



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File Nos. PR-2004-058 and  
PR-2004-059

Trust Business Systems

v.

Department of Public Works and  
Government Services

*Determination issued  
Friday, May 13, 2005*

*Reasons issued  
Wednesday, May 18, 2005*

**TABLE OF CONTENTS**

DETERMINATION OF THE TRIBUNAL..... i

STATEMENT OF REASONS ..... 1

    COMPLAINTS ..... 1

    PROCUREMENT PROCESS..... 2

    PRELIMINARY MATTER ..... 3

        PWGSC’s Motion..... 3

        Trust’s Response to the Motion..... 4

        Tribunal’s Decision on the Motion..... 4

POSITIONS OF THE PARTIES ..... 5

    Trust’s Position ..... 5

    PWGSC’s Position ..... 6

TRIBUNAL’S ANALYSIS..... 7

DETERMINATION OF THE TRIBUNAL ..... 12

IN THE MATTER OF two complaints filed by Trust Business Systems 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 complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act* in accordance with rules 6.1 and 107 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499;

AND FURTHER TO an order under rule 24 of the *Canadian International Trade Tribunal Rules*.

**BETWEEN**

**TRUST BUSINESS SYSTEMS**

**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 complaints are valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate Trust Business Systems by an amount that reflects the profit that it reasonably would have made had it been the successful bidder in Solicitation Nos. F7047-040176/A and T8211-040003/A. The Canadian International Trade Tribunal further recommends that the Department of Public Works and Government Services compensate Trust Business Systems with an appropriate amount that recognizes the degree to which the integrity and efficiency of the competitive procurement system was prejudiced, the degree to which Trust Business Systems and all other interested parties were prejudiced and the degree to which the parties acted in good faith. The Canadian International Trade Tribunal recommends that the parties develop a joint proposal for compensation to be presented to it within 30 days of the publication of the statement of reasons. Should the parties be unable to agree on the amount of compensation, the parties shall report back to the Canadian International Trade Tribunal separately within the same 30 days, following which the Canadian International Trade Tribunal will issue its recommendation in this respect.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Trust Business Systems its reasonable costs incurred in preparing and proceeding with the complaints, 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 these complaint cases is Level 2, and its preliminary indication of the amount of the cost

award is \$2,400. 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.

Meriel V. M. Bradford  
Meriel V. M. Bradford  
Presiding Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

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

Tribunal Member: Meriel V. M. Bradford, Presiding Member

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## STATEMENT OF REASONS

### COMPLAINTS

1. On March 22, 2005, Trust Business Systems (Trust) filed two complaints with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning procurements (Solicitation Nos. F7047-040176/A and T8211-040003/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans (DFO) for the provision of workstations.

2. Trust alleged that PWGSC breached the *North American Free Trade Agreement*<sup>2</sup> and the *Agreement on Internal Trade*<sup>3</sup> by limiting the procurements to brand-name products and not allowing for equivalent products. It also alleged that PWGSC breached *NAFTA* by not providing it with the information that it had requested in order to submit a bid. In addition, Trust alleged that PWGSC breached the trade agreements by failing to follow its own procedure for addressing enquiries during the solicitation stage by not publishing its questions as an amendment to the solicitations.

3. Trust requested, as a remedy, that the Tribunal recommend that PWGSC cancel the solicitations and that new solicitations be conducted in compliance with the trade agreements. In the event that a contract had already been awarded under the solicitations, Trust requested that the Tribunal recommend that the contract be terminated so as to permit a proper competition. In the alternative, it requested that the Tribunal recommend that PWGSC compensate it for its lost opportunity to participate in the competition and to profit therefrom and that, if such compensation is recommended, then the amount of compensation be developed jointly by the parties. If a joint proposal cannot be arrived at, Trust requested that the Tribunal decide the amount of compensation. In addition, it requested its costs incurred in preparing and proceeding with the complaints.

4. Trust requested that the Tribunal deal with these complaints under the express option set out in rule 107 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup>

5. On April 1, 2005, the Tribunal informed the parties that the two complaints had been accepted for inquiry, as both 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>5</sup> The Tribunal also informed the parties that, in accordance with subrule 107(4) of the *Rules*, the Tribunal would apply the express option in this case. In addition, the Tribunal informed the parties that, in accordance with rule 6.1 of the *Rules*, the Tribunal decided to combine both inquiries into a single proceeding.

6. On April 4, 2005, PWGSC informed the Tribunal that one contract had been awarded to Compugen Inc. on March 9, 2005, and another on March 15, 2005. On April 8, 2005, PWGSC filed a motion requesting that the Tribunal issue an order dismissing the complaints on the basis that Trust is not a “potential supplier” and that the time for filing the Government Institution Report (GIR) be extended until the Tribunal has determined this matter. On April 11, 2005, the Tribunal denied the request for an extension

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

2. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

4. S.O.R./91-499 [*Rules*].

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

of time for filing the GIR. The Tribunal sent the motion to Trust and informed Trust that any comments that it wished to make on the motion should be included in its comments on the GIR.

7. On April 11, 2005, PWGSC filed a GIR with the Tribunal in accordance with paragraph 107(5)(a) of the *Rules*. On April 19, 2005, Trust filed its comments on the motion and the GIR. On April 22, 2005, PWGSC filed its response to Trust's submission on the motion. On April 25, 2005, the Tribunal dismissed the motion, since it was satisfied that, based on the evidence provided, Trust was a "potential supplier" for the subject procurements within the meaning of section 30.1 of the *CITT Act* and indicated that it would give its reasons for this decision in the reasons for the determination on the complaints.

8. Given that there was sufficient information on the record to determine the validity of the complaints, the Tribunal decided that a hearing was not required and, pursuant to paragraph 25(c) of the *Rules*, disposed of the complaints on the basis of the written information on the record.

## PROCUREMENT PROCESS

9. According to PWGSC, Solicitation No. F7047-040176/A for the provision of "serveurs" was issued on February 15, 2005, with an original closing date of March 3, 2005, which was subsequently extended to March 8, 2005, and Solicitation No. T8211-040003/A for the provision of "workstation", was issued on February 17, 2005, with a closing date of March 7, 2005. In both cases, the solicitations were on behalf of the DFO for replacement components to be installed in the Integrated Information System on Maritime Navigation (INNAV) operated by the Canadian Coast Guard (CCG).

10. The Request for Proposal (RFP) for Solicitation No. F7047-040176/A reads in part as follows:

### Statement of work

26 Proliant Server, 34 HP Workstation xw6200, some other [components], NEC monitors and Cisco equipment.

NO substitute will be considered for compatibility purpose. This is an upgrade. Actual equipment is working in a very critical environment for controlling movement of vessels on [St. Lawrence] river.

A substitute product could put the Canadian [Coast Guard] in very bad situation.

You must [fill in] your individual price per item on the document Appendix "A". The total amount must include shipping, warranty, loading and downloading at destination.

11. The RFP for Solicitation No. T8211-040003/A reads in part as follows:

### Statement of work

3 Proliant Server, 2 HP Workstation xw6200, some other [components], NEC monitors and Cisco equipment.

NO substitute will be considered for compatibility purpose. This is an upgrade. Actual equipment is working in a very critical environment for controlling movement of vessels on [St. Lawrence] river.

A substitute product could put the Canadian [Coast Guard] in very bad situation.

You must [fill in] your individual price per item on the document Annexe "A". The total amount must include shipping, warranty, loading and downloading at destination.

12. Both RFPs contain the following clauses:

### Communications – Solicitation Period

3. Enquiries must be received no less than **4 calendar days** prior to the bid closing date to allow sufficient time to provide a response. Enquiries received after that time might not be answered prior to the bid closing date.

4. To ensure consistency and quality of information provided to bidders with respect to significant enquiries received, and the replies to such enquiries, any information will be provided simultaneously to bidders to which this solicitation has been sent, without revealing the sources of the enquiries.

13. According to the complaints, Trust downloaded a copy of the RFP for Solicitation No. F7047-040176/A on February 27, 2005, and a copy of the RFP for Solicitation No. T8211-040003/A on February 28, 2005. On February 28, 2005, Trust sent several e-mails regarding each solicitation to PWGSC and objected to the fact that the RFPs included items that were limited to NEC monitors and Cisco equipment, with no provision for considering equivalent products. Specifically, Trust requested whether the “no substitute” requirement could be removed for the following items:

F7047-040176/A, Annexe A and revised Annexe A:

Servers C 13, monitors D1 and LAN switches and routers E2, E3, E4 and E13

T8211-040003/A, Annexe A:

Monitor D1 and LAN switches and routers E1, E13, E16, E17 and E18.

14. In addition, Trust requested a network diagram showing the devices connected to the devices shown as E2, E3 and E13, asked several questions of PWGSC and also indicated that it was prepared to provide a demonstration of its equivalent products. On February 28 and March 1, 2005, PWGSC responded to Trust’s e-mails and indicated as follows: “Your e-mail message below has been referred to our Senior Legal Counsel for response.” On March 7, 2005, Trust filed a formal objection with PWGSC.

15. According to the complaints, on March 8, 2005, Trust received a letter from PWGSC, which stated in part:

[I]t is PWGSC’s position that Trust Business Systems is not a “potential supplier” in regards to Federal government procurement and does not have a *bona fide* interest in this procurement. Consequently, PWGSC officials will not be responding to your inquiries or objections regarding this PWGSC procurement process.

According to PWGSC, bids closed on March 7 and 8, 2005. Two compliant bids were received for each of the solicitations, and contracts were awarded on March 9 and 15, 2005. Trust filed its complaints with the Tribunal on March 22, 2005.

## PRELIMINARY MATTER

### PWGSC’s Motion

16. PWGSC requested that the Tribunal issue an order dismissing the complaints on the basis that Trust is not a “potential supplier” for the solicitations at issue. It argued that only the *AIT* applies to the procurements at issue. PWGSC submitted that Trust is not a “potential supplier” in accordance with section 30.1 of the *CITT Act* because Trust does not satisfy the *AIT* definition of “supplier”.

17. PWGSC submitted that, at the time of its objection, Trust did not propose any equivalent products for consideration by PWGSC. According to PWGSC, Trust consistently declined to provide PWGSC with any information regarding proposed equivalent products for consideration by PWGSC and the DFO. PWGSC contended that Trust stated that it would provide a “demonstration” of equivalent products only after PWGSC amended the RFPs to allow equivalent products to be proposed. PWGSC argued that Trust clearly had no intention of providing information regarding the equivalent products that it planned to



propose so as to provide a basis on which PWGSC and the DFO could consider its objection and that, consequently, Trust did not demonstrate a *bona fide* interest in participating in the procurement processes.

18. PWGSC argued that it was being asked to modify the requirements of the RFPs without information being provided by Trust with respect to any proposed equivalent products. It submitted that this approach is contrary to standard procurement practice between the Crown and *bona fide* potential suppliers and that, in normal practice, suppliers are eager to provide information about their products in the context of a request that it modify the requirements of a procurement. PWGSC argued that it is not reasonable to cancel and amend a requirement upon the objection of a complainant that has no apparent legitimate interest in the procurement, an interest that would be demonstrated through the customary explanation of its proposed equivalent products. PWGSC submitted that refusing to provide product information is a peculiar way for a supplier to conduct business and would raise concerns on the part of any buyer.

19. With respect to the manufacturers' authorization letters filed by Trust,<sup>6</sup> PWGSC submitted that they do not support the contention that, at the time of the objection, it ought to have considered Trust as a "potential supplier". PWGSC submitted that the date of the letters is subsequent to the date of Trust's objections and the procurement processes at issue. It further submitted that, due to the protected designation that Trust has given the letters, PWGSC and the DFO officials are not permitted to know the names of the manufacturers from whom Trust purports to obtain the products. PWGSC contends that it is absurd to suggest that PWGSC ought to accept Trust's claims of "equivalency" and modify the requirements of the RFPs accordingly without knowing the manufacturers or products proposed.

### **Trust's Response to the Motion**

20. In response to PWGSC's submission that it did not propose equivalent products in support of its request to amend the requirements of the RFPs, Trust submitted that bidders do not disclose the products that they will be proposing during the enquiry process since this information can be communicated to all bidders. It added that the proper process is to propose products on the bid closing date.

21. With respect to providing a demonstration of its equivalent products, Trust submitted that it had a legitimate interest in these procurements and that it had been prepared to provide the products for testing; however, this offer was ignored by PWGSC. Trust further submitted that the products that it would have proposed would have met the DFO's legitimate operational, public safety and security requirements. It also submitted that it has significant supporters and joint venture partners that would allow it to handle procurements much larger than the procurements at issue.

### **Tribunal's Decision on the Motion**

22. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, is the *AIT*. The procurement is not subject to *NAFTA* or the *Agreement on Government Procurement*,<sup>7</sup> as the requirement for the DFO with respect to Federal Supply Classification 70 (automatic data processing equipment, software supplies and support equipment) is exempt under Annex 1001.2b, General Notes, paragraph 1(e), and Annex 1 respectively.

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6. Confidential version of the complaint.

7. 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].

23. Article 518 of the *AIT* defines “supplier” as “a person who, based on an assessment of that person’s financial, technical and commercial capacity, is capable of fulfilling the requirements of a procurement and includes a person who submits a tender for the purpose of obtaining a construction procurement”.

24. In declaring that Trust was not a potential supplier for the two procurements at issue, PWGSC did not demonstrate that it assessed Trust’s financial, technical and commercial capacity to fulfill the requirements of the procurements. Instead, it relied on assumptions derived from a previous procurement process and a corresponding inquiry which was never completed and should not have been used as a basis to determine if Trust was a potential supplier in the complaints now before the Tribunal.

25. PWGSC did not give Trust the opportunity to establish its capacity, which, given the evidence submitted in these cases, would have readily met the relatively low threshold for determining if a supplier is a “potential supplier” within the meaning of the *AIT*. In *Alcatel*,<sup>8</sup> the complainant demonstrated this capacity by referring to industry alliances, sub-contractors, and in-house manufacturing and outsourcing options necessary to execute the requirements of the subject solicitation and by stating that it had the financial and commercial means to undertake the project as a primary contracting vendor. In that case, the Tribunal found the complainant’s submission credible and persuasive. It was the Tribunal’s opinion that the complainant demonstrated that it had the financial, technical and commercial capacity to fulfill the requirements of the subject procurement.

26. In the information on the record, Trust refers to two industry alliances, an outsourcing option and staff that includes several systems engineers. While the manufacturers’ authorization letters were dated soon after the objection, the Tribunal is satisfied that the purpose of the letters was to prove to it that Trust indeed had the requisite capacity. Trust also stated that it had the means to take on much larger procurements than the ones at issue. In addition, Trust identified products that it considers equivalent and, arguably, has shown knowledge of these products and how they might fulfill the requirements of the procurements at issue. The Tribunal is therefore of the opinion that, on the basis of the information on the record, Trust did have the financial, technical and commercial capacity to fulfill the requirements of the procurements at issue and, on April 25, 2005, determined that, for the purposes of this inquiry, Trust is a potential supplier. Accordingly, the Tribunal dismissed the motion. It did not agree that there was a requirement to grant a time extension for the submission of the GIR in view of all the information set out already by PWGSC in the motion.

## POSITIONS OF THE PARTIES

### Trust’s Position

27. Trust submitted that it has a focus on the provision of products and services that could have met the RFP requirements and that it could have won the contracts if equivalent products to those of Hewlett-Packard, Cisco and NEC had been allowed. Trust submitted that it recognizes and respects the importance of the DFO’s INNAV and issues surrounding public safety and security. However, PWGSC has not provided any *bona fide* technical reasons, or any reasons at all, for requiring only certain manufacturers’ products over other manufacturers’ products, and it has not explained how equivalent products could not meet its functional requirements. It argued that the items in question are products where equivalents can strategically be proposed in order to provide specific lower-cost alternative products to the Crown and, further, that superior products, including monitors with faster response times, could even improve the DFO

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8. *Re Complaint Filed by Alcatel Canada Wire, a Division of Alcatel Canada Inc.* (7 December 1999), PR-99-024 (CITT).

environment. Trust submitted that it had been prepared to provide a demonstration of the equivalent products to prove to PWGSC that they would meet the requirements.

28. Trust submitted that specifying brand-name products with no substitutes has the effect of precluding other vendors like itself from offering competing product solutions. It argued that PWGSC should have provided the details of the actual requirements generically, without listing the names of specific manufacturers and product codes. In support of its arguments, Trust referred to the Tribunal's decision in *Foundry Networks*.<sup>9</sup>

29. Trust submitted that it acted in good faith by following PWGSC's RFP enquiry process. It asked legitimate questions during the solicitation period, and it contended that these questions should have been responded to according to the RFP procedures and that they should have been posted as amendments to the RFPs with the corresponding answers provided simultaneously to all bidders. Trust submitted that PWGSC did not act in good faith by not following the enquiry process and by refusing to answer its questions.

30. In addition, Trust submitted that PWGSC breached *NAFTA*, since its request for a network diagram was not granted. It submitted that PWGSC refused to provide it with relevant and necessary information relating to the existing network devices being used by the DFO.

### **PWGSC's Position**

31. PWGSC submitted that the solicitations were for the purchase of certain replacement components for installation in INNAV on behalf of the DFO. It submitted that INNAV is operated by the CCG as part of the DFO. INNAV monitors and controls marine navigation in all Canadian waters, with the exception of the West Coast, in a manner similar to that of air traffic control. It is a network system connecting 15 CCG Centres with the INNAV centre in Québec, Quebec. INNAV serves a number of operational purposes. By monitoring and providing traffic information to the marine community, it allows vessels to avoid collisions and accidents and, thereby, operate safely in Canadian waters.

32. PWGSC contended that INNAV must operate at a high level of operational readiness on a real-time basis, 7 days a week, 24 hours a day, and that faults and downtime must be minimized. It submitted that these exacting technical requirements require that there be the highest confidence that any replacement parts for INNAV will work seamlessly with the existing system on an immediate basis. PWGSC argued that it is the shared opinion of the DFO and the CCG that the use of any replacement parts other than those that have already been integrated and tested on a full-system basis within INNAV would create unacceptable risks.

33. PWGSC submitted that, given the interests at stake, INNAV must provide its traffic controllers with functionality and tools that are visually uniform and consistent, to ensure that controllers are able to track, at all times, the full traffic image of their responsibility zones. It must also ensure that no element or component of the system functionally or visually impairs a controller's ability to track such traffic at the highest standard. It submitted that, as a purchaser, the Crown is entitled to set its own reasonable and operational requirements in a procurement process. It submitted that Articles 506(11)(e) and 506(12)(a) of the *AIT* reflect the recognition of certain legitimate operational requirements accruing to procuring entities and that, specifically in the case of INNAV, the "no substitute" requirement is based on the DFO's need to maintain security and safety in Canadian waters and to ensure compatibility with existing products.

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9. *Re Complaint Filed by Foundry Networks* (23 May 2001), PR-2000-060 (CITT).

34. PWGSC cited several previous Tribunal decisions in support of its submission.<sup>10</sup> It contended that, with respect to the procurements at issue, it set out the CCG's reasonable and legitimate requirements and that the CCG should not be required to alter those requirements to accommodate any supplier's particular corporate or business circumstances. It submitted that the requirements of the RFPs clearly were not restricted "for the purpose of avoiding competition between suppliers or in order to discriminate against suppliers of any other Party", but rather for legitimate operational reasons, as set in the RFPs.

35. Finally, PWGSC requested its costs incurred in responding to the complaints.

### TRIBUNAL'S ANALYSIS

36. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, is the *AIT*.

37. Article 501 of the *AIT* provides in part that "the purpose of this Chapter [Procurement] is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

38. To this end, Articles 504(1) and (2) of the *AIT* generally prohibit discrimination between goods and between suppliers. Article 504(3) provides in part that, except as otherwise provided in this chapter, measures that are inconsistent with Articles 504(1) and (2) include, but are not limited to:

- (b) the biasing of technical specifications in favour of, or against, particular goods or services . . . or . . . the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter;
- (c) the timing of events in the tender process so as to prevent suppliers from submitting bids;
- (g) the unjustifiable exclusion of a supplier from tendering.

39. This general rule against discrimination is subject to Article 404 of the *AIT*, "Legitimate Objectives", which permits departures from the competitive norm where it can be demonstrated that:

- (a) the purpose of the measure is to achieve a legitimate objective;
- (b) the measure does not operate to impair unduly the access of persons, goods, services . . . that meet that legitimate objective;
- (c) the measure is not more trade restrictive than necessary to achieve that legitimate objective; and
- (d) the measure does not create a disguised restriction on trade.

40. The term "legitimate objective" is defined in Article 200 of the *AIT* as including:

- (a) public security and safety;

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10. *Re Complaint Filed by Computer Talk Technology, Inc.* (26 February 2001), PR-2000-037 (CITT); *Re Complaint Filed by Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT); *Re Complaint Filed by Aviva Solutions Inc.* (29 April 2002), PR-2001-049 (CITT).

- (c) protection of human, animal or plant life or health;
- (d) protection of the environment.

Thus, any solicitation that discriminates in favour of, or against, particular products or suppliers can only be permitted if the procuring entity can satisfy all the conditions of Article 404.

41. In addition, some parts of Article 506 of the *AIT*, which sets forth open procurement procedures that must generally be followed to ensure equal access to procurement for Canadian suppliers, cross-reference Article 504. More specifically, Article 506(7) provides that the process to qualify goods or suppliers prior to the close of call for tenders must itself be consistent with Article 504, i.e. it must not discriminate in favour of, or against, particular products. Similarly, Article 506(9) provides that, for certain procurements that are publicly tendered in a daily newspaper or on an electronic tendering system, “the tender notice shall indicate the restrictions and highlight the practices that do not conform with . . . Article 504.” In other words, if a procurement discriminates in favour of particular goods or against particular suppliers and is nonetheless being exempted on the basis of Article 506 (11) or (12), this fact must be indicated in the tender notice.

42. Article 506(11)(e) permits the use of procurement procedures that differ from those prescribed in Articles 506(1) to (10) where compliance “would interfere with a Party’s ability to maintain security or order or to protect human, animal or plant life or health”. However, these procedures may not be used for the purpose of avoiding competition between suppliers or in order to discriminate against suppliers.

43. Similarly, Article 506(12)(a) provides that a procuring entity may use procurement procedures that differ from those prescribed in Articles 506 (1) to (10)—where only one supplier is able to meet the requirements of a procurement—“to ensure compatibility with existing products”.

44. With this in mind, the Tribunal notes that there are only certain specified items at issue in these complaints. They are specifically, for Solicitation No. F7047-040176/A, items C13, D1 to E4 and E13, and, for Solicitation No. T8211-040003/A, items D1, E1, E13, E16, E17 and E18.

45. The Tribunal will first address Trust’s allegation that PWGSC did not follow its own procedure for addressing enquiries during the solicitation stage by not publishing Trust’s questions as amendments to the solicitations.

46. The RFPs both contained clauses titled “Communications – Solicitation Period” that instructed bidders on the process for making enquiries regarding the bid solicitations. Bidders that submitted an enquiry to PWGSC more than four calendar days prior to the bid closing date could have reasonably expected a response from PWGSC. However, bidders that submitted an enquiry less than four calendar days prior to the bid closing date might not have received a response from PWGSC prior to the bid closing date.

47. With respect to Solicitation No. F7047-040176/A, the original bid closing date was March 3, 2005. Trust submitted questions to PWGSC on February 28, 2005, which was less than four calendar days prior to the bid closing date. The Tribunal is of the opinion that PWGSC was under no obligation to answer Trust’s questions, since they were not originally submitted within the required time frame.

48. With respect to Solicitation No. T8211-040003/A, the bid closing date was March 7, 2005. Trust submitted questions to PWGSC on February 28, 2005, which was more than four calendar days prior to the bid closing date. The Tribunal is of the opinion that Trust submitted its questions to PWGSC in an appropriate and timely manner, requesting the government allow for equivalent products for certain specified items and provide a network diagram to show how certain products were connected to the overall INNAV. Instead of providing a reply to the questions, PWGSC sent the questions to its legal counsel who

sent a letter to Trust. The letter reached Trust on March 8, 2005, which was after the closing date for the solicitations. The Tribunal notes that the letter did not answer Trust's questions.

49. The reason for the non-response given by PWGSC was that Trust was not a "potential supplier" and did not have a *bona fide* interest in the procurements. The facts and analysis on which PWGSC's decision was based were not made available to Trust. PWGSC refers to another procurement and complaint involving Trust where the complaint was subsequently withdrawn and which does not form part of the record in this case. In order to deal with the current complaints on their own merits, the Tribunal does not consider it appropriate to refer to this previous complaint. Based on the evidence before it, the Tribunal is of the opinion that Trust acted in a responsible manner in requesting that the "no substitute" requirement be removed for certain items and that a network diagram be provided for the information of all suppliers.

50. Therefore, the Tribunal finds with respect to Solicitation No. T8211-040003/A that PWGSC breached Article 504(3)(c) of the *AIT* in not providing timely information to Trust, thereby preventing it from submitting a bid. Further, given that PWGSC did not raise any arguments with respect to Article 404, the Tribunal finds that PWGSC has not demonstrated that this breach is permissible under the provisions of the *AIT*.

51. The Tribunal now turns to Trust's allegation that PWGSC acted improperly by not providing it with information that it requested in order to submit a bid, specifically, a network diagram. While Trust made this allegation under Article 1008(2) of *NAFTA*, and the Tribunal previously stated that the applicable trade agreement in this case is the *AIT*, the Tribunal is of the view that this ground of complaint relates to Trust's allegation that PWGSC did not properly respond to its enquiries. A network diagram, insofar as it related to Trust's request for the opportunity to bid equivalent products, may have been of some assistance to Trust and other potential suppliers and levelled the playing field with incumbent suppliers. The refusal to respond to the request for a network diagram and to provide such information to all bidders without providing any explanation has the appearance of favouring the incumbents that were already familiar with INNAV.

52. Therefore, the Tribunal finds that PWGSC breached Article 504(3)(c) of the *AIT* by not providing Trust, and all potential suppliers, with information that it considered necessary in order to submit a bid. Further, given that PWGSC did not raise any arguments with respect to Article 404, the Tribunal finds that PWGSC failed to demonstrate that this breach is permissible.

53. Finally, the Tribunal turns to Trust's allegation that PWGSC incorrectly limited the procurements to brand-name products by not allowing for equivalent products.

54. In keeping with its decision in *Foundry Networks*, the Tribunal is of the view that procurement requirements should be performance-based to the greatest extent possible so that bidders may propose solutions that may be assessed against the Crown's requirements. Where there may be a requirement to test for interoperability or equivalence, this should be stated in the solicitation documents, and the selected bidder may be required to demonstrate the interoperability or equivalence of the proposed product prior to contract award.

55. In the present case, there appears to have been a decision to discriminate in favour of the installed equipment for reasons that were not adequately justified in the solicitation documents. It is conceivable that equivalent products, had they been provided for in the bid, may have been able to meet, or possibly exceed, the department's operational requirements with an improved level of operation and at less cost to the Crown. If the supplier is not afforded an opportunity to propose such solutions and have them evaluated against all other bids, they are effectively shut out of the competitive process. It is not the role of the

Tribunal to judge the equivalence of any products or their relative worth and value, as that is the role of PWGSC and the operating department purchasing the equipment. However, the Tribunal is of the opinion that the solicitation documents could have been written in such a way as to allow for equivalent products to be proposed and for the procuring entity to assess their suitability against the required performance standards of INNAV. Therefore, the Tribunal finds that PWGSC breached Article 504(3)(b) of the *AIT*.

56. PWGSC attempted to exempt the procurements on the basis of Articles 506(11)(e) and 506(12)(a) of the *AIT*. However, the Tribunal notes that these exemptions would only excuse discriminatory tendering procedures, rather than discriminatory technical specifications. While there is some overlap between those provisions and Article 404, there is insufficient evidence before the Tribunal to show that the true purpose of the “no-substitute” requirement was to maintain public security, or to protect human, animal or plant life and the environment, rather than to avoid the obligations of the *AIT*. Further, PWGSC failed to persuade the Tribunal that the discrimination against equivalent products does not unduly impair the access of persons or goods and services that would achieve the same legitimate objective. On the contrary, it appears to the Tribunal that the restriction is unduly and unnecessarily restrictive. Therefore, the Tribunal finds that PWGSC failed to demonstrate that the breach of Article 504(3)(b) is permissible, and the Tribunal must also find that Trust was unjustifiably excluded from tendering, in breach of Article 504(3)(g).

57. Further, given that the solicitations were purportedly exempted under Articles 506(11)(e) and 506(12)(a) of the *AIT*, PWGSC was obliged by Article 506(9) to indicate this in the public tender notice. The RFPs merely stated that no substitute would be considered for compatibility purposes and that a substitute could put the CCG in a very bad situation. In the Tribunal’s opinion, the RFPs do not draw adequately clear references to Articles 506(11)(e) and 506(12)(a) and how they justify non-compliance with Article 504. Therefore, the Tribunal finds that PWGSC breached Article 506(9).

58. In addition, in light of the fact that the procurements do not conform to Article 504 of the *AIT* and it has not been demonstrated that this breach of the *AIT* is permissible, the process to qualify the goods is called into question. In *Lexmark*,<sup>11</sup> as in this case, the procuring entity limited the procurement to a particular brand-name product. The Tribunal found that this was contrary to Article 506(7) because it effectively amounted to a qualification process that itself was inconsistent with Article 504. In particular, by specifying the brand-name product on a “no substitute” basis, the procuring entity biased the technical specifications in favour of that product, contrary to Article 504(3)(b). Similarly, in this case, by discriminating against equivalent products without justification, the procuring entity unjustifiably excluded Trust from tendering, contrary to Article 504(3)(g). In the Tribunal’s view, in the present case, PWGSC effectively limited the procurement to certain brand-name goods qualified prior to the close of call for tenders. As such, the qualification process was itself inconsistent with Article 504 and, therefore, constitutes a breach of Article 506(7).

59. With respect to this breach of Article 506 of the *AIT*, the Tribunal considered the merits of PWGSC’s claims under Article 506(11)(e). The Tribunal notes that the chapeau to Article 506(11) entitles a procuring entity to use procurement procedures that differ from, among others, Articles 506(7) and (9), “provided that it does not do so for the purpose of avoiding competition between suppliers or in order to discriminate against suppliers”. If this condition is satisfied, then, according to Article 506(11)(e), the procuring entity must demonstrate that compliance with the open tendering provisions would interfere with the ability to maintain security, or to protect human, animal or plant life or the environment. In the Tribunal’s view, PWGSC’s argument fails to satisfy any of these conditions. The Tribunal is not persuaded that the purpose of having a qualification process that discriminated in favour of brand names and against

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11. *Re Complaint Filed by Lexmark Canada Inc.* (23 March 2001), PR-2000-070 (CITT).

equivalent products was other than to discriminate against equivalent products or suppliers thereof. As mentioned, it appears that equivalent products may have been able to meet the performance requirements of the DFO, perhaps at a better price. Indeed, in the Tribunal's opinion, PWGSC failed to demonstrate that an open *qualification process* would negatively affect the DFO's ability to maintain security, or to protect human, animal or plant life or the environment.

60. With regard to PWGSC's arguments under Article 506(12)(a) of the *AIT*, the Tribunal notes that the chapeau to Article 506(12) indicates that this exemption applies "[w]here only one supplier is able to meet the requirements of a procurement". Given that two bids were submitted for each of these solicitations, this is clearly not the case here, and this argument also fails.

61. Therefore, the Tribunal finds that the breach of Article 506(7) is also not in conformity with the *AIT* and is therefore not permissible.

62. In light of the foregoing, the Tribunal determines that Trust's complaints are valid.

63. In recommending a remedy, the Tribunal considered all the circumstances relevant to these procurements, including those outlined in subsection 30.15(3) of the *CITT Act*. The Tribunal views these cases as serious breaches of the procurement rules. A supplier was denied information on which to base a bid that may have been to the advantage of the Crown. Furthermore, the basis for refusing to consider and respond to the supplier's legitimate questions has not been provided to the supplier and has the appearance of not being in good faith. Further, by insisting on a product-specific solution for these procurements without an adequate explanation of the reason for rejecting performance-based specifications, PWGSC compromised the competitive conditions that are to be the norm.

64. The Tribunal notes that contracts have been awarded and that delivery was to have been completed by March 31, 2005. Accordingly, it would not be appropriate to recommend that the contracts be terminated and the requirements re-tendered. The Tribunal therefore recommends that, within 30 days from the date of the statement of reasons, the parties propose to the Tribunal an agreed upon amount of compensation to Trust which would reflect the profit that it reasonably would have made on the procurements, had it been the successful bidder on both procurements, and an appropriate amount that recognizes the degree to which the integrity and efficiency of the competitive procurement system was prejudiced, the degree to which Trust and all other interested parties were prejudiced and the degree to which the parties acted in good faith.

65. The Tribunal awards Trust its reasonable costs incurred in preparing and proceeding with the complaints. In determining the amount of the cost award for these complaints, the Tribunal 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. The Tribunal's preliminary view is that these complaint cases have a complexity level corresponding to the second level of complexity referred to in Appendix A of the *Guideline* (Level 2). The procurements involved the provision of many off-the-shelf items, and the complaints involved allegations of restrictive specifications. The complaint proceedings for the two solicitations had many parallels and were therefore dealt with as a single inquiry by the Tribunal. The proceedings were moderately complex in that there was one motion and the process followed the express option, 45-day, time frame. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$2,400.



**DETERMINATION OF THE TRIBUNAL**

66. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaints are valid.

67. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC compensate Trust by an amount that reflects the profit that it reasonably would have made had it been the successful bidder in Solicitation Nos. F7047-040176/A and T8211-040003/A. The Tribunal further recommends that PWGSC compensate Trust with an appropriate amount that recognizes the degree to which the integrity and efficiency of the competitive procurement system were prejudiced, the degree to which Trust and all other interested parties were prejudiced and the degree to which the parties acted in good faith. The Tribunal recommends that the parties develop a joint proposal for compensation, to be presented to it within 30 days of the publication of the statement of reasons. Should the parties be unable to agree on the amount of compensation, the parties shall report back to the Tribunal separately within the same 30 days, following which the Tribunal will issue its recommendation in this respect.

68. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Trust its reasonable costs incurred in preparing and proceeding with the complaints, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for these complaint cases is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. 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.

Meriel V. M. Bradford

Meriel V. M. Bradford

Presiding Member