

Ottawa, Thursday, February 21, 2002

File Nos. PR-2001-030 and PR-2001-040

IN THE MATTER OF complaints filed by Hewlett-Packard (Canada) Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO decisions to conduct inquiries into the complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

The Canadian International Trade Tribunal notes that File No. PR-2001-30 contains two grounds of complaint: the first with respect to compliance with the mandatory terms of the Request for Proposal and the evaluation of bids; and the second with respect to price discrimination.

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the first ground of complaint is valid. The second ground of complaint was not filed within the time limit set out in section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*. Consequently, pursuant to section 10 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal dismisses the second ground of complaint.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the contract awarded to IBM Corporation on September 12, 2001, be terminated. The Canadian International Trade Tribunal further recommends that the Department of Public Works and Government Services and the Department of Human Resources Development issue a new solicitation for the requirements contained in Solicitation No. V9419-000008/C in accordance with the provisions of the applicable trade agreements.

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint in File No. PR-2001-040 is valid. The Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services develop and implement procedures designed to ensure that complete documentation is maintained for procurements, as required by the provisions of Article 1017(1)(p) of the *North American Free Trade Agreement*.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Hewlett-Packard (Canada) Ltd. its reasonable costs incurred in preparing and proceeding with these complaints.

Ellen Fry
Ellen Fry
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

James A. Ogilvy
James A. Ogilvy
Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.



Ottawa, Wednesday, March 6, 2002

File Nos. PR-2001-030 and PR-2001-040

IN THE MATTER OF complaints filed by Hewlett-Packard (Canada) Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO decisions to conduct inquiries into the complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

CORRIGENDUM

In the third paragraph of the Tribunal's determination dated February 21, 2002, which reads in part "... recommends, as a remedy, that the contract awarded to IBM Corporation on September 12, 2001, be terminated.", "IBM Corporation" should have read "IBM Canada Ltd."

By order of the Tribunal,

Michel P. Granger
Secretary

Date of Determination: February 21, 2002
Date of Reasons: March 22, 2002

Tribunal Members: Ellen Fry, Presiding Member
Pierre Gosselin, Member
James A. Ogilvy, Member

Investigation Manager: Paule Couët

Investigation Officer: Ronald B. Harrigan

Counsel for the Tribunal: John Dodsworth

Complainant: Hewlett-Packard (Canada) Ltd.

Counsel for the Complainant: David Sherriff-Scott
Vincent DeRose

Interveners: IBM Canada Ltd.
Amdahl Canada Limited

Counsel for IBM Canada Ltd.: Ronald C. Lefebvre

Government Institution: Department of Public Works and Government Services

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



Ottawa, Friday, March 22, 2002

File Nos. PR-2001-030 and PR-2001-040

IN THE MATTER OF complaints filed by Hewlett-Packard (Canada) Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO decisions to conduct inquiries into the complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

COMPLAINTS

On October 9, 2001, Hewlett-Packard (Canada) Ltd. (Hewlett-Packard) filed a complaint (File No. PR-2001-030 [the first complaint]) with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Human Resources Development (HRDC). This procurement (Solicitation No. V9419-000008/C) is for the development and implementation of a consolidation plan for UNIX server services, based on a proven methodology, and the establishment of a means of acquiring the “as-and-when-required” services, equipment and software that are necessary to implement and maintain the consolidation plan over a period of up to five years.

Hewlett-Packard alleged that, contrary to the provisions of the *North American Free Trade Agreement*² and the *Agreement on Internal Trade*,³ PWGSC selected IBM Canada Ltd. (IBM) as the successful bidder and that, had PWGSC evaluated IBM’s technical proposal according to the evaluation criteria set out in the Request for Proposal (RFP), IBM’s proposal would have been declared non-compliant.

Hewlett-Packard also alleged that the RFP’s financial structure worked to Hewlett-Packard’s disadvantage, as it resulted in price discrimination in favour of other bidders.

Hewlett-Packard requested, as a remedy, that the identification of IBM as the successful bidder be set aside, that the award of any contract or task authorizations to IBM be terminated and that the designated contract or task authorizations be awarded to Hewlett-Packard. In the alternative, Hewlett-Packard requested that the identification of IBM as the successful bidder and any award of task authorizations to it arising out of the solicitation, as well as the solicitation itself, be terminated and that a new solicitation for the designated contract be issued. In the further alternative, Hewlett-Packard requested that it be awarded its lost profits or any associated or relevant costs and, finally, that it be awarded its reasonable costs incurred in preparing and proceeding with the complaint.

Hewlett-Packard also requested that a hearing be held and that the Tribunal issue an order requiring the production of a number of documents.

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].

On November 15, 2001, Hewlett-Packard filed a second complaint (File No. PR-2001-040 [the second complaint]) in respect of the same solicitation and provided further submissions in a letter dated November 19, 2001. In the second complaint, Hewlett-Packard alleged that, contrary to the *National Archives of Canada Act*⁴ and Article 1017 of NAFTA, the Crown had destroyed documentation relating to the procurement.

Hewlett-Packard submitted that the unauthorized destruction of these documents made the basis of the evaluation of bids uncertain and undermined the integrity of the legitimacy of the evaluation results. It submitted that the destruction of documents also caused harm and prejudice to its case, as it does not have access to critical information. Hewlett-Packard requested, as a remedy, that the Tribunal assess PWGSC's submissions with extra care, that it draw a negative inference or presumption that the destroyed documents would have been unhelpful to PWGSC and would, in fact, have corroborated or assisted Hewlett-Packard's position and that, if PWGSC does not provide the evidence that has been destroyed in a compelling and clear way, it set aside the evaluation results.

PROCEDURES BEFORE THE TRIBUNAL

On October 17, 2001, the Tribunal informed the parties that the first 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 The Tribunal also advised the parties that its decision on the requests for a hearing and the production of documents was deferred to a later date. On October 23, 2001, the Tribunal issued an order postponing the award of any contract, including task authorizations, in relation to this solicitation until it determined the validity of the complaint.

On October 24, 2001, a notice of motion (the first motion) was filed by Hewlett-Packard for an order for the production of documents. On November 2, 2001, the Tribunal issued an order to PWGSC for the production of certain documents relating to the evaluation process in general, and to the evaluation of Hewlett-Packard's proposal in particular. On November 7, 2001, PWGSC provided some of the documents requested by the Tribunal. It also advised the Tribunal that some of the requested documents had been destroyed.

On November 7, 2001, PWGSC filed a notice of motion (the second motion) with the Tribunal. In the motion, PWGSC requested an order striking the aspects of the complaint that impugn the RFP for not containing provisions that address the costs associated with transition, on the basis that a challenge to the RFP in respect of transition costs, i.e. the ground of complaint, was untimely.⁶ On November 8, 2001, the Tribunal informed the parties that IBM had been granted leave to intervene in the first complaint. On November 9, 2001, the Tribunal informed PWGSC that the second motion had been denied.

On November 13, 2001, PWGSC filed a Government Institution Report (GIR) relating to the first complaint with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁷

4. R.S.C. 1985 (3d Supp.), c. 1 [hereinafter NAC Act].

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

6. Hewlett-Packard has also referred to this ground of complaint as the "price discrimination" ground of complaint. These reasons refer to the "transition cost" and "price discrimination" grounds of complaint interchangeably.

7. S.O.R./91-499 [hereinafter Rules of Procedure].

On November 21, 2001, the Tribunal informed the parties that the second 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 Regulations.

In a letter dated November 21, 2001, the Tribunal informed the parties that it intended to join both complaints and that the period for dealing with the first complaint had been extended to 135 days from the day on which it was filed.

On November 26, 2001, IBM provided comments on the GIR relating to the first complaint. The same day, the Tribunal informed the parties that Amdahl Canada Limited (Amdahl) had been granted leave to intervene in the first complaint. On November 26, 2001, Hewlett-Packard filed comments on the GIR with the Tribunal.

On November 27, 2001, the Tribunal informed the parties that IBM had been granted leave to intervene in the second complaint. On November 30, 2001, Amdahl provided comments on Hewlett-Packard's complaint, the GIR and Hewlett-Packard's reply to the GIR relating to the first complaint.

On November 30, 2001, PWGSC requested permission from the Tribunal to file a response to Hewlett-Packard's reply to the GIR relating to the first complaint. The Tribunal granted permission on December 3, 2001, and PWGSC filed its reply with the Tribunal on December 7, 2001.

On December 14, 2001, Hewlett-Packard and IBM filed their comments on PWGSC's reply to Hewlett-Packard's response to the GIR relating to the first complaint. Amdahl did not file any comments.

On December 17, 2001, PWGSC filed a GIR relating to the second complaint with the Tribunal in accordance with rule 103 of the Rules of Procedure. On December 31, 2001, Hewlett-Packard filed comments on the GIR with the Tribunal. IBM did not file any comments on the GIR relating to the second complaint. On December 18, 2001, the Tribunal requested additional information from PWGSC with respect to the first complaint. On December 28, 2001, PWGSC responded to the Tribunal's request for information.

On January 10, 2002, the Tribunal informed the parties that it had extended the period to deal with the second complaint to 135 days and that its determination on both complaints would be issued by February 21, 2002.

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

FIRST COMPLAINT – FIRST MOTION

On October 24, 2001, Hewlett-Packard filed a motion with the Tribunal requesting that an order be made requiring PWGSC to produce certain documents. Hewlett-Packard argued that the documents requested were relevant to the grounds of complaint. In a letter dated October 25, 2001, PWGSC responded to this motion, stating that the fact that Hewlett-Packard's motion was made prior to the filing of the GIR was a departure from the established practice. PWGSC requested that the Tribunal reserve its decision on the motion until after the GIR was filed and, if that request was not granted, that PWGSC be provided an opportunity to provide comments on the relevancy of the documents requested.

In its motion, Hewlett-Packard argued that the Tribunal should order the production of documents, if those documents have some “semblance of relevancy” to the complaint. Hewlett-Packard referred the Tribunal to decisions of the Federal Court—Trial Division involving requests for documentation in the context of an examination for discovery in proceedings before the Federal Court of Canada.

The legislation and regulations governing the Tribunal’s work set out the process that the Tribunal must follow in conducting its inquiries. This is a different process from that followed by the Federal Court of Canada and, accordingly, in this instance, the cases cited concerning proceedings of the Federal Court—Trial Division are not of assistance. Rule 103 of the Rules of Procedure requires PWGSC to file a GIR that includes all documents relevant to the specific grounds of complaint. Section 17 of the CITT Act provides the Tribunal with the authority to issue an order for the production of documents, either at its own instance or at that of another party. The Tribunal may exercise its discretion to issue such an order at any time.

In the Tribunal’s view, the documents requested by Hewlett-Packard pertaining to the evaluation of its bid in particular and the evaluation process in general were clearly relevant to the complaint. In the Tribunal’s view, PWGSC should make these documents available to bidders when they are debriefed on the evaluation of their bids. Consequently, on November 2, 2001, the Tribunal ordered PWGSC to produce certain documents.

In a letter dated November 9, 2001, the Tribunal notified the parties that it would make its decision with respect to the other documents requested in Hewlett-Packard’s motion of October 24, 2001, pertaining to IBM’s bid after the GIR was filed. On December 17, 2001, the Tribunal notified the parties that it had decided not to order the production of these documents.

FIRST COMPLAINT - SECOND MOTION

On November 7, 2001, PWGSC filed a motion with the Tribunal pursuant to rule 24 of the Rules of Procedure and subsections 6(1) and (2) of the Regulations. In the motion, PWGSC requested that an order be made to strike the aspects of the complaint that impugn the RFP for not containing provisions that address the costs associated with transition, on the basis that the ground of complaint was untimely.

On November 9, 2001, the Tribunal denied the motion, on the ground that there was no compelling reason to address the issue of timeliness through a motion rather than in the GIR. It indicated that, if PWGSC should choose to incorporate the substance of the motion into the GIR, it would consider the matter as part of PWGSC’s position. In the GIR, PWGSC raised this allegation again.

PROCUREMENT PROCESS

Background

On September 12, 2000, a Letter of Interest (LOI) was posted on MERX⁸ in relation to a requirement for the development and implementation of a consolidation plan for UNIX server services at HRDC (LOI No. V9419-000008/A). On December 1, 2000, a second LOI was posted on MERX for the requirements contained in LOI No. V9419-000008/B. This second LOI provided potential bidders with a draft RFP and solicited feedback on the contents to be used in the development of the final RFP. Submissions in response to the second LOI were received from 10 potential bidders, including Hewlett-Packard.

8. Canada’s Electronic Tendering Service.

A vendor information session was held on January 30, 2001, where a handout⁹ was distributed to all participants. This document provided, *inter alia*, a compendium of the questions asked by potential suppliers during the LOI process and all corresponding responses. On April 6, 2001, a Notice of Proposed Procurement for the requirement was posted on MERX with respect to Solicitation No. V9419-000008/C, the solicitation at issue. It indicated that the solicitation was being conducted under NAFTA, the *Agreement on Government Procurement*¹⁰ and the AIT and that the closing date was May 15, 2001. The closing date was extended several times during the solicitation period and, finally, was set at July 3, 2001. During that period, 18 amendments to the RFP were issued, addressing 135 questions from potential suppliers.

The RFP includes the following provisions that are relevant to this case:

Section A: Bidders Instructions and Information

A.1 Requirement Overview (I)

- i) The UNIX Systems Requirements (USR) Project was undertaken to develop and implement a Consolidation Plan for UNIX services with Human Resources Development Canada (HRDC), and to establish a means of acquiring the services, equipment and software that will be required to implement and maintain the plan.

The Statement of Requirements (SOR), Annex A to the RFP, includes the following provisions that are relevant to this case:

1.1 Requirement Overview (I)

- 1.1.2 The major requirement will be for the Contractor to develop and implement a Consolidation Plan for UNIX services within HRDC. This Plan is to be developed based on the Contractor's proven methodology.

4. Required UNIX Hardware and Software

4.2 UNIX Systems (I)

The bidder must be able to provide the following UNIX systems:

- 4.2.1 Utility Class Systems (I)
- ...
- 4.2.2 Power Class Systems (I)
- ...
- 4.2.3 Enterprise Class Systems (I)
- ...
- 4.2.4 Internet Class Systems (I)

4.4 SOFTWARE

4.4.4 System Management Software (M)

Each system must come with installed system management software meeting the following requirements:

- 4.4.4.5 Partition a single server into multiple partitions
- ...
- 4.4.4.7 Allow an administrator to balance workloads across processors and platforms

9. File No. PR-2001-030, GIR, Exhibit 4.

10. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

4.4.5 Additional System Management Software Requirements

Each system in the Power, Enterprise and Internet classes as specified in Sections 2 and 3 of this document, must come installed with system management software meeting the following requirements:

- 4.4.5.1 Allow for dynamic system domains, or independent partitions, each running its own operating system, that are isolated from other domains, or partitions, to provide protection and insulation between applications running in different domains without any hardware changes.

The following questions and answers provided to bidders as part of the solicitation amendments are also relevant to this case:

Q. 63^[11] 4.4.4.5 and 4.4.4.7 refer to partitioning of a system into multiple partitions. Vendors implement this in various ways – some with physical hardware partitioning and others with software partitioning. In many cases it is the application which allows partitioning to occur. Please confirm that the following 2 types of partitioning will result in full compliance to 4.4.4.5 and 4.4.4.7:

1. Available applications with the capability to be partitioned, and
2. An Operating System which allows workload to be partitioned across CPU/memory/IO resources based on static and dynamic parameters. The amendment removed the requirement that the system must be able to provide for internal disk storage not the referenced requirement. There is still a requirement for 1 Terabyte of storage and this is to be usable storage after RAID configuration.

A. 63 The question is not understood. The requirement of 4.4.4.5 is that a single server must be able to be partitioned so that multiple applications, with their own allocated resources, can be run in isolation from each other. The requirement of 4.4.4.7 is for the ability to balance workloads across processors (CPUs) and platforms (different systems). This does not necessarily have to be a function of the operating system; it could be handled by a separate software package.

Q. 77 Annex A: Section 4.4.5.1^[12]

Paragraph 4.4.5.1 requests a very specific set of partitioning capabilities, not found in all major UNIX vendors platforms. All vendors implement partitioning in different fashions – physical, logical, dynamic and static partitioning. Partitioning is a relatively new technology, as evidenced by the limited number of products partitionable in each vendors product set.

Given that partitioning is not implemented on any of HRDC's current servers, will the Crown remove 4.4.5.1 since vendors will outline their specific implementation of server consolidation in the design phase, as requirements dictate?

A. 77 While partitioning may not currently be in widespread use within HRDC, it is envisioned that partitioning would be extremely beneficial in any server consolidation effort and in implementing an application hosting environment.

Given the above, delete Article 4.4.5.1 in its entirety and replace with:

4.4.5.1 Allow for independent partitions, each running its own operating system, that are isolated from other partitions, to provide protection and insulation between applications running in different partitions without any hardware changes.

11. Amendment No. 006, 7 May 2001, File No. PR-2001-030, "Notice of Complaint", Vol. 2, Tab 2.

12. Amendment No. 009, 18 May 2001, File No. PR-2001-030, "Notice of Complaint", Vol. 2, Tab 2.

Q. 95 Reference: Annex A: Section 4.4.5.1^[13]

Paragraph 4.4.5.1 requests a very specific type of partitioning. Vendors implement partitioning in different fashions – physical, logical, dynamic and static partitioning. Some use multiple operating systems and some partition within a single operating system. All requirements of Section 4.4.5 can be met with either a single operating system environment or a multiple system operating environment. Please confirm that either a single operating system environment for partitions or a multiple operating system environment for partitions can be proposed?

A. 95 Both a single operating system environment and a multiple operating system environment are acceptable approaches to meet the partitioning requirement.

In addition, the following questions pertaining to the issue of transition costs are also relevant to this case:

Q. 107 **Reference: Appendix PB5: Response to Industry Comments on Draft RFP**^[14]

Please explain how the business case will address transition, or life-cycle costs, such as code conversion, changing the application software development infrastructure, testing, configuration management, re-training of departmental personnel, maintaining a dual environment prior to changeover, etc. These are costs to be borne by the Crown if the RFP results in a change in suppliers and they are potentially huge. Excluding these costs from the scoring and evaluation of bids misrepresents the true costs of the initiative by transferring the risk and the very large potential expenses of transition/conversion from bidders to taxpayers.

Because transition costs associated with a potential change of suppliers are not included in the RFP's assessment criteria, the overall cost of the Government of Canada is unknown and unlimited. To select a supplier under the current assessment criteria would not represent "best value" to the Crown. Please explain how these concerns will be addressed.

A.107 Transition costs will not be forming part of the evaluation of this RFP as the Crown is not in the position to quantify transition costs.

The above statement pre-supposes a solution of a wholesale replacement of HRDC existing servers. The aim of this RFP is for the development and implementation of a Consolidation Plan for Unix *services* within HRDC not to just replace existing servers.

Also relevant to these complaints are the following articles found in the document entitled "Technical/Management Evaluation Methodology"¹⁵ (the Evaluation Methodology):

1.2. Guiding Principles

1.2.11 The evaluation process will ensure that all evaluation results are well documented and defensible.

5.4 Detailed Evaluation Procedures

5.4.6 Step 4 – Consensus Agreement

5.4.6.1 Upon the completion of a single proposal's evaluation, the Evaluation Team Leader will lead a review of the responses and the individual

13. Amendment No. 013, 5 June 2001, File No. PR-2001-030, "Notice of Complaint", Vol. 2, Tab 2.

14. Amendment No. 014, 6 June 2001, File No. PR-2001-030, "Notice of Complaint", Vol. 2, Tab 2.

15. Prepared by the UNIX System Requirements Project Team and dated May 14, 2001, File No. PR-2001-040, GIR, Exhibit 1a.

evaluations with the goal of identifying and resolving to consensus, any variations between the results of the individual evaluations.

5.5 Assessment Criteria

The following assessment criteria [are] to be taken into consideration by the Evaluation Team members when conducting their proposal evaluations:

5.5.1 Each proposal will be evaluated to ensure that the Bidder's response meets all of the mandatory requirements of the RFP. Evaluations will be based upon an in-depth evaluation and will be documented on evaluation worksheets.

5.7 Risk Evaluation Process

5.7.1 Each Evaluation Team member is responsible for documenting any identified risks they may encounter during the evaluation process. This includes any risk . . .

5.7.2 . . . Consider and record the conditions that cause concerns to the project, followed by a brief description of the potential consequences of those conditions.

5.7.3 The team members should provide enough information about the risk to capture the context and to ensure that other Evaluation Team members can understand the intent of the risk. Any additional information regarding the circumstances, event and interrelationships not described in the risk statement should be added.

6.3 Evaluation Consolidation

6.3.1 The Evaluation Team leader will provide the Evaluation Co-ordination Committee with each of the team member's written hard-copy evaluation response sheets as well as a written summary of contentious responses to requirements.

Three proposals were received by the bid closing date of July 3, 2001, including one each from Hewlett-Packard and IBM. HRDC conducted the evaluation of the technical/managerial portion of the proposals during the month of July and finalized this evaluation on July 30, 2001. Both IBM's and Hewlett-Packard's proposals were declared compliant. PWGSC then conducted the financial evaluation of the proposals on August 1, 2001.

The total value of the procurement was in excess of \$20 million,¹⁶ to be contracted under a series of task authorizations. On September 12, 2001, PWGSC advised the bidders that a contract had been awarded to IBM, the lowest compliant bidder, in the amount of \$2.675 million.¹⁷

On September 17, 2001,¹⁸ Hewlett-Packard wrote to PWGSC objecting to the results of the evaluation and alleging that "an error [had] occurred in the evaluation process in that the solution provided [did] not meet all of the mandatory requirements." In its letter, Hewlett-Packard concluded that "[t]he successful supplier can only meet the mandatory [requirements] detailed in articles 4.4.4.5 and 4.4.5.1 independently and at time of bid closing, IBM does not have a solution that meets both requirements simultaneously."

On September 21, 2001, a debriefing session was held with Hewlett-Packard, where it provided PWGSC with a letter in which it raised objections to the RFP's alleged deficiency in addressing the costs associated with transition.

16. Based on bid evaluation prices.

17. File No. PR-2001-030, GIR, Exhibit 13.

18. *Ibid.*, "Notice of Complaint", Vol. 2, Tab 3.

According to the GIR, on September 25, 2001, PWGSC issued to IBM, in accordance with the terms and conditions of the contract, the first task authorization in the amount of \$546,021. On September 26, 2001, PWGSC replied to Hewlett-Packard's letter of September 17, 2001, stating that it was "satisfied that the successful bidder [had] met all the stated mandatory requirements of the RFP as originally determined." On September 28, 2001, PWGSC replied to Hewlett-Packard's letter of September 21, 2001, in regard to the objection on transition costs.

On October 9, 2001, Hewlett-Packard filed the first complaint with the Tribunal.

FIRST COMPLAINT (FILE NO. PR-2001-030)

In the first complaint, Hewlett-Packard identified two grounds of complaint: the first ground deals with the evaluation of IBM's proposal in terms of compliance with mandatory requirements, and the second ground deals with alleged price discrimination. The positions of the parties are presented in the same way.

Positions of Parties

Hewlett-Packard's Position

– First Ground of Complaint

In the first complaint, Hewlett-Packard submitted that the RFP's mandatory terms required the bidders to demonstrate conformity with the RFP's essential requirements at the time of bid closing. Hewlett-Packard submitted that the RFP's requirements deal with "partitioning" in relation to computer servers. It also offered the following definition: "the 'partitioning' of servers represents the functional ability to logically or physically slice, divide or allocate the capabilities of a single server so as to distribute its capabilities among possible, multiple applications which a server may run." It further added that partitioning was central to the RFP.

Hewlett-Packard submitted that the combined effect of articles 4.4.4.5 and 4.4.5.1 of the SOR, as amended, was to require bidders to demonstrate that they could deliver servers with installed system management software meeting the cumulative requirements set out in those articles. To that effect, Hewlett-Packard provided a report by Illuminata, Inc. (Illuminata) on the requirements imposed on bidders when these two articles are read together.¹⁹ Hewlett-Packard also submitted that industry-based media reports, independent information technology analysts, consultants retained by IBM and IBM itself had stated that, at the time of bid closing, IBM did not have the capability to provide the type of partitioning required by both article 4.4.4.5 and article 4.4.5.1. It added that Illuminata also indicated that IBM could not satisfy the combined requirements of articles 4.4.4.5 and 4.4.5.1 at the time of bid closing.

Hewlett-Packard submitted that, by qualifying IBM under the requirements in articles 4.4.4.5 and 4.4.5.1 of the SOR, PWGSC either allowed IBM to qualify on the basis of technology that it did not have on bid closing or, alternatively, improperly evaluated IBM's proposal against the requirements of articles 4.4.4.5 and 4.4.5.1.

Hewlett-Packard also raised the issue of whether answer 95, in amendment No. 013, modified the requirements of articles 4.4.4.5 and 4.4.5.1 of the SOR. It submitted that the answer did not state or suggest that article 4.4.5 or article 4.4.5.1 would be amended. It further submitted that, at best, answer 95 provided "information", as opposed to the expression of a mandatory term of the RFP. Citing a portion of the answer

19. File No. PR-2001-030, "Notice of Complaint", Vol. 2, Tab 7.

from PWGSC in its letter of September 26, 2001, in response to Hewlett-Packard's objection, Hewlett-Packard submitted that PWGSC did not interpret the RFP to require bidders to meet the cumulative, conjunctive, mandatory requirements expressed by both articles 4.4.4.5 and 4.4.5.1 when read together. Instead, Hewlett-Packard submitted, PWGSC interpreted the RFP as requiring bidders to comply with each article in isolation from the other and, consequently, this meant that PWGSC evaluated the bids under the RFP in the same disjunctive manner.

Hewlett-Packard submitted that PWGSC's position concerning the proper interpretation of the RFP and the evaluation of bids was inconsistent with the clear language of the RFP. The language of the RFP required PWGSC to have interpreted articles 4.4.4.5 and 4.4.5.1 of the SOR as imposing a cumulative, conjunctive set of requirements on bidders and to evaluate bids accordingly.

Hewlett-Packard also submitted that answer 95 identified "acceptable approaches" to meet only the requirements of article 4.4.5 of the SOR in isolation. It further submitted that answer 95 did not change the combined requirements of articles 4.4.4 and 4.4.5 when read together.

In its response to the GIR, Hewlett-Packard submitted that PWGSC's definition of partitioning was wrong and inconsistent with the RFP and industry standards. It argued that this definition was, in fact, a description of resource management, which PWGSC calls "resource partitioning", and that resource management does not create or accomplish partitioning either as the RFP conceives it or as the industry understands it. Hewlett-Packard submitted that IBM itself, in published detailed product information,²⁰ describes the fundamental differences between workload management, which PWGSC calls "resource partitioning", and partitioning, and further argued that IBM itself claims that workload management does not represent partitioning, as the RFP defines it.

Hewlett-Packard also stated that, contrary to what was said in the GIR, it did not claim that the requirements of articles 4.4.4.5 and 4.4.5.1 of the SOR could be satisfied only by "virtual partitioning". It argued that its complaint indicated clearly and directly, through the *Illuminata* report, that the combined effect of these articles called for hard, virtual or logical partitioning. Hewlett-Packard submitted that resource management is inconsistent with the definition of partitioning. It submitted that articles 4.4.4.5 and 4.4.5.1 must be read together as creating a cumulative set of requirements to be met by bidders for their servers. Citing *Illuminata*'s report, Hewlett-Packard submitted that a resource management product, such as IBM's AIX 4.3.3 WLM product, did not satisfy the requirements of articles 4.4.4.5 and 4.4.5.1.

According to Hewlett-Packard, PWGSC admitted, in its letter of September 26, 2001, that it treated articles 4.4.4.5 and 4.4.5.1 of the SOR as creating separate, isolated and disjunctive requirements. Hewlett-Packard submitted that, in the GIR, PWGSC is now taking the opposite view.

Hewlett-Packard rejected PWGSC's suggestion, in the GIR, that answers 63, 77 and 95 somehow amended the cumulative requirements of articles 4.4.4.5 and 4.4.5.1 of the SOR or that those answers changed what the RFP permitted PWGSC to accept as compliant technology.

Hewlett-Packard submitted that answer 95 did not amend article 4.4.5.1 of the SOR, but, at best, provided "information", as opposed to the expression of a mandatory term of the RFP. It further submitted that PWGSC's interpretation cannot be maintained because, if it were given the effect that PWGSC wants, it would make answer 95 totally inconsistent with and contradictory to the combined requirements of articles 4.4.4.5 and 4.4.5.1.

20. File No. PR-2001-030, Hewlett-Packard's reply to the GIR, Tab 1 at 2-5.

Hewlett-Packard submitted that there is no basis to suggest that it knew or ought to have known that PWGSC would modify the evaluation criteria after bid closing by adopting an interpretation inconsistent with the terms of the RFP. It argued that the first notice that it received to that effect was in PWGSC's letter of September 26, 2001; therefore, there is no basis to suggest that its complaint is out of time.

In addition, Hewlett-Packard alleged that the worksheets provided to the evaluators to evaluate the proposals modified the requirements of articles 4.4.4.5 and 4.4.4.7 of the SOR. Hewlett-Packard submitted that, in creating the evaluation worksheets, PWGSC applied answer 63 as it related to article 4.4.4.5 to article 4.4.4.7, thereby changing the evaluation criteria and making them unclear, confusing, inconsistent and contradictory. It further submitted that the manner in which the evaluators dealt with this confusing direction while evaluating the proposals would never be known because of the disposal of the evaluation worksheets and notes.

In its submissions of December 14, 2001, in response to PWGSC's reply, Hewlett-Packard argued that PWGSC's submissions had not addressed or refuted the evidence that it provided regarding the suitability of a workload management product and that File No. PR-99-007²¹ was distinguishable from this case. It submitted that the misapplication of the criteria in the worksheets arising out of question 63 fundamentally altered the evaluation criteria and that the effect of this unannounced alteration created a serious inconsistency between the published criteria and the criteria in the worksheets. To PWGSC's suggestion that the evaluators did, in fact, note the errors on the worksheets, Hewlett-Packard submitted that the worksheets and the evidence in connection with this issue were destroyed.

– Second Ground of Complaint

Hewlett-Packard alleged that the structure of the RFP resulted in price discrimination in favour of the other bidders, to its detriment and in violation of NAFTA and the AIT.

Hewlett-Packard referred to the fact that the RFP required the provision of goods and services, including both professional services and equipment, which HRDC intended to purchase in the implementation phase of a consolidation plan for the UNIX-based servers. It argued that it was the incumbent supplier of HRDC's UNIX-based servers and platform and that its equipment was the current standard at HRDC. In the event that a company other than Hewlett-Packard was declared the successful bidder, it would be necessary for that non-incumbent supplier to carry out the transition of applications hosted on the current Hewlett-Packard equipment to its own. This transition would require the expenditure of millions of dollars in professional services. Non-incumbent bidders would have access to a large base of payment for professional services under the contract to carry out the transition and could dramatically discount their hardware and software prices as a result. In contrast, Hewlett-Packard would not have access to payment for these services, since no transition would be necessary, and it would not be able to incorporate similar price discounting into its bid.

Further, Hewlett-Packard argued that the time that a non-incumbent would require to carry out the transition would permit it to "forward price" its equipment. A non-incumbent could include, in its proposal, current technology, which it knew would not be actually sold until after the transition had been completed. By that time, the equipment would be either at the end of its life span or at a reduced market value, which would allow for dramatic discounting of its hardware and software. Since Hewlett-Packard would not need any transition time, it would be required to sell its equipment much sooner than would a non-incumbent, so that it could not forward price its equipment in the same manner.

21. *Re Complaint Filed by IT/NET Consultants* (20 July 1999) (CITT) [hereinafter *IT/NET*].

With respect to the timeliness issue, Hewlett-Packard acknowledged that it was informed that transition costs would not form part of the evaluation of the proposals as early as January 30, 2001. However, it argued that the discriminatory effect of the transition costs issue did not crystallize until it was informed of IBM's bid price on September 12, 2001. It was only then that it could "see how, by exploiting transition fees, IBM was able to offer remarkable and predacious discounts on its hardware/software." Since it filed the complaint within 10 working days of becoming aware of IBM's bid price, Hewlett-Packard argued that this ground of complaint was, in fact, filed within the time limit provided in section 6 of the Regulations.

PWGSC's Position

– First Ground of Complaint

With respect to the first ground of complaint, PWGSC submitted that partitioning is a term used to describe the separation of computer workload on a computer system or systems and that each vendor offers different types of partitioning. PWGSC further submitted that the concept of partitioning, as it applies to UNIX systems, refers to the capability of grouping the processors, memory, networking and storage capabilities of a computer into multiple sets of resources that can be operated independently, such that different applications (programs) running on that computer do not affect each other.

PWGSC submitted that Hewlett-Packard described only one method of partitioning, namely, "virtual partitioning". It further submitted that virtual partitioning was not stated as a requirement in the RFP. PWGSC argued that there were several accepted mechanisms by which partitioning might be achieved and, in support of this position, it provided a Hewlett-Packard publication²² that described three types of partitioning, i.e. hard partitions, virtual partitions and resource partitions. PWGSC further submitted that the essence of Hewlett-Packard's argument is that articles 4.4.4.5 and 4.4.5.1 of the SOR permit only a type of partitioning, namely, "virtual partitions", which Hewlett-Packard alleged was not within IBM's capability at the time of bid closing. It submitted that the RFP did not restrict the acceptable method of partitioning to virtual partitions only and that IBM did not propose this method of partitioning.

PWGSC submitted that three questions submitted during the bidding period had an impact on the wording and the interpretation of article 4.4.5.1 of the SOR. It submitted that answer 63 clearly supported the concept of resource type partitioning relying on software as acceptable to meet the requirements of article 4.4.4.5, as the answer clarified that the requirement was for multiple applications, not multiple operating systems or different operating systems to be run in isolation from each other on a single server. PWGSC further submitted that the objective that HRDC was trying to achieve, through the use of partitioning, was to have the ability to separate applications on a single server. By answer 77, it amended article 4.4.5.1 to ensure that this specification did not favour any one vendor.

PWGSC submitted that question 95 requested PWGSC to clarify acceptable approaches for meeting the requirements of article 4.4.5.1 of the SOR. It further submitted that it published amendment No. 013 on June 5, 2001, which, *inter alia*, provided answer 95, thereby providing notice to all bidders that both a single operating system environment and a multiple operating system environment were acceptable approaches to meet the partitioning requirement.

In response to Hewlett-Packard's argument that answer 95 should be regarded "at best as information", PWGSC submitted that enquiries made during the bidding period are an important tool in

22. File No. PR-2001-030, GIR, Exhibit 18.

identifying technical specifications that may be unduly restrictive or ambiguous and that questions and answers are published as amendments to ensure that all bidders are formally alerted to clarifications or appropriate interpretations of the provisions of the tender documents. It submitted that not all questions result in answers that require amendments to the wording of the tender documents. PWGSC argued that it had to confirm or clarify a correct interpretation and then to evaluate the proposals submitted, consistent with the information provided to bidders.

PWGSC submitted that it was clear that the *Illuminata* report was premised upon incomplete information and should not be given any weight.

PWGSC submitted that the time for filing a complaint with respect to the interpretation of articles 4.4.4.5 and 4.4.5.1 of the SOR ran, at the latest, from the date that amendment No. 013 was published, i.e. June 5, 2001, advising all bidders that both a single operating system and a multiple operating system environment were acceptable approaches to meet the partitioning requirements in article 4.4.5.1. Therefore, it submitted that Hewlett-Packard's allegations with respect to the interpretation of these two articles were untimely.

In response to Hewlett-Packard's allegation that it evaluated the requirements on partitioning as discrete requirements instead of a cumulative requirement, PWGSC submitted that Hewlett-Packard misinterpreted PWGSC's letter of September 26, 2001, concerning the fulfillment of mandatory requirements by the successful bidder. It submitted that this response to Hewlett-Packard's September 17, 2001, letter was not intended to suggest that there was no cumulative requirement for partitioning. It argued that articles 4.4.4 and 4.4.5 of the SOR were a cumulative, conjunctive set of requirements against which all bidders were evaluated.

With respect to Hewlett-Packard's allegation that, on the date of bid closing, IBM's servers were not capable of performing the partitioning function required by the RFP, PWGSC submitted that IBM's proposal offered servers with resource partitioning capability using a product called Workload Manager (WLM). IBM's proposed solution was evaluated as meeting the RFP's partitioning requirement at bid closing, given the inclusion of the IBM AIX 4.3.3 WLM feature. PWGSC further submitted that the use of WLM involves a type of partitioning analogous to Hewlett-Packard's definition of resource partitioning and that it complied with the accepted method of partitioning using a single operating system environment to satisfy the partitioning requirements.

Consequently, PWGSC submitted that IBM's proposal was correctly evaluated as compliant with the requirements of both article 4.4.4.5 (using WLM as the software to achieve resource partitioning) and article 4.4.5.1 (using a single operating system environment and WLM to achieve resource partitioning) of the SOR.

In its reply to Hewlett-Packard's comments on the GIR, PWGSC argued that Hewlett-Packard's allegations were premised, for the most part, on the unfounded assumption that government officials were inclined to favour IBM.

In response to the additional *Illuminata* report²³ provided by Hewlett-Packard with its comments on the GIR, PWGSC submitted that the premise that workload management cannot be partitioning, upon which both Hewlett-Packard and its consultant relied, ignored uncontradicted evidence provided in the GIR.

23. File No. PR-2001-030, Reply to the GIR, Tab 2.

In response to Hewlett-Packard's position that, absent a formal amendment to the wording of article 4.4.5.1 of the SOR, the Tribunal must ignore the notification to all bidders that a single operating system environment would be an acceptable approach to meeting the partitioning requirement, PWGSC argued that this position is contrary to the Tribunal's previous determination in *IT/NET* and without merit.

Consequently, PWGSC argued that answer 95 broadened the requirement of article 4.4.5.1 of the SOR and that there was no ambiguity between articles 4.4.4 and 4.4.5 and answer 95. Alternatively, Hewlett-Packard could have sought further clarification on answer 95.

With respect to the cumulative requirements of articles 4.4.4.5 and 4.4.5.1 of the SOR, PWGSC submitted that Hewlett-Packard's contention that article 4.4.4.5 applied only to one type of system was without merit and that the requirements of articles 4.4.4.5 and 4.4.5.1 were cumulative.

In respect of Hewlett-Packard's new allegation that PWGSC made undisclosed modifications to the requirements of articles 4.4.4.5 and 4.4.4.7 of the SOR in the evaluation worksheets, PWGSC submitted that there was, in fact, a simple typographical error and that answer 63, as it related to article 4.4.4.5, was inadvertently inserted under the wrong article, i.e. under article 4.4.4.7, in the evaluation worksheets. Similarly, answer 63, as it related to article 4.4.4.7, was inadvertently inserted under the wrong article, i.e. under article 4.4.4.5, in the evaluation worksheets. It further submitted that this obvious error was so clear on its face as to be immediately apparent to any reasonable person and that it was clearly apparent to the evaluators.

– Second Ground of Complaint

PWGSC argued that the time for filing a complaint with respect to the alleged price discrimination had long expired, given that Hewlett-Packard had objected to the RFP's alleged deficiency in addressing the costs associated with transition as early as January 15, 2001, and on numerous other occasions prior to the filing of the first complaint. PWGSC submitted that it clearly responded to this objection on January 30, 2001, that the objection was not accepted, in that the costs associated with transition would not be addressed in the RFP in the manner requested, and that it consistently provided the same reply in response to the Hewlett-Packard's subsequent objections.

PWGSC argued that this aspect of the complaint should have been filed with the Tribunal within 10 working days of Hewlett-Packard's receipt of PWGSC's response on January 30, 2001, in accordance with subsections 6(1) and (2) of the Regulations. In fact, PWGSC argued, this complaint was not made until October 9, 2001, so that this ground of complaint was untimely.

PWGSC further asked that costs be awarded against Hewlett-Packard, given that it did not raise all relevant facts in its complaint regarding the timing of its objection on this ground.

Alternatively, PWGSC also argued that this ground of complaint was without merit, given that Hewlett-Packard's view that it would not itself incur transition costs is based on the faulty premise that its equipment was the standard for HRDC's UNIX platform across Canada. It also argued that there was no reasonable basis for the Tribunal to conclude that the price of the successful bid is explained by an unfair advantage structured in the solicitation through the timing of equipment deliveries.

In its response to Hewlett-Packard's comments on the GIR, PWGSC argued that the date on which Hewlett-Packard became aware that IBM had bid more competitively was irrelevant for the purposes of the complaint.

Positions of Interveners

IBM's Position

IBM submitted that it was satisfied that the concerns raised in the first complaint had been thoroughly addressed by PWGSC in the GIR. In its comments in response to PWGSC's reply of December 6, 2001, IBM submitted that answer 95 could not have been clearer that the means by which IBM was to provide partitioning would be acceptable. It argued that PWGSC and HRDC obviously wanted to be as inclusive as possible. On the issue of the alleged price discrimination, IBM submitted that Hewlett-Packard's own expert from Illuminata had made it clear in various interviews that IBM was typically lower priced in its offering than Hewlett-Packard. It did not file any comments on the second complaint.

Amdahl's Position

In its comments on the GIR relating to the first complaint, Amdahl agreed with Hewlett-Packard's interpretation of the combined requirements of articles 4.4.4.5 and 4.4.5.1 of the SOR. It stated that its position was that the evaluation and award were considered flawed and, therefore, that a complete re-rendering of the UNIX system requirement was warranted.

Tribunal's Decision

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations 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 trade agreements, which, in this instance, are NAFTA and the AIT.

– First Ground of Complaint

In addressing this ground of complaint, the Tribunal needs to consider:

- whether PWGSC properly concluded that IBM's proposal met the mandatory requirements contained in articles 4.4.4.5 and 4.4.5.1 of the SOR; and
- the merits of the allegation that PWGSC, in evaluating the bids, improperly changed the RFP's mandatory requirements after bid closing.

Before doing so, the Tribunal needs to consider PWGSC's submission that the first ground of complaint was not timely. PWGSC argued that the time for filing this ground of complaint ran, at the latest, from the date on which amendment No. 013 was published on June 5, 2001. In amendment No. 013, PWGSC responded to a question concerning the partitioning requirements of article 4.4.5 of the SOR.

However, the Tribunal considers that Hewlett-Packard could only reasonably have become aware of this ground of complaint concerning the evaluation of bids after it received the relevant information concerning the evaluation process and its results. Hewlett-Packard received some information in this regard on September 12, 2001, and filed objections with PWGSC regarding the procurement in letters dated September 17 and 21, 2001. Further, the Tribunal notes that Hewlett-Packard received a denial of its objection in a letter from PWGSC dated September 26, 2001, and filed the first complaint with the Tribunal

on October 9, 2001. Consequently, the Tribunal considers that this ground of complaint was filed within the time limit for filing complaints, as established in section 6 of the Regulations.

Article 4.4.4.5

Article 4.4.4 of the SOR requires, for all four classes of UNIX systems to be proposed, that “[e]ach system must come with installed system management software meeting the following requirements: ... 4.4.4.5 Partition a single server into multiple partitions”.

In determining whether the bids were properly evaluated in accordance with this mandatory requirement, the Tribunal needs to consider the meaning of “partition”, as used in this article.

The parties disagree on the meaning of “partition”. Hewlett-Packard submitted that the partitioning of servers represents the functional ability to logically or physically slice, divide or allocate the capabilities of a single server, so as to distribute its capabilities among possible, multiple applications that a server may run. In this context, each partition has its own operating system. PWGSC, on the other hand, submitted that partitioning is a term used to describe the separation of computer workload on a computer system or systems. PWGSC also submitted that the concept of partitioning, as it applies to UNIX systems, refers to the capability of grouping the processors, memory, networking and storage capabilities of a computer into multiple sets of resources that can be operated independently, so that different applications running on that computer do not affect each other. In short, it submitted that partitions are physical or logical mechanisms for isolating operational requirements within single servers that can be implemented using either a single operating system or multiple operating systems.

The Tribunal is of the view that the essence of the parties’ disagreement on partitioning is that Hewlett-Packard considers that “partitioning” requires a multiple operating system environment, whereas PWGSC considers that a single operating system environment is also acceptable. Based on their understandings of the meaning of “partitioning”, Hewlett-Packard and PWGSC disagree on whether the WLM feature of the AIX 4.4.3. software bid by IBM would provide partitioning. PWGSC submitted that WLM involves a type of partitioning similar to “resource partitioning” and, hence, would fulfill the partitioning requirement. Hewlett-Packard submitted that WLM does not constitute partitioning at all.

The RFP and its associated documentation do not provide any definition of “partitioning”. Question 63 seeks clarification of “partitioning” as referred to in articles 4.4.4.5 and 4.4.4.7 of the SOR. Question 63 and answer 63 stated the following:

- Q. 63 4.4.4.5 and 4.4.4.7 refer to partitioning of a system into multiple partitions. Vendors implement this in various ways – some with physical hardware partitioning and others with software partitioning. In many cases it is the application which allows partitioning to occur. Please confirm that the following 2 types of partitioning will result in full compliance to 4.4.4.5 and 4.4.4.7:
1. Available applications with the capability to be partitioned, and
 2. An Operating System which allows workload to be partitioned across CPU/memory/IO resources based on static and dynamic parameters. The amendment removed the requirement that the system must be able to provide for internal disk storage not the referenced requirement. There is still a requirement for 1 Terabyte of storage and this is to be usable storage after RAID configuration.
- A. 63 The question is not understood. The requirement of 4.4.4.5 is that a single server must be able to be partitioned so that multiple applications, with their own allocated resources, can be run in isolation

from each other. The requirement of 4.4.4.7 is for the ability to balance workloads across processors (CPUs) and platforms (different systems). This does not necessarily have to be a function of the operating system; it could be handled by a separate software package.

However, this question and answer do not assist in interpreting “partitioning” because “partitioning”, as defined by either Hewlett-Packard or PWGSC, could potentially meet the requirement that “multiple applications, with their own allocation resources, can be run in isolation from each other”. It is the interpretation of “isolation” that would determine which of the parties’ definitions of “partitioning” is correct, but question 63 and answer 63 do not provide any assistance in interpreting “isolation”.

The parties have provided a large amount of technical evidence to support their respective interpretations of what “partitioning” means. This evidence comes from documents produced by Hewlett-Packard and IBM and by other industry sources. It is clear from the evidence presented that there is not a universally held understanding, or an industry standard, concerning the meaning of the term “partitioning”.

Looking, first, at documents in evidence that were produced by industry sources other than Hewlett-Packard and IBM, these documents indicate several conflicting views of the term “partitioning”.

For example, the Product Report by Gartner Group, Inc.,²⁴ submitted by Hewlett-Packard in support of its complaint, made a clear distinction between WLM and partitioning, stating, in part: “WLM isn’t the same as true software partitions: applications aren’t isolated and they don’t run on top of their own separate software stack with its own operating system instance.”

Similarly, an article²⁵ submitted by Hewlett-Packard indicated that partitioning requires that each partition have its own operating system.

In contrast, however, in an article published by the Giga Information Group²⁶ entitled “IBM’s RS/6000 Reinvented: S80 Enterprise Server and AIX as Change Agents”, “workload partitioning” (i.e. workload management) is referred to as being a type of virtual partitioning. This same article indicated that this feature is “[l]imited to one operating system”.

Further, the Tribunal finds that the parties themselves refer to “partitioning” in a manner that is not always consistent with their position in this complaint.

Looking at the documents in evidence that were produced by IBM, an IBM slide deck submitted by PWGSC in response to questions by the Tribunal states that “Workload Management is Virtual Partitioning”.²⁷ However, in contrast, *Flexible Capacity Deployment*,²⁸ also a document prepared by IBM

24. File No. PR-2001-030, “Notice of Complaint”, Vol. 2, Tab 8 at 8. The IBM e(logo) server pSeries Model 680 (p680) was announced in October 2000. The operating system for the e(logo) server p680 is IBM AIX 4.3.3.

25. *Ibid.*, Tab 9 at 2.

26. File No. PR-2001-030, GIR, Exhibit 25.

27. Letter from PWGSC, dated December 28, 2001 (protected), Attachment 2, Exhibit F. This document was provided by IBM to PWGSC in response to the LOI.

28. *Ibid.*, Exhibit E.

and submitted by PWGSC, makes a distinction between the concepts of partitioning and workload management. IBM's *AIX 5L Workload Manager (WLM) Redbooks*²⁹ makes the same distinction.

Looking at the documents in evidence that were produced by or for Hewlett-Packard, one of the Illuminata reports stated as follows: "The term 'partition' as widely defined and used within the computer industry, requires a separate operating system instance for each partition or system domain."

However, in contrast, a Hewlett-Packard document, entitled "hp partitioning continuum – partitioning the infrastructure for flexibility and control",³⁰ refers to resource partitions as a type of partitioning.³¹

The Tribunal also notes that PWGSC, like IBM and Hewlett-Packard, has not always put forward a consistent view of "partitioning". For example, in the GIR, PWGSC indicated that, in its view, the RFP did not require "virtual partitioning" and that the AIX 4.3.3. WLM, which was bid by IBM, did not constitute "virtual partitioning". In contrast, as noted above, an IBM document submitted by PWGSC stated that, in fact, WLM does constitute "virtual partitioning".

Overall, the evidence shows that there are at least two definitions of partitioning in use in the industry, and there is no evidence of any industry standard. It appears that the existence of confusion in this area is recognized within the industry, as stated in the IBM publication on the AIX 5L WLM cited above: "The demand for advanced management functionality has caused some confusion about the differences between partitioning and workload management."³²

Article 506(1) of the AIT provides that each party shall ensure that the procurement covered by Chapter Five is conducted in accordance with the procedures set out in Article 506. Article 506(6) provides, in part, that "[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and methods of weighting and evaluating the criteria."

Article 1013 of NAFTA requires that tender documentation "shall contain all information necessary to permit suppliers to submit responsive tenders" and, also, that it provide a complete description of the goods and services to be procured, technical specifications, and criteria for awarding the contract. Article 1015(4)(d) of NAFTA states that "[contract] awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation".

In the absence of an industry standard or clear understanding within the industry of the term "partitioning", the Tribunal is of the view that it was particularly important for PWGSC to be clear in the solicitation with respect to the partitioning requirement. The Tribunal finds that article 4.4.4.5 of the SOR does not describe its partitioning requirement clearly and, hence, does not "clearly identify the requirements of the procurement", does not provide "all information necessary to permit suppliers to submit responsive tenders" and does not provide clear "technical specifications". Hence, article 4.4.4.5 does not meet the requirements of Article 506(6) of the AIT and Articles 1013 and 1015(4)(d) of NAFTA.

29. File No. PR-2001-030, Hewlett-Packard's reply to the GIR, Tab 1. The Tribunal notes that the hardware and software referred to in this documentation were not proposed by IBM in response to the solicitation at issue; however, the Tribunal finds that the information contained in these documents is general in nature and therefore helpful.

30. File No. PR-2001-030, GIR, Exhibit 18.

31. Based on the evidence, the Tribunal considers resource partitioning and workload management to be equivalent in this context.

32. *Supra* note 29 at 2.

Article 4.4.5.1

This article, as modified by amendment No. 009 on May 18, 2001, provides as follows:

4.4.5 Additional System Management Software Requirements

Each system in the Power, Enterprise and Internet classes as specified in Sections 2 and 3 of this document, must come installed with system management software meeting the following requirements:

- 4.4.5.1 Allow for dynamic system domains, or independent partitions, each running its own operating system, that are isolated from other domains, or partitions, to provide protection and insulation between applications running in different domains without any hardware changes.

Question 95 and answer 95 state as follows:

Q. 95 Reference: Annex A: Section 4.4.5.1

Paragraph 4.4.5.1 requests a very specific type of partitioning. Vendors implement partitioning in different fashions – physical, logical, dynamic and static partitioning. Some use multiple operating systems and some partition within a single operating system. All requirements of Section 4.4.5 can be met with either a single operating system environment or a multiple system operating environment. Please confirm that either a single operating system environment for partitions or a multiple operating system environment for partitions can be proposed?

- A. 95 Both a single operating system environment and a multiple operating system environment are acceptable approaches to meet the partitioning requirement.

Regardless of what “partitioning” means as a stand-alone term, as discussed in the context of article 4.4.5 of the SOR, answer 95 appears to contradict the clear language of article 4.4.5.1. Whereas the language of article 4.4.5.1, as amended, specifically stipulates independent partitions, “each running its own operating system”, answer 95 indicates that all requirements of article 4.4.5.1 can be met with either a single operating system environment or a multiple system operating environment. Because article 4.4.5.1 and answer 95 contradict each other, it is important to consider whether or not the effect of answer 95 is to amend the requirements of article 4.4.5.1.

In this solicitation, PWGSC responded to questions from bidders in two distinct ways. In some instances, it simply published answers to the questions. In other instances, it amended the solicitation in response to the questions. For example, article 4.4.5.1 of the SOR was, in fact, amended prior to question 95 in response to question 77.

In the numerous questions and answers submitted to the Tribunal as evidence, questions that resulted in amendments to the solicitation were clearly distinguished from those that did not. PWGSC submitted that not all questions and answers required amendments to the wording of the tender documents, but that all answers were equally important in notifying bidders of the correct interpretation of technical specifications or other requirements of the tender documents. PWGSC submitted that, where, as in this case, a bidder requests confirmation of an acceptable approach to meeting the requirements of the solicitation, it had to confirm or clarify the correct interpretation and then to evaluate the proposals submitted consistently with the information provided to bidders.

The Tribunal agrees with PWGSC’s position that not all answers to questions posed during the bidding process need to be framed as amendments. However, the Tribunal finds that, in this case, the fact

that PWGSC did not choose to frame this particular answer as an amendment is confusing. This is because the answer is not merely a clarification or correction of a bidder's interpretation of article 4.4.5.1 of the SOR, but is in fact a contradiction of that article. As a result, the Tribunal finds that article 4.4.5.1 is unclear and, consequently, breaches the requirements of Article 506(6) of the AIT and Article 1013 of NAFTA.

Alleged Changes to Mandatory Requirements

In addressing the allegation that PWGSC, in evaluating the bids, improperly changed the RFP's mandatory requirements after bid closing, the Tribunal considered Hewlett-Packard's two allegations: that PWGSC did not interpret articles 4.4.4.5 and 4.4.5.1 of the SOR cumulatively and that PWGSC did not evaluate articles 4.4.4.5 and 4.4.4.7 correctly.

The Tribunal agrees with the parties that the system management software requirements under articles 4.4.4 and 4.4.5 of the SOR are cumulative. This is clear from the drafting of the RFP, where article 4.4.5 is entitled "Additional System Management Software Requirements", thereby indicating a requirement supplementary to article 4.4.4. Accordingly, articles 4.4.4.5 and 4.4.5.1 are also cumulative.

In its letter of September 17, 2001, to PWGSC, Hewlett-Packard objected to the results of the evaluation and alleged that IBM's solution did not meet all the mandatory requirements, specifically articles 4.4.4.5 and 4.4.5.1 of the SOR. It further stated that IBM did not have a solution that met both requirements simultaneously. In its response dated September 26, 2001, PWGSC indicated that "the requirements as stated in the RFP and SOR did not require that these functions have to be 'simultaneous' as per your assumption". Hewlett-Packard submitted that PWGSC's letter indicated that PWGSC did not interpret articles 4.4.4.5 and 4.4.5.1 cumulatively in evaluating the bids.

In the GIR, PWGSC disagreed with Hewlett-Packard's interpretation of its letter and submitted that the requirements of these two articles were, in fact, evaluated cumulatively. However, the Tribunal notes that PWGSC did not provide any evidence to that effect. Given the absence of any contrary evidence, the Tribunal concludes that these articles were not evaluated cumulatively.

With respect to the allegation that articles 4.4.4.5 and 4.4.4.7 of the SOR were evaluated incorrectly, the following text of answer 63 applied to article 4.4.4.5: "The requirement of 4.4.4.5 is that a single server must be able to be partitioned so that multiple applications, with their own allocated resources, can be run in isolation from each other", whereas the following text applied to article 4.4.4.7: "The requirement of 4.4.4.7 is for the ability to balance workloads across processors (CPUs) and platforms (different systems). This does not necessarily have to be a function of the operating system; it could be handled by a separate software package." This is not disputed. However, the copies of worksheets used by the evaluators in evaluating compliance with the various provisions of the RFP, as filed by PWGSC, indicated that, on these worksheets, the portion of answer 63 attributable to article 4.4.4.5 was incorrectly applied to article 4.4.4.7 and, similarly, that the portion of the answer attributable to article 4.4.4.7 was incorrectly applied to article 4.4.4.5.

Hewlett-Packard submitted that this error indicated that PWGSC evaluators evaluated articles 4.4.4.5 and 4.4.4.7 of the SOR incorrectly. PWGSC submitted that this was an obvious typographical error and was treated as such by the evaluators, but did not provide any evidence to support this position.

The Tribunal has reviewed the documentation relating to the evaluation process, as submitted by PWGSC, particularly the "USR-RFP Evaluation Daily Journal" and the evaluation process report, and has

found no indication that this error had been identified during the evaluation process or that any corrective measure had been taken. Based on the evidence submitted, it finds that articles 4.4.4.5 and 4.4.4.7 were evaluated incorrectly.

The Tribunal notes that the evaluators' worksheets were destroyed. These worksheets might have provided useful information concerning the allegations concerning changes to mandatory requirements after bid closing. However, the Tribunal does not consider that Hewlett-Packard was prejudiced in this instance by the destruction of these documents.

The Tribunal determines that PWGSC and HRDC breached the provisions of the trade agreements, as discussed above, and that this ground of complaint is valid.

In determining a remedy, the Tribunal has considered the parties' submissions and the circumstances relevant to the procurement, as referred to in subsection 30.15(3) of the CITT Act. It considers that the deficiencies in the procurement process, particularly the lack of clarity in articles 4.4.4.5 and 4.4.5.1 of the SOR, are serious and have potentially prejudiced not only Hewlett-Packard but also Amdahl, the other bidder. Consequently, the Tribunal recommends that the contract awarded to IBM be terminated and that PWGSC and HRDC issue a new solicitation.

– Second Ground of Complaint

As outlined above, this ground of complaint contains two allegations of price discrimination against Hewlett-Packard as the incumbent supplier. The first allegation is that the need to make the transition from the incumbent supplier would give non-incumbent suppliers the advantage of accessing a large base of payment for professional services under the contract. This would enable non-incumbent suppliers, unlike the incumbent, to dramatically discount their hardware and software prices. The second allegation is that the time that a non-incumbent would require to carry out the transition would give it an advantage over the incumbent by permitting it to "forward price" its equipment.

The Tribunal notes that Hewlett-Packard identified the essential elements of this ground of complaint in its letter dated January 15, 2001,³³ in which it commented on the LOI issued in relation to the procurement. In this letter, Hewlett-Packard stated its view that the LOI made no allowance for transition costs in the Evaluation Methodology. It argued, in this letter, that there would be costs associated with potentially changing suppliers and that these costs must be included in the evaluation. Further, Hewlett-Packard noted that transition to a new supplier would increase the quantity of professional services that would be required. Hewlett-Packard stated:

HP strongly recommends the Crown quantify the costs associated with the potential transition from one supplier to another and include these costs in the evaluation methodology.

The Tribunal also notes that, in the handout³⁴ distributed to each participant, including Hewlett-Packard, at the information session held on January 30, 2001, PWGSC responded to Hewlett-Packard's concerns about the alleged deficiency of the RFP regarding transition costs as follows:

HRDC could not, at this point in time or for RFP evaluation purposes, quantify potential transition costs as it is not known what HRDC will transition to, the extent of the transition, or when any such transition will take place. However transition costs and preserving technology investment costs are a concern of HRDC and therefore a requirement has been added to ensure that the contractor must

33. File No. PR-2001-030, GIR, Exhibit 27, Attachment 3.

34. *Ibid.*, Attachment 4 at 12.

develop business cases identifying the cost/benefits associated with retaining the current systems and environment versus replacing the existing systems.

On April 6, 2001, the RFP for Solicitation No. V9419-000008/C was issued. Hewlett-Packard subsequently raised the issue of transition costs several times prior to bid closing. In correspondence, dated May 1, 2001, to the Deputy Minister of HRDC, Hewlett-Packard raised the failure of the RFP to include transition costs in the scoring and evaluation of bids. HRDC responded in a letter dated May 10, 2001, that any concerns regarding this procurement should be directed to the contracting officer. Hewlett-Packard then sent a second letter, this time to the Deputy Minister of PWGSC outlining these concerns.

On June 4, 2001, the Deputy Minister of PWGSC replied to this letter, stating that these concerns should be directed to the contracting authority responsible for the RFP.

On that same date, Hewlett-Packard sent a letter to the contracting authority in which the question and answer on the issue of transition costs provided at the January 30, 2001, information session were reproduced. The question asked by Hewlett-Packard read, in part, as follows:

Please explain how the business case will address transition, or life-cycle costs, such as code conversion, changing the application software development infrastructure, testing, configuration management, re-training of departmental personnel, maintaining a dual environment prior to changeover, etc. These are costs to be borne by the Crown if the RFP results in a change in suppliers and they are potentially huge. Excluding these costs from the scoring and evaluation of bids misrepresents the true costs of the initiative by transferring the risk and the very large potential expenses of transition/conversion from bidders to taxpayers.

Because transition costs associated with a potential change of suppliers are not included in the RFP's assessment criteria, the overall cost of the Government of Canada is unknown and unlimited. To select a supplier under the current assessment criteria would not represent "best value" to the Crown. Please explain how these concerns will be addressed.

The Tribunal also noted the questions asked by bidders during the solicitation period and the corresponding answers provided by PWGSC. In particular, the Tribunal noted answer 107 provided in amendment No. 014, on June 6, 2001. In this answer, PWGSC essentially repeated its position from the January 30, 2001, information session that the transition costs would not form part of the evaluation, as the Crown could not quantify these costs. In addition, the Tribunal noted answer 116, also in amendment No. 014, which addressed the range and quantity of professional services that would be required:

Q. 116 Reference: Annex A Section 3.

The RFP details many diverse professional services resources, including having the ability to supply three Project Administrators, and three Technical Writers. The RFP is for the stated major purpose of a UNIX services and Server consolidation. Please explain why such a wide variety and large number of resources are required for what has been presented as basically a systems consolidation project. The resources identified in the RFP would appear excessive to the stated goals of the RFP.

A. 116 The identified resource requirements are those that HRDC believe they may require over the period of the contract to perform the type of work identified in the RFP. This includes the development and implementation of a Consolidation Plan for UNIX services and the establishment of [a] UNIX-based Application Hosting environment.

The solicitation closed on July 3, 2001, and Hewlett-Packard was informed that its bid was unsuccessful on September 12, 2001. Hewlett-Packard filed the first complaint with the Tribunal on October 9, 2001.

In the Tribunal's view, it is clear that Hewlett-Packard directed its mind seriously, over a period of months, to the fact that the draft RFP, as contemplated during the LOI stage, and the final RFP issued on April 6, 2001, did not address issues relating to transition costs. By June 6, 2001, when question 107 was answered in amendment No. 014, Hewlett-Packard had been considering this issue for over four months since the date of its first correspondence and about two months subsequent to the issuance of the RFP.

Over this period of time, Hewlett-Packard indicated a concern that transition costs would be higher for non-incumbents and that too much weight was being given to professional services in the solicitation. Having considered these issues, Hewlett-Packard should reasonably have been aware of the potential advantage that might accrue to non-incumbents in accessing payment for professional services under the contract. Similarly, in considering these issues, Hewlett-Packard should reasonably have become aware of the possibility of non-incumbents requiring a longer transition period than the incumbent, with the potential result of a "forward price" advantage.

Given the fact that it focussed on these concerns over a period of months, Hewlett-Packard should reasonably have known by June 6, 2001, the manner in which non-incumbents, such as IBM, might be advantaged under the RFP and did not need to wait until the evaluation of IBM's bid for this concern to "crystallize".

Further, the Tribunal finds that Hewlett-Packard had been repeatedly informed by PWGSC that its concerns would not be addressed and that, by June 6, 2001, at the latest, it knew that PWGSC would not be amending the RFP to address its concerns. There is no evidence that Hewlett-Packard filed an objection with PWGSC after June 6, 2001, and Hewlett-Packard did not file the first complaint with the Tribunal until October 9, 2001. As a result, the Tribunal is of the view that this ground of complaint was filed outside the time limit for filing a complaint, as provided for in section 6 of the Regulations.

Accordingly, pursuant to section 10 of the Regulations, the Tribunal dismisses this ground of complaint. The Tribunal denies PWGSC's request for costs.

SECOND COMPLAINT (FILE NO. PR-2001-040)

The Tribunal's order required PWGSC to produce, among other things, "[a] copy of the evaluation scoring, including raw scoring sheets from each evaluator and each evaluator's scoring notes, as they relate to Hewlett-Packard's bid evaluation". In its letter of November 7, 2001, in response to the Tribunal's order, PWGSC advised the Tribunal that the evaluation worksheets which fall into this category, had been destroyed. The letter read, in part:

We have been informed by PWGSC officials that the individual evaluator's evaluation worksheets were destroyed upon completion of the Evaluation Results Report on August 28, 2001, after the final evaluator had signified concurrence with the report by signing the front page of the report.

As a result of the information provided in this correspondence, on November 15, 2001, Hewlett-Packard filed a second complaint regarding this solicitation and provided further submissions in a letter dated November 19, 2001. In the second complaint, Hewlett-Packard alleged that, contrary to the NAC Act and Article 1017 of NAFTA, the Crown had destroyed documentation relating to the procurement. Specifically, it submitted that the destruction of documents, in particular, evaluation materials, was in violation of Article 1017(1)(p) of NAFTA. It submitted that a provision with virtually identical wording was contained in Article 1305 of the *Canada-United States Free Trade Agreement*.³⁵ Citing a

35. *Canada Treaty Series*, 1989, No. 3 (C.T.S.).

decision³⁶ of the Procurement Review Board of Canada (PRB), the Tribunal's predecessor as the bid challenge authority for Canada, Hewlett-Packard submitted that the PRB concluded, in that case, that the evaluation was improper, in part because the government failed to maintain adequate documentation to support its processes.

Hewlett-Packard submitted that the unauthorized destruction of documents relating to this procurement made the basis of the evaluation of bids uncertain and undermined the integrity of the evaluation results. It submitted that the destruction of documents also caused harm and prejudice to its case, as it does not have access to critical information. Hewlett-Packard requested, as a remedy, that the Tribunal assess PWGSC's submissions with extra care and that it draw a negative inference or make a presumption that the destroyed documents would have been unhelpful to PWGSC and would, in fact, corroborate or assist Hewlett-Packard's position. Hewlett-Packard submitted that, unless PWGSC provides the evidence that has been destroyed in a compelling and clear way, the evaluation results should be set aside.

Positions of Parties

PWGSC's Position

PWGSC submitted that Hewlett-Packard did not suffer material harm and prejudice in the presentation of its case as a result of the disposal of the individual evaluators' worksheets because there was no logical connection between Hewlett-Packard's allegations in the second complaint and the matters at issue in the first complaint, particularly the interpretation of articles 4.4.4.5 and 4.4.5.1 of the SOR with respect to partitioning. PWGSC also submitted that the discarded worksheets had no relevance or connection to the issue of transition costs. Furthermore, it submitted that a comprehensive evaluation record existed and that the contents of the worksheets, and whatever they might reveal about the evaluation, had no relevance to the matters at issue.

Regarding the allegation that, in the absence of the discarded individual evaluators' worksheets, the evaluation documentation is inconsistent with articles 5.5.1 and 5.5.3 of the Evaluation Methodology, PWGSC submitted that this requirement was satisfied through the conduct of a comprehensive, in-depth evaluation, as demonstrated by the documentation kept during the evaluation process and provided with the GIR.³⁷ Further, with regard to the question of the scoring of proposals during the evaluation process, it submitted that the evaluation did not involve point-rated scoring and that, therefore, Hewlett-Packard could not have been prejudiced by the granting of a higher score to IBM. PWGSC also argued that it was not inappropriate for information contained in the evaluators' worksheets to have been rolled up into the evaluation report for each proposal together with the requests for clarification and the responses by the bidders. It also argued that there was no ill intent or other improper purpose associated with the decision to discard the worksheets.

PWGSC submitted that the record discloses that the evaluation team's treatment of the bids was in accordance with the trade agreements. The fact that the record does not disclose any issues with respect to compliance with articles 4.4.4.5 and 4.4.5.1 of the SOR demonstrates that there were no issues relating to IBM's compliance with these two articles. If such issues had existed, it would be apparent from a review of

36. *Re Complaint filed by ATS Scientific* (26 January 1994), G93PRF6623-021-0027 (PRB) [hereinafter *ATS Scientific*].

37. This documentation includes the "USR-RFP Evaluation Daily Journal," the evaluation process report, the "Agenda – EUSC – USR RFP Orientation & Evaluation," the "Record of Decision" dated July 24, 2001, and the evaluation report for each proposal, together with the requests for clarification, the responses by the bidders to the requests for clarification and the "Fairness Monitor Report."

the record, especially the evaluation daily journal, the evaluation process report, the evaluation report and the fairness monitor report.

PWGSC further submitted that the disposal of the worksheets did not constitute a destruction of the procurement record. The procurement process was amply recorded in the documentation kept during the evaluation process. PWGSC further argued that the worksheets for the technical evaluation have no bearing on Hewlett-Packard's argument regarding financial proposals with respect to transition costs.

In response to the allegation that PWGSC destroyed the individual evaluators' worksheets contrary to the NAC Act, PWGSC submitted that the Tribunal has no jurisdiction under the CITT Act to conduct an inquiry into the issue of whether the worksheets fall within the definition of a government "record" under the NAC Act or whether the discarding of the worksheets in any way contravened the provisions of the NAC Act.

Regarding Hewlett-Packard's allegation that the discarding of the evaluation worksheets prejudiced the presentation of its case, PWGSC submitted that there is no basis for such an allegation and that no *prima facie* connection was made between the absence of the worksheets and the allegations. PWGSC submitted, in the alternative, that a comprehensive record of the procurement process had been carefully maintained, as demonstrated by the above-mentioned documentation. It further submitted that the NAFTA requirement for complete documentation "including a written record of all communications substantially affecting each procurement" is satisfied by the comprehensive record maintained in this matter. PWGSC argued that this provision was not violated by virtue of the disposal of the evaluators' worksheets, which set out points requiring clarification, because all these points of clarification were rolled up into the requests for clarification and the evaluation reports. It also argued that the PRB's decision in *ATS Scientific* has no application to the allegations regarding Article 1017(1)(p) of NAFTA in this case.

PWGSC submitted that there ought not to be, in the circumstances of this procurement, a presumption that the discarded worksheets would have been unhelpful to the Crown's case in this inquiry. It submitted that the complaint should be dismissed and that it should be awarded its costs.

Hewlett-Packard's Position

In the second complaint, Hewlett-Packard submitted that, without access to the evaluators' worksheets, scoring records, notes and comments, it could not know how the evaluators understood, assessed, evaluated and conceptually approached the scoring of the proposals in relation to the matters at issue. It further submitted that it was materially prejudiced and was denied access to information that would have assisted it, and the Tribunal, in knowing how key issues in this procurement were evaluated by each evaluator. It further submitted that the Evaluation Methodology, which is part of the solicitation documents, described the requirements for the proper and detailed documentation of the evaluators' assessments.

Hewlett-Packard submitted that the government must ensure that it preserves information that it created and on which it relied in coming to its decision. It further added that the reason that a complete record is so important is that the information contained in it may inform a potential supplier, or indeed the Tribunal when considering a bid challenge, about the essential fairness of the procurement process. Moreover, a complete record will assist in determining whether the government's treatment of the bids was in accordance with the provisions of the applicable trade agreements. Hewlett-Packard further asserted that the destruction of records frustrates the intention of the CITT Act and the ability of bidders to challenge a procurement.

In its reply³⁸ to the GIR, Hewlett-Packard argued, contrary to PWGSC's submissions, that the question of how the evaluation was conducted is one of the central issues raised in the first complaint, especially as it relates to the reading, the understanding and the evaluation of articles 4.4.4.5 and 4.4.5.1 of the SOR. It also argued that PWGSC offered no explanation as to why the documents had been destroyed and that the evidence that was destroyed was material. Hewlett-Packard further argued that it had been prejudiced by the destruction of these documents and that no credible, objective or direct evidence had been tendered to fill the resulting void.

In addition to the remedies requested in its first complaint, Hewlett-Packard asked for its complaint costs and compensation for lost profits in connection with the first task authorization.

Tribunal's Decision

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations 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 trade agreements. The Tribunal has no jurisdiction to monitor compliance with respect to the record retention requirements of the NAC Act.

Article 1017 of NAFTA provides, in part:

1. In order to promote fair, open and impartial procurement procedures, each Party shall adopt and maintain bid challenge procedures for procurement covered by this Chapter in accordance with the following:

- (p) each Party shall ensure that each of its entities maintains complete documentation regarding each of its procurements, including a written record of all communications substantially affecting each procurement, for at least three years from the date the contract was awarded, to allow verification that the procurement process was carried out in accordance with this Chapter.

The Tribunal must decide whether PWGSC breached Article 1017(1)(p) of NAFTA by destroying the individual evaluators' worksheets upon completion of the Evaluation Results Report.

The Tribunal is of the view that the obligation under Article 1017(1)(p) of NAFTA requires the government to maintain documentation for every procurement, regardless of the circumstances. This obligation must be observed, regardless of whether the evaluation process is at issue. Furthermore, the Tribunal notes that Article 1017(1)(p) states that the documentation is to be maintained "to allow verification that the procurement process was carried out in accordance with this Chapter." The Tribunal is of the opinion that the "verification" referred to in Article 1017(1)(p) is not necessarily confined to situations where a bidder has complained.

In this instance, the issue before the Tribunal is whether "complete documentation" includes the evaluators' worksheets. Article 5.5.1 of the Evaluation Methodology indicated that the evaluation of proposals would be based upon an in-depth evaluation and would be documented on evaluation worksheets. PWGSC confirmed that, in accordance with the Evaluation Methodology set out in the RFP, evaluation

38. Hewlett-Packard's letter dated December 31, 2001, to the Tribunal.

worksheets³⁹ were produced to conduct the evaluation, the evaluation worksheets were made available to each evaluator at the start of the evaluation of the technical/management portions of the proposals to conduct their individual evaluations, the worksheets were used by the evaluators and, once completed, the information was rolled up into the evaluation reports. Furthermore, the Tribunal notes that, in accordance with articles 5.7.3 and 6.3.1 of the Evaluation Methodology, the evaluation worksheets were to be used as a basis for communications and not just as evaluators' personal records. This is particularly true of the use of the individual evaluations for the purpose of reaching consensus among evaluation team members as required by article 5.4.6.1 of the Evaluation Methodology.

PWGSC submitted that all the information contained in the worksheets was recorded in other evaluation documents submitted to the Tribunal and that, therefore, the absence of the evaluators' worksheets does not affect the completeness of the documentation relating to this procurement. In the Tribunal's opinion, this argument is without merit. There is no evidence upon which the Tribunal could determine whether all the information contained in the worksheets was rolled up in the evaluation report for each proposal, as alleged by PWGSC.

In light of the above, in the Tribunal's opinion, the evaluators' worksheets were an integral part of the evaluation process and constituted part of the "complete record" regarding the procurement and part of the "written record of all communications" substantially affecting the procurement, within the meaning of Article 1017(1)(p) of NAFTA. Therefore, the Tribunal finds that PWGSC and HRDC breached the provisions of Article 1017(1)(p) by destroying the evaluators' worksheets.

The Tribunal notes that, although no similar provision exists in the AIT, the maintenance of complete documentation is essential under the AIT to promote fair and open procurement procedures.

In recommending a remedy, the Tribunal has considered the provisions of subsection 30.15(3) of the CITT Act, including the degree to which Hewlett-Packard and the integrity and the efficiency of the competitive procurement system have been prejudiced. In this instance, it was able to decide the matters in the first complaint without the use of the individual evaluators' worksheets and Hewlett-Packard was, therefore, not prejudiced by the absence of this documentation. However, the Tribunal is of the view that the maintenance of complete documentation for each procurement is fundamental to preserving the integrity and transparency of the procurement system. Accordingly, it will recommend that PWGSC establish procedures designed to ensure that complete documentation be maintained for each procurement, as per the provisions of Article 1017(1)(p) of NAFTA.

DETERMINATION OF THE TRIBUNAL

The Tribunal notes that File No. PR-2001-30 contains two grounds of complaint: the first with respect to compliance with the mandatory terms of the RFP and the evaluation of bids; and the second with respect to price discrimination.

Pursuant to section 30.14 of the CITT Act, the Tribunal determines that the first ground of complaint is valid. The second ground of complaint was not filed within the time limit set out in section 6 of the Regulations. Consequently, pursuant to section 10 of the Regulations, the Tribunal dismisses the second ground of complaint.

39. Each evaluation worksheet contained three columns: one listing the SOR requirements, one for recording compliance with each of the requirements, and one for recording the evaluator's remarks.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the contract awarded to IBM on September 12, 2001, be terminated. The Tribunal further recommends that PWGSC and HRDC issue a new solicitation for the requirements contained in Solicitation No. V9419-000008/C in accordance with the provisions of the applicable trade agreements.

Pursuant to section 30.14 of the CITT Act, the Tribunal determines that the complaint in File No. PR-2001-040 is valid. The Tribunal recommends that PWGSC develop and implement procedures designed to ensure that complete documentation is maintained for procurements, as required by the provisions of Article 1017(1)(p) of NAFTA.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards Hewlett-Packard its reasonable costs incurred in preparing and proceeding with these complaints.

Ellen Fry
Ellen Fry
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

James A. Ogilvy
James A. Ogilvy
Member