



Ottawa, Monday, April 14, 2003

**File No. PR-2002-055**

IN THE MATTER OF a complaint filed by Questcom Consulting 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 motion by the Department of Public Works and Government Services for an order dismissing the complaint on the basis that the complaint is late.

### **ORDER OF THE TRIBUNAL**

The Canadian International Trade Tribunal hereby grants the motion by the Department of Public Works and Government Services and, pursuant to paragraph 10(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, dismisses the complaint.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

Date of Order and Reasons: April 14, 2003

Tribunal Member: Pierre Gosselin, Presiding Member

Senior Investigation Officer: Cathy Turner

Counsel for the Tribunal: Roger Nassrallah

Complainant: Questcom Consulting Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Ian McLeod  
Christianne M. Laizner  
Susan D. Clarke



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## STATEMENT OF REASONS

### INTRODUCTION

On February 3, 2003, Questcom Consulting Inc. (Questcom) filed<sup>1</sup> a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*<sup>2</sup> concerning the procurement (Solicitation No. W7714-020009/A) by the Department of Public Works and Government Services (PWGSC) for the provision of a simulation network computer system for the Department of National Defence (DND).

Questcom alleged that the procurement specified particular brand names and suppliers, with no provision for equivalent products.

Questcom requested, as a remedy, that the Tribunal recommend that the solicitation be cancelled and that a new solicitation be conducted in accordance with the trade agreements.

On February 11, 2003, 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*.<sup>3</sup> That same day, the Tribunal issued an order postponing the award of any contract in connection with the procurement at issue until the Tribunal determined the validity of the complaint. On February 14, 2003, PWGSC informed the Tribunal, in writing, that a contract in the amount of \$457,251.09 had been awarded to Integra Networks Corporation. On February 17, 2003, the Tribunal issued an order rescinding its postponement of award order. On February 26, 2003, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*,<sup>4</sup> PWGSC filed a motion with the Tribunal requesting an order dismissing the complaint. PWGSC submitted that Questcom's time for filing a complaint with respect to the contents of the solicitation documents in this matter had expired.

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1. The initial complaint was received on January 23, 2003. On January 24, 2003, the Tribunal requested additional information from Questcom. On January 31, 2003, Questcom replied to the Tribunal's request for additional information. Subsequently, on February 3, 2003, the Tribunal requested further additional information from Questcom. The Tribunal received a response from Questcom on February 3, 2003, however, this letter was dated February 4, 2003.
  2. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
  3. S.O.R./93-602 [*Regulations*].
  4. S.O.R./91-499.

PWGSC submitted that Questcom did not raise any question or make an objection to PWGSC concerning any aspect of the Statement of Work (SOW) until January 23, 2003. According to PWGSC, it is well established that, where a complaint concerns a matter that is clear in the text of the solicitation documents, the day of publication of that text on MERX, Canada's electronic tendering service, is considered to be the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier. PWGSC cited numerous examples.<sup>5</sup> It, therefore, argued that the time for Questcom to file its complaint expired 10 working days after the publication of the text of the Request for Proposal (RFP) and SOW on December 5, 2002.

PWGSC submitted that, if, in the alternative, it is considered that Questcom only knew or ought to have known the text of the RFP and SOW on December 12, 2002, the date on which Questcom states that it obtained the text of the solicitation documents (or December 20, 2002, the date that MERX records indicate that Questcom obtained the text), the result is the same. It added that Questcom did not file either a complaint with the Tribunal or an objection with PWGSC within 10 working days of either December 12 or December 20, 2002, and that, therefore, the complaint is untimely. PWGSC also submitted that Questcom did not raise any question about the contents of the RFP, despite having had actual knowledge of the terms of the solicitation since December 20, 2002, at the latest.

On March 6, 2003, Questcom filed its response to PWGSC's motion. Questcom agreed with PWGSC's submission that MERX records indicate that it downloaded the RFP on December 20, 2002. It vigorously objects to PWGSC's claim that "[n]o questions or objections, written or oral, were received by PWGSC from the Complainant during the bid period, that is, between the publication of the solicitation on December 5, 2002 and the day of bid closing, January 20, 2003."<sup>6</sup> Questcom submitted that there was a call placed by its representative to the PWGSC contracting authority on January 20, 2003, the day of bid closing. It contended that the PWGSC contracting authority never invited it to send the objections in writing. Further, the PWGSC contracting authority indicated that the RFP did not violate any *North American Free Trade Agreement* or *Agreement on Internal Trade* rules and that, if Questcom wanted to challenge the solicitation, it should consult PWGSC's Web site to gather information to file a complaint. In addition, it submitted that a copy of the PWGSC contracting authority's day planner attached to the PWGSC contracting authority's affidavit<sup>7</sup> provides no date and time stamp to prove clearly when and at what time the call was placed and, thus, should not be considered as evidence in this case. Questcom, therefore, argued that it made an objection within the time frame allowed. It further submitted that it understood that a complaint could be filed with the Tribunal and/or PWGSC until the closing day of the RFP.

On March 10, 2003, PWGSC submitted that Questcom's comments did not raise any new substantive issues or introduce any new evidence requiring a response and that it, accordingly, repeated and relied on its previous submissions filed in this matter.

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5. *Re Complaint Filed by DRS Technologies Inc.* (2 May 2002), PR-2001-051 at 18 (CITT); *Re Complaint Filed by Jastram Technologies Ltd.*, PR-98-008 (CITT); *Re Complaint Filed by Doran Canadian Expo Consortium* (12 February 1999), PR-98-029 (CITT); *Re Complaint Filed by IT/NET Consultants Inc.* (20 July 1999), PR-99-007 at 6 (CITT); *Re Complaint Filed by Métro Excavation inc. and Entreprise Marissa inc.* (5 November 1999), PR-99-016 at 6 (CITT); *Re Complaint Filed by Brent Moore & Associates* (4 May 2000), PR-99-040 at 8 (CITT); *Re Complaint Filed by Foundry Networks Inc.*, PR-2001-047 (CITT); *IBM Canada Ltd. v. Hewlett-Packard (Canada) Ltd.* (4 July 2002), A—173—02 at paras. 18, 20 (FCA).

6. PWGSC's motion dated February 26, 2003 at para. 6.

7. *Ibid.* Exhibit 9.

## TRIBUNAL'S DECISION

Section 6 of the *Regulations* sets out time limits for filing a complaint with the Tribunal. Subsection 6(1) provides that a complaint shall be filed with the Tribunal no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier. Subsection 6(2) states that “[a] potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

The RFP and SOW were published on MERX on December 5, 2002. Questcom acknowledged that it downloaded the RFP on December 20, 2002, and “began to develop a response but not in a formal manner this commenced January 13, 2003.” The Tribunal notes that the original bid closing date was January 13, 2003, and that amendment No. 003 to the solicitation issued on January 7, 2003, subsequently extended the bid closing date to January 20, 2003.

Contrary to Questcom’s submission that it has the right to submit a challenge 10 working days after the closing of any RFP produced by the Crown, section 6 of the *Regulations* states that “[a] potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, **if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier**”(emphasis added).

The Tribunal does not support PWGSC’s contention that the 10-day period for objection or for complaint is automatically triggered by the publication of an RFP. However, given the short time frames for filing a complaint, it does expect potential suppliers to exercise due diligence and to take account of the terms and conditions of an RFP as soon as the RFP comes into their possession.

Furthermore, in Questcom’s response of March 6, 2003, to PWGSC’s notice of motion, it indicates that “Questcom **owners** were made aware of the Solicitation violations on closing day January 20, 2003 as a Questcom **employee** was originally in charge of this project” (emphasis added). The Tribunal notes that it would not be appropriate to make a distinction between an owner and an employee of a corporation in these circumstances. In this context, Questcom is deemed to have had knowledge of its basis of complaint by virtue of the employee’s knowledge.

In light of the above, the Tribunal is of the opinion, in this case, that Questcom knew or should have known the basis of its complaint on or about December 20, 2002, when it downloaded the RFP from MERX and that it did not, therefore, make its objection to PWGSC within the time limit allowed. Therefore, the Tribunal considers that the objection was late, and the complaint is dismissed.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member