



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2003-005R

Ready John Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Tuesday, July 20, 2004*

**TABLE OF CONTENTS**

DETERMINATION OF THE TRIBUNAL.....i  
STATEMENT OF REASONS ..... 1  
    BACKGROUND..... 1  
    TRIBUNAL’S DECISION..... 2  
    DETERMINATION OF THE TRIBUNAL .....2

IN THE MATTER OF a complaint filed by Ready John 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 decision of the Federal Court of Appeal, which set aside the determination of the Canadian International Trade Tribunal in File No. PR-2003-005 made on July 14, 2003, and remitted the matter to the Canadian International Trade Tribunal for redetermination.

**BETWEEN**

**READY JOHN INC.**

**Complainant**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT  
SERVICES**

**Government  
Institution**

**DETERMINATION OF THE TRIBUNAL**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act* and provided Ready John Inc. meets the requirements of the standing offer, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services compensate Ready John Inc. for the profit that it would reasonably have made, had it been issued the standing offer.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Ready John Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services.

Meriel V. M. Bradford

Meriel V. M. Bradford  
Presiding Member

Susanne Grimes

Susanne Grimes  
Acting Secretary

Tribunal Member: Meriel V. M. Bradford, Presiding Member

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## STATEMENT OF REASONS

### BACKGROUND

1. On April 14, 2003,<sup>1</sup> Ready John Inc. (Ready John) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>2</sup> The complaint concerned a Standing Offer Agreement (Solicitation No. W0105-03E005/A) (the solicitation or the standing offer) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of chemical toilets (or units) at Canadian Forces Base (CFB) Gaquetown in New Brunswick.

2. Ready John alleged that Plaggenborg's Ltd. (Plaggenborg), the successful bidder, was not in a position to submit a proposal that could comply with a mandatory requirement of the solicitation and, thus, should not have been issued the standing offer.

3. Specifically, Ready John alleged that Plaggenborg was not in a position to satisfy the requirement of section 14.1.1 of the solicitation, which is as follows: "The Contractor is to have in their possession a minimum of 250 units. Toilets will be inspected prior to award." Ready John submitted that, with respect to Plaggenborg's proposal, this requirement should be interpreted together with Plaggenborg's similar obligation under another standing offer for chemical toilets also for CFB Gaquetown. Accordingly, Ready John submitted that Plaggenborg had to demonstrate that it had a minimum inventory of 500 chemical toilets and that, based on its knowledge, Plaggenborg did not have this number of units in inventory. As a remedy, Ready John requested that only bidders that abided by the tender requirements be considered.

4. On July 14, 2003, the Tribunal determined that the complaint was not valid.

5. On June 8, 2004, the Federal Court of Appeal (the Court) allowed, with costs, an application for judicial review<sup>3</sup> brought by Ready John. The Court's decision set aside the Tribunal's determination that the complaint was not valid and remitted the matter to the Tribunal for redetermination in accordance with the Court's reasons. The Court made the following findings:

- The Tribunal misdirected the inquiry when it equated "possession" in the context of the requirement of section 14.1.1 of the solicitation with an ability on the part of the contractor to "control the allocation of units to this procurement". The Court stated that this reasoning did not focus on Plaggenborg's relationship with respect to particular goods and failed to address the key question of whether Plaggenborg had 250 chemical toilets in its *de facto* control when the contract was awarded, or whether it had the legal right to assume such control.
- The Tribunal erred by reaching the conclusion that Plaggenborg was in possession of the requisite number of units on the basis of an agreement to lease chemical toilets between Plaggenborg and A-1 Portable Toilets Inc. (A-1). The Court stated that the Tribunal seemed to have been of the view that, since possession could be acquired as a result of "leasing arrangements" and since Plaggenborg had a contract with A-1 to lease toilets, it was well on its way to proving that it was in possession of toilets that, when ordered, would be delivered without delay. The Court stated that the error in that reasoning was that it equated the lease of a

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1. The date on which the additional information requested by the Tribunal was received.

2. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

3. *Ready John Inc. v. Canada (Department of Public Works and Government Services)*, 2004 FCA 222.

- particular chattel with an agreement to lease, at some future date, an unspecified number of goods of generic description.
- The Tribunal erred in basing its decision on the evidence that, having secured a reliable source of supply, A-1 would in fact be able to perform its contract to lease units to Plaggenborg. The Court found that that alone could not satisfy the requirement that the contractor have at least 250 toilets in its possession when the contract was awarded. The Court also found that that specification did not stipulate that the contractor had to simply be able to acquire sufficient units on short notice. In the Court's view, while the purpose of section 14.1.1 of the solicitation was to ensure a reliable and prompt supply of toilets, the particular manner in which that specification sought to achieve that purpose, namely, through the requirement of possession, could not be ignored.

### **TRIBUNAL'S DECISION**

6. The Tribunal is directed to redetermine the complaint in accordance with the Court's reasons. Accordingly, the Tribunal now finds that Plaggenborg failed to comply with the mandatory requirement in section 14.1.1 of the solicitation. Plaggenborg was not able to demonstrate that it had sufficient control over the required number of units so as to amount to "possession" of those units.

7. The Tribunal therefore finds that, since Plaggenborg did not meet one of the mandatory requirements of the solicitation, PWGSC should have disqualified Plaggenborg from consideration for the issuance of the standing offer. As such, the Tribunal finds that the complaint is valid.

8. As indicated by the Court, the issue of whether the contractor had to have 500 toilets (250 for this solicitation and 250 for another procurement for CFB Gagetown) does not need to be addressed, as the bidder failed to meet the possession requirement of section 14.1.1 of the solicitation.

9. In recommending the appropriate remedy, the Tribunal considered all the circumstances relevant to this procurement, including those outlined in subsection 30.15(3) of the *CITT Act*. Since approximately 70 percent of the period of application for the standing offer has elapsed, the Tribunal will not recommend that a new standing offer be issued.

10. Because there were only two bidders for this solicitation and since the Tribunal has determined that PWGSC improperly qualified Plaggenborg, Ready John should therefore have been issued the standing offer, provided its proposal met the solicitation requirements. Accordingly, the Tribunal recommends that PWGSC, if it has not already done so, evaluate Ready John's bid. In the event that Ready John meets the solicitation requirements and in view of the fact that it is not practical at this point to issue a new standing offer (the standing offer expires on March 31, 2005), the Tribunal further recommends that PWGSC compensate Ready John for the profit that it would reasonably have made, had it been issued the standing offer.

### **DETERMINATION OF THE TRIBUNAL**

11. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

12. Pursuant to subsections 30.15(2) and (3) of the *CITT Act* and provided Ready John meets the requirements of the standing offer, the Tribunal recommends, as a remedy, that PWGSC compensate Ready John for the profit that it would reasonably have made, had it been issued the standing offer.

13. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Ready John its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC.

Meriel V. M. Bradford  
Meriel V. M. Bradford  
Presiding Member