



Ottawa, Monday, February 26, 2001

File No.: PR-2000-037

IN THE MATTER OF a complaint filed by Computer Talk Technology, 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 not valid.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination: February 26, 2001

Tribunal Member: Patricia M. Close, Presiding Member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: John Dodsworth

Complainant: Computer Talk Technology, Inc.

Counsel for the Complainant: Dalton Albrecht
Blair Allen
Shahen Mirakian

Interveners: Bell Canada
BCE Nexxia Inc.

Counsel for the Interveners: J.P. Yves Caron

Government Institution: Department of Public Works and Government Services

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



IN THE MATTER OF a complaint filed by Computer Talk Technology, 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 October 25, 2000, Computer Talk Technology, Inc. (Computer Talk) 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. V9345-000020/A) by the Department of Public Works and Government Services (the Department) for the provision of hardware, software, maintenance, and moves, adds and changes, and the management of an integrated network of Interactive Voice Response (IVR) systems,² Computer Telephony Integration (CTI) applications and Toll Free Services solution for the Department of Human Resources Development (HRDC) call centres. The Request for Proposal (RFP) requested bidders to provide a replacement IVR platform for the current HRDC IVR network and a full suite of call processing tools, including a CTI solution that will support the management of calls to HRDC client contact centres across Canada.

Computer Talk alleged that, contrary to Articles 501, 504(3)(b) and (d), and 506(5) and (6) of the *Agreement on Internal Trade*,³ the Department, in conducting this procurement, demonstrated bias in favour of UNIX/RISC (Periphonics); failed to provide all potential suppliers with sufficient time to prepare competitive bids due to the unclear language that it used in changing a requirement from being mandatory to being rated; required qualifications with respect to the system's port capacity that are not essential to fulfill the contract, thereby using quantity requirements to eliminate potential bidders; put "unnecessary" weight on prior experience with the Stahurra-Brenner Custom Connect Facility (CCF) protocol⁴ (the Protocol), thereby biasing the specifications; and referenced brand names in describing its requirements.

Computer Talk requested, as a remedy, that the contract award be postponed until the complaint is resolved. It also requested that a new solicitation, with revised specifications, be issued, and requested its costs for filing this complaint. In the alternative, it requested that the Tribunal award it compensation equal to its lost-profit opportunity. Computer Talk also requested its bid preparation and complaint costs.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. HRDC has more than 100 IVR systems that support several applications for the Employment Insurance, Employment, Canada Student Loans and Income Security programs. Canadians can access these systems through the use of local or toll free telephony services. HRDC maintains 21 call centres and 4 mainframe computers. Three distinct IVR platforms are currently employed by HRDC to deliver these services: Computer Talk, Periphonics and Nortel Meridian IVR. Computer Talk systems predominate in local offices; Periphonics is used in the call centres; and Nortel Meridian systems deliver Income Security program services.
3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
4. The Stahurra-Brenner CCF protocol acts as a "common language" for interactions between systems that must interface with HRDC's Unisys mainframes.

On October 31, 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 That same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. On November 27, 2000, the Tribunal informed the parties that Bell Canada (Bell) and BCE Nexxia Inc. (BCE) had been granted intervener status in the matter. On November 29, 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 December 12, 2000, Computer Talk filed a notice of motion with the Tribunal requesting that the Tribunal order the Department to produce several additional documents relevant to the matter. On January 9, 2001, the Tribunal dismissed Computer Talk's motion because, in its opinion, the documentation and information requested by Computer Talk was not relevant to the complaint. On January 15, 2001, Computer Talk filed comments on the GIR 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

A Notice of Proposed Procurement (NPP) for this solicitation, along with an RFP, was issued on August 17, 2000, and made available to vendors on Canada's Electronic Tendering Service (MERX) on August 21, 2000. The NPP indicated that the solicitation was being conducted under the AIT.

The following provisions of the RFP, as amended, are relevant to this case.

Section A.8i) reads:

All enquiries regarding the bid solicitation are to be submitted in writing . . . to the Contracting Authority named on page one (1) of this document as early as possible within the bidding period. Enquiries must be received no less than 10 calendar days prior to the bid closing date to allow sufficient time to provide a response. Enquiries received after that time may not be able to be answered prior to the bid closing date.

Section B.3 reads:

This document contains the entire requirements and objectives relating to this RFP. Other information and/or documentation provided to or obtained by the Bidder from any source prior to the date of this RFP shall have no force or effect in relation to this RFP.

Section C.7i) reads:

The selection of the Contractor will be made on the basis of the best overall value to Canada in terms of technical merit and price where best value is defined as the highest combined rating of technical merit and price. Price will account for 80% of the total rating, and technical merit will account for 20% of the total rating. The compliant proposal with the highest Total Evaluation Score will be selected for Contract Award.

5. S.O.R./93-602 [hereinafter Regulations].

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

The RFP initially specified September 29, 2000, as the closing date for the submission of proposals. At the request of bidders, the closing date was first extended to October 3, 2000, and subsequently to October 12, 2000. In total, 14 amendments were issued with respect to the RFP. On September 27, 2000, the Department, through RFP amendment No. 011, also extended the deadline for the submission of questions to 12:00 noon EDT on September 28, 2000. Bidders were advised that only questions of clarification regarding amendment No. 011 would be answered. During the time period for the submission of questions, the Department received three e-mails from Computer Talk, with letter attachments containing its questions regarding the RFP.

Computer Talk's letters of September 14 and 24, 2000, questioned the original RFP's point-rated criterion that awarded five points for proposals that included a UNIX/RISC solution. In its September 24, 2000, letter, Computer Talk requested that the same number of evaluation points be awarded for proposals that included alternate platforms, provided the vendor could demonstrate "equivalent" performance to that offered by the UNIX/RISC platform.

The Department responded to Computer Talk's concern in answer 35 included in amendment No. 011 as follows:

HRDC will accept any operating system that meets HRDC's requirements. These requirements are outlined in Annex B to the solicitation, the Statement of Work [SOW]. Section 4.6.1 Hardware architecture (M) "The system must be a proven and reliable platform such as HRDC's current open UNIX/RISC architecture." To further clarify this statement the term "such as" refers to an equivalent operating system and hardware platform.

In addition, section 4.6.2 Operating System (M) states that "The Bidder's proposed operating system must demonstrate 99.999% availability through the equipment demonstration process described in Section 9.15. In addition, Bidders must provide three customer references, with 400 port or greater IVR systems, where an availability level of 99.999% using the proposed operating system has been achieved." Therefore, Annex E, Evaluation Criteria, Point Rated Requirements item 12.2 of the RFP will now read: "Bidders will receive points for: a RISC IVR processor platform and UNIX operating system, or equivalent. Section 12.2 of Annex B will be changed as follows: "Bidders proposing a RISC IVR processor platform and UNIX operating system, or equivalent, will receive maximum points." The term "equivalent" will mean that the proposed system meets the criteria specified in Section 4.6.2.

Computer Talk's letter of September 18, 2000, sought clarification regarding the five evaluation points awarded to proposals that provided one customer reference demonstrating prior experience in supporting the Protocol. In its letter of September 24, 2000, Computer Talk requested that a vendor experience in integrating through any of the standard interface/tools offered by the Protocol be considered fully compliant with this point-rated requirement.

The Department responded to Computer Talk's concern in answer 37 included in amendment No. 011 as follows:

The reliability of the host connection is very important to the availability of the applications that are operating on the IVR Systems. For this reason, HRDC will award points to Bidders, including partners within a Bidder's consortium, that have experience in supporting the Stahurra-Brenner protocol and can provide a reference where they have actually interfaced an IVR system to a Unisys host using the Stahurra-Brenner CCF protocol.

In its letter of September 24, 2000, Computer Talk, in question 5, requested that HRDC “halt, or at least extend, this RFP process”. On September 27, 2000, the Department issued amendment No. 011 in which it answered Computer Talk’s request as follows:

A38. Amendment #010 extended the closing date to October 12th, 2000. No further extensions are anticipated. The deadline for questions is hereby extended to 1200 noon EDT on 28 September 2000. Only questions of clarification regarding this amendment will be answered.

Bidders should note that this solicitation is not subject to guidelines for NAFTA [*North American Free Trade Agreement*⁷] or WTO-AGP [*Agreement on Government Procurement*⁸]. This procurement is being conducted under the guidelines for the Agreement on Internal Trade only, as specified in the Notice of Proposed Procurement published 17 August 2000.

On October 10, 2000, the Department received an e-mail from Computer Talk containing a letter attachment dated October 7, 2000. In this letter, Computer Talk objected to section 4.6.2 of the SOW, which required three references from customers with 400 port or greater IVR systems. Computer Talk also requested an extension to the bidding period of 15 working days on the grounds that amendment No. 011 had the effect of changing the mandatory requirement in section 4.6.2 to a point-rated requirement. Computer Talk further requested that maximum points be awarded for experience demonstrating integration ability in cooperation with the Stahurra-Brenner Group. That same day, the Department responded to Computer Talk by e-mail as follows:

In accordance with Amendment 011, A38, on page 4 of 4, the deadline for responding to questions has passed. We, therefore, regret but we are unable to respond to the questions posed. These guidelines are necessary in order to allow bidders some period where the solicitation document does not change anymore.

On October 11, 2000, Computer Talk sent a letter (notice of objection) to the Department, by e-mail, requesting that “HRDC address [Computer Talk’s] most recent issues and questions filed and grant the extension necessary to respond”. That same day, the Department acknowledged receipt of Computer Talk’s notice of objection and informed it, in writing, as follows: “I have reviewed the circumstances of this solicitation and have come to the final conclusion that Canada can neither grant your request for an extension to the bid closing date, nor can Canada respond to your October 10, 2000 questions”.

Six proposals were received in response to the solicitation. Computer Talk did not submit a proposal in response to the solicitation.

POSITION OF PARTIES

Department’s Position

With respect to the issue of bias, specifically Computer Talk’s allegation that the Department improperly attempted, in July 1998, to “standardize” its IVR requirements on the Periphonics platform by means of single tendering, the Department submitted that this ground of complaint is late or, in the alternative, without merit. The time period to complain about an Advance Contract Award Notice (ACAN) published in July 1998 has long expired. Furthermore, the Department submitted that Computer Talk has not accurately and properly explained that the 1998 ACAN procedure, subsequently withdrawn by the Department, was necessitated solely because of Computer Talk’s initial refusal to provide a Y2K compliant

7. 32 I.L.M. 289 (entered into force 1 January 1994).

8. *Agreement on Government Procurement*, 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

solution for its incumbent IVR CTalk product other than the costly procurement by the Department of Computer Talk's new Windows NT version of its software. At the time, this solution was unacceptable to HRDC. Furthermore, the Department submitted that, ultimately, Computer Talk was the recipient of a sole-source contract for a Y2K compliance upgrade to its existing IVR CTalk systems and that, therefore, this allegation is entirely without foundation.

With respect to Computer Talk's allegation that the RFP, in contravention of Article 501 of the AIT, provided "unfair and significant" point advantages to vendors offering a UNIX platform, the Department submitted that this ground of complaint is late. The Department argued that the time for filing a complaint with respect to any alleged unfairness in the RFP unresolved by amendment No. 011 expired 10 days from the date on which amendment No. 011, specifically answer 35, was provided to the bidders, i.e. September 27, 2000. However, the Department submitted, it received no further objection by Computer Talk with respect to the UNIX/RISC preference issue during the period from September 27, 2000, to the filing of the complaint on October 25, 2000.

In the alternative, the Department submitted that there is no basis for this allegation. The original RFP scoring methodology, the Department asserted, afforded a "very limited point advantage" to a bidder proposing a UNIX platform. However, the RFP scoring methodology as amended in answer 35 of amendment No. 011 specifies maximum scoring for this criterion to bidders proposing a "RISC IVR processor platform and UNIX operating system, **or equivalent**" [emphasis added]. In this context, the Department argued that, although, prior to amendment No. 011, the RFP contained a very slight point advantage for bidders proposing a RISC IVR processor platform and UNIX operating system, the advantage was entirely removed with the addition of the term "or equivalent" in amendment No. 011.

With respect to Computer Talk's allegation that, contrary to Articles 506(5) and (6) of the AIT, amendment No. 011, answer 35, came too late for Computer Talk to establish a toll service partner and to submit a proper response to the RFP, the Department submitted that this ground of complaint is also late. The Department submitted that the time to file a complaint arising out of amendment No. 011 expired 10 days from September 27, 2000, the date on which the amendment was issued to bidders. This is so, the Department argued, because the substance of this ground of complaint was apparent at the very face of the amendment and because there was no further communication between the Department and Computer Talk in which additional inquiries were posed or which otherwise would have had the effect of extending the time for filing.

In the alternative, the Department submitted that the minimal scoring advantage (1.67 evaluation points out of 100) associated initially with the preference for a UNIX/RISC platform cannot reasonably be attributed to being determinative of a bidder's ability to establish a partnership with a toll service carrier and submit a response to the solicitation. In any event, the Department argued, bidders were given notice of amendment No. 011, answer 35, more than two weeks before the extended bid closing date of October 12, 2000, which ought to have been ample time to pursue this matter.

Computer Talk alleged that amendment No. 011, answer 35, lacked clarity and constituted a change of the "mandatory requirement" in section 4.6.2 of the SOW to a "rated requirement", which came too late for Computer Talk to submit a proper response to the RFP. In this respect, the Department submitted that amendment No. 011, answer 35, very clearly addressed the rated requirement in section 12.2 of the SOW. Furthermore, the Department submitted that the only change to the RFP pertinent to this allegation was the amendment of the rated requirement set forth in the SOW section affording maximum points to bidders proposing a "RISC IVR processor platform and UNIX operating system" to also include bidders proposing a "RISC IVR processor platform and UNIX operating system, **or equivalent**". The Department asserted

that section 4.6.2 of the SOW was always a mandatory requirement and that the amendment did not change this fact. The reference to section 4.6.2 was to clarify for bidders what was required for an operating system to be considered “equivalent”, that is, an operating system that met the mandatory requirements in section 4.6.2 of the SOW.

With respect to Computer Talk’s allegation that the RFP improperly requested three references from customers with 400 port or greater IVR systems, the Department submitted that this ground of complaint is late. This requirement, the Department submitted, was clearly set out in section 4.6.2 of the SOW made available on MERX on August 21, 2000. Therefore, this requirement was known to Computer Talk at that time. However, Computer Talk first raised this issue on October 10, 2000.

In the alternative, the Department submitted that the requirement for three references from customers with 400 port or greater systems is not intended to eliminate bidders, but is to provide HRDC with assurance that the bidders have the proper experience to provide systems that can meet current and future demand. This requirement, the Department argued, is consistent with actual size requirements, is necessary to demonstrate a bidder’s ability to meet the qualifications required to fulfill the contract and is neither based nor designed to avoid the obligation of the AIT. Furthermore, the Department submitted that this requirement is necessary and reasonable because the installed system must have the capability to increase the number of ports to the port size required; it must be able to accommodate the anticipated consolidation of IVR sites into a reduced number of sites as specified in section 4.7.3 of the SOW; it must be able to meet increased port requirements as demand dictates; and it is consistent with fair procurement procedures for the verification of a bidder’s capability to meet the requirements of the procurement. In any event, the Department submitted, because the 10 port sites operated by HRDC are not average in size — Toronto, Montréal and Vancouver generate many more calls within the local calling area than, for example, Regina—, it is not appropriate to suggest, as Computer Talk did, that references should be based upon an averaging of port requirements over the number of port sites.

With respect to Computer Talk’s allegation that the award of five points in the evaluation of the rated requirements for providing a reference project where the bidder has interfaced an IVR to a Unisys mainframe using the Protocol is unnecessary, excessive and biased against Computer Talk, the Department submitted that this complaint is late. The Department submitted that the answer to question 37 included in amendment No. 011 made it clear that HRDC was not prepared to amend the requirement for experience in supporting the Protocol. Therefore, the Department argued, to the extent that Computer Talk objected to this requirement or sought an amendment to the requirement, this was denied upon issuance of amendment No. 011. Computer Talk raised no further clarification questions on this point before bid closing. Consequently, the Department submitted, the time to complain that this requirement contravened the obligations of Article 504(3)(b) of the AIT has long since expired.

In the alternative, the Department submitted that, with respect to Computer Talk’s allegation that this rated requirement is “unnecessary”, the Protocol is an integral component required for HRDC’s Unisys mainframe host communication. In fact, any device, including IVR systems, requiring mainframe connectivity must use HRDC Conn, i.e. HRDC’s standard protocol. HRDC Conn is a proprietary code that is embedded in a standard protocol. It resides on the server and allows the server to communicate with the Unisys mainframe host. Since host connectivity is critical to the successful operation of the IVR systems, it is necessary for the bidder, or partners within the bidder’s consortium, to demonstrate experience in supporting the Protocol.

With respect to the alleged “excessive” nature of the requirement, the Department submitted that the requirement only represents 1.67 percent of total available evaluation points. Furthermore, the Department submitted that there is no evidence to support the allegation that the requirement is biased. The requirement is a *bona fide* requirement for the successful contractor to provide and support software to ensure that applications, such as the existing Telemessagerie Insurance and the Teledec, have the necessary host connectivity. In addition, any IVR bidder to whom the contract would be awarded would need to build the necessary host interface.

With respect to Computer Talk’s allegation that the requirement for demonstration of past experience in supporting the Protocol improperly referenced a product by brand name, the Department submitted that this allegation is late, as this requirement was known from the time of the issuance of the RFP. Computer Talk did not object to this point before the closing date for the submission of questions. In the alternative, the Department submitted that the requirement was not a mandatory condition for bidders’ participation in the RFP and that no company-specific certification by Stahurra-Brenner was required. The RFP, the Department argued, required only a demonstration of prior experience in supporting the Protocol. As such, it is unwarranted to claim that the requirement constitutes brand name referencing. As well, the Protocol is an integral component required for HRDC’s Unisys mainframe host communication and, therefore, there exists a *bona fide* requirement for this condition.

Computer Talk’s Position

Computer Talk submitted, contrary to the Department’s assertion, that those parts of its complaint that relate to the UNIX operating system and the RISC IVR platform, the Protocol and the time period in which to bid are timely. Computer Talk submitted that it received amendment No. 011 on September 27, 2000, and that it clearly objected to the whole solicitation process on October 11, 2000.

According to Computer Talk, the Department’s contention that Computer Talk’s complaint on these grounds is late stems from the narrow interpretation that it gave to Computer Talk’s objection of October 11, 2000. However, Computer Talk submitted, its objection was not so limited, as it referred to and incorporated all the issues previously raised by it.

Computer Talk submitted that the issue relating to the improper use of an ACAN in 1998 had already been resolved and served no purpose in this context.

Computer Talk submitted that the Department’s contention that the UNIX/RISC and the Protocol are evaluation factors of limited significance, given the small number of evaluation points assigned to them, is misleading in light of the bundled nature of the RFP. Indeed, Computer Talk asserted, under the current evaluation scheme, each 5-point advantage represents a price differential of approximately \$1 million to be overcome. Furthermore, given the bundled nature of the requirement (a CTI and an IVR) and the highly competitive nature of the CTI, the bulk of the competition will take place over the IVR. This situation, Computer Talk submitted, further increases the significance of any 5-point advantage to a price point disadvantage of approximately \$2 million.

Computer Talk reaffirmed that the time to prepare a bid after amendment No. 011 was received on September 27, 2000, was insufficient. This is because of the complexity and the bundled nature of the requirement, which required the formation of partnerships.

Computer Talk submitted that, by failing to make a distinction in the RFP between the users of UNIX-based operating systems solutions and the users of Windows operating systems solutions, the Department biased the RFP in favour of the UNIX operating systems by imposing on all bidders a “Protocol/operating system interface” experience requirement that should have applied only to proposals offering UNIX systems.

Computer Talk submitted that there are two possible, equally valid interpretations of the change that the Department made to section 4.6.2 of the RFP. A first interpretation, that of the Department, is that section 4.6.2 remained a mandatory requirement after it was modified by the Department through answer 35, on September 27, 2000, and that every minimally compliant bidder would receive “maximum points”, implying that section 4.6.1 was a mandatory requirement. The second interpretation, that of Computer Talk, is that section 4.6.2 was no longer a mandatory requirement and simply served as a guide with which to interpret section 4.6.1 and, thus, aid the Department in awarding points to bidders. In any event, Computer Talk submitted that the modification made through answer 35 was ambiguous and required clarification. However, Computer Talk submitted, given the tight time frames to bid, bidders were not afforded a reasonable period of time to formulate clarification questions and to receive comprehensive responses on this point, thereby compromising Computer Talk’s ability to make a timely bid.

With respect to the requirement for three references from customers with 400 port or greater IVR systems, Computer Talk submitted that table 4.1 of the RFP is merely HRDC’s analysis and not a requirement that bidders must meet. Furthermore, HRDC’s analysis is based upon placing IVR systems in call center locations, which is not a requirement of the RFP. For these reasons, Computer Talk submitted that calling for these three references is not a legitimate factor in setting requirements for customer references. Computer Talk added that, given the magnitude of the system described in the RFP and its anticipated growth, a fully compliant solution could be designed that would be based upon a series of sites not exceeding 200 port capacity.

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 that the Tribunal is required to determine whether the procurement was conducted in accordance with the provisions of the trade agreements. The relevant legal authority in this complaint is the AIT.

Article 501 of the AIT provides that the purpose of Chapter Five is to establish a framework that will ensure equal access to procurement for all Canadian suppliers. In this context, Article 504(3)(b) of the AIT prohibits “the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter”. Article 506(5) further provides that “[e]ach Party shall provide suppliers with a reasonable period of time to submit a bid, taking into account the time needed to disseminate the information and the complexity of the procurement”. Moreover, Article 506(6) provides that “[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The 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”.

Computer Talk raised seven issues in its complaint based upon the above-stated articles of the AIT. The Tribunal will address these in turn.

Computer Talk alleged that, in 1998, the Department, using an ACAN procedure, attempted to improperly standardize its IVR requirements on the Periphonics platform. In its reply submission, Computer Talk withdrew this issue.

With respect to the allegation that the Department, in conducting this solicitation, has afforded a significant and unfair advantage to bidders offering UNIX-based solutions, the Tribunal concludes that there is no basis to this allegation. The Department has conceded, in the GIR, that the RFP, as originally drafted, provided a small advantage to bidders offering UNIX-based solutions. However, answer 35 included in amendment No. 011 issued on September 27, 2000, in the Tribunal's view, rectified any original bias by allowing bidders to propose "equivalent" solutions without incurring any evaluation penalty, i.e. by securing the maximum available evaluation points for this item.

With respect to Computer Talk's allegation that the Department has amended, late into the bid preparation process and in an ambiguous manner, a mandatory requirement to make it a rated requirement without providing bidders a reasonable period of time to seek clarification and/or to react to this significant change in formulating their proposal, the Tribunal finds that there is no merit to this allegation. The Tribunal is of the view that the amendment made through answer 35 was clear and did not have the effect of turning a mandatory requirement into a rated requirement. In the Tribunal's opinion, the amendment clearly conveyed to potential suppliers that bidders offering an "equivalent" solution would receive "maximum points". The amendment also clearly indicated the parameters that the Department would use in determining equivalency. No other change was introduced by the Department's response to question 35.

With respect to Computer Talk's assertions that the lateness of the change allowing for the submission of "equivalent" solutions and the Department's refusal to further extend the time limit in which to submit bids resulted in insufficient time to find a toll service partner and to submit a proper bid, the Tribunal notes that this assertion is not supported by the evidence on the record. Computer Talk has not demonstrated to the Tribunal either why or how this was not possible during the period from September 27, 2000, the date on which amendment No. 011 was issued, to October 12, 2000, the date of bid closing. Furthermore, the Tribunal notes that Computer Talk did not raise this matter with the Department until its objection letter of October 11, 2000, nor raised any specific concern about the time required to complete a partnership agreement when it wrote the Department in relation to other perceived outstanding issues on October 7, 2000.

Furthermore, the Tribunal finds that there is no merit to Computer Talk's allegation that the Department and HRDC insisted, without justification, that bidders provide three references from customers with 400 port or greater IVR systems. In the Tribunal's view, this requirement was clearly set out in the original text of the RFP and is a reasonable requirement in the circumstances. It may be, as was suggested by Computer Talk, that there exist alternate ways in which HRDC could organize itself to deliver its services. However, it is HRDC, not a particular supplier or the supplier community, that is responsible for defining its requirements in a solicitation, as long as they are within the existing procurement rules. In the Tribunal's opinion, the evidence on the record sufficiently supports the 400-port capacity requirement set out in the RFP. Given that the requirement is a rated requirement, in the Tribunal's opinion, there is no evidence to show that this requirement was intended to limit or had the effect of limiting equal access by all Canadian suppliers to this solicitation.

The Tribunal finds that the Protocol issue raised by Computer Talk is also without merit. In its comments on the GIR, Computer Talk indicated that it is incorrect to assume that the interface between the Protocol and the UNIX operating system and the Windows operating system is one and the same and that, therefore, all suppliers should attest to experience with the Protocol, irrespective of the solution offered. In the Tribunal's opinion, the need for experience with the Protocol fundamentally rests on the requirement that bidders, be they offering a UNIX or a Windows or any other brand name operating system, demonstrate experience in managing the interface between any such operating systems and the Unisys mainframe computers installed at HRDC through the Protocol. The Department emphasized repeatedly that connectivity with the mainframe computers was critical to any solution that it adopted. In the Tribunal's view, therefore, it cannot be said that the requirement that all bidders, regardless of the operating system proposed, have experience with the Protocol was unfair or unjustified in the circumstances.

With respect to Computer Talk's allegation that the Department, in setting out the specifications in the RFP, improperly referred to specific brand names, the Tribunal finds that there is no foundation to this allegation. As indicated above, the reference to a UNIX operating system found in the original RFP was corrected through amendment No. 011, which allowed bidders to propose "equivalent" solutions. With respect to the reference by brand name to the Protocol, the Tribunal is of the view that there is no better way to describe precisely HRDC's requirement for connectivity between the operating system chosen and the mainframe computers installed. The Tribunal notes that the RFP is not requesting a particular solution by brand name. Rather, it is identifying, by brand name, the communication protocol that HRDC currently possesses and through which the operating system chosen will connect to the mainframes. The Tribunal finds no violation of the AIT in that approach.

Furthermore, the Tribunal finds that there is no foundation to Computer Talk's allegation that the above-mentioned issues separately and taken together demonstrate a bias on the part of the Department and HRDC in favour of a particular solution. As indicated, none of the issues raised above is valid in itself and, in the Tribunal's opinion, nor is the sum of these allegations a basis for an allegation of bias.

The Tribunal notes that the parties have made extensive submissions on the timeliness of a number of the grounds of complaint raised in this case. Computer Talk argued that it objected, in writing, to the Department about all these issues on October 11, 2000, within 10 working days from the issuance of amendment No. 011, being the date on which it discovered its grounds of complaint. The Department argued that Computer Talk's objection letter of October 11, 2000, was limited to a few selected issues and concerns, and did not cover all of the above-mentioned grounds of complaint. The Tribunal observes that, while all grounds of complaint were raised at one time or another during the bidding process, several of the grounds, while late by themselves, remained timely as discrete elements of Computer Talk's allegation of bias. The Tribunal further observes that waiting until mid-September to question elements of the specification that might have been clarified earlier and waiting until the last minute before bid closing to file an objection, as Computer Talk did in this instance, does not appear to be the most conducive method to resolving grievances, particularly in instances such as this one where time is of the essence. However, Computer Talk is entitled under the Regulations to 10 working days to file an objection. The Tribunal has not been persuaded by the Department's argument that the objection submitted by Computer Talk on October 11, 2000, was so narrowly constructed as to make most grounds of complaint untimely.

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 and that, therefore, the complaint is not valid.

Patricia M. Close
Patricia M. Close
Presiding Member