



IN THE MATTER OF:

**A Complaint
By Jean Pierre Hamel Packaging Inc.
of 21 Steel St.
Ottawa, Ontario**

**Board File No:
D91PRF6666-021-0014**

Complaint dismissed

AND IN THE MATTER OF:

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

3 June 1991

DETERMINATION BY THE BOARD

This complaint concerns a solicitation for an estimated \$54,570 worth of "mailing wrapper, corrugated fibreboard selfseal" for the Canada Communication Group of the Department of Supply and Services (DSS). It was advertised in Government Business Opportunities (GBO) as coming under the Free Trade Agreement (FTA) for open bidding.

The complainant, in submitting their bid, failed to include a complete form DSS/MAS 4079 "Statement of Eligible Goods" -- in which they could have stated that their goods were "eligible goods" under the FTA. The bid package contained a clear warning that if they did not complete and return the form, their goods would be considered "non-eligible".

The consequence of having their goods considered "non-eligible" was that a 10 percent penalty was added to their quotation for evaluation purposes and they feared this would alter their chances of winning the contract.

Their complaint is that they didn't see Form 4079 in the bid package...but that they filled in a box on the front page of the Request for Proposal (RFP) to indicate that there was "0" foreign content in their product. They also state that the product they would supply is manufactured by a 100 percent Canadian company operating across Canada: Ivex Corporation. They did set out in their bid that they were agents for Ivex, without mentioning its status as a Canadian company.

Since this complaint was received before the contract was awarded, the Board issued a Stop Award Order on 11 April 1991.

DSS was informed about this complaint by copy sent to them from the Board and they have filed a Governmental Institution Report (GIR) as required by Section 30 of the Procurement Review Board (PRB or the Board) Regulations. A copy of the GIR was sent to the complainant and although the Regulations allow the complainant a further seven days to submit any comments, they have made no response.

By Section 35 of the PRB Regulations, parties are warned that a determination on a complaint shall not be delayed by their failure to file any submission within a prescribed time limit, and their failure to do so may result in the resolution of the complaint without consideration of the submission.

In this case, the Board has found that the complaint and the facts are essentially the same as those in the Buntin Reid case (Board File No.: D91PRF66W-021-0010, dated 30 May 1991), and it has not required that the case be further investigated. It will proceed to a determination in this case on the existing record which, as with other cases dealt with by the Board, is available to the parties, and, subject to the provisions of the Access to Information Act, to any other person.

This complaint will be dismissed for the same reasons as those given in the Buntin Reid case. They are summarized as follows:

The policy of DSS is to treat all suppliers who do not file the 4079 "Statement of Eligible Goods" form as offering "non-eligible" goods. This policy was clearly stated in the bidding documents by a clause printed in caps on the first page after the standard form face page.

It is true that the exact consequence of the goods being treated as "non-eligible" was not as clearly spelled out as it might have been, and the sources of information on that subject, to which the supplier was directed, as in Buntin Reid, didn't contain the right information, and the source that **did** contain it was not brought to their attention.

However, as the Board said in the Buntin Reid case:

"Nevertheless, there was sufficient information to put a reasonably prudent business person on guard about what was required, why it was required and that there was an important consequence attached to failing to supply it [the form]. Business persons have responsibilities in these matters too, and are expected to react prudently and in their own best interests. They had before them sufficient information to know that the consequences might affect them and they ignored it at their peril."

Also, as with Buntin Reid, this was a case where the policy was applied evenhandedly by the contracting officer. Two other respondents failed to file the 4079 form (one of them filed it blank) and their bids, too, were handicapped in the same way. (This tends to show, incidentally, that this is not likely to be a case in which the blank forms were inadvertently not sent out with the bid packages -- since three of the bidders did return the forms. In any event, having seen the warning in the RFP, the bidder can always ask for another copy of the blank form).

The end result, however, is unfortunate, the Board feels, because even though the policy is applied fairly, it **can** have the result that the government is reduced to having to accept higher bids in procurements where an otherwise low bidder fails to return the form. The importance of this form was explained and underlined in the Buntin Reid decision, but its significance may not be generally understood by the supplier community. This may be because, in the bidding documents, the significance of "eligible goods" (or "goods of domestic origin") has normally been expressed by stating that bids for such goods "...may be given preference over other bids..."; but it is poorly explained that the preference is accorded by the attachment of a handicap, for evaluation purposes, to bids offering "non-eligible" goods (or to break a tie). Thus the importance of both the identification of goods as "eligible" -- and of the **assumption of "non-eligibility"** that will automatically attend the mere failure to complete and submit the form -- is not always immediately evident.

In the present case, the complainant objects in their complaint:

"Since I have requested the possibility of a complaint, I also did get a copy of the form 4079 and noticed that even if I would have wanted to fill out the form there was nothing for me to fill other than my co. name, date and my signature.

I could understand if information rendered for the purpose of evaluating this contract might have been used but nothing in there affect the prices."

These statements clearly reflect a misunderstanding of the significance of the Form 4079, which certainly is more important than this supplier believed; and certainly does have "...information rendered for the purposes of evaluating this contract..." and certainly does have something "...in there that affect the prices..." (albeit for evaluation purposes only).

This lack of clarity -- about the sorts of goods that will receive "national treatment", and the true significance of Form 4079 -- can ultimately result in driving up the prices of the goods the government ends up buying.

DETERMINATION

The Board, pursuant to Section 33 of the Procurement Review Board Regulations, hereby dismisses this complaint because it finds that it is without a valid basis.

The Stop Award Order of 11 April 1991 is rescinded with effect from the date hereof.

G.A. Berger

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Chairman
Procurement Review Board of Canada