



Ottawa, Wednesday, February 14, 2001

File No.: PR-2000-041

IN THE MATTER OF a complaint filed by BancTec (Canada) Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

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 in part.

Pursuant to subsection 30.15(4) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards BancTec (Canada) Inc. its reasonable costs incurred in preparing a response to this solicitation but limits those costs to the costs involved in preparing and giving its oral presentation.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards BancTec (Canada) Inc. its reasonable costs incurred in filing and proceeding with this complaint.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons for the Tribunal's determination will be issued at a later date.

Date of Determination: February 14, 2001
Date of Reasons: March 22, 2001

Tribunal Member: Patricia M. Close, Presiding Member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Marie-France Dagenais

Complainant: BancTec (Canada) Inc.

Counsel for the Complainant: Barbara A. McIsaac, Q.C.
Kris Klein

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: David M. Attwater



Ottawa, Thursday, March 22, 2001

File No.: PR-2000-041

IN THE MATTER OF a complaint filed by BancTec (Canada) Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

On November 16, 2000, BancTec (Canada) Inc. (BancTec) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. 45866-000005/A) by the Department of Public Works and Government Services (the Department) for the supply, customization, installation, integration and support of an image scanning, storage and retrieval system for Statistics Canada to process the 2001 census of population.

BancTec alleged that the Department and Statistics Canada failed to meet their obligations under Articles 1008(1)(a), 1013(1)(h) and 1015(4)(d) of the *North American Free Trade Agreement*,² Article 506(6) of the *Agreement on Internal Trade*³ and Article XII(2)(h) of the *Agreement on Government Procurement*⁴ in evaluating BancTec's proposal. Specifically, BancTec alleged that the Department and Statistics Canada failed to adhere to the evaluation criteria set out in the Request for Proposal (RFP), failed to use an objective rating guide in evaluating proposals by arbitrarily including the requirement for an oral presentation where such a requirement was not necessary to evaluate the merits of BancTec's or any bidder's proposal and failed to conduct the procurement in a fair and transparent manner. In its final submissions, BancTec alleged that, in conducting this solicitation, the Department and Statistics Canada were biased or gave the appearance of favouring Unisys Canada Inc. (Unisys).

BancTec requested, as a remedy, that the contract awarded to Unisys be terminated and that it be awarded to BancTec. Alternatively, BancTec requested that the Tribunal recommend that the contract be terminated, that a new solicitation be conducted and that it be compensated for its bid preparation costs. In the further alternative, BancTec requested its bid preparation costs and its costs in preparing for and giving the oral presentation. In any event, BancTec requested compensation for its costs incurred in filing and pursuing this complaint.

On November 22, 2000, 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*.⁵ On November 24, 2000, the Department informed the Tribunal that a contract in the amount of \$7,355,301.98

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
4. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].
5. S.O.R./93-602 [hereinafter Regulations].

(GST included) had been awarded to Unisys on October 2, 2000. On December 18, 2000, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁶ On January 2, 2001, BancTec filed comments on the GIR with the Tribunal. On January 10, 2001, the Tribunal wrote the Department to request additional information and documents in relation to steps 3 and 4 of the evaluation process. The Department submitted the additional material to the Tribunal on January 17, 2001. On January 30, 2001, BancTec made comments to the Tribunal on the additional information. On February 1, 2001, the Department filed final comments with the Tribunal.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

PROCUREMENT PROCESS

On May 2, 2000, an RFP for this procurement was posted on Canada's Electronic Tendering Service (MERX) with a closing date of June 13, 2000. The closing date was subsequently extended to June 20, 2000.

The RFP includes the following provisions relevant to this case:

C1 GENERAL (I)

1) INFORMATION TO ASSESS

Specifically, the Evaluation Team shall use the following information to assess proposals:

- a) All information provided in, and documentation provided with, the proposal which is relevant to the stated evaluation criteria.
- b) Information obtained from reference checks conducted by the Evaluation Team.
- c) Additional clarifying data which might be requested and provided during the evaluation process.
- d) Information obtained in interviews with proposed personnel.

C2 PROPOSAL EVALUATION PROCESS (M)

The proposals shall be evaluated in accordance with the process described in Section 10 of the Statement of Requirement, Annex "A".

Section 2.12, "Schedule of Events", of Annex "A", "Statement of Requirement" (SOR), of the RFP reads, in part, as follows:

The following is the anticipated schedule of events:

<u>Event</u>	<u>Date</u>
RFP Issue Date	May 02, 2000
Proposal Submission Deadline	June 13, 2000
Evaluation Complete (i.e. successful Bidder is identified)	July 28, 2000
Contract Awarded	August 25, 2000

6. S.O.R./91-499.

Section 10, “Evaluation Process”, of the SOR reads, in part, as follows:

Bidders may be requested to provide clarification at any time during the evaluation process and will be given twenty-four (24) hours from time of notification by PWGSC to respond to the PWGSC Contractual Authority in writing to any questions raised by the evaluation committee. Failure to do so will result in the proposal being deemed NON-RESPONSIVE.

Following the bid solicitation closing date, a five step bid evaluation will commence. Proposals must achieve the criteria set for each step consecutively in order to be considered further in the evaluation process.

10.1 Summary – Steps One to Five

- In Step 1, all bids will be evaluated for their compliance to the mandatory requirements (summarised in the Compliance Matrix in Section 4). Any bid that fails to meet any of the mandatory requirements will be deemed non-responsive and will not be considered further. The financial capability of each Bidder will also be assessed at this point.
- In Step 2, the bids that passed Step 1 will be point rated for their Management, Technical and Operations Proposals. If any of these Proposals does not achieve the stated pass mark as provided in the Evaluation Chart in Section 10.2, then this bid will not be considered further.
- In Step 3, bids which pass Step 2 will be point rated based on reference checks. If the evaluation of the Reference Checks fails, this bid will not be considered further.
- In Step 4, Bidders who have passed all previous steps, will be invited to make a 90-minute presentation on their proposed solution. The time and location of the presentation will be disclosed to the Bidder at least one week prior to the date of the presentation. The Presentation will also be point rated.
- In Step 5, a score will be calculated for all bids that have successfully passed steps 1, 2, 3 and 4. This score will be calculated in accordance with Section 10.4. The bids will be ranked according to this score.

Section 10.2, “Summary Chart of Evaluation Process”, of the SOR sets out the points assigned to the various aspects of the proposal and the passing marks for bidders to be declared compliant. Specifically, the summary chart provides that 100 points are assigned to step 3 - reference checks. Bidders are required to achieve 60 percent for each of the three items evaluated for each reference and 80 percent overall to pass. Similarly, the summary chart provides that 60 points are assigned to step 4 - presentation. Bidders are required to achieve 60 percent for each item of the oral presentation and 80 percent overall to pass.

Section 10.3, “Step 4 – Presentation”, of the SOR reads, in part, as follows:

All costs incurred by the Bidder in conjunction with the presentation shall be at the Bidder’s expense.

The Bidder’s proposed Project Manager must lead the Oral Presentation with the participation of the proposed key project personnel. Marketing presentations shall not be allowed. A Question and Answer Period conducted by the Evaluation Team will follow the presentation.

The Oral Presentation shall be rated against the following criteria:

- (a) Explanation of the scanning, storage and retrieval solution including an explanation of the solution in a production environment;
- (b) Project Manager’s suitability;
- (c) The Project Team dynamics and interaction internally and with client;
- (d) Project Manager and team members’ handling of the Q&A period; and
- (e) Strategies to ensure the success of the production operation using the Bidder’s proposal (e.g. explicit recognition of the risk factors).

The Department received four proposals, including one from BancTec and one from Unisys. The written proposals were evaluated between July 11 and 14, 2000. On July 20, 2000, two members of the evaluation team conducted the reference check with one of the two references submitted by BancTec. On July 25, 2000, the second reference submitted by BancTec was interviewed as part of the reference check.

The references submitted by BancTec revealed some concerns. In the circumstances, the Department decided that clarifications were required before the evaluation of BancTec's references could be finalized. However, as the date for awarding the contract was fast approaching and as key personnel from both Statistics Canada and one of the references was not available from July 20 until August 8, 2000, it was decided to proceed to the oral presentation (step 4), subject to finalizing the evaluation of BancTec's references (step 3) at a later date. A preliminary score for step 3 was given to BancTec. A follow-up with BancTec's references would occur after the oral presentation. BancTec was not informed of the conditional situation.

On July 26, 2000, the Department wrote BancTec, in part, as follows: "The Crown has completed Steps 1, 2, & 3 of the Evaluation Process of the subject Request for Proposal (RFP). Congratulations, your proposal met all the mandatory requirements and met the minimum scoring requirements for the rated items detailed in the RFP. As a result, your proposal has qualified your company to proceed to Step 4 – Oral Presentation of the Evaluation Process as per the terms and conditions of the RFP".

To prepare for the oral presentations, each evaluator was provided with an evaluation booklet and two background documents. In addition, the evaluators met and discussed the criteria and point scale to be used in assessing the presentations. The evaluation booklet contained six sections, including information from the company's proposal and a detailed evaluation sheet. The evaluation sheet included a description of the criteria taken from section 10.3 of the SOR by which the oral presentations were to be rated. The evaluation sheet indicated how points were to be assigned, as per section 10.2 of the SOR, and included a scale for assigning points to each of the criteria.

On August 11, 2000, BancTec made its oral presentation. During the question and answer period following the oral presentation, clarification of information obtained during BancTec's reference checks was sought. However, BancTec was not informed that its references were still under consideration.

On August 14, 2000, BancTec's oral presentation was formally evaluated. According to the GIR, each of the elements of the criteria was discussed in turn by the eight evaluators. Each evaluator then presented his/her score to the group. Where differences arose in the assigned scores, the evaluators sought a consensus. Based on this process, an individual score was assigned to each of the evaluation criteria, according to the distribution provided in section 10.2 of the SOR (step 4). Using this process, BancTec did not achieve the minimum number of points required to pass step 4, i.e. 40 points out of a possible 60.

On August 16, 2000, members of the evaluation team from Statistics Canada called BancTec's references to confirm that the information given was still valid in light of the clarifications received from BancTec during the question and answer period held after its oral presentation. Once the further checks were completed, BancTec's preliminary score obtained for step 3 was finalized. BancTec did not achieve the minimum required to pass step 3, i.e. 80 points out of a possible 100.

On October 2, 2000, the Department informed BancTec during a telephone conversation that the reason that it had not won this solicitation was because it failed steps 3 (reference checks) and 4 (presentation).

On or about October 10, 2000, the Department informed BancTec, again by telephone, that it had indeed passed step 3 and that a letter explaining why BancTec did not win the solicitation would be forthcoming. On October 17, 2000, the Department wrote BancTec, in part, as follows: "As your proposal did not obtain the minimum required score for client references or the Oral Presentation, a cost per point ratio was not determined for your proposal. Please refer to the attached table for a listing of the Minimum Scores required to be considered responsive in each area".

POSITION OF PARTIES

Department's Position

The Department submitted that BancTec missed the time limits imposed by section 6 of the Regulations for complaining about the inclusion of an oral presentation as part of the evaluation process. Similarly, the Department added that BancTec missed the time limits for complaining about certain matters such as whether sufficient information was included to permit suppliers to submit responsive bids and whether the tender documents clearly identified the requirements of the procurement. The Department submitted that BancTec was or should have been aware of the requirement for an oral presentation or of any other impugned aspects of the RFP on or about May 2, 2000, when the RFP was posted on MERX. However, BancTec failed to object to and/or to complain about these grounds of complaint within the prescribed time frames. Citing the Tribunal in File No. PR-96-011,⁷ the Department submitted that "[t]he procurement review process does not provide for an accumulation of grievances to be put forward only in the event of an unsuccessful bid".⁸ Regardless of the time limits, the Department submitted that the oral presentation provided Statistics Canada with an opportunity to assess the suitability of bidders as potential service providers on an important contract.

The Department asserted that BancTec's proposal was evaluated against the objective criteria specified in the RFP. The Department and Statistics Canada employed a detailed evaluation grid based on the criteria specified in the RFP. In addition, the Department submitted that BancTec's proposal was rated using the scoring scale provided in the evaluation grid and that all proposals received were evaluated using the same evaluation grid. Therefore, the Department argued, BancTec's proposal was evaluated in a procedurally fair manner.

Furthermore, the Department submitted that BancTec's proposal received fair and unbiased treatment at all times during the evaluation. The Department argued that the fact that BancTec received mixed messages on the result of the evaluation of its references during step 3 does not constitute a denial of fair treatment. In fact, the Department submitted, these mixed messages resulted from a desire to provide BancTec with a full and fair opportunity to obtain the score merited based on its references. In this respect, the Department argued that, on occasion, providing fairness to a bidder may require deviation from the evaluation process specified in the RFP, as long as the criteria specified in the RFP are followed. Adherence to process, the Department argued, must come second to affording a bidder full and fair opportunity to achieve the full points merited on its proposal for the rated requirements of the RFP. The Department further submitted that, while the trade agreements require that award be made in accordance with the evaluation criteria specified in tender documents, they do not necessarily require that evaluations be conducted according to the process specified in the tender documents. If a contracting authority applies the criteria in a fair manner, no breach of the trade agreements occurs because of a slight deviation from the stated evaluation process. In this instance, the Department argued, the reference checks raised issues that required

7. *Corel Corporation* (21 November 1996) (CITT).

8. *Ibid.* at 12.

clarification before a final score could fairly be assigned. Therefore, it was decided that fairness to BancTec required a slight deviation from the evaluation process specified in the RFP.

Addressing a number of specific points in BancTec's complaint, the Department submitted the following:

- Contrary to BancTec's allegation, the detailed evaluation sheets used by the evaluators, and BancTec's evaluation report, mirror the evaluation criteria specified in the RFP. As well, BancTec's oral presentation was rated according to the evaluation sheet.
- The expression "level of comfortableness" used by the evaluators during the debriefing of November 8, 2000, was merely a colloquial reference to the second element of the evaluation criteria.
- BancTec was referred to as "Unisys" by simple human error.
- The evaluators did not state, nor admit, that BancTec's Project Manager "was very good". Rather, it was a comment provided by a reference during the first reference check.
- The evaluators were not operating on a fundamental misunderstanding of BancTec's written proposal, since the notion of throughput that they used in assessing BancTec's proposal was defined in BancTec's written proposal, specifically the literature on the scanner specifications that referred to throughput on landscape orientation.
- The RFP clearly provided for an oral presentation to be made by bidders. Even if certain alleged statements attributed to one of the Department's personnel were made at the time of the debriefing, a mere opinion by someone outside of the evaluation team is irrelevant to a fair evaluation.

In its final submissions of February 1, 2001, the Department submitted that the Tribunal should disregard the new issues raised by BancTec in its submissions of January 30, 2001. The Department specifically denied that it intended to pass BancTec at step 3 or that BancTec had passed step 3. The Department reaffirmed that the evaluation of BancTec's references and of the oral presentation was made using the objective criteria specified in the RFP and the same detailed evaluation grid. Furthermore, the Department denied that there were "many inexcusable errors" in the evaluation of BancTec's proposal.

On the issue of apprehended or real bias, the Department denied that Unisys was treated more favourably than BancTec. As to one of the documents provided to the evaluators as part of an information package, the Department submitted that neither it nor Statistics Canada had any knowledge that this document was once available on the Unisys website. In addition, the Department argued that BancTec did not provide any evidence to support this claim. The Department also submitted that, contrary to BancTec's claim, it never intended to ask BancTec or to invite Unisys to use additional references.

BancTec's Position

BancTec submitted that the GIR describes a procurement process that was in disarray, that did not follow the requirements of the RFP or the applicable trade agreements and that clearly violated its rights under both the RFP and the trade agreements.

Specifically, BancTec submitted, on the basis of the Department's letter of July 26, 2000, that it is disingenuous on the part of the Department and Statistics Canada to argue now that BancTec did not pass step 3 (reference checks). The letter, BancTec submitted, was extremely important in its decision to invest the considerable time and effort required to mount an oral presentation.

BancTec submitted that the Tribunal should discount the Department's explanation that it was urgent to proceed with BancTec's oral presentation before finalizing the evaluation of BancTec's references. The actions of the Department and Statistics Canada, e.g. the evaluation of proposals being started some three weeks after bid closing and the contract being awarded on October 2, 2000, are not at all consistent with an urgency in finalizing this procurement.

With respect to the Department's reference to a "duty" to seek clarification to ensure a fair treatment of BancTec's proposal, BancTec submitted that it was never asked to provide any clarification in accordance with section A3 of the RFP or section 10 of the SOR in respect of any matter and, in particular, any matter relating to step 3 of the evaluation process. Furthermore, BancTec submitted that it was never advised during the oral presentation that clarifications regarding its references were needed in order to determine whether it would pass or fail step 3. In addition, BancTec submitted, the GIR explanation of how such clarifications were conducted and the sequence of events thereof is not credible.

With respect to the evaluators' conduct and the assessment by the Department and Statistics Canada of the oral presentation, BancTec submitted that the admissions made in the GIR and the failure to produce critical documents in relation to the presentation lead to the inescapable conclusion that the oral presentation and the reference checks were evaluated together rather than separately. For example, BancTec submitted that the oral presentation appears to have been used to verify information given during the alleged "preliminary reference checks". The information thus gathered not only affected steps 3 and 4 of the evaluation of its proposal but possibly prejudiced the fair and objective evaluation of its proposal as a whole.

In its comments, BancTec raised concerns about three specific items in the final evaluation report of the oral presentation, namely, the alleged discrepancy between portrait and landscape paper, the 5- versus 6-day issue and the role played by the proposed project manager during the oral presentation, all pointing to the apparent misunderstanding by the Department and Statistics Canada of BancTec's proposal.

BancTec submitted that the evidence on the record shows that the evaluators who did the initial check of the references provided by BancTec gave it a passing score for that step of the evaluation process and that it is on that basis that the Department's letter of July 26, 2000, to BancTec was authorized. BancTec further submitted that, sometime after the fact, possibly as a result of something that occurred during the oral presentation, the evaluators either decided to change their scoring of BancTec's proposal at step 3 or were told to do so.

Furthermore, BancTec submitted that the other conclusion that could be reached on the basis of the facts presented is that the evaluators simply decided to deviate from the evaluation process set out in the RFP. In so doing, they did not complete step 3 before moving to step 4 and were negligent in their consideration of the evaluation process and BancTec's rights. They negligently advised BancTec that it passed step 3 when there was no basis for that statement and caused BancTec to incur costs in preparing and presenting an oral presentation, when, in fact, BancTec's proposal did not stand a chance of being found compliant.

BancTec submitted that the evaluation process stipulated in the RFP could not be clearer and that the distinction between step 3 and step 4 was particularly significant. Clearly, the evaluation of the references and the evaluation of the oral presentation were intended to be quite separate exercises, which would evaluate distinct and separate components of the proposal according to different criteria. BancTec submitted that, if these steps were not kept separate, there was a real risk that the criteria intended for step 3 would be used as part of step 4 of the evaluation and vice versa. Indeed, BancTec asserted, that is exactly

what may have happened in this case, with the end result that it could not believe that either step was fairly evaluated using the published criteria.

BancTec also submitted that the evaluation guide for steps 3 and 4 failed to include an indication as to what measurements or criteria would be used by the evaluators in determining the “similarity” of the project undertaken, the “degree” of client satisfaction or the “quality” of the oral presentation made. This lack of objective criteria, BancTec submitted, resulted in arbitrary conduct in evaluating BancTec’s proposal.

BancTec submitted that, in light of the serious issues of credibility raised by the contradictory statements in the GIR, the Tribunal should order the disclosure of additional information and the production of additional documents.

In its submissions of January 30, 2001, BancTec submitted that, at the very least, the evidence shows that the Department and Statistics Canada were totally negligent in their consideration of the evaluation plan and haphazardly went about the evaluation process, oblivious to the fact that BancTec was spending considerable time and money participating in the procurement.

BancTec submitted that the Department and Statistics Canada did not use detailed evaluation sheets when checking the references or during the oral presentation. Instead of using objective criteria, the evaluators simply took handwritten notes. There were no guidelines describing what types of answers from the references would result in “excellent”, “very good”, “good” or “poor” marks. The same applied to the oral presentation. This type of ambiguity and subjectivity, BancTec submitted, is a clear contravention of the trade agreements and resulted in an unannounced subjective comparison of BancTec’s proposal with that of Unisys and in many inexcusable errors in the evaluation of BancTec’s proposal, e.g. the orientation issue.

BancTec submitted that the Department, during the evaluation process, added criteria that altered the requirements of the RFP. Furthermore, BancTec submitted that the Department failed to disclose all relevant information in the GIR and that this should be interpreted in its favour.

BancTec also alleged that the additional information released by the Department on January 17, 2001, revealed that the Department and Statistics Canada favoured Unisys and, as a result, treated BancTec’s proposal unfairly and that, as such, there is evidence of real bias or, at the very least, a reasonable apprehension of bias. BancTec submitted that Unisys either directly or indirectly provided some of the material used by the evaluators without BancTec’s knowledge and that Unisys was given additional opportunities to explain areas of concern, whereas there was a conscious decision not to give BancTec the same opportunity.

TRIBUNAL’S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements of NAFTA, the AGP and the AIT.

Article 1008(1)(a) of NAFTA requires that entities apply the tendering procedures in a non-discriminatory manner. More specifically, Article 1013(1)(h) of NAFTA and Article XII(2)(b) of the

AGP both stipulate that, where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders, including the criteria for awarding the contract and any factors other than price that are to be considered in the evaluation of tenders. Article 1015(4)(d) of NAFTA provides that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation”. Article 506(6) of the AIT provides, in part, that “tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria”.

In its complaint, BancTec alleged that, in evaluating proposals, the Department and Statistics Canada arbitrarily included a requirement for an oral presentation when such presentation was not necessary to evaluate its proposal or any proposal. The Tribunal notes that the RFP clearly and distinctly provided that oral presentations would be made by bidders that successfully completed the first three steps of the evaluation process. If BancTec felt that this approach violated provisions of the applicable trade agreements, it should have raised the matter with the Department or the Tribunal within 10 working days from discovering the requirement, as prescribed in section 6 of the Regulations. This was not done and, in the Tribunal’s opinion, this ground of complaint was not filed in a timely manner.

BancTec further alleged that the Department and Statistics Canada acted unfairly and without transparency in evaluating its proposal, particularly in assessing the references that it submitted as part of its proposal. The Tribunal finds that there is merit to this allegation. The Tribunal understands the key facts surrounding the evaluation of the references submitted by BancTec to be the following: On July 20 and 25, 2000, members of the evaluation team from Statistics Canada contacted the two references submitted by BancTec. The reference checks revealed concerns with BancTec’s project management capability and with the quality of the scanners that it proposed. On this basis, a preliminary score, less than the required 80 points, was attributed to BancTec. The Department and Statistics Canada concluded that further clarification was required to complete the assessment of BancTec’s references. However, given the tight time frame estimated to complete the evaluation of proposals and to issue a contract and because of the absence, at the time, of certain key individuals both at Statistics Canada and at one referenced contact, it was decided to proceed to the oral presentation stage of the evaluation process and to complete BancTec’s reference checks afterward. On July 26, 2000, the Department informed BancTec in writing and in an unequivocal manner that its proposal had successfully passed steps 1, 2 and 3 and, therefore, qualified for step 4. This action was clearly a contradiction of the fact that BancTec had received a preliminary score for its reference checks below the minimum points required and a breach of the evaluation methodology set out in the RFP, requiring that step 3 be completed before step 4 was initiated.

The Department argued that it acted this way to ensure that BancTec would have a fair chance to secure maximum points for the references submitted. The Tribunal has no reason to doubt the Department’s and Statistics Canada’s motive in the matter. However, the approach adopted by the Department clearly ran counter to that set out in the RFP and misled BancTec as to the real status of its proposal. BancTec argued that it attached great importance to the Department’s letter of July 26, 2000, when it decided to invest significant resources in preparing and delivering its oral presentation. The Department’s letter of July 26, 2000, in no way informed BancTec that the assessment of the references submitted with its proposal was still ongoing. Therefore, in the Tribunal’s opinion, the Department caused BancTec to incur costs in preparing and giving an oral presentation without informing it of all the risks related thereto. The Tribunal is of the view that the Department should not have misled BancTec as to the status of its proposal and that, should that have occurred inadvertently, the Department should have corrected the situation expeditiously. The Tribunal is not satisfied that such a correction was done in this instance and will therefore award BancTec the reasonable costs that it incurred in preparing and giving its oral presentation.

BancTec alleged that, in evaluating its proposal, specifically steps 3 and 4, the Department and Statistics Canada varied the criteria set out in the RFP and failed to use an objective rating guide. As a result, BancTec submitted, the criteria governing steps 3 and 4 were intermingled, resulting in the evaluation of BancTec's oral presentation being coloured by the ongoing assessment of its references. The Tribunal finds that there is no merit to this allegation. There were clear criteria set out in the RFP to guide the evaluation of the references and the oral presentations. Although the sequencing of steps 3 and 4 of the evaluation process was not observed, the Tribunal is satisfied that the evaluation criteria applicable to steps 3 and 4 of the evaluation process were otherwise correctly applied by the Department and Statistics Canada in evaluating BancTec's proposal.

With respect to BancTec's allegation that the Department and Statistics Canada favoured or appeared to favour Unisys, the Tribunal finds that there is no foundation on the record to support this allegation.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was conducted in accordance with the requirements of the AIT, NAFTA and the AGP and that, therefore, the complaint is valid in part.

Pursuant to subsection 30.15(4) of the CITT Act, the Tribunal awards BancTec its reasonable costs incurred in preparing a response to this solicitation but limits those costs to the costs involved in preparing and giving its oral presentation.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards BancTec its reasonable costs incurred in filing and proceeding with this complaint.

Patricia M. Close
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