



IN THE MATTER OF:

**A Complaint
By Trenton Textile Mills Limited
of 48 Film Street
Trenton, Ontario**

**Board File No:
F91PRF6621-021-0024**

Complaint upheld

AND IN THE MATTER OF:

**The Free Trade Agreement
Implementation (FTAI) Act, Part II,
Sec. 15, S.C. 1988, Ch. 65.**

September 20, 1991

DETERMINATION BY THE BOARD

This is the third recent complaint by Trenton Textile Mills Limited (Trenton) against the Department of Supply and Services (DSS) because of contracts for fabric awarded on a sole source basis for use in the production of furniture by CORCAN Industries (CORCAN), of the Correctional Service of Canada (CSC).¹

Trenton contends that the contract awardee is not the only source for this fabric, and they "*would like to be considered as a supplier for this and other fabrics which may now be listed as sole source*", and they also seek any other form of compensation to which they may be entitled.

¹ The second complaint (Board File D91PRF6621-021-0021) involved the procurement of fabric for the production of ergonomic chairs on a sole source basis. The complaint was upheld. The first complaint (Board File D91PRF6621-021-0020) involved the procurement of the same type of fabric but the complaint could not be accepted by the Board because the value of the procurement exceeded the Board's jurisdiction under the FTAI Act.

The contract was a Standing Offer Agreement, awarded to Newlands Textile Inc. (Newlands) of Cambridge, Ontario in late November 1990, and it came to the complainant's attention through a Contract Award Notice (CAN) published in the Government Business Opportunities (GBO) issue of July 12, 1991. (The Government is required to publish notices of these contracts within 60 days after they are awarded, according to the terms of the GATT Procurement Code which is incorporated in the Free Trade Agreement (FTA)). The complaint was filed on July 23, 1991. The value of the Standing Offer was \$109,225 which brought it within the Board's monetary 'window' of jurisdiction under Section 15 of the FTAI Act.

The Investigation

The allegations of this complaint, the government's response to those allegations and the complainant's comments on the government's response were investigated by means of interviews and the examination of documents.

A number of individuals were interviewed in person and/or by telephone to confirm various statements made and/or contained in the documentation. These include:

- Mr. Pat Kitchin, DSS, Kingston Purchasing Office (Contracting Officer);
- Mrs. Lise Rieger, DSS, Central Directorate (Program Advisor);
- Mr. Garry Sly, CSC, CORCAN Industrial Operations (IO) (Regional Manager, Production Planning and Control);
- Mr. John Lancaster, CSC, CORCAN (IO) (Senior Manufacturing Technologist);

Following a new procedure, of which notice was given by the Board in the GBO during the week of February 18, 1991, a copy of the Preliminary Investigation Report was sent to both the governmental institution and the complainant for their comments, prior to submission to the Board. Both these parties submitted brief written comments, and these have been added to the Investigation Report, and taken into account by the Board in reaching this determination.

As well, the report of this investigation contains a number of other appendices relating to material and documents deemed relevant by the investigative staff as part of the basis of that report. Particular reference is

not made to all of these supporting documents in this determination, but they have been made available to the parties, and, subject to the provisions of the Access to Information Act, they are available to any other person.

Because the investigation produced sufficient information to enable the Board, in its opinion, to resolve the issues raised in this complaint, it was determined that no formal hearing was required in the present case. The Board, in reaching its conclusions, has considered the report of its investigative staff and the comments thereon by the parties, and has made its findings and determinations on the basis of the facts disclosed therein, the relevant portions of which are mentioned in this determination.

DSS, in responding to the Board's Preliminary Investigation Report, requested the Board to refer to their comments on Trenton's previous complaint (Board File No: D91PRF6621-021-0021).

Among these earlier comments is the following paragraph:

"If the Board feels that this matter turns on the basis of the procedures followed by the Crown to establish its needs, the Board is respectfully requested to hold a hearing at which the government can adduce evidence and arguments in support of the procedures they follow."

And, as with that earlier case, it is the Board's view that the issue here is not how the government chose to establish its needs, but whether it followed proper procedures in filling them. To adjudicate that issue, the Board believes there is ample and clear evidence, and there is no need to put either party to the trouble and expense of a hearing.

The Procurement

CORCAN has been manufacturing several different lines of upholstered furniture over the past 15 years, including the Tuffy II furniture line (see Investigation Report (I.R.) Appendix 2). During that period, CORCAN has bought fabrics from several different suppliers, including both Trenton and the contract awardee, Newlands. CORCAN's operations are said to be a mid-size furniture production facility using state-of-the-art product lines demanding that fabric specifications and selection be on the leading edge of the industry. CORCAN sells to federal departments, provincial and municipal entities, agencies and non-profit organizations. It

develops its own product lines and can also develop customized products. In order to manufacture its products, CORCAN buys the components referred to as raw materials (see I.R. Appendix 3) through DSS. The drawings, plans and specifications of any given product are prepared by the central administration in Ottawa, after market studies identifying popular trends and colours have been conducted. The components are listed in the CORCAN National Raw Material Coding List by brand name, item description and CORCAN code as appropriate.

The Tuffy II line of furniture is manufactured at the Collins Bay and Kingston penitentiaries in Kingston, Ontario. The purchasing of the raw materials is done locally, by the DSS Kingston Purchasing Office on behalf of the CSC Ontario Regional Headquarters. Tuffy II furniture is also manufactured at penitentiaries in CSC's Atlantic and Pacific Regions.

The fabric, which is considered a raw material, must meet the specifications and standards developed by the CORCAN central administration. To select the fabric, CORCAN contacts sources of supply known to them and asks these firms to submit samples of fabrics which would meet the specifications and standards. It was also noted in the Governmental Institution Report (GIR) (see I.R. Appendix 14) that any supplier may submit its products to CORCAN for evaluation. Depending on the product, prototypes are then tested in offices and, according to the senior manufacturing technologist, the selection is made by CORCAN's marketing group based on various factors including taste, personal preferences, wearability, colour and texture.

Although the line evolves as a result of new technology and improvements, according to the acting Assistant Director of CORCAN's Industrial Operations, unless complaints related to the performance of the fabric are received or a change in the industry trends occur, CORCAN's general practice has been to not change the raw material it selected in order to offer consistency in texture, pattern and colours.

In fact, on this subject, the government's comments on the Board's Investigation Report seek to make this point directly. They observe that the complainant knew about CORCAN's practice, and about their National Raw Material Coding List because they had submitted sample materials for evaluation by CORCAN some time ago -- perhaps as early as May 1990 --and that their sample was found unacceptable.

A small controversy has developed over this issue, with the complainant saying that they have often sold to CORCAN in the past, that they were never notified that their sample was unacceptable, or even notified that it was tested, and with DSS stating that the notice was oral, and that in those circumstances "*...it was appropriate for the Government not to go to the complainant again.*"

In the final analysis, however, nothing turns directly on this issue because the means by which, and from whom, the government solicits bids for FTA procurements is governed by, and must conform to, the very strict rules set out in the GATT Procurement Code. These are different from the rules the government uses for non-FTA and non-GATT procurements.

And, the means by which the government establishes a standard such as was done here is not unusual or necessarily unfair as long as when it chooses a specific product as a "standard", the essential evaluation criteria are documented and, where trade names are used, "or equivalent" is added to the description for competitive procurement purposes.

The Sole Source Justification

In November of 1990, DSS received a requisition from CSC for 7000 yards of "Picton" fabric in six different colours and 2500 yards of "Mirage" fabric in three different colours. The requisition specified "*Tuffy II upholstery fabric to match existing product lines*", and Newlands was noted as a source for the fabric.

Knowing that a justification for sole sourcing was required, the contracting officer filled out a typed form of "Memorandum to File" (see I.R. Appendix 7) containing a list of 19 statements, which, it appears, were supposed to serve as justifications for concluding that the open tendering provisions of FTA, and its incorporated GATT Code, did not apply to that procurement.²

² While this is not quite what the form says, the Board assumes that this is what the department meant. The form actually says:

"THE PROVISIONS OF THE GATT / FREE TRADE AGREEMENT ON GOVERNMENT PROCUREMENT DO NOT APPLY FOR THE FOLLOWING REASONS:"

Two of these statements that purport to justify sole sourcing were marked as being applicable in this case and the contracting officer and his Acting Manager of Commercial Acquisitions signed the form at the bottom. The two statements were:

"- The products to be supplied are provided by a sole source supplier due to patents or copyrights or other reasons connected with the protection of exclusive rights and no reasonable alternative or substitute exists"; and

"- A specified proprietary product is required for reasons of logistics, where the introduction of a non-standard item would cause operating difficulties or extra costs in maintenance."

The first of these two reasons is a close approximation of Article V:16(b) of the GATT Code which, as part of the FTA, provides that open tendering procedures need not apply in the following condition (provided single tendering (i.e., sole sourcing) is not used with a view to avoiding maximum possible competition...):

"when, for works of art or for reasons connected with protection of exclusive rights such as patents or copyrights, the products can be supplied only by a particular supplier and no reasonable alternative or substitute exists"

No one has anywhere suggested that Newlands claims any exclusive rights, such as patents or copyrights, in its "Picton" or "Mirage" fabrics. These are simply trade names for their products. Other companies may make or allege to make trade matches for these products, and it is specifically claimed by Trenton that their fabric, trade named "Vision", is a trade match for Newlands' "Mirage" fabric. The truth of this claim is not conclusively established (although DSS says that the fabric offered by Trenton in May 1990 was unacceptable to CORCAN), but nowhere does Newlands, or the complainant for that matter, lay claim to any exclusive rights in the design or make-up of their products that are **legally** protected in any way analogous to patents or copyrights. In fact, the Board's investigator has contacted DSS, who in turn confirmed with Newlands that they are not prepared to make any claim for this product based on exclusive legal rights. Accordingly, the Board does not consider this justification to be successfully made out in this case.

The second justification offered, dealing with proprietary products and logistical problems, is not acceptable either. This ground was offered as justifying the sole source procurement conducted in two earlier decisions before this Board (Enconaire/EGC, January 28, 1991, Board Files E90PRF6601-021-0020 and 0021 and Enconaire, February 15, 1991, Board File E90PRF664Y-021-0019) and was rejected because it does not apply to Free Trade procurements. In the earlier of the two cases the Board said:

"When neither a Free Trade nor a GATT procurement is involved, there is a policy recorded at SPM 3002.7(c) which would seem to allow sole sourcing where a "...proprietary product is required for reasons of logistics, where the introduction of a non-standard item would cause operating difficulties or extra costs in maintenance..." This was a policy that, before Free Trade, frequently applied to procurements many of which had values generally in the range that fits into what is now the Free Trade monetary "window" between \$31,000 and \$210,000, and it may shed some light on the way the justifications for sole sourcing are advanced in the GIRs.

However, with the recent advent of Free Trade between Canada and the United States, and the application to such procurements of the GATT Code on Government Procurement, a much more rigorous set of rules governing the suitability and use of single tendering has come into play. This case is a good example of one of the significant differences between the regime that controls Free Trade procurement (and GATT ones), and the regime applicable to other sorts of procurements."

The Board concludes, therefore, that neither of the two reasons offered in the file memo prepared for seeking internal approval for sole sourcing these goods, is acceptable.

But this is not quite the end of the matter.

When, seven months after this sole source contract was awarded, the government published the CAN in the GBO, the notice carried the code reference: "*Sole Source/Fournisseur unique - D*", in which 'D' is a reference to Article V:16(d) of the GATT Code, where another justification for sole sourcing is to be found. Article V:16(d) is summarized for the benefit of suppliers in the Miscellaneous Notices to Suppliers published in the GBO issue of January 25, 1991. Under the heading "*Single Tendering Exceptions*", the following is set out:

"Single tendering procedures may be used as exceptions to the provisions of the Code in the following circumstances, provided that they are not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among foreign suppliers of protection to domestic producers (V.16):

...

- (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 or installations, where a change of supplier would compel an entity to purchase equipment not meeting requirements of interchangeability with already existing equipment (Note: It is understood that "existing equipment" includes software to the extent that the initial procurement of the software was covered by the Agreement.) (V.16(d))"*

This justification was offered for the sole sourcing in the last Trenton complaint, mentioned above. There, the Board noted that the GATT Code provision deals with "parts" and "equipment", not upholstery fabric.

And in this case, as in that one, DSS has attached to their GIR the same CORCAN-prepared memo (of July 10, 1991) setting forth its fabric purchasing history in which the following paragraph appears:

"If Trenton Textiles can supply the fabric to the exact specifications and colours requested, and are willing to maintain inventory, so that no minimum order quantities apply, and replacement fabric is readily available at a competitive price and delivery they should be considered as suppliers. To ensure the quality of the product certification to ISO 9002 or equivalent would also be required."

This makes it plain that even if one were to interpret "parts" and "equipment" to include "fabric", the point is academic since it is clear from CORCAN's Chief Engineer that they would consider other suppliers if they met their stated criteria. Therefore, this reason for sole sourcing (if seriously intended, given that the only reference to it is the CAN published in the GBO and not in the procurement file) is not valid.

And, as a final comment on this issue of the sole sourcing of CORCAN's requirements, the Board believes they had always anticipated change in the supply of their fabrics which could result from competition or other reasons because of the statement which is included in their sales catalogue:

"Specifications are effective at the time of printing. Details of finish, fabric and colour may change without prior notice; please consult your area representative." (see I.R. Appendix 2)

Accordingly, the Board concludes that the complainant prevails in this case, and it will award them their reasonable costs relating to the filing and proceeding with the complaint. Since this was a sole source contract of which they had no knowledge, they had no bid preparation costs. But the Board does not consider that this is a case in which to recommend any other form of compensation.

However, the Board does recommend that DSS and CORCAN review the procurement process for components for CORCAN's production operations so that, where applicable, they meet the requirements of the GATT Code and the FTA.

DETERMINATION

The Board has determined on the basis of its investigation that this procurement by the Department of Supply and Services did not comply with the requirements of Section 17 of the Free Trade Agreement Implementation Act in that it did not provide all potential suppliers equal opportunity to be responsive to the requirement of the procuring entity in the tendering and bidding phase because the requirement was sole sourced on the basis of justifications that were not applicable.

The Board awards the complainant its reasonable costs of filing and pursuing this complaint.

The Board recommends that future requirements for these goods, in similar circumstances, be competed in accordance with the provisions of the Free Trade Agreement.

Gerald A. Berger
G.A. Berger
Chairman
Procurement Review Board of Canada