



IN THE MATTER OF:

**A Complaint
By Enconaire (1984) Inc.
of 80 Sutherland Avenue
Winnipeg, Manitoba**

**Board File No:
E90PRF664Y-021-0019**

**Wherein
Controlled Environments Ltd.(Conviron)
of 1461 St. James Street
Winnipeg, Manitoba
has been granted leave to intervene**

Complaint upheld

AND IN THE MATTER OF:

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

15 February 1991

DETERMINATION BY THE BOARD

This complaint relates to one of two items being procured by DSS for the Department of Forestry's Forest Pest Management Institute (FPMI) at Sault Ste. Marie, Ontario. The item is a "Reach-in environmental cabinet" which was sole sourced to Controlled Environments Ltd. (Conviron) of Winnipeg, Manitoba.

The complainant alleges that sole sourcing this equipment, which they too could have supplied, deprived them of an equal opportunity to be responsive to the requirements of Forestry Canada (FC), contrary to the Free Trade Agreement.

DSS takes the view that their customer department (FC) has produced an adequate justification for sole sourcing under the Free Trade Agreement (FTA), which, itself, provides that the normal rules requiring open competition "*need not apply*" when the goods ordered are "*...additional deliveries by the original supplier which are intended either as parts replacement for existing supplies or installations, or as the extension of existing supplies or installations where a change of supplier would compel the entity to procure equipment not meeting requirements of interchangeability with already existing equipment...*" (to quote the GATT Code, Art. V:16(d), which is incorporated into the FTA, and which is applicable to this procurement.)

The other item in this procurement (in respect of which no complaint is raised), is an incubator -- a somewhat smaller form of a reach-in environmental growth chamber -- and it, too, was sole sourced to Conviron. The Board observes that the contract award notice, published in Government Business Opportunities (GBO) -- which alerted the complainant to the existence of the procurement -- did not mention this second item as being included in the contract awarded.

The complainant became aware, or should have become aware, of the second item in the contract when they were sent a copy of the Governmental Institution Report, which clearly mentions it, and they made no effort thereafter to amend their complaint to include the second item. Consequently, the Board assumes that the complainant intended to restrict its complaint to the single item at issue here, the reach-in environmental cabinet.

The significant point for the procurement system, however, is that it is a requirement of the FTA, when publishing notices of contract awards, that they "*...contain the nature and quantity of the products in the contract award...*" (GATT Code, Article VI:1(a)), and this particular contract award notice did not do this. Such imprecision creates some potential for unfairness, although in the present case there is no clear evidence that it did so.

All of the technical requirements for filing the complaint have been met by the complainant. The contract awardee, Conviron, after receiving notice of the complaint, sought, and was granted, leave to intervene in these proceedings. Their comments were received by the Board and they were sent copies of the Governmental Institution Report and of the complainant's comments thereon. They made no further representation to the Board.

The allegations contained in the complaint, together with the government's responses thereto, the intervener's comments, and the complainant's own comments, were investigated by means of interviews with individuals, and the examination of documents on the DSS procurement file. Individuals interviewed were: J. Manning, DSS, North Bay Sub-Office (Chief of Procurement, and the contracting officer in this case); J. Heatley, FC, Sault Ste. Marie (Requisitioning Officer and Chief of Maintenance and Construction); Dr. Blair Elson, FC (Scientist); Mr. D. Kruse, Enconaire (General Manager).

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.

Background

The Forest Pest Management Institute (FPMI) uses these environmental growth chambers to conduct a variety of plant research experiments. Currently they have in use about 132 cabinets and chambers, 100 of which were made by Conviron, the balance being a mix of products from three other manufacturers, none of them being Enconaire, the complainant in this case. This procurement is being conducted to enable FPMI to replace an obsolete reach-in cabinet and incubator (both of non-Conviron manufacture) (see I.R. Appendix 12).

FPMI also has a central computer-based data logger, that was supplied earlier by Conviron, that collects and records data from any growth chamber connected to it. And, as was the case with Agriculture Canada in the complaint the Board decided on 28 January 1991 involving a similar

system of growth chambers (Board file nos. E90PRF6601-021-0020 and E90PRF6601-021-0021), Forestry Canada also has a separate, host computer (also supplied earlier by Conviron) that can both access the data collected by the data logger and enable the manager to adjust individually, from that central point, the environmental conditions of all the growth chambers connected to it.

In this case, however, in contrast to the situation with Agriculture Canada, FPMI does not currently connect all its growth chambers to the data logger and host computer. And, in fact, the equipment being ordered will not be connected to them for now. Nevertheless, according to the FC Chief of Maintenance at FPMI, they considered it "*a plus*" that the Conviron electronic control system attached to each cabinet offers the flexibility of being connectable to the data logger and host computer, should they require it in the future. This feature was not, however, specifically mentioned in either the RFP or the contract.

The Sole Source Justification

When FC sent their requisition for this equipment to DSS, they included a "sole source justification" which DSS later asked FC to augment with a more complete supporting document. This was sent to DSS, and it reads as follows (see I.R. Appendix 4):

"REASONS FOR PREFERRING CONVIRON REACH-IN ENVIRONMENTAL CABINETS

Following are some reasons why Conviron controlled-environment cabinets are preferred as replacements for the existing obsolete units.

- 1. It is essential that our new environmental equipment continues to be standardized with existing equipment. Standardization of such equipment provides consistency of operating and maintenance techniques; minimizes errors or delays associated with the operation and maintenance of different types of equipment; minimizes maintenance costs; minimizes the number of spare parts required since there are fewer types of equipment; and minimizes training costs since personnel are already familiar with Conviron equipment.*

2. *There are already a total of 132 environmental cabinets at the Great Lakes Forestry Centre. (77 walk-ins, and 55 reach-ins). Most of these were manufactured by Conviron. All the cabinets purchased in recent years were manufactured by Conviron.*

3. *Scientific personnel are satisfied with Conviron equipment, specifications, and performance.*

Long term experience with Conviron equipment and Conviron representatives has been quite satisfactory.

4. *Conviron is a well-established company with a capable service organization. Parts and service are available on short notice from their Winnipeg facility.*

5. *The stock of spare parts for our existing equipment can be used on the proposed new equipment. A significant number of expensive parts including the microprocessor system, dry humidity sensors, and so on, are interchangeable between Conviron walk-in and reach-in cabinets.*

6. *Our maintenance and operating personnel are already familiar with Conviron equipment. Additional training would not be required.*

7. *Conviron microprocessors and data-logging equipment is designed to work with Conviron equipment only."*

Evidently content with this documentation, the contracting officer prepared the memorandum to file headed: "PROVISIONS OF THE GATT/FREE TRADE AGREEMENT ON GOVERNMENT PROCUREMENT DO NOT APPLY FOR THE FOLLOWING REASONS:" to obtain internal approval to sole source (see I.R. Appendix 5). The reason invoked was:

"A specified proprietary product is required for reasons of logistics, where the introduction of a non-standard item would cause operating difficulties or extra costs in maintenance."

This document was signed off for the Chief of Procurement by the manager of the DSS Northern Ontario Regional Office on October 5, 1990. According to the contracting officer, this form was developed by the regional office for its procurement actions.

The Governmental Institution Report (GIR) (see I.R. Appendix 12), filed with the Board by DSS, includes a copy of a memo prepared by their customer department, that offers some further explanation and background in support of the decision to seek sole sourcing to Conviron. The relevant portions are set out below:

"ENVIRONMENTAL CABINETS

This morning you...requested the following information.

1. *How did Forestry decide to standardise? Do we have any supporting documentation?*

Comments

The history of the situation dates back many years, into the early 1980's It is my understanding that the history included unsatisfactory experiences with other suppliers, followed later by very satisfactory experience with Conviron in terms of specification compliance, manufacturer support and equipment maintenance and servicing.

...the decision to standardise on Conviron equipment was made on the basis that in the early 80's there was no other sizeable, Canadian company which manufactured good environmental equipment and provided capable service/maintenance. Even during the Phase two major construction project the environmental equipment was purchased on an open tender basis, and the evaluation of the bids confirmed that Conviron was the supplier of choice.

...

In 1985/86 the pattern of purchasing Conviron equipment had already been established, and all of the environmental equipment that had been purchased during Phase 2 and Phase 3 of the major construction program had been purchased from Conviron,

and Conviron equipment had been purchased well before that time. With the concurrence of the scientific staff, a sheet which briefly explained the reasons for preferring Conviron was attached to each subsequent requisition for environmental equipment.

2. . . .

3. *Do we have any evaluation information to determine our standard? Do we have a standard?*

Comment

No environmental equipment other than Conviron has been purchased since 1975. Specifications, standards and performance tests, have varied over the years depending on the specific requirements of the scientific staff for various types of equipment.

4. *Can we give them an overview of the incremental costs in respect to reconnecting and disconnecting these cabinets to do modifications to make components work. Can we estimate the impact all these modifications will have on the life of the product.*

Comment

Such modifications are probably quite impractical. It is our understanding that the microprocessors used by Conviron are not compatible with the microprocessors use by Enconaire. We are advised that such things as internal speed and language and so forth are different, and the microprocessors will simply not communicate with each other, and the Enconaire microprocessor will not communicate with the Conviron datalogger.

This information was provided by Conviron. We have had no opportunity to check it.

5. . . .

The following comments relate to the Executive Summary of the Government Institution Report:

...

The last paragraph under the heading of "SSC Position" is somewhat confusing to read. It is my understanding that the Convicon microprocessor is a proprietary device that is currently only used on Convicon equipment. It is an integral part of the control system of each cabinet, and a competitor's microprocessor would have to be compatible to allow their microprocessor to communicate with a Convicon datalogger. The attached Enconaire letters do not mention compatibility with Convicon microprocessors and data loggers and to the best of our knowledge they are not. Modifications to obtain compatibility could well be impractical, and it is possible that any future generic specification that we prepare would require compatibility with Convicon microprocessors and/or dataloggers.

...

Miscellaneous Comments

...

At this point we are not planning to purchase additional environmental cabinets or chambers this fiscal year. But if we do get to the stage of evaluating bids from this company at some future time, part of the technical evaluation may involve microprocessor and datalogger compatability with existing Convicon equipment. Also of interest would be the risks associated with the on again/ off again history of Enconaire; and potential financial risk. We would probably also be very interested in checking with other recent purchasers of the specific type of equipment we may be purchasing to determine whether there is any risk associated with quality, warranty, or after-sales service support with a company such as Enconaire."

Analysis

In order to sole source an FTA procurement, the procuring department must, in compliance with GATT Code Article V:16, conclude that one of the conditions that would permit it has been met and, moreover, that it was neither desirable to compete the requirement anyway, nor that single tendering was being used to avoid maximum possible competition or to discriminate in favour of domestic producers. There is no evidence that the latter two considerations figured prominently in the decision-making here, but these two points are not really at issue; the real issue is whether the first condition is met. That condition is set out in paragraph 16(d), as follows:

"Use of single tendering

16. The provisions of paragraphs 1-15 above governing open and selective tendering procedures need not apply in the following conditions, provided that single tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among foreign suppliers or protection to domestic producers:

...

- (d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies or installations, or as the extension of existing supplies or installations where a change of supplier would compel the entity to procure equipment not meeting requirements of interchangeability with already existing equipment;⁴*

⁴ *It is the understanding that "existing equipment" referred to in Article V:16(d) includes software to the extent that the initial procurement of the software was covered by the Agreement.*

This case is quite similar to the Agriculture Canada case mentioned earlier, where the same issue was raised: whether condition (d) from the GATT Code Article V:16 had been met, when a similar justification was offered.

Forestry Canada does offer a rationale for what they are doing -- but, unfortunately, it does not meet the requirements of the FTA set out in the GATT Code item incorporated into it. The two pieces of equipment ordered are replacements for other similar items -- but they are not "parts replacement" for those items and they are not being ordered from the original supplier, as required by Article V:16(d).

Nor is there a case here for interchangeability with already existing equipment. They have in place a number of growth chambers and cabinets of different manufacture at the FPMI and it cannot be said, nor has it been argued, that interchangeability is a matter of such concern to FC that a change of supplier would compel them to procure equipment not meeting their requirements in this regard.

The Board has already dealt, in the Agriculture Canada case mentioned above, with the issue of the confusion between the terms "compatibility" and "interchangeability" and that affects this case just as it did that one.

Firstly, "compatibility" is not a justification that will meet the Code condition that demands "interchangeability". The rule is more stringent than that.

Secondly, even if the two terms could be treated as synonymous, the government has not actually made compatibility with the data logger and host computer a requirement in this procurement. Further, they have not placed themselves in a position to decide that the condition, even if so interpreted, has been met.

They have made a case that compatibility between the new equipment and the Conviron data logger and host computer would be a desirable feature -- even though they acknowledge no immediate requirement for it. They acknowledge as well that if they ever had to procure these articles in a competition, that very compatibility would be one of their requirements. It would then be for the private sector to respond positively to this and other requirements. But in this case, as in the Agriculture Canada case, the private sector was not given that opportunity. In the absence of expending the effort required to hold a competition, the government ultimately relied on "convenience" as the rationale for sole sourcing.

Indeed, the file form completed to obtain internal approval to sole source (see I.R. Appendix 5) cites as the reason therefor:

"A specified proprietary product is required for reasons of logistics, where the introduction of a non-standard item would cause operating difficulties or extra cost in maintenance."

These words are drawn from the DSS Supply Policy Manual (SPM), Directive 3002, paragraph 7(c), which is a policy that does not apply to Free Trade or GATT procurements. As already mentioned, for these procurements a more rigorous set of rules governing the suitability and use of single tendering has now come into play.

Finally, the Board notes that there can be no objection to technical authorities wishing to "standardize" their requirements, so long as it is not done only by reference to trade names or by specifying the origin or producer, which can become a vehicle for curtailing competition. The GATT Code itself (Article IV:3) recognizes that when there is no sufficiently precise or intelligible way of describing procurement requirements except by means of such a reference, then one may do so, but one must add words such as "or equivalent" in the tenders.

In conclusion, the Board finds that the department has not placed itself in a position to determine whether the conditions under which the requirements for competitive tendering need not apply, had been met. The Board will award the complainant its reasonable costs relating to filing and proceeding with the complaint. It will also recommend that this procurement action be cancelled and that, if the requirement continues to exist, it be competed in accordance with the provisions of the Free Trade Agreement.

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 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 because the requirement was sole sourced without the procuring entity being in a position to determine whether the conditions under which the requirements for competitive tendering need not apply, had been met.

The Board awards the complainant its reasonable costs of filing and pursuing this complaint and it recommends that the procurement action for the reach-in cabinet complained about be cancelled, and that, if the requirement continues to exist, it be competed in accordance with the provisions of the Free Trade Agreement.

The reasoning that supports this determination in respect of the reach-in cabinet, applies equally to the procurement of the incubator, and the Board recommends that the cancellation and reprourement action referred to above include the incubator as well.

Gerald A. Berger
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Chairman
Procurement Review Board of Canada