Ottawa, Friday, August 23, 2002

File No. PR-2002-004

IN THE MATTER OF a complaint filed by COGNOS Incorporated 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 not valid.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

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Date of Determination: August 23, 2002
Date of Reasons: September 18, 2002

Tribunal Member: Patricia M. Close

Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Lynne Soublière

Complainant: COGNOS Incorporated

Counsel for the Complainant: Ronald D. Lunau

Interveners: Montage-DMC eBusiness Services, a division of AT&T Canada
                                Business Objects Americas

Counsel for the Interveners: Gregory O. Somers
                                Paul D. Conlin

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, Wednesday, September 18, 2002

File No. PR-2002-004

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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 April 11, 2002, COGNOS Incorporated (COGNOS) 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. T8086-010080/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Transport (Transport Canada) for the supply of business intelligence software.

COGNOS submitted that, 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] PWGSC awarded a contract to a bidder whose offered product did not meet all the requirements that were identified as mandatory in the Request for Proposal (RFP). As a remedy, COGNOS requested that the contract be cancelled and that a new solicitation be issued, which complies with the trade agreements. COGNOS also requested that the Tribunal recommend that, in the new solicitation, PWGSC and Transport Canada list the specific functions that are mandatory requirements in order for bidders to know exactly what functions their offered product must support. COGNOS also requested that, if the contract is not terminated, it be compensated for the lost opportunity to compete in this requirement. COGNOS requested that, in consideration of the factors listed in section 30.15 of the CITT Act, it be awarded additional compensation in view of the prejudice that it suffered. Finally, COGNOS requested that it be awarded the costs of preparing and proceeding with the complaint.

On April 19, 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*.[5]

On April 30, 2002, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*,[6] PWGSC filed a motion with the Tribunal requesting an order dismissing the complaint. PWGSC submitted that COGNOS was not a potential supplier and, therefore, did not have standing to file a complaint.

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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].
5. S.O.R./93-602 [hereinafter Regulations].
6. S.O.R./91-499 [hereinafter Rules of Procedure].

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PWGSC also requested an extension of the time period for filing the Government Institution Report (GIR). On May 6, 2002, COGNOS submitted a response to the motion and, on May 9, 2002, PWGSC responded to that submission. On May 21, 2002, the Tribunal dismissed the motion and established the deadline for the submission of the GIR as May 28, 2002.

In response to requests on April 30 and May 2, 2002, the Tribunal granted intervener status to Montage-DMC eBusiness Services, a division of AT&T Canada (Montage) and to Business Objects Americas (Business Objects) (collectively, the interveners) on May 6, 2002.

On May 14, 2002, the interveners filed a motion with the Tribunal requesting that the Tribunal dismiss the complaint, on the basis that the complaint material did not include all the documents that were relevant to the complaint and were in COGNOS's possession, namely, Business Objects' manuals that were referenced in the complaint. Therefore, the interveners alleged that the complaint had not been filed within the prescribed time limit. On May 21, 2002, the Tribunal dismissed the motion because, at the time that the complaint was submitted, it considered paragraph 30.11(2)(*f*) of the CITT Act and the material submitted with the complaint, and decided that all the documents relevant to the complaint had been filed and that, therefore, the complaint had been filed within the meaning of subrule 96(1) of the Rules of Procedure.

On May 22, 2002, PWGSC submitted a request to the Tribunal asking that COGNOS be required to identify and file all of the information used in its "research and analysis". PWGSC submitted that being denied this information constituted a breach of natural justice, of the fairness requirements of section 35 of the CITT Act and of the filing requirements of subsection 30.11(2). On May 27, 2002, the Tribunal denied PWGSC's request and stated that it was of the opinion that COGNOS's complaint had been properly filed in accordance with the Rules of Procedure and the CITT Act and granted an extension to file the GIR to June 3, 2002.

On June 3, 2002, PWGSC filed a GIR with the Tribunal in accordance with rule 103 of the Rules of Procedure. On June 17, 2002, COGNOS and the interveners filed comments on the GIR.

On June 19, 2002, COGNOS requested access to the confidential portion of the interveners' comments on the GIR. On June 20, 2002, COGNOS requested the Tribunal's permission to respond to the interveners' comments on the GIR.

On June 25, 2002, the Tribunal requested the interveners' view relating to the confidential portion of the comments to which COGNOS was seeking access.

On June 28, 2002, the interveners advised the Tribunal that the confidential designation of concern would be removed and, on July 8, 2002, a revised public version of the interveners' comments on the GIR was filed. On July 10, 2002, the Tribunal granted COGNOS an opportunity to comment on the interveners' comments on the GIR and also granted the interveners a chance to respond to those comments. On July 16, 2002, COGNOS filed its comments and, on July 19, 2002, the interveners responded to COGNOS's submissions.

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 January 4, 2002, a Notice of Proposed Procurement was published on MERX. The procurement was for business intelligence software by PWGSC on behalf of Transport Canada. The bid closing date was February 18, 2002.

Item C13 of Annex 1 of Transport Canada's "Product Evaluation" grid [hereinafter item C13] forms part of Appendix D to the RFP and reads:

> The multi-dimensional reporting tool's front end component (reporting agent) must be able to connect to and access all of the advanced functionality within Microsof[t's] OLAP Services and Microsoft's Analytical Services 2000 software as Transport Canada currently has data cubes in these format[s].

Paragraph A.12.3 of the RFP is entitled "EVALUATION PROCESS AND CONTRACTOR SELECTION" and reads, in part:

> All Proposals shall be examined in accordance with the evaluation criteria and following the process outlined in this section.
>
> The Evaluation Process and Contractor Selection is subdivided into five (5) phases:
>
> Phase 1:   Confirmation of compliance to the Mandatory requirements;
> Phase 2:   Evaluation of the Rated Requirements;
> Phase 3:   Proof of Proposal (POP) Test;
> Phase 4:   Evaluation of the Financial Proposal;
> Phase 5:   Contractor Selection.
>
> Phase 1 of the evaluation process reads:

> Proposals shall first be reviewed by the Evaluation Team for compliance to the **MANDATORY** requirements of this RFP, including Part A, Part B and the mandatory functional (business and technical) requirements stated in the Statement of Requirements – Appendix "D". Proposals not complying with any **MANDATORY** requirement shall receive no further consideration.

> This confirmation will take the form of validating that the statements and supporting material referenced in the responses substantiate a compliant response. Mandatory functional (business and technical) requirements in the Statement of Requirements – Appendix "D" will be confirmed on as [*sic*] a simple pass/fail basis.

Phase 2 of the evaluation process contained a description of the process of evaluating rated requirements. The proposals scoring the top three marks in Phase 2, along with any other compliant proposal within 10 points of the top ranked proposal, would move on to Phase 3.

> Phase 3 of the evaluation process reads, in part:

> Through the Proof of Proposal (PoP) Process, the Bidder must demonstrate to the satisfaction of the Evaluation Team that the proposed solution will function as described in the Bidder's proposal. The proposed software solution will be evaluated for product functionality and objectives as stated in the Statement of Requirements – Appendix "D". The bidder will be required to install the proposed Business Intelligence Software Solution in [an] environment that includes Transport Canada technical platforms.

> The Bidder must demonstrate during the proof of proposal testing its compliance to the mandatory requirements and the stated point rated criteria.

The RFP also included the evaluation grid that would be used by Transport Canada when conducting the product evaluation. Transport Canada's "Product Evaluation" grid indicates the grading scheme to be used and provides the weight and points given to each requirement. More specifically, the "Section/Description" for item C13 of Annexes 2 and 3 of Transport Canada's "Product Evaluation" grid states "Automatically terminate or re-authenticate an interactive user's session after a predefined period of inactivity" and the possible scores for this item are as follows "3 = built in functionality", "1 = requires programming, scripts, or additional software", "0 = not available".

A number of amendments to the RFP were issued in response to questions from suppliers, including questions from COGNOS.

On February 6, 2002, amendment No. 002 to the RFP was issued and contained the following question and answer:

Question #8

Mandatory Requirement: The multi-dimensional reporting tool's front end component (reporting Agent) must be able to connect to and access all of the advanced functionality within Microsoft OLAP Services and Microsoft's Analytical Services 2000 software as the Crown currently has data cubes in these format[s].

Question: If a bidder does not comply with the above mandatory [requirement] at bid closing date, will this make their proposal non-compliant?

Answer: Transport Canada currently has data cubes in the Microsoft Analytical Services 2000 format. Transport Canada has created as part of the Data Warehousing activities, the Aviation (existing), the Rail (existing) and the marine (under development) Occurrence multi dimensional Data Bases using Microsoft Analytical Services 2000.

As an alternative, the Bidder must provide their own backend cube technology in accordance with the following five (5) conditions:

1) Conversion of existing cubes for Aviation, Marine and Rail occurrence data at no cost;
2) Conversion of existing programs and functionality that access the Aviation, Marine, Rail Occurrence cube data at no cost;
3) Provide training to Transport Canada BI programmers on the use of this new cube technology at no cost;
4) provide the backend cube technology free of charge (at no cost) for unlimited Transport Canada usage;
5) guarantee and ensure the cube back end can be accessed using Transport Canada Standard products (MS Excel, MS Access etc.), there should be no costs associated (i.e. if additional products are required to accomplish this, the vendor must provide these products free of charge for unlimited Transport Canada usage).

Therefore, in order to comply with this mandatory requirement the following must be met:

The vendor's multi dimensional reporting tool's front end component (reporting Agent) must be able to connect to and access all of the advanced functionality within Microsoft OLAP Services and Microsoft's Analytical Services 2000 software as Transport Canada currently has data cubes in this format.

OR,

The Bidder guarantees / commits to meeting the five (5) conditions noted above at no cost.

This is a mandatory requirement and failure to meet this requirement will make a vendor non compliant.

On February 13, 2002, amendment No. 003 to the RFP was issued and contained the response to a question which, according to COGNOS, it submitted on February 8, 2002. Amendment no. 003 also extended the bid closing date to February 21, 2002. Question and answer No. 17 read as follows:

> **REF: Annex 1 C13: The multi-dimensional reporting tool's front end component (reporting agent) must be able to connect to and access all of the advanced functionality within Microsoft OLAP Services and Microsoft's Analytical Services 2000 software as Transport Canada currently has data cubes in these format[s].**

> **Question: Which specific analysis functions are required for Transport Canada OLAP reporting and what are they required for? Please provide examples of what each would be used for - example of business need. Please refer to the table (below) of specific MS Analysis Services functions as an example of the desired response.**

> Answer: The specific analysis functions required for Transport Canada OLAP reporting are those contained in Microsoft OLAP Services and Microsoft's Analytical Services 2000 software. Transport Canada will not be providing example of business need because they are diversed [*sic*] and Transport Canada does not wish to limit current or future functionality.

On February 18, 2002, COGNOS wrote to PWGSC and expressed concerns with respect to the requirements of the RFP. That letter reads, in part:

> Cognos respectfully declines submitting a formal proposal to this RFP due to a number of very serious concerns with the requirements.

> Annex 1-C13: Access to all microsoft Analysis Services Advanced Functionality would, according to reliable information suggest that only one vendor would satisfy this mandatory requirement.

> Cognos cannot, in good conscious [*sic*] state support for all MS OLAP functions even though Cognos may never be functionally tested on all MS OLAP functions.

On February 20, 2002, amendment no. 004 was issued, extending the bid closing date to February 25, 2002. On February 21, 2002, amendment no. 005 was issued and reads, in part:

> **CLARIFICATION:**

> Annex 1 – Requirement C 13

> The purpose of this addendum is to clarify Annex 1 C13 – Specifically, the word "**all**" – "all" refers to the published suite of API's [Application Programming Interfaces] provided by Microsoft for use with Microsoft Analytical Services.

> Terms and conditions of the original Statement of Functional (Business and Technical) Requirements Appendix D and specifically Annex 1 C13 remain unchanged.

> This clarification is provided as additional information only and does not change the intent or scope of the requirement.

On February 22, 2002, PWGSC sent a letter to COGNOS in response to COGNOS's correspondence of February 18, 2002. With regard to the COGNOS's statement that item C13 limits the competition to only one vendor, PWGSC responded that "[c]larification on the word 'All' has been provided to the Bidders through GETS/MERX in solicitation amendment # 5."

According to PWGSC, three firms submitted proposals to this solicitation. COGNOS did not submit a proposal. According to PWGSC, one of the three proposals was declared non-responsive to a mandatory requirement during Phase 1 of the evaluation process and was eliminated from further

evaluation. After the completion of all phases of the evaluation process, a contract was awarded to Montage in the amount of $434,805.20. A contract award notice was published on MERX on March 28, 2002 stating that a contract had been awarded to AT&T Canada Corp.

On April 11, 2002, COGNOS filed its complaint with the Tribunal.

POSITION OF PARTIES

PWGSC's Position

According to PWGSC, the sole complaint raised by COGNOS is that the software proposed by Montage did not meet the mandatory requirements of item C13. PWGSC submitted that the deadlines imposed by section 6 of the Regulations to complain about any aspect of the procurement process relating to the restrictive nature or lack of information in the requirements expired long before the complaint was filed on April 11, 2002, and that the Tribunal lacks jurisdiction to consider the alleged prejudice suffered by COGNOS because the Crown refused to modify item C13. PWGSC stated that, in any event, COGNOS has not been prejudiced by the procurement process.

PWGSC submitted that COGNOS had failed to meet the burden of proof and that the complaint should, therefore, be found invalid. PWGSC submitted that COGNOS indicated that it determined the contents of "the published suite of API's" by reference to a certain Microsoft publication and certain on-line information provided by Microsoft. PWGSC also submitted that COGNOS claimed that, by reference to certain "Business Objects manuals", it was able to conclude that the unspecified "offered product" or "Business Objects product" did not support those features marked with an "X" in the chart submitted with the complaint. PWGSC submitted that it was unable to verify which versions of the software and manuals were considered by COGNOS and, as a result, PWGSC was denied the ability to positively refute COGNOS's allegations.

PWGSC submitted that COGNOS's complaint is based on the wholly unsupported allegation that an unspecified "Business Objects product" is unable to connect to and access the entire published suite of APIs provided by Microsoft for use with Microsoft Analytical Services. However, according to PWGSC, COGNOS does not know what Business Objects software, or version thereof, was proposed by Montage and has not supported its conclusion that Business Objects' software is unable to meet the requirements of the RFP. PWGSC further submitted that it is COGNOS that bears the burden of tendering proof that PWGSC did not apply the evaluation criteria specified in the RFP. PWGSC submitted that, in any case, Montage's proposal and the Business Objects software proposed are compliant with the mandatory requirements of the RFP, including item C13.

PWGSC submitted that the evaluation team followed the evaluation methodology specified in paragraph A.12 of the RFP in determining that Business Objects' software was fully compliant with the requirements of the RFP. PWGSC submitted that, during Phase 1 of the evaluation process, it confirmed that the Business Objects software proposed by Montage complied with item C13 based on the statements and supporting materials included in the proposal. PWGSC also submitted that, during Phase 3 of the evaluation process, the "Proof of Proposal" testing, it confirmed that the suite of Business Objects software proposed by Montage complied with item C13.

PWGSC submitted that the fact that Business Objects' software complies with item C13 is supported by information included on Microsoft's Web site. An article titled "Industry Comments Endorsing OLE DB for OLAP" notes that Business Objects' software "will natively support access to

Microsoft's OLE DB for OLAP".[7] With this capacity, PWGSC argued that it is technically reasonable to expect that Business Objects' software has the capacity to connect to and access the entire published suite of APIs provided by Microsoft for use with Microsoft Analytical Services.

Finally, PWGSC requested its complaint costs and also reserved the right to make further submissions with respect to any award of costs or compensation in this matter.

Interveners' Position

The interveners submitted that the only issue before the Tribunal relates to whether Business Objects' software products that were bid meet the requirements of the RFP issued in the solicitation. The interveners argued that the only alleged violation of the applicable trade agreements put forward by COGNOS is that PWGSC awarded the contract in question to a bidder whose offered product did not meet all the requirements that were identified as mandatory in the RFP. The sole mandatory requirement referenced in the complaint is set out in item C13.

The interveners point out that COGNOS's complaint did not specify which Business Objects software products were included in Montage's proposal. According to the interveners, the allegations set out in the complaint strongly suggest that COGNOS has made incorrect or incomplete assumptions regarding the suite of Business Objects' software products that were actually included in Montage's proposal. Furthermore, the interveners stated that the most striking feature of the complaint is the complete lack of evidence to support the misinformed allegation of non-compliance. In addition, the interveners stated that COGNOS appears to have based its research and conclusions on two manuals referenced as the "Business Objects OLAP Connect User's Guide", which provide only a partial description of Business Objects' Web intelligence products. According to the interveners, in order for COGNOS to assess the Business Objects software that was bid, upwards of 20 software manuals would have to be consulted.

The interveners further stated that, in addition to BUSINESSOBJECTS 2000, Business Objects also develops and sells a wide range of other business intelligence software and stated that the bundled offering of Business Objects' software supports all the advanced functionality of Microsoft OLAP Services and Microsoft's Analytical Services 2000 software and that it was these additional products that were bid on the disputed contract. The interveners stated that Business Objects' software bid by Montage and cited above supports the functionality of Microsoft SQL Server 2000 and its components, Analysis Server 2000 and English Language Query. It further stated that, from within Microsoft Excel, business query provides easy-to-use access to both relational and/or multidimensional databases (Microsoft OLAP). According to the interveners, the OLAP Access Packs and Microsoft Analysis Services work in conjunction with BUSINESSOBJECTS 2000 and the BUSINESSOBJECTS Developer Suite to allow Business Objects' developers complete access to MS Analysis Server's advanced functionality. The interveners submitted that the above three elements of Business Objects' solution allow business intelligence developers to access the complete family of Analysis Server APIs provided by Microsoft in order to implement advanced and/or customized functionality within Business Objects.

The interveners also submitted that COGNOS did not have the benefit of reviewing the interveners' proposal to ascertain exactly what products were bid, nor did they have the benefit of attending the many hours of rigorous "Proof of Proposal" testing that PWGSC applied to the Business Objects products bid. The interveners also submitted that the complaint amounts to an attempt by COGNOS to have the Tribunal

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7.   GIR, exhibit 6.

reconduct the evaluation process for Business Objects' bid, since COGNOS has not specified, much less produced, the information on which it bases its allegations of non-compliance.

In addition, the interveners requested that they be awarded the costs associated with this proceeding.

In response to COGNOS's comments on the interveners' comments on the GIR, the interveners submitted that COGNOS has erroneously interpreted item C13 to mean that the proposed software must connect to and access all the advanced functionality of the specified Microsoft software. The interveners submitted that this is a very narrow interpretation and that the RFP actually requires that the "reporting tool's front end component . . . must be able to connect to and access all of the advanced functionality within [the specified Microsoft software]". In addition, the interveners submitted that the developers suite that formed part of their proposal is a standard integration tool and commercially available software. The interveners also submitted that even the published evaluation criteria expressly contemplated an implementation/integration process because the scoring reflects points being available where the software solution "requires programming, scripts, or additional software".

COGNOS's Position

COGNOS's complaint is that PWGSC awarded the contract to a bidder whose offered product did not meet all the requirements that were identified as mandatory in the RFP. COGNOS alleged that the award of the contract is, therefore, contrary to Article 506(6) of the AIT, Article 1015(4)(d) of NAFTA and Article XIII(4)(c) of the AGP. COGNOS also asserts that it did not bid on this contract and that, to the best of its knowledge, there was only one potential vendor that could meet all the mandatory requirements of the RFP. According to COGNOS, this vendor was not Montage.

In its submissions, COGNOS argued that the successful bidder is not compliant with item C13 because the offered product "does not offer connectivity to and access to all of the advanced functionalities within Microsoft's OLAP and Analytical Services software", as required in the RFP. COGNOS further argued that, under the terms of the RFP, an offered product must support all the functions contained in the Microsoft software, even if the functions were irrelevant to Transport Canada's actual needs. COGNOS submitted that the functions that bidders were required to support were not listed in the RFP and that it only referred to "all functions" in a general sense. COGNOS claimed that, during the clarification procedures, PWGSC did not specify which of the many functionalities that are contained within the Microsoft OLAP and Analytical Services software were actually required by Transport Canada. COGNOS argued that, instead, PWGSC made a blanket assertion to the effect that connectivity to all the functions contained within the software was a mandatory requirement. Accordingly, COGNOS submitted that, in effect, the RFP deemed each function to be equally important to Transport Canada, no matter how relevant that function was to Transport Canada's needs.

COGNOS submitted that, since the requirements of the RFP were sufficiently restrictive to preclude it from submitting a bid, PWGSC should not have ignored that requirement when it came to awarding the contract. COGNOS submitted that, in doing so, PWGSC awarded the contract on the basis of criteria other than those set out in the RFP, which is contrary to the provisions of the trade agreements and discriminates against COGNOS.

COGNOS also argued that, since this complaint was accepted for inquiry, PWGSC and the interveners have attempted to defeat the complaint on various technical grounds so as to avoid having to deal with the complaint on its merits. COGNOS further submitted that the Tribunal had discussed these various challenges and had determined that the evidence and submissions produced by COGNOS

constituted reasonable grounds of complaint. According to COGNOS, this finding by the Tribunal now means that the burden of proof has shifted to PWGSC to answer the substance of the complaint and that, since PWGSC has not discharged the burden of rebuttal, COGNOS is entitled to a finding in its favour.

In its response to the interveners' comments on the GIR, COGNOS reiterated its allegation that the interveners' proposal did not offer the solution that the RFP required. COGNOS submitted that, because the software proposed would require Transport Canada to undertake further development work to create access to specified functions, which was stipulated as mandatory, the contract was not awarded in accordance with the criteria set out in the RFP. COGNOS submitted that, while the BUSINESSOBJECTS Developer Suite that was proposed may be capable of developing access to some of the required advanced functions, it is not a reporting tool's front end component and, therefore, does not comply with the requirement that stipulated the "multi-dimensional reporting tool's front end component (reporting agent) must be able to connect to and access all of the advanced functionality". Finally, COGNOS submitted that, if Transport Canada was prepared to accept a proposal that required it to develop access to some of the specified functions, rather than a product that had the stipulated connections and access built in, then that had to be stated in the RFP.

TRIBUNAL'S DECISION

Motion on the Issue of Standing

On April 30, 2002, PWGSC filed with the Tribunal a motion in accordance with rule 24 of the Rules of Procedure. The motion raised the issue of COGNOS's standing. PWGSC submitted that COGNOS was without standing for filing a complaint with the Tribunal because it was neither a bidder nor a prospective bidder on the designated contract. In support of its submission, PWGSC claimed that, because COGNOS had decided not to submit a proposal in response to the RFP given that it claimed that it was not able to meet the mandatory requirements, it could not be considered a bidder or a prospective bidder. PWGSC also cited the Tribunal's decisions in File No. PR-2001-008[8] and File No. PR-2000-078.[9] In its submissions, PWGSC also cited an Oxford dictionary definition of "prospective", which is "characterized by looking forward into the future", and argued that COGNOS had lost its ability to become a prospective bidder as the bidding period closed. PWGSC requested an order dismissing the complaint because of this lack of standing. Alternatively, it requested an order extending the time period for filing the GIR.

On May 6, 2002, COGNOS filed its response to PWGSC's motion. COGNOS, in rebuttal to PWGSC's argument, submitted that a potential supplier includes a bidder that would have been a bidder, if not for the restrictive nature of the solicitation. COGNOS submitted that it was a potential supplier because it is a world leader in business intelligence software and the largest supplier of business intelligence software to the Government of Canada. COGNOS also cited a number of the Tribunal's decisions, such as File No. PR-98-047,[10] File No. PR-99-001[11] and File No. PR-2001-048.[12]

PWGSC's reply, received on May 9, 2002, repeated its position that COGNOS must be a potential supplier on the designated contract in order to complain about the procurement and that COGNOS does not have standing because it acknowledged that it could not meet the mandatory requirements of the RFP.

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8. *Re Complaint Filed by Foundry Networks* (30 August 2001) (CITT).
9. *Re Complaint Filed by Eurodata Support Services* (30 July 2001) (CITT).
10. *Re Complaint Filed by Novell Canada* (17 June 1999) (CITT).
11. *Re Complaint Filed by Novell Canada* (7 July 1999) (CITT).
12. *Re Complaint Filed by Foundry Networks* (12 March 2002) (CITT).

Therefore, it was neither a bidder nor a prospective bidder on the designated contract. PWGSC also added that the cases cited by COGNOS do not support its case.

On May 21, 2002, the Tribunal dismissed the motion.

The Tribunal was not convinced by PWGSC's argument that, once the bidding is closed, there are no longer any potential suppliers. The Tribunal, in making its determination of whether to accept a complaint, considers whether there is a reasonable indication of a breach of one of the applicable trade agreements. If such an indication exists, the Tribunal then considers, amongst other factors, whether the complainant is a potential supplier. Section 30.1 of the CITT Act defines a "potential supplier" as "a bidder or prospective bidder on a designated contract". The Tribunal's decision, in this regard, depends upon a somewhat broader definition than that argued by PWGSC. In the Tribunal's mind, a potential supplier is a supplier that could have bid on a contract, had an alleged breach not occurred. A potential supplier, according to the Tribunal, is one that would have or could have been a bidder, were it not for the alleged restrictive nature of the procurement process.

A similar situation arose in File No. PR-2001-049,[13] where the Tribunal ruled that, although the complainant could not directly provide the mandatory requirements of the Advance Contract Award Notice, it could nevertheless challenge an aspect of the procurement process that prevented it from bidding on future contracts, should the breach therein continue.

Accordingly, and based on the above reasons, the Tribunal dismissed the motion.

Burden of Proof

The issue of burden of proof was raised by all three parties. PWGSC argued that COGNOS bears the burden of proving that Business Objects' software does not meet the requirements of item C13. PWGSC further argued that COGNOS had failed to meet this burden because its claims were unsupported by evidence. The interveners also submitted that COGNOS did not satisfy its burden of proof. They argued that COGNOS had failed to adduce evidence to support its allegations against the evaluation of Business Objects' software and that COGNOS had failed to provide evidence to substantiate the alleged violations of the trade agreements. In response, COGNOS argued that the burden of proof shifted to PWGSC once the complaint was accepted by the Tribunal. At that point, it convinced the Tribunal that there is a reasonable indication that the procurement in question was not conducted in accordance with the applicable trade agreements.

The Tribunal does not accept this argument of COGNOS, that the burden of proof shifts back to the government institution once a complainant has convinced the Tribunal that there is a reasonable indication of a breach of one of the applicable trade agreements. In the Tribunal's opinion, there is a burden on COGNOS to demonstrate or provide evidence to prove that PWGSC's actions have breached the applicable trade agreements. However, while the legal burden of proof may rest with COGNOS, the Tribunal expects PWGSC to answer fully to the complaint, as opposed to submitting a perfunctory response along with argument that COGNOS bears the burden of proving its allegations. In the present case, the Tribunal did not find PWGSC's GIR convincing. Rather, it was the interveners that answered the substance of the complaint. The interveners submitted argument and evidence that greatly assisted PWGSC's position and were instrumental in convincing the Tribunal.

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13. *Re Complaint Filed by Aviva Solutions* (29 April 2002) (CITT).

Merits of the Complaint

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. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the trade agreements, which, in this instance, are NAFTA, the AGP and the AIT.

COGNOS alleged that PWGSC awarded the contract to a bidder whose offered product did not meet all the requirements that were identified as mandatory in the RFP. COGNOS argued that the award of the contract was contrary to Article 506(6) of the AIT, Article 1015(4)(d) of NAFTA and Article XIII(4)(c) of the AGP, which articles impose the obligation to evaluate bids in accordance with the criteria and essential requirements specified in the tender documents. More specifically, COGNOS claims that the successful bidder was not compliant with item C13 because the offered product "does not offer connectivity to and access to <u>all</u> of the advanced functionalities within Microsoft's OLAP and Analytical Services software", as required in the RFP. Both PWGSC and the interveners argued that the evaluation team followed the methodology specified in the RFP to determine that the Business Objects' software was fully compliant with the specified requirements, including those of item C13.

The Tribunal agrees with the interveners argument that COGNOS misinterpreted the requirements of item C13. COGNOS has based its case on the fact that the selected software "must connect to and access all of the advanced functionality within [Microsoft's software]", while the RFP required that the software "must be able to connect to and access" all of Microsoft's advanced functionalities. Given the wording of item C13, it appears that COGNOS may have failed to recognize the future functionality of the software, as required by Transport Canada. Such "future functionality" is evidenced throughout the documentation.

The wording of item C13 states that the "multi-dimensional reporting tool's front end component (reporting agent) **must be able to** connect to and access all of the advanced functionality within Microsof[t's] OLAP Services and Microsoft's Analytical Services 2000 software" [emphasis added]. According to the Tribunal, this phrase in item C13 has to be interpreted in context. In this case, it is clear to the Tribunal that "must be able to" does not mean that the software "must connect to" the advanced functionality, but rather, that the software "must be able to", i.e. "must have **the capability to**" connect to and access the advanced functionalities at some point in the future. The Tribunal comes to this conclusion based on the following factors.The fact that the grading of the software proposed for item C13 was scaled (in Transport Canada's "Product Evaluation") indicates to the Tribunal that the proposed software need not immediately, at the time of evaluation, have connected to and accessed the advanced functionalities. The middle score of "1", which "requires programming, scripts, or additional software", indicates that the proposed software had to have the ability to connect to and access the advanced functionalities, but need not have done so at the time of the evaluation. The software was graded according to its capability to connect to and access the advanced functionalities; it was not given a pass or fail grade depending upon whether it did or did not connect and access at the time of the evaluation.

Moreover, the Tribunal notes that PWGSC, in answer No. 17, stated that "Transport Canada [would] not be providing example[s] of business need because they are diversed [*sic*] and **Transport Canada does not wish to limit current or future functionality**" [emphasis added], which again indicates to the Tribunal that Transport Canada wished to acquire software that could adapt to its future needs. Further, in answer No. 8, PWGSC indicated that Transport Canada was accepting alternatives, including "backend cube technology", in accordance with the specifications provided in amendment No. 002, which

again indicates to the Tribunal that Transport Canada did not wish to limit its future functionality. And finally, the Tribunal notes that paragraph B.3.5 of the RFP indicates that Transport Canada requires technical specialists to be on site on an "as and when requested" basis, thereby indicating its future requirements for operational and maintenance procedures. Again, this is an indication that future functionality was envisaged by Transport Canada. The Tribunal, therefore, accepts that the words "must be able to " of item C13 implies, in this case, a future orientation for the software and that Transport Canada had imposed this requirement to ensure that the chosen software would meet its future needs, whatever these needs may be.

The Tribunal is of the opinion that, in accepting that Business Objects' software was able, with some subsequent implementation or integration, to connect to and access all the advanced functionality within the specified Microsoft software, PWGSC did not violate the requirements specified in the RFP, as amended. In this context, the Tribunal agrees with the interveners' interpretation of item C13.

As to the credibility of the evaluation process, the Tribunal observes that the evaluation team reportedly confirmed compliance with the mandatory requirements of the RFP, including item C13. In addition, the testing conducted during Phase 3 of the evaluation process again confirmed, to the satisfaction of the evaluators, that the proposed solution functioned, as described in the bidder's proposal, and thereby met the mandatory requirements and the functionality of the rated requirements, including item C13. Given the fact that Montage's proposal successfully passed all three of these stages of evaluation, it is the Tribunal's opinion that PWGSC reasonably interpreted and applied the criteria in the RFP and, thus, awarded the contract to a compliant bidder.

The Tribunal is convinced, from the evidence provided by the interveners and PWGSC, that the evaluation of the proposed product and the award of the resulting contract were conducted in accordance with the provisions of the RFP.

Accordingly, the Tribunal determines that the complaint is not valid.

With respect to requests by parties that they receive the costs associated with these proceedings, the Tribunal determines that no costs will be awarded to any of the parties to this complaint.

DETERMINATION OF THE TRIBUNAL

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

Patricia M. Close
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Presiding Member