



IN THE MATTER OF:

**Complaints
By Sweeprite Mfg. Inc.
of 1891 Albert St. N.
Regina, Saskatchewan**

**Board File Nos:
G92PRF66K-021-0005
G92PRF66K-021-0006**

Complaints upheld

AND IN THE MATTER OF:

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

6 May 1992

DETERMINATION BY THE BOARD

Complaints

This determination deals with two complaints involving the procurement of self-propelled street sweepers, one each for the Jasper and Banff National Parks. The complainant, in both cases Sweeprite Mfg. Inc. of Regina, Saskatchewan (Sweeprite), alleged that Environment Canada (Parks), through the Department of Supply and Services (DSS), used "*blatantly restrictive*" specifications for these procurements. Specifically, they stated that the specifications outlined a feature which could only be met by a specific make thereby depriving them of the possibility of being able to bid successfully for this equipment.

The complainant further states: "*This is the second attempt made by Environment Canada Parks through Supply and Services to restrict our company from bidding on a government tender.*"

The complainant met the criteria for filing (subsection 21(1) of the *Procurement Review Board Regulations* (Regulations)). Pursuant to subsection 21(3) of the Regulations, the receipt of the complaints was acknowledged to the complainant.

On February 12, 1992, upon reviewing the complaints, the Board accepted the complaints for investigation as, on their face, they met the criteria for acceptance (subsection 28(1) of the Regulations). Pursuant to paragraph 16(1)(a) of the *Free Trade Agreement Implementation Act* (Act) and subsection 28(2) of the Regulations, Notices of Complaints were published in the Canada Gazette, Part I and Government Business Opportunities (GBO). DSS was officially notified of the complaints on February 12, 1992 and sent copies thereof. Pursuant to paragraph 16(1)(b) of the Act, on February 14, 1992, two Stop Award Orders to postpone the issuance of any contract in relation to these procurements were issued by the Board.

The Investigation

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

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

Mr. Stan Tereshyn, Chief, TY Section; and Ms. Colleen Simpson, Senior Contract Management Officer, DSS Headquarters, National Capital Region; Mr. G.L. Purcell, Manager, and Mr. Richard Tuttosi, Contracting Officer, DSS Calgary District Office.

Mr. Pierre Lessard, Director, Material Management and Administrative Services; Mr. Don Moore, Chief, Program Material Management; Mr. Robert Graham, Chief, Procurement and Administrative Services; Mr. Dave McFadden, Procurement Officer; all from Canadian Parks Service Headquarters, National Capital Region; Ms. Jillian Roulet, (currently) Director, Heritage Resource Conservation, Canadian Parks Service, Western Region (at the time A/Director General, Western Region); Mr. David Edwards, Highway & Sanitation Supervisor, Calgary Parks Service, Jasper National Park.

Mr. Peter Bartosek, Fleet Management Officer, Headquarters, National Capital Region and Mr. Bill Grosvenor, Head, Equipment Management, Western Region, Architectural and Engineering Services for the Department of the Environment (DOE), Department of Public Works (DPW).

Mr. Brent Raddysh, Controller, Sweeprite Mfg. Inc., Regina; and Mr. Ken Hammer, Blackwood Hodge (at the time, agent for FMC, a manufacturer of street sweepers); Mr. Irv Lund, Maran Equipment (agent for Mobil, a manufacturer of street sweepers); and Mr. W.E.J. Wilson, Cubex Limited (agent for Elgin); all of Calgary.

A copy of the Preliminary Investigation Report was sent to DSS and the complainant for their comments. Both parties responded with written replies which were then exchanged between them. These comments have been added to the Preliminary Investigation Report and form part of the Investigation Report as submitted to the Board. As well, supplementary information to the Preliminary Investigation Report was produced at the request of the Chairman. This information has been communicated to the parties and also forms part of the Investigation Report.

The report of this investigation contains a number of appendices relating to material and documents deemed relevant by the investigative staff as part of their 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, 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 these complaints, it was determined that an oral hearing was not required, nor was one requested by either of the parties. The Board, in reaching its conclusions, has considered the report of its investigative staff and the comments made 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.

The Procurement

The Canadian Parks Service is a program within Environment Canada. It is structured in three levels: headquarters (Parks HQ), based in the National Capital Region, and responsible for the coordination of the national aspects of the program; regional offices - in these cases the Western Regional Office (Parks Western) covering parks and sites in Alberta and British Columbia and situated in Calgary; and field level - the individual National Parks and Historical Sites. DPW supplies dedicated units for Architectural and Engineering Services (A&E Services) to DOE Parks at both headquarters and in the regions.

Previous Actions Regarding Jasper National Park Requirement

The undertaking to purchase a street sweeper for Jasper National Park began in 1990 with the identification of a need to replace the existing sweeper. In the fall of 1990, Jasper National Park personnel were given a demonstration of two mechanical type street sweepers. One was a Sweeprite, Model 4400, and one was an Elgin Eagle. A memo dated May 2, 1991, some six months after the event mentioned above [see Investigation Report (I.R.) Appendix 4], describes this demonstration as follows:

In the fall of 1990 we had 2 demonstrations of mechanical type street sweepers. The first demo was a sweep-rite[sic] unit. The demo went well and we were impressed with the operation of their machine and the quality of the cleaning operation. We did express that their machine was much superior to our present machine which even when it was new could not compare to the sweep-rite's performance.

The second demo was put on by Elgin who demonstrated the Elgin Eagle. This machine was fantastic. It picked up heavy gravel build up, large stones, boards and most anything that you would normally avoid with a street sweeper. This extraordinary capability was allowable due to the unique elevator system on the Elgin Eagle. In addition to its pickup capabilities the Eagle has adjustable gauged down pressure on it's [sic] gutter brooms which allows excellent pickup of packed or heavy material from gutters.

This same memo, this time referring to events taking place in the spring of 1991 and commenting on the rental of an Elgin Eagle, then states:

In our opinion the Elgin Eagle by far out performed the sweep-rite. In fact we at present have a new Elgin Eagle working in the Park on a monthly rental and in the 3 weeks we have used it. [sic]

It has picked up nearly as much material off streets and roads in the park as our old sweeper did in an entire year. Definatly [sic] the area is swept much cleaner in 2 passes than our old machine did in 6 to 7 passes.

In the 3 weeks of using the Elgin Eagle it has been in the garage 3 times, twice for servicing and once for a change of gutter brooms. We are very impressed with its performance and reliability.... The Elgin Eagle is the sweeper we want and we are not willing to accept a lesser product.

On October 22, 1990, a specification was drafted by A&E Services Calgary for Parks Western. According to A&E Services Calgary, this specification was built around the Elgin Eagle. A comparison with the Elgin technical literature shows that the majority of detailed requirements are substantially the same. Indeed, the final line in the specification under Miscellaneous Requirements, states "*Sweeper equal to Elgin Eagle, Series F*" (see I.R. Appendix 5). This specification was sent along with a requisition to DSS Edmonton on or around October 22, 1990. However, according to an internal A&E Services Calgary memo, a complaint about the specification was received by DSS Edmonton from Sweeprite. After attempts by DSS Edmonton to have the specification changed, A&E Services Calgary cancelled the requisition and a new one was issued to DSS HQ through Parks HQ.

The new specification, drafted by A&E Services HQ, reflected in more general terms the specification created by A&E Services Calgary. This specification, along with the requisition, was received by DSS HQ on February 11, 1991. The requirement was advertised in the GBO of April 4, 1991 and on April 24, 1991 Sweeprite filed a complaint with the Board alleging that the specification unfairly restricted competition. DSS approached Parks HQ with the idea of modifying the specification in order to make it more generic. In consultation with DSS HQ, Parks HQ effected a number of amendments and ultimately arrived at a specification that was acceptable to Sweeprite resulting in their complaint being withdrawn on June 12, 1991. This new specification included a provision which stated that a successful bidder may be required to demonstrate their product before being awarded the contract. According to an internal A&E Services Calgary memo, they received the amendments from Parks HQ on May 22, 1991. A later memo (July 24, 1991) from the same source, described these as efforts being made "*to assist Sweeprite in tendering and at the same time satisfy the requirements of the Park*" (see I.R. Appendix 16).

Seven proposals from four firms were received, and after preparing a tabulation and performing an initial evaluation, DSS HQ sent the package to Parks HQ. Sweeprite's bid offered the Model SR3300F, not the Model

4400 demonstrated at Jasper. Based on this initial technical review of the bids by DSS HQ, the Sweeprite proposal was found to meet all the mandatory requirements. A subsequent technical evaluation conducted by A&E Services HQ, determined that Sweeprite failed to comply with eight requirements in the specification, none of which was mandatory. It is noteworthy that, at this stage, only one bid, offering the Elgin model, was considered to have met all the mandatory requirements and all but one of the non-mandatory requirements and was, therefore, found to be "*technically acceptable*".

After a review of the bids by a committee composed of Parks HQ representatives, a memorandum dated July 18, 1991 (see I.R. Appendix 14) was sent to the Parks Western indicating that the Sweeprite bid should be considered responsive. The memo states:

Although there are some minor deviations from the specification, none are considered serious enough to warrant rejection based on operational requirements...

...we have no grounds to reject the bid on the basis of available information. The preceding deviations have to be weighed against the additional cost [amount deleted] of the other qualified contender.

The memo also indicated that the Request for Proposal (RFP) allowed for a "*practical demonstration*" of the machine's capabilities before awarding a contract. A memo (see I.R. Appendix 15) dated July 19, 1991 sent from Parks Western to Parks HQ stated:

As the Park has already had a demonstration of the Sweeprite machine, an additional demonstration is unnecessary.

Yet, as stated above, the machine tested was a Sweeprite Model 4400, not the Model SR3300F being offered by Sweeprite.

A briefing note prepared by Parks HQ dated October 3, 1991 (see I.R. Appendix 20) states:

Jasper National Park and Western Region Offices do not agree with this position [that Sweeprite's bid be accepted]. They believe that the deviations are significant and have stated that Sweeprite is not acceptable. A demonstration of the two machines was carried out at Jasper before the original requirement was submitted. Officers at Jasper state that the superiority of the Elgin model was clearly indicated. This was the reason why the original specification included technical requirements exclusive to Elgin, a practice in violation of government contracting regulations and why the specification when challenged, required amendment action.

A letter dated October 4, 1991 from the Superintendent of Jasper National Park to A&E Services Western Region (see I.R. Appendix 21) indicates:

We will be cancelling the purchase of the Jasper street sweeper in 1991-92, because of 1.5M shortfalls in the Capital Program. The funding [amount deleted] should be declared surplus for 1991-92. We have increased our equipment budget by the same amount for 1993-94 [should read 1992-93].

We should develop another tendering package for delivery of a street sweeper before the end of April 1992. Justification and all necessary approvals for a single source contract should be prepared before the end of February, to avoid unnecessary expenditures on our O & M budget.

I hope the difficulties we had this year can be resolved well before the tendering.

According to Parks Western (see I.R. Appendix 22), a decision was made to use the funds to help finance a settlement with an aboriginal band in British Columbia. On October 18, 1991, a requisition to cancel the procurement was sent by Parks HQ to DSS HQ. After seeking and receiving clarification from Parks HQ as to the reason for cancelling the procurement, DSS HQ issued letters to the bidders informing them of the cancellation.

Current Actions regarding the Jasper and Banff National Parks Requirements

On December 20, 1991, two requisitions were sent from Parks Western to DSS Calgary. These requisitions were for the purchase of street sweepers, one each for Jasper National Park and Banff National Park.

The requirement for Banff began with a memo dated July 4, 1991 and an "Equipment Replacement Evaluation" (see I.R. Appendix 28) in which they state: "ONLY ELGIN ACCEPTABLE BASED ON PERFORMANCE & RELIABILITY." Attached to the two requisitions were detailed specifications. These specifications did not contain any of the modifications agreed upon as a result of the previous complaint but instead reverted to the original specification for the Jasper requirement dated January 1991 or, as will be seen later, were even more descriptive of the Elgin Eagle.

The specifications are identical for both cases except that each contains a different requirement for distance to a service depot.

A Notice of Proposed Procurement for each requirement was prepared and appeared in the January 28, 1992 issue of the GBO in the GATT/FTA section of Proposed Procurements with the designation F-1, meaning Free Trade procurement - open to all interested suppliers.

An Invitation to Tender (ITT) (rather than an RFP, as was used in the original Jasper procurement) dated January 20, 1992 with a public opening date of 2 p.m. MST March 10, 1992, was prepared for each requirement. The two tenders described the need as follows:

For the supply of one (1) V.A.P. (92/93) Street Sweeper, self propelled, 3 cu. yd. hopper capacity...in accordance with the specifications eighteen (18) pages attached.

The following clause from the Standard Acquisition Clauses and Conditions (SACC) manual, shown as "B3000T SUBSTITUTES - EQUIVALENT", was incorporated by reference in the two tenders:

"EQUIVALENT SUBSTITUTES" WILL BE CONSIDERED ONLY IF THE TENDERER (1) DESIGNATES THE TRADE REFERENCE OF THE SUBSTITUTES, (2)

STRIKES OUT THE TRADE REFERENCE SPECIFIED AND THE WORDS "OR EQUAL", AND (3) PROVIDES COMPLETE SPECIFICATIONS AND DESCRIPTION LITERATURE FOR THE SUBSTITUTES.

In the ITT, there is no trade reference specified with or without the words "*or equal*".

Sweeprite requested bid sets for both procurements and, after receiving them, contacted DSS Calgary to express their concerns that the specifications were too restrictive. On February 10, 1992 Parks Western issued two requisitions to amend the specifications. This coincided with Sweeprite filing a complaint with the Board. On February 13, 1992, DSS Calgary issued letters (see I.R. Appendix D) to those who had requested bid sets, amending, inter alia, specification 2.8.8 as follows:

Delete in its entirety

Insert the following:

2.8.8 *A conveyor belt type hopper loading system is preferred [sic] to feed dirt hopper.*

Previously, the specification described the conveyor system used by Elgin and specifically stated that "*the use of a friction type conveyor is not acceptable.*" Sweeprite uses a friction type conveyor.

According to DSS, the solicitation closing date was extended to March 30, 1992.

Discussion

These cases clearly proceed on the basis of differing perceptions. From the government user department's point of view, they knew what they wanted; in one instance, the Jasper Park case, they had even leased identical equipment to meet their spring 1991 sweeping requirement pending a purchase; but are frustrated by the workings of the government's own open tendering operating rules from getting it.

From the complainant's point of view, they contend they are being frustrated in their attempt to supply their product which they believe meets the government's needs, if not its wants, by the repeated issuance of overly restrictive specifications by the government.

The Banff requirement began in 1991. Insofar as the Jasper requirement is concerned, the Board sees all the actions beginning in 1990 as part of the same procurement. This latter point is disputed by the government, and in its comments on the Preliminary Investigation Report it states:

It is regrettable that the investigative report has only reviewed the previous aborted procurement and not addressed the present procurement which was undertaken in a competitive environment intended to maximize competitions without compromising the legitimate needs of the end users. It is respectfully submitted that the Board require its investigative staff to revisit the investigation and to provide the Board evidence directly related to the present procurement which is the subject of the present complaint.

The Board is of the view that, departmental financial problems notwithstanding, the reasons for the "*present procurement*" for both Banff and Jasper is rooted in "*the previous aborted procurement*" for Jasper and the difficulties the government had in obtaining what it wanted at that time. The Board did not have to decide in that case, it will be remembered, because Sweeprite had dropped its complaint as a result of the revision of the specification to, in the words of the government technical authority, "*assist Sweeprite in tendering and at the same time satisfy the requirements of the Park.*"

What Sweeprite didn't know then was that their ultimate bid was considered by the headquarters evaluation committee as the lowest responsive bid and the government had "*no grounds to reject the bid on the basis of available information.*"

However, between the cancellation of the RFP on October 21, 1991 and the issuance of the new Notices of Proposed Procurement on January 28, 1992, much work appears to have been done resulting in the specifications for both Jasper and Banff (18 pages involving some 149 entries) being even more descriptive of the Elgin Eagle machine than before. For example, in the original specification, the weight of the vehicle

was stated as 13,610 kilograms, the metric equivalent of 30,000 pounds. In the current specification, the weight is revised to 14,100 kilograms, the exact figure for the Elgin. Similar changes were made for the front axle rating and the rear axle rating, for example.

And whereas the amended 1991 specifications had included some revisions to include performance requirements in respect of front and rear suspension, for example, these latest specifications revert back to the original Elgin-oriented descriptive specifications.

As this Board has said on other occasions, if more time were spent preparing a truly performance-oriented specification which related more to needs than wants, the government departments, in addition to fulfilling their operational need, would truly be contributing to the achievement of open, fair, and transparent procurement as agreed in the Free Trade Agreement, would encourage technological innovation, and would save the taxpayers money at the same time.

In this regard, there are three factors in these two cases that are of concern to the Board. The first, as described above, relates to restrictive specifications which clearly go against the government's general procurement policy and are in specific contravention of the provisions of Chapter 13 of the Free Trade Agreement in that they fail to provide all potential suppliers equal opportunity to be responsive to the requirements of the procuring entity in the tendering and bidding phase.

The second factor has to do with the spelling out in advance of clear evaluation criteria to assess the offers made by potential suppliers. In these instances, although the tenders allow for "*equivalent substitutes*" to be offered, it fails to formally specify the particular trade reference referred to in the clause noted previously for which "*equivalent substitutes*" would be accepted. As well, it is unclear which of the 149 or so different features contained in the specifications are mandatory and which are optional. If they are all mandatory, then the specification becomes a description and the procedure for the consideration of "*equivalent substitutes*" would become null and void. As the Board noted in Cardinal of February 27, 1990 (Board File No. D89PRF6608-021-0005):

...to insist that any product offered as an "equal" must match every feature of the product used as the standard in the specification would be to deprive the specification of its general applicability, reduce the words "or equal" to meaninglessness, and turn the procurement into a "no substitute" purchase.

Further, how does the government intend to interpret, for evaluation purposes, the preference it has now introduced with respect to item "2.8.8 *A conveyor belt type hopper loading system is **perferred** [sic] [emphasis added] to feed dirt hopper*"? This may be particularly difficult within the framework of a TENDER as opposed to the Request for Proposals, as is the case in this instance.

Finally, it is not clear why the government chose to use an "Invitation to Tender", involving restrictions on the use of judgement, as opposed to a "Request for Proposals", which permits some flexibility. It is interesting to note that in the original Jasper solicitation, for which Parks HQ assessed Sweeprite as the lowest responsive proposal, a Request for Proposals procedure was used. With the two current procurements, with their clearly more restrictive, Elgin-oriented specifications, the Invitation to Tender procedure was invoked.

For these two reasons, the Board will recommend that these two procurements be reconsidered in order to enable the government to write the specifications and the evaluation criteria properly so that the resulting competitions can be conducted in accordance with provisions of the GATT Code on Government Procurement and the Free Trade Agreement provisions on government procurement. The Board will also award the complainant its costs of bidding for these requirements, as well as its bid protest costs.

The third and final point on which the Board wishes to comment involves a statement by the government in its comments on the Preliminary Investigation Report:

The Crown also notes that it welcomed any review of the present procurement in that it chose not to combine the requirements of the two sweepers so as to render the procurement outside the audit of the Procurement Review Board's present jurisdiction.

The Board hopes that, like the pitcher who throws one too many fastballs and watches it sail beyond the centre-field fence, the officials who wrote that comment would like to "have it back." The comment is not useful and does not appear to be in tune with efforts of the Minister of Supply and Services to have a fair and open purchasing system. It is one thing to combine requirements in order to save money by bulk buying (bulk purchasing was never mentioned in any of the material). It is quite another

thing to use the monetary limitation in the mandate of the Board to mask what would otherwise show, at best, as poor procurement planning on the part of the government and, at worst, disclose a practice possibly in contravention of the GATT Code on Government Procurement, the Free Trade Agreement, and the government's stated intentions.

DETERMINATION

The Board has determined on the basis of its investigation that these procurements by the Department of Supply and Services did not comply with the requirements referred to in section 17 of the *Free Trade Agreement Implementation Act*, in that the specifications were written around a particular product. Furthermore, because it would involve the use of decision criteria in the evaluation of bids and award of contracts that were not clearly specified in advance, the government failed to provide all potential suppliers an equal opportunity to be responsive to the requirements of the procuring entity in the tendering and bidding phase.

The Board recommends that these procurements be reconsidered in order to enable the government to write the specifications and the evaluation criteria properly so that the resulting competitions can be conducted in accordance with the provisions of the Free Trade Agreement and the GATT Code on Government Procurement.

The Board has also decided:

- a) to award the complainant its reasonable costs of filing and proceeding with these complaints; and
- b) to award the complainant its reasonable costs of preparing its bids.

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