

Ottawa, Monday, September 11, 2000

File No.: PR-2000-005

IN THE MATTER OF a complaint filed by Radiant Point 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 section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian
International Trade Tribunal determines that the complaint is valid in part.

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

James A. Ogilvy
James A. Ogilvy
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination: September 11, 2000

Tribunal Member: James A. Ogilvy, Presiding Member

Investigation Officer: Paule Couët

Counsel for the Tribunal: Marie-France Dagenais

Complainant: Radiant Point Inc.

Government Institution: Department of Public Works and Government Services

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

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the complaint under subsection 30.13(1) of the *Canadian
International Trade Tribunal Act*.

STATEMENT OF REASONS

On April 27, 2000, Radiant Point Inc. (Radiant Point) 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 Nos. 05005-9-0492/A, /B and /C)² by the Department of Public Works and Government Services (the Department) for the provision of hardware³ and service components⁴ required by the Office of the Chief Electoral Officer of Canada (Elections Canada) to run federal electoral events (general elections, referendums and by-elections). The contract period is 48 months, with an option for 12 additional months.

Radiant Point alleged that, contrary to the provisions of the *North American Free Trade Agreement*,⁵ the *Agreement on Government Procurement*⁶ and the *Agreement on Internal Trade*,⁷ it was materially misled by the Department in respect to the technical compliancy of the proposal that it submitted in response to Solicitation A. Specifically, Radiant Point alleged that: (1) it was refused vital information provided to other bidders; (2) its proposals in response to the first, second and third Requests for Proposal (RFPs) were not properly or fairly evaluated; and (3) it was discriminated against by the Department.

Radiant Point requested, as a remedy, its costs of bidding, its costs of filing this complaint and the profits that it would have earned, had its proposal in response to Solicitation B or Solicitation C been properly evaluated by the Department and had it been awarded the contract.

On May 3 and 4, 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*.⁸ On June 16, 2000, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. Hereinafter referred to as Solicitation A, Solicitation B and Solicitation C.
3. Equipment estimated volumes are as follows: 3,500 microcomputers, 602 printers, 301 servers, 301 concentrators and related equipment. Source: Request for Proposal at 2.
4. Including warehousing, delivery, configuration, installation, de-installation, documentation, warranty/maintenance services and technical support. Source: Request for Proposal at 2.
5. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].
7. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].
8. S.O.R./93-602 [hereinafter Regulations].

with rule 103 of the *Canadian International Trade Tribunal Rules*.⁹ On June 29, 2000, Radiant Point filed comments on the GIR with the Tribunal. On July 13, 2000, the Tribunal requested additional information from the Department on the product evaluation exercise that took place at the end of Solicitation A. On July 24, 2000, the Department filed the additional information with the Tribunal and, on August 22, 2000, Radiant Point filed comments on the additional information provided by the Department 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

The procurement process for this requirement was initiated upon the receipt by the Department of a requisition from Elections Canada on July 5, 1999.

An RFP for Solicitation A was posted on Canada's Electronic Tendering Service (MERX) and published in *Government Business Opportunities* on September 30, 1999, with a closing date of November 16, 1999.

Six proposals, including one each from Radiant Point, GE Capital and IBM Canada Limited (IBM), were received on November 16, 1999. According to the GIR, the evaluation of the proposals consisted, in order of precedence, of a technical evaluation, a point rated evaluation, a financial evaluation and a product evaluation.

Section 4.0 of Appendix "E" to the RFP, "Product Evaluation", reads, in part:

At the request of the Contracting Authority, the Bidder **SHALL** submit to the Elections Canada product evaluation team within forty eight hours, two fully configured systems (including servers, desktops, printers, UPS, concentrators and power bars) for evaluation and certification purposes.

The Bidder shall demonstrate to the Elections Canada product evaluation team that the provided systems are working properly prior to Elections Canada accepting the systems for evaluation.

In the event that a system fails to work properly after the Bidder has certified the system to be fully operational; a Bidder will be provided a maximum of four instances or maximum of eight accumulated wall clock hours in total to identify and resolve any and all product failures identified during product evaluation.

On November 30, 1999, the technical, point rated and financial evaluations of the proposals were completed, and only the proposals of GE Capital and IBM remained under consideration. The other proposals, including Radiant Point's proposal, were found non-responsive as they did not obtain the minimum score of 70 percent for the rated requirements. Furthermore, GE Capital was determined to have submitted the proposal with the "lowest evaluated price" and, consequently, on November 30, 1999, it was advised to submit its proposed system to Elections Canada for "product evaluation", as provided for in the RFP.

GE Capital made numerous unsuccessful attempts to provide Elections Canada with its configured system, as proposed, for evaluation and certification purposes. However, it was determined that GE Capital failed the product evaluation because the modem that it proposed could not function with its server running

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

the Microsoft Windows NT Server Operating System Version 4.0 and because GE Capital failed to have available, for product evaluation, one of the monitors that it proposed.

According to the GIR, at that point in Solicitation A, only IBM's proposal remained under consideration. In reviewing the specific components of IBM's proposed system in the context of a future product evaluation, it was determined that clarification from IBM was necessary regarding which one of three modems mentioned in its proposal it was offering. Upon evaluation of IBM's response, it was determined that the modem proposed by IBM did not meet the mandatory requirement to support transmission rates of up to 56 kilobits per second. As a result, no product evaluation of IBM's proposed system was conducted. On January 14, 2000, the six firms that had submitted proposals were advised by letter that the solicitation was being reissued, as there had been no responsive bid received in response to Solicitation A. On or about that date, Radiant Point requested a debriefing. the Department declined the request.

Also, on January 14, 2000, the Department issued a revised solicitation (Solicitation B) to the six bidders, with a closing date of January 28, 2000. Solicitation B incorporated the changes made to Solicitation A through the question and answer process and a number of administrative changes. All the changes made between Solicitation B and Solicitation A were marked in Solicitation B for easy identification. Solicitation B also incorporated a statement to the effect that Solicitation B cancelled and superseded Solicitation A.

On January 14, 2000, the Department contacted, by telephone, the four bidders (including Radiant Point) that had not met the minimum score of 70 percent for the rated requirements of Solicitation A to provide them with information with respect to their scores, along with the evaluation team's remarks on those scores. During these telephone calls, the four bidders were also informed that their technical proposals submitted in response to Solicitation A had been evaluated as compliant. According to the GIR, neither GE Capital nor IBM was provided with any information beyond that which they had gleaned during the product evaluation stage of Solicitation A. No bidder was given any information about problems encountered with any other firm's proposal at any time.

On January 24, 2000, the Department sent a clarification letter to the six bidders as follows:

This retender will entail a complete evaluation of the new bids submitted. The evaluation of the previous proposals submitted to Solicitation No. 05005-9-0492/A will have no bearing on this new evaluation. It is the bidder's responsibility to insure that their new bids meet all the requirements of the retendered Solicitation No. 05005-9-0492/B.

The new bids will be evaluated as stand alone documents. **NO REFERENCES TO THE PREVIOUS BID SUBMISSION ARE ALLOWED.**

All six bidders submitted new proposals by January 28, 2000. The technical evaluation of the proposals submitted in response to Solicitation B was completed on February 14, 2000. According to the GIR, all six proposals contained one or more areas that did not comply with the mandatory technical requirements of Solicitation B. As a result, the evaluation process of all proposals submitted in response to Solicitation B was terminated at that point. According to the GIR, no bidder was advised of the specific problems of its proposal. However, Radiant Point had asked for a debriefing again.

On February 16, 2000, the Department wrote the six bidders again, in part, as follows:

This Solicitation document, Solicitation No. 05005-9-0492/C cancels and supersedes the previous Solicitation document, Solicitation No. 05005-9-0492/B dated January 14, 2000.

The reason for reissuing the solicitation is that after evaluating all technical proposals submitted, no bids were found to be compliant. Accordingly, the evaluation process ceased. As the evaluation ceased at this point, no conclusions may be drawn about the existence of additional non-compliances in any of the bids. **IT IS THE RESPONSIBILITY OF THE BIDDER TO ENSURE THE COMPLIANCE OF ITS BID PRIOR TO ITS RESUBMISSION.**

The nature of the deficiencies that caused the non compliance are a direct result of not thoroughly reading the RFP document and in particular, not paying close attention to the mandatory requirements and the technical specification. As a result of this, there is no need for changes or additions to the new solicitation except for the following:

It is NOT mandatory to submit new complete proposal packages, however, Bidders may do so if they so chose. If you choose to modify the proposal submitted in response to Solicitation No. 05005-9-0492/B rather than submit a new proposal, then it is mandatory that you explicitly state which pages or sections are to be deleted and what they are to be replaced with.

[Underlining added]

The closing date of Solicitation C was February 22, 2000.

On February 16, 2000, Radiant Point contacted, by telephone, two representatives of the Department to advise that Radiant Point should be informed specifically about the areas of its proposal that needed to be corrected. According to the GIR, the only information conveyed to Radiant Point during these telephone conversations was that "all bidders needed to pay close attention to each of the mandatory requirements".

All six bidders submitted proposals in response to Solicitation C. According to the GIR, the technical evaluation of the proposals submitted in response to Solicitation C was completed on March 10, 2000. IBM's proposal was the only proposal that was deemed compliant with the mandatory requirements of the RFP. Therefore, it was evaluated with respect to point rated criteria and achieved a passing score. On March 14, 2000, IBM was requested to submit its proposed system for "product evaluation". The evaluation was successfully completed on March 20, 2000, and IBM's proposal was determined to be fully responsive.

Radiant Point's proposal in response to Solicitation C was deemed non-compliant for failing to meet the requirements of section 2.2 of Appendix "H" to the RFP, which reads:

2.2 Microsoft NT certification

must have Microsoft for NT Server vers. 4.0 certification (logo level). The certification must be between Microsoft and the final assembler of the system (as defined by the brand name appearing on the system unit and in all supporting manuals and documentation). Proof of certification for each system bid must be provided in the form of a copy of the complete Microsoft NT certification report. This report(s) must be enclosed in the bid response.

On March 31, 2000, a contract was awarded to IBM. On April 4, 2000, the Department advised the unsuccessful bidders of the contract award and informed each of the bidders why their respective proposals had been declared non-responsive and offered an opportunity for a debriefing.

In its letter to Radiant Point to give context to the mandatory server certification requirement, the Department provided additional background information in respect of the requirement for obtaining the Microsoft Windows NT Server Operating System Version 4.0 certification (logo level), including information on the Microsoft Windows NT Server System Design Guide 1.0 (SDG 1.0).

At the debriefing held on April 12, 2000, between Radiant Point, the Department and Elections Canada, it became apparent that the reference to the SDG 1.0 in the Department's letter of April 4, 2000, to Radiant Point was confusing to several of Radiant Point's representatives.

POSITION OF PARTIES

Department's Position

The Department submitted that Radiant Point's allegation that it was prejudiced by information that it received from the Department, to the effect that its technical proposal submitted in response to Solicitation A was evaluated as being compliant, is without merit when considered in the context of more pertinent information provided to bidders following Solicitation B. This latter information, the Department submitted, specifically advised that all bidders' technical proposals submitted in response to Solicitation B were non-compliant.

The Department argued that, logically, Radiant Point reasonably should have been focussing on the evaluation of its proposal submitted in response to Solicitation B when preparing its proposal in response to Solicitation C. Consequently, the Department argued that information with respect to Radiant Point's proposal in response to Solicitation A, to the effect that its proposal was technically compliant, had no relevance whatsoever to its disqualification after the third solicitation.

The Department further submitted that any information gleaned by GE Capital and IBM in the context of the product evaluation conducted at the end of Solicitation A was clearly of no assistance to them in the preparation of their subsequent proposals because both bidders submitted proposals in response to Solicitation B which were technically non-compliant. Furthermore, the Department argued that the information gleaned by GE Capital and IBM at the product evaluation stage of Solicitation A pertained only to their modems. This information, the Department submitted, had no relevance to the final solicitation or to Radiant Point's disqualification for failure to provide, in its proposal, the proper Microsoft Windows NT Server Operating System Version 4.0 certification.

The Department argued that the only issue in this complaint is whether Radiant Point's technical proposal in response to Solicitation C was properly determined to be non-compliant for failing to meet the requirements of section 2.2 of Appendix "H" to the RFP. The Department submitted that the server certification that it required is of particular importance when considered in the context of the equipment's use, i.e. for election returns, a use during which a system failure would be catastrophic. The Department submitted that Radiant Point did not include, in its proposal, equipment with server capability as a deliverable. In fact, Radiant Point bid the same equipment under the headings "**Standard Desktop Configuration**" and "**Standard Server Configuration**", i.e. Seanix TCO GAT III 500 with an Intel Pentium III 500 MHz processor.¹⁰ The Seanix TCO GAT III 500, the Department asserted, is not certified by Microsoft to run the Microsoft Windows NT Server Operating System Version 4.0 as a server.

With respect to Radiant Point's allegation that the "System Test Report PC 98", concerning the Seanix TCO GAT III 500 that it proposed, met the requirements of section 2.2 of Appendix "H" to the RFP, the Department submitted that the said report is not a Server Test Report certifying a server for running the Microsoft Windows NT Server Operating System Version 4.0. Radiant Point had not provided a certification document to show that its proposed Seanix TCO GAT III 500 conforms to the requirements of the Microsoft Windows NT Server SDG 1.0, as stipulated in the Server Test Report. Rather, the Department

10. See GIR, Exhibit 8.

submitted, its "System Test Report PC 98" shows that it meets the requirement only for PC 98 (personal computer) certification.

The Department requested the opportunity to make further submissions with respect to costs.

On July 24, 2000, in providing the additional information requested by the Tribunal, the Department submitted that, throughout the entire product evaluation conducted at the end of Solicitation A, no testing results were ever communicated by Elections Canada to GE Capital. Communication was restricted to Elections Canada's receipt of the complete and accurate equipment for product testing. The only information gleaned by GE Capital was to the effect that its proposed facsimile modem was non-compatible with the Microsoft Windows NT Server Operating System Version 4.0. The Department argued that, while the problem with the modem was discovered at the product evaluation stage, the nature of the problem was such that GE Capital could have discovered the problem itself at any time, simply by having one of its technicians conduct a review of the equipment included in its bid. The Department submitted that this appears to have happened, since, on December 2, 1999, before the system proposed by GE Capital was evaluated, GE Capital attempted to substitute the modem that it proposed with others that would have functioned correctly with the Microsoft Windows NT Server Operating System Version 4.0.

With respect to the treatment of IBM's proposal in response to Solicitation A, the Department indicated that no product evaluation of the system proposed by IBM was conducted. Furthermore, the Department submitted that the only information gleaned by IBM with respect to its proposal was limited to the Department's query with respect to the modem that it proposed. Because IBM's proposal was not clear as to which one of three different modems was bid, the Department asked IBM to clarify its proposal in that respect. This information, the Department argued, could not have advantaged IBM in any way.

Radiant Point's Position

Radiant Point submitted that for the client to conduct a product evaluation of the system proposed by GE Capital, specifically the proposed modem, even though one of its required monitors was not available for testing within 48 hours after notification, is a breach of the terms of the RFP. In fact, Radiant Point submitted, as a result of a product evaluation that should not have been allowed, GE Capital secured valuable technical information. The same treatment was not afforded to other bidders.

Radiant Point further submitted that the issue is not only the disqualification of its proposal submitted in response to Solicitation C but the fact that the Department failed to follow the tendering procedures for this procurement fairly and equitably for all suppliers. Radiant Point argued that the fact that IBM's and GE Capital's proposals in response to Solicitation B were non-compliant does not negate the fact that they obtained privileged information as a result of the product evaluation conducted by the Department pursuant to Solicitation A and that this information was and remained valuable throughout the procurement process. Radiant Point added that the Department had given technical information to GE Capital and IBM and not to the other bidders, thereby breaching the trade agreements which require that procurements be carried out in an impartial manner.

Radiant Point submitted that the Department's letter initiating Solicitation C and requesting bidders to pay close attention to the mandatory requirements and technical specifications indicated to it that there were two separate areas in which bids were found to be non-compliant: mandatory requirements and technical specifications. In this context, Radiant Point maintained that it was prejudiced by the information that it received from the Department after the conclusion of Solicitation A, to the effect that its technical proposal submitted in response to this solicitation was evaluated as being compliant. This information was

inaccurate and, therefore, misleading. If, Radiant Point reasoned, its proposal was technically compliant in Solicitation A and then was technically non-compliant in Solicitation B, and the Department had not made any changes to the requirements, then the only conclusion that one could draw was that it was in fact the additions that it made to its technical proposal that were non-compliant. Therefore, the Department's letter at the end of Solicitation B, indicating that all technical proposals were non-compliant, could only be taken to mean that the changes made by Radiant Point to the point rated portion of its proposal were the cause of its non-compliance.

Radiant Point submitted that the Department has failed to indicate, in the GIR, that the PC 98 certification is a more robust and extensive test than the Microsoft Windows NT Server Operating System Version 4.0 certification. Furthermore, Radiant Point submitted, it is understood and agreed by Microsoft and the industry that a system with the PC 98 certification would easily obtain the Microsoft Windows NT Server Operating System Version 4.0 certification.

Radiant Point submitted that the server specification in the RFP did not outline any server capabilities. It asserted that the specifications clearly described a desktop system, not a server, and that the Seanix TCO GAT III 500 that it proposed was fully capable of functioning as a desktop and as a server. In summary, Radiant Point argued that its proposal met and even exceeded the certification requirements in the RFP.

Radiant Point concluded that, if the Department had not committed the above-mentioned error or had not failed to properly inform Radiant Point after discovering its error, and instead had followed proper procedure, it would have submitted fully compliant proposals in response to both Solicitation B and Solicitation C and been awarded the contract.

In its commentary of August 22, 2000, Radiant Point indicated that the Department's responses make it clear that the Department's and Elections Canada's evaluation of Solicitation A was not conducted in a fair and equitable manner, thus resulting in unfair advantages to GE Capital and IBM in Solicitation A and, by way of consequence, in Solicitation B, Solicitation C and contract award. Specifically, Radiant Point asserted that, contrary to the provisions of the RFP, Elections Canada conducted extensive testing of the equipment provided by GE Capital without GE Capital ever having provided a fully configured system for evaluation and certification purposes. In addition, GE Capital did not demonstrate to the Elections Canada product evaluation team that the provided system was working properly prior to Elections Canada accepting the system for evaluation. Radiant Point further asserted that GE Capital was given ample opportunity, not permissible under the RFP, to rectify the situation. As well, Radiant Point asserted that the product evaluation process was plagued with improper communications between GE Capital and Elections Canada.

Radiant Point submitted that the Department's assertion that, after the disqualification of GE Capital's proposal, IBM's proposal was the only remaining bid that had been evaluated as technically compliant is false. Radiant Point's proposal was also deemed technically compliant, as was stated in the GIR.

Furthermore, Radiant Point submitted that IBM's proposal in response to Solicitation A should have been declared non-compliant because it was unclear as to which modem it was proposing. If IBM had complied with the requirement to provide, with its proposal, sufficient narrative to substantiate it, there would have been no need for clarification by the Department. However, because the clarification was sought, and sought late in the bid evaluation process, IBM received preferential treatment because the rated requirement portion of its proposal was, nevertheless, evaluated and relevant information thus produced and gleaned by IBM.

In light of the above, Radiant Point submitted there was a gross mishandling of this file by the Department and Elections Canada from the onset of Solicitation A through Solicitation B, Solicitation C and contract award.

VALIDITY OF THE COMPLAINT

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 NAFTA, the AGP and the AIT.

Article 1008 of NAFTA requires that entities apply the tendering procedures in a non-discriminatory manner. More specifically, Article 1008(2) requires that each Party ensure that its entities:

- (a) do not provide to any supplier information with regard to a specific procurement in a manner that would have the effect of precluding competition; and
- (b) provide all suppliers equal access to information with respect to a procurement during the period prior to the issuance of any notice or tender documentation.

Article 1015(4)(a) of NAFTA stipulates, in part, that “to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation”.

The AGP contains provisions to the same effect. Article 501 of the AIT states that the purpose of Chapter Five, “Procurement”, is to establish a framework that will ensure equal access to procurement for all Canadian suppliers. Furthermore, Articles 504(3) and 506 of the AIT specifically prohibit any measures that are inconsistent with that purpose.

Radiant Point alleged that the Department and Elections Canada, in conducting Solicitation A, Solicitation B and Solicitation C for this procurement, acted inconsistently in dealing with potential suppliers and mistakenly with regard to Radiant Point, resulting in discrimination against Radiant Point and it being prejudiced in its effort to be the successful bidder. Furthermore, Radiant Point alleged that its proposal was improperly declared non-compliant for failing to provide the certification required at section 2.2 of Appendix “H” to the RFP.

Addressing the last issue first, the Tribunal notes that the parties agree that, to be considered for award, a proposal had to meet all the mandatory requirements of the RFP and that the certification described at section 2.2 of Appendix “H” to the RFP is a mandatory requirement. Radiant Point argued that the “System Test Report PC 98” that it submitted concerning the Seanix TCO GAT III 500 met this requirement. For its part, the Department argued that the equipment proposed by Radiant Point does not have server capability and is not certified by Microsoft to run the Microsoft Windows NT Server Operating System Version 4.0 as a server. After carefully reviewing the evidence on this point, the Tribunal finds that Radiant Point did not provide, with its proposal, the certification mandated under section 2.2 of Appendix “H” to the RFP. Therefore, the Tribunal finds that the Department acted in accordance with the relevant provisions of the trade agreements when it declared Radiant Point’s proposal non-compliant for this reason.

Radiant Point's first allegation has two branches, namely, that:

- (a) the Department's mistaken statement after Solicitation A that its proposal was technically compliant (an erroneous statement which, Radiant Point submitted, was never corrected until after contract award) compromised its opportunity to be successful during Solicitation B and Solicitation C; and
- (b) GE Capital and IBM obtained relevant information on their proposals while Radiant Point was refused such information, thereby affording potential suppliers uneven treatment.

The Tribunal finds that there is no merit to the first branch of Radiant Point's allegation, but that the second branch of its allegation has merit.

The Tribunal understands the relevant facts of this case as follows. On September 30, 1999, the Department issued Solicitation A. Six proposals were received in response, including one each from Radiant Point, GE Capital and IBM. On November 30, 1999, the financial evaluation phase of Solicitation A having been completed, only the proposals submitted by GE Capital and IBM remained under consideration. That same day, GE Capital, the lowest responsive bidder, was requested to submit the system that it proposed to Elections Canada for product evaluation. On or about that date, GE Capital requested permission to substitute the modem that it had offered in its proposal with an equivalent model. The request was denied. After numerous attempts to provide Elections Canada with the configured system for evaluation and certification purposes, GE Capital failed the product evaluation because the modem that it proposed could not function with its server running the Microsoft Windows NT Server Operating System Version 4.0 and because it failed to have available, for product evaluation, one of the monitors that it proposed. At that point, after seeking clarification from IBM, but before any product evaluation of IBM's proposed system, IBM's proposal was declared non-compliant for failing to include an adequate modem. On January 14, 2000, the Department informed all bidders that no proposal met the mandatory requirements of Solicitation A and that, therefore, it was reissuing the procurement as Solicitation B. That same day, Radiant Point was informed by the Department (mistakenly, it is now known) that the proposal that it submitted in response to Solicitation A was technically compliant and that the reason for its proposal being rejected had to do with the rated requirements in the RFP. Solicitation B superseded and cancelled Solicitation A. On January 14, 2000, the Department, in a written clarification to all bidders, indicated that the proposals submitted in response to Solicitation A would have no bearing on the new evaluation. All proposals submitted in response to Solicitation B were declared non-compliant, and the bidders were not informed of the reasons therefor. On February 16, 2000, the Department wrote the six bidders informing them of the results of solicitation B, i.e. that no proposal was found to be compliant, and reissued the procurement in the form of Solicitation C which superseded and cancelled Solicitation B. The facsimile indicated that the reason that none of the proposals submitted in response to Solicitation B were deemed compliant was the direct result of "not thoroughly reading the RFP document and in particular, not paying close attention to the mandatory requirements and the technical specification".

The Department erroneously informed Radiant Point, after Solicitation A was concluded, that its proposal in response to Solicitation A was technically compliant. This is not disputed. However, the Tribunal is satisfied that the Department clearly indicated to bidders, including Radiant Point, that the responses received in response to Solicitation A would have no bearing on the evaluation of proposals submitted in response to Solicitation B and likewise informed all bidders after the conclusion of Solicitation B that the reason for the failure of the proposals to be deemed compliant was due to a less than thorough reading of the mandatory requirements and the technical specification. In the Tribunal's opinion, Radiant Point received sufficient written notice from the Department that all proposals submitted in response to Solicitation A and Solicitation B were deficient in respect of the mandatory technical

requirements, and Radiant Point should have ignored the antecedent oral information that it received from the Department to the contrary. In addition, the Tribunal is of the view that the requirement stipulated in section 2.2 of Appendix “H” to the RFP is sufficiently clear and straightforward that Radiant Point, knowing its response to this requirement, could reasonably conclude, by itself, that its proposal might not be totally acceptable in the circumstances.

With respect to the uneven treatment afforded to all bidders, specifically at the time of the conduct of the product evaluation at the end of Solicitation A, the Tribunal finds that, by failing to apply the product evaluation procedure set out in the RFP, Elections Canada and the Department favoured GE Capital to the detriment of other bidders. The Department admits that GE Capital was able to glean certain information as a result of the failed product evaluation. Because, in the circumstances, this product evaluation should never have taken place and because GE Capital might have benefited from the information thus gleaned, the Tribunal concludes that, contrary to Article 1008(2)(b) of NAFTA, all bidders were not provided equal access to information in the period prior to Solicitation B and Solicitation C. The Tribunal has also carefully examined Radiant Point’s allegation, as it applied to IBM, and concludes that IBM did not receive preferential treatment as a result of the product evaluation exercise in Solicitation B. The Tribunal sees no fault with the clarification process that took place at that point.

Although the Tribunal has concluded that GE Capital received preferential treatment, the Tribunal finds that the information that it gleaned did not prejudice Radiant Point or vitiate the final outcome of this procurement process. The Tribunal is satisfied that the information gleaned by GE Capital (1) was of marginal value, (2) could be and possibly was found by GE Capital itself before the product evaluation was conducted and (3) did not affect the outcome of Solicitation B, which subsequently was superseded and cancelled by Solicitation C and for which IBM, not GE Capital, was the successful bidder. For all these reasons, the Tribunal will not recommend a remedy and will award Radiant Point its costs for filing and proceeding with the complaint.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the requirements of the applicable trade agreements and that, therefore, the complaint is valid in part.

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

James A. Ogilvy
James A. Ogilvy
Presiding Member