Procurement Review Board of Canada
La commission de révision des marchés publics du Canada

IN THE MATTER OF:

A Complaint By Cardinal Industrial Electronics Ltd. of 10630 - 172 Street Edmonton, Alberta

Board File No: D89PRF6608-021-0005

AND IN THE MATTER OF:

The Free Trade Agreement Implementation Act, Part II, Sec. 15 S.C. 1988, Ch. 65.

27 February 1990

DETERMINATION BY THE BOARD

This complaint concerns a contract with Her Majesty the Queen, as represented by the Department of Supply and Services (DSS), that was signed on 24 August 1989. This contract, worth $16,544., was awarded to Webster Instruments Ltd (Webster) of Ottawa Ontario, for the supply of 32 "American Power, 330XT, 120VAC/60 cycle Uninterruptible Power Supplies, for the Canadian Embassy, San Jose, Costa Rica."

At this low price, the contract may not have been thought to fall within the Free Trade Agreement (FTA) which only applies to procurements above a threshold of $25,000. US ($31,000. Cdn) and below the (GATT) Code threshold ($213,000. Cdn). However, a notice of the proposed procurement (NPP) was published in the official publication called Government Business Opportunities (GBO) in its 7 June 1989 issue, carrying the "Tendering Procedure" code F-01, meaning that the procuring authorities estimated that this procurement was likely to result in a contract whose value would be in the Free Trade range, and that the tendering procedure was "open" (as opposed to "selective" tendering from source lists). (This estimate proved not as unreasonable as might be thought at first glance because, as will be seen from what follows, the subsequent solicitation produced 24 bids ranging in value from just under $14,000. to over $44,000.).

The Complaint

The issue the complainant, Cardinal Industrial Electronics Ltd. (Cardinal), has raised is simply that they were the lowest responsive bidder, whereas DSS awarded the contract to Webster for a higher-priced product, and that this did not comply with the terms and conditions of the bid solicitation. They asked the Board to recommend re-tendering.

The Department of Supply and Services (DSS), in its response to this complaint, has dealt with that issue at some length. However, they have also raised an additional issue that goes to the jurisdiction of this Board to entertain this complaint at all, and it is necessary, therefore, to deal with this issue at the outset.

The Jurisdictional Issue

Simply put, the DSS position is that the Board's jurisdiction in these government procurements coincides with the range of applicability of the Free Trade Agreement, and that no complaint may be brought in respect of a contract that has been awarded unless it "has a value that (a) exceeds the amount of the threshold fixed by article 1304 of the (Free Trade) Agreement (Cdn $31,000.)...and (b) is less than the amount of the threshold of the (GATT) Code (Cdn $213,000.)..." (The quoted excerpts are from Sec. 15 of the Free Trade Agreement Implementation Act (FTAI) Part II S.C. 1988, Ch. 65, which will be more fully set out shortly).

Plainly, with a contract value of only $16,544.00, the contract at issue here appears to fall below that lower threshold, and if that were all there was to the argument, the Board would indeed be without jurisdiction.

In fact, the Board itself was influenced by this view at first, and went so far as to write a letter to the complainant, Cardinal, on 16 October 1989 advising them that the complaint had been rejected on the ground that

> "...it did not meet the criteria set forth in Sec. 15 of the...Act. More precisely, the value of the subject contract is $16,544. and since this is less than the amount of the threshold fixed by Article 1304 of the Free Trade Agreement, currently $31,000. ($Can.), it does not fall within the jurisdiction of the Board. The complaint has therefore been ruled inadmissible."

Shortly afterward, however, the Board had occasion to reconsider this view and, on the basis of legal advice (the burden of which will be hereinafter set out), it sent a notice to the complainant on 1 December 1989 advising that:

> "A legal review of this position has led to the conclusion that the Board's jurisdiction is not so limited and this notice is now to advise you that the Board intends to proceed with the processing of your complaint on Monday 11 December 1989. This short delay is provided because the premature rejection of your complaint was based on a view of its admissibility that was not attributable to the fault of the parties, to afford reasonable notice of the Board's intentions to the parties, and to enable you to take such action as you wish."

The notice went on to state:

> "On that day, the Board intends to take up the process at the point at which it was interrupted, and will
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> (a) publish notice of the filing of the complaint pursuant to Sub-section 28(2) of the PRB regulations;
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> (b) send a copy of the complaint to the awardee of the contract that is the subject of the complaint pursuant to Sub-section 25(2) of those regulations, and
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> (c) if necessary, extend, pursuant to Sub-section 39(2) of those regulations, the time limit referred to in Sub-section 39(1) thereof within which the Board is required to issue a determination on the complaint.
>
> Yours truly,
>
> Jean Archambault
> Secretary to the Board"

A copy of this notice was sent to DSS at the same time.

Subsequently, the Board took all of the actions listed in the notice, and in particular, by Order of the Board dated 21 December 1989, made pursuant to Sec. 39(2) of the PRB Regulations [PC 1988-2865 of 30 December 1988 (SOR/89-41)] by reason of exceptional circumstances set out therein, the Board extended to 2 March 1990 the time within which it was required to issue a determination on this complaint, as fixed in Sec. 39(1) of the said Regulations.

No one has advanced the notion that as a result of the above actions taken by the Board, the Board might be "functus officio" in this matter (i.e. had discharged its duty to the extent of its authority), and for that reason alone, is without authority to re-enter upon consideration of this complaint.

Accordingly, the Board is not obliged to deal with that issue as part of this determination. However, the Board takes the view, for the record, that the earlier decision to reject the complaint was based upon an erroneous view it took of its own jurisdiction, an error which might have been corrected by a superior court, had anyone taken the trouble to appeal it. In the circumstances, it seems reasonable that the Board should be able to correct its own error itself so that any appeal might proceed upon the merits, rather than upon a technical ground that enables the substance of the matter to be avoided.

Moreover, particularly where:

(a) the parties are not prejudiced as a result of having acted in reliance upon the rejection;

(b) the matter had not been dealt with on the merits; and

(c) (bearing in mind that the contract had been awarded and completed long before the complaint was filed) that to deal with the merits now would not be more prejudicial than to have dealt with it at the time the complaint was filed,

the Board has decided that it ought to correct the error upon which it first proceeded.

The jurisdictional issue raised by the government institution in its response has significant ramifications for the operations of the Board and,

as it seems to us, for the operation of an effective bid challenge system. What follows, therefore, is a full setting out of the reasons for the Board's decision to take jurisdiction in this case.

Section 15 of the Free Trade Agreement Implementation (FTAI) Act reads as follows:

> "15. Any potential supplier may, within the time and in the manner prescribed, file a complaint with the Board in relation to any aspect of the procurement relating to a contract awarded or to be awarded by a governmental institution where the contract is prescribed or is of a prescribed class of contracts and has a value that
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> (a) exceeds the amount of the threshold fixed by Article 1304 of the Agreement or such lesser amount as may be prescribed; and
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> (b) is less than the amount of the threshold of the Code referred to in Article 1304 of the Agreement or such greater amount as may be prescribed."

(Throughout these reasons there will be frequent references to the legislative scheme that underlies the Board's existence and activities. It would unduly lengthen these reasons to set them out fully herein. However, the various parts of the scheme will be found in Part II of the FTAI Act S.C. 1988 Ch. 65; Chapter 13 of the Free Trade Agreement (relating to Government Procurement) which is incorporated into the FTAI Act; Annex 1305.3 to Chapter 13, and the GATT Agreement on Government Procurement (revised text 1988). The reader will find it convenient to have these references at hand when considering these reasons.)

The difficulties with this section flow from the words: "any aspect of the procurement relating to a contract awarded or to be awarded", and from the existence and inter-action of the two monetary thresholds, as these apply to the various common situations to be met with in the procurement field nowadays. (There are, of course, other possible jurisdictional problems arising from other words used in Sec 15, but for the moment attention is directed to the problems that flow from the foregoing.)

Section 15, whether intentionally or not, has the effect of dividing complaints into 2 groups:

- those that are about some aspect of the procurement relating to a contract that has been awarded, and

- those that are about some aspect of the procurement relating to a contract that IS TO BE AWARDED (but isn't yet).

If the complaint is in the first group (re a contract that has been awarded), then, of course, it remains only to determine the value of that contract and measure it against the two thresholds, to determine if the Board has jurisdiction; if it falls between the two thresholds, the Board has jurisdiction; if it falls above the upper threshold, or below the lower threshold, then the Board is without jurisdiction.

But if the complaint is in the second group (re a contract that is yet to be awarded) then there is an immediate problem because there is no contract whose value can be measured against the thresholds to determine jurisdiction. Can this possibly mean then that there can be no complaint in such a situation?

We believe not. It is obvious that Parliament fully intended complaints to be possible in respect of contracts to be awarded because:

(a) Section 15 plainly says so: "Any...supplier may...file a complaint...in relation to...the procurement relating to a contract...to be awarded by a governmental institution...";

(b) Section 16(1)(b) authorizes the Board to make an order postponing the award of the contract (which could only be done in respect to a procurement that had not yet proceeded to contract award);

(c) Section 16(2) allows an exception to Sec. 16(1)(b) when delay in procurement (to the extent of postponing contract award) would be prejudicial to the public interest - which it wouldn't have been necessary to say if complaints weren't possible before the contract was awarded; and

(d) Section 19(1)(ii) includes among the remedies that the Board may recommend, a recommendation that new bids be sought - a remedy that could be available only in the case of a complaint that had been brought before contract award.

These four clues afford positive evidence that Parliament intended the Board to deal with complaints relating to contracts not yet awarded.

But, which ones? Plainly it is absurd to suppose that Parliament, wanting these matters to be dealt with, intended a mystery over this question.

There are no obvious clues how to deal with the fact that, without a contract, there can be no "value" to measure against the thresholds to determine which, among all such complaints, are within the Board's jurisdiction.

Could we take the value of the procurement as the measure? Apparently not, for two reasons: the word "value" in the grammatical context here relates to "contract" not "procurement", and anyway procurements don't have precise values; at best they have estimated values. Only after competition or negotiation to bring the procurement to the point of contract award, could it be said to have some reasonably precise value...but even there, such value would be the value of the contract (or that contract, since more than one contract can emerge from a single procurement) not the procurement, properly so-called.

In a case such as this, where the two thresholds are such an obvious part of the rule that controls jurisdiction - but there is no clear expression of Parliamentary will about how to make use of them - it is necessary to turn elsewhere.

Is it possible that we could, in effect, treat the expression "awarded or to be awarded" as somehow not really being intended to have the result of dividing all complaints into these two groups? Could we argue that it was not intended to have that effect because in point of fact, the words are merely descriptive of what the procurement is about and not restrictive of what the complaint is about.

FTA annex 1305.3 - which sets out the principles that are to guide the set up of Bid Challenge procedures - provides that bid challenges may concern "any aspect of the procurement process...leading up to and including the contract award." It is apparent therefore, and it is of course always the case, that the events or facts that give rise to a complaint invariably occur prior to contract award. Even if the complaint concerns the award of the contract itself, the central issue will be why it was so awarded, and will turn on events (usually the decision-making process) that preceded the actual award.

Can we argue therefore, that Sec. 15 is aimed at setting out the Board's jurisdiction to investigate only those events that occur prior to award, and that the

way the statute chose to say that ("any aspect of the procurement relating to a contract") merely had to have additional words descriptive of the contract ("awarded or to be awarded") - recognizing that sometimes the events would be known of before the award of the contract, and sometimes they would not be known of until afterwards.

In the result, we would argue, the words "awarded or to be awarded" are merely descriptive of the contract to which the procurement relates...because it is any aspect of the procurement that is to be subject of the complaint.

This is an attractive idea because it focuses on the jurisdictional point that the complaint is about events that occur prior to contract award...implying, in effect, that all complaints are about events that relate to contracts that are "to be awarded". None is a complaint about the awarded contracts themselves.

The principal difficulty with this proposal is that it doesn't get over the problem of the thresholds. We still have a situation in which there is no contract with a known value, to measure against those thresholds. We will still be cast back to the problem set out above...that Parliament intended the Board to deal with procurements relating to contracts yet to be awarded...But which ones?

Yet another possibility may be found in the GATT Code which is incorporated in the FT Agreement (by FTA Chapter 13 Act 1302.1). There we find a rule (relating, admittedly, to the application of the Code - not to the Board's jurisdiction) to which we can analogize to help solve the problem.

This rule is found in the GATT Code, Article I.1(b), and in Footnote 3, which read as follows:

"Article I

Scope and Coverage

1. **This Agreement applies to:**

(a)...

(b) any procurement contract of a value of SDR 130,000 or more.[2,3] No procurement requirement

shall be divided with the intent of reducing the value of the resulting contracts below SDR 130,000. If an individual requirement for the procurement of a product or products of the same type results in the award of more than one contract or in contract being awarded in separate parts, the basis for application of this Agreement shall be either the actual value of similar recurring contracts concluded over the previous fiscal year or twelve months adjusted, where possible, for anticipated changes in quantity and value over the subsequent twelve months, or the estimated value of recurring contracts in the fiscal year or twelve months subsequent to the initial contract. The selection of the valuation method by the entity shall not be used with the purpose of circumventing the Agreement. In cases of contracts for the lease, rental, or hire-purchase of products, the basis for calculating the contract value shall be:

(i) in the case if fixed-term contracts, where their term is twelve months or less, the calculation should be based on the total contract value for its duration, or, where their term exceeds twelve months, its total value including the estimated residual value;

(ii) in the case of contracts for an indefinite period, the monthly instalment multiplied by forty-eight;

(iii) if there is any doubt, the second basis of calculation, namely (ii), is to be used.

In cases where a proposed procurement specifies the need for option clauses, the basis for application of this Agreement shall be the total value of the maximum permissible purchases, lease, rentals or hire-purchases, inclusive of optional purchases.

[2] For contracts below the threshold, the Parties shall consider, in accordance with paragraph 6 of Article IX, the application in whole

or in part of the Agreement. In particular, they shall review the procurement practices and procedures utilized and the application of non-discrimination and transparency for such contracts in connection with the possible inclusion of contracts below the threshold in this Agreement.

[3] **This Agreement shall apply to any procurement contract for which the contract value is estimated to equal or exceed the threshold at the time of publication of the notice in accordance with Article V:4."**

[Note: Paragraph 1(b) has been quoted in full; however, for present purposes, only the first sentence, and footnote 3 **(bolded)**, are germane to this discussion (Footnote 1 is omitted because it is not relevant to para(b)). The GATT Code on Government Procurement came into effect on 1 January 1981, and it included footnote 2. Footnote 3 was added to the Code in February 1988. Obviously, seven years of experience with a rule of application containing the same problem as that found in Sec. 15 of the FTAI Act (viz...how to apply the Code to a procurement - the value of which cannot be known for sure, when the rule in the Code itself purports to apply only to CONTRACTS) drove the framers of the Code to the solution set out in footnote 3.]

The thing to note at this point is that it is, of course, the existence of the notice feature, coupled with the threshold, that creates the problem of needing to know BEFORE there is a contract, if the Agreement applies to it. And that is the same problem created in Sec. 15 of the FTAI for the Board's jurisdiction: the need to know before there is a contract, if a complaint may be made in respect of it.

Footnote 3 to para(b) provides a simple rule for Code application where a "notice of procurement" (required by Art V:4 of the Code and mentioned in the footnote) must be published in respect of a procurement relating to a contract the value of which cannot yet be known. (The notice of proposed procurement (NPP) is required under the Code - as it is under FTA - to enable potential suppliers to be aware of the procurement and respond to competition, yet because of the fixed threshold, there is a need to know if the Code applies to the procurement BEFORE there is any contract having a value that can be measured against it. Note that the Code (absent the footnote) would apply to "any procurement CONTRACT having a value..." above the threshold.)

The rule is simply that the value to be used for measurement is the estimated value of the contract at the time the Notice (NPP) is published, at which point "contract" and "procurement" are, in effect, synonymous.

By analogy, we could adopt the same rule to determine the Board's jurisdiction under Sec. 15 of the Act. We could then take the value of the contract expected to result from the procurement, as estimated at the time of publishing the NPP, and measure that against the thresholds mentioned in Sec. 15 of the Act (the requirement to publish is the same one set out in Art. V:4 of the GATT Code, owing to its incorporation into the FTA).

(This should be simple enough in practice since all procurements (sole source procurements are the exception) that come under FTA are disclosed in notices published weekly in the Government Business Opportunities (GBO) book - which is the publication authorized for Canada for these purposes. All such procurements are identified with the code letter 'F' (for Free Trade) - on the basis of an estimate that has been made, that the value of the contract likely to result from the procurement will fall in the Free Trade range set out in Art 1304.1 of the Agreement. Such notices are required by the Code, and the estimates are made in order to display the fact that a determination has already been made by the government that the Code applies to that procurement. In the case of sole source procurements, they are identified at the inception of procurement - even though no NPP is published. The proof of this is that they are later identified in notices of contract award, together with the reason - selected from the GATT Code - that justifies the sole sourcing.)

If we adopted this rule as a rule for determining Board jurisdiction, we would have a handy means of determining that question when a complaint brought to the Board relates to a contract that had not yet been awarded.

The rule proposed would then be: when the complaint is in relation to any aspect of a procurement relating to:

(a) a contract awarded, - and the value of that contract falls between the thresholds, the Board has jurisdiction.

(b) a contract to be awarded - and the estimated value of the contract likely to result from the procurement falls between the thresholds, the Board has jurisdiction.

The Board is conscious that at this point it is beginning to suppose that Parliament must have intended to use words other than those it plainly did in the statute, and it is conscious of the dangers of so doing. There is, of course, a legal

presumption that words in a statute are strictly and correctly used. Although their grammatical and ordinary sense must be harmonized with the purposes of the statute, this does not allow us to (nor would a Court in attempting to interpret Sec. 15) depart from the grammatical and ordinary meaning unless an absurdity would thereby result. Having established that the precise words of Sec. 15 lead to an absurdity, the Board must be as strict in testing the logic of its proposed rule as it was in testing Sec. 15. If such a rule does not produce a logical result, then it is not appropriate in any case and we shall have to search for another rule.

The rule proposed does unfortunately have some problems:

Example 1: If a procurement is advertised (i.e. given notice of in the GBO) at a level that falls between the two thresholds - and if it is complained of to the Board before any contract is awarded - the Board will have jurisdiction (the second branch of the rule covers this). But if the same procurement results in the award of a contract, which owing to the vagaries of competition, or price escalation, has a value that is either below the lower threshold or above the upper one, and if the complaint is THEN brought before the Board...the result will be that the Board is without jurisdiction (the first branch of the rule prevents this).

Is that reasonable, from a practical point of view? Unfortunately, for the procuring agency (the governmental institution) and the potential suppliers, it produces uncertainty in that when the advertised procurement is estimated to be one to which the Free Trade Agreement applies, then all the other features of the Free Trade Agreement, including the bid challenge mechanism of course, are available to all potential suppliers who participate in the procurement process. On the other hand, having entered into the process on that basis, and if the resulting contract value falls outside the jurisdictional "window" of the Board, they will find, if they then wish to complain about the bidding process, that the bid challenge mechanism they thought was part of the process has been shorn from it, and no bid challenge is possible.

This produces uncertainty and procedural unfairness for the suppliers and for the procuring department, and is illogical because the loss of a legal right to lodge a complaint is unpredictable and not based on any action taken by the parties themselves, and cannot be foreseen at the time the decision is made to participate in the procurement.

That this situation is intolerable will be understood even more fully when it is realized that it works in reverse with even more illogical and unfair results;

Example 2: If a procurement is NOT advertised at all (because it is estimated as not likely to produce a contract valued above the lower threshold -

and as a result, there is no legal obligation to publish the NPP) OR if the procurement is advertised at a level above the GATT threshold (and is not therefore identified in the GBO with the Code "F"), then it is evident that any complaint brought to the Board in respect of it, before contract award, must fail for lack of jurisdiction in the Board, according to the second branch of the rule.

But, if owing to the same marketplace vagaries mentioned above, the same procurement results in the award of a contract whose value does fall within the jurisdictional "window" set out in Sec. 15 - AND if a supplier chooses THEN to complain, they will be surprised to find that the Board has jurisdiction to hear the complaint, according to the first branch of the rule.

This is illogical and unfair for several reasons - the first being (as in the first example) that the parties entered into the procurement process believing that it was not one to which FTA applied - and that the bid challenge mechanism was not available to them, only to find that for reasons unpredictable and not attributable to actions of their own, a legal right to complain has - after the award -suddenly become available to them. This is unfair because it is an unexpected windfall to the supplier, and because it exposes the procuring governmental institution to a formal complaint where they had expected, and had prepared for, none.

Moreover, it is not merely the vagaries of the marketplace as it affects the ultimate contract value that is unpredictable. Equally unpredictable is the timing of the events that give rise to the complaint. The complainant has only a very limited time (10 days after they knew or should reasonably have known of the basis for the complaint - Sec 23 - PRB Regulations) to file the complaint, and it is not predictable when the events that give a basis for complaint will occur, or when they will learn of them. They could occur at any time before award of contract - but they may well not know of them until after award. Thus, the complainant cannot choose when they will file the complaint, even if they knew and understood the above proposed jurisdictional rule and wished to take advantage of it.

And there is yet a third inequity produced by the proposed rule in this example: If the contract value, after award, fell within the Board's jurisdictional "window" (which is to say that it became one to which FTA applied) but if it was never advertised because it was estimated as likely to fall below the lower (FTA) threshold, then a range of potential suppliers who would have been interested in competing for it - will never even have had the opportunity to learn of its existence because no NPP was ever published. Moreover, the right to protest that would unexpectedly arise after contract award is largely an empty right because, by that time, the contract is awarded and will, in many cases, be already performed. Finally, any notice of contract award would likely appear in a general section of the GBO without necessarily any FTA identifier.

On the other hand, if the contract (whose value upon award fell within the Board's jurisdictional "window") had been advertised above the upper threshold, then there is the possibility that GATT competitors who bid on the procurement, would be afforded a right of bid challenge they were never intended to have.

A note here, about Notices...Proposed Procurements and Contract Awards:

These NPP's are a critically important feature of GATT and FTA. They must normally be published at least 40 days before tender closings: they constitute invitations to tender and they are literally the foundation of a "transparent" or open procurement system (the only exceptions are sole source contracts - presumably because no other tenders are to be invited - more about this later). Transparency is also catered for by a requirement to publish notices of contract AWARDS, not later than 60 days after award (including sole source awards).

Canada complies with these requirements, and all such notices appear in the GBO.

With respect to procurements below the FTA threshold (Cdn $31,000) there is no obligation to publish any NPP - and Canada does not do so. For those procurements (to which GATT applies) and whose value lies above the upper threshold (Cdn $213,000) the NPP must identify the contract as a GATT Contract -and if so, then it is not an FTA contract and the PRB bid challenge system is not available in respect of it.

Besides this, there are many contracts not coming under GATT or FTA (for instance all DOT, DOC, DFO and certain DND and RCMP contracts) and no NPP is ever published in the GBO for any of them. However, the government has taken a policy decision to publish in the GBO notices of all unclassified DSS contract awards (whether FTA or not) above $50,000 if issued out of Headquarters, and above $10,000 if issued out of the Regional Offices.

Now these complexities result in a situation (related to the third inequity referred to above) in which an apparently NON-FTA procurement is either not advertised at all (below the lower threshold) or advertised as (say) a GATT procurement (above the upper threshold) - and yet, as noted, either case could result in a contract award within the FTA range. But no notice of it will come to general attention until after the notice of contract award is published in the GBO...not later than 60 days afterward in the case of an FTA or GATT contract, or whenever DSS chooses to publish in the case of those other procurements that don't come under FTA or GATT.

The result is that alert suppliers will have to act within 10 days of that notice of contract award (the one that fell unexpectedly within the FTA range, although not advertised there) if they are to get their complaint in on time. But even if they do complain in time, it will be too late for any effective remedy should a complaint prove well-founded. The point of all this is that the defect lies in the under-estimation of the value of the contract in the first place...another matter that is not the fault of the supplier and may not be unreasonable on the part of the government either.

The reason why this second example produces even greater procedural unfairness than the first one is because the proposed rule is adapted from a GATT application rule that was tailored to cope with a problem arising from the existence of a lower threshold. It was never intended to cope with a second problem that arises from the fact that the FTA (and the Board's jurisdictional control) has an upper threshold as well, which, of course, the GATT Code does not. Obviously, any assumption made that the application rule that applies to the lower threshold would work in reverse when applied to the upper threshold, proves to be wrong.

Unfortunately, the situations examined thus far, even though they expose the practical defects in the proposed rule, do not exhaust the situations that any procuring governmental institution will be faced with and which also will run afoul of the proposed rule. And these other situations are not only common, but they complicate both the application of the proposed rule of Board jurisdiction, and they appear to be giving difficulty in the application of the Code itself, to judge by the lengthy explanatory language that takes up the bulk of para (b) of Article I:1 of the Code . These other situations include the following:

- It is not uncommon to initiate a single procurement for several different categories of similar goods, and provide in the bidding documents that the government reserves the right to select a winner on the basis of the best over-all price...or to select several winners on the basis of the best unit or item prices, or the best prices of lots of goods within each of the various categories. This can and frequently does result in the award of several contracts whose values are all considerably below the originally estimated value of the total procurement (which is the value given in the NPP). It will be common therefore that procurements advertised above the upper threshold will produce several contracts valued below it. Or that procurements advertised within the FTA range will produce several contracts some or all of which may fall below the lower threshold.

- Another common practice concerns "standing offer" agreements that are awarded to winning bidders on the basis of the best offered prices for estimated lots of goods to be ordered under the Standing Offer...but in

> respect of which there is no obligation to order any goods at all and for which no real contract comes into being until a "call-up" is made against the offer. Any one of these "call-up" contracts may be well below the lower threshold of the Board's jurisdiction - but taken together over the applicable period of time, they may fall within the Board's jurisdiction. (This is the situation - taken in the context of the Application of the GATT Agreement itself - that most of the rest of Article I:1(b) of the GATT Code is designed to cope with).

It is the certain need to allow the Government to procure by these methods, coupled with the unpredictability of both the timing of, and the knowledge about, the events that lead to a complaint, plus the unpredictability of the value of the various contracts likely to result from any given procurement initiative that conclusively display, in the Board's opinion, the unacceptability, not only in fact but in law, of the proposed rule of jurisdiction.

At this point it becomes necessary to turn to the statutory rules of construction. The rule required here is the one set out by the late E.A. Driedger in his book "Construction of Statutes" (2nd Ed. 1983 at 87) which has almost universal approval in the courts: (eg: Travail des Femmes v. CNR, (1987) 1 SCR, 1114), as follows:

> "Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Following this rule, we must turn to all the surrounding circumstances of the Legislation in question - the totality of the FTAI Act itself, and the FT Agreement that is approved by it, and the GATT Agreement on Government Procurement (the Code) that is incorporated in, and forms part of, the FT Agreement - to determine the meaning and intent of Parliament when it enacted Sec. 15.

In this connection, the following items seem to be relevant:

<u>In the FTAI Act Itself</u>:

(a) <u>There is a Preamble</u>, which sets out the purposes of the Legislation, among which is found:

- "to establish a climate of greater predictability for Canadians...to compete more effectively."

(b) Sec. 3 states that it is the purpose of the Act to implement the Free Trade Agreement, and it provides that one of its objectives is "to facilitate conditions of fair competition within the Free Trade Area";

(c) Sec. 4 provides that the Act is binding on Her Majesty.

(d) Sec. 8 provides "The Agreement is hereby approved."

In the Free Trade Agreement:

(e) There is a preamble setting out that one of the purposes of the Agreement is "to ensure a predictable commercial environment"

(f) Article 102 sets forth the objectives, among which is "to facilitate conditions of fair competition", and

And in Chapter 13 relating to Government Procurement:

(g) Art 1302 - in which the parties reaffirm their rights and obligations under the (GATT) Code;

(h) Art 1301 - setting out its objectives as being

- "fair and open competition", and
- "the parties undertake the obligations of Chapter 13."

(i) Art. 1303 - by which the Code, as modified or supplemented by Ch. 13, is incorporated into and made part of Ch. 13;

(j) Art. 1305(3) in which the parties undertake "to...introduce and maintain equitable, timely, transparent and effective bid challenge procedures", and

(4) "provide sufficient transparency to...ensure that the bid challenge procedure operates effectively"

And in Annex 1305.3 (to Chapter 13) on the Principles Governing Bid Challenge Procedures

(k) "challenges may concern any aspect of the procurement process leading up to and including the award of contract", and

(l) the mechanism shall afford "impartial and timely consideration to any complaint or bid challenge brought by any supplier".

(m) "each party shall specify in writing and shall make generally available to all potential suppliers, all bid challenge procedures..."

From the foregoing (which is not quoted in extenso - but is summarized from the several texts that are readily available, in order to condense what is already a lengthy examination of the subject), the Board concludes that the true intent and purpose of the legislation, insofar as it relates to the bid challenge system, may be said to be as follows:

> To implement for Canada, an international undertaking to provide an equitable (i.e. procedurally fair), transparent (i.e. all the details of which are known from the outset), and effective bid challenge system, to facilitate fair competition, to ensure a predictable commercial environment, and in which disputes relating to any aspect of the procurement leading up to and including an award of contract are dealt with promptly and impartially by an independent mechanism available to all potential suppliers.

The critical notions are equity, transparency and the assurance of a predictable commercial environment.

It is precisely in these areas, for the reasons set out above, that the jurisdictional rule set out in Sec. 15 of the Act, and the proposed modifications of it, just discussed, fail us and lead to the absurdities outlined above.

It is because of the absurdities that have been shown to result from the straightforward language of Sec. 15 (and the proposed rule for interpreting a part of it), that we must seek for a rule that both makes sense of the words used in the statute, and accords with the true intent and purpose of the Act, which has been derived as outlined above.

In the Board's view, there is a rule that is drawn from the language of Sec. 15 - and which can satisfy all the other criteria as to fairness, transparency, and commercial predictability that we are seeking. It involves merely taking the rule proposed above, eliminating its first branch (i.e. where the complaint relates to an awarded contract and its value falls between the thresholds, the Board has jurisdiction) and extending the second branch of the rule to cover the first case (and adding a special phrase to cover the case of sole source contracts for which NPP's are not published and which would be left out if the reference to 'estimates at the time of publishing the NPP' were left to stand by itself).

Thus, revising the proposed rule, and rewriting it to incorporate it into the Language of Sec. 15, with as little change as possible, the rule would read as follows:

> Any potential supplier may, within the time and in the manner prescribed, file a complaint with the Board in relation to any aspect of the procurement relating to a contract **or contracts with** a governmental institution, where **any such** contract is prescribed or is of a prescribed class of contracts and **is estimated at the time of the inception of the procurement or at the time of publication of the Notice of Proposed Procurement, to be likely to have** a value that:
>
> (a) exceeds the amount of the threshold fixed by Article 1304 of the Agreement or such lesser amount as may be prescribed; and
>
> (b) is less than the amount of the threshold of the Code referred to in Article 1304 of the Agreement or such greater amount as may be prescribed,
>
> **regardless of the actual value of any awarded contract and whether the complaint is brought before or after any such award.**

(The added words have been bolded.)

This rule is based on estimated contract(s) values, having been drawn from the Code application rule set out in Art. I:1(b) of the Code - but it is extended to apply to both upper and lower thresholds, and to do away with the (essentially misleading) issues of whether the contract has yet been awarded, and what is the actual value of the awarded contract.

This rule would also meet the criteria of **equity** (in that it would apply equally in all cases requiring notice - regardless of ultimate contract award value), and **transparency** (in that it would be known from the moment public notice is given of the proposed procurement whether the bid dispute mechanism would be available in respect of the contracts to flow from the proposed procurement - and it would cover sole source contracts, from the time notice is given of them). As well, it would contribute to ensuring an environment of **commercial predictability** in that the legal right to make a bid challenge would not be taken away because of either the economic vagaries of the marketplace, or the vagaries of timing relating to <u>when</u> the facts giving rise to the challenge occur, or come to the attention of the complainant; nor would such a right come unexpectedly into existence because of such vagaries, none of which matters is within the control of the parties.

Admittedly, there is one striking aspect of this rule that must give anyone concern, and this is simply that it flies in the face of the only aspect of the language of Sec. 15 that seems relatively clear...viz - that where the value of the awarded contract falls between the thresholds, the Board has jurisdiction. However, as we have recited above, this literal interpretation of Section 15 leads to an absurd result, and it is for this reason that it requires another interpretation. The interpretation that the Board now proposes to give to this section is reasonable, is drawn from a Code application rule that was designed to cope with the <u>same type</u> of problem under the Code that the Board has in respect of its jurisdiction under the FTAI Act, and does no violence to, and in fact conforms to, what the Board takes to be the true intent and purpose of the Act, and covers (so far as presently appears) all the known types of procurement that must be catered for.

Accordingly, the Board has determined that it will, in interpreting the meaning of Sec. 15 of the FTAI Act, for the purposes of determining its own jurisdiction, adopt the interpretation set out in the proposed rule above.

As that rule applies to this case, it would enable the complainant to bring this complaint to the Board because the procurement was given notice of in an NPP published in the GBO, which identified it as one to which the Free Trade Agreement applied. All potential suppliers who acted upon the Notice were entitled to believe that all the features of the Free Trade Agreement, including the bid challenge mechanism, were available to them. Finally, notice of contract award was published in the GATT/FTA section of the GBO.

In the result, the Board determines that it has jurisdiction to entertain this complaint.

On the Merits

Turning now to the substance of the complaint itself:

As mentioned earlier, on December 11 1989 a notice of complaint was sent to DSS and an acknowledgement of its re-activation was sent to the complainant. On December 13, 1989, the Board received notification from DSS as to the identity of the contract awardee, Webster Instruments Ltd. (Webster), and subsequently, pursuant to paragraph 16(1)(a) of the Act, Webster was sent a copy of the complaint. A notice of complaint was published in both the Canada Gazette Part I and Government Business Opportunities.

On December 21, 1989, the Board received a letter (see Investigation Report (I.R.) Appendix 6) from DSS stating:

> "The Department will not be filing a Government Institution Report as required by Section 30 of the Procurement Review Board Regulations (Regulations). The Department is asking that this response be accepted instead.
>
> The Department is asking that, pursuant to Section 32(1)(c) of the Regulations, the complaint be dismissed."

On December 22, 1989, the Board sent a letter (see I.R., Appendix 7) to DSS requesting that the "department fulfil its obligation to submit a report that responds fully to the allegations of the complaint." At that time, the Board also notified DSS, as well as the complainant and the contractor, that the time limit for making a determination in this case had been extended to March 2, 1990, pursuant to subsection 30(2) of the Regulations (see I.R., Appendix 8). On January 3, 1990, the Board received a written request from DSS asking for an extension of time for filing the Government Institution Report to January 12, 1990. Pursuant to subsection 30(5) of the Regulations, the Board granted this request (see I.R., Appendix 9).

DSS filed the Government Institution Report (subsection 30(1) of the Regulations) with the Board on January 12, 1990. A copy of the report was sent to the complainant, pursuant to paragraph 30(3)(a) of the Regulations, who in turn

filed comments (subsection 31(1) of the Regulations) with the Board on January 24, 1990. The complainant's comments were forwarded to DSS, pursuant to subsection 31(2) of the Regulations. Since the contract had been awarded on August 24, 1989, the provisions of paragraph 16(1)(b) of the Act, dealing with the postponement of award, could not be considered.

The Investigation

The allegations of this complaint, along with the government response to those allegations and the complainant's comments on the government response, were investigated through interviews and the examination of files in both DSS and the Department of External Affairs (DEA).

A number of individuals were interviewed in person and/or by telephone to confirm various statements made and/or contained in the documentation. These included Ms. W. Ladouceur, DSS (the Contracting Officer); Mr. M. Munroe and Mr. M. McDonald, DEA (the officers performing the technical evaluation); Mr. W. Hennessey, DEA (the originator of the requisition); Mr. M. Kaczon, Alpha Technologies, Vancouver; Mr. T. Carlson, Olivetti Canada Ltd., Ottawa; Mr. T. Hofmann and Mr. R. Holland, Cardinal Industrial Electronics Ltd., Edmonton; and Mr. D. Collins, Webster Instruments Ltd., Ottawa.

The Board, with the assistance of the Association of Consulting Engineers of Canada, engaged the services of DTI Télécom Inc. of Montreal as a technical advisor, pursuant to section 17 of the PRB Regulations. A letter from the Secretary to the Board to the consultant outlined the conditions of that engagement (see I.R., Appendix 10). The consultant's report is at I.R., Appendix 18.

The report of this investigation, made to the Board by its investigative staff, contains a number of appendices relating to material and documents deemed relevant by them as part of the basis of that report. Particular reference is not made to all of these supporting documents in this determination, but they are available to the parties, as may be required, and, subject to the provisions of the Access to Information Act, to any other person.

Because the investigation produced sufficient information to enable the Board, in its opinion, to resolve the issues raised in this complaint, it was determined that no formal hearing was required in the present case. The Board, in reaching its conclusions, has considered the report of its investigative staff and has made its findings and determinations on the basis of the facts disclosed therein, the relevant portions of which are mentioned in this determination.

The Procurement

The purchase order, which is the subject of the complaint (see I.R., Appendix 11) was issued on August 24, 1989. This purchase order, worth $16,544 and awarded to Webster Instruments Ltd. (Webster), was for the provision of thirty-two (32), American Power, 330XT, Uninterruptible Power Supplies (UPS) for DEA. A notice of the award was published (see I.R., Appendix 12) in the September 27, 1989 issue of Government Business Opportunities (Vol. 1 No. 26) in the GATT/FTA Contract Award Section.

Initiation of the Procurement

As part of the Canadian International Development Agency (CIDA) Decentralization Project, DEA was responsible for the setting up of facilities in Costa Rica. Concerns about protecting valuable data and equipment have led to the inclusion of UPS units as standard items for personal computers and other critical electrical/electronic equipment. This procurement was just such a case. A requisition (see I.R., Appendix 13) was initiated by the project office that was coordinating the property management details of setting up the post in Costa Rica, for twenty-seven (27) Alpha 300FR UPS units. The specification of the Alpha 300FR is said to have been based on an evaluation (see I.R., Appendix 14) performed by the Information Systems Division in DEA as a result of earlier procurements of like devices. Although the requisition had listed an `available from' source (not Cardinal or Webster), there was no indication that the procurement was intended to be a `sole source' or that an equivalent substitute would not be considered. The estimated value for the requisition was $32,000 which prompted the procurement to be treated as falling within the Free Trade Agreement Chapter on Government Procurement. A note to file by the contracting officer and the request for insertion in Government Business Opportunities confirm this treatment (see I.R., Appendix 15).

A Request for Proposal (RFP) with a closing date of July 17, 1989 was formulated by the Capital Region Supply Centre of DSS (see I.R., Appendix 16). A notice of proposed procurement (NPP) (see I.R., Appendix 17) was published in the June 7, 1989 issue of Government Business Opportunities under the GATT/FTA Section for Notice of Proposed Procurement. The RFP and the NPP specified "Alpha 300FR UPS units. 60 cycles 220 volts for the Canadian Embassy, San Jose, Costa Rica" and permitted the substitution of equivalent products. The RFP also mentions that any contract resulting from it will normally be awarded to the lowest bidder.

Subsequent to the publication and at the request of DEA (see I.R., Appendix 13) an amendment to the RFP was issued by DSS to revise the electrical specification from 220 volts to 110 volts. All companies that had requested bid packages were advised of the change required.

In response to the NPP, twenty-four (24) bids were received by DSS that ranged in value from just under $14,000 to over $44,000

Technical Background

It became necessary during the course of this investigation to analyze certain technical aspects of this procurement. A summary of the relevant portions follows. This information was collected as a result of consultations with Alpha Technologies, Olivetti Canada, the manufacturer of the end-use equipment, and the Board's technical advisor, DTI Télécom Inc. In addition, we examined the technical submission by the complainant and those included in some of the proposals received in response to this procurement.

A UPS (Uninterruptible Power Supply) can be of two basic configurations: 1) on-line, providing power to the end-use equipment continuously through the battery support system, and 2) off-line or "stand-by" with batteries that are not in the continuous circuit but transfer in when the main power supply is interrupted. A special type of "stand-by" unit uses a device called a ferroresonant transformer to constantly condition the power being received by the end-use equipment. A feature called transfer time is the time it takes a "stand-by" unit to switch the end-use equipment on to reserve power when the main power is interrupted.

The unit specified in the RFP, the Alpha 300 FR, is a "stand-by" UPS that incorporates a ferroresonant transformer. This UPS has an effective transfer time that is instantaneous because of the use of the transformer design. The unit offered by Webster is a "stand-by" UPS without the transformer but with a transfer time of 1-3 milliseconds. The unit offered by Cardinal (the complainant) is a "stand-by" UPS with a transfer time of 4-8 milliseconds. The Board's technical advisor has advised that "all three types of SPS under review would perform satisfactorily with most micro-computers." (see I.R., Appendix 18). Further, the Board's technical advisor indicated in this report that, for certain applications with a linear power supply, a 1-3 ms transfer time is a clear advantage. Given the application in this case, however, (Olivetti M290 personal computers which have switching power supplies) this is irrelevant.

The Technical Evaluation

The Property Acquisition and Development Division of DEA initiated the requisition but they were not the technical authority that performed the evaluation of the bids. The technical authority for this procurement was the CIDA Decentralization Project Office of the Information Systems Division of DEA.

Once the tabulation of the bids had been performed, the contracting officer contacted the requisitioning officer and was re-directed to the appropriate authority within DEA for the technical evaluation of the bids.

The contracting officer's note to file (see I.R., Appendix 19) indicates that the technical authority was given the five lowest bidders' quotes and model numbers. No technical literature was transmitted at this point although it was requested from all bidders submitting equivalent products. On August 10, 1989, responding to a request by the technical authority, the contracting officer sent the `spec.' sheet that was included in a bid from Webster. This `spec.' sheet (see I.R., Appendix 20) described the American Power Conversion Corporation model 330XT as offered by Webster.

As confirmed in a memo dated August 18, 1989 (see I.R., Appendix 21), the technical authority advised the contracting officer that, as agreed, all bids offering a "stand-by" design "are unacceptable, as they do not provide on-line power conditioning."

The August 18 memo also stated that Webster's offer of "the American Power Conversion Corporation's UPS model 450AT meets all the requirements and was the lowest acceptable submission." (The model actually proposed was the 330XT. The reference to model 450AT was said in the Governmental Institution Report to be in error.)

It should be noted here that the technical authority was operating on two critical assumptions. One was that the proposal by Webster was for an on-line UPS. The second was that the specification in the RFP (the Alpha 300FR or equal) was also for an on-line UPS. Neither is supported by the facts.

On September 1, 1989, a memo (see I.R., Appendix 22) was sent from the DEA technical authority to the DSS contracting officer to confirm their telephone conversation during which the eligibility of the Webster proposal was discussed. It had been discovered by the technical authority that the American Power Model

offered (again mistakenly referred to as the 450AT in the memo) was "stand-by" in design. Based on their original criteria for evaluation, they were requesting that the Webster "bid...be rejected". It should be noted that at this point in time more than just a bid existed. In fact, a purchase order accepting the Webster offer had been issued by DSS as of August 24, 1989.

A note to file (see I.R., Appendix 23) indicates that the contracting officer notified Webster on September 5, 1989 of the decision to cancel the purchase order. It also indicates that a representative from Webster wanted to deliver a sample unit to the DEA technical authority for evaluation.

This sample was delivered on September 7, 1989 to the technical authority and tried out after installing it on a personal computer being used in the office. Over the course of a week, the power was interrupted by pulling the plug out of the wall outlet during various operations. Although no problems were encountered with lost or corrupted data, the technical authority issued a memo to DSS (see I.R., Appendix 24) stating: "the bids submitted by Cardinal and Webster, which were not for on-line UPSs but in fact a Standby Power Supply (SPS), or off-line power supplies, are not acceptable." It should be noted here that no opportunity was given to Cardinal to provide a sample for try-out even though they too were offering a "stand-by" unit and they were the lowest bidder.

Over the course of the next three days, a number of contacts were made between Webster, the technical authority, and the contracting officer. The end result was that the technical authority came to agree, as per a note to file dated September 18, 1989 by the contracting officer (see I.R., Appendix 25), that, notwithstanding paragraph 2 of the 18 August 1989 memo, the 1 September 1989 memo, and the September 15, 1989 memo, the units proposed by Webster would be suitable for the purpose intended. The purchase order was left as awarded to Webster.

Up to this point during the procurement, the only reference to transfer time that is documented is contained in a letter (see I.R., Appendix 26) dated September 14, 1989 from American Power Conversion, the manufacturer of the product offered by Webster, to DEA through Webster. This letter states "stand-by in design, its [model 330XT] transfer time of 1-3 milliseconds is fast enough to ensure uninterrupted operation of your phone system during momentary power outages." The end-use equipment was not a phone system but stand-alone personal computers.

DISCUSSION

The Government's Response

The DSS response to the allegations of the complaint, signed off by the Director General, Central Directorate, (see I.R., Appendix 27) can be split into two main sections. The first does not deal with the complaint but refers to the jurisdiction of the Board in this case. This issue has been addressed earlier in these reasons. The second section sets out the DSS view of the chronology of events during the procurement in question.

The Board's investigation has revealed certain contradictions with respect to the events listed by DSS. Among those that are relevant are:

1. "8 August 1989 The five lowest proposals were submitted to External Affairs for technical evaluation..."

In fact, the only documentation that was received by the technical authority was one specification sheet relating to the product offered by Webster. No other technical literature was received even though it was called for in the RFP and submitted by most bidders including Cardinal. There is a note on the DSS procurement file (see I.R., Appendix 19) indicating that the "quotes and model names" were given to the technical authority by telephone.

2. "1 September 1989 Cardinal Industrial Electronics Ltd. contacted External Affairs to question the evaluation procedure."

No evidence has been found that supports this statement. The representatives from Cardinal who were involved in the procurement state that they were not in contact with the technical authority. The individuals involved in the technical evaluation and the originator of the requisition have no recollection of ever being contacted by Cardinal representatives. According to Cardinal, DSS was not contacted regarding this procurement until after they had read about the award of the contract in Government Business Opportunities (October 2, 1989). As well, the DSS procurement file makes no mention of any such contact.

There are two reasons why this is relevant. First, if there had been contact, Cardinal might have been able to make representations that would have led to the same treatment for them as was afforded Webster. Second, if a possible basis for

complaint had been known on September 1, 1989 and a complaint filed at that time, it would have resulted in a wider range of remedies being available to resolve this complaint.

3. Finally, the reference for September 18, 1989 states:

> "...The letter [from American Power Conversion] indicated that although the unit was stand-by in design, its transfer time of 1-3 milliseconds was fast enough to ensure uninterrupted operation for the telephone system during power outages. The SOLA unit offered by Cardinal and other bidders had a transfer time of 4-8 milliseconds.
>
> Based on this information, External Affairs advised SSC by telephone that the units from Webster's would be acceptable and to maintain the purchase order."

The phrase "Based on this information..." implies that a comparison in transfer times was performed by the technical authority and that the difference in times was critical. According to the DEA technical authority, however, no comparison of transfer times was performed. The Webster unit was judged acceptable at the outset and a contract awarded. It was then rejected when it was found to be stand-by in design. Even though it was found suitable based on the "try out" done at the office of the DEA technical authority, it was rejected again after that. Finally, it was accepted again after communications with Webster. The statement referring to a telephone system as the end-use equipment was apparently taken from the letter from the supplier.

The Complainant's Comments on the Governmental Institution Report

The complainant's comments to the governmental institution report (see I.R., Appendix 28) were filed with the Board on January 24, 1990. The comments mistakenly identify the "Alpha" unit as the device referred to in the American Power Conversion letter (see I.R., Appendix 26). The actual unit referred to is the 330XT which is the purchased unit. As well, the complainant may have been misled by the reference to a telephone system as being the end-use equipment.

There is a statement, however, that says:

> "In conversations with Sola Canada, their engineers feel that faster transfer times do nothing to improve performance in practical applications."
>
> In addition, it states:
>
> "I would suggest that if your equipment is so sensitive to require a 1/16 of a cycle [1.04 milliseconds] transfer time and any fluctuations over 3.16 of a cycle [3.1 milliseconds] cannot be tolerated you should not be using a stand-by supply...If your equipment is not that sensitive I would suggest there is no advantage in a 1-3 ms over a 4-8 ms transfer time."

The latter part of this statement is supported by the opinion received from the Board's technical advisor. In addition, Olivetti Canada has provided information (see I.R., Appendix 29) with regard to their computer's power supply which in turn supports the independent assessment. This documentation states that: "The power supply supports a total power failure for a max. period of 20ms without system operation being jeopardized." This indicates that the transfer time issue as described is immaterial.

Findings

1. A request for proposal (RFP), which asked for twenty-seven (27) Alpha 300 FR UPS units, was issued by DSS and was published in Government Business Opportunities under the GATT/FTA section.

2. The RFP was in response to a requisition issued by DEA and contained the same specification. The RFP also contained two clauses as follows:

> "NOTE TO SUPPLIERS QUOTING ON EQUIVALENT SUBSTITUTES:
>
> FAILURE TO PROVIDE SUFFICIENT DESCRIPTIVE LITERATURE WITH WHICH TO EVALUATE YOUR BID AGAINST REQUIRED SPECIFICATIONS WILL RENDER THE BID NON-RESPONSIVE."
>
> and

> "Any contract resulting herefrom will normally be awarded to the tenderer whose quotation produces the lowest total cost at point of destination."

3. Twenty-four proposals were received prior to bid closing deadline. These bids proposed a variety of equipment brands and ranged in value from just under $14,000. to over $44,000. Cardinal submitted the lowest bid and Webster the second lowest.

4. The contracting officer was told by the technical authority from DEA that all "tenders received for Standby Power Supply (SPS) units are unacceptable."

5. The DEA technical authority believed that the specified unit (the Alpha 300 FR) was an on-line UPS.

6. The Alpha 300 FR is, in fact, a "stand-by" UPS that employs a ferroresonant transformer in its circuitry [this feature allows continuous power conditioning and, under most conditions, makes the unit appear as if it is an on-line type].

7. The contracting officer sent the technical authority only the documentation (specification sheet) from what was believed to be the lowest responsive bidder, Webster.

8. Webster was offering an American Power 330XT Uninterruptible Power Supply.

9. The technical authority indicated the Webster proposal met all the requirements and at the same time requested an increase in the number of units to thirty-two (32). (Their memo mistakenly refers to a different model than that proposed).

10. A purchase order for thirty-two (32) American Power, 330XT, Uninterruptible Power Supplies was issued by DSS to Webster on August 24, 1989 and the firm was so notified.

11. The technical authority informed DSS on September 1, 1989 that the Webster bid was no longer acceptable because it had determined that the proposed unit was a "stand-by" UPS.

12. Webster was informed on September 5, 1989 by DSS, by telephone, that the purchase order was going to be cancelled.

13. Webster supplied a sample unit to the technical authority for evaluation on September 7, 1989.

14. The technical authority notified DSS on September 15 that neither the Webster nor the Cardinal bids was acceptable and that DSS should then go to the "next eligible bidder on the list."

15. After communications among Webster, DSS and DEA, the technical authority changed their decision and agreed that the proposed unit by Webster would be suitable for their purposes.

16. The purchase order was left as awarded and the units were obtained from Webster.

17. DEA indicates that the units were in Costa Rica by September 26, 1989.

18. Cardinal had submitted a bid proposing a Sola Basic SPS 450, a "stand-by" power supply.

19. When comparing all the bids for twenty-seven (27) units, the Cardinal bid was the lowest of all bids received.

20. Cardinal, the low bidder, was not given the same opportunity as Webster to demonstrate the characteristics of the product they were offering.

21. The Cardinal bid was rejected because its literature stated the Sola product was a "stand-by" power supply.

22. The Webster bid was accepted even though it offered a "stand-by" unit.

23. For the end-use equipment, personal computers with a switching power supply, the Board's technical advisor has advised that any of the following would have been acceptable and, therefore, equivalent:

    1. Alpha 300FR
    2. American Power 330XT
    3. Sola Basic SPS 450

Documentation from Olivetti Canada supports this assertion.

24. Cardinal was the lowest responsive bidder.

CONCLUSION ON THE MERITS

a) Liability Issues

The findings set out above indicate that the allegation in Cardinal's complaint is valid.

By using decision criteria in the evaluation of bids that were not clearly specified in advance (initially, a mandatory on-line design requirement and subsequently an unexpressed transfer time requirement) and then ostensibly applying them in an inconsistent manner, DSS failed to provide all potential suppliers equal opportunity to be responsive to the requirements of the procuring entity in the tendering and bidding phase. The DSS Supply Policy Manual Directive 3002 clearly states, in paragraph 15c - Bid Solicitation, that contracting officers must "Ensure...that mandatory requirements are clearly defined." Paragraph 15d goes on to say: "Do not use "brand name or equal" type of purchase description unless no other specification is available. In such cases state, in addition to the "brand name", those salient physical, functional or other characteristics essential to the customer's needs." Although the procuring entity is not expected to be expertly knowledgeable about all the technical requirements of the client department (the use of a technical authority is authorized to provide for this) the procurement policy and directives relating to the use of technical requirements and trade references in formulating solicitation documents and in evaluating bids are clear.

It may be argued that the product offered by Cardinal did not meet the specification because it has a transfer time of 4 to 8 milliseconds where as the Alpha 300 FR has an effective zero transfer time. The response to this argument is two fold. First, if an effective zero transfer time was a requirement, the chosen product offered by Webster did not meet it. Secondly, the end-use equipment can accommodate a transfer time of greater than 8 milliseconds and therefore this feature is not critical anyway.

The Board concludes that although something is sought to be made of the transfer times issue before the Board, yet at the time of evaluation it did not figure in the evaluation of the bids, and for a good reason. All transfer times under

consideration were fast enough. It is true that the transfer times of the products offered by the complainant and by the contract awardee, were marginally slower than for the product that was used as the standard in the specification. However, to insist that any product offered as an "equal" must match every feature of the product used as the standard in the specification would be to deprive the specification of its general applicability, reduce the words "or equal" to meaninglessness, and turn the procurement into a "no substitute" purchase.

It is clear that, for the purposes of this procurement, the transfer times under consideration were all fast enough to be properly considered "equal" to the standard called for in the specification. If transfer times had in fact been of such importance that it was intended to form part of the criteria for discriminating among bidders, then it ought to have been specifically set out in the specification. That it was not is justified by the fact that, in the end, transfer times were not the basis of choosing the winner in this competition. The error, if that is the way to express it, lay elsewhere.

It also may be argued, whether rightly or wrongly, that the product offered by Webster is better than the product offered by Cardinal and only involved paying a relatively small premium. This is irrelevant. Cardinal was eliminated on the basis that their documentation stated they were offering a stand-by power supply. This, in fact, was not contradictory to the specification published in Government Business Opportunities or that in the RFP which called for an "Alpha 300 FR or equal." The Alpha product is a stand-by power supply. The product offered by Webster was ultimately accepted, and the contract allowed to stand, even though it was known by then to be a stand-by power supply. If the criteria contained in the specification had been applied equally to all bidders, Cardinal would have succeeded in this procurement action since they were the lowest responsive bidder. Cardinal has, as a result of the government actions taken in this procurement, lost a contract for government business.

In the last analysis, this is simply a case of overlooking the low bidder. It is a fundamental principle in competitive solicitations for government contracts that, all other things being equal, the low bidder is awarded the contract. This is not only obvious, but it is reflected in Government policy in several places - in particular, in the DSS Supply Policy manual, Directive 3002, where it is set out that bid solicitation processes must ensure (inter alia) that DSS obtain the best value for the taxpayer's dollar. In the case of bid solicitations conducted by way of Invitation to Tender (ITT) or by way of Request for Quotation (RFQ), the

directive requires, in paragraphs 29 and 31, that tenders and quotations shall be evaluated with the objective of accepting the lowest priced responsive bid. In the present case, the solicitation was by way of Request for Proposal (RFP) in respect of which para 30 of the Directive requires that Proposals shall be evaluated in accordance with criteria set out in the RFP. Such criteria were set out in the RFP, and one of them specified that:

> "Any contract resulting herefrom will normally be awarded to the tenderer whose quotation produces the lowest total cost at point of destination."

Both the Webster and the Cardinal bids quoted prices that were for delivery at the required point of destination. Therefore, Cardinal would normally have been the successful bidder.

The Board can see nothing that would take this evaluation out of the "normal" category. Can it be argued that if DSS had given Cardinal's product the same consideration they gave the Webster product, they might have rejected it? There is no evidence whatever on which to base speculation of that kind. It is sufficient for disposal of the issue of liability in this case, to know that both products met the specification, and Cardinal's product was less expensive for the government. By the government's own rules then, Cardinal should have been awarded this contract. But for the non compliance of the government with its own rules and directives, Cardinal would have, in fact, been the successful bidder.

In this respect, the Board has no fault to find with this aspect of the system under which DSS operates. Indeed, the system appears to meet the requirements of modern law in this field - as will be discussed shortly - and if it had been properly applied, it would have worked as it was intended to work. As the DSS directive quoted above says, at para. 4:

> "As DSS functions in an environment which permits constant scrutiny, it is imperative that its actions adhere to existing laws and regulations. The bid solicitation system and its operation must therefore be and be seen as scrupulously impartial."

b) Compensation Issues

Accordingly, the complainant, having been successful in establishing the case before us, the Board intends, firstly, to award reasonable costs of filing and proceeding with the complaint, and secondly, to award the complainant reasonable costs relating to the preparation of their bid. These two awards are to be established before the Board, by appointment for determination, within 30 days of notification of this decision.

This raises the question of the appropriate remedy to recommend in this case. The Board's jurisdiction to apply remedies, in cases where it has determined that the requirements of Sec. 17 have not been met, are rather closely circumscribed by the provisions of Sec. 19. Apart from awarding costs, the Board may only recommend an appropriate remedy, including any one or more of several possible remedies specifically listed.

Five of the items on the list relate to: new solicitations (and this was the relief requested by the complainant), new bid calls, re-evaluating bids, and terminating an awarded contract and awarding the contract to the complainant. They are all inappropriate in this case because the awarded contract has been fully performed, the goods delivered and entered into service. It is simply impracticable to attempt to undo what has been done in this case as a result of the failures determined by the Board to have occurred. To recommend any of them would, if carried out, cause additional hardship and unfairness to the government and also to the Contract Awardee who has already fully discharged all its obligations under the contract.

The Board, however, may recommend that compensation be awarded to the complainant and the appropriate amount thereof, and this appears to the Board to be a proper case for such a recommendation. The Board believes, however, that the principles that ought to apply to determining the kind and amount of any compensation that it might recommend, should be the same as those which would apply in a court of law having jurisdiction to deal with a case similar to that before the Board.

The Board's determination has been that there was a breach of contract here. The contract in question is the one characterized as "Contract A" by the Supreme Court of Canada, in its judgement in the Ron Engineering case[1]. That case was a considerably more complex procurement operation than faces the Board here, involving as it did, an irrevocable bid with a security deposit, a purported mistake, and a deposit forfeiture controlled by certain surrounding terms and conditions; all being features lacking in the present case. However, for present purposes, it is, we think, sufficient to observe that the Court held that in a proper case, the submission of a tender in response to a tender call causes a contract to arise between the contractor and the owner. The contract is brought into being automatically upon the submission of a tender. It is characterized as "Contract A" to distinguish it from "Contract B" which is the contract that would arise upon acceptance of the tender. It is governed by the terms and conditions specified in the tender documents, which become part of the terms of "Contract A". In the Ron Engineering case, these included a number of complex provisions relating to the deposit and the irrevocability of the tender (not relevant here) but they also included other terms such as the qualified obligations of the owner to accept the lowest tender, the degree of that obligation being controlled by the terms and conditions established in the call for tenders (a matter that is very relevant to us here). (see Estey J. at p. 275).

Is this present case an example of the type of tendering situation in which such a unilateral contract can be brought into being? In considering this question, it must be borne in mind that it is possible there could be some doubt over this matter. The doubt arises over the relative simplicity of the present case, compared to that dealt with by the Supreme Court of Canada and from a recent case in the Federal Court of Appeal, (called the Hertz Case[2]) in which is found

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[1]The Queen in Rt. of Ontario et al v. Ron Engineering and Construction Eastern Ltd. 119DLR (3rd) 268 (SCC)

[2]The Federal Court of Appeal, per Heald J, in The Queen v. Canamerican Auto Lease et al 1987 3FC 144 (the Hertz case), noted with apparent approval that the Trial Judge in that case had observed (p. 156) that not every tendering process will create a preliminary or initial contract...and that she had examined the circumstances in the case before her to determine whether the tendering procedure there amounted to a simple invitation to treat or whether it was in the nature of an offer to enter into a preliminary contract. She had concluded that the tendering process in question was the latter for reasons quoted in the judgement, which had mainly to do with the irrevocability of the

apparent approval for the idea that not every tendering process will create a preliminary or initial contract.

The Hertz case involved not a call for tenders (in which the lowest price is being sought) but a call for offers to receive a concession for a rent-a-car stand at Federal airports (in which the highest offer is usually being sought). Nevertheless, the Trial Court found, and the Appeal Court agreed, that this was a situation, like tendering, in which a "Contract A" came into being upon the submission of offers to the government.

The reason we think that the "Contract A" situation arises in this case is that, simple though it was, the invitation to tender (here called a Request for Proposals) contained very specific terms and conditions; in fact (matching the Hertz case), virtually all the terms of the final contract (and there were 12 pages of them) were contained in the tender specifications, and, following the observations of Mr. Justice Estey in Ron Engineering, the terms included the qualified obligation of the government to accept the lowest tender (which is the issue in this case) controlled by terms and conditions precisely set out in the Request for Proposals.

The consequences for a government procurement, of a tendering process of this sort (and perhaps of <u>any</u> sort, if rightly understood -- although the Board expresses no opinion of this latter point), is that there has been set up by the government a framework of relatively elaborate rules for the conduct of the tendering operation, and those rules apply to the government as well as to the tenderer. Everyone "playing the game" is entitled to rely upon the supposition that the "game" will be played by those rules. When the "game" is not played by those rules, one party or another can be expected to be injured. In this case, as in the Ron Engineering case, the "game" was the preliminary contract or "Contract A" and the principal rule at issue was that the contract would normally go to the low bidder.

In the present case, those rules were not complied with by the government party to that preliminary contract, and that is a breach of contract.

Before departing from this point, it will be convenient to deal with one other matter which, happily, has been dealt with in the Hertz case in a manner similar to that we propose to apply here. In that case, counsel for the government noted

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offer, the payment of a deposit, and tender specifications that contained virtually all the terms of the final contract.

that among the other clauses in the tendering documents was one that read "The Department will not necessarily accept the highest offer, nor will it be bound to accept any tender submitted..." It was argued there, that this clause also forms an important part of "Contract A" and should be adhered to, with the result that, even though the government did not follow the rules, it was the one "player" in the "game" that didn't have to, and thus there had really been no breach of contract at all.

The Federal Court of Appeal noted with approval that the Trial Judge had rejected the government's reliance on the "no tender need necessarily be accepted" clause, characterizing it as "a 'boiler-plate' type" clause, adding: "If the defendant's argument is correct, that clause would vitiate any tender contract; it would empower the Department to choose in a completely arbitrary way between tenderers."

The Appeal Court agreed with that view of the matter, noting that "to give paramountcy to this clause would be to render nugatory and completely meaningless the Award Procedure clause of the Specifications..." (per Heald J. at p. 157).

Now in the case before us, a similar clause is to be found in the Request for Proposals. It, too, comes over in the guise of "boiler plate", appearing, as it does, in fine print on the back of "page 1 of 12" - being the cover page for the RFP, DSS Form 9400-2. The relevant sentence appears in para 2 under the heading "Instructions" on the back of that form, as follows:

> "2. Offers may be accepted in whole or in part and may be accepted on a lowest price per item and/or destination or group of items and/or destinations or on a lowest aggregate price basis. The lowest or any offer will not necessarily be accepted. In case of error in the extension of prices, the unit price will govern. Offers will remain open for acceptance for a period of not less than 60 days from the closing date of this solicitation, unless otherwise indicated herein by DSS."

The Board notes that this clause comes under the heading "A. INSTRUCTIONS", and treats of 4 different subject-matters in the same clause. It is not represented to be a condition of the contract (although nine other clauses

on the same page do appear under a heading called "B. CONDITIONS"). (The Board notes also that this same clause imposes a requirement that bids be held open for 60 days unless otherwise indicated...a feature similar to the "irrevocable tender" provision in the Ron Engineering case...and a point that offers further support for the proposition that this is a "Contract A" situation.)

The Board is far from contending that these clauses are meaningless in appropriate situations; however, they are general in nature and cannot be used to contradict or over-ride specific clauses that are set out to govern the tendering procedure. On this issue, the Board believes it ought to be guided by the decision in the Hertz case.

Turning now to the compensation itself, the Board will follow the legal principles that govern the award of damages in a case of breach of contract. The main purpose of damages in such a case is to place the complainant in the position in which (in the contemplation of the parties at the time of contracting) they would have been, had the contract been performed.[3]

In this case, that seems to involve recognizing that, had this contract been awarded to the complainant, they would have earned the profit, if any, they had expected from the sale of 32 SOLA BASIC SPS 450 units, at the price per unit quoted in the complainant's proposal, less bid preparation costs, which the Board intends to award the complainant, as already noted. This compensation, if awarded, would require to be demonstrated as to its precise amount by evidence on the subject, placed before the Board - which the Board will determine if the intended recommendation is accepted. The Board believes that this is the amount that could reasonably be expected to have been in the contemplation of both parties at the time the proposals were submitted, as being the likely loss that the complainant would suffer if a breach of the kind that occurred here had taken place.

Proceeding now to its determination:

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[3]This principle hardly requires case citations to bolster it, but is to be found in statutory form in the various Sale of Goods Acts where the measure of damages is set out usually as being "the estimated loss directly and naturally resulting in the ordinary course of events from the...breach of contract." (Sec. 48, 49, 51) It stems from the case of Hadley v. Baxendale (1854) 9 Ex 341 and is frequently cited with approval in case law, including the Hertz case (footnote 2) supra.

DETERMINATION

The Board has determined on the basis of its investigation that this procurement by the Department of Supply and Services did not comply with the requirements referred to in Section 17 of the Free Trade Agreement Implementation Act in that it did not "provide all potential suppliers equal opportunity to be responsive to the requirements of the procuring entity in the tendering and bidding phase."

The Board has also decided:

1. **to award the complainant reasonable costs relating to filing and proceeding with the complaint, and**

2. **to award the complainant reasonable costs relating to the preparation of its bid.**

Finally, the Board recommends that compensation be awarded to the complainant based upon the amount of the profit, if any, it would have received had it been awarded a contract for thirty-two SOLA Basic SPS 450 units (at the price per unit quoted in the complainant's proposal), less the bid preparation costs referred to in 2. above the precise amount to be settled by the Board after conferring with the parties.

Gerald A. Berger
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Chairman
Procurement Review Board of Canada