Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2003-078

Laerdal Medical Canada Ltd.

v.

Department of Public Works and Government Services

Determination issued
Monday, May 17, 2004

Reasons issued
Thursday, May 20, 2004

Canada

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IN THE MATTER OF a complaint filed by Laerdal Medical Canada Ltd. 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*.

BETWEEN

LAERDAL MEDICAL CANADA LTD.	**Complainant**

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES	**Government Institution**

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 in part.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act,* the Canadian International Trade Tribunal awards Laerdal Medical Canada Ltd. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is $1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

The statement of reasons will be issued at a later date.

Tribunal Member:	James A. Ogilvy, Presiding Member
Senior Investigation Officer:	Cathy Turner
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Complainant:	Laerdal Medical Canada Ltd.
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STATEMENT OF REASONS

COMPLAINT

1. On February 17, 2004, Laerdal Medical Canada Ltd. (Laerdal) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*[1] concerning a procurement (Solicitation No. W8476-04AA01/A) by the Department of Public Works and Government Services (PWGSC) for the provision of patient simulation models on behalf of the Department of National Defence (DND).

2. Laerdal alleged that PWGSC treated it in a discriminatory and unfair manner before and after the issuance of the solicitation, that PWGSC improperly evaluated its bid and that PWGSC issued the contract to a company whose product was not compliant with the specifications.

3. Laerdal requested, as a remedy, that the Tribunal recommend that PWGSC re-evaluate the bids, excluding the bid from Medical Education Technologies, Inc. (METI), and award the contract appropriately. In the alternative, Laerdal requested compensation for its lost opportunity. In addition, it requested its costs incurred in preparing and proceeding with the complaint. Laerdal also requested that the Tribunal order the postponement of the award of any contract in relation to the solicitation until the Tribunal determined the validity of the complaint.

4. On February 20, 2004, 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*.[2] The Tribunal did not issue a postponement of award order in accordance with subsection 30.13(3) of the *CITT Act*, since the evidence on file indicated that a contract had already been awarded, and this was confirmed on February 24, 2004, when PWGSC informed the Tribunal that a contract had been awarded to METI. On March 12, 2004, the Tribunal granted intervener status to METI. On March 16, 2004, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[3] On March 30, 2004, both Laerdal and METI filed their comments on the GIR with the Tribunal. On April 8, 2004, Laerdal filed its comments on METI's submission.

5. 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

6. On October 7, 2003, a Notice of Proposed Procurement was posted on MERX, Canada's Electronic Tendering Service. The Request for Proposal (RFP) had a bid closing date of November 17, 2003. According to PWGSC, three bids were received and, on November 18, 2003, the technical proposals were sent to the DND technical authority for evaluation. On November 25, 2003, DND informed PWGSC that both Laerdal's and METI's bids were found to be technically compliant. PWGSC informed METI on November 26, 2003, that its bid was the lowest-priced responsive bid and, in accordance with the terms of

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499.

the RFP, arrangements were made to physically demonstrate that METI's mannequin met the technical requirements of the RFP.

7. According to PWGSC, on December 17, 2003, METI demonstrated, to DND, compliance of its mannequin with the technical requirements of the RFP. On December 23, 2003, PWGSC awarded a contract to METI and advised Laerdal of the results of the solicitation. On January 8, 2004, Laerdal raised an objection with PWGSC concerning the conduct of the procurement. On February 3, 2004, Laerdal received a response from PWGSC rejecting Laerdal's objection. On February 17, 2004, Laerdal filed its complaint with the Tribunal.

8. The RFP reads, in part, as follows:

> **DELIVERY**
>
> While delivery is requested by 31/01/2004, the best delivery we can offer is _____.
>
> **NOTE:** Date of delivery will be of the essence of any resulting contract. Your attention is drawn to article 11 of General Conditions, DSS-MAS 9601.

9. The Statement of Work (SOW) reads, in part, as follows:

> **3.0 REQUIREMENTS**
>
> 3.1 **General**
>
> 3.1.3 Transportability. The patient simulation mannequin and accompanying equipment shall be easily operable and sufficiently rugged to permit the following "patient" transport training scenarios:
>
> a. transfer by stretcher;
> b. transfer by civilian pattern road ambulance;
> c. transfer via standard military pattern field ambulance; and
> d. transfer via aircraft.
>
> 4.1 Hardware. The patient simulation mannequin shall:
>
> e. have a hardened personal computer system capable of being deployed to non-static locations and theatres of operation. This computer will employ as the operating system Microsoft Windows 2000 or NT, in accordance with . . . DND Information Management Directions;
>
> 4.2 Software. The patient simulation mannequin system shall include:
>
> a. a scenario software package of at least 100 scenarios and capability to programmed customized scenario based training modules;
>
> 5.1 Replacement parts. Parts are defined as the items found on the standard list of SPARE (replacement) parts for the simulator, as advertised commercially by the manufacturer at the time of purchase. These parts shall be:
>
> a. easily available in Canada; and
> i. deliverable within 48 hours. It shall be the contractor's responsibility to ensure that long lead-time items are readily available.

POSITIONS OF THE PARTIES

PWGSC's Position

10. PWGSC submitted that it had purchased mannequins from Laerdal in the past and that DND was fully aware of Laerdal's mannequins, given that it currently has several of them in use and has been using them for several years. PWGSC submitted that, since DND had little knowledge of METI's mannequin and wanted to better understand the market for and the capacity and technical specifications of full-bodied patient simulation mannequins, a DND official met with METI representatives on August 13, 2003. PWGSC submitted that DND had no further meeting with METI prior to the physical examination of its mannequin on December 17, 2003, as part of the evaluation process.

11. PWGSC submitted that, due to the power failure that affected Ontario in August 2003, the scheduled meeting with Laerdal on August 15, 2003, was cancelled. In response to the allegation that Laerdal requested, on numerous occasions, a rescheduling of the meeting, PWGSC submitted that neither it nor DND had knowledge of the requested rescheduling, that any voice messages may have been lost due to the recurring power failures and that the alleged lack of response by PWGSC or DND was not a deliberate attempt to avoid Laerdal. PWGSC contended that Laerdal was not unfairly denied an opportunity equal to that given to METI and that, in fact, Laerdal has had greater opportunity than METI to meet with and to present its product to DND.

12. PWGSC submitted that the RFP requested bidders to quote a firm unit price for each mannequin and that, under the provisions of the RFP, it was not open to bidders to propose additional terms that would have a possible and undefined effect on firm unit prices. PWGSC submitted that Addendum "A" to Laerdal's bid was considered, but that, because any potential financial impact was clearly immaterial in the circumstances, the actual financial impact of Laerdal's additional terms was not evaluated.

13. With respect to Laerdal's allegation that METI's mannequin is non-compliant with the specifications, PWGSC submitted that the onus is on Laerdal to provide evidence to demonstrate that METI's proposal was not evaluated in conformity with the trade agreements. It further submitted that, in this case, the allegations are based merely on Laerdal's belief and not on any evidence. PWGSC submitted that METI's proposal clearly demonstrates that its product is a proven off-the-shelf product in extensive use in Canada and the United States.

14. Regarding transportability, PWGSC submitted that, contrary to Laerdal's position, a certificate of airworthiness was not required to meet the requirements of the RFP and that the evaluation team found METI's mannequin compliant with this section of the RFP.

15. With respect to Laerdal's allegation that the system presented by METI was an Apple-based system, which, it argued, is not compatible with DND Information Management Directions, PWGSC submitted that the Tribunal's jurisdiction does not extend to considering whether the RFP breached DND's policy requirements. PWGSC submitted that it was not a mandatory requirement of the RFP for bidders to propose mannequins that employ Microsoft Windows 2000 or NT and that only the requirement for a "hardened personal computer system" was made mandatory by the use of the command "shall".

16. PWGSC contended that, in contrast, using the word "will" in the same provision was intended to convey a different meaning than the mandatory "shall". PWGSC submitted that "Microsoft Windows 2000 or NT" was named merely as an element of an equivalency test. It submitted that the RFP is reasonably understood as allowing for mannequins that employ operating systems equivalent to "Microsoft

Windows 2000 or NT" and that two of the three proposed mannequins employ operating systems other than Microsoft Windows 2000 or NT. PWGSC also submitted that the evaluation team found all three bids compliant with this requirement of the RFP.

17. Additionally, PWGSC submitted that, under the trade agreements, the evaluators were required to allow for equivalents to a Microsoft operating system. It further submitted that, where a particular application of a specification has the effect of creating an unnecessary obstacle to trade, the trade agreements require a government institution to apply the specification otherwise.

18. Regarding the software requirement, PWGSC submitted that Laerdal has provided no evidence to support its allegation and that, during the physical demonstration of METI's mannequin, the evaluation team was satisfied that METI's product met the requirements of this section of the RFP.

19. With respect to replacement parts, PWGSC submitted that being "easily available in Canada" does not require a "direct or authorized distributor, appointed sales, marketing or other such service in Canada". It submitted that the requirement was only that spare parts be "deliverable" within 48 hours. PWGSC submitted that, for the purposes of the physical demonstration, METI was capable of having an entire mannequin delivered to Ottawa, Ontario, from Florida within 36 hours. It also submitted that, unless there is some basis in a bidder's proposal to question the veracity of the information provided in response to a requirement, the evaluation team is obligated to accept and act upon the information. It further submitted that there was no suggestion in METI's proposal that spare parts were not deliverable within 48 hours.

20. Regarding delivery of the product, PWGSC submitted that it was not a mandatory requirement of the RFP for bidders to commit to a delivery date of January 31, 2004. It submitted that the RFP merely requested delivery by January 31, 2004, but left it open for bidders to advise of their best delivery date and that the agreed-upon delivery date would "be of the essence of any resulting contract."

21. Finally, PWGSC requested its costs in this matter.

METI's Position

22. Regarding Laerdal's allegation that it was unfairly denied an equal opportunity to present its product to DND, METI submitted that this ground of complaint is untimely. METI submitted that Laerdal refers to two meetings between METI and DND, the first meeting occurring on August 13, 2003, almost two months before the solicitation was issued. METI submitted that Laerdal had actual or constructive knowledge of this meeting prior to the issuance of the solicitation and, therefore, argued that the time limit for filing a complaint regarding this meeting expired, at the latest, on October 23, 2003, 10 working days after the issuance of the solicitation. METI submitted that the second meeting referred to in the complaint was expressly contemplated in the "EVALUATION OF PROPOSALS/BASIS OF SELECTION" section of the RFP. It contended that Laerdal knew, or should have known, that such a meeting would occur shortly after the RFP was published and, therefore, submitted that this ground of complaint is also untimely. It further submitted that a meeting between the lowest-priced compliant bidder and the client department, in order to verify compliance with the requirements of the RFP, is not inconsistent with the terms of the *North American Free Trade Agreement*[4] or the *Agreement on Government Procurement.*[5]

4. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].
5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

23. With respect to Laerdal's submission that it has purchased and examined METI's latest patient simulator, METI submitted that it has no record of any purchase of a simulator by any of Laerdal's divisions or subsidiaries. With respect to the compliance of METI's mannequin with the requirements of the RFP, METI submitted that, as with most technological products and software, METI simulators undergo continuous product improvements and feature enhancements and that it is highly probable that the METI simulator that Laerdal claims to have purchased is not the latest version of what is currently being sold.

24. METI submitted that the reference to the operating system is prefaced with the word "will", which is prospective in nature. It submitted that it understood the requirement to allow for equivalents to a Microsoft operating system and that, when technical specifications make reference to a particular trademark or name, both *NAFTA* and the *AGP* stipulate that documents must allow for equivalent products.

25. With respect to software, METI submitted that it included one of its learning modules with its simulator and that this learning module offers additional scenarios that can be interchanged with each other and with the standard simulator patients and scenarios. METI further submitted that the software of its simulator offers the ability to customize scenarios that can be overlaid on any patient.

26. Regarding the availability of parts, METI submitted that the RFP did not require bidders to have offices located directly in Canada; the RFP required that parts be easily available in Canada and deliverable within 48 hours. Regarding transportability, METI submitted that it has a customer base that uses its simulator for field exercises that include transfer by aircraft. It further submitted that Laerdal misconstrued the terms of the RFP and appeared to be arguing that bidders were required to obtain a certificate of airworthiness. METI submitted that there is no reference to a certificate of airworthiness anywhere in the RFP and that there was no requirement for bidders to include any such certificate. With respect to the delivery schedule, METI submitted that the RFP does not establish a rated preference for delivery dates that precede the requested delivery date.

Laerdal's Position

27. Laerdal submitted that it became aware of the proposed procurement around March 2003 and that, along with other potential suppliers, it made arrangements to meet with DND representatives to present its product. It submitted that it was initially scheduled to meet with a DND representative on August 15, 2003; however, as a result of the power failure that affected parts of Ontario and the United States, the meeting did not take place. Laerdal submitted that it requested, on numerous occasions, that the meeting be rescheduled. However, neither the DND representative nor any PWGSC official responded to Laerdal's requests. Laerdal contended that, by their actions, DND and PWGSC effectively refused to schedule a meeting, despite its repeated efforts to do so.

28. Laerdal submitted that it is aware that DND officials met with METI on at least two occasions, once before the bid closing date and on another occasion after the bid closing date, but before the selection of the successful bidder. Laerdal submitted that it has never been offered the opportunity to present its product to DND and that giving one bidder, METI, multiple opportunities to present its product in a face-to-face meeting with the potential buyer, without allowing other bidders an equal opportunity to do so, amounts to an unfair and discriminatory preference for METI when METI is ultimately selected as the successful bidder.

29. With respect to the evaluation of its bid, Laerdal submitted that it was advised by PWGSC that Addendum "A" to its bid could not be considered, as the items listed could not be measured and were not recorded in the space provided in the solicitation. Laerdal argued that items 1 to 5 in the "PROPOSED

BASIS OF PAYMENT/TERMS OF PAYMENT" section of the RFP do not indicate that all the relevant information would not be considered and that such information must be contained inside the small boxes provided in the RFP. Laerdal submitted that the space provided in the RFP for item 1 was not large enough to conveniently include additional and highly advantageous terms that Laerdal is prepared to offer and that, as a result, a short addendum was included with its bid materials. Laerdal contended that fairness required that this information be taken into consideration when its bid was evaluated.

30. Laerdal submitted that, during a conversation with a PWGSC representative on December 23, 2003, or shortly after receiving confirmation that it had not been selected, it was informed that Addendum "A" to its bid had not been considered. However, Laerdal contended that PWGSC's correspondence of January 30, 2004, which states that the "Addendum was indeed considered as part of the pricing evaluation but did not affect the rankings of the lowest priced responsive proposals", contradicts the previous information received from PWGSC and amounts to an after-the-fact attempt to justify a decision that was made on an improper basis.

31. Laerdal submitted that it has purchased and examined METI's latest patient simulator within the category covered by the solicitation and, on that basis, has reason to believe that the product does not meet the technical requirements of the solicitation. Laerdal submitted that METI's bid is non-compliant with several technical requirements, namely, item 3.1.3 (transportability), 4.1 (hardware), 4.2 (software) and 5.1 (replacement parts). In addition, Laerdal submitted that it strongly believes that METI's delivery date was not earlier than Laerdal's stated date.

32. With respect to transportability, Laerdal submitted that it believes that, at the time of bid closing, METI could not supply "ease" of transportability and did not have a certificate of airworthiness required to meet the criterion set out in item 3.1.3(d). Regarding hardware, Laerdal submitted that it has reason to believe that the system presented by METI at the time of bid closing was an Apple-based system, which, it argued, is not compatible with DND Information Management Directions. As for software, Laerdal submitted that it has reason to believe that the system presented by METI did not comply with the requirement at the time of bid closing. With respect to replacement parts, Laerdal submitted that METI is located in Florida and that it had no direct or authorized distributor, appointed sales, marketing or other such service in Canada at the time of bid closing. Laerdal argued that delivery from the United States cannot be expected across Canada within 48 hours, due to existing and continually increasing customs requirements.

33. Laerdal contended that the apparent circumvention of the various requirements of the solicitation mentioned above has resulted in price becoming the sole determining factor in the decision-making process, despite the various respects in which METI's product was not in conformity with the technical requirements of the solicitation.

34. In response to PWGSC's submission that DND was fully aware of Laerdal's mannequins, Laerdal contended that the submission is based on the false assumption that Laerdal's proposed mannequin was identical to the Laerdal mannequin already being used by DND. Laerdal contended that, had the requested meeting taken place, PWGSC would have known that this was not the case and that Laerdal had significantly upgraded both the hardware and software elements of its mannequin to the extent that this mannequin was not the same product with which DND was familiar.

35. Regarding PWGSC's submission concerning Addendum "Ato Laerdal's bid, Laerdal submitted that this addendum complied with the terms of the RFP by listing a unit price in the applicable column in the RFP and included additional pricing information that was directly relevant to any future acquisitions by DND and to Laerdal's previous discussions with DND. It contended that the pricing information was simple

and straightforward and that this was not a term or condition that requires evaluation. Laerdal argued that its submission is supported by the following statement contained on the cover page of the RFP:

> We hereby offer to sell to Her Majesty the Queen in right of Canada, in accordance with the terms and conditions set out herein, referred to herein or attached hereto, the goods, services, and construction listed herein and *on any attached sheets at the price (s) set out therefor*. [Emphasis added]

36. In response to PWGSC's submission regarding the hardware system, Laerdal submitted that the "Collins English Dictionary" defines both "will" and "shall" as indicating or expressing compulsion and that, with respect to the relationship between "will" and "shall", the dictionary provides that "the usual rule given for the use of shall and will is that where the meaning is one of simple futurity, shall is used for the first person of the verb and will for the second and third. Where the meaning involves command, obligation, or determination, the positions are reversed."[6] Laerdal argued that this illustrates that the meanings of "will" and "shall" are equal and the same and that their alternate uses are simply a matter of grammar.

37. Laerdal contended that the RFP clearly required a Microsoft Windows 2000 or NT operating system and that no provision for equivalency was ever made; yet, PWGSC submitted that the RFP is reasonably understood as allowing for mannequins that employ operating systems that are equivalent to Microsoft Windows 2000 or NT because two of the three proposed mannequins employ operating systems other than Microsoft. Laerdal argued that the fact that potential suppliers attempted to propose a product that did not comply with the mandatory requirement does not change the fact that it is a mandatory requirement. Laerdal contended that, as METI's mannequin does not use Microsoft Windows 2000 or NT as its operating system, METI did not meet the mandatory requirement of the RFP.

38. With respect to the software requirement, Laerdal submitted that the evaluation team misunderstood how scenarios operate in practice. It submitted that a medical scenario refers to the software program that allows the mannequin to exhibit symptoms consistent with a medical emergency. Laerdal submitted that it is essential to distinguish between the physiological characteristics of a particular patient and the medical scenarios to which a given patient can be subjected. Laerdal contended that, while those scenarios can be applied to a number of different patients with different physiological characteristics, it is misleading to multiply the number of patients by the scenarios.

39. Regarding transportability, Laerdal submitted that PWGSC has misunderstood the meaning of the term "transportability" as required by the SOW. It contended that transportability means that the mannequin can be transported in the ways that an actual patient would be in an emergency situation. Laerdal submitted that PWGSC has not properly confirmed that the METI mannequins are airworthy.

40. In response to METI's comments on the GIR regarding the timeliness of Laerdal's complaint, Laerdal submitted that it continued to await a response from DND up until the time that METI had been selected as the successful bidder of the contract. Laerdal further submitted that, until February 3, 2004, it had not received "actual or constructive knowledge of the denial of relief" by PWGSC, which, it argued, is a necessary condition stipulated by subsection 6(2) of the *Regulations*, because relief was never explicitly or implicitly denied by DND.

TRIBUNAL'S DECISION

41. 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

6. See Laerdal's response to the GIR, public version, para. 24.

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 Internal Trade,*[7] the *AGP* and *NAFTA*.

42. Article 506(6) of the *AIT* provides that, "[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The 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."

43. Article 1007(3) of *NAFTA* provides that "[e]ach Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as 'or equivalent' are included in the tender documentation."

44. Article 1015(4)(a) of *NAFTA* provides that "[a]n entity shall award contracts in accordance with the following: . . . (a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation".

45. 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."

46. Laerdal alleged that PWGSC incorrectly declared METI's proposal compliant with the technical specifications and cited several specific requirements to support its allegation.

47. With respect to transportability, Laerdal argued that METI did not provide a certificate of airworthiness and, therefore, could not supply ease of transportability, and that METI's proposal should have been declared non-compliant. The Tribunal notes that the requirement is for the mannequin and accompanying equipment to be easily operable and sufficiently rugged to permit transport by various methods. While it may be understood by the industry or even by certain users that "a certificate of airworthiness" is desirable as a means of confirming a certain type of transportability, there is no evidence that this is a common and "understood" standard, nor is there any requirement for it in the RFP. The Tribunal will not, in this instance, substitute its judgment for that of the evaluators. As a result, the Tribunal finds that this ground of complaint is not valid.

48. Regarding replacement parts and the delivery thereof, the requirement was that parts be "easily available in Canada" and "deliverable within 48 hours". Laerdal argued that, since METI is located in Florida and had no direct or authorized distributor, appointed sales, marketing or other such service in Canada at the time of bid closing, it could not easily make available, in Canada, within 48 hours, the required replacement parts. In addition, Laerdal alleged that METI's delivery date for the mannequins was not earlier than Laerdal's stated date. The Tribunal notes that, in accordance with the requirement, bidders need not have direct or authorized distributors, appointed sales, marketing or other such service in Canada,

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat http://www.intrasec.mb.ca/eng/it.htm [*AIT*].

only that the parts be easily available and delivered within 48 hours. The Tribunal also notes that METI was capable of having an entire mannequin delivered to Ottawa from Florida within 36 hours and that there is no evidence to suggest that METI cannot provide the parts as required. The delivery clause in the RFP states that, "[w]hile delivery is requested by 31/01/2004, the best delivery we can offer is _____." PWGSC submitted that it was not a mandatory requirement that bidders commit to a delivery date of January 31, 2004, but left the date open for bidders to advise of their best delivery date. Failure to deliver according to the agreed time lines becomes a matter of contract administration and, therefore, outside the Tribunal's jurisdiction. The Tribunal will not substitute its judgment for that of the evaluators on matters of delays at border crossings and the like. It is of the view that, in this respect, PWGSC evaluated METI's proposal in accordance with the RFP. As a result, the Tribunal finds that this ground of complaint is not valid.

49. Laerdal submitted that METI's proposal did not comply with the requirement that the patient simulation mannequin system include a scenario software package of at least 100 scenarios. Laerdal submitted that it is essential to distinguish between the physiological characteristics of a particular patient and the medical scenarios to which a given patient can be subjected and that, while those scenarios can be applied to a number of different patients with different physiological characteristics, it is misleading to multiply the number of patients by the scenarios. The Tribunal notes that the RFP requested unit pricing for each patient simulator. It is of the view that a unit is one mannequin. The Tribunal is also of the view that, while it may not be expressly stated in the RFP, the unit, or mannequin, is the entity to which one would apply the scenarios. The Tribunal notes that the RFP does not state that the scenarios must be 100 different "medical" scenarios, rather it simply states "at least 100 scenarios". The evidence shows that the terms "patient" and "mannequin" are not synonymous in the references to METI's system. Rather, METI's use of "patient" seems to refer to a first level of profile selection in which one mannequin can be any of a set number of patients—the METI description refers to specialized software programs that are aspects of the software package. Further, the GIR associates the requirement of at least 100 scenarios with the set number of patients, but with a single METI mannequin. Therefore, it appears legitimate to multiply the number of "patients" by the number of scenarios possible with each of those "patients" and to conclude that, in this respect, the METI mannequin is compliant. As a result, the Tribunal finds that this ground of complaint is not valid.

50. With respect to the hardware requirement, Laerdal submitted that the "Collins English Dictionary" defines both "will" and "shall" as indicating or expressing compulsion. The Tribunal notes that PWGSC often indicates in RFPs that words such as "must", "shall", "will" and "essential" indicate a mandatory condition.[8] However, a statement to that effect does not appear in the present RFP. The Tribunal finds that PWGSC's argument departs from even its own normal understanding and practice, which is surprising at best. On its face, the RFP includes a mandatory requirement that the patient simulation mannequin "shall" have a hardened personal computer system and that this computer "will" employ Microsoft Windows 2000 or NT as the operating system. The Tribunal is of the view that a reasonable person would interpret this requirement to mean that the operating system employed by the hardened personal computer will be Microsoft Windows 2000 or NT. This interpretation is consistent with PWGSC's general usage of words that indicate a mandatory requirement. Therefore, the Tribunal finds this ground of complaint to be valid. However, the Tribunal will consider this issue in greater detail in its discussion concerning the remedy below.

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8. For instance, see *Re Complaint Filed by Cifelli Systems Corporation* (21 June 2001), PR-2000-065 (CITT); *Re Complaint Filed by Bell Canada* (21 February 1997), PR-96-023 (CITT); *Re Complaint Filed by Cabletron Systems of Canada Ltd.* (8 March 1996), PR-95-018 (CITT).

51. Regarding Laerdal's allegation that PWGSC improperly evaluated its bid by not considering Addendum "A", the Tribunal notes that bidders were required to submit a firm unit price per patient simulator for the initial delivery of 30 simulators, as well as a firm unit price per patient simulator for the optional 20 units, and that the unit prices were to be applicable to all destinations. While Laerdal provided a unit price per simulator as required, it also included an addendum as part of its pricing offer, which introduced variable terms that were not permissible under the RFP. The Tribunal is of the view that the notation on the cover page is not intended to permit modifications to stated bidding requirements. In this case, Addendum "A" to Laerdal's bid changes otherwise fixed prices into variable (conditional) prices. The Tribunal is of the opinion that PWGSC was correct in not considering the additional pricing scheme when evaluating Laerdal's financial proposal. As a result, the Tribunal finds that this ground of complaint is not valid.

52. Laerdal alleged that PWGSC treated it in a discriminatory and unfair manner before and after the issuance of the solicitation. Specifically, Laerdal contended that, by giving one bidder, METI, multiple opportunities to present its product in face-to-face meetings with the potential buyer, without allowing other bidders an equal opportunity, PWGSC demonstrated an unfair and discriminatory preference for METI. The first meeting with METI took place on August 13, 2003, just before the power failure. That fact is not in dispute. Laerdal was scheduled to meet two days later, but the power failure led to the cancellation of that meeting. It claims to have made several attempts by phone to reschedule. While not directly contradicting this claim, PWGSC says it has no knowledge of these attempts. It is impossible to determine with certainty whether Laerdal knew at that time about METI's meeting with DND. Laerdal's anxiety with regard to rescheduling the cancelled meeting may suggest that it was seeking equal treatment on the basis of such knowledge, but this is unknown.

53. Pursuant to subsection 6(1) of the *Regulations*, a complaint must be filed with the Tribunal "not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier." Pursuant to subsection 6(2), a potential supplier may make an objection to the relevant government institution "within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier" and has 10 more working days "after the day on which the potential supplier has actual or constructive knowledge of the denial of relief" by the government institution within which to file a complaint with the Tribunal.

54. Whenever Laerdal became aware of METI's first meeting with DND and realized that it would not receive a similar opportunity, it would have had to register an objection or a complaint within 10 working days of gaining that knowledge. The latest that such an objection or complaint could legitimately have been made was 10 working days after the publication of the RFP, since "equal treatment" of this sort could not be requested following such publication. Though this is not known on the basis of the existing record, the Tribunal is of the opinion, on the balance of probabilities, that Laerdal first knew of the meeting with METI before February 2004. Therefore, Laerdal is out of time with respect to this ground of complaint.

55. With respect to a meeting between DND and METI after the issuance of the solicitation, the Tribunal notes that the RFP provides that "the lowest priced compliant bidder will be required to physically demonstrate to the evaluation team that their patient simulation mannequin meets all of the mandatory technical requirements." The evidence on file indicates that METI, being the lowest-priced compliant bidder, provided a demonstration of its mannequin on December 17, 2003, which was after the bid closing date, but before the contract award date. Therefore, the Tribunal is of the opinion that this meeting was legitimate, as it was contemplated in the RFP, and was carried out under the terms spelled out therein. As a result, the Tribunal finds that this ground of complaint is not valid.

56. In light of the above, the Tribunal finds that the complaint is valid in part.

57. Laerdal requested, as a remedy, that the Tribunal recommend that PWGSC re-evaluate the bids, excluding the bid from METI, and award the contract appropriately. In the alternative, it requested compensation for its lost opportunity. In addition, Laerdal requested its costs incurred in preparing and proceeding with the complaint.

58. In recommending a remedy, the Tribunal considered the provisions of subsection 30.15(3) of the *CITT Act*. PWGSC failed to stipulate "or equivalent" with respect to the operating requirements, but nevertheless evaluated non-Windows equivalents as compliant. Therefore, the Tribunal finds that Laerdal's allegation that PWGSC incorrectly evaluated METI's proposal with respect to this requirement is valid. It is of the opinion that PWGSC erred in making no provision for equivalent operating systems. The Tribunal is also of the opinion, however, that PWGSC/DND actually intended other operating systems to be permissible. This creates a dilemma: if the mandatory requirement is that the operating system be Microsoft Windows 2000 or NT, any proposal not meeting that requirement should, in theory, be declared non-compliant. However, PWGSC's failure to specify "or equivalent" violates the applicable trade agreements. Had the RFP allowed for an equivalent operating system, as required by the agreements, the evaluators' conclusion that three bids were compliant on this point would not have been prone to challenge in the same way. The Tribunal also notes that, with the evaluation as it stands (i.e. allowing for equivalent operating systems), Laerdal's bid was not competitive on the basis of price, nor would it have been competitive, even with Addendum "A" to its bid being taken into account. The complaint is valid in part, to the extent that the evaluation was inconsistent with the RFP.

59. When proposals are evaluated incorrectly but, as it turns out, the evaluation was done on the basis that was originally intended, the Tribunal would normally recommend that the procurement be restarted. However, in this case, the Tribunal will not recommend that PWGSC's decision to award the contract to METI be reversed, as the principle of equivalency, required by the trade agreements, was respected in the evaluation. In the final outcome, Laerdal was not prejudiced. Nevertheless, in view of the flawed RFP and of the inconsistent application of its terms during the evaluation process, there was prejudice to the public procurement system, as it cannot be known whether and how many potential bidders were turned away by the requirement for the specified operating system.

60. The Tribunal makes no specific recommendation for compensation, but awards Laerdal its reasonable costs incurred in preparing and proceeding with the complaint. In determining the amount of the cost award for this complaint, the Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. Taking into consideration the facts surrounding this case, namely, that the complaint clearly identified the goods and issues under dispute and that the issues themselves were straightforward and did not involve complex analysis, the Tribunal's preliminary indication of the amount of the cost award is $1,000.

DETERMINATION OF THE TRIBUNAL

61. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid in part.

62. Pursuant to section 30.16 of the *CITT Act,* the Tribunal awards Laerdal its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is $1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

James A. Ogilvy

James A. Ogilvy
Presiding Member