CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, October 15, 2002

File No. PR-2002-015

IN THE MATTER OF a complaint filed by ZENON Environmental 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 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) 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 terminate the contract awarded to Seprotech Systems Inc. and, for the remaining two proposals, re-evaluate only the criterion to provide a firm indication, as far as components not readily available by commercial supply or not manufactured by the bidder itself are concerned, that such components are accessible to the bidder.

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

Patricia M. Close
Patricia M. Close
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

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

Date of Determination and Reasons:	October 15, 2002
Tribunal Member:	Patricia M. Close, Presiding Member
Investigation Officer:	Cathy Turner
Counsel for the Tribunal:	Reagan Walker
Complainant:	ZENON Environmental Inc.
Counsel for the Complainant:	Ronald D. Lunau Phuong T.V. Ngo
Interveners:	Seprotech Systems Inc. Peacock Inc.
Counsel for the Interveners:	David Sherriff-Scott Gerry Stobo
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Ian McLeod Christianne M. Laizner Susan D. Clarke

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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 July 15, 2002, ZENON Environmental Inc. (ZENON) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*[1] concerning the procurement (Solicitation No. W8482-01TF04/A) by the Department of Public Works and Government Services (PWGSC) for the repair and overhaul of shipboard reverse osmosis desalinator units for the Department of National Defence (DND).

ZENON alleged that, contrary to Article 506(6) of the *Agreement on Internal Trade*,[2] PWGSC awarded a contract to a bidder whose proposal did not meet all the mandatory requirements of the solicitation document. Specifically, it alleged that Seprotech Systems Inc. (Seprotech) failed to provide letters of intent from original equipment manufacturers (OEMs), as stipulated by Annex "A" to the Request for Proposal (RFP). ZENON further alleged that some representations made by Seprotech in its proposal with respect to its personnel resources are inaccurate.

ZENON requested, as a remedy, that the Tribunal recommend that the contract awarded to Seprotech be terminated and, instead, be awarded to it. It also requested that it be awarded its costs incurred in relation to preparing and proceeding with the complaint.

On July 18, 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*.[3] On July 22, 2002, PWGSC informed the Tribunal, in writing, that a contract in the amount of $6.9 million had been awarded to Seprotech. On July 25 and August 7, 2002, respectively, the Tribunal granted intervener status to Seprotech and Peacock Inc. (Peacock). On August 13, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[4] On August 23, 2002, ZENON filed its confidential and public comments on the GIR with the Tribunal. Seprotech filed its confidential comments on the GIR with the Tribunal on August 23, 2002,

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [hereinafter AIT].
3. S.O.R./93-602 [hereinafter Regulations].
4. S.O.R./91-499.

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

and filed its public comments on August 29, 2002. On September 11, 2002, PWGSC requested permission to respond to allegedly new issues and arguments raised in ZENON's comments on the GIR and provided comments on them. On September 12, 2002, Seprotech requested permission to submit further information for the Tribunal's consideration and provided the information. On September 13, 2002, ZENON requested permission to respond to allegedly new issues and arguments raised in Seprotech's submission and provided comments on them. On September 27, 2002, the Tribunal granted PWGSC's, Seprotech's and ZENON's requests and sent the comments and information to the parties for their information. On September 30, 2002, ZENON requested that Seprotech provide a non-confidential edited version or a non-confidential summary of the information designated as confidential in its submission of September 12, 2002. On October 4, 2002, Seprotech provided to the Tribunal a non-confidential edited version of the confidential information contained in its September 12, 2002, submission. The Tribunal sent this information to the parties on October 7, 2002, for their information.

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

On March 22, 2002, a Notice of Proposed Procurement was published on MERX, Canada's Electronic Tendering Service, for the repair and overhaul of shipboard reverse osmosis desalinator (SROD) units employed aboard Canadian Forces' frigate ships on an as and when requested basis.

The RFP reads, in part, as follows:

> THE FULL SCOPE OF THE WORK REQUIRED IS DETAILED IN THE FOLLOWING DOCUMENTS:
>
> 1) THE REQUEST FOR PROPOSAL DOCUMENT,
>
> 2) ANNEX "A" ATTACHED – BIDDER REQUIREMENTS.

Annex "A" to the RFP reads, in part, as follows:

> Bidders are required to submit the following as part of their reply to this Request for Proposal:
>
> **TECHNICAL PROPOSAL**
>
> Bidders are to submit a full technical proposal showing that they have the capability to perform on any resulting contract. This technical proposal shall include, but not be limited to, a full presentation on:
>
> - a listing of the firm's personnel resources, their experience and expertise. This should include engineering and design personnel and their capabilities,
> - firm indication that all components required to perform the required work are accessible to the bidder (ie. Letters of intent from Original Equipment Manufacturers),
>
> Bidders are advised that a technical evaluation will be done by the Dept. Of National Defence and PWGSC on all the information submitted. It is incumbent upon bidders to submit a complete technical proposal showing how they are qualified to perform the work as described in this solicitation as well as in all Annexes, Specifications and Drawings which form part of this solicitation. Failure to submit sufficient information to allow for a full technical evaluation will result in the proposal being declared non-responsive.

The closing date for the submission of proposals was April 17, 2002. According to PWGSC, three firms submitted proposals. On April 22, 2002, PWGSC forwarded the technical proposals to DND for evaluation. On May 16, 2002, DND indicated to PWGSC that it had several concerns with regard to the mandatory technical requirements. After discussion with PWGSC on these concerns, all bidders were determined to be technically compliant. On June 4, 2002, DND forwarded the final technical evaluation report to PWGSC.

Based on the financial evaluation, Seprotech's proposal was found to be the lowest-priced compliant bid; consequently, a contract was awarded to Seprotech in the amount of $6.9 million on June 6, 2002. On June 7, 2002, PWGSC advised ZENON that a contract had been awarded to Seprotech. On June 12, 2002, ZENON submitted a letter of objection to PWGSC with respect to the award of the contract to Seprotech. On July 2, 2002, PWGSC forwarded a letter to ZENON denying its objection. On July 12, 2002, ZENON submitted its complaint to the Tribunal.

POSITION OF PARTIES

PWGSC's Position

With respect to the requirement to include, in the proposal, a firm indication that all components required to perform the required work are accessible to the bidder (i.e. letters of intent from OEMs), PWGSC claimed that the letters of intent submitted with Seprotech's proposal were evaluated as meeting this requirement.

In response to ZENON's new argument that letters of intent submitted with Seprotech's proposal from authorized distributors or representatives of OEMs did not satisfy the mandatory requirement of the RFP, PWGSC claimed that the mandatory requirement of the RFP did not restrict the bidder to letters from OEMs alone. It submitted that to do so would have unfairly limited competition by restricting the source of supply, contrary to the requirements of the AIT. It further submitted that, where component parts from OEMs are required or where repair and overhaul work involves warranty from OEMs, the parts may be obtained from or the work conducted by the OEMs or their authorized distributors or representatives. (Further information and arguments were contained in the confidential version of the GIR.)

Regarding the mechanical strainer manufactured by Hellan Strainer, PWGSC submitted that the technical evaluation team did not consider that a letter of intent was required from this manufacturer because the component is a commercial off-the-shelf unit. Regarding the variable flow metres and other instrumentation manufactured by ABB, PWGSC submitted that the technical evaluation team did not consider that a letter of intent was required from this manufacturer because there are no proprietary or patent issues involved with these components, which are commercial off-the-shelf units.

Regarding ZENON's allegation that Seprotech made inaccurate representations with respect to its personnel resources, PWGSC submitted that Seprotech's proposal was properly evaluated on the basis of the information contained in its proposal, which included detailed information and résumés with respect to Seprotech's personnel resources.

In response to ZENON's new argument regarding the evaluation of personnel resources, PWGSC submitted that the RFP did not involve any evaluation of personnel resources; in particular, it did not involve criteria for the assessment of availability.

PWGSC further submitted that any alleged dispute between ZENON and former employees in respect of confidentiality agreements was not known to PWGSC at the time of the evaluation of the proposals and, nevertheless, would not properly have been a consideration in the evaluation. Furthermore, it submitted that whether such confidentiality agreements, which allegedly prohibit former employees from working on ZENON programs while in the employ of a competitor, in fact, would apply in the circumstances of the requirement at issue is not properly a matter for consideration by PWGSC in the context of the evaluation or by the Tribunal.

Seprotech's Position

Seprotech submitted that it clearly and properly demonstrated, in its proposal, its ability to secure access to the components necessary to perform the work described in the RFP.

Seprotech submitted that the RFP does not require bidders to file letters of intent from OEMs; the RFP only required a bidder to supply PWGSC with a "firm indication" that it could supply the necessary components, and the reference to a letter of intent was only illustrative of one means by which a bidder could satisfy PWGSC that it had access to the required components. It further submitted that the expression "i.e." is an abbreviation of the Latin words "*id est*", which mean, in English, "that is" or "that is to say". It submitted that the courts have consistently held that the expression "i.e." or "that is", when used to modify the general description of a thing or requirement, does not abridge, cut down or restrict the meaning of the expression. It submitted two cases[5] in support of this position. It submitted that, for example, an indication of verbal commitments or other methods of access were acceptable and that bidders were not restricted to providing letters of intent.

Regarding the SROD drawing package contained in the RFP, Seprotech submitted that only in the case of 14 components identified in the RFP were bidders explicitly required to specify that they could secure such components from specific, named manufacturers and that the drawings for the other components did not have these requirements or restrictions. These drawings were identified as "source control drawings" and had, in the upper left-hand block of each of them, a vendor part number with a description of "approved sources of supply", which set out the only approved vendor's name and address for the component. It submitted that, with respect to the vendors listed as being mandatory on source control drawings, it filed letters of intent from each of those manufacturers. In the case of one vendor, listed as an exclusively approved vendor on a source control drawing, it submitted that it obtained a verbal commitment from that vendor to supply it with the components specified on the source control drawing. It further submitted that the verbal commitment was verified by PWGSC. It also submitted that all other components were essentially generic and could be obtained from any number of sources or from their original manufacturers. Therefore, it submitted that, in the circumstances, an affirmative statement or an indication of how access would be obtained was sufficient to effect compliance in this context.

Regarding ZENON's allegation that Seprotech misrepresented its personnel resources, Seprotech submitted that there is no rated requirement or marking scheme identified in the RFP for the review of personnel. It submitted that the alleged restrictive agreements have not been provided to the Tribunal and that, therefore, there is no evidence of the breadth, time, limit or extent of the alleged restrictions or confidentiality agreements. It further submitted that there is no evidence before the Tribunal whatsoever as to what these restrictions are, how they operate, for what time they apply or over what jurisdiction, and to what extent they govern anyone. Finally, it submitted that these allegations were not only lacking in

5. *Re Hudson*, [1908] 16 O.L.R. 165 [hereinafter *Hudson*]; *Bird Construction* v. *Maier and Saskatchewan Government Insurance Office*, [1949] 1 D.L.R. 51 [hereinafter *Bird Construction*].

credibility but were profoundly unfair and, in the circumstances, did not demonstrate any non-conformance with the trade agreements.

ZENON's Position

ZENON submitted that Seprotech's proposal did not meet the requirements of Annex "A" to the RFP, since Seprotech failed to provide letters of intent from OEMs. It submitted that this includes the firms (OEMs) that manufacture the following required components:

a. The C9 and C46 Aqua Pumps (FMC EnergySystems);
b. The Seawater Feed Pump, C-Face conversion for the 1st and 2nd Stage Motors (Springcrest Inc.);
c. The pre-treatment strainers (Hellan Strainer);
d. The seawater ball valves (Marwin Valve);
e. The proposed salinity monitoring instrumentation (Thorton Inc.);
f. The pressure-regulating and pressure knockdown valves (Jordan Valve);
g. The instrumentation switches (Detroit Switch);
h. The flow instrumentation (ABB);
i. The safety relief valves (CPV) and
j. The SROD feedwater heater (Glo-Quartz).[6]

ZENON further submitted that it has been advised, as a result of making inquiries of the responsible employees with the OEMs after the contract award, that there are no agreements, verbal or otherwise, between Seprotech and any authorized representative of the OEMs to supply the components that are required to satisfy the requirements of the RFP.

ZENON submitted that the documentation that had to be provided by bidders to satisfy the mandatory requirement of a "firm indication" of accessibility consisted of letters of intent from OEMs. It submitted that the use of the abbreviation "i.e." indicated that this was not merely an example of one way in which accessibility to components could be indicated and argued that the abbreviation "i.e." means "that is to say", which identifies specifically what is required. In this case, it argued that the RFP specified that the manner in which bidders were to provide a firm indication of accessibility to components was by providing letters of intent from the OEMs and that the RFP provided for no other method of satisfying this requirement.

In response to Seprotech's submission that the reference in the RFP to letters of intent from OEMs was only illustrative of "one of the means by which a bidder" could meet this requirement, ZENON submitted that Seprotech's submissions reduced the requirement for a "firm indication", and the phrase "ie. Letters of intent from Original Equipment Manufacturers", to near meaninglessness. It further submitted that to give effect to Seprotech's submission would be to introduce into the RFP the very ambiguity with respect to what constitutes a "firm indication" of access to components that the specific phrase "ie. Letters of intent" was intended to remove.

ZENON submitted that, in the case of *Hudson*, the clause at issue was contained in a will and that the court held that the itemized list did not detract from the general bequest. It further submitted that *Hudson* is not analogous to the present complaint, since, in this complaint, there is no contradiction in the terms of the RFP to resolve.

6. Complaint at para. 31.

Regarding *Bird Construction*, ZENON submitted that the case was reversed on appeal to the Saskatchewan Court of King's Bench and that the decision of that court was subsequently overturned by the Saskatchewan Court of Appeal on jurisdictional grounds and that, therefore, *Bird Construction* cannot be considered an authority for the proposition for which Seprotech cited it.

ZENON filed two cases[7] that it submitted were more applicable to this complaint.

In addition, ZENON argued that the reference to obtaining letters of intent had to mean that documentary support was required, that a mere assertion of verbal authorization was inadequate and that it is evident that an assertion of a verbal commitment is not a "firm indication". ZENON further submitted that, if it had been intended that this was sufficient, then there would have been no need to refer to the submission of a letter of intent from OEMs at all.

With respect to the components manufactured by Hellan Strainer, ZENON submitted that it is inaccurate to state that the components are commercial off-the-shelf units. It submitted that these components are unique to the SROD and have no other application, and further submitted that, in any event, Annex "A" to the RFP did not differentiate between OEMs on the basis of whether the components were off-the-shelf or whether they involved proprietary or patent issues. It also argued that PWGSC had no authority under the RFP to dispense with the requirement to provide letters of intent.

With respect to the requirement in the RFP to list the firm's personnel resources and their experience and expertise, which should include engineering and design personnel and their capabilities, ZENON submitted that its purpose is to provide PWGSC and DND with appropriate information to demonstrate that bidders have personnel resources who are qualified to perform the work described in the solicitation document. ZENON submitted that it has reason to believe that some representations made by Seprotech in its proposal with respect to its personnel resources are inaccurate. It submitted that, for example, it believes that there are former ZENON employees who are inappropriately included in Seprotech's list of personnel resources. It submitted that all its former employees signed confidentiality agreements that prohibit them from working on ZENON programs while in the employ of a competitor. Thus, it submitted that this type of resource would not be accessible to Seprotech as a result of the confidentiality agreements and that any representations made by Seprotech to the contrary would render Seprotech's proposal non-compliant. Finally, ZENON submitted that a former employee was included by Seprotech primarily to embellish its proposal by referring to the former employee's previous experience with the SROD.

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, is only the AIT.

7. *Re Toronto Transit Commission and A.T.U., Loc. 113 (Rain Pay)*, [1999] 78 L.A.C. (4th) 364; *Walt Estate* v. *Williams*, [1997] 18 E.T.R. (2d) 242.

Article 506(6) of the AIT 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 the methods of weighting and evaluating the criteria."

ZENON alleged that, contrary to Article 506(6) of the AIT, PWGSC awarded a contract to a bidder whose proposal did not meet all the mandatory requirements of the solicitation document. Specifically, it alleged that Seprotech failed to provide letters of intent from OEMs, as stipulated by Annex "A" to the RFP. ZENON also alleged that some representations made by Seprotech in its proposal with respect to its personnel resources are inaccurate.

The Tribunal must determine whether, in evaluating the proposals and in awarding the contract, PWGSC properly applied the evaluation criteria set out in the RFP for these two matters.

The Tribunal interprets the requirement that a bidder provide a "firm indication that all components required to perform the required work are accessible to the bidder" as meaning that written confirmation from OEMs or their distributors or agents is required for components not readily available by commercial supply or not manufactured by a bidder itself. Essentially, these components are those identified in the source control drawings where the names and addresses of the approved OEMs are specified. Components that are readily available by commercial supply, that is, off-the-shelf or catalogued items or components that are manufactured by the bidder itself, do not need more than a statement by the bidder that they are readily accessible in order to constitute a firm indication of accessibility.

The Tribunal notes that PWGSC expected that a letter of intent from an OEM was to be one form that a bidder could use to provide a firm indication that all components required to perform the required work were accessible to the bidder. In this regard, it is the Tribunal's observation that PWGSC intended the "i.e." notation as an example and did not intend a letter of intent from an OEM to be the only acceptable format to confirm component availability. PWGSC considered that a letter from a distributor, authorized dealer or agent was also an acceptable form of providing a firm indication of component availability. The Tribunal is of the opinion that letters from OEM distributors, authorized dealers or agents are essentially the same as letters from OEMs themselves. As a result, the Tribunal finds this interpretation by PWGSC consistent with the wording of the RFP.

PWGSC, however, also accepted the bidder's assertions that it had obtained verbal authorizations of component availability. In its submission, Seprotech argued, on the basis of the common law cases mentioned earlier, that the parenthetical phrase "(ie. Letters of intent from Original Equipment Manufacturers)" did not prohibit PWGSC from accepting other forms of confirmation of availability of supply of component parts. The Tribunal has heard and acknowledges arguments from both ZENON and Seprotech relating to their interpretation of "i.e." and notes that the common law cases seem to favour both a restrictive and a non-restrictive interpretation, depending on the case. In any event, it is not necessary for the Tribunal to settle the interpretation of "i.e.", since in its opinion there is no question that the preceding expression "firm indication that all components required to perform the required work are accessible to the bidder" contemplates something more concrete than the reporting of a verbal conversation between bidder and supplier. At the very least, there must be some form of written evidence that the components shown in the SROD source control drawings were available to the bidder for purposes of the procurement. The Tribunal finds that, by accepting these verbal indications as meeting the evaluation criterion, PWGSC allowed the evaluation to differ from what was stated in the RFP.

Therefore, the Tribunal finds that PWGSC improperly concluded that the requirement to provide a "firm indication that all components required to perform the required work are accessible to the bidder"

includes the assertion by the bidder of a verbal agreement covering components not readily available by commercial supply or not manufactured by the bidder itself. For this reason, the Tribunal finds that PWGSC improperly applied the evaluation criteria set out in the RFP and that, in determining that Seprotech's proposal was compliant, it breached the provisions of Article 506(6) of the AIT in conducting the evaluation.

In light of the forgoing, the Tribunal finds that the complaint is valid.

With respect to the second aspect of the complaint, ZENON alleged that some representations made by Seprotech in its proposal with respect to its personnel resources are inaccurate.

The Tribunal is of the opinion that any alleged dispute between ZENON and former employees in respect of confidentiality agreements could not reasonably have been known to PWGSC at the time of evaluation of the proposals and, even if it had been known, would not properly have been a consideration in the evaluation.

Finally, the Tribunal awards ZENON its reasonable costs incurred in relation to preparing and proceeding with this complaint.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) 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 terminate the contract awarded to Seprotech and, for the remaining two proposals, re-evaluate only the criterion to provide a firm indication, as far as components not readily available by commercial supply or not manufactured by the bidder itself are concerned, that such components are accessible to the bidder.

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

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