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

IN THE MATTER OF:	
A Complaint By Environmental Growth Chambers, Ltd. of Winnipeg, Manitoba, a Division of Integrated Development & Manufacturing of Chagrin Falls, Ohio, U.S.A.	**Board File No: D90PRF6631-021-0017**
And a Complaint By Enconaire (1984) Inc. of 80 Sutherland Avenue Winnipeg, Manitoba	**Board File No: D90PRF6631-021-0018**
AND IN THE MATTER OF:	
The Free Trade Agreement Implementation Act, Part II, Sec. 15 S.C. 1988, Ch. 65.	

14 January 1991

DETERMINATION BY THE BOARD

These two complaints relate to a single procurement that was undertaken to fulfil a National Research Council requirement for one environmental growth room and two environmental growth chambers, for use in their Plant Biotechnology Institute (NRC-PBI) located in Saskatoon, Saskatchewan.

Since both complaints raise essentially the same issues and seek the same remedies, and since the determination of each turns upon exactly the same facts, the Board has been able to deal with these complaints together for the purposes of this determination.

The basic facts are relatively straight-forward. At NRC's request, the Department of Supply and Services (DSS or SSC), through their Regional Office in Regina, commenced a competitive procurement action to meet the above requirement. The competition closed at 14:00 on 18 October 1990, at which time two bids, one from each of the complainants in this case, had been received. However, only hours before the closing, DSS received a facsimile message from NRC cancelling their requisition and DSS so advised the bidders later that day. NRC's reasons were confirmed to DSS the next day by facsimile message stating that "*The Scientist's* [sic] *have reconsidered and decided not to make this purchase.*" DSS concluded that the requirement no longer existed, published a notice of cancellation in the GBO, and "*closed this file*" (see I.R. Appendices 7 and 8).

However, the complainants both learned independently that one of their competitors, a Winnipeg company called Controlled Environments Limited (or Conviron) had received an order for exactly the same equipment from a Saskatchewan Government agency called the Saskatchewan Economic Development Corporation (or SEDCO), on a sole source basis, to be installed in a building SEDCO owned on the campus of the University of Saskatchewan, in which a portion of NRC's Plant Biotechnology Institute is located. And in fact, the equipment was to be used by PBI.

The complainants contend that NRC-PBI had not decided to forego the purchase at all - but had decided to have it procured for them on a sole source basis by their landlord.

These complainants therefore both allege that they were not given a fair and equal opportunity to be awarded this contract, and they claim not only their costs of pursuing their complaints, but their bid preparation costs and other costs, losses, and damages as well.

Both of these complaints were filed in time and met the other technical requirements for filing. Since at that date no formal contract or other arrangement had been concluded, the Board issued a Stop Award Order to NRC on 13 November 1990, pursuant to paragraph 16(1)(b) of the Free Trade Agreement Implementation (FTAI) Act.

The Investigation

The allegations of these complaints, the government response to those allegations, and the complainants' comments on the government's response were investigated by means of interviews and the examination of documents.

A number of individuals were interviewed by telephone to confirm various statements made and/or contained in the documentation. These include: Mr. W. Cooley, DSS Regina, Saskatchewan (Contracting Officer's Supervisor); Dr. Warren Steck, NRC-PBI Saskatoon, Saskatchewan (Director General); Mr. Doug Tastad, SEDCO Saskatoon, Saskatchewan (Manager for Properties in Saskatoon); Mr. David H. Brant, Environmental Growth Chambers, Ltd., Winnipeg, Manitoba (Application Consultant); Mr. Don Kruse, Enconaire (1984) Inc., Winnipeg, Manitoba (General Manager); Ms. Sharon Reid, Controlled Environments Limited, Winnipeg, Manitoba (Canadian Sales Supervisor).

The report of this investigation (references to which are identified hereinafter by the initials I.R.), 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 NRC-PBI is located in Saskatoon, Saskatchewan on the campus of the University of Saskatchewan in the downtown core of the city. They are currently housed in two separate locations. One building is an NRC owned facility that is located on leased land with an address of 110 Gymnasium Place. The second and just recently occupied location is in a newly constructed building located not far away on Research Drive. (see

maps of campus and city in I.R. Appendix 13). This second building, the L.F. Kristjanson Biotechnology Complex, is owned by SEDCO and is located on land leased from the University of Saskatchewan. NRC is one of a number of tenants in this building which is dedicated to research in the area of biotechnology. NRC currently leases about one third of the available space. The NRC-PBI has established what is known as the Transgenic Plant Centre at this location. The purpose of this facility is to study the characteristics of genetically engineered plants. As part of ongoing research the need for two growth chambers and a growth room was established. These facilities would be used to test and analyze the resistance of genetically engineered plants to the effects of various challenges, such as insects or fungi.

With the identification of the need, NRC raised a requisition and sent it along with some attached documentation (see I.R. Appendix 14) to the DSS Regional Office in Regina which received it on July 25, 1990. This requisition outlined the specification for the facilities needed by incorporating a quote that had been submitted to NRC earlier by Conviron dated June 13, 1990. The requisition requested the purchase be made on a sole source basis from Conviron. The documentation contained a justification for the sole source request that hinged mainly on the compatibility and interchangeability of spare parts, the reputation and service offered by Conviron and the linking of the new units with existing ones at the facility. It also stated that delivery by March 31, 1991 was imperative to meet research project financial goals and commitments. A further list of comments attached to the package contains a December 31, 1990 delivery date and the following statement:

> *"While we have been pursuing the purchase of the equipment as stated under requisition number 31029-0-0037; we have become aware that SEDCO (Saskatchewan Economic Development Corporation) considers the installation of the equipment. Such installation would allow NRC/PBI to lease rather than purchase the equipment as described."*

A note (see I.R. Appendix 15) in the DSS procurement file dated July 27, 1990 indicates that, at the request of DSS, NRC-PBI agreed to provide a "*good generic description...that are unbiased*" in order that a "*proper description*" could "*be used for FTA solicitation.*" The original requisition was returned to NRC-PBI on August 10, 1990 and a revised requisition was received by DSS on August 16, 1990 (see I.R. Appendix 17).

However, as noted above, at least by August 13, 1990 (three days before the revised requisition was received by DSS), NRC had begun actively pursuing directly with SEDCO a lease option for the same equipment. This is reflected in a letter from NRC-PBI dated August 13, 1990 addressed to SEDCO (see I.R. Appendix 18) that states:

> *"We at PBI considered to undertake the purchase the [sic] 3 growth rooms ourselves. In this case we would have to abide by Dept of Supply and Services regulations and, thus, fear of running short of time (in this fiscal year). We would, therefore, like to suggest that SEDCO install facilities to challenge plants with insects and phytopathogenic fungi, a BioControl Test Unit, for us to lease. We would appreciate a note indicating SEDCO's willingness to establish this BioControl Test Unit at the L.F. Kristjanson Biotechnology Complex and a price for the lease. We would be in a position to submit floor plans and a description of the equipment to be purchased (Conviron, Winnipeg)."*

Meanwhile, DSS proceeded to implement the NRC requisition and since the estimated value of the requirement was $139,610.00 (derived directly from the Conviron quote), this, among other things, prompted DSS-Regina to treat the procurement as falling within the Free Trade Agreement (FTA) Chapter on Government Procurement. A Notice of Proposed Procurement (NPP) was prepared and published in the Government Business Opportunities (GBO) booklet of August 30, 1990, coded F-1, denoting a Free Trade procurement with open tendering (see I.R. Appendix 19). The Request for Proposal (RFP) (see I.R. Appendix 20), dated August 27, 1990 with a closing date of October 18, 1990, was prepared by DSS-Regina and eight potential bidders requested bid-sets.

On September 27, 1990 a facsimile (see I.R. Appendix 22) was sent by SEDCO to NRC-PBI which contained a draft of a letter that SEDCO was proposing NRC-PBI send back to them, together with a lease price proposal.

That draft contemplates a lease of enough space to accommodate the growth room and the two growth chambers at a rental rate based on square footage leased, an electrical surcharge (because of the higher than usual electricity usage of the three pieces of equipment), and went on to provide that the letter from NRC-PBI to SEDCO would say:

> "*...B) In addition to (A) above, we wish to lease from SEDCO two (2) PGV 36 Plant Growth Chambers and one (1) GR 72 Plant Growth Room (Conviron) for use in the biocontrol unit. We understand the capital cost of that equipment is approximately $***[amount deleted]** *(See Schedule "A") and that SEDCO would agree to lease such equipment to us over the term of the lease agreement currently in place, as an addendum to that lease. We understand the financing rate is currently 14.25% and that Plant Biotechnology Institute could lump sum pay such lease costs as per the enclosed Schedule "A". We also understand that at the end of the lease term, such equipment will be sold to Plant Biotechnology Institute for $1.*"

An internal NRC-PBI memo from the Director General of NRC-PBI to the Head of the Transgenic Plant Centre and others dated October 1, 1990 (see I.R. Appendix 23) recording decisions taken at a meeting dated 27 September 1990, discusses this proposal specifically by stating:

> *"...3. Methods for acquiring the use of challenge units were discussed, based on SEDCO's recent quotes on equipment rental. NRC should proceed on this rental basis with an option to buy for $1 at the close. Costs of site space will be $***[amount deleted]** *annually above the rental; these should be covered through an addendum to our present lease if possible. ACTION: Keller to clarify the terms of rental with SEDCO; Yorke to look after obtaining an addendum to the lease and to clear financial arrangements for rental..."*

Another internal NRC-PBI memo from the head of the Transgenic Plant Centre to the Director General of NRC-PBI dated October 3, 1990 (see I.R. Appendix 24) discusses an October 2, 1990 meeting between NRC-PBI personnel and a representative from SEDCO:

> *"...to determine conditions for the establishment of a contractual agreement between NRC and SEDCO for the lease (and eventual purchase) of the facility..."*

This memo also states that:

> *"...4. We felt that the SEDCO proposal of four equal leasing payments for the facility was a reasonable deal for PBI. However, the recent proposal of a single `up front' payment is a better deal and is the route that we recommend. We should also advise you that we may soon see the outcome of the DSS tender process and we may still have the option to go with that if we choose..."*

SEDCO had already prepared a purchase order dated September 25, 1990 with a project identification: "Biocontrol PBI" (see I.R. Appendix 25). The above-mentioned October 3, 1990 memo also refers to the preparation of a letter from NRC-PBI to SEDCO which when received by SEDCO would result in:

> "*...the preparation of a contract which when signed will lead to the release of SEDCO's purchase order to Conviron...*"

Although the investigation did not reveal any formal signed contract between SEDCO and NRC for the leasing of this equipment, NRC sent a letter dated October 5, 1990 (see I.R. Appendix 26) to SEDCO, setting out the "*wishes*" of NRC as follows:

> *"...a) The National Research Council (NRC) wishes to lease approximately 1100 gross square feet (800 net) of laboratory space in the north bay area for the purposes of establishing a biocontrol unit. We understand the lease rate is $***[amount deleted]** *per gross sq. ft. per year for a total of $***[amount deleted]** *annually.*
>
> *b) In addition to (a) above, we wish to lease from SEDCO two (2) PGV 36 Plant Growth Chambers and one (2) [sic] GR 72 Plant Growth Room (Conviron) for use in the biocontrol unit. We understand the capital cost of that equipment is approximately $***[amount deleted]** *(See Schedule "A") and that SEDCO would agree to lease such equipment to us over the term of the lease agreement currently in place, as an addendum to that lease. We understand that NRC could lump sum pay such lease costs, and that at the end of the lease term, such equipment will be offered for sale to the National Research Council for one dollar ($1)..."*

This letter resulted in the release of the purchase order which was received on October 12, 1990 and acknowledged by Conviron in a facsimile to SEDCO on October 15, 1990 (see I.R. Appendix 27).

Several days later, on October 17, 1990 according to the DSS Governmental Institution Report, NRC-PBI contacted DSS-Regina to let them know that the requisition "may be" cancelled. Elsewhere in the GIR, this action is recorded as being notice that the competition "was to be" cancelled. DSS-Regina asked for confirmation in writing and a facsimile of the amending requisition cancelling the original requisition was sent on October 18, 1990, the closing date for submission of bids. DSS also asked for the reasons for the cancellation and on October 19, 1990 the reasons were confirmed by facsimile (see I.R. Appendix 28). This fax stated that reason as:

> *"The Scientist's* [sic] *have reconsidered and decided not to make this purchase."*

At the time of cancellation, two proposals had been duly received by DSS, one from each of the complainants. DSS published a Cancellation Notice in the November 5, 1990 issue of GBO (see I.R. Appendix 29). Conviron had requested a bid package but did not bid. According to Conviron, the reason for not submitting a bid was because they had already received an order from SEDCO on October 12, 1990 to supply this equipment.

The Governmental Institution Reports

The position taken by the Government in response to these complaints is set out in the Governmental Institution Reports (GIRs) filed by DSS (see I.R. Appendices 7 and 8) and containing attachments prepared by NRC.

The NRC material contains the following statement:

> "*3) In the course of negotiations for additional greenhouse space SEDCO offered to provide the space complete with the growth chamber equipment required. The option of acquiring the additional space fully equipped was very attractive to NRC for the following reasons:*

a) *SEDCO is the landlord for the facility where the equipment will be installed and the installation must meet with SEDCO's approval.*

b) *SEDCO would be responsible for all associated support and on-going maintenance of the equipment.*

c) *The lease of the additional space complete with growth chamber equipment could be funded from an operations and maintenance budget as opposed to a capitals* [sic] *acquistions* [sic] *budget thus freeing up limited capital funds.*

d) *NRC does not have a long term need for the equipment therefore it is much more cost effective to lease the equipment on a short term basis. The proposed amendment to the lease with SEDCO will run to August 1993. (It is usually not possible to lease equipment of this type on a short term basis)*

4) *As soon it* [sic] *became clear that NRC would be able to able to* [sic] *rent the required greenhouse space complete with growth chambers the Request for Proposals was cancelled. It is regrettable that the bidding process was so far advanced at the time of the cancellation ;however, under the circumstances it was not possible to do so sooner.*

5) *The proposed agreement with SEDCO does not require SEDCO to purchase equipment from any supplier nor was there any intention to direct SEDCO in this regard.*

At the time the Request for Proposals was issued NRC had every intention to allow the bidding process to proceed ;however, NRC's requirement changed significantly as a result of the leasing opportunity and for this reason the RFP was cancelled. NRC will not acquire a long term interest in the growth chamber equipment as a result of the SEDCO agreement. The proposed amendment of the agreement with SEDCO is a natural extension of the present landlord/tenant agreement."

The DSS material in the GIRs includes the following statement:

"*The procurement of growth chambers proceeded in accordance with the usual provisions including discussions between SSC and NRC to ensure a competitive environment. Having undertaken this process, it was anticipated that the process would be carried out to its logical conclusion, namely the acquisition of the chambers. Regrettably, the process had to be terminated as the requirement ceased to exist. This was a most unfortunate infrequent development and in accordance with the terms of the bid solicitation issued publicly, SSC cancelled the requirement even though it was the eleventh hour. SSC considers such withdrawals should be rare and therefore steps were taken prior to advising vendors to re-confirm that the requirement no longer existed.*

As stated in the attached submission by NRC, the procurement for leasing space does not fall under the FTA. Furthermore, SEDCO, the procurement agency for the growth chambers, is not a federal government institution and thus is not subject to the FTA."

The Complainant's Comments

As required by the PRB Regulations, copies of the GIRs were sent to the complainants. They, in turn, responded to the Board with comments upon the GIRs (see I.R. Appendices 11 and 12) and these were relayed to DSS and to NRC.

Both comments from EGC and Enconaire make essentially the same points. The longer of the two, that from EGC, reflects a fairly clear understanding of the Free Trade Agreement and the GATT Code on Government Procurement that underlies it, and for these reasons the relevant portions of the EGC response are quoted here, at some length:

"*...As an initial matter EGC refutes the claim asserted in the GIR that a lease of equipment by the NRC is not subject to the mandates of the Free Trade Agreement. The GATT Agreement of Government Procurement states in Article I, Section 1. "This Agreement applies to: (a) any law, regulation, procedure and practice regarding <u>any procurement of products, through such</u>*

methods as purchase or as lease, rental or hire-purchase, with or without an option to buy, by the entities subject to this Agreement." NRC is specifically listed as "subject to this Agreement" in the Free Trade Agreement (Annex 1304.3 Entity number 22). The claim in the GIR that the lease is not subject to the Free Trade Agreement is incorrect.

. . .

EGC alleged that the procurement of the three growth rooms/chambers denied EGC a fair and equal opportunity to be awarded the contract in direct contravention of the Free Trade Agreement. The statements contained in the GIR fail to refute this allegation and indeed actually further prove EGC's contention. Following is a chronological listing of this proof supported by statements from the GIR.

. . .

The facts, as presented in the GIR, demonstrate NRC's preference for Conviron as the sole supplier of the equipment and NRC's intention to sole source the equipment from Conviron despite laws prohibiting this action.

. . .

The GATT Agreement of Government Procurement states in Article IV, Section 4 "Procurement entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement." Nevertheless the specifications in the Request for Proposal were in fact prepared in a manner precluding competition, and included verbatim passages from the Conviron Quotation. They stated that the equipment to be supplied must interface with existing remote control systems which were supplied by Conviron. Requiring the interface with Conviron equipment limited competition and was a further attempt to sole source the equipment from Conviron.

Additionally, it is shown that consultation had occurred between Conviron and NRC prior to the submission of the Request for Proposal. EGC is a listed supplier of this equipment with SSC and known to NRC yet was not given equal access to this pre-solicitation information. This violated Chapter 13, Article 1305, Paragraph 2 of the Free Trade Agreement which provides that "[e]ach party shall, for its procurements covered by this Chapter: a) provide all potential suppliers equal access to pre-solicitation information and with equal opportunity to compete in the pre-notification phase."

The fact that Conviron, did not submit a proposal in response to the RFD, [sic] *is prima facie evidence that they were aware in advance of the cancellation. This demonstrates the existence of a procurement process being negotiated outside of the published RFP, while the RFP submission was being prepared in good faith, and at cost, by EGC. This outside procurement process is specifically precluded in the GATT Agreement on Government Procurement which states in Article 5, Section 3. "Entities shall not provide to any potential supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition." To the best of our knowledge no potential supplier was aware of this negotiation process of procurement except Conviron. They could only have been advised by an insider who was involved in the process.*

On the 5th of December, 1990, EGC made an inquiry of the PRB in an attempt to secure information about the lease between NRC and SEDCO. EGC considers the omission from the GIR of the lease arranged between the National Research Council and the Saskatchewan Economic Development Corporation a severe restriction upon our ability to bring all of the facts before the Procurement Review Board (PRB). We feel this information should be disclosed.

On the 6th of December, 1990, EGC received a letter from Mr. G. Offet of SEDCO stating "unequivocally, that the purchase decision was ours and not dictated by Plant Biotechnology Institute." SEDCO does not suggest that they had any reason to purchase this equipment except the requirement of NRC. NRC seems indeed to have found a way to secure equipment from a favored supplier while bypassing the FTA and ignoring the Procurement Review Board orders.

SUMMARY

The facts demonstrate that from the onset the intent of the National Research Council was to sole source the equipment they required from a single favored supplier. NRC resorted to a convoluted procurement process bypassing SSC entirely, and withheld the reasons for cancellation of the RFP. EGC continues to look to the PRB for relief from this purchasing mechanism which does not conform to the Free Trade Agreement and precludes equal access to a trading opportunity with the Canadian Government..."

ANALYSIS

Jurisdictional Issues

The first point to note in this case is that NRC is a "*governmental institution*" as defined in the FTAI Act, because it is listed for Canada as a covered entity in Annex 1304.3 of the Agreement. The consequence is that all of its goods procurements that come with the scope of the Agreement must be carried on in the manner prescribed therein.

Many procurements for the governmental institutions listed in the Annex to the Agreement are carried out on their behalf by the Department of Supply of Services which has a statutory mandate flowing from Sections 5 and 9 of the Department of Supply and Services Act RSC 1985 c.S-25, to procure goods on their behalf, acting as "*a common service agency*". In such cases DSS can be effectively treated as the governmental institution itself (and it usually has been so treated - and it responds as such - in all past complaints brought before this Board). However, a decision not to use DSS as their agent in a procurement that comes within the Free Trade Agreement does not absolve the governmental institution from the obligation to comply with the Agreement. If the objective is to acquire a growth room and two growth chambers for NRC, and if those articles and their values are covered by the Agreement and the FTAI Act, then NRC must comply with them.

Whether SEDCO was acting as an agent or as a prime contractor in this case is really immaterial. The responsibility to ensure adherence to the rules by which the government is bound under the FTA belongs to the procuring entity, in this case, NRC. This procurement is that of an "*entity*" of the Canadian Government which is, by definition, a "*governmental institution*" (Section 13 FTAI Act).

By Section 15 of that Act, any potential supplier may file a complaint with the Board in relation to any aspect of the procurement relating to a contract to be awarded by that governmental institution. When this happens, and providing only that the dollar value and the class of contract are within the range specified, this Board has jurisdiction to investigate the complaint.

A further point being made by NRC (and supported by DSS) is that a procurement of this nature (a lease of equipped space) is not covered by the Free Trade Agreement.

Procurements covered by the Agreement are those described in Section 1(a) of Article I, "Scope and Coverage", of the GATT Code which is, by Article 1303 of the Agreement, incorporated into and made part of Chapter 13 of the Agreement. It reads as follows:

> "***1. This Agreement applies to:***
>
> *(a) any law, regulation, procedure and practice regarding any procurement of products, through such methods as purchase or as lease, rental or hire-purchase, with or without an option to buy, by the entities subject to this Agreement. This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts* per se"

The complainants contend that this procurement is covered by the FTA even if it does involve a lease because the GATT Code rules apply where the procurement is by lease, rental or hire-purchase, with or without an option to buy. The investigation disclosed that although no formal lease in this case was drawn up or executed by the parties, yet its principal terms are fairly disclosed in the letter of 5 October 1990 (see I.R. Appendix 26 quoted above) from NRC to SEDCO. It indicates that NRC wished to lease two things:

(a) a modest addition to laboratory floor space at a rate fixed per square foot, for the purpose of establishing a biocontrol unit;

(b) two plant growth chambers and a plant growth room to be bought from Conviron, to be used as the biocontrol unit. The rent would be based on the cost of the units, and NRC could "*lump sum pay*" the rent and at the end of the term the equipment would be offered for sale to NRC for $1.00.

It is item (b) that is covered by the GATT Code description quite precisely. The objective is plainly to acquire the goods. The "*rent*" is based upon the price of the goods, and is to be paid at once in a lump sum that equals the purchase price (or, alternatively, there is a scheme to pay a rental that includes interest, in four instalments, the total of which is considerably more than the purchase price) and, in either case, NRC is to have an option to buy at the end for one dollar.

In their submission for the GIR, NRC seems to contradict the above evidence, stating:

> "*...NRC does not have a long term need for the equipment therefore it is much more cost effective to lease the equipment on a short term basis. The proposed amendement* [sic] *to the lease with SEDCO will run to August 1993. (It is usually not possible to lease equipment of this type on a short term basis)...*"

The Board does not accept this belated statement that NRC has no long term need for the equipment as being determinative of the nature of the transaction in which they were involved. The contemporaneous record of their wishes, referred to above, sent directly to SEDCO, is the best evidence of their intent in this regard.

Accordingly, the Board concludes that this transaction is a procurement that is in relation to a contract to be awarded by a governmental institution and its value falls within the jurisdictional "window" of values set out in Section 15 of the FTAI Act, and as such, it must be accomplished in accordance with procedures that comply with the provisions of the Code.

Effectiveness

Concerning the statement by NRC that it is "*...much more cost effective to lease the equipment...*", the Investigation Report shows that the lump-sum-payment proposed is substantially higher than that set out in the requisition originally sent to DSS, and which, in turn, was based upon a Conviron quote to NRC (which, according to the RFP, would have been exempt from federal sales tax if the goods had been bought as research equipment through DSS, and, insofar as NRC is concerned, provincial sales tax as well). The Board is hard pressed to understand how either that payment, or the alternate four-payment plan to pay that amount together with interest estimated at the time at 14.25%, could be more "*cost effective*" than encouraging companies to "sharpen their pencils" and earn the contract in a fair competition.

Running Two Procurement Methods Simultaneously

NRC appears to have conducted, or attempted to conduct, this procurement in two different ways, by purchase and by lease, at the same time. If these had been pursued under a single RFP, in effect soliciting bids based on either of these alternatives according to established rules and procedures, then the potential suppliers would have had clear options in the way they chose to make up their bids, and the governmental institution would have had fairly comparable bids on which to make a fair and informed decision about cost-effectiveness.

While the investigation did not show that the cost-effectiveness of "lease vs. purchase" was the reason for the double action in this case, that issue is more a question for the Auditor General than for this Board.

What does matter are the consequences of running two different, distinct, parallel, and incompatible procurement actions simultaneously, to fill the same need. To have decided to go with the one of those two actions that was not conducted in conformity with FTA rules, and to cancel out the one that was, exposed potential suppliers to risks that were beyond the normal business risks involved in a fair competition, and for that reason, NRC must be responsible to meet the consequences when it results in injury to the complainants.

Indeed, there is something disturbing about their persistent efforts to keep both options open - even until the final hours before bid closing, regardless of the consequences to the bidders whom they have led to believe that it would be worthwhile to spend time, effort, and money in this abortive competition. Then, to simply note that it is "*regrettable*" that the bidding process was "*so far advanced*" but that "*in the circumstances it was not possible to (cancel) sooner*" (see I.R. Appendices 7 and 8), knowing full well that "*without doubt this abandonment of the process will cause chagrin to the bidders*" (see I.R. Appendix 31), is simply not frank or forthcoming. This is no way to treat bidders in a fair competition.

On the question of inability to cancel the competitive action sooner, the Board notes that the effective decision in this matter was taken by NRC on 27 September 1990 and the NRC order to SEDCO was given on 5 October 1990. SEDCO's order to Conviron was given on 12 October 1990 and the DSS competition was not cancelled until 18 October 1990, only hours before bid closing. The Board believes that in the circumstances, the notice of cancellation could indeed have been given sooner.

There is, perhaps, a question as to whether DSS, in light of the statement in the requisition regarding alternate acquisition methods, should have done anything beyond obtaining confirmation in writing from NRC that they no longer intended to purchase the goods, in order to protect the integrity of the bidding system. On the basis of the investigation, it is difficult to see how DSS could have done anything more under the circumstances. DSS is, as stated above, a "common services agency" not an investigative body and they would have had to undertake an inquiry similar to the one conducted by the Board's staff to uncover all that was actually going on to fulfil this procurement.

Accordingly, the Board intends to compensate the complainants in this case with their reasonable costs of filing and proceeding with these complaints, and with an award of reasonable costs of preparing their bids.

Since the competition was never completed and it is not possible to conclude that one or another of the competitors would necessarily have won it (and particularly where the actions in respect of the lease negotiations effectively took one of the likely competitors out of the competition because they already had an order for the goods) the Board considers that this is not a case in which it ought to recommend any further damages, as claimed by the complainants.

Concerning Sole Sourcing

Sole sourcing a government requirement that comes under FTA must be justified in terms of the permissable reasons for sole sourcing set out in the GATT Code Article V.16. This was not done in this case.

An attempt to justify sole sourcing was made by NRC at the time they issued the requisition to DSS back in August 1990 - but DSS did not find their reasons convincing and they requested NRC to put together a generic specification upon which they could base a competitive procurement. Although NRC revised the specification, they also decided later to cancel that competition in favour of their other method of procurement.

In this respect, there is really no difference whether one chooses to see this procurement as being sole sourced to Conviron - using SEDCO as NRC's agent - or sole sourced to SEDCO; in either case, the action must be justified in terms of GATT Code Article V.16.

The Board has laid stress on this point partly because the sole sourcing justifications offered by NRC in August of 1990 appear to have been prepared in relation to rules set out for sole sourcing in DSS Supply Policy Manual (SPM) Directive 3002.9 as it applies to domestic procurements not covered by either the GATT Code or FTA. If these goods are ever to be sole sourced in the future, the justifications for so doing must meet the rather more stringent requirements of the GATT Code (which are reflected in SPM Directive 3004.59).

Finally, the Board notes that both complainants raised an issue to the effect that NRC was in contact with Conviron in the pre-notification phase, to seek advice in the preparation of specifications, in a manner that had the effect of precluding competition, contrary to certain provisions of Article IV of the GATT Code, and Article 1305 of the FTA. The Board did not find it necessary to deal with this issue in light of the fact that NRC's action in the cancellation of the competitive process precluded consideration of issues that could have been relevant if the competition had proceeded to completion and had been challenged at that time. The Board specifically makes no finding of fact on this issue.

DETERMINATION

The Board has determined on the basis of its investigation that this procurement by the National Research Council did not comply with the requirements of Section 17 of the Free Trade Agreement Implementation Act by failing to provide all potential suppliers an equal opportunity to be responsive to their requirements in the tendering and bidding phase, in that they engaged in a procurement on a sole source basis without meeting the justification requirements of Article V.16 of the GATT Code with respect to single tendering.

The Board has decided:

1. **to award both complainants their reasonable costs in relation to filing and proceeding with these complaints; and**

2. **to award both complainants their reasonable costs of preparing their bids.**

The Board hereby rescinds the Stop Award Order issued by it on 13 November 1990, and also recommends that NRC cancel their plans to enter into the sole source lease for this equipment and, if the requirement continues to exist, to conduct the procurement therefor in accordance with the provisions of the Free Trade Agreement and the GATT Code on Government Procurement.

Gerald A. Berger
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Chairman
Procurement Review Board of Canada