical and operational criteria used by PWGSC to determine, based on the information provided in its Statement of Capabilities, that IBI was not compliant.

16. The central question in this case is whether PWGSC and its client department, DIAND, were compliant with the above provisions of the trade agreements in proceeding with a limited tendering procurement, particularly following IBI's challenge of the ACAN. In the Tribunal's view, they were not.

17. The onus is on the government institution to establish and justify the need to utilize limited tendering procedures. In its decision in *Sybase Canada Ltd.*,⁸ the Tribunal stated the following:

... It is the Tribunal's view that exceptions to the open competitive process should be read narrowly. Where evidence is presented to suggest that a limited tendering procedure is not justified, the onus will fall upon government departments to show that the use of these exceptions is, in fact and in law, appropriate. As stated in a decision by the Procurement Review Board of Canada, *Econaire (1984) Inc. and Environmental Growth Chambers, Ltd.*: "... It is not for the complainant to demonstrate any case for a competitive solicitation. Competitive solicitations are the norm - the standard requirement of the rule. The true requirement is for the government to demonstrate the case for a sole sourcing." ...⁹

[Footnotes omitted]

8. *Re Complaint Filed by Sybase Canada Ltd.* (30 July 1997), PR-96-037 (CITT) [*Sybase*].

9. *Sybase* at 9.

18. Requirements should be expressed in terms of results required, not solutions. In a true competitive environment, bidders have the opportunity to offer solutions which may differ in features and approaches, as well as in price. When it chooses the restrictive environment of a limited tendering process, the government institution must have reasons that fall within the narrow parameters of the trade agreements that allow for recourse to a single source of supply. When this approach is followed, an ACAN must satisfy the substantive scrutiny required by the trade agreements in order to withstand a challenge.

19. The Tribunal is satisfied that, in the first instance, PWGSC gave some consideration to IBI's challenge, as it acknowledged the challenge and engaged in an exchange with IBI. However, in the Tribunal's view, this exchange was ultimately inadequate and resulted in the denial of due process to IBI. Given that the valid grounds for the government institution to utilize limited tendering procedures are narrowly defined in the trade agreements, the threshold for success in a challenge should be relatively low. It is clear that IBI was convinced that it could offer a workable solution but it was not given adequate consideration. The ACAN closed on March 29, 2007, and the contract was awarded on the following day. The Tribunal notes that the rules established by PWGSC allow a supplier until the closing date of an ACAN to challenge it. Therefore, the period of review for a challenge may extend beyond that closing date. It appears that PWGSC moved with undue haste when it awarded the contract even though IBI's challenge was still current. While the successful challenge of an ACAN would not entail any right on the part of the challenger to be retained as the winning bidder, it would result in shifting the procurement process from the limited or sole-source tendering sphere to one that is competitive. When properly applied, this measure provides an opportunity to the challenger and protects the competitive process.

20. The Tribunal notes that an ACAN is, by its nature, an instrument that often provides only a short description of the specific requirement for which a solution is being sought. Therefore, a challenge to an ACAN by a potential supplier that views its alternative solution as being viable cannot be expected to contain the same level of detail as would its response to a competitive Request for Proposal (RFP). In the present instance, the Tribunal considers that PWGSC and DIAND moved to deny IBI's challenge on the basis of information whose incompleteness is understandable, given that it was provided in response to an ACAN, not an RFP.

21. The Tribunal finds that IBI's claim to be able to offer an alternative solution was sufficiently compelling to require that it be given consideration in a competitive environment. The Tribunal is of the view that the position taken by PWGSC and DIAND that "cubes" were required for a successful solution indicates that they had in mind a predetermined solution rather than simply a required outcome. It is conceivable that such an outcome might have been achieved through an alternative solution that did not use "cubes", such as the solution that IBI purported was equivalent to Cognos's solution. The Tribunal is also of the view that the conclusion of PWGSC and DIAND that IBI's solution would rely on third-party software for its execution prejudged IBI's solution without giving IBI adequate opportunity to demonstrate whether its solution would or would not require third-party software.

22. The challenger in this instance, having established that it believed itself to be capable of responding, in at least an alternative manner, to the operational needs that gave rise to the procurement, was not afforded the opportunity to respond, in a competitive environment, to a fully detailed statement of requirements. Accordingly, the Tribunal finds that PWGSC breached Article 506(12) of the *AIT*, Articles 1016(2)(b) and 1016(2)(d) of *NAFTA* and Articles XV(1)(b) and XV(1)(d) of the *AGP*.

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

Remedy

24. In recommending a remedy, the Tribunal is required, under subsection 30.15(3) of the *CITT Act*, to consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including the following:

...

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

25. In determining the remedy to recommend in this case, the Tribunal considered the circumstances relevant to the procurement, including the above-mentioned considerations. The major factor applicable to this case is that a potential supplier was not given the opportunity to compete for the work by providing a solution to DIAND's operational needs.

26. Accordingly, the Tribunal recommends that PWGSC conduct a competitive procurement process, in accordance with the applicable trade agreements, for the requirement that is the subject of this complaint, the RFP to be published no later than 90 days after the issuance of its determination. Should the competitive process result in a supplier other than Cognos prevailing, the Tribunal also recommends that the current contract with Cognos be terminated and a new contract be awarded.

Costs

27. The Tribunal awards IBI its reasonable costs incurred in preparing and proceeding with 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 second level of complexity referred to in Appendix A of the *Guideline*. The procurement was moderately complex, as it involved the provision of business intelligence software licences and maintenance. The complaint was of medium complexity, as it dealt with matters of limited tendering and the use of an ACAN. The complaint proceedings were also moderately complex, as there was one intervener and additional submissions from parties were filed. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$2,400.

DETERMINATION OF THE TRIBUNAL

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

29. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC conduct a competitive procurement process, in accordance with the applicable trade agreements, for the requirement that is the subject of this complaint, the RFP to be published no later than 90 days after the issuance of its determination. Should the competitive process result in a supplier other than Cognos prevailing, the Tribunal also recommends that the current contract with Cognos be terminated and a new contract be awarded.

30. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards IBI its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. 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 the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

James A. Ogilvy
James A. Ogilvy
Presiding Member