



IN THE MATTER OF:

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

**Board File No:
E90PRF66W9-021-0009**

AND IN THE MATTER OF:

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

23 August 1990

DETERMINATION BY THE BOARD

This complaint concerns a contract with Her Majesty the Queen, as represented by the Department of Supply and Services (DSS), that was signed on 8 June 1990. This contract, worth \$100,762.50, was awarded to Patlon Aircraft and Industries Ltd. (Patlon) of Mississauga, Ontario, for the supply, to various Canadian Forces Supply Depots in Canada, of 750 "work station grounding kits".

These kits are used by technicians assembling or servicing delicate electronic equipment and parts that may be subject to damage from static electrical charges, which can be built up while these parts are being handled. The function of the grounding kit is to dissipate static electric charges to zero and maintain that condition as required. The kit consists of five parts: a table mat, a floor mat, a separate electrical cord for each, and a wrist band for the operator.

The complainant is Cardinal Industrial Electronics Ltd. (Cardinal) of Edmonton, Alberta, one of 16 suppliers who bid on the contract, and it is their contention that the evaluation of their bid was unsatisfactory because it did not recognize that the product they offered was an acceptable "equivalent substitute" for the goods specified in the Request for Proposal (RFP), and that if it had been, they would have been awarded the contract because they were the low bidder. Cardinal seeks cancellation of the contract and its re-award to themselves.

The procurement was advertised with a Notice of Proposed Procurement (NPP) published in Government Business Opportunities (GBO) on 28 February 1990 under the GATT/FTA section, and was coded "F-01", meaning that it was being treated as a Free Trade Procurement (whose value was estimated to be likely to fall between \$31,000 and \$210,000, the monetary "window" for procurements covered by the Free Trade Agreement) and that the solicitation method would be by "open tendering".

Those who responded to the NPP were sent a 21-page RFP (see Investigation Report (I.R.) Appendix 5). This document includes a number of significant clauses. Those that are relevant to this determination are reproduced below:

1. The procurement is for:

"001 4940-21-882-7143

ea 750.00
(sic)

GROUNDING KIT, WORK STATION, CONSISTING OF 5 COMPONENTS; EA 1 TABLE MAT 2 FT BY 4 FT BY 0.125 IN THK, 1 EA FLOOR MAT 4 FT BY 6 FT BY 0.125 IN THK, EA 1 WRIST STRAP, EA 1 GROUND CORD 6 FT LG W/I SNAP AND 1 CLIP AT ENDS, EA 1 GROUND CORD 10 FT LG W/I SNAP AND 1 CLIP AT ENDS.

ELECTRICAL PROPERTIES OF MATTING:

- 1. RESISTANCE TO GROUND - SURFACE RESISTANCE 10^6 TO 10^9 OHMS.*
- 2. STATIC DECAY - ± 5 KV TO 0 IN LESS THAN .1 SECONDS.*

09581 (3M CANADA INC.) P/N8020 OR EQUAL"

¿ NATO Stock
Number

U

¿ Purchase
description
as per
Canadian
Forces
Publication
(CFP 137)

U

¿ Added by
DND
Technical
Authority

U

¿ Manufacturer
Number and
part number

U

2. "NOTES TO BIDDERS:

- *If your offer is for the referenced part numbers indicated, you are to strike out "OR EQUAL".*

- *If you offer an "EQUIVALENT SUBSTITUTE", you are to strike out the trade reference shown and indicate the trade reference and part number offered and provide technical data to support your offer. IF DATA IS NOT SENT YOUR OFFER CANNOT BE EVALUATED AND MAY BE REJECTED AS NON-RESPONSIVE."*

- 3. *"DELIVERY:
While delivery is required by 30 June 1990 the very best delivery we can make is _____."*

- 4. *"As opposed to an Invitation to Tender, this is a request [commonly referred to as a Request for Proposal (RFP)] that proposals be developed and submitted to the Minister of Supply and Services setting out the alternative means by which several technical, performance, time and other goals and objectives may be best met, having regard to stated mandatory requirements. The Minister will consider entering into a contract for the implementation of the most acceptable proposal which will be determined having regard to the evaluation factors set out in this RFP. In addition, the acceptability of the contract terms and conditions upon which the respondent would be prepared to undertake the implementation of the proposal will be measured against the contract terms and conditions set forth in this RFP."*

- 5. *"9. Contract(s) will be awarded to competent/qualified supplier(s) who provide the best value to the Crown with respect to price, technical compliance and delivery requirement."*

- 6. *"EVALUATION CRITERIA:
The following factors will be taken into consideration in the evaluation of your proposal:*
 - 1. *Price*

2. *Compliance with technical requirement*
- *DESIRABLE*

3. *Delivery - DESIRABLE*

Your proposal may be accepted without further negotiation.

PLEASE INDICATE THE PART NUMBER YOU ARE QUOTING ON.

ADHERENCE TO DELIVERY:

CONTRACTORS ARE REQUIRED TO QUOTE THE BEST POSSIBLE DELIVERY DATE FOR EACH ITEM TAKING INTO ACCOUNT THE POSSIBLE CONSEQUENCES (TERMINATION FOR DEFAULT) FOR NOT MEETING ANY RESULTANT CONTRACTUAL OBLIGATIONS."

7. *"INSPECTION: The contractor is responsible for performing or having performed all inspections and tests necessary to substantiate that the materiel or services provided conform to the drawings, specifications and contract requirements including any applicable technical requirements of the specified manufacturers' part number."*

The closing date for bid submissions was 11 April 1990, and by that date 19 proposals from 16 suppliers had been duly received by DSS. They tabulated the results and Cardinal was the low bidder, with an offer fixed at \$97,220. Patlon was second, at the contract price of \$100,762.50 and these two quotes, along with six others ranked in order from third to eighth lowest, along with technical literature submitted by the offerers, were sent to DND on 18 April for technical evaluation, covered by a letter of transmittal signed by the contracting officer (see I.R. Appendix 6) that contained the following relevant clauses:

"SUBJECT: Request For Proposal No. 019DE.W8473-0-MROA

Enclosed for your evaluation and recommendation are the Proposals received as a result of our subject request.

PROPOSAL INFORMATION IS TO BE DIVULGED (sic) ONLY TO DEPARTMENTAL OR AGENCY OFFICIALS AUTHORIZED TO PARTICIPATE IN THIS PROCUREMENT. NONE OF THIS INFORMATION IS TO BE DIVULGED TO OR DISCUSSED WITH THE TRADE.

If other than the lowest bid is recommended for acceptance, you must provide a full explanation including specific and valid reasons for rejection of any lower bids and the reply must be signed by an authorized officer of your department.

All bids received must be evaluated up to the point where at least two bids are acceptable. Where only one bid is acceptable, reasons must be provided for rejection of all other bids.

In order to meet your required delivery date, and to maintain the prices quoted, your technical evaluation and recommendation (sic) must reach this office before May 2, 1990.

If you cannot meet this date, please advise the undersigned by the fastest possible means, otherwise, the required delivery and cost may be prejudiced."

Despite the warning about this deadline, DND replied to DSS on May 22, enclosing their form DND 635 "Selection of Tenders". This form contains all the reasons for rejection given by DND for the two bids that were found not acceptable, as well as the deviations that were found acceptable and since it is brief and to the point, it is reproduced here, complete, except that unit prices and the names of six competitors ranking third to eighth have been omitted for reasons of confidentiality.

The complainant, Cardinal, had been advised that this evaluation was going on when they called DSS to enquire about it on 4 May 1990, but it was not then complete.

They called again on 14 June to enquire about the outcome, and were advised that the contract had been awarded to Patlon on 8 June. Since they knew they had offered a lower price than Patlon, they enquired why they had not been awarded the contract and were given, orally, the three reasons recorded in the DND 635 reproduced below.

Since Cardinal disagreed with the rejection on those grounds, and believed that they had offered a viable "equivalent substitute" at a lower price, they then took the step of filing a complaint with this Board. In their complaint letter of 20 June 1990, they deal with the three grounds of rejection set out in the DND 635, in the following manner:

"According to the contracting officer our bid was rejected on three counts:

*Static decay time
Mat thickness
Cord length*

Static decay time:

The proposal stated:

*The electrical properties of the matting
Static Decay - +/- 5kv to 0 in less than .1 seconds*

Our product literature states:

Static Decay time: < 0.5 seconds

Without further investigation our decay time of less than (<) 0.5 seconds was determined to be unsuitable. In laboratory reports the Dissimat will decay a 5kv charge between:

0.085211 and 0.039627 seconds,

These figures were obtained by testing to MIL81705B suggested method 101 which refers to E1A541. This decay time meets the requested specifications.

Mat Thickness:

The proposal requested a mat thickness of .125 inch. Our product literature indicated a thickness of .250mm which is a typographical error. This should read 2.5mm (.098 inch), less than 1/32 inch difference in mat thickness.

Cord Length:

The proposal requests two (2) ground cords. One (1) 6 foot long and one (1) 10 foot long. Our bid offers two (2) cords 8 feet long.

These final specifications, mat thickness and cord length, were not listed as critical criterion (sic). This product is used to control static charge build-up for the purpose of handling static sensitive devices. Therefore the electrical properties of the mat should be most important. We feel that the product we have offered will function equal to or better than the product purchased and at a reduced cost.

As for the mechanical properties, here is a (sic) excerpt from a previous Procurement Review Board ruling:

"However, to insist that any products offered as an `equal' must match every feature of the products used as the standard in the specification would be to deprive the specification of its general applicability, reduce the words `or equal' to meaninglessness, and turn the procurement into a `no substitute' purchase."

We feel that the evaluation process was incomplete and that upon further investigation the product we offered should be considered as an "equivalent substitute".

If our product is an "equivalent substitute" and we are the lowest bid then the contract should be issued to Cardinal Industrial Electronics. Since the contract was only awarded on June 8, 1990 we request the original order be cancelled and re-issued to Cardinal Industrial Electronics."

This complaint was found to be filed in proper time, and in compliance with the Procurement Review Board (PRB) Regulations, a copy of it was sent to DSS, which responded with a "governmental institution report" on 20 July 1990.

That report takes the form of a chronology of events, without, in the Board's view, complying properly with Sec. 30(2)(e) of the PRB Regulations, which requires the report to contain "a statement that sets out all findings, actions, and recommendations of the governmental institution and responds fully to all allegations of the complaint". DSS's only view about the complaint is the last line of the 6 July memo signed by the Director General of Industrial and Commercial Products Directorate stating:

"In view of the foregoing, our position is that the contract as awarded be upheld." (Oddly, there is nothing in the "foregoing" parts of the memo that offers any justification "in view of" to support why that position could be reasonably adopted) (see I.R. Appendix 14)

Nevertheless, the report does attach, as an annex, a somewhat fuller amplification of DND's rejection of the Cardinal bid. This was prepared by DSS, for DND approval, at the request of the Office of the DSS Corporate Secretary, a week after the Director General of Industrial and Commercial Products Directorate's letter of 6 July, quoted above.

"ANNEX "A"

Cardinal's proposal was rejected on three counts:

- 1. Static decay time*
- 2. Mat thickness*
- 3. Cord length*

1. STATIC DECAY TIME

The proposal stated:

*The electrical properties of the matting
Static decay - $\pm 5KV$ to 0 in less than .1 seconds*

This is a very critical component as the workstations are used in the repair of aircraft components and telecommunications equipment. These are very sensitive and expensive components and if static decay time is wrong the static charge could cause serious damage to microelectronic devices and the technician themselves.

Cardinal's proposal stated Static Decay Time: < 0.5 seconds. Their complaint states that further investigation (done by Bystat - the manufacturer) shows that the static decay time is between 0.085211 and 0.039627 seconds.

This should have been shown in their descriptive literature attached to their RFP, as technical data to support their offer was requested for evaluation purposes.

2. *MAT THICKNESS*

The proposal states:

Mat thickness of 0.125 in (1/8")

The thickness specified is important because problems have arisen in the past with thinner mats which would roll up and the mats too soft causing the castor type chairs not to roll properly.

Cardinal mat thickness offered in their literature indicated a thickness of .250 mm which according to them was a typographical error and should have been 2.5 mm (.098 in) which is less than 1/32" difference.

According to DND the thickness of .250 mm did not warrant a sample or question as these mats come in all thicknesses.

3. *CORD LENGTH*

The proposal states:

*One ground cord 6 ft. long
One ground cord 10 ft. long*

These ground cords lengths are important as the 6 ft. cord connects the table mat to the floor mat thus preventing the possibility of an equipment ground fault bypassing the protective resistor (the deviation of 8 ft. in Cardinal's proposal could have been accepted in lieu of the 6 ft.).

The 10 ft. cord connects the floor mat to a central grounding station point. The 8 ft. cord offered by Cardinal is 2 ft. too short and that in itself would be a major deviation and therefore unacceptable.

The matter of acceptance of the minor deviation in Patlon's proposal of acceptance of a 3 ft x 6 ft floor mat in lieu of a 4 ft x 6 ft is not critical. The mat length of 6 ft. is the critical part as it must be the same length as the 6 ft. desk. The width of 4 ft. is not critical - the 3 ft. mat is very acceptable."

Again, conforming to the PRB Regulations, the Governmental Institution report was relayed to the complainant for comment, and by letter of 25 July they replied, as follows:

"...In the Government Institution Report, Section 4, Page 3, heading:

Factors:

Bid Evaluation Criteria:

Our attention is drawn to "Notes to Bidders" on Page 2 of the Request for Proposal, copy attached, which states:

If you offer an "Equivalent Substitution" you are to strike out the trade reference shown and indicate the trade reference and part number offered and provide technical data to support your offer. If data is not sent your offer cannot be evaluated and may be rejected as non-responsive. This was to "signify" the intent of SSC to evaluate on the basis of technical literature...

...I now call your attention to the "Evaluation Criteria" on Page 11 of the Request for Proposal, copy attached. This clearly indicates the evaluation criteria and does not infer or "signify" evaluation criteria but states:

The following factors will be taken into consideration in the evaluation of your proposal:

1. *PRICE*
2. *Compliance with technical requirements*
- DESIRABLE -
3. *Delivery*
- DESIRABLE -

From this we concluded that this proposal would be evaluated on the PRICING of the referenced part or equivalent substitution.

In Section 5, Annex "A".

Our proposal was rejected on three counts:

1. *Static decay time*

The proposal asks for a static decay of +/-5Kv to 0 in less than .1 seconds. The product we offered meets this specification and the literature we sent indicates a decay time of less than .5 seconds and this also meets your requirements.

It was assumed that the decay time of our product was less than .5 seconds BUT greater than .1 seconds. Why not assume less than .5 seconds and less than .1 seconds or better yet find out exactly what this specification was. This assumption was arbitrary, incorrect and quite unfair to Cardinal Industrial Electronics Ltd. and our product.

The report also states; "Their complaint states that further investigation (done by Bystat - the manufacturer) shows ...". This is incorrect as our complaint stated "without further investigation (by the evaluation team) our decay time of less than .5 seconds was determined to be unsuitable.: The additional specifications sent with the complaint are Bystat's normal production reports on their products and not additional or special testing as a result of this bid.

The report states that "This is a very critical component...". although we would suggest that this is the most critical component in a work station grounding kit and considering Cardinal Industrial Electronics Ltd. is the low bidder, I would suggest a more thorough examination of the technical specifications was warranted.

2. Mat Thickness

As we stated in our complaint there was a typographical error in the technical literature but this should have been very obvious. The proposal requests a MAT thickness:

- .125 in., 1/8 in., 3.715mm

Our literature states:

- .01 in. <1/64 in., .25 mm.

This is obviously an error as this thickness is more in line of a bag thickness and not a mat. Again further investigation would have corrected this error.

3. Cord Length

The length of the cords was never indicated as being a critical criteria (sic) and to change this status after the bid opening and not advise all the bidders is unfair and unjust.

If cord length and mat thickness were going to be critical in the evaluation of this bid, this fact should have been stated in the Request for Proposal.

The report states; "According to DND the thickness of .250mm did not warrant a sample or question..." and "the 8 ft. cord offered by Cardinal is 2 ft. too short and that in itself would be a major deviation and therefore unacceptable."

Yet to purchase a product at a higher cost (approximately 3500.00 higher) and receive 4500 sq.ft. less product is a minor deviation not worth a question or request a sample?

Based on the Evaluation Criteria as stated in the request for proposal:

Cardinal Industrial Electronics Ltd. offered -

1. *Price-Bid total \$97,220.00; \$3,542.50 lower than the next bidder.*

2. *Compliance with Technical Requirement-Desirable-*
We meet or exceed specifications required with minor deviations in mat thickness, cord length and our offer includes 4500 sq.ft. more product than the next bidder.
3. *Delivery-Desirable-*
The delivery time was not a factor in the bids or complaint.

In conclusion since Cardinal's bid is the most cost effective in terms of total dollar value per product received, we feel a more detailed examination of the other evaluation criteria was warranted. When this was not done, we were deprived of a fair evaluation and the contract for this product."

Finally, following DSS Supply Policy Manual (SPM Directive 3006.16, DSS contacted the contract awardee 27 June 1990 requesting that its 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.

Here is the reply they got from Patlon:

"...Patlon is unable to comply with your request that we place the above mentioned contract "on hold" for reasons which I will explain.

Upon checking the status of this order, we find that all material has been delivered and assembly has commenced. We face 100% cancellation costs from our suppliers. The wrist straps, ground cords and floor mats are all non standard sizes designed specifically for the Canadian government. It will be virtually impossible to sell these products to other companies.

Unfortunately if you cancel this order there will be a 100% cancellation charge.

Please call if you wish to discuss this further."

The Investigation

The allegations of this complaint, the government response to those allegations, and the complainant's comments on the government's response were investigated by Board staff by means of interviews and the examination of documents.

A number of individuals were interviewed in person and/or by telephone to confirm various statements made and/or contained in the documentation. These included: Ms. Lynn Morris, DSS (Contracting Officer); Mr. Robert Frogley, DSS (Group Manager); Lieutenant-Colonel J.P.R. Alain, DND-Directorate, Procurement and Supply Common User (DPSCU) (Section Head); Major J.A. Gosselin, DND-DPSCU, (Sub-Section Head); Mr. J.P. Kroeplin, DND-Directorate of Clothing, General Engineering and Maintenance (DCGEM) (Section Head); Mr. Ed C. Sonnenburg, DND-DCGEM (Sub-Section Head); Master Warrant Officer D.J. Murphy, DND-DCGEM (Technical Authority); Mr. Thomas Hofmann, CARDINAL INDUSTRIAL ELECTRONICS LTD., Edmonton, Alberta (the complainant); Mr. Peter Green, 3M Canada Inc., London, Ontario (3M is the manufacturer of part number 8020 which was specified in the requisition); Mr. John Kinoshita, PATLON AIRCRAFT AND INDUSTRIES LIMITED, Mississauga, Ontario (Patlon) (the contract awardee); and Mr. Paul Brander, BYSTAT Inc. (Bystat), Ville St-Laurent, Québec (the manufacturer of the products offered by Cardinal).

The Investigation Report, 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 decide on 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 determination on the basis of the facts disclosed therein, which are substantially known to the parties, the relevant portions of which are mentioned in this determination.

Analysis

The problems that surround this procurement start with the discrepancies in what DND said they wanted, what DSS said DND wanted, and what DND was ultimately (and perhaps always) prepared to accept.

Having announced in the RFP that contractor selection would be based on a determination of best value to the Crown (rather than on the lowest-priced responsive offer), the government then did nothing of any kind to determine best value. Instead they sought to determine the lowest-priced responsive offer and purported to award the contract on that basis. Put another way, the government set out the rules of the game - and then didn't play by them.

The investigation bears this out. No scheme of any kind that could actually have been used to determine best value was ever set out in the RFP - and the procurement file contains no record that any such scheme was ever drawn up between DSS and DND for use in the evaluation process. However, the RFP implies that such work had been done.

Supply Policy Manual (SPM) Directive 3002 is quite clear about how to do these things. Para. 30 requires that proposals shall be evaluated in accordance with the criteria set out in the RFP. It directs attention to Exhibit D to Directive 3002, on the subject of evaluation of proposals, which has the following to say in relevant part:

"Evaluation Criteria

Point rating is the evaluation procedure in which a list of criteria, to which values have been assigned, is used to ascertain the individual merits of proposals that have met the mandatory factors specified in the RFP.

The contracting officer, in concert with the customer, must establish the criteria to be used in evaluating proposals prior to issuing the RFP.

The RFP must clearly identify these criteria and their relative importance.

When assigning weights to each criterion, the contracting officer should ensure that a high aggregate of points from minor criteria could not overcompensate for a low aggregate of points from major criteria.

Any changes to the criteria must be forwarded to all invited suppliers before the closing date and in sufficient time for each to respond.

...

- (d) Contractor selection. *The basis upon which a contractor will be selected from the firms that submit responsive proposals should be indicated in the RFP. If the intent is to award the contract on the basis of best value, the criteria and the methods that will be used to determine the best value should be stated...*

Yet the only elaboration of the evaluation criteria set out in the RFP was the cryptic, even enigmatic, clause:

"Evaluation Criteria

The following factors will be taken into consideration in the evaluation of your proposal:

- 1. Price*
- 2. Compliance with technical requirement - DESIRABLE*
- 3. Delivery - DESIRABLE"*

This does not constitute either a point rating scheme, or any other method for determining best value.

Further, while the RFP refers to "Desirable" with regard to adherence to technical requirements and delivery, this term was never defined as it applied to specific elements of the purchase description and it was only after contract award that any effort appears to have been made to articulate critical elements of items that were purchased.

The issue of delivery is an example of how this was played out. The RFP implied that delivery was important with the required delivery date stated as June 30, 1990. Bidders were requested to state their "best delivery date." The importance of delivery was underlined in the DSS letter of April 18, 1990, when the DSS contracting officer stated:

"In order to meet your required delivery date.....your technical evaluation and recommendation must reach this office by May 2, 1990."

In the RFP under "Evaluation Criteria", compliance with the delivery requirement was stated as "Desirable". The contract awardee bid 12-14 weeks after receipt of order which was beyond the June 30 date in the RFP. The complainant bid 4-6 weeks after receipt of order. There is no further reference to the issue of delivery in the bid evaluation nor in the subsequent post contract justification. From these actions, it appears to the Board that delivery was never an important factor in determining supplier responsiveness nor as part of a "best value" assessment. It is not clear what impact this knowledge would have had on the bids of other suppliers.

Another example is the size of the floor mat. The purchase description described the floor mat as 4 x 6 feet. The Evaluation Criteria in the RFP stated that adherence to technical requirements was "Desirable". The contract awardee bid 3 x 6 feet (which they later stated was "designed specifically for the Canadian government") which was regarded by DND as a "minor deviation". This resulted in a reduction of 4,500 square feet in the amount of matting supplied. Again, what would the other bidders have done if they had known that a 3 x 6 foot mat was acceptable to DND.

These examples clearly indicate that even if an attempt were made to conduct an evaluation on the basis of "best value" as announced in the RFP, there was no plan as to how one would carry out such an evaluation, and no way of predicting the outcome. Further, there was no methodology applied by the technical authority to assess the equivalency of the products offered. Finally, contrary to DSS policy advice relating to the disclosure of prices to customer departments, DSS sent the bid prices to DND along with a letter which appears to treat this procurement as one which should be awarded to the lowest bidder. For these reasons, it is not possible for this Board, after the fact, to determine whether the complainant was the bidder providing "best value" or, for that matter, was even the lowest priced responsive bidder. Indeed, the same could be said for the contract awardee.

All this, however, is speculation because the RFP and the procurement plan which stood behind it were inherently flawed.

Moreover, Cardinal's own submission had certain flaws in it. There was an error in the printed literature submitted with their bid, relating to thickness of mats; also, their promise of performance in relation to static decay time appeared not to be as fast as the specifications demanded or at least was unclear on this point. In this regard, DSS points out that it was up to the suppliers to establish - through their product literature (and by test demonstrations, if requested) - that any equivalent substitute product

offered as an "or equal", could perform as required. DSS stated that they were not obliged to go back to any supplier to clarify the meaning of their offer in any case.

The Board believes that DSS is generally correct in this matter, EXCEPT THAT it is subject to one over-riding consideration that came into play in this case - that is the consideration alluded to in DSS SPM Directive 3002 at para. 32 which requires that reasons for by-passing a low bidder be fully justified on the file. This was not done in the case of Cardinal's bid (in fact, although some reasons were given for the rejection, the procurement file and the Board's subsequent investigation show that no clarifications were requested from any bidder). If clarification had been sought from Cardinal, it might have turned up the facts about the discrepancies in Cardinal's bid. The Board considers that DSS ought to have clarified these points before deciding conclusively to declare the low bidder non-responsive and understands that it is not unusual for DSS to do so (see Bio-Temp Determination, June 1, 1990). For the potential of a \$3,500 saving, someone should have made a phone call! On the other hand, Cardinal itself did nothing to correct these discrepancies after bid submission but before bid closing although they themselves might have done so.

Remedies

The Board believes that this contract should be cancelled and the requirement recomputed after a proper procurement plan has been prepared which addresses such issues as:

- mandatory and desirable features
- relative importance of evaluation criteria

Under the Act, the Board may order a government department to postpone awarding a contract pending the termination of its investigation. It has no powers to order the suspension of work on contracts already awarded.

DSS does have procedures in place for communicating with contract awardees when a complaint under the Act has been lodged. In this case, DSS contacted Patlon on 27 June 1990 requesting that they "place the above mentioned contract on hold...". Patlon stated that they were "unable to comply...". The reason given is that the "wrist straps, ground cords and floor mats are all non standard sizes designed specifically for the Canadian

government. It would be virtually impossible to sell these products to other companies." It is interesting to note that in the case of the floor mats, for example, what was offered by Patlon did not match the government's own description (3 x 6 feet rather than 4 x 6 feet).

The Board notes that DSS has the power under Section 4(4) of its General Conditions (1026A) which forms part of this contract to suspend work under this contract. If they had chosen to do so at the time of the complaint, additional remedies might now be available which benefit the complainant and, in fact, other bidders in this procurement. Because this was not done and as a result of the passage of time, the Board is conscious of the impact (particularly to the Canadian taxpayer) if a recommendation for contract cancellation and recompetition, for example, were made, accepted and implemented given that the kits are soon to be delivered.

On the other hand, because the Board determines that the procurement does not meet the requirements of Article 17 of the Act and that the complainant is the prevailing party, the Board will award Cardinal its costs of pursuing this complaint.

There is the question of whether the complainant should also be awarded bid preparation costs. Normally, bid preparation is a cost of doing business. The Board has awarded such costs in the past, however, in cases where it is plain that, but for the government's actions, the complainant would have won the contract.

That outcome is not clear in this case because, as already noted, it is not certain that if the government had played by its rules, Cardinal would have won. Therefore, the Board cannot recommend the remedy sought by the complainant, namely the award of the contract, or, for that matter, compensation.

On the other hand, this procurement was being conducted under the requirements of the Procurement Chapter of the Free Trade Agreement which includes the provisions of the GATT Code on Government Procurement, as well as related policy and procedural requirements of DSS. As such, the Board believes that bidders should be able to expect fair treatment by the government in all stages of the procurement process. This was not the case in this procurement. Since the complainant was, in part, responsible for its problems, the Board is inclined to divide responsibility between the complainant and the government and award the complainant half its bid preparation costs.

Proceeding now to its determination:

DETERMINATION

The Board has determined on the basis of its investigation that this procurement did not comply with the requirements of Sec. 17 of the Free Trade Agreement Implementation Act in that it did not provide all potential suppliers an equal opportunity to be responsive to the requirements of the procuring entity in the tendering and bidding phase, specifically by using decision criteria in the evaluation of bids and awarding of the contract that were not clearly specified in advance.

The Board has also decided to award the complainant its reasonable costs of filing and proceeding with the complaint and one half of its reasonable costs of preparing its bid.

Gerald A. Berger

Gerald A. Berger
Chairman
Procurement Review Board of Canada