CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, May 6, 2002

File No. PR-2001-059

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

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

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

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 Department of Public Works and Government Services re-evaluate the proposal submitted by MaxSys Professionals & Solutions Inc. with respect to the mandatory experience requirements for the following workstreams: Business Planning, Program Planning, Project Management, and Comptrollership and Accounting. In this re-evaluation, experience acquired by 1230357 Ontario Limited is to be considered as experience of MaxSys Professionals & Solutions Inc., to the extent that the contracts for the relevant work were assigned by 1230357 Ontario Limited to 3755479 Canada Inc. Experience of 1230357 Ontario Limited shall not be considered eligible to fulfil the mandatory experience requirements if it was acquired while the Business Contract dated December 1, 1997, between 1230357 Ontario Limited and BMB Consulting Services Inc. was in effect. For each workstream where the re-evaluation indicates that MaxSys Professionals & Solutions Inc. fulfils the mandatory experience requirements, the Department of Public Works and Government Services shall evaluate all other elements of the proposal, to the extent that they have not yet been evaluated, according to the evaluation criteria and methodology set out in the Request for Proposal (Solicitation No. W2177-00EG01/B).

In the event that the proposal of MaxSys Professionals & Solutions Inc., for any workstream, is the lowest total average evaluated price per point on the basis of the evaluation criteria set out in the Request for Proposal, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate MaxSys Professionals & Solutions Inc. for the profit that it would have made, had it been awarded the contract for that workstream.

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards MaxSys Professionals & Solutions Inc. its reasonable costs incurred in preparing and proceeding with this complaint.

Ellen Fry
Ellen Fry
Presiding Member

Pierrre Gosselin
Pierrre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination:	May 6, 2002
Date of Reasons:	June 17, 2002
Tribunal Members:	Ellen Fry, Presiding Member Pierre Gosselin, Member Zdenek Kvarda, Member
Investigation Officer:	Peter Rakowski
Counsel for the Tribunal:	Michèle Hurteau
Complainant:	MaxSys Professionals & Solutions Inc.
Counsel for the Complainant:	Ronald D. Lunau Carina DePellegrin
Intervener:	ADGA Group Consultants Inc.
Counsel for the Intervener:	Richard A. Wagner
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	David M. Attwater

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, June 17, 2002

File No. PR-2001-059

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

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

STATEMENT OF REASONS

COMPLAINT

On February 5, 2002, MaxSys Professionals & Solutions Inc. (MaxSys) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.[1] The complaint concerns the procurement (Solicitation No. W2177-00EG01/B) by the Department of Public Works and Government Services (PWGSC) of omnibus management consulting and professional (OMCP) services for subsequent ordering by the Department of National Defence (DND) by means of "tasking" on an "as and when required" basis. DND's requirement for OMCP services includes five workstreams as follows: business planning, program planning, project management, comptrollership and accounting, and human resources. DND's intent was to award one contract for each of the workstreams. Accordingly, bidders had to submit a separate proposal for each of the workstreams on which they wished to bid.

MaxSys alleged that PWGSC and DND, acting contrary to the provisions of the *North American Free Trade Agreement*,[2] the *Agreement on Government Procurement*[3] and the *Agreement on Internal Trade*,[4] have applied, in the evaluation of its proposals, an unfair and biased evaluation methodology that resulted in the improper disqualification of its bids. Specifically, it alleged that PWGSC and DND improperly disqualified its proposals for four workstreams on the basis that it failed to meet the mandatory requirements of demonstrating completion, within the last 10 years, of three projects similar in scope and nature to those workstreams. It further alleged that the prejudicial treatment that it was afforded in the course of this solicitation gives rise to a reasonable apprehension that the procurement process was unfair and biased against it.

MaxSys requested, as a remedy, that the Tribunal immediately issue an order directing PWGSC and DND not to award any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. It further requested that, if the contracts had not yet been awarded, it be awarded the contracts for business planning, project management, comptrollership and accounting, and program

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. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].
4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [hereinafter AIT].

planning.[5] If the contracts have already been awarded, it requested compensation for the lost profit on these contracts, as well as for the loss of reasonably foreseeable future financial benefits associated with the contracts. In addition, it requested a substantial additional amount of compensation under subsection 30.15(3) of the CITT Act in consideration of the degree to which it, and the integrity and efficiency of the procurement process, had been prejudiced. In the alternative, it requested that the four contracts be cancelled and awarded to it. Finally, it requested its costs of preparing and proceeding with the complaint.

On February 14, 2002, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[6] That same day, the Tribunal issued four orders postponing the award of any contract in relation to the four workstreams at issue until the Tribunal determined the validity of the complaint. On February 19, 2002, PWGSC informed the Tribunal that four contracts[7] had already been awarded in response to this solicitation. On March 12, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[8] On March 25, 2002, the Tribunal informed the parties that ADGA had been granted intervener status in the matter. That same day, MaxSys filed comments on the GIR with the Tribunal. On April 4, 2002, ADGA advised the Tribunal that it would not provide any comments in regard to the matter. On April 5, and 9, 2002, PWGSC filed additional comments with the Tribunal.

On April 9, 2002, the Tribunal asked both parties to provide additional information. MaxSys and PWGSC provided the additional information to the Tribunal on April 16 and 19, 2002, respectively. On May 1, 2002, MaxSys and PWGSC filed final comments with the Tribunal.

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

PROCUREMENT PROCESS

Background

Prior to 1995, Mr. Bryan Brulotte formed a sole proprietorship. In 1997, he incorporated 1230357 Ontario Limited and conveyed all assets of the sole proprietorship to that company. In 1997, 1230357 Ontario Limited entered into a business arrangement (the 1997 business contract) with BMB Consulting Services Inc. (BMB). In 1998, a new business arrangement (the BMB business arrangement), was concluded in a shareholders agreement between 1230357 Ontario Limited, BMB and three other shareholders. In 2001, 1230357 Ontario Limited withdrew from the BMB business arrangement. In January 2001, it transferred all of its assets, contracts, employees and intellectual property to 3755479 Canada Inc. to the extent that they were transferable, and 3755479 Canada Inc. became responsible for all the rights and obligations under the contracts transferred to it by 1230357 Ontario Limited. Initially,

5. The contract for services relating to the human resources workstream is not in dispute.
6. S.O.R./93-602 [hereinafter Regulations].
7. AIM-Automated Information Management Corporation was awarded a $3M contract for comptrollership and accounting. ADGA Group Consultants Inc. was awarded three contracts, one each for business planning, program planning and project management, worth $3M, $3.5M and $2.5M respectively.
8. S.O.R./91-499.

3755479 Canada Inc. operated under the business name BMB Professionals & Outsourcing and, later, as MaxSys.

Procurement

On July 27, 2001, a Notice of Proposed Procurement and related Request for Proposal (RFP) were posted on MERX.[9] Part 2 of the RFP includes the following provisions relevant to this case:

> **4.0 EVALUATION PROCEDURES AND METHODOLOGY**
>
> 3. The evaluation team reserves the right but is not obliged to perform any of the following:
>
> a) seek clarification or verify any or all information provided by the Bidder with respect to this RFP.

Annex D to the RFP, "Evaluation Procedures & Criteria", states, in part, as follows:

> D.1.1.1 To be considered responsive for the workstream for which the proposal has been submitted, the proposal must
>
> a. meet all the mandatory requirements of this solicitation applicable to that workstream.
>
> D.1.1.2 Bids not meeting D.1.1.1 (a) . . . will be given no further consideration.
>
> [D.1.2 describes the nine-step evaluation procedures.]
>
> D.2.1 The word "Bidder" in all mandatory requirements under D.2.4 below refers to the potential supplier submitting the proposal. The experience being put forward by the Bidder to meet the mandatory requirement described below in this annex must be work for which the Bidder was under contract to clients exterior to the Bidder's own organization. The Bidder submitting a proposal may, however, consist of several firms putting one proposal together as a joint venture. In the case of a joint venture, the combined experience of the firms forming the joint venture will be considered for the purposes of determining the Bidder's compliance to the mandatory requirement.
>
> D.2.4.1 The bidder must clearly demonstrate completion, within the past ten (10) years of three (3) projects that are similar in scope and nature (ie. related to some or all of the various services outlined) to the workstream as described in Annex A, for which a bid is being submitted. To demonstrate that the Bidder possesses the above required experience, the following mandatories must be met with respect to these projects:
>
> a) The three (3) projects must have been conducted under contract for clients exterior to the Bidder's own organization;
>
> b) At least one of the projects must have a contract value of over $150,000.00;
>
> c) The bidder must have been the lead firm (as opposed to a sub-contractor) in at least one of the projects;
>
> d) At least one of the projects must have been completed for the public sector at the Federal level and the two (2) other projects must have been completed for the private and/or public sector; and,
>
> e) The bidder must provide at a minimum the following information for each project cited.

By correspondence dated August 31, 2001, Mr. Brulotte invited an official from DND to an "open house". The correspondence, under the header "BMB MaxSys", reads, in part:

9. Canada's Electronic Tendering Service.

> Please join our Member of Parliament, . . . and our city Councillor, . . . in a wine & cheese open house . . . We will be celebrating the opening of our new corporate offices and the transitioning of our name from "*BMB*" to "*MaxSys*".

The solicitation period closed on September 7, 2001. According to the GIR, 27 firms submitted 43 proposals for the five workstreams. MaxSys bid on each of the five workstreams. Separate bids were received from joint ventures, which included BMB.

The review of technical proposals against mandatory requirements, step 4 of the evaluation procedures, which is the portion of the evaluation at issue, commenced on September 12, 2001. During the week of September 12, 2001, a DND evaluator brought the "BMB MaxSys" correspondence of August 31, 2002, to the attention of PWGSC's contracting officer and enquired whether PWGSC was aware that BMB was changing its name to MaxSys. According to the GIR, neither DND nor PWGSC had received prior notification of the name change. As a result, on October 22, 2001, the contracting officer asked an employee of BMB about the name change. As the employee was not aware of the name change, the contracting officer sent her a facsimile of the "BMB MaxSys" correspondence. Shortly thereafter, Mr. Brulotte called the contracting officer, at which time the contracting officer explained that she did not fully understand the relationship between BMB and MaxSys. That same day, MaxSys sent additional information on its corporate history to PWGSC.

Following completion of the technical evaluations on November 14, 2001, the contracting officer sought clarifications from bidders. On November 20, 2001, PWGSC's contracting officer wrote to MaxSys as follows:

> We are presently conducting the evaluations of the proposals submitted for the subject Request for Proposal. With regard to Maxsys' proposal submitted under the Omnibus requirement, we are hereby requesting clarification of your firm's legal incorporation, in order that we may clarify your firm's project experience stated in your proposal, as being experience of Maxsys' legal corporation.

MaxSys provided the requested clarification by correspondence dated November 22, 2001.

By correspondence dated January 4, 2002, MaxSys was advised that it would not be awarded a contract under the RFP. Subsequent to the above correspondence, MaxSys telephoned PWGSC's contracting officer to request a debriefing. On that occasion, it was informed that no debriefing could take place before January 14, 2002. During the period from January 9 to 23, 2002, PWGSC received several pieces of correspondence from MaxSys for purposes of arranging a debriefing and requesting information and documentation prior to the debriefing. More specifically, by correspondence dated January 22, 2002, PWGSC stated:

> To be considered responsive for the workstream for which a proposal has been submitted, the proposal must meet all of the mandatory requirements of the solicitation as stated in Annex D, Evaluation Procedures & Criteria of the RFP. Specifically, the proposals submitted by MaxSys were non-responsive due to the failure of MaxSys meeting the mandatory requirement D.2.4.1, with regard to the Bidder clearly demonstrating completion within the past ten years, of three projects that are similar in scope and nature to the workstream for which they were bidding.
>
> . . .
>
> Upon review of the documentation provided on November 22, 2002 by the solicitors for MaxSys in reply to our request for clarification, it was determined that because 1230357 Ontario Limited and MaxSys did not bid as a joint venture, the experience gained by 1230357 Ontario Limited (the parent company and shareholder of MaxSys) cannot be considered the experience of the Bidder MaxSys (the subsidiary), a company incorporated as 3755479 Canada Inc. on January 26, 2001, who has

legally changed its name to MaxSys on September 2, 2001. The experience of a parent company is distinct from the experience of a subsidiary because they are two different legal entities.

In addition, MaxSys was informed that the proposal that it submitted with respect to the human resources workstream was found non-compliant with the mandatory requirement that its proposed personnel have certain minimum work experience. MaxSys has not taken issue with the latter determination; hence, the human resources workstream is not at issue.

Two debriefings were held with MaxSys on January 24 and 29, 2002.

POSITION OF PARTIES

MaxSys' Position

MaxSys submitted that the crux of its complaint is that, having accepted that the corporate experience cited in its proposal surpassed the technical requirements set out in the RFP, PWGSC wrongly disqualified its bids on the basis that MaxSys could not claim the benefit of the experience gained by 1230357 Ontario Limited prior to the corporate reorganization.

With respect to whether the evidence discloses real or apprehended bias, MaxSys submitted that there is substantial evidence that it was treated with less than full candour with respect to the evaluation of its proposals.

MaxSys submitted that the substantive issue to be resolved in this case is whether it is entitled to claim the benefit of the project experience gained by its corporate predecessor and parent company, 1230357 Ontario Limited, prior to reorganization of that company.

MaxSys submitted that the GIR disregards the factual circumstances relating to the experience that it put forward in its proposals, which serve to provide substantial evidence of continuity between it and its predecessor, including the wholesale transfer of assets and personnel, the assignment of contracts, the effective transfer of all intellectual property and corporate knowledge and the guiding role played by Mr. Brulotte, both before and after the reorganization.

MaxSys submitted that evaluating a bidder's experience involves many factors that PWGSC failed or refused to take into account in this case. Citing General Accounting Office[10] cases[11] in support, it submitted that the approach which PWGSC ought to have adopted in this case was to analyse the degree of continuity between MaxSys and 1230357 Ontario Limited. This analysis involves considering whether the experience included in MaxSys' proposals, reasonably evaluated, can be considered predictive of its performance under the contract. In this case, MaxSys argued, the offered experience clearly provided a reliable indication of its expected performance, if it were awarded the contract, given the obvious continuity of its personnel, operating assets, assignable contracts, intellectual property and corporate knowledge. The intellectual property and corporate knowledge gained by 1230357 Ontario Limited, including models, theories, templates, processes, etc., produced during the projects, were transferred to MaxSys. It submitted that, as a result of the very significant continuity between the operations and personnel of the predecessor company, 1230357 Ontario Limited and MaxSys, the experience gained while the business operated as

10. The General Accounting Office (GAO) is the U.S. counterpart of the Tribunal for bid challenges under NAFTA and the AGP.
11. *Oklahoma County Newspapers* (6 May 1996), B-270849, B-270849.2 (GAO); *Cygnus* (23 April 1997), B-275957, B-275957.2 (GAO).

1230357 Ontario Limited should have been recognized by PWGSC in evaluating the proposals of MaxSys. Moreover, MaxSys argued that the projects that it referenced, which were undertaken prior to the incorporation of the new company, were performed primarily by or under the direction of Mr. Brulotte, the directing mind of both 1230357 Ontario Limited and MaxSys.

MaxSys submitted that, at times, the GIR treats MaxSys and 1230357 Ontario Limited as though they were two arm's length and unrelated entities. In fact, it submitted that 1230357 Ontario Limited and MaxSys have the relationship of subsidiary and parent to one another, as recognized by the *Canada Business Corporations Act*.[12] Furthermore, the courts[13] and the Tribunal[14] have recognized that a subsidiary is in a position to benefit from the experience of its parent company by virtue of being part of the same corporate family.

MaxSys submitted that its bids have been declared non-compliant on a narrow and unreasonable application of the wording of article D.2.1 of Annex D to the RFP. It submitted that, as a general rule, the Tribunal should not support an unreasonable application of the provisions of an RFP that is so restrictive of bidders' rights. If an RFP is to limit bidders' rights, it submitted that this must be done in the clearest of terms.

Referring to the wording of article D.2.1 of Annex D to the RFP and virtually identical language[15] in another RFP, and considering that, in this latter instance, PWGSC expressly recognized that the experience of a separate corporate entity could be treated as the corporate experience of the bidder, MaxSys submitted that the GIR offers no explanation for this inconsistent position that it brought to PWGSC's attention in its complaint.

Noting that ADGA is one of the successful bidders and further noting that ADGA conducts business through five operating companies, MaxSys indicated that it has serious questions about whether PWGSC applied the same test to ADGA's proposals as the one applied to MaxSys' proposal. It argued that the predominant purpose of article D.2.1 of Annex D to the RFP, when viewed in the context of the RFP as a whole, is to exclude projects from consideration which were conducted for clients within a bidder's own organization. This purpose is mirrored in article D.2.4.1 a). In this context, it submitted that the GIR places a great amount of weight on the words "the Bidder was under contract". However, these words are notably absent from article D.2.4.1, the article under which MaxSys was declared non-compliant. Article D.2.4.1 states that bidders "must clearly demonstrate completion" of the required projects, and MaxSys clearly demonstrated completion of the required projects. It submitted that the fact that the words "Bidder was under contract" are not repeated in article D.4.2.1 indicates that they should not be given undue weight. In any event, even if the submissions in the GIR relating to article D.2.1 were valid (which MaxSys denies), the project experience claimed by MaxSys would still qualify, by virtue of it having been assigned of all 1230357 Ontario Limited's assignable contracts.

MaxSys further submitted that the GIR is incorrect when it suggests that the requirements of article D.2.4.2 of Annex D to the RFP distinguish the experience of personnel from the corporate experience

12. R. S. 1985, c. C-44.
13. *Moody S.I.* v. *Canada* (28 July 1983), F.C.J. No. 618 at 2 (F.C.T.D.); *Downtown Eatery (1993)* v. *Ontario*, [2001] 54 O.R. (3d) 161 at 171 (Ont. C.A.).
14. *Re Complaint Filed by Rolls-Royce Industries Canada* (4 August 2000), PR-99-053 (CITT).
15. Compare the language of article D.2.1 above with the following in a Request For Supply Arrangement, Solicitation No. EN537-01GOL2/C: "The word "offeror" in all mandatory requirements refers to the potential supplier submitting the offer. Therefore, the experience being put forward . . . must be work for which the offeror was under contract to outside clients."

of the bidder. This article only applies to the qualifications of the personnel being proposed, a question distinct from the examination of whether these personnel participated in past projects on which the bidder is relying as corporate experience.

With respect to the transferability of experience, MaxSys submitted that the experience of a corporation is not ephemeral, as the GIR seems to suggest. While a corporation is itself nothing more than a legal construct, an "artificial legal person", it argued that corporate experience and knowledge have a real physical embodiment in the corporate personnel who performed the projects and in the business documents and information created during the completion of the projects. It submitted that this explains why, for example, it is common for companies to place restrictive covenants in employment contracts.

MaxSys argued that its legal rights to claim the benefit of the experience gained during a prior legal incarnation are dependent on principles of law. It now has the legal and practical benefit of the knowledge gained during those prior projects due to the transfer of all intellectual property and personnel to it. In its submission, an evaluation by a government official cannot strip it of the legal rights that it has obtained by virtue of a corporate reorganization. The government cannot wipe out, in a single stroke, the legal rights that have accrued to MaxSys and decide that the corporate knowledge and corporate experience have no value and have never been transferred to MaxSys for the purposes of an evaluation.

MaxSys submitted that the legal precedents and principles that are relied on by the GIR to support PWGSC's position are extremely weak. In addition, it submitted that the cases[16] cited by PWGSC in support of its position either can be distinguished or are irrelevant.

With respect to PWGSC's suggestion that MaxSys should have entered into a joint venture with 1230357 Ontario Limited, MaxSys submitted that, in the present case, because 1230357 Ontario Limited is now the holding company of the operating company, MaxSys, it has no personnel, no operating assets and no intellectual property; in other words, it has no operational abilities whatsoever.

MaxSys submitted that PWGSC's submissions of April 5, 2002, allege that 1230357 Ontario Limited did not even possess the experience that was cited by MaxSys in its proposal. In its submission, PWGSC based its allegations on mistaken assumptions about the nature of the relationship between 1230357 Ontario Limited and BMB. It submitted that the fact that certain contracts were issued in the name of BMB does not lead to the conclusion that 1230357 Ontario Limited did not perform the tasks that were done under the contracts.

MaxSys further submitted that it is apparent that PWGSC did not question, at the time of the evaluation of its proposal, the project experience gained by 1230357 Ontario Limited. Rather, PWGSC's position was that MaxSys should have entered into a joint venture with 1230357 Ontario Limited in order to rely on the latter's experience. MaxSys submitted that PWGSC is now attempting to shift ground and alter the basis for the disqualification of its proposal.

Addressing the wording of article D.2.4.1 of Annex D to the RFP, that the experience claimed by a bidder must have been conducted "under contract for clients exterior to the Bidder's own organization", MaxSys submitted that this means any client and not only the Crown. It submitted that 1230357 Ontario Limited had a direct contractual relationship with the Crown by virtue of the joint venture with BMB. In the alternative, it argued that, if the Tribunal concludes that there is no such direct contractual relationship, the

16. *Re Complaint Filed by M.D. Heat Techs* (3 December 1998), PR-98-025 (CITT) [hereinafter *M.D. Heat Techs*]; *Re Complaint Filed by Canadian Helicopters* (19 February 2001), PR-2000-040 (CITT).

experience of 1230357 Ontario Limited would still qualify under the terms of the solicitation, as the work was performed by 1230357 Ontario Limited under a contract with BMB, an entity which is exterior to 1230357 Ontario Limited.

Furthermore, MaxSys submitted that, even if the requirement in article D.2.4.1 c) of Annex D to the RFP is found to mean that the client must have contracted directly with the bidder for at least one of the projects in each workstream, it meets that requirement.

Commenting on the additional information filed by PWGSC on April 19, 2002, MaxSys submitted that PWGSC not only disregards the Tribunal's established processes but splits its case and complicates the record, thus prejudicing MaxSys' right to make the final reply and causing it to incur substantial unnecessary additional expenses.

MaxSys submitted that the record shows that, both during the evaluation and thereafter, PWGSC embarked upon a course of unfair and evasive dealings with respect to MaxSys, to the point that the Tribunal should award it substantial additional compensation in recognition of the continuing, deliberate and vexatious manner in which PWGSC has aggravated the prejudice that was initially suffered by MaxSys.

PWGSC's Position

With respect to MaxSys' allegation that the evaluation procedures of Annex D to the RFP breached the trade agreements, PWGSC submitted that this ground of complaint was raised outside the time limit imposed by section 6 of the Regulations. It submitted that, since MaxSys did not object to the evaluation procedures in the RFP, subsection 6(1) determines the time limit within which MaxSys can complain to the Tribunal about the evaluation procedures. Pursuant to subsection 6(1), MaxSys had 10 working days after becoming aware of the evaluation procedures to complain to the Tribunal about these procedures. PWGSC submitted that MaxSys became aware of the evaluation procedures on or about July 27, 2001, when the RFP was posted on MERX. However, MaxSys did not complain about the evaluation procedures until February 5, 2002, after it was informed that its proposals were declared non-compliant.

PWGSC submitted that, in any event, the evaluation procedures, its actions and those of DND were fully consistent with the trade agreements. DND's evaluators engaged in the evaluation of proposals at step 4 were not privy to any financial information. Furthermore, step 3 of the evaluation procedures merely involved confirming that certain mandatory requirements had been met. It did not involve any manipulation of the financial information, which was reserved exclusively for step 7. PWGSC submitted that this approach is consistent with the evaluation procedures accepted by the Tribunal in File No. PR-2000-019,[17] where financial proposals were reviewed prior to the evaluation of the rated requirements for compliance with the mandatory requirements

PWGSC submitted that, at article 4.0 of Part 2 of the RFP, the Crown reserved the right to seek clarifications from bidders. MaxSys' proposals were declared non-compliant after PWGSC sought clarifications from it on its corporate history and on the basis of the information provided by it.

PWGSC submitted that the evaluation criteria distinguish between experience of the bidder (articles D.2.4.1 and D.3.3 of Annex D to the RFP) and experience of the personnel proposed by a bidder (article D.2.4.2). Personnel experience cannot be substituted for a bidder's experience. PWGSC submitted that the RFP clearly and unambiguously requires that the actual "supplier submitting the proposal" satisfy

17. *Re Complaint Filed by TELUS Integrated Communications* (10 November 2000) (CITT).

the mandatory requirement of article D.2.4. This was neither questioned nor challenged by MaxSys prior to its bid being declared non-compliant.

PWGSC submitted that it determined that some of the experience cited by MaxSys was not its own but, rather, that of a related corporation. MaxSys was the bidder, not 1230357 Ontario Limited. Furthermore, many of the projects cited by MaxSys in all four workstreams were dated prior to MaxSys coming into existence on January 26, 2001.

PWGSC added that article D.2.4 of Annex D to the RFP is a mandatory requirement and that, as such, the Crown was required to "thoroughly and strictly" evaluate MaxSys' conformance to it.[18] To do otherwise, it argued, would not be fair to the other bidders, some of which were joint ventures.

Furthermore, referring to MaxSys' reference to a previous solicitation,[19] PWGSC submitted that the Tribunal has consistently held that bidders must treat all solicitations as independent. Therefore, what happened in the above-referenced solicitation is not relevant to this case.

Citing *M.D. Heat Techs*, PWGSC submitted that the Tribunal has already recognized that the employment experience of a complainant's principals does not satisfy the corporate experience required by the RFP. It submitted that MaxSys and 1230357 Ontario Limited are distinct corporate entities with distinct legal personalities. Article D.2.4.1 of Annex D to the RFP imposed a mandatory requirement for certain experience on bidders. The mandatory requirement could not be satisfied by the experience of a different corporation, and MaxSys could not purchase that experience from another corporation.

Referring to the Tribunal's determination in File No. PR-95-011[20] and the question of the purchase and sale of intangible assets, such as the right to file a complaint, PWGSC submitted that a specific bidder's experience with projects "that are similar in scope and nature" is not an intangible asset that can be bought and sold. It argued that, while the experience of personnel may be transferred from one bidder to another through the assignment of an employment contract, the actual experience of a bidder may not be purchased. Moreover, it indicated that the "Bill of Sale & Assignment"[21] was not included as part of MaxSys' proposal, nor was it provided by MaxSys as part of its response to PWGSC's request for clarification. Therefore, it submitted, any reliance on the "Bill of Sale & Assignment" must be viewed as bid repair.

PWGSC submitted that article D.2.1 of Annex D to the RFP expressly contemplated MaxSys' circumstances and allowed bids by joint ventures. For reasons left unexplained, MaxSys chose not to submit bids as part of a joint venture with its related corporation. This was a choice open to MaxSys, which it did not exercise. In the circumstances, PWGSC argued that it should not be reproached for the choices made by MaxSys.

With respect to MaxSys' allegation that the Crown demonstrated biased and unfair treatment, PWGSC submitted that MaxSys was simply not credited with experience that it did not have. PWGSC also denied that it intentionally misinformed MaxSys. In the circumstances, it argued, it was reasonable and acceptable for it to seek clarification about Maxsys' name change. Furthermore, it submitted that the various allegations made by MaxSys, taken individually or collectively, do not remotely suggest bias.

---

18. PWGSC referred to *Siemens Westinghouse* v. *Canada (Minister of Public Works and Government Services)* (2000), 260 N.R. 367 (C.A.).
19. *Supra* note 15.
20. *Re Complaint Filed by AmeriData Canada* (9 February 1996) (CITT).
21. Complaint, Exhibit 24.

PWGSC requested its complaint costs.

In its additional comments dated April 9, 2002,[22] PWGSC submitted that 1230357 Ontario Limited did not possess much of the experience claimed by MaxSys in its proposal. Specifically, it asserted that MaxSys was not under contract in many of the examples cited in its proposals in order to satisfy article D.2.4.1 of Annex D to the RFP.

Furthermore, PWGSC submitted that, considering that BMB submitted bids as part of a joint venture in response to the RFP, it appears that MaxSys is claiming the corporate experience of its competitor. It submitted that, simply put, 1230357 Ontario Limited did not have the experience that MaxSys claims to have purchased from it.

In forwarding the additional information requested by the Tribunal on April 9, 2002, PWGSC submitted that articles 6B.142, 6B.143 and 6B.146 of the *Supply Manual* that deal with bidders' qualifications provide for use of a bidder's previous experience as a qualification factor. It submitted that the policy is sufficiently flexible to allow for the imposition of those mandatory and/or rated requirements considered appropriate in the circumstances as exemplified by the solicitation cited by MaxSys. However, it emphasized that bidders must treat all solicitations as independent.

PWGSC further submitted that there are no policies or guidelines with respect to the interpretation of article D.2.4.1 of Annex D to the RFP. The requirements are clear and unambiguous, and bidders may request clarification or amendment during the bidding period.

PWGSC further submitted that the contracts for which MaxSys was not the contractor, including the contracts of a predecessor company, cannot satisfy the mandatory requirements of article D.2.4.1 of Annex D to the RFP.[23] Furthermore, it submitted that, even accepting that MaxSys may rely on contracts under which a predecessor company performed work for a client organization, which it expressly denies, MaxSys is unable to establish that its predecessor companies held the contracts cited in its proposal. In fact, it submitted, the evidence available contradicts many of the claims made by MaxSys. It also submitted that there is no evidence of any "joint venture business activity" under the 1997 business contract. Furthermore, the 1997 business contract did not create a joint venture between 1230357 Ontario Limited and BMB.

TRIBUNAL'S DECISION

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal must determine whether the procurement was conducted in accordance with the requirements of the trade agreements, which, in this instance comprise NAFTA, the AGP and the AIT.

PWGSC submitted that MaxSys became aware of the evaluation procedures on or about July 27, 2001, when the RFP was posted on MERX, but did not complain about these procedures until February 5, 2002, after it was informed that its proposals were declared non-compliant. Thus, according to PWGSC, this ground of complaint was raised outside the time limit imposed by section 6 of the

22. The confidential version of the submission was filed on April 5, 2002, while the public version was filed on April 9, 2002.
23. PWGSC's response dated May 1, 2002, para. 50.

Regulations. However, the Tribunal is of the opinion that, although MaxSys was aware of the evaluation procedures in July 2001, it did not know why PWGSC considered it non-compliant with respect to these evaluation criteria until it received a facsimile from PWGSC dated January 22, 2002, and had its debriefing with PWGSC on January 24, 2002. Accordingly, the Tribunal remains convinced that the complaint was filed in accordance with the Regulations and will deal with the merits of this allegation.

Article 1008(1) of NAFTA and Article VII(1) of the AGP provide that Parties shall ensure that the tendering procedures of their entities are applied in a non-discriminatory manner. Article 501 of the AIT states that the purpose of Chapter Five is to establish a framework that will ensure equal access to procurement for all Canadian suppliers. Article 1015(4)(d) of NAFTA and Article XIII(4)(c) of the AGP provide that awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation. Article 506(6) of the AIT provides that the criteria and method to be used in the evaluation of bids must be clearly identified in the tender documents.

Article D.2.1 of Annex D to the RFP states, in part, that "[t]he experience being put forward by the Bidder to meet the mandatory requirement described below in this annex must be work for which the Bidder was under contract to clients exterior to the Bidder's own organization. The Bidder submitting a proposal may, however, consist of several firms putting one proposal together as a joint venture. In the case of a joint venture, the combined experience of the firms forming the joint venture will be considered for the purposes of determining the Bidder's compliance to the mandatory requirement."

Article D.2.4.1 of Annex D to the RFP states that a "bidder [the potential supplier submitting the proposal] must clearly demonstrate completion, within the past ten (10) years of three (3) projects that are similar in scope and nature . . . to the workstream as described in Annex A, for which a bid is being submitted."

The evidence shows that PWGSC disqualified MaxSys' bids on the grounds that it did not meet the requirement of article D.2.4.1 of Annex D to the RFP on the basis that:

> 1230357 Ontario Limited and MaxSys did not bid as a joint venture, the experience gained by 1230357 Ontario Limited (the parent company and shareholder of MaxSys) cannot be considered the experience of the Bidder MaxSys (the subsidiary), a company incorporated as 3755479 Canada Inc. on January 26, 2001, who has legally changed its name to MaxSys on September 2, 2001. The experience of a parent company is distinct from the experience of a subsidiary because they are two different legal entities. Therefore, the proposals submitted by MaxSys failed to meet the aforementioned mandatory criterion [article D.2.4.1] and the bid could be given no further consideration.[24]

The evidence indicates that, on February 6, 2001, 1230357 Ontario Limited transferred all of its transferable assets to 3755479 Canada Inc. These transferred assets included all assignable contracts, all employee contracts and the business experience, corporate knowledge and intellectual property gained during the existence of 123057 Ontario Limited. As a result, 3755479 Canada Inc., carrying on business as MaxSys, took over all remaining rights and obligations under all contracts that 1230357 Ontario Limited was permitted to assign. MaxSys submitted that, at the time that 3755479 Canada Inc. took over these contracts from 1230357 Ontario Limited, there was still work to be done under one of the contracts.[25] It also submitted that, for all the transferred contracts, it "would have been responsible for resolving any residual issues that might have arisen with respect to the project". The Tribunal accepts these submissions, which

24. Complaint, Exhibit 12.
25. MaxSys' confidential submissions dated April 16, 2002, Tab 11D.

were not disputed by PWGSC, and considers that MaxSys became the contractor under the transferred contracts.

Therefore, the Tribunal concludes that the experience of 1230357 Ontario Limited should be considered as the experience of MaxSys for purposes of the RFP, to the extent that the contracts for the relevant work were assigned by 1230357 Ontario Limited to 3755479 Canada Inc. It also notes that there was a transfer of substantive experience of 1230357 Ontario Limited to 3755479 Canada Inc. through the transfer of employee contracts and intellectual property. MaxSys submitted that the personnel of 1230357 Ontario Limited who performed the projects are now MaxSys' personnel and that "all models, theories, templates, processes etc. produced during the projects"[26] were transferred to MaxSys. The Tribunal accepts this submission, which was not disputed by PWGSC.

In light of the above, the Tribunal finds that, contrary to Article 506(6) of the AIT, Article 1015(4)(d) of NAFTA and Article XIII(4)(c) of the AGP, PWGSC failed to apply the criteria of article D.2.4.1 of Annex D to the RFP in evaluating MaxSys' proposals and that the complaint, therefore, is valid.

The Tribunal notes the evidence that some of the experience submitted by MaxSys in its bid involved work that was contracted by BMB. Article D.2.1 of Annex D to the RFP requires that "[t]he experience being put forward by the Bidder to meet the mandatory requirements described below in this annex must be work for which the Bidder was under contract to clients exterior to the Bidder's own organization." Given the nature of the working relationship between 123057 Ontario Limited and BMB, which is provided for in the 1997 business contract (which MaxSys submitted was a joint venture), the Tribunal is of the opinion that BMB was not "exterior to" 123057 Ontario Limited's own organization. Consequently, the work done by 1230357 Ontario Limited under the 1997 business contract would not qualify as experience for purposes of this RFP.

With respect to MaxSys' allegation of apprehension of bias, the Tribunal is of the view that this allegation is without foundation. In the Tribunal's view, this allegation rests primarily on the manner in which the evaluation of MaxSys' bids was conducted, including the seeking of clarifications. In the Tribunal's opinion, the evidence does not indicate that PWGSC acted in a biased manner during the evaluation process. Similarly, the Tribunal is of the view that PWGSC was entitled to seek clarification of MaxSys' corporate history when assessing the experience that MaxSys submitted in order to satisfy articles D.2.1 and D.2.4.1 of Annex D to the RFP and that the evidence does not indicate that it acted in a biased manner in doing so. In the Tribunal's opinion, the evidence does not indicate any ulterior motive in the actions taken by PWGSC.

Subsection 30.15(3) of the CITT Act stipulates that the Tribunal shall, in recommending an appropriate remedy, consider the seriousness of the deficiency found in the procurement process, the degree to which the complainant and all other interested parties have been prejudiced, the degree to which the integrity and efficiency of the competitive procurement system was prejudiced, the good faith of the parties and the extent to which the contract was performed.

In the Tribunal's view, the violation of the provisions of the trade agreements, in this instance, was potentially injurious to the interests of MaxSys. However, it did not cause significant prejudice to the integrity and efficiency of the competitive procurement system as a whole. Therefore, in order to correct any

26. Complaint, para. 55.

prejudice suffered by MaxSys, the Tribunal will recommend that the four proposals of MaxSys that are in issue be re-evaluated in accordance with the determination below.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the CITT Act, the Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that PWGSC re-evaluate the proposal submitted by MaxSys with respect to the mandatory experience requirements for the following workstreams: Business Planning, Program Planning, Project Management, and Comptrollership and Accounting. In this re-evaluation, experience acquired by 1230357 Ontario Limited is to be considered as experience of MaxSys, to the extent that the contracts for the relevant work were assigned by 1230357 Ontario Limited to 3755479 Canada Inc. Experience of 1230357 Ontario Limited shall not be considered eligible to fulfil the mandatory experience requirements if it was acquired while the Business Contract dated December 1, 1997, between 1230357 Ontario Limited and BMB was in effect. For each workstream where the re-evaluation indicates that MaxSys fulfils the mandatory experience requirements, PWGSC shall evaluate all other elements of the proposal, to the extent that they have not yet been evaluated, according to the evaluation criteria and methodology set out in the RFP (Solicitation No. W2177-00EG01/B).

In the event that the proposal of MaxSys, for any workstream, is the lowest total average evaluated price per point on the basis of the evaluation criteria set out in the RFP, the Tribunal recommends that PWGSC compensate MaxSys for the profit that it would have made, had it been awarded the contract for that workstream.

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

Ellen Fry
Ellen Fry
Presiding Member

Pierrre Gosselin
Pierrre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member