



Procurement  
Review  
Board  
of Canada

La commission  
de révision  
des marchés publics  
du Canada

**IN THE MATTER OF:**

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

**Board File No:  
D91PRF6621-021-0021**

**Complaint upheld**

**AND IN THE MATTER OF:**

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

**September 13, 1991**

**DETERMINATION BY THE BOARD**

This complaint concerns the procurement on a sole source basis by the Department of Supply and Services (DSS) of fabric to be incorporated in the production of ergonomic chairs by CORCAN Industries (CORCAN) of the Correctional Service of Canada (CSC).

The complainant is Trenton Textile Mills Limited (Trenton) of Trenton, Ontario and they are protesting the award of a contract to Tandem Fabrics Inc. (Tandem) of Cambridge, Ontario for \$104,260.80. Their complaint is that since they "*feel we could manufacture the fabric required*" they, therefore, believe that Tandem (the contract awardee) is not the "*sole source*".

The complainant asked "*... that by way of relief, Trenton Textile Mills Limited [sic] be considered as a supplier for these and any other fabrics which may now be listed as "Sole Source" and that we receive any other form of relief to which we are entitled, and the Board may award.*"

**The Issue of Jurisdiction: Late Filing**

In the Governmental Institution Report, DSS states:

*"This complaint should be dismissed as it was received after the 10-day deadline set forth in section 23.2 of the Procurement Review Board Regulations. The grounds for the complaint were or should conceivably have been discovered on our [sic] around June 13, 1991, two days after the notice of proposed procurement was published in Government Business Opportunities, whereas the complaint was received on June 26, 1991, thirteen days later. The ten-day deadline expired on Tuesday, June 25, 1991.*

*We therefore submit that in accordance with sections 35 & 38 of the regulations this complaint should appropriately be dismissed."*

Under the Procurement Review Board Regulations, (subsection 23(2)):

*"... a complaint shall be filed not later than 10 days after the basis of the complaint is known or should reasonably have been known, whichever is earlier."*

Subsection 20(1) of the same Regulations states that:

*"All proceedings before the Board shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit."*

As a first comment, this Board takes seriously its responsibility to provide, on the one hand, a "user-friendly service" insofar as the protestor is concerned matched by its recognition of the needs of the government to proceed with its procurement programs without being unnecessarily delayed, all of this recognizing the requirements in Section 23. (There is, of course, the ability of the Board, at its discretion, under subsection 23(4) to consider

any complaint that is not filed within the time limits set out "... where good cause is shown or where it determines that a complaint raises issues significant to the procurement system ...".)

In this case, we are speaking of a contract which was already awarded on May 15, 1991, notice of which was published in Government Business Opportunities (GBO) in its issue of June 11, 1991. There is, therefore, no question of this complaint delaying the award of a contract or the supply of the fabric.

Trenton is located in Trenton, Ontario and receives the GBO by third class mail. Neither the Board nor the complainant has definitive information as to when the June 11, 1991 issue would have reached Trenton or when it was that the President of the company (or any other responsible official) would have had the opportunity to become aware of the award of a contract, notice of which he was not anticipating. On July 24, 1991 when questioned as to the date of the latest issue received, the President's assistant replied that the July 19, 1991 issue was the most recent issue received.

DSS, as noted above, has indicated that "discovery" (which one assumes is delivery plus normal time for first reading) should take two days. The Board does not understand the reference to the two-day period because it is contained neither in the PRB Regulations nor in any decision that the Board has rendered that deals with timeframes, nor, for that matter, in the GBO.

The Board, itself, receives the GBO by first class mail and a review of recent issues shows that the publication arrives in the Board's office in Ottawa anywhere from one to four days after the day of publication with the norm being two to three days.

Therefore, in considering whether the complaint met the timeframes provided for in the Regulations, the Board had no difficulty in accepting it as meeting them.

### **The Investigation**

The allegations in the complaint, as well as the government's response to those allegations and the complainant's comments on the government's response, were the subject of an investigation conducted by

means of interviews and an examination of the documents in the procurement file kept by DSS.

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:

- Ms. Joanne Valin, DSS, Laval Purchasing Sub-Office (Contracting Officer);
- Mr. Gilles Vanier, CSC, Québec Regional Supply Centre (Chief Purchasing Management);
- Mr. John McHardy, CSC, CORCAN Industrial Operations (IO) (Acting Assistant Director);
- Mr. John Lancaster, CSC, CORCAN (IO) (Senior Manufacturing Technologist);
- Mr. Roger Parker (President) and Mrs. Mary Chandler (Mr. Parker's assistant) both from Trenton Textile Mills Limited;
- Mr. Claude McDonald, Tandem Fabrics Inc., Cambridge, Ontario (Credit and Customs Manager) (Contract Awardee).

Following a new procedure, of which notice was given by the Board in the GBO during the week of 18 February 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.

In its comments to the Preliminary Investigation Report, DSS stated:

*"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."*

As will be seen later, the Board does not find anything inherently discriminatory in the manner in which the government has established its needs expressed in generic terms although, ultimately, the term "or equivalent" should have been employed. This will be discussed later. Rather, the Board's attention was drawn quickly to the procedures which the government followed in satisfying those needs.

For this, the evidence is quite clear and neither the government nor the protestor should be put to the expense of providing even further information on this matter.

### **The Procurement**

CORCAN has been manufacturing several different lines of upholstered furniture over the past fifteen years, including ergonomic chairs since 1987 (See Investigation Report - Appendix 2). During that period, CORCAN has bought fabrics from several different suppliers, including Trenton and Tandem. CORCAN considers its operations a mid-size facility producing state of the art product lines demanding that fabric specifications and selection be on the leading edge of the industry. Sales of ergonomic chairs for 1990-91 totalled \$1,989,466. CORCAN sells to federal departments, provincial and municipal entities, agencies and non-profit organizations. CORCAN develops its own product lines and can also develop customized products. In order to manufacture the ergonomic chairs, CORCAN buys the components referred to as "raw materials" (See Investigation Report - 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 CORCAN National Raw Material Coding List by brand name, item description and CORCAN code as appropriate. The Leclerc Institution in Laval, Québec manufactures the ergonomic chairs. The purchasing of the raw materials is

done locally, that is by the DSS Laval Purchasing Sub-Office on behalf of the CSC Québec Region Supply Centre.

The fabric, which is considered a raw material, has to meet certain specifications and standards developed by CORCAN central administration. To select the fabric, CORCAN informed the Board that it contacts five or six sources of supply and asks them to submit samples of fabrics which would meet certain specifications and standards. Prototypes of chairs using the different samples are then tested in offices and, according to the Senior Manufacturing Technologist, the selection of a specific fabric is made by the marketing group based on taste, personal preferences, wearability, colour and texture.

Although the line has evolved 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 occurs, CORCAN's general practice has been to not change the raw material it selected in order to offer consistency in texture, pattern and colours.

There was a standing offer in place for the supply of Canton fabric to CORCAN by Tandem which ran out on March 31, 1991. On April 24, 1991, DSS Laval Office received a requisition (See Investigation Report - Appendix 4) dated April 22, 1991 from CORCAN to procure 5600 metres of Tandem Canton fabric in five different colours for an estimated value of \$95,000. The requisition specified a delivery date of April 30, 1991 and is stamped "urgent". This requisition was to satisfy immediate manufacturing requirements.

In addition, around the same time, another requisition to replace the major standing offer that had expired the previous month was prepared and sent over to DSS. This requisition also resulted in a sole source contract to Tandem in the amount of \$272,400. This contract also resulted in a complaint to this Board but since it fell above the threshold of the Free Trade Agreement (FTA) (namely \$210,000 Canadian) the Board did not have jurisdiction and could not consider that complaint.

Apart from the item description and applicable standards to be met or exceeded, the requisition indicates the name of the supplier (Tandem) and includes the notation:

[TRANSLATION]

*(Sole source -  
No substitute -  
Explanatory letter attached)*

The requisition includes a statement to support sole sourcing as follows:

[TRANSLATION]

*"The product has been identified as the only one that meets the ergonomic chair's manufacturing plans and specifications. All studies, tests and verifications have been conducted by our central administration Corcan Division and have been completed before this specific fabric was approved.*

*In addition, our assembly line has been designed in relation to this type of ergonomic chairs components."*

The "explanatory letter" referred to above and attached to the requisition is a memorandum (See Investigation Report - Appendix 4) dated April 16, 1991 from the Leclerc Institution to the regional warehouse.

In the letter, it is stressed that:

[TRANSLATION]

*"... the purchase of this raw material is indispensable to the manufacturing of the ergonomic chairs which must be delivered during the months of April, May and June, 1991.*

*We have initiated a standing offer for that product for which bids and the delivery will take place in a few months time. It is impossible for us to wait until then without being obliged to close our industrial plants for lack of raw materials. The company mentioned in the DIV [Demand Issue Voucher] already has in hand the requested product and can deliver it to us in a fairly short timeframe. This would enable us to keep our*

*manufacturing plant open though operating at a reduced pace.*

*Therefore, it is very important, in order to prevent the interruption of work that this contract be awarded as soon as possible to the proposed company."*

In a note to file dated April 25, 1991 (See Investigation Report - Appendix 5), the contracting officer accepted the justification for sole sourcing.

According to the contracting officer, there was no need to question the justification offered as this type of request is frequent and the sources are established by the client.

On April 26, 1991 the contracting officer filled out a form entitled "Exemption au libre-échange" (Free Trade Exemption) (See Investigation Report - Appendix 6). Since it was determined that this contract fell within the range and class of contracts to which Chapter 13 of the Free Trade Agreement applied, the reason given for sole sourcing was:

[TRANSLATION]

*"... for additional deliveries to be made by the original supplier as replacement parts for existing supplies or installations, and as addition to existing supplies or installations, where a change of supplier would compel the client to purchase equipment that does not meet the compatibility requirements with the existing equipment. This includes software to the extent that the initial procurement of software was covered by the Code."*

This is a close approximation of Article V, paragraph 16(d) of the GATT Code.

The "Request for Authority-Summary" form states that the Free Trade Agreement is not applicable since the product must be obtained from a sole source and there does not exist any alternative replacement acceptable for the reasons of logistics. (See Investigation Report - Appendix 9).



The contract dated May 15, 1991 was awarded to Tandem (See Investigation Report - Appendix 10) at a cost of \$104,260.80 and a "Contract Award Notice" was published in the GBO on June 11, 1991. The reason for sole sourcing which was announced in the GBO as GATT Article V, paragraph 16(b) which deals with a contract awarded to a supplier where exclusive rights, such as patents and copyrights, must be protected and no reasonable alternative or substitute existed. DSS acknowledged this was included in error.

### **The Issue**

The issue in this case is quite simple - namely the procedures by which CORCAN and DSS go about procuring upholstery fabric. The GATT Procurement Code, which applies to Free Trade Agreement procurement, is quite specific when it states in Article IV, paragraph 3:

*"There shall be no requirement or reference to a particular trade mark or name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tenders."*

At the same time, the GATT Code does enable procurement entities to sole source their requirements *"... in the following conditions, provided that single tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among foreign suppliers or protection to domestic producers: ...."*

The reason given for going sole source in accordance with the regime under the GATT Code (although not the one published in the GBO) was:

*"... 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 the entity to procure equipment not meeting the requirements of interchangeability with already existing equipment."*

The Board has dealt with this reason for sole sourcing in other decisions and would emphasize that the GATT Code does not force anyone

to procure something that will not work according to specifications or from someone who cannot deliver. Here, however, we are faced with another factor in that the justification noted above deals with "parts" and "equipment", not upholstery fabric. A review of the other reasons listed in the Code shows that none of them applies as well. And 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.

In a note dated July 10, 1991, he states:

*"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."*

That, in effect, is CORCAN's specification for a competitive procurement and this is what Trenton requested. While the current contract and its related RFP did not contain certain of these requirements, it does not seem to this Board unreasonable that conditions such as these could be asked of all bidders. Therefore, the reason given for sole sourcing is invalid and the complainant prevails.

This Board has no problem with understanding the need in certain circumstances for the pre-qualification of suppliers and their products and, indeed, there are provisions in the GATT Code, which covers FTA procurements, for this eventuality.

In the January 25, 1991 issue of the GBO, DSS announced its procedures for qualifying suppliers on DSS source lists for selective tendering procedures for, among other things, procurements under the GATT Agreement and the Canada-United States Free Trade Agreement for certain product categories.

Fabric to be incorporated in the production of ergonomic chairs is not one of the product categories listed.

DSS, in its executive summary of the Governmental Institution Report has stated that:

*"The customer department stated in its request that the fabric sought had been identified by CORCAN Industries as the only fabric meeting the specifications for ergonomic chairs."*

The Board is unable to determine how CORCAN came to this conclusion. A procedure was outlined to the Board which described how a particular fabric was selected. But to jump from that process to stating that no other firm in Canada or the United States could supply fabric meeting the stated specifications, properly expressed, cannot be supported.

In addition, DSS has indicated that CORCAN has raised a number of additional reasons for not having a competition:

*"It also stated that CORCAN's production line had been designed for this type of fabric, and that a change in fabric would lead to the use of additional resources (funds, labour) for CSC, which would have to adjust to any production changes."*

*CORCAN currently has a customer showroom and a catalogue of available products that includes samples of fabric used in the manufacture of ergonomic chairs.*

*A change in fabric would impose significant additional costs on CORCAN, which would have to completely redo its showroom and print a new catalogue to ensure that the products supplied conformed to specifications and its samples."*

Without getting into the substance of the three points, it is interesting to repeat what is in the CORCAN catalogue, specifically that *"Specifications are effective at the time of printing. Details of finish, fabric and colour may change without prior notice; please consult your area representative"*.

**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 a justification that was 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**

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**Chairman**

**Procurement Review Board of Canada**