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

IN THE MATTER OF:

A Complaint By Bio-Temp Scientific Inc. of 7555 Commerce Court Sarasota, Florida 34243 U.S.A.

Board File No: E90PRF66W9-238-0003

AND IN THE MATTER OF:

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

June 1, 1990

DETERMINATION BY THE BOARD

This complaint concerns the award of a contract by Her Majesty the Queen as represented by the Department of Supply and Services (DSS) to Burnsco Technologies Inc. (Burnsco) of Woodlawn, Ontario, on 5 March 1990. This contract, worth $140,522.00, was for the supply of one Environmental Test Chamber of about 1 cubic meter interior size, with `reach-in' access and adjustable for humidity, altitude and temperature to simulate, in a test laboratory, conditions to which certain products and materials are exposed in the field. The end-user is to be an engineering unit of the Land Engineering Test Establishment (LETE) of the Department of National Defence (DND), located on National Research Council premises on Montreal Road in Ottawa.

The complainant is Bio-Temp Scientific Inc. (Bio-Temp) of Sarasota, Florida. The substance of their complaint is that they were the low bidder, with a fully compliant proposal and should have been awarded the contract.

The complaint met the requirements set out in the Procurement Review Board (PRB or the Board) Regulations (PC 1988-2865 of 30 December 1988 - SOR/89-41) for filing with the Board, and after being sent a copy of the complaint, DSS filed the required governmental institution report, and the complainant subsequently filed comments on that report.

Since the contract had already been awarded to Burnsco, the Board's authority to postpone the contract award (Sec. 16(1)(b) of the Free Trade Agreement Implementation (FTAI) Act) did not come into play. The Board sent Burnsco a copy of the complaint, as required by the Regulations, but Burnsco made no reply and has not sought to intervene in these proceedings.

On 19 March 1990, the Board directed that an investigation be conducted into this complaint and a notice to this effect was published in the Government Business Opportunities (GBO) booklet, and in the Canada Gazette, Part I.

The Investigation

The allegations of this complaint, and the responses and comments thereto, were investigated by the Board's investigative staff, by means of interviews and the examination of documents from DSS and DND.

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: Mr. Gérald Brown, DSS (Contracting Officer); Mrs. Maureen Baker, DSS (Section Chief); Mr. G.E. Jette, DND -Land Engineering Test Establishment (LETE) (Head Environmental Test); Major A.R. Beveridge, LETE, Electrical and Armaments Engineering Squadron (E Squadron), (Officer Commanding); Chief Warrant Officer Williams, DND - Directorate, Clothing and General Engineering and Maintenance (DCGEM), (Life Cycle Materiel Manager (LCMM)); Mr. Steve Ladas, DND - Directorate, Procurement and Supply Common User (DPSCU), (Requisitioning Officer); Major J.A. Gosselin, DND - DPSCU, (Sub-Section Head); Lieutenant-Colonel J.P.R. Alain, DND - DPSCU (Acting Director); Mr. Steve Raz, Bio-Temp Scientific, Inc., Sarasota, Florida, (the complainant); Mr. Robert Hosley, ESPEC Corp.(ESPEC), Zeeland, Michigan; Mr. Steven Burns, Burnsco Technologies Inc., Woodlawn, Ontario (the contract awardee); Mr. Harry Evans, L & A Machine Works Ltd., Fredericton, N.B. (potential supplier); Mr. B. Aubin, Revenue Canada -Customs and Excise, Ottawa Region (Operational Review Officer).

The report of the 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 determine the issues raised in the complaint, it was determined that no formal hearing was required in this 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 Electrical and Armament Engineering Squadron of the LETE is responsible for the environmental testing of products such as electrical and armament components used by military, departmental, or private entities. Its Environmental Testing Unit had a long standing requirement for a reach-in temperature, altitude and humidity chamber, which is used to reproduce specific conditions to which products will be exposed. The specification was drawn up some five years ago, with minor changes being incorporated to reflect advances in technology. A requisition (see I.R. Appendix 2) was forwarded to DSS by DND - DPSCU on August 31, 1989. It was for one chamber to be supplied in accordance with a description/specification attached. It also included standard clauses related to different aspects of the procurement cycle and a list of three suggested sources of supply, which included the contract awardee. The estimated value of the requirement was $180,000. which prompted the procurement to be treated as falling within the Free Trade Agreement Chapter on Government Procurement.

A Request for Proposal (RFP) dated September 11, 1989 with a closing date of November 7, 1989 was formulated by the Industrial and Commercial Products Directorate of DSS (see I.R. Appendix 5).

A Notice of Proposed Procurement (NPP) was prepared and approved (see I.R. Appendix 3) and appeared in the September 27, 1989 issue of GBO under the GATT/FTA section for Proposed Procurements as F-01 (see I.R. Appendix 4). Distribution of bid packages was carried out by the contracting officer.

Two requests for bid packages were received prior to publication of the notice in GBO. The first request was received on September 12, 1989 from L & A Machine Works Ltd. of Fredericton, N.B., and a bid package

was issued on September 15, 1989. The second request was received on September 21, 1989 from Burnsco and the bid package was issued on the same day (see I.R. Appendix 6). (L & A Machine Works Ltd. did not submit a proposal in response to this solicitation and Burnsco was the eventual contract awardee). Although the first request refers to "As per our discussion...", and the second refers to "...we discussed...", the investigation did not produce conclusive evidence about how these suppliers became aware of this requirement nor why the bid packages were actually sent out prior to the publication in GBO.

In addition to the two "early" requests, twenty-five other requests for bid packages were received in response to the NPP. At the time of closing, eight proposals had been duly received by DSS, including a proposal transmitted by facsimile (subsequently confirmed in writing) from Bio-Temp. Prices as quoted were tabulated. The material, including bid prices, was submitted to DND "for evaluation and recommendation purposes" on November 20, 1989 (see I.R. Appendix 7).

The RFP specified the evaluation criteria to be considered at the evaluation stage (see I.R. Appendix 5). The technical evaluations performed by DND on all eight bids submitted listed technical deficiencies for seven out of eight (see I.R. Appendix 8). The then thought-to-be two lowest proposals, Bio-Temp and CMR & Associates (CMR) from Englewood, Colorado, were listed as "not acceptable". Burnsco's bid, at that time the third lowest, was the only acceptable bid. Both Bio-Temp and CMR are U.S. manufacturers offering their own products whereas Burnsco is a Canadian supplier offering a product that would be manufactured in the U.S. by the firm ESPEC, located in Zeeland, Michigan. Two evaluation forms (one is handwritten and dated January 18, 1990, the other is typed and undated) were generated by DND for internal purposes which, while similar, do not address exactly the same points. These were transmitted to DSS on January 22, 1990.

Clarifications on deficiencies from the combined evaluations were obtained from Bio-Temp and CMR by DSS and DND through telephone conversations and/or correspondence during the months of December 1989 to February 1990. There is no evidence from the file that clarifications were sought from any other bidder. A letter dated December 18, 1989 from Bio-Temp, to clarify engineering experience and manufacturing capabilities, and providing names of user references, was sent to DSS and transmitted to DND on December 19, 1989 (see I.R. Appendix 9).

According to the technical officer at LETE, a telephone reference check of users of Bio-Temp's equipment was conducted and the sources contacted made reference to the equipment supplied by Bio-Temp as being "walk-in refrigerators". No written record exists of these conversations.

CMR sent a letter dated January 22, 1990 to DSS to clarify dewpoint, static load, and electrical specifications. Another letter dated January 24, 1990 from CMR to DSS was sent to clarify warranty and service matters. Both letters were transmitted to DND on January 24, 1990 (see I.R. Appendix 10). On January 25, 1990, DND revised its previous review of bids...i.e. 22 January...in light of the clarifications noted above and requested the acceptance of the second lowest bidder, CMR (see I.R. Appendix 11).

Although the RFP contained on its face page a general instruction that all prices quoted were to be net prices in Canadian funds, including Canadian customs duties, excise taxes and Federal Sales Tax (FST), this was said to apply "unless otherwise specified" in the RFP. This RFP specifically did instruct that suppliers located outside Canada submit prices excluding Duty and FST and that suppliers located in Canada submit prices including Duty and FST. Accordingly, the quoted prices from Bio-Temp and CMR did not include the applicable Duty and FST. When the re-evaluation of 25 January, noted above, was submitted by DND to DSS, Duty and FST were then added to the prices of the two American bids received. As a result, although Bio-Temp's proposal remained lowest, Burnsco's was now second, and CMR was fourth. It was concluded, therefore, that CMR could no longer be considered for award.

According to a note to file by DND, referring to a telephone conversation on January 30, 1990 with the contracting officer, "DSS now feel that the reasons [to reject Bio-Temp's proposal] stated on the 635 (Selection of Tenders form) are not enough justification" (see I.R. Appendix 12).

On January 31, 1990, DSS requested clarifications from Bio-Temp, which resulted in the Bio-Temp letter dated February 2, 1990 (see I.R. Appendix 13), to clarify the following points:

a) CSA requirements;
b) interconnect cable's minimum length;
c) site check-out and start-up by factory representative;
d) refrigeration malfunction display requirements; and
e) silencing package requirements.

This letter was transmitted to DND by DSS on February 2, 1990 (see I.R. Appendix 13).

On February 28, 1990, DND transmitted a letter to DSS dated February 23, 1990 with an attached memorandum dated February 15, 1990 referring to a further review of the subject bid and the reasons for its unacceptability (see I.R. Appendix 14).

Post-evaluation activities

As bids expired on February 5, 1990, Burnsco was asked by DSS on February 28, 1990, to verify whether its quoted price was still valid. This was confirmed. The file also shows that, at that time, negotiations for the introduction of "progress payments" were underway, notwithstanding the fact that progress payments were not a feature of the bid solicitation. In fact, in the RFP, bidders were told that the method of payment was to be thirty (30) days after work completion and delivery, or upon receipt of invoice and/or substantiating documentation, whichever was later.

On March 5, 1990, the contract was awarded to Burnsco (see I.R. Appendix 17) with delivery planned for 16-20 weeks ARO (after receipt of order). A notification was sent to Bio-Temp and CMR on that day informing them that Burnsco had been awarded the contract (see I.R. Appendix 18).

A letter dated March 8, 1990, notified DSS of Bio-Temp's intention to protest the award should it not be awarded the contract (see I.R. Appendix 19). Bio-Temp received the official notification of contract award on March 12, 1990 (see I.R. Appendix 1). The complaint was received by the Board on March 13, 1990 with the confirmation package received on March 19, 1990. The complaint was considered filed on that same day. DSS informed DND on March 23, 1990, that a notice of complaint had been issued with reference to this procurement (see I.R. Appendix 20).

About March 21, 1990, approximately two weeks after contract award, the contract awardee submitted its progress claim No. 1 to DSS for fifty percent (50%) work completion even though final delivery was scheduled for 16-20 weeks after receipt of order (see I.R. Appendix 21). Prior to March 31, 1990, all sign-offs were obtained and the requisition for the release of the cheque was processed. In April 1990, a cheque in the amount of $56,208.80 was issued to the contract awardee, which represents fifty percent (50%) of the contract value less a twenty percent (20%) holdback.

The Governmental Institution Report

The DSS report, signed off by the Assistant Deputy Minister, Supply Operations Sector (see I.R. Appendix 22), sets out the DSS view of the chronology of events during the procurement in question. The report does not respond fully to all allegations of the complaint as required by paragraph 30(2)(e) of the PRB Regulations and provides no DSS position.

Our investigation indicates that the list of events provided by DSS is incomplete and many items listed are in apparent contradiction with documents on the procurement file. For example:

1. "01 OCT 89 - Date of Notice of Proposed Procurement.
   - Solicitation issued."

implies that these documents were released on that day. In fact, prior to the actual 27 September publication date in GBO, two bid solicitation packages had already been issued (see I.R. Appendix 6). The RFP is dated September 11, 1989 (see I.R. Appendix 5).

2. "07 NOV 89 - ...
   - 8 proposals received:

(1) Bio-Temp ...	$120,524.46	Duty & FST Incl
(2) Burnsco ...	$139,667.00	Duty & FST Incl
(3) Dalimar ...	$141,057.00	Duty & FST Incl
(4) CMR ...	$146,380.81	Duty & FST Incl"

implies that this is how the tabulation report was completed on November 7, 1989. In accordance with the RFP, Duty and FST were excluded in prices quoted by Bio-Temp and CMR, but were included in prices submitted by Burnsco and Dalimar. The original tabulation, which was sent to DND by DSS, and which used `as quoted prices', ranked Bio-Temp lowest, CMR second lowest, Burnsco third and Dalimar fourth. It was on this basis that on 25 January, DND requested DSS to accept CMR's bid, then thought to be the lowest responsive bidder.

3. "18 JAN 90 - Bid evaluation received from to 22 JAN 90 Department National Defence; the only technically responsive bids are from Burnsco Technologies Inc. and CMR & Associates."

implies that the original technical evaluation by DND recommended two acceptable tenders. In fact, however, on 22 January DND declared "the 2 lowest responsive tenders, Bio-Temp and CMR, are not acceptable". As noted above, on 25 January, DND requested acceptance of CMR's bid, after clarifications on its offer had been obtained.

Events such as the letters dated January 22 and 24, 1990 from CMR, the revised review of January 25, 1990 from DND, the establishment of the price validity and the introduction of progress payments by DSS on February 28, 1990, and the DSS failure to communicate with Burnsco (see SPM 3006.16), are examples of important items in the chronology that were omitted from the list.

The Complainant's Comments on the Governmental Institution Report

The complainant's comments on the DSS report (see I.R. Appendix 23) were filed with the Board on April 30, 1990. In its response, the complainant addresses the issues raised in the 15 February memo from DND on which its bid was rejected. Specifically, it reaffirms having adequate manufacturing facilities, being capable of building the chamber to specifications and performance requirements and being able to provide after-sale service. This letter identifies Sherwood Integrated Systems (Cooksville, Ontario) as the firm that would be handling the service program in addition to any factory service required. The complainant also provided details as to the size of its operation, namely a 9400 square foot facility and seven full-time employees.

Discussion

The issues that require consideration, from the above recital of the facts, appear to be these:

1. Whether the rejection of the Bio-Temp proposal was fair and properly done;

2. Whether the release of bid packages in advance of publication of the NPP is in accordance with the FTAI Act;

In addition, four other procurement issues have engaged the Board's attention as matters which come within the Board's mandate under Section 19(b) of the PRB Regulations, in which it is the Board's duty and function to make recommendations to a governmental institution respecting any aspect of its procurement. These are:

1. Whether the procedures for comparing the prices from U.S. and Canadian sources, relating to the application of Customs Duties and FST are clear and transparent, meeting the requirements of the FTA;

2. Whether the negotiation into the winning proposal, before contract award, of a provision for progress payments, without obtaining a reduction in the price attributable to the value of this concession, was fair treatment to the other bidders, all of whose bid prices could have been affected by the knowledge that such a concession was available, and whether it meets the procedural requirements to obtain fair value to the Crown for this concession.

3. Whether the release of price data to its customer at the time of technical evaluation was appropriate in this case, and

4. Whether the failure to communicate with the contract awardee (for the purpose contemplated in SPM 3006.16) after the complaint was filed, was appropriate in this case.

Dealing with these issues in order:

1. **The rejection of the Bio-Temp proposal**

As noted above, DSS had evidently some concern about the DND evaluation that rejected Bio-Temp, and around the end of January 1990 they communicated this to DND, while at the same time seeking further clarification in respect of DND's concerns from Bio-Temp. They got these clarifications and forwarded them to DND on 2 February. On 15 February, DND put together their arguments for rejection, and sent these under cover of a letter of 23 February to DSS.

Since much turns on the substance of that rejection memo, it will be worthwhile setting out their contents, in full:

The following is a comparison between the above memo and the information discovered during the Board's investigation:

> **"1....A careful review was made of all bids and no favouritism is being shown to any of the bidders."**

The only record of the above mentioned "careful review" is the January 22, 1990 letter from DND to the DSS contracting officer (see I.R. Appendix 8). Two DND 635 forms for "Selection of Tenders" were attached to this letter outlining a number of deficiencies in the Bio-Temp proposal. Each point on these documents was responded to by Bio-Temp in its letter of February 2, 1990 (see I.R. Appendix 13). In response to telephone inquiries from both the technical officer and the contracting officer, Bio-Temp, in its letter dated December 18, 1989 (see I.R. Appendix 9), provided a list of three references who were customers that had purchased equipment from Bio-Temp. In this letter the company also provided details about the experience of the engineer who would be working on this project as well as the experience of the fabricating firm that would be building the chamber. No account whatever is taken of these clarifying responses (which were received after the 22 January "review", but before the above quoted rejection memo), in that rejection memo.

> **"...a. by their own admission Bio-Temp have never made an equipment of this type and have no expertise in vacuum systems..."**

It appears to be true that Bio-Temp has not previously made "an equipment of this type". It did, however, provide the name of a consulting engineer, Mr. Robert Nash, from Holland, Michigan, who has considerable experience in vacuum systems and who would be providing the company with the required engineering expertise. The Board's investigators verified with ESPEC, the U.S. firm that manufactures the equipment offered by Burnsco, that Mr. Nash had indeed worked for that company in the area of refrigeration and altitude test chamber design. His position there was Chief Refrigeration Engineer. Mr. Nash, in fact, contacted the end-user directly to discuss the product and its specifications (see I.R. Appendix 9). Bio-Temp also provided a schematic diagram of their proposed vacuum system along with their bid - not done by (nor apparently requested of) either Burnsco or CMR. No comment was ever made by the technical authority of any deficiencies in this drawing. Consequently, Bio-Temp does appear to have access to the required technical expertise, but DND took no account of it in making their evaluation.

> **"...This item is a complicated computer controlled scientific test instrument which requires detailed engineering in order to be both accurate and safe to operate. The company has already asked for our help in determining what the wiring requirements will be in order to meet the required CSA approval. If the basic wiring is a problem for them, how will they deal with the problem of computer control and safety standards for pressure..."**

Bio-Temp may have indeed contacted the end-user to question him about the CSA approval (although no written record exists as to the substance of this contact). Bio-Temp had provided details about the electrical system in its proposal by means of an electrical schematic. It also provided a letter (February 2, 1990) describing the additional steps taken to assure compliance to the CSA standards:

> "...We have contacted Mr. Jim Morrison of the CSA in Rexdale, Ontario, AC416-747-2219. We will manufacture the equipment per their "Special Inspection Guide Lines". Upon delivery of the equipment then either Mr. J. Morrison or Mr. J. Robertson will inspect the equipment so final electrical can be accomplished. We have a project now in progress in Western Canada and are following the same procedure. This cost is our responsibility."

Thus, the wiring issue, which has been raised in order to offer an inference that the complainant may be incapable of manufacturing a "complicated computer controlled scientific test instrument which requires detailed engineering in order to be both accurate and safe to operate...", is shown to have been responded to by the complainant with relevant information, not contradicted by DND, and not taken into account in the rejection memo. With this out of the way, there is nothing left of the inference, and the opening sentence of that quotation becomes an innocuous statement that tells nothing against the complainant.

> **"...b. A survey of the references provided by Bio-Temp indicated that they have previously only made what were described as `walk-in freezers'. The requirement is for an altitude test chamber, which has a climate control system to vary the temperature, while simultaneously varying the internal air pressure to near vacuum levels. This is definitely more complicated than anything the company has done before, and as LETE will probably have this item for 20 years or more, we do not want to be the guinea pig that they use to gain the required expertise..."**

The Board's check of the same references did not reveal the same information (see I.R. Appendix 15).

Although it may be true that Bio-Temp has not previously manufactured a test chamber with pressure as one of the controlled parameters, they have supplied/manufactured scientific test chambers to a range of customers, including government, academic, and industrial end-users who report satisfaction with their products. For example:

1. The director of maintenance for the Pillsbury Co. reports using two cooler/freezers which, while not sophisticated instruments, are temperature-controlled walk-in boxes that give very little trouble, and he finds normal response on service ..."when we call, they're there".

2. The director of maintenance for the U.S. Environmental Protection Agency office at Port Orchard, Washington reports using a constant temperature room for test samples, made by the complainant that has "worked absolutely perfect for two and a half years...all we have changed is the chart paper". They have five such rooms and this is the best. They report installation with personal attention from the president, and attentive service thereafter.

3. The director of planning at the University of Wisconsin reports using a Bio-Temp temperature and humidity controlled room to simulate Antarctic conditions. He reports no problems and very good service. He commented that they had another similar unit on which he wished the complainant had bid, believing he might thereby have saved money.

"c. Bio-Temp has no service facilities in Canada and their service support in the United States is limited. This will seriously limit or curtail any after sales service if there are any problems with the instrument."

The RFP contained no service requirement with the exception of providing "the name, address, and telephone number of your nearest after sale service centre(s)/depot(s)". Bio-Temp offered factory service support and the willingness to train a local service company (see I.R. Appendix 16). CMR only offered factory service (see I.R. Appendix 10). This company is

located in Colorado and yet DND found this proposal acceptable (DND fax dated January 25, 1990) (see I.R. Appendix 11). Again, the rejection letter takes no account of what appears to be at least comparable service support arrangements to what was being offered by CMR, which, at one point, they were willing to accept.

As noted previously, the comments obtained by Board investigators on Bio-Temp's service support were uniformly good, and directly contradict the above quotation from the rejection memo.

> **"The next successful bidder, Burnsco, have a proven track record in this area of engineering and a Canadian service network if anything goes wrong."**

In fact, Burnsco will not be performing the engineering services for this chamber. According to Burnsco, it is the authorized representative, in Canada, for ESPEC. Burnsco started in business in July 1989 and is currently a one-person operation. Burnsco's president indicated to the Board's investigators that it has never sold a temperature/humidity/altitude chamber until this one. It offered the name of a local refrigeration company as the service contact. It is difficult to conclude from this that they "have a proven track record in this area of engineering" or that a Canadian service "network" exists. There is nothing present on the DSS file that would obligate the manufacturer or service organization mentioned to honour any warranty or provide any service in the future should Burnsco cease to operate. Indeed, nothing in the file reveals any details of the contractual relation between Burnsco and ESPEC, that bears on these issues.

> **"This unit has no confidence in the qualifications of Bio-Temp to produce a reliable, accurate scientific instrument."**

In light of the evidence found, particularly from the reference checks, and the documents provided to the end-user (the Bio-Temp proposal and responses to the various requests for clarification), the Board finds no support for this conclusion.

It may be worth observing that the rejection memo at this point appears to be comparing Bio-Temp (a manufacturer) on these issues of track record, engineering expertise and service support, with Burnsco as if

Burnsco had a better record in this regard. In fact, Burnsco has no manufacturing capability and has stated that it is but an "authorized representative" of a U.S. manufacturer. And yet Burnsco signed this contract with the government as a principal, not as an agent, with the risks regarding warranty and service already noted above. To compare these two suppliers in this fashion is to compare apples and oranges, and the conclusion DND reached can only be characterized as a `lemon'.

It is clear from this analysis that the rejection letter is an attempt to provide a paper justification for overlooking the low bidder. It fails to take any account of the complainant's reasonable responses to the clarifications requested by DSS and sent to DND, even though they had these in hand at the time they wrote the rejection. The failure even to take them into consideration deprives the rejection memo of all credibility. When, to this, one adds questionable statements concerning the winner's "proven track record in this area of engineering" and "service network if anything goes wrong", it provides, on its face, an apparent contradiction of its opening statement that "a careful review was made of all bids and no favouritism is being shown to any of the bidders".

Finally, this use of criteria, to eliminate the low bidder, that was not specified in advance, and was applied unevenly between bidders, is directly contrary to Paragraph 2 of Article 1305 of Chapter 13: Government Procurement of the Free Trade Agreement which states, in part:

> *"Each Party shall, for its procurements covered by this Chapter:*
>
> *...c) use decision criteria in the qualification of potential suppliers, evaluation of bids and awarding of contracts, that:*
>
> *...iii) are clearly specified in advance..."*

2. **The early release of bid packages**

Prior to publication of the NPP on 27 September 1989 in the GBO, bid packages were requested from, and sent by, DSS to two potential suppliers.

Para 2. of Article 1305 of the Free Trade Agreement states, in part:

> *"Each 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;*
>
> *(b) provide all potential suppliers equal opportunity to be responsive to the requirements of the procuring entity in the tendering and bidding phase;..."*

It is plain that this practice did not accord with these provisions, as required in Sec. 17 of the FTAI Act. It is true that one of those receiving a bid package never submitted a bid, and if that had been the only instance of early distribution, it would be hard to conclude that it prejudiced the competition. However, the other "early" bid package went to the ultimate winner of the competition and it is thus impossible to say with any certainty that it did not confer an advantage on Burnsco. It is also not possible to be certain that it did confer an advantage on Burnsco, but it has, at the very least, left the government open to a charge of unfair practice, in that it afforded both of these suppliers more time to prepare their bids than was accorded any of the other bidders.

Turning now to the four general issues concerning the procurement system referred to above, the first point the Board wishes to comment upon under this heading is:

1. **The "Full-pricing" of the U.S. bids**

The RFP standard Form 9400-2 contemplates on its face that Duty and FST will always be a part of bid prices, "unless otherwise specified herein by the Crown". And it was otherwise specified, that U.S. bidders should quote less Duty and FST, although domestic suppliers were specifically instructed to include these items. There was, however, no transparency to the bidders as to what DSS intended to do with the ambiguity in the evaluation process that would result from this instruction.

Presumably, the reason for this is that the U.S. bidders are not charging the Canadian government its own duties and FST in their prices. In the case of Canadian bidders, they have already paid these amounts. In the case of U.S. suppliers, the government (whose policy it is to pay these

duties and taxes on its own purchases in the same way as must any private subject of the Crown) would doubtless pay the price to the supplier and, in a separate transaction, pay the applicable taxes and duties directly to the Receiver General for Canada.

However, for bid evaluation purposes, it is critical to add these amounts into the U.S. bidders' prices in order to make a fair comparison of the prices offered to the Crown. It is the failure to explain that this would be done, and how, that is the object of criticism here.

The critical point for procedural regularity is that Paragraph 13(h) of Article V, Tendering Procedures, in the GATT Agreement on Government Procurement states that tender documentation provided to suppliers shall include:

> *"the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of foreign products, customs duties and other import charges, taxes and currency of payment."*

The failure to do this, even though the government's intentions might have been clear enough to any one knowledgeable in the matter, does not comply with that procedural requirement of the Free Trade Agreement.

Moreover, the consequences of this procedural oversight are not minor, because the unfairness to the foreign bidder lay in the total failure to explain when and by how much their bids would be bumped up before they were evaluated. In the case of Bio-Temp, this practice still left them low bidder. But in the case of another bidder - CMR - it moved them from second place to fourth place. It should be remembered that, at that point in time, DND had written to DSS requesting that they award the contract to CMR. It was only after the belated "add-in" of Duty and FST that CMR's proposal slipped back to fourth place.

There is a question too, whether the bids were "bumped-up" by the right amounts. The Board's investigators informally consulted Customs officers about this matter, while DSS had consulted a DND employee who is said to specialize in this work. The Board's consultations produced advice

that the matter is complex and not free from difficulty, and that experts can easily differ in the view of the proper applicable provisions. It is at least possible that if the U.S. bidders had been asked to include Duty and FST they might have been able, for example, to employ a Customs Broker who could have arranged Customs treatment for evaluation purposes, that was both appropriate and not subject to the criticism noted above.

2. **The Progress Payments issue**

Before contract award, and with the end of the 1989-90 fiscal year fast approaching, negotiations were undertaken to introduce a scheme of progress payments into the proposed contract with Burnsco. The agreed clause which appeared in the contract awarded on 5 March 1990 contemplates a single progress payment to "be made after equipment is assembled to 50%", upon receipt of proper justification on the DSS form 1111, Claim for Progress Payment.

On 19 March, Bio-Temp's complaint was filed with the Board, and DSS was advised of the complaint the next day (although DSS had known Bio-Temp intended to file a complaint since 8 March when Bio-Temp indicated to them their intent to protest if not awarded the contract).

The contract with Burnsco called for a delivery schedule of 16-20 weeks ARO. On 21 March, about 2 weeks after contract award, the Progress Claim No. 1, on DSS Form 1111, was submitted for 50% work completion, and all necessary processing for approval and cheque requisition was completed before 31 March, the end of the fiscal year. A cheque was sent to the contractor, in April, for $56,208.80, representing 50% of the contract value less an agreed 20% holdback.

The point that is of interest to the Board here, relates to the integrity of the procurement system and is that the possibility of such payments being available was not known to any of the bidders in the competition, and, owing to the dollar value of the article to be produced and the lengthy delivery schedules required by all the bidders, it is quite likely that had they known such a payment scheme was available, it could have affected significantly the prices bid, and of course, given the closeness of the bid prices, the order of bid standing.

As a corollary to that point, there is the question of whether the Crown got value for money for the concession it granted here. After confirming that Burnsco's price would remain as bid (after the bid expiry

date), DSS then negotiated the progress payment clause, which is, in effect, a concession to the contractor that ought to have been reflected in a reduction in the contract price, attributable to the reduced interest costs to the contractor resulting from his ability to obtain half the cost of the work upon partial completion, rather than having to wait for payment until after delivery and installation.

Neither the Free Trade Agreement, the FTAI Act, nor the PRB Regulations specifically calls upon the Board to ensure that the public purse obtains the best value for its money...that is the duty of others. It is, however, a part of the Board's duty to make recommendations concerning compliance with the policies and procedures that are designed to promote that objective. The Board's duty to deal with this matter is set out in Section 19(b) of the PRB Regulations.

The relevant procedural requirement that has not been followed in this case is to be found in the DSS Supply Policy Manual Directive 4202 dealing with method of payment.

Para. 3 sets out the standard DSS policy (exactly as appears on the face of page 1 of the RFP, quoted above) which calls for payment within 30 days after the later of work completion or the rendering of an invoice in accordance with the contract. The exceptions are set out in Para. 4, which authorizes advance payments and progress payments - but only if certain conditions are met. These include obtaining value commensurate with the amount of the payment (4.2(b)) and obtaining economic advantage to the Crown (4.2.(d)(1)).

Para. 14(e) provides:

> *"14. Selection of the method of payment most appropriate to a particular procurement shall be made after evaluation of the following factors:*
>
> *(e) Reduction in contract price resulting from the various methods of payment. Since progress or advance payments reduce the need for borrowing by the contractor or reduce the size of equity capital on which a return must be realized, lower prices should flow through to the Crown, with the price reduction varying with different methods of payment and their relative attractiveness to the contractor. For negotiated contracts SPM 4001 and 4002 outline procedures to adjust profit levels in line with the provision of progress payments."*

(SPM 4001 and 4002 contain provisions which, by their terms, are not applicable to this procurement).

The investigation discloses that the file contains no record of any attempt to obtain the required price reduction, or any reaction of the contractor other than that they accepted the inclusion of the progress payment clause into the proposed contract. The Board considers that the apparent absence of any attempt to comply with this requirement reflects negatively on the integrity of the procurement system as it applies to fairness to the Crown.

3. **Release of price data to the customer at the time of technical evaluation**

SPM Directive 3002.27 reads as follows:

"It is generally not advisable to disclose price information to customers"

The wisdom of this policy advice is well demonstrated in this procurement where the technical evaluators knew all the bid prices and this knowledge, in light of the way in which the evaluation was done (as set out in detail earlier), could have had a bearing on the objectivity with which the technical evaluation was carried out. Those who set up the procurement system appear to have been aware of this possibility, and were concerned that the system not be laid open to such criticism. Unfortunately, in this case, the policy advice was not followed.

4. **Failure to communicate with the contract awardee after complaint filed**

The fourth issue is that flowing from SPM Directive 3006.16 which provides direction to contracting officers concerning their conduct vis-a-vis a contractor after a complaint has been filed with the Board:

> *"Where a contract has already been awarded, the Board will notify the contractor of the complaint. DSS will write to the contractor requesting that his work in performing the contract be done in such a way as to minimize the cost to the Crown, consistent with proper performance of the terms of the contract, until such time that the matter before the Board is resolved."*

No record exists on the procurement file of any correspondence from DSS to the contract awardee relating to "minimizing the cost to the Crown." In fact, there is some evidence to suggest exactly the opposite, taking into account the celerity with which the change in payment method was approved in the time remaining before the end of the fiscal year.

This is unfortunate because it was in the nature of this complaint that it could not have been filed before the contract was awarded, and the Board was not, of course, able to stop the award of the contract (which, had it been possible, would have made the resolution of the difficulty presented by this case, somewhat simpler). And these difficulties were unfortunately increased by reason of the contractor not having been advised to minimize costs as per SPM 3006.16.

Remedies

The Board believes that this is a case where the low bidder has been by-passed for reasons that the Board has not accepted as valid, and had these actions not occurred, Bio-Temp would have been entitled to the award of this contract.

The Board is conscious of the fact that to terminate the contract with Burnsco now and award it instead to Bio-Temp, may present DSS with some practical difficulties. In view of the facts established in this case, the Board has no alternative but to recommend the proper remedy viz, termination of the contract, and its award to the complainant. However, if as a practical matter this recommendation cannot be implemented, this determination will, at least, arm the parties with a recognition of their rights, and allow them scope to make such arrangements as can properly be made in recognition thereof.

Since the complainant has been substantially successful in this complaint, the Board intends to award them their costs in pursuing this complaint. They are entitled as well to an award of reasonable costs relating to the preparation of their bid.

Proceeding now to its determination:

DETERMINATION

The Board has determined on the basis of this investigation that this procurement by the Department of Supply and Services did not comply with the requirements of Sec. 17 of the Free Trade Agreement Implementation Act in that:

(a) it did not provide all potential suppliers equal access to pre-solicitation information and with an equal opportunity to compete in the pre-notification phase;

(b) 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;

(c) it used decision criteria in the evaluation of bids and awarding of contracts that were not clearly specified in advance.

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.

The Board recommends that DSS terminate the contract awarded to Burnsco and award it to the complainant.

If the contract is awarded to the complainant, the value thereof should be reduced by any amount paid in compliance with the Board's bid preparation cost award under paragraph 2 above and if the progress payment concession granted to the original contract awardee is to be included in the contract with the complainant, the price should further reflect the negotiated value of that concession.

Alternatively, if the contract is not awarded to the complainant, the Board recommends that DSS present the Board with a proposal for compensation, developed jointly with the complainant, that the Board could recommend as fair and reasonable pursuant to Section 19(1)(v) of the FTAI Act, and that recognizes that Bio-Temp should have been awarded this contract. This proposal is to be presented to the Board within 30 days after the date hereof.

The Board also recommends that solicitation information (bid packages) in procurements covered by the Free Trade Agreement (and indeed in any procurement in which foreign suppliers are invited to bid) contain clear and transparent information about the government's intentions with respect to Customs Duties and Federal Sales Tax and how they mean to treat these matters for the purposes of bid evaluations.

Gerald A. Berger

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Chairman
Procurement Review Board of Canada