



Ottawa, Wednesday, May 8, 2002

File No. PR-2001-060

IN THE MATTER OF a complaint filed by Corel Corporation 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 subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services cancel the solicitation and that a new solicitation be issued in accordance with this determination and the applicable trade agreements.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Corel Corporation its reasonable costs incurred in preparing and proceeding with the complaint.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

Ellen Fry  
Ellen Fry  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

The statement of reasons will follow at a later date.

Date of Determination: May 8, 2002  
Date of Reasons: May 30, 2002

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

Investigation Manager: Paule Couët

Counsel for the Tribunal: Dominique Laporte

Complainant: Corel Corporation

Counsel for the Complainant: Ronald D. Lunau

Government Institution: Department of Public Works and Government Services

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

Ottawa, Thursday, May 30, 2002

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

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## STATEMENT OF REASONS

### COMPLAINT

On February 7, 2002, Corel Corporation (Corel) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>1</sup> The complaint concerns the procurement (Solicitation No. K0360-000005/B) by the Department of Public Works and Government Services (PWGSC) of an enterprise licence for an office automation (OA) suite<sup>2</sup> comprising an integrated word processor, spreadsheets, a presentation package and a database, and related requirements for the Department of the Environment (EC).

Corel alleged that, contrary to the provisions of the *North American Free Trade Agreement*,<sup>3</sup> the *Agreement on Government Procurement*<sup>4</sup> and the *Agreement on Internal Trade*,<sup>5</sup> PWGSC and EC have set out, in the Request for Proposal (RFP), a weighting factor that is based on market share rather than product performance, thereby introducing into the evaluation methodology an impermissible bias that favours Microsoft Corporation (Microsoft), discriminates against non-Microsoft suppliers and results in a denial of equal access to this opportunity for non-Microsoft suppliers.

Corel requested, as a remedy, that the Tribunal order PWGSC and EC to postpone the award of any contract in relation to this solicitation until the Tribunal determines the validity of the complaint. It further requested that the Tribunal recommend that the solicitation be cancelled and that a new solicitation that complies with the provisions of the trade agreements be issued. Corel also requested its costs of preparing and proceeding with the complaint.

On February 15, 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*.<sup>6</sup> That

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. The selected OA suite will be the departmental standard for an estimated 6,000 EC users, with an estimated growth of 10 percent, consisting of permanent employees, casual employees, contractor personnel and students across Canada. The contract, including the option years, is intended for a seven-year period.
3. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
4. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [hereinafter AGP].
5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
6. S.O.R./93-602 [hereinafter Regulations].

same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until it determined the validity of the complaint. On March 15, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>7</sup> On March 26, 2002, Corel filed comments on the GIR with the Tribunal.

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

## **PROCUREMENT PROCESS**

### **Background**

The tender documents provide the following information regarding EC's mandate and requirements. EC's mandate to conserve and protect Canada's natural heritage and to protect the health and safety of Canadians requires that EC have regular and extensive communications with numerous organizations within and outside the federal government. Collaborative work is ongoing at many levels within EC, across the country and throughout the world. This collaboration, which includes collaboration via electronic means, is essential to EC's work. At any given time, work with outside information trading partners<sup>8</sup> (ITPs) is ongoing, and information must be exchanged within and outside EC.

The OA suite currently used by EC (Microsoft Office 95) is outdated, and EC has been finding it increasingly difficult to use the OA suite to effectively collaborate and exchange information using documents and files that are imported from or exported to ITPs. For this reason, the new OA suite must include, as an essential operational requirement, the functionality for effective and accurate information exchange and collaboration using documents or files produced electronically that are imported from or exported to ITPs.

On June 14, 2001, a Request for Information<sup>9</sup> (RFI), which included a draft RFP, was posted on MERX.<sup>10</sup> The RFI closed on July 23, 2001. On July 26, 2001, Corel wrote to PWGSC expressing concerns relating to the draft RFP. Specifically, it believed that the draft solicitation document was unjustifiably biased towards a specific vendor, Microsoft. On July 27, 2001, PWGSC acknowledged Corel's comments, indicating that it would consider these comments and make changes that are consistent with EC's operational needs, as appropriate. On August 8, 2001, EC retained an independent fairness monitor<sup>11</sup> to review the draft RFP and assess EC's operational/functional requirements in light of the concern of bias expressed during the RFI process. That same day, EC met with Corel to discuss its concerns. On October 5, 2001, it wrote to all companies that had responded to the RFI, advising that it, along with PWGSC, was in the process of making changes to the tender documents in response to the RFI.

### **Procurement**

On January 21, 2002, a Notice of Proposed Procurement for this solicitation was posted on MERX, together with the RFP.

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

8. The term "information trading partners" is used to designate third parties that have reason to communicate with EC through information exchange and collaboration using documents or files produced electronically by various components of an OA suite.

9. In its complaint, Corel refers to this document as a Letter of Interest.

10. Canada's Electronic Tendering Service.

11. Kroll Lindquist Avey Co.

The RFP includes several provisions relevant to this case. Section 13 of Part A, “Instructions and Information to Bidders”, indicates that the evaluation process is divided into five phases.<sup>12</sup> Phase 2, evaluation of the rated requirements, sets out the relative weight of the various categories of rated requirements. It indicates, for example, that the technical and functional requirements relating to the ITPs, Appendix “D” to the Statement of Requirements (SOR), will account for 30 percent of all available rating points. Section 14 indicates that the proposal that offers the highest combined point rating for technical merit (75 percent) and price (25 percent) will be recommended for award.

Section 3.2.3.2 of Part “C” of the RFP reads, in part:

Essentially, the ability of the proposed OA Suite to support information exchange with ITPs will be rated by considering:

- (1) Various collaboration-oriented features available with the proposed OA Suite;
- (2) the effectiveness of the proposed OA suite in terms of the importing, exporting and round-tripping of various documents and data files with various Office Suite formats and
- (3) the relative use of the various types of Office Suites used by ITPs to create and manage documents and datasets.

Section 1 of Annex “D” to the SOR, entitled “Relative usage of OA Suites by the Department’s Information Trading Partners”, reads, in part:

For the most part, the department’s collaborative work involves documents and files that are produced using OA Suites from Corel, Lotus and Microsoft. Given that the various OA Suite products vary in their capabilities to work with the different OA Suite product formats, to determine the overall effectiveness for any given OA Suite to support collaboration among Environment Canada ITPs, it is necessary to consider, among other issues, the relative use of various OA Suites used by the ITPs.

In that regard, this document will describe how Environment Canada has derived estimated usage figures for the various Office Automation (OA) Suites used by the department’s Information Trading Partners (ITPs).

Section 3.1 of Annex “D” and Annex “D1” to the SOR consider the overall OA suite market share for Corel, Lotus and Microsoft. On the basis of information set out in sections 3.1.2 to 3.2.3, inclusive, of Annex “D”, EC estimated that the use of the various OA suites by its ITPs was within the following ranges:<sup>13</sup>

|           |                                      |
|-----------|--------------------------------------|
| Corel     | 5 – 15 percent                       |
| Lotus     | up to 10 percent                     |
| Microsoft | 70 – 80 percent                      |
| Other     | less than 1 percent, not significant |

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12. Phase 1, evaluation of the mandatory requirements; phase 2, evaluation of the rated requirements; phase 3, proof of product functionality; phase 4, evaluation of financial proposals; phase 5, contractor selection.

13. Section 4 of Annex “D” to the SOR.

Section 2.2 of Appendix “D” to the SOR<sup>14</sup> reads, in part:

## 2.2 Rated Requirements

### 2.2.1 Assessing Import, Export, and Roundtrip Capability

The relative ability of the proposed OA Suite to import and export documents/files will be rated through a series of tests involving documents/files of varying complexity originating from different OA Suites. In addition, a round trip test will be performed to evaluate the extent to which multiple conversions affect document/file integrity. In this case, the relative ability relates to the degree to which the document/file can be imported/exported by the proposed OA Suite without change in terms of look, feature, and function compared with the look, feature, and function of the document/file with the originating OA Suite product. This capability will be evaluated through a series of rated requirements.

The evaluation will be carried out on the proposed word processor, spreadsheet, and presentation package applications using the two versions of the ITP’s OA Suites indicated in this appendix. The same steps will be followed for each application to derive an overall score for Appendix “D”.

Section 2.2.2 of Appendix “D” to the SOR, “Relative Use of Various OA Suite Products by ITPs”, sets out the estimated percentage use of OA suites by ITPs and resulting weighting factors<sup>15</sup> as follows:

| Office Suite Publisher | Estimated % use of OA Suite by ITPs | Resulting Weighting Factor |
|------------------------|-------------------------------------|----------------------------|
| Corel                  | 5-15                                | 1.5 <sup>[16]</sup>        |
| Lotus                  | Up to 10                            | 1                          |
| Microsoft              | 70-80                               | 8                          |
| Other                  | Less than 1                         | Not applicable             |

### 2.2.3 Example application of Resulting Weighting Factors

For each application comprising the proposed OA Suite, the applicable weighting factors will be applied against the evaluation scores from the “Import, Export and Roundtrip Capability” test to derive a total score for this appendix. . . .

## 2.3 Word Processors - Rated Requirements

The proposed OA Suite Word Processor will be rated on its “round trip” capability in terms of being able to support collaborative work with office suite word processors manufactured by Corel, Lotus and Microsoft. This will include but not be limited to the ability to import and export documents from Corel, Lotus and Microsoft (source suites).

The evaluation of the proposed word processor will be carried out as follows:

- a) create scripted identical test document in source word processor application format
- b) import document in proposed word processor application
- c) evaluate

14. “Office Suite Technical Requirements (Information Trading Partners)”.

15. The relative use of the various types of OA suites among ITPs was estimated following consideration of a number of sources, including independent published reports (Ref. IDC report: “Office Suite Market Forecast and Analysis, 1999-2000”, dated July 2000, document #22658; Dataquest Report, 1997 Personal Computing Software Market Statistics, dated July 1998, PCWS-WW-MS-9801). See GIR, Part III, para. 6.

16. Subsequently amended to 2.0.

- d) make scripted changes to document using proposed word processor application
- e) evaluate
- f) export document to source word processor application format
- g) open with source word processor application
- h) evaluate

Specifically, once a source document is imported from a source office suite word processor (source word processor) by the proposed office suite word processor (proposed word processor) then:

the proposed word processor will be evaluated in terms of the degree to which it maintains content and format that existed when the source word processing document was created by the source word processor. The proposed word processor will also be evaluated in terms of the ability to import and interpret source word processor functions associated with various types of imported source document content. For example, the proposed word processor's ability to support importing a Table of Contents will be evaluated in terms of maintaining content, format and the ability of the proposed word processor to use the imported Table of Contents as a functional Table of Contents (i.e. the imported Table of Contents can be used by the proposed word processor as though it was originally created as a Table of Contents by the proposed word processor).

[F]urther, once the word processor document is exported back from the proposed suite word processor to the source word processor[,] then:

the proposed suite word processor will be evaluated in terms of the degree to which the source word processor maintains content, format and function of features that existed at the time the source document was created by the source word processor, i.e. before it was originally imported by the proposed suite word processor.

Sections 2.4 and 2.5 of Appendix "D" to the SOR set out similar requirements for the spreadsheet and the presentation applications respectively.

On February 1, 2002, Corel wrote to PWGSC, among other things, objecting to the weighting factors relating to the use of specific OA suites as part of the evaluation methodology. On February 4, 2002, PWGSC received a written report<sup>17</sup> from the fairness monitor, which contains, in part, the following:

We caution that our review has not included a detailed review of every functional specification required by the RFP. We further note that our review is based on representations made by Environment Canada concerning the supportability of their operational and functional requirements.

*Findings*

Based on the scope of work undertaken, we believe that the RFP represents a reasonable balance between; (i) fairness to all potential bidders and (ii) the operational/functional requirements of Environment Canada. As a result we do not believe that the RFP is unfairly biased towards any particular vendor.

On February 7, 2002, Corel filed this complaint with the Tribunal.

On February 15, 2002, PWGSC sent a facsimile to Corel, providing further explanation of the weighting factors and their application and notifying that the answers to the questions that Corel raised in its letter of February 1, 2002, would be provided simultaneously to all bidders by means of a solicitation

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17. See GIR, Exhibit 6.

amendment posted on MERX. That same day, PWGSC issued amendment No. 002, which was posted on MERX on February 18, 2002. The amendment extended the bid closing date to April 8, 2002.

On February 15, 2002, PWGSC was notified by the Tribunal that Corel's complaint had been accepted for inquiry. On February 22 and March 6, 2002, it issued amendment Nos. 003 and 004 to answer questions by bidders and to amend certain requirements of the RFP that were not related to the issues in the complaint.

## **POSITION OF PARTIES**

### **Corel's Position**

Corel submitted that the ability of its OA suite to meet EC's conversion requirements is essentially a matter of product performance that can be objectively tested and measured by EC. It added that the market share held by Microsoft, as compared to Corel or Lotus, is totally irrelevant to testing the conversion capabilities of non-Microsoft products.

Corel submitted that altering the technical score that is achieved by an OA suite as a result of objective testing and observation, by applying a superfluous and irrelevant weighting factor that is based on unreliable market share information, merely introduces an unfair preference for a particular product into the selection process. Corel argued that the market share that is held by Microsoft does nothing to assist EC in meeting its technical objectives, as described in the RFP. Therefore, market share should not be used as an evaluation factor.

Corel submitted that, if the rationale and methodology used by EC in this case were upheld by the Tribunal, the same rationale and methodology could be adopted by other government entities, thereby tilting the selection process in favour of the market leader simply because of its greater market share. The eventual outcome of such a situation, Corel argued, could be the elimination of competition for public sector contracts and the emergence of one dominant supplier.

Citing File No. PR-2001-048<sup>18</sup> in support, Corel submitted that entities must express their requirements in terms of performance specifications, as was done in section 2.2.1 of Appendix "D" to the SOR. It submitted that, in this instance, the requirement that the offered product be able to import and export documents and files of varying complexity originating from different OA suites without change in terms of look, feature and function can be objectively measured by EC through a series of tests and rated requirements. This, Corel submitted, is the case regardless of whether the originating suite is Microsoft's or some other publisher's product.

Corel argued that it is clearly the technical performance of non-Microsoft products to convert files and documents originating from Microsoft users that is relevant to EC. If the non-Microsoft offerings can technically perform the required conversions to an acceptable degree, then EC's performance requirements are met, and the number of EC ITPs using Microsoft products is irrelevant. Corel further submitted that all OA suites on the market today have virtually seamless compatibility with other publishers' OA suite products. There would simply be no market for an OA suite that did not offer such compatibility.

Corel submitted that the weighting scheme proposed by EC, even as recently amended, is based on unreliable data. This fact was effectively acknowledged by PWGSC in the GIR. Furthermore, such an approach is unfair because it relies on an outdated "snapshot in time" that can be misleading and prejudicial to bidders whose market share has increased.

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18. *Re Complaint Filed by Foundry Networks* (12 March 2002) (CITT).



With respect to PWGSC's argument that Corel's complaint with respect to the usage of outdated data should be dismissed because Corel did not notify PWGSC before filing its complaint with the Tribunal, Corel submitted that the Tribunal cannot dismiss a valid complaint simply because PWGSC subsequently took some action in response to the complaint. Furthermore, there is no requirement in the CITT Act or the Regulations for a supplier to give PWGSC prior notice of a complaint.

With respect to the allegedly disproportionate weight, relative to the other appendices, given to Appendix "D" to the SOR, which relates to the import/export capability, Corel submitted that one would not intuitively think that the actual usage represented by the above-mentioned function would justify such a heavy weighting. Corel argued that, although the GIR speaks in general terms of the "significant importance" of the import/export function and the "extensive collaboration" between EC and its ITPs, such an explanation sheds no light and offers no information on why Appendix "D", in which a Microsoft product benefits from a heavy weighting, would be rated more highly than any other appendix, at 30 percent. The GIR offers no explanation as to why the weighting was set at 30 percent, as opposed to 15 or 20 percent or some other number.

Corel submitted that the Tribunal should recommend that the evaluation in the new solicitation be based on the technical capabilities of the products offered, without reference to the market share held by any supplier, and that EC and PWGSC review the weighting assigned to Appendix "D" to the SOR and provide substantiation for that weighting.

### **PWGSC's Position**

PWGSC submitted that Corel has improperly described the purpose and application of the weighting factors in a manner that ignores the importance and direct relationship of the weighting factors to EC's operational reality. It submitted that the raw scoring of the OA suites, in terms of the "round trip" testing of features such as the maintenance of the integrity of paragraph breaks, paragraph indentation and alignment, scientific equations, tabular formatting, header and footer formatting, Word macros, and WordPerfect and WordPro macros, will no doubt systematically and transparently test the technical capabilities of each product proposed. Nonetheless, such raw scoring does not reflect the fact that a product's capability for certain kinds of import/export functions is more pertinent to EC's operational reality than others.

PWGSC submitted that Corel does not dispute the fact that a significant portion of EC's collaboration is with respect to documentation originating from Microsoft's OA suite. This reality, PWGSC submitted, is outside the control of the Government of Canada. It simply reflects the fact that, currently, Microsoft is more dominant in the OA suite market than is Corel or Lotus. Therefore, PWGSC submitted, the capability of the OA suite being procured by EC to collaborate (import and export) with a Microsoft OA suite is operationally important to EC.

PWGSC submitted that the weighting scheme in the RFP is not unjustifiably biased in favour of Microsoft products and does not reward Microsoft for its market share rather than its product performance. Rather, PWGSC argued, the "scores of the products' capability to import and export documents will be weighted in exactly the same way, with greater weight being applied to the products' testing scores pertinent to the applications of the OA Suites used more frequently by EC's ITPs".

PWGSC further submitted that, because current OA suite products have been developed with the goal of compatibility, current OA vendors have, of necessity, designed their products so that they can import, export and "round trip" documents originating from other vendors' OA suites. Therefore, it is a *bona fide* requirement that proposed products be tested on the basis of their ability to support collaboration associated with a competitor's product, and the higher weighting of test scores associated with collaborating with the most commonly used OA suites is justified.

Furthermore, PWGSC noted that the “round trip” testing is not intended simply to test the capability of the proposed product to support collaboration with recent releases of Corel, Lotus and Microsoft OA suites, but also to test the capability of these new releases against some of the vendors’ own older releases,<sup>19</sup> another important consideration.

With respect to Corel’s allegation that the weighting factor in the RFP is based on inaccurate and outdated information, specifically as regards Corel’s total federal government “seats”, PWGSC submitted that this information, along with other factors,<sup>20</sup> has now been taken into consideration and that a revised weighting factor of 2.0 for Corel would be posted on MERX in the form of a solicitation amendment. However, PWGSC submitted, considering that Corel did not object or raise any concern about the accuracy of Annex “D” to the SOR before filing its complaint, when it could have done so on the basis of the documentation released, its complaint with respect to that issue should be dismissed.

PWGSC submitted that the 30 percent of the total rated scoring given to the evaluation category of Appendix “D” to the SOR is justified because it reflects the significant importance of the overall ability for the proposed OA suite to collaborate and exchange documents effectively and efficiently among ITPs relative to EC’s other functionality requirements. In addition, it submitted that this requirement is not simply importing/exporting documents and files, as stated by Corel, but also involves department-wide electronic distribution of documents for such purposes as to provide information, to enable notes and comments to be attached to documents, to enable documents to be revised and to obtain document approval. This is an essential department-wide requirement that affects every business line, as specified in section 3.2.3.1 of Part “C” of the RFP.

PWGSC submitted that the weighting factors applicable to the ITPs were determined with reference to independent published reports of the relative use of various types of OA suites among ITPs and other specific information concerning the use of OA suites among federal departments and provincial and territorial governments. It submitted that the use of market share information in determining the weightings for relative usage is objective, not arbitrary, and, as such, is not designed to discriminate against bidders, but to reflect EC’s operational reality and requirements. In this context, PWGSC noted that neither the independent consultant nor the fairness monitor took issue with the evaluation methodology or the ITP weighting factor.

PWGSC submitted that Corel’s interpretation of the non-discrimination and equal access provisions of the trade agreements is ill founded. It further submitted that the application of a weighting factor to the scores to reflect the operational importance of collaboration with more frequently used OA suite applications is not only reasonable and fair, but also necessary to reflect EC’s operational reality. This approach is also consistent with sound procurement practice, which is to weigh evaluation criteria that represent an important operational requirement more heavily than other evaluation criteria. PWGSC submitted that the procurement disciplines of the trade agreements do not prohibit government entities from applying *bona fide* operational requirements in the context of the evaluation criteria and methodology.

PWGSC further submitted that EC’s operational reality involves collaboration on documentation/files that originate from the OA suites of its ITPs. This reality is the crux of the import, export and “round trip” capability test, which is intended to test the capability of proposed OA suites to achieve these functionalities on documents originating from different OA suites, and different versions of the same OA Suites, outside EC.

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19. The proposed OA suite components (word processor, spreadsheet and presentation graphics package) will be tested along with the Corel WordPerfect 7 and Corel WordPerfect 2000; Lotus WordPro 96 and Lotus WordPro Millennium edition (9.5); Microsoft Word 95 and Microsoft Word 2000.

20. See GIR, Part III, para. 12.

With respect to Corel's contention that the OA suite competition is biased in favour of a Microsoft solution, as shown by Solicitation No. K2609-1-0096 for editorial services, posted on MERX on February 6, 2002, PWGSC submitted that this allegation is without merit. Specifically, it argued that the RFP for editorial services was developed to handle editorial services for the in-house reports that are generated by EC in the latter half of the current fiscal year and the early part of next fiscal year. These reports will be in the native Microsoft Office 95 format currently employed by EC. This is intended to reduce the risk of document alteration, which would result in the loss of chemical equations and symbols, tabular data, superscript and subscript text, and French accents. Accordingly, PWGSC submitted, the reference to Microsoft in the RFP for editorial services is to make clear that the contract production services will be using manuscripts developed in the native Microsoft suite format currently employed by EC. This is unrelated to the RFP for OA suites now at issue.

PWGSC requested that it be awarded its costs for this complaint.

### **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 applicable trade agreements, which, in this instance, are NAFTA, the AGP and the AIT.

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. In this context, Article 506(6) prohibits the use of evaluation criteria that are inconsistent with the principle of non-discrimination set out in Article 504(2).

Article 1001(4) of NAFTA provides that no Party may prepare, design or otherwise structure any procurement in order to avoid the obligations of Chapter Ten. Article 1008(1)(a) stipulates that each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner. Article VII(1) of the AGP provides likewise.

The Tribunal will determine whether, contrary to the above provisions, the RFP, as structured, discriminates against bidders, so that the suppliers of Microsoft products are favoured to the detriment of suppliers of non-Microsoft products, such as Corel and Lotus. Specifically, it will determine whether the use of market share as a proxy to measure ease of collaboration with ITPs is an acceptable basis for evaluation.

The Tribunal finds that ease of collaboration (the relative facility in importing, exporting and "round tripping" documents while preserving their integrity) with a large number of ITPs is a real dimension of EC's needs. It is the Tribunal's view, therefore, that EC is entitled to factor this consideration into the evaluation of the OA suites proposed. However, the Tribunal finds that using market share, based on the total number of "seats" for each ITP, to approximate usage is inappropriate and discriminates against the suppliers of non-Microsoft products. This is a breach of the trade agreements.

PWGSC repeatedly indicated in the GIR, and the RFP clearly states, that the use of relative market share as the weighting factor to be applied to the raw scoring of the "import/export/round trip" capability of the OA suites is intended to reflect EC's operational requirement to collaborate effectively with a diversified community of ITPs. The usage by the ITPs of various OA suites and versions, published by Corel, Lotus and Microsoft, is unevenly distributed.

The Tribunal is not convinced that, in this instance, market share constitutes a fair and reliable approximation of the usage made in collaboration by EC with the ITPs. It bases this conclusion on the fact that there is no evidence on the record that market share, in proportions of 8.0, 2.0 and 1.0 for the three suites in question, is a reasonable proxy for actual usage in collaboration with ITPs. Therefore, market share is not a proper basis on which to establish a weighting factor.

For example, Annex “D1” estimates the OA user bases of the Department of National Defence (DND), the Canada Customs and Revenue Agency (CCRA) and the Department of Human Resources Development (HRDC) at 40,000, 39,500 and 26,000 users respectively. By comparison, the user bases for the Department of Natural Resources (NRCan) and the Department of Fisheries and Oceans (DFO) are estimated at 3,586 and 3,419 users respectively.

The Tribunal is not persuaded that, in delivering its mandate, EC does, in fact, collaborate with each of these departments in a proportion that is represented by the number of “seats” that these departments may have. The record provides neither information nor assessment of the number or proportion of users whose duties involve the communication and exchange of files with EC, or whether this number or proportion is the same from department to department. Nor does it provide information about traffic (for example, the distribution of files by type of application, software version, volume, size and complexity) and whether these traffic characteristics vary from user to user or department to department.

It appears to the Tribunal that it is reasonable to assume that EC would have to deal more frequently, and at a higher relative volume, with an ITP such as NRCan or DFO, whose mandates might be expected to have significant points of contact with EC’s mandate, than with some other listed ITPs, such as the CCRA, HRDC and DND, even though the latter may have many more “seats”. The Tribunal notes that EC included, in Annex “D1” to the SOR,<sup>21</sup> several tables from its “Report on Plans and Priorities for 2001-2002”. These tables identify EC’s key co-delivery partners by area of cooperation and key results. These tables show that, in fact, departments such as NRCan and DFO are listed as key partners in many more instances than are the CCRA, HRDC and DND. In addition, the Tribunal does not believe that, for the areas of cooperative activity where only “federal departments” are mentioned, such as the development of environmental quality guidelines and fresh water management, the CCRA, HRDC or DND would normally be as important a partner as DFO or NRCan.

Similarly, no evidence has been provided to demonstrate that market share would be a reliable proxy for the volume of collaboration that EC has with its non-federal government partners (provinces, territories, non-governmental organizations, etc.). The Tribunal is of the view that this kind of information would be needed in order to establish an acceptable weighting factor that would reflect EC’s operational requirements.

In the Tribunal’s view, when a government entity uses a weighting factor in evaluating proposals, it must ensure that the weighting factor is reflective of its true operational requirements. The burden rests on the government entity to demonstrate that this has been done.

The Tribunal acknowledges that PWGSC made some changes to the RFP in the form of solicitation amendments, which had the effect of raising both Corel’s absolute number of users and its relative share of the market for the purposes of the evaluation. However, even when these changes are taken into consideration (which the Tribunal has done above, in accepting market share in proportions of 8.0, 2.0 and 1.0), the Tribunal is of the opinion that these changes do not remedy the fundamental problem outlined above.

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21. RFP, Annex “D” to the SOR, chart 2.8 and table 3.3.

The Tribunal finds that the market share held by different OA suites is not an acceptable proxy for the relative levels of their use in collaborations between EC and its ITPs. Therefore, it concludes that, in this instance, market share is not supportable as a basis for evaluation weighting. The Tribunal finds that the use of market share in this manner unfairly favours one supplier over others and is therefore contrary to Article 506(6) of the AIT, Article 1008(1)(a) of NAFTA and Article VII(1) of the AGP.

For the above reasons, the Tribunal finds that the complaint is valid. Therefore, the Tribunal does not find it necessary to address the issue of the weighting given to Appendix “D” over the total rating score.

In addressing what remedy would be appropriate in the circumstances, the Tribunal notes that no contract has been awarded for this solicitation. Attempting as much as possible to put the parties into the positions in which they were before this solicitation started, the Tribunal recommends that the solicitation be cancelled and that a new solicitation be issued in accordance with the provisions of the applicable trade agreements and this determination.

### **DETERMINATION OF THE TRIBUNAL**

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

Pursuant to subsection 30.15(2) of the CITT Act, the Tribunal recommends that PWGSC cancel the solicitation and that a new solicitation be issued in accordance with this determination and the applicable trade agreements.

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

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

Ellen Fry  
Ellen Fry  
Member