



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

Ottawa, Tuesday, August 12, 2003

**File No. PR-2003-002**

IN THE MATTER OF a complaint filed by EDUCOM TS Inc.  
and RAND IT Solutions 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

333 Laurier Avenue West  
Ottawa, Ontario K1A 0G7  
Tel.: (613) 990-2452  
Fax.: (613) 990-2439  
[www.citt-tcce.gc.ca](http://www.citt-tcce.gc.ca)

333, avenue Laurier ouest  
Ottawa (Ontario) K1A 0G7  
Tél. : (613) 990-2452  
Fax. : (613) 990-2439  
[www.tcce-citt.gc.ca](http://www.tcce-citt.gc.ca)

Date of Determination and Reasons: August 12, 2003

Tribunal Member: Patricia M. Close, Presiding Member

Senior Investigation Officer: Cathy Turner

Counsel for the Tribunal: John Dodsworth

Complainants: EDUCOM TS Inc. and RAND IT Solutions

Counsel for the Complainants: Barbara A. McIsaac

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: David M. Attwater



Ottawa, Tuesday, August 12, 2003

**File No. PR-2003-002**

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

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

## STATEMENT OF REASONS

### COMPLAINT

On April 7, 2003, EDUCOM TS Inc. and RAND IT Solutions (EDUCOM-RAND) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*<sup>1</sup> concerning the procurement (Solicitation No. FP867-010047/B) by the Department of Public Works and Government Services (PWGSC) for the provision of an automated archiving software solution for the Department of Fisheries and Oceans (DFO).

EDUCOM-RAND alleged that PWGSC conducted an improper evaluation contrary to the provisions of the applicable trade agreements. Specifically, EDUCOM-RAND alleged that PWGSC declared its bid non-compliant for failing to contain an outline of a proposed training plan that was purportedly required by Article B.3.8 of the Request for Proposal (RFP); it submitted that the RFP contained no such article. It also alleged that its bid was found to be non-compliant for failing to contain a letter, in accordance with Article A.11.4, certifying that it is an authorized reseller of Microsoft software. Finally, it alleged that PWGSC erroneously concluded that, even if its bid had been found to be compliant, EDUCOM-RAND would be “unwilling or unable” to remove certain provisions in the terms of use for the proposed solution, which PWGSC might find unacceptable.

EDUCOM-RAND requested, as a remedy, that the Tribunal recommend that the bids be re-evaluated and, if its bid is found to be the winning bid, that it be awarded the contract or, in the alternative, that it be compensated for lost profit opportunity. In the further alternative, it requested, as a remedy, that the Tribunal recommend that it be awarded bid preparation costs. In addition, it requested that it be awarded costs for preparing and proceeding with the complaint.

On April 11, 2003, 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>2</sup> On April 16, 2003, PWGSC informed the Tribunal that a contract in the amount of \$230,480 had been awarded to IXOS Software Inc. (IXOS). On May 9, 2003, PWGSC filed a Government Institution Report (GIR) with

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> On May 15, 2003, EDUCOM-RAND requested that PWGSC disclose certain confidential information along with additional documentation mentioned in the GIR; it also requested an extension to the deadline for filing comments on the GIR. After receiving comments from the parties, the Tribunal granted the request and extended the deadline to May 30, 2003. EDUCOM-RAND filed its comments on May 30, 2003. On June 5, 2003, the Tribunal granted PWGSC permission to respond to new allegations raised in EDUCOM-RAND's comments on the GIR. On June 9, 2003, PWGSC filed its comments and, on June 13, 2003, EDUCOM-RAND filed its response 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

An RFP was posted on MERX, Canada's Electronic Tendering Service, on November 11, 2002, for the provision of an automated archiving software solution for the DFO.

The RFP reads, in part, as follows:

### A.1.1 MANDATORY REQUIREMENTS

Where a requirement of this RFP is mandatory, it will be identified specifically with "**Mandatory**", "**(M)**", or **with a statement covering a section of this document**. The words "shall", "must", "essential", "will" and "required" in this RFP are to be interpreted as mandatory requirements.

Bidders are advised to address each requirement in sufficient depth to permit a complete analysis and assessment by the Evaluation Team. Proposals must comply with every mandatory requirement. If a proposal does not comply with a mandatory requirement, the proposal will be considered NON-RESPONSIVE, will be set aside and will receive no further consideration.

### A.11.4 CERTIFICATION REQUIREMENTS

- a) In order to be awarded a contract, the Bidder must provide:
  - ii) a letter from the Software Publisher for **each and every** software component of the proposed Software Solution for which the Bidder is not the manufacturer. The letter must be on the Software Publisher's letterhead and signed by an authorized representative of the Software Publisher.

The Software Publisher's letter must be in the following form:

*This is to confirm that, as an authorized reseller of our software, \_\_\_\_\_  
[Bidder] is authorized to include our software as part of its proposal in response  
to Canada's Request for Proposal # **FP867-010047/B**.*

- c) For Bidders who do not submit the above-noted certifications and letters with their proposals or whose letters or certifications are not in the form required by Canada, Canada will contact the Bidder and the Bidder must provide the certifications or letters described above within three (3) working days (or such other longer time period as Canada, in its

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

discretion, may specify). **Failure to comply with this request by the PWGSC Contracting Authority and to meet this requirement within the time period will render the proposal non-responsive.**

#### **A.12 PROPOSAL FORMAT, CONTENT AND NUMBER OF COPIES**

##### **A.12.3 . . .**

The Bidder's Technical Proposal **MUST** provide information of sufficient scope and depth to demonstrate the ability of the proposed SOFTWARE to meet the mandatory requirements stated in this RFP and Appendices. It is **mandatory** that each Technical Proposal include:

- d) Training Plan The Bidder's Outline of the proposed training, as per article B3.8 and Table 4 and Mandatory requirement M-10. The bidders must provide a description of the required two-day training that is required for the Administrator and his backup to become fully knowledgeable about the administration, operation and troubleshooting of the product. The Bidder should include copy of the course material with its proposal.

##### **B.3.9 OPTIONS**

##### **B.3.9.2 TRAINING**

[F]ollowing the installation, the Contractor must provide the client with irrevocable options for training in English as described in the next paragraph (instructors and supporting material) to DFO on the Software Solution as required by DFO at the prices stated in the Basis of Payment (Table 4).

Training is defined as an overview course customized for DFO personnel. This course will be delivered in the National Capital Region for up to 2 systems administrators per course. The Course will cover all the information necessary, Systems Administrators to operate the Contractor's Software Solution and to perform designated DFO operational needs and upkeep activities safely and efficiently. The main objective of the training is for the administrator and his backup to become fully knowledgeable about the administration, operation and troubleshooting of the Automatic Archiving Software Solution.

A note above Table 4 in section B.10, Basis of Payment, reads as follows:

##### **TRAINING**

Subject to the request of training as described in Article B.3.9.2, the Contractor shall be paid as identified herein, upon delivery and acceptance, following submission of a valid invoice, FOB not applicable, delivery to destination, Customs Duty included, GST/HST extra, payable by Consignee if applicable.

Amendment No. 001 to the RFP, dated December 12, 2002, revised Article A.11.4(a)(ii), in part, to read as follows:

The Software Publisher's letter must be in the following form:

"This letter is to confirm that we have authorized [ ] (the "Bidder") to include the [Software Publisher] software products set out in the attached schedule (collectively the "[Software Publisher] Products") as part of its proposal in response to Canada's Request for Proposal # \_\_\_\_\_ (the "RFP"). "Please be advised that the Bidder's authority to supply the [Software Publisher] Products to Canada is limited to the supply of products pursuant to a contract that both results from the RFP procurement process and incorporates to our satisfaction [Software Publisher] approved terms of use for the [Software Publisher] Products, in accordance with the process set out in the RFP. For the

avoidance of doubt, the Bidder has no authority to make commitments in any way on behalf of or bind [Software Publisher] or any of its affiliated or related entities.”

The original closing date for the submission of proposals was December 16, 2002, which was subsequently extended to January 10, 2003. According to PWGSC, three proposals were received. On March 24, 2003, EDUCOM-RAND was advised that its proposal had been deemed non-compliant. On April 7, 2003, EDUCOM-RAND filed its complaint with the Tribunal.

## POSITION OF PARTIES

### PWGSC's Position

PWGSC submitted that it is a mandatory requirement of the RFP that a bidder's technical proposal include an outline of a two-day training program. It agreed that, as noted in the complaint, there is no Article B.3.8 in the RFP; however, the article that follows Article B.3.7 is Article B.3.9. It argued that Article B.3.9.2 describes a training course on the software solution offered by the bidder. It contended that the reference in Article A.12.3 to Article B.3.8 should have been a reference to Article B.3.9. It submitted that EDUCOM-RAND was not declared non-compliant with Article B.3.8, but rather was declared non-compliant with Article A.12.3. It argued that Article A.12.3 provides sufficient information on the nature of the training course to allow bidders to prepare the required outline or description. Further, it submitted that, as evidenced in EDUCOM-RAND's e-mail correspondence dated January 20, 2003,<sup>4</sup> EDUCOM-RAND was fully aware of the mandatory requirement to include an outline of the training course in its proposal.

With respect to the mandatory requirement to provide a certification letter from the software publisher for “each and every software component of the proposed Software Solution for which the Bidder is not the manufacturer”, PWGSC submitted: “*The Oxford Dictionary* defines ‘software’ as ‘programs and other operating information used by a computer.’” It contended that software is expressed in either object code or source code. It argued that Microsoft SQL Server Desktop Engine (MSDE) is software, as it consists of “code”, is “operating information for a computer” and is “part of a software application”. It also argued that MSDE is a component of the software solution proposed by EDUCOM-RAND, for which certification is required from Microsoft Corporation (Microsoft). It further submitted: “*The Oxford Dictionary* defines ‘component’ as ‘[c]omposing, making up, constituent. A constituent part or element.’” It also submitted that, while alleging that the MSDE is not a component of the Exchange Archive Solution (EAS), EDUCOM-RAND acknowledge that MSDE is a component of the Microsoft SQL Server Developer Edition product and is an enabling technology that EDUCOM used and that became part of the EAS application. It contended that the End-User License Agreement (EULA)<sup>5</sup> contains the terms and conditions of the license under which Microsoft granted EDUCOM the right to use the Microsoft SQL Server Developer Edition product. It submitted that Article 2(d)(iii) of the EULA notes that the “Product”, being the Microsoft SQL Server Developer Edition product, may contain components over which a separate license agreement applies. It also submitted that, as acknowledged by EDUCOM-RAND, the Addendum to the EULA<sup>6</sup> applies to MSDE. PWGSC argued that, as MSDE is a component of the Microsoft SQL Server Developer Edition product, subject to a component agreement, MSDE is a “component of the proposed Software Solution” for the purposes of Article A.11.4 of the RFP and, therefore, a certification letter from the software publisher was required.

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4. Complaint, tab 6.

5. Complaint, tab 10.

6. *Ibid.*

PWGSC submitted that, contrary to the position adopted by EDUCOM-RAND, the certification required by Article A.11.4 of the RFP is not dependent on the bidder being an authorized reseller of the software publisher. It submitted that, by Amendment No. 001 to the RFP, dated December 12, 2002, Article A.11.4(a)(ii) was amended to remove the reference to “authorized reseller” from the “form” of the software publisher’s letter. It argued that the required certification is independent of the relationship between the software publisher and the bidder, and does not limit the mandatory requirement to resellers of software.

Regarding the additional software terms and conditions, PWGSC submitted that EDUCOM-RAND’s proposal was declared non-compliant with the RFP not because its software solution included MSDE, which was subject to terms and conditions that conflicted with the mandatory terms and conditions of the RFP, but rather because EDUCOM-RAND was unable to negotiate any provision of the EULA, such that the proposal would have ultimately been found to be non-compliant at the contract finalization stage. It submitted that its decision in this regard does not constitute a proper ground of complaint.

In response to new allegations raised by EDUCOM-RAND in its comments on the GIR, PWGSC submitted that IXOS’s proposal included a certification from Microsoft, as required by Article 11.4 of the RFP, and that Microsoft had provided the certification letter to IXOS prior to bid closing. It also submitted that the software license between IXOS and the Crown includes usage terms in addition to the mandatory terms and conditions contained in the RFP and does not include usage terms that conflict with the RFP.

With respect to remedies, PWGSC submitted that, in the event that the Tribunal finds a breach of the trade agreements and recommends a re-evaluation, all proposals should be re-evaluated. In the event that the Tribunal recommends a re-evaluation of proposals and that a bidder other than the existing contractor is found to be the low-compliant bidder, PWGSC requested the option of either terminating the contract and awarding it to the low-compliant bidder or maintaining the existing contractor and paying monetary compensation to the low-compliant bidder. It also submitted that any award of monetary compensation should be based on net profit and not gross profit. It also requested its costs in preparing its submission to the Tribunal.

### **EDUCOM-RAND’s Position**

EDUCOM-RAND submitted that, on January 16, 2003, in reference to Article A.12.3(d) of the RFP, PWGSC requested the following: “Where in your bid will the Crown find ... the outline of the proposed training?” It submitted that, on January 20, 2003, it responded: “The course training plan is outlined on page 19 of the RFP for the mandatory two day training.” It submitted that, on February 22, 2003, PWGSC requested the following: “Please identify where in your proposal ... will we find the description of the two-day training required as per A.12.3 (d).” It submitted that, on February 26, 2003, it responded to PWGSC stating: “As per A.12.3 (d) above, the statement refers to Article B.3.8 which does not exist in the RFP... As for Table 4, nothing refers to a ‘two-day’ training. As for M-10, it refers to Article B.3.9.2, which still [does] not refer to a ‘two-day’ training. My question to you is, why do you need to see our ‘two-day’ training. Isn’t the course description located with the EAS Manual sufficient to answer these requirements?” EDUCOM-RAND argued that it did not understand from the RFP that the actual detailed outline and course description of the proposed optionally priced training was to be included with the bid. EDUCOM-RAND submitted that it is now apparent that PWGSC required a detailed training plan and has now purported to declare EDUCOM-RAND’s bid non-compliant for failing to comply with the requirements of the non-existent RFP Article B.3.8.

EDUCOM-RAND submitted that a number of technologies were used to create the EAS product. One of those technologies was Microsoft SQL Server Developer Edition, which EDUCOM-RAND submitted is available to companies for the purpose of designing, developing and testing new software products. It further submitted that MSDE is a component of the Microsoft SQL Server Developer Edition and is an enabling technology, which EDUCOM used and which became part of the EAS application. According to EDUCOM-RAND, PWGSC insisted that MSDE is a software component of the EAS and that, therefore, EDUCOM-RAND is a reseller of MSDE and is required to provide a letter from Microsoft authorizing EDUCOM-RAND to include MSDE as part of its proposal. EDUCOM-RAND argued that it is not required to provide a letter because MSDE constitutes a technology or tool and not a software component. It also argued that it has not purchased MSDE and cannot therefore be considered a reseller of MSDE. It submitted that it has obtained, from Microsoft, a license to use MSDE and that, when it provides the EAS application with the embedded MSDE, it is granting a license to the Crown to use the EAS product and a sublicense to use MSDE. It further submitted that, in accordance with Microsoft's EULA and Addendum thereto, it cannot resell MSDE. It submitted that PWGSC proceeded on an erroneous characterization of the relationship between EDUCOM-RAND and Microsoft.

According to EDUCOM-RAND, PWGSC erroneously concluded that, even if its bid had been found to be compliant, it would be "unwilling or unable" to remove certain provisions contained in the proposed terms of use for the proposed solution, which PWGSC might determine to be unacceptable. It argued that PWGSC misunderstands the nature of the Addendum to the EULA governing the use of MSDE. EDUCOM-RAND submitted that the Addendum sets out the terms and conditions of the license agreement between EDUCOM (and subsequently RAND) and Microsoft and that it does not address the terms and conditions of any license to the Crown of the EAS product or the terms and conditions of any contract between EDUCOM-RAND and the Crown for the supply of the EAS product, except in one respect. It submitted that, because it has limited rights to redistribute MSDE, it must incorporate those limited redistribution rights into any subsequent license of the EAS product to the Crown and any subsequent contract with the Crown. It further submitted that, subject to this redistribution restriction, the proposed terms and conditions of the license to be issued to the Crown for the EAS product can be negotiated.

In response to PWGSC's statement in the GIR that EDUCOM-RAND never asked for clarification on Article A.12.3(d) of the RFP,<sup>7</sup> EDUCOM-RAND submitted in its comments on the GIR that this statement is wrong and that its e-mail of February 26, 2003,<sup>8</sup> is a request for clarification. It further submitted that PWGSC did not respond to the request.

Regarding the requirement for a certification letter, EDUCOM-RAND submitted in its comments on the GIR that, throughout its discussions with PWGSC, it was clear that the certification that PWGSC wanted was the one originally set out in the RFP and that at no time did PWGSC refer to the certification wording of Amendment No. 001 to the RFP, as it now claims in the GIR.<sup>9</sup> It further submitted that, in all the correspondence from PWGSC, reference is made to the reseller certification letter.<sup>10</sup> EDUCOM-RAND argued that PWGSC cannot now claim that its proposal was deficient for failing to contain a different certification letter from that which was discussed throughout the process and which was cited in the March 24, 2003, letter as the reason for the finding of non-compliance.<sup>11</sup> EDUCOM-RAND further argued

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7. GIR, para. 90.

8. Complaint, tab 8.

9. GIR, paras. 92, 115-16.

10. Complaint, tabs 5, 7.

11. Complaint, tab 2.



that, if the certification letter specified in Amendment No. 001 to the RFP was what PWGSC was looking for, it was obliged to make the requirement clear.

In response to PWGSC's submission dated June 9, 2003, EDUCOM-RAND submitted that PWGSC does not understand software licensing issues and is confused over the nature of the license obtained by EDUCOM-RAND which allows them to use MSDE and redistribute it as the data engine for the EDUCOM-RAND e-mail archiving product. It submitted that PWGSC fails to understand that EDUCOM-RAND was not proposing a Microsoft product in response to the RFP, but rather proposed the EAS product, a product which EDUCOM developed using MSDE to create the database element of EAS. It submitted that it has a license from Microsoft for MSDE and that it has the authority, under that license, to redistribute MSDE in connection with its own product. Finally, it submitted that the EULA is an agreement between Microsoft and EDUCOM-RAND only and that it does not create a contract between the Crown and Microsoft.

### 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 the *Agreement on Government Procurement*,<sup>12</sup> the *North American Free Trade Agreement*<sup>13</sup> and the *Agreement on Internal Trade*.<sup>14</sup>

Article XIII(4)(c) of the *AGP* provides that "[a]wards shall be made in accordance with the criteria and essential requirements specified in the tender documentation."

Article 1007(1) of *NAFTA* provides that "[e]ach Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade."

Article 1008(1) of *NAFTA* provides, in part, that "[e]ach Party shall ensure that the tendering procedures of its entities are: (a) applied in a non-discriminatory manner".

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."

The Tribunal must determine whether, as EDUCOM-RAND alleged, PWGSC, in evaluating the proposals for this solicitation, conducted a proper evaluation in accordance with the applicable trade agreements.

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12. 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) [AGP].

13. 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA].

14. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [AIT].

As to the first ground of complaint, the Tribunal agrees with PWGSC that, in accordance with Article A.12.3 of the RFP, bidders were required, as a mandatory criterion, to include a training plan. Article A.12.3 states in part: “It is **mandatory** that each Technical Proposal include: (d) Training Plan”. Furthermore, it is clear from Article A.12.3(d) that this outline was for “the required two-day training”. As to EDUCOM-RAND’s allegation that its proposal was declared non-compliant for failing to comply with the requirement of the non-existent Article B.3.8, the Tribunal first notes that PWGSC stated that EDUCOM-RAND’s proposal was not declared non-compliant with Article B.3.8, but rather was declared non-compliant with Article A.12.3, since the proposal failed to provide the required training outline.

Second, the Tribunal is of the view that it is evident on the face of the tender documents that reference in Article A.12.3(d) of the RFP to the non-existent Article B.3.8 was a mistake and should have been to Article B.3.9. The Tribunal accepts PWGSC’s submission that the reference to Article B.3.8 was an error and that the correct reference should have been to Article B.3.9. Since both mandatory requirement M-10 and Table 4 (which were mentioned in the same sentence as the erroneous reference to B.3.8 in Article A.12.3(d)) make reference to Article B.3.9.2 and since Article B.3.9 would be found by anyone searching for Article B.3.8 as it followed Article B.3.7, it appears to the Tribunal that EDUCOM-RAND should have been able to determine that the reference to Article B.3.8 was a mistake. In the Tribunal’s view, such a mistake does not relieve EDUCOM-RAND from complying with the mandatory requirement to include a two-day training plan with its bid.

Consequently, the Tribunal is of the opinion that, although PWGSC made an error in referring to Article B.3.8 instead of Article B.3.9, this error was of a *de minimis* nature and did not result in PWGSC acting in a manner that was contrary to the provisions of the RFP in its determination that EDUCOM-RAND’s proposal was non-compliant for failing to contain a two-day training plan.

As to the second ground of complaint, the Tribunal again agrees that PWGSC was correct in its interpretation that MSDE is a software component of the EAS product and that, for the purposes of Article A.11.4 of the RFP, EDUCOM-RAND was required to provide a letter. Although EDUCOM-RAND argued that MSDE constitutes a technology or tool and not a software component, it acknowledged that MSDE is a component of the Microsoft SQL Server Developer Edition, which EDUCOM used and which became part of the EAS.<sup>15</sup> It also acknowledged that the EULA and Addendum thereto apply to MSDE. Article 4(a)(i) of the Addendum to the EULA states in part: “If you choose to redistribute the SQL Redistributable Code and/or MSDE, you agree: i. to distribute MSDE in object code form and only in conjunction with and as a part of a software application product developed by you that adds significant and primary functionality to the SOFTWARE PRODUCT (‘Licensed Product’)”.<sup>16</sup>

Based on the evidence before it, the Tribunal considers that a certification letter from Microsoft was to be provided by EDUCOM-RAND as part of its proposal. In the Tribunal’s view, PWGSC has valid concerns about the use of other proprietary software in the proposed software solution and therefore included, as part of the mandatory requirements, a requirement to provide an authorization by the software publisher that the bidder could include the particular software product as part of its proposal. The Tribunal is of the opinion that PWGSC was correct in its determination that EDUCOM-RAND’s proposal was non-compliant for failing to include a “letter from the Software Publisher for **each and every** software component of the proposed Software Solution for which the bidder is not the manufacturer.”

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15. Complaint at 11.

16. Complaint, tab 10.

The Tribunal notes that, in its complaint, EDUCOM-RAND referred to the text of the original version of the software publisher's letter required by Article A.11.4 of the RFP. The original version of this letter required the software publisher to confirm that the bidder, as an authorized reseller of its software, is authorized to include the software in its bid. In this regard, EDUCOM-RAND argued that it was not required to provide the certification letter, since neither one of them can be considered to be a software reseller.

However, the text of the software publisher's letter was amended by Amendment No. 001 to the RFP. Significantly, in this respect, the new required letter did not refer to the bidder as a software reseller. Although it is unfortunate that, in its correspondence, PWGSC continued to refer to the text of the original software publisher's letter, EDUCOM-RAND should have been informed of the changes made to the letter by Amendment No. 001. In any case, the Tribunal is required to interpret the meaning of the certification referred to in the amended Article A.11.4 of the RFP, not the original version, since there is no suggestion that the article was not properly amended. As stated above, the Tribunal is of the view that MSDE is a software component of the EAS product and, therefore, EDUCOM-RAND was required to submit a certification letter from Microsoft as part of its proposal.

The Tribunal does not consider the third and final allegation to be a proper ground of complaint. EDUCOM-RAND alleged that PWGSC erroneously concluded that, even if its proposal had been found to be compliant, EDUCOM-RAND would be "unwilling or unable" to remove certain provisions in the proposed terms of use for the proposed solution, which PWGSC might find unacceptable. In the Tribunal's opinion, PWGSC did not disqualify EDUCOM-RAND's bid on these grounds. Instead, PWGSC appears to have been merely indicating in its March 24, 2003, letter that EDUCOM-RAND would not have been able to enter into a contract containing the terms required by PWGSC, even if it had been declared the successful bidder. For the above reasons, the Tribunal finds that PWGSC did not violate the trade agreements as alleged by EDUCOM-RAND.

In light of the foregoing, the Tribunal finds that the complaint is not valid.

PWGSC requested its costs for responding to the complaint. As discussed above, the Tribunal is of the view that, when read together, Article A.12.3(d), mandatory requirement M-10, Table 4 and Article B.3.9.2 of the RFP should have alerted EDUCOM-RAND that a two-day training plan outline was required as part of its proposal. However, the Tribunal notes that, while minor in nature, the reference to Article B.3.8 was an error. Further, even after the software publisher's certification letter required by Article A.11.4 had been amended, PWGSC continued to refer to the original version of the letter. This too was an error on the part of PWGSC that may have led to some confusion on the part of the bidder.

Further, the final ground of complaint regarding PWGSC's determination that EDUCOM-RAND was unable to negotiate any provision of the EULA, which the Tribunal found to be invalid, resulted from statements made in PWGSC's letter of rejection to EDUCOM-RAND. In the Tribunal's view, since PWGSC was the author of the statement that led to this complaint, as well as the author of the above errors that led to some confusion on the part of the bidder, PWGSC should bear the costs of defending any complaint resulting from these errors. Therefore, the Tribunal will not award any costs in relation to this complaint.

**DETERMINATION OF THE TRIBUNAL**

Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

Patricia M. Close

Patricia M. Close  
Presiding Member