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

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| **IN THE MATTER OF:** | |
| **A Complaint By Enconaire (1984) Inc. of 80 Sutherland Avenue Winnipeg, Manitoba** | **Board File No: E90PRF6601-021-0020** |
| **And a Complaint By Environmental Growth Chambers, Ltd. a Division of Integrated Development & Manufacturing of Chagrin Falls, Ohio, U.S.A.** | **Board File No: E90PRF6601-021-0021** |
| **AND IN THE MATTER OF:** | |
| **The Free Trade Agreement Implementation Act, Part II, Sec. 15 S.C. 1988, Ch. 65.** | |

**28 January 1991**

## DETERMINATION BY THE BOARD

These two complaints relate to the same procurement action: the purchase by the Department of Supply and Services (DSS or SSC) of four environmental growth chambers for the Department of Agriculture or Agriculture Canada (AC) on a sole source basis. The complainants allege that sole sourcing this equipment, which they, too, could have supplied, deprived them of an equal opportunity to be responsive to the requirements of Agriculture Canada, contrary to the Free Trade Agreement (FTA).

DSS acknowledges these bare facts - but responds that they were justified in sole sourcing these goods, because the Free Trade Agreement itself provides that the normal rules requiring open competition need not apply when the goods ordered are additional deliveries from the original supplier intended as the extension of existing installations, and where a change in supplier would compel their customer department to procure equipment not meeting their requirements of interchangeability with already existing equipment.

The only issue is whether or not, on the facts of this case, the government has met the procedural requirements necessary to justify this sole source procurement.

These two complaints have been combined and dealt with together in this determination because they both relate to the same procurement, raise the same issue, and fall to be determined upon the same facts.

## Background

These environmental growth chambers (or plant growth facilities) are to be installed by AC at its Plant Research Centre in Building 21 on the Central Experimental Farm in Ottawa, and will be used to conduct a wide variety of plant research experiments that demand carefully controlled plant growth environments.

AC has many such growth chambers in Building 21, acquired over a number of years, and most of them (over 50 at the time of this investigation) were supplied by Controlled Environments Limited (Conviron) of Winnipeg, Manitoba -- the contract awardee in this present procurement. The four new chambers will be installed with all the others, and each will have an attached electronic control system -- but they will also be connected to a central, computer-based, data logger that was supplied earlier by Conviron, and which collects and records data from all of the growth chambers connected to it. In addition, there is a separate central 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.

**The Complainants**

The complainants, Enconaire (1984) Inc. (Enconaire) and Environmental Growth Chambers, Ltd. (EGC), both of Winnipeg, Manitoba, are suppliers of environmental growth chambers. The former is a Canadian manufacturer and the latter a division of an American company located in Chagrin Falls, Ohio, where its equipment is manufactured.

**The Complaints**

It will be important in considering these two complaints to set out certain relevant portions of them, because the evidence offered in the Governmental Institution Reports (GIRs), the comments made by the complainants and the contract awardee, and the evidence found in the Board's investigation, make reference to certain matters of detail contained in them. Only the portions relevant to the sole sourcing issue are quoted here.

The Enconaire complaint is contained in two letters, the first dated 16 November 1990 and a supplementary letter of 21 November 1990. The relevant parts are as follows:

November 16, 1990

"*RE: SSC FILE NO. DA1085104087/01 F*

*Dear Sir:*

*Please be advised that ENCONAIRE (1984) INC. wishes to formally lodge a complaint in regards to the method in which Public Funds were spent in the SOLE sourcing of 2 Conviron model PRG15's and 2 Conviron model PGW 36's on the above noted procurement...*

. . .

*THE FACTS:*

*A) On November 14, 1990, we received the November 9, 1990 issue of Government Business Opportunities and saw the awarding of a contract to Conviron for 4 Plant Growth Facilities on a Sole Source Basis.*

*B) After many telephone calls ENCONAIRE personnel located the source of this order and requested information as to why it was sole sourced when there are manufacturers other than Conviron who can supply this equipment. Unfortunately the responses given in our view were unsatisfactory.*

*C) I believe we can offer a superior product, encompassing all the advantages of the Conviron product, and that tendering has the advantage of competitive pricing.*

*Enconaire request that this order be cancelled and these items be offered for tender ensuring the best equipment is purchased at the most reasonable price.*"

November 21, 1990

"*RE: SSC FILE NO. DA1085104087/01 F*

*Dear Sir:*

*Further to your request I wish to add the following justification for our endeavors to obtain cancellation of this order and have the equipment offer for tender in the normal acceptable manner.*

*Enconaire's justification for opposing "SOLE SOURCING" of this equipment are as follows:*

*a) Enconaire offers the same design philosophy. The equipment designer is one/and the same for both companies.*

*b) Both corporations utilize the same components in the manufacturing of the equipment ie: evaporator coils, switches, relays, lights, compressors etc. Therefore maintenance inventory and training is basically the same for both.*

*c) . . .*

*d) . . .*

*Beyond the physical and technical analysis of both and all manufactures* [sic]. *I believe that this "SOLE SOURCING" of equipment in the manner with which it has been done over the years has far reaching political ramifications when it comes to Free Trade. If U.S. competition is eliminated through "SOLE SOURCING" our American competition can lobby to their Government to place tariffs or other such barriers whereby eliminating Canadian companies like ourselves from competing on an equal basis in their multi million dollar market.*

*It is my understanding that at this time the government is advocating restraint and maximizing the use of available tax dollars. "SOLE SOURCING" does nothing to achieve this aim. There is absolutely no incentive to produce the best possible product, using the most cost effect methods.*"

The EGC complaint is contained in a letter dated 19 November 1990, the relevant parts of which read:

***"REFERENCE: Supply & Services Canada***
***`Sole Source Procurement'***
***Contract # (DA 0185104087/01)F***

*ENVIRONMENTAL GROWTH CHAMBERS (EGC) is a United States of America based manufacturer of "Plant Growth Facilities" similar to and equal in performance to those purchased for Agriculture Canada's Central Experimental Farm under this contract.*

. . .

*Despite numerous protests to both Agriculture Canada and SSC including on site presentations.*[sic] *Procurements for this and other locations are still being carried out in a "Sole Source" format with a total disregard for the "GATT Agreement on Government Procurement".*

. . .

***ENVIRONMENTAL GROWTH CHAMBERS FORMALLY SUBMITS THIS COMPLAINT TO THE PROCUREMENT REVIEW BOARD OF CANADA AND REQUESTS THAT THE ABOVE MENTIONED CONTRACT BE TERMINATED TO ALLOW AN "OPEN TENDER". ALSO, THAT ALL FUTURE PROCUREMENTS OF "PLANT GROWTH FACILITIES" BY WHATEVER NOMENCLATURE AT THIS CANADIAN GOVERNMENT LOCATION BE DIRECTED TO ADHERE TO THE TERMS OF GATT. FURTHER, EGC HEREBY REQUESTS COMPENSATION FOR COSTS, AND LOSSES OF PROFIT INCURRED AS A RESULT OF THIS ONGOING "SOLE SOURCE PROCUREMENT" AT THE CENTRAL CENTRAL*** **[sic]** ***EXPERIMENTAL FARM BY VARIOUS AGENTS OF THE CANADIAN GOVERNMENT.***

. . .

*Environmental Growth Chambers must seek relief from this ongoing "Sole Source" procurement practice that is limiting the Company's access to an equal trading opportunity with the Canadian Government nationwide. EGC has elected not to harass the Board with a multitude of complaints at this time but rather is seeking a single ruling which will set a national precedent to end this practice. An example of the pervasiveness of this practice can be seen in the same issue of "Government Business Opportunities" where this contract was discovered. The listing published following this one is for a "Sole Source" contract between Forestry Canada, at Sault Ste. Marie and Conviron which follows the same pattern.*

*We have sought relief through normal channels for years...and have been advised, the next procurement will be different. These statements have lost all creditability with EGC as the practice continues and the losses mount. Conviron continues to introduce new and modified equipment to these facilities without tender under the guise of standardization, while other suppliers are not even advised of the requirement.*

*EGC believes it is in the best interests of all Canadian Researchers to be exposed to all available equipment technologies for "Plant Growth Facilities" when sourcing new equipment. Furthermore, the "Public Purse" can best by protected by an open and competitive procurement process...*"

**The Investigation**

The allegations of these complaints, the government's response to those allegations, and the complainants' comments on the government's response were investigated by means of interviews and the examination of documents. The Board also received a letter from Conviron, the contract awardee, commenting on the complaint documents, and the letter is included in the Investigation Report. Conviron did not request intervenor status at that time -- although they did request it later, after the investigation was complete and the Board had received the Investigation Report. For that reason, Conviron was not accorded intervenor status in this case.

A number of individuals were interviewed in person and/or by telephone to confirm various statements made and/or contained in the documentation. These include: Ms. Elise Doucet, DSS (Contracting Officer); Mr. Pierre H. Juneau, DSS, Scientific, Electrical, Mechanical and Construction Products Branch (Acting Chief); Mr. Willis McCormick, AC, Plant Research Centre (Supervisor and Requisitioning Authority); Mr. Ron Wheeler, AC (Technician); all from the National Capital Region.

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.

**Notice of the Procurement**

Enconaire and EGC both learned, from a notice published in the Government Business Opportunities (GBO) booklet on 9 November 1990, that the government had awarded a contract, valued at $132,412 to Conviron, a competitor of theirs, for four plant growth facilities. The notice contained the notation "Sole source/Fournisseur Unique - D".

This notice is one that is required to be published in the GBO by Article VI:1 of the GATT Agreement on Government Procurement (the Code) the provisions of which are incorporated into the Free Trade Agreement, and are applicable to all Free Trade procurements by virtue of Sections 3 and 8 of the Canada-United States Free Trade Agreement Implementation (FTAI) Act. The "sole source" notation and the letter "D" are references to the type of procedure used for this procurement and the justification for the use of that procedure according to paragraph (d) of Article V:16 of the Code.

**The Requirements of the Code**

The provisions of the first 15 sections of Article V of the Code have to do with tendering procedures, and are concerned with the regulation of competition in those procurements governed by it. Section 16, by contrast, authorizes non-competitive procurements (called single tendering or sole sourcing) in a limited range of circumstances described in that section. The section is quoted here, in full:

"Article V

Tendering Procedures

. . .

***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:*

*(a) in the absence of tenders in response to an open or selective tender, or when the tenders submitted have been either collusive or do not conform to the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Agreement, on condition, however, that the requirements of the initial tender are not substantially modified in the contract as awarded;*

*(b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, the products can be supplied only by a particular supplier and no reasonable alternative or substitute exists;*

*(c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products could not be obtained in time by means of open or selective tendering procedures;*

*(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]

*(e) when an entity procures prototypes or a first product which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent procurements of products shall be subject to paragraphs 1-15 of this Article...*[5]

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[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.*

[5] *Original development of a first product may include limited production in order to incorporate the results of field testing and to demonstrate that the product is suitable for production in quantity to acceptable quality standards. It does not extend to quantity production to establish commercial viability or to recover research and development costs.*"

At this point, it becomes necessary to take note of one further document - the DSS Supply Policy Manual (SPM), because in what follows, there will be found frequent reference (particularly in the GIRs) to a directive contained therein that quotes from and paraphrases the governing provisions of the GATT Code.

The SPM reference is Directive 3004, paragraph 59(d). Directive 3004 is entitled "GATT Agreement on Government Procurement" and is dated 29 December 1989 (as amended on 30 March 1990). It contains two "background" paragraphs reading as follows:

> "*1. The GATT Agreement on Government Procurement, generally referred to in this policy as the Code, is one of the multilateral agreements that resulted from the Tokyo Round of Multilateral Trade Negotiations within the General Agreement on Tariffs and Trade (GATT). It introduces the GATT principles to the area of Government procurement policies and provides a set of rules aimed at reducing discrimination against foreign suppliers. The Canadian Government is a Contracting Party to the GATT and Canada is a signatory country of the Code, along with most of the industrialized countries. Signatory countries are listed in* ***Annex A***.
>
> *2 .This policy explains the obligation of the Department of Supply and Services (DSS), in the context of the Code, and with regard to its responsibilities in respect of Government procurement. It also provides instructions to procurement officers on the procedures to follow to ensure the effective application of the Code.*"

Under the terms of Chapter 13 of the Free Trade Agreement with the United States, Canada undertook, in Article 1305.6, to take all necessary steps to ensure the efficient administration of its obligations under Chapter 13 relating to Government Procurement. One of the ways in which it did this was to promulgate a directive in the Supply Policy Manual, for the use of DSS procurement officers, setting out and explaining the portions of those obligations that it was important for them to know and comply with in carrying out their duties. That directive is number 3005, entitled "Government Procurement Under the Canada-U.S. Free Trade Agreement", and is also dated 29 December 1989. It provides, in Section 8, under the heading "Guidelines", as follows:

> "*8. The Procedures of the GATT Code provided within the guidelines of SPM Directive 3004 apply to FTA procurements and shall form a part of this directive, with the exception of the national treatment provisions, rules of origin, and dispute settlement. Any amendments to SPM Directive 3004 shall also form a part of this directive.*"

It is for this reason that a reference back to SPM 3004 is necessary, to disclose that portion thereof that relates to sole sourcing, found in Section 59. It is not quoted here, but it is to be noted that it is, in effect, a paraphrasing of the content of Article V:16 of the GATT Code, but is not an exact rendition thereof. For the purposes of these proceedings, its paraphrasing of Article V:16(d) of the GATT Code is accurate enough, but it must not be forgotten that it is the GATT Code that prevails in this matter.

**The Procurement Process**

Returning now to the procurement process, at the time Agriculture Canada first sent a requisition (dated 16 July 1990) for these goods to DSS, a sole source justification was attached, and it was set out in the following terms:

> "*JUSTIFICATION OF "SOLE SOURCE" PURCHASE*
>
> *1. Plant growth facilities needed to be purchased will be located in Bldg. 21. There are already 53 Conviron units at this location. This tends to suggest No Substitutions for the following reasons:*
>
> *A. These units to be purchased must be compatible with the Host Computer and Data Logger, designed exclusively by Conviron. This will permit the new units to interface with the existing systems which have sufficient capacity to handle these units. The fact the new units will be compatible with the Host Computer is very important. The Host Computer allows the manager of this location to monitor, control and/or adjust any of the Conviron units. A Host Computer gives a more accurate picture of the experiments by providing more exact and focussed readings.*

> *B. These new units will be identical to many cabinets located in Bldg. 21, therefore eliminating the need of purchasing additional inventory parts for units of a different make. This also reduces the amount of storage space required which would be better used by the research scientists.*
>
> *C. By purchasing from Conviron, the need for training service and maintenance technicians on new equipment will not be required as they are already fully experienced with the service and operation of Conviron equipment (product familiarity)*"

The technical specification for each type of plant growth facility as well as the control system for each is prefaced by a Conviron model number.

The investigation reveals that upon review of the requisition and attachments, DSS did not request AC to provide a generic description of the requirement nor did it challenge AC's justification for sole source.

On August 10, 1990, a Directorate Procurement Plan was prepared. On August 14, 1990, it was signed off by the Group Manager in DSS (see I.R. Appendix 6). DSS thereby accepted AC's reasons to proceed on a sole source basis and as a result indicated that "*...the provisions of FTA will not apply...*" That same day, a Request for Proposal (RFP) was issued to Conviron in Winnipeg, Manitoba (see I.R. Appendix 7) ultimately resulting in the award of a contract on 2 October 1990.

A Contract Award Notice was published in the November 9, 1990 issue of GBO (see I.R. Appendix 14).

On November 15, 1990, both complainants contacted the contracting officer to inform her of their intention to challenge the contract awarded on a sole source basis.

On November 27, 1990, after receipt of notification from the Board that complaints had been filed, the acting section chief, in conformity with a direction in the SPM 3006.16, sent a facsimile transmission to Conviron 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.*" (see I.R. Appendix 15).

**The Governmental Institution Reports**

The GIRs, one for each complaint, were sent to the Board on 17 December 1990 and are similar. Each attached a copy of the original Agriculture Canada sole source justification sent to them with the AC requisition (and quoted earlier) - citing essentially three things to justify sole sourcing:

A- The importance of assured compatibility of the purchased goods with the host computer and data logger which would have to be connected with them, and which had been earlier supplied by Conviron.

B- Eliminating the need to purchase an inventory of spare parts for units of a different make, and the need to dedicate storage space for it.

C- Eliminating the need to train service and maintenance technicians on new equipment.

The GIR relating to the Enconaire complaint elaborates on this a little further, as follows:

"*II. COMPLIANCE WITH OBLIGATIONS UNDER FTA*

*a. In sole source procurements under FTA the key factor is the application of SPM 3004 para 59 and in this particular case para 59 d.*

*The essence of para 59 is that sole source procurements are permitted providing certain criteria are met.*

*The Agriculture Canada criteria included with the requisition addresses three issues: compatibility with the host computer and data logger (which includes a software component); the existing inventory of spare parts; the availability of trained staff.*

*It is the view of the Government that these criteria meet the requirement of para 59 d. Specifically, the phrase "...where a change of suppliers would compel the customer to procure equipment not meeting the requirements of interchangeability with existing equipment".*

> *The Agriculture Canada determination that only the growth chambers manufactured by Conviron were capable of being controlled by the on-site host computer and data-logger and software was arrived at after due consideration comprising, in part, the on-going review of other available products by the responsible technical experts.*
>
> *In concurring with the Agriculture Canada sole-source request, the SSC product specialist also considered the capabilities of competing products. The conclusion was that only Conviron manufactured chambers could be controlled by the proprietary software resident in the on-site host computer.*"

The GIR relating to the EGC complaint elaborates still further on the AC statement, as follows:

> "*...The product manufactured by the complainant, as shown below, cannot interface with this* [the on-site host] *computer...*" and
>
> "*II. COMPLIANCE WITH OBLIGATIONS UNDER FTA*
>
> *a.. . .*
>
> *It is the view of SSC that these criteria meet the requirement of para 59 d. Specifically, the phrase "...where a change of suppliers would compel the customer to procure equipment not meeting the requirements of interchangeability with existing equipment" is complied with through review of the ability of competing products to be controlled by the installed Host Computer. This assessment would seem to be supported by the Conviron submission to the Board dated 4 December 1990.*"

(The 4 December 1990 letter to the Board from Conviron has the following to say on this point:

> "*...Certainly, any other supplier would not be able to connect his control system to our control system without extensive development work. We would have the same problem if we were trying to connect our system to one of our competitors. There are probably five or six different control systems for plant growth chambers throughout the world, none of which are compatible with one another...*")

**Analysis**

The first point to make is that this Board is not in the business of making decisions that, by the rules of the Free Trade Agreement and the GATT Code, are confided to others. The Board has the mandate under the Act to deal with procedural matters, not substantive ones. It will not determine whether, on the facts of this case, a change of supplier would compel Agriculture Canada to procure equipment not meeting requirements of interchangeability with already existing equipment.

The Board will, however, consider the procedural requirements necessary to place the government institution in a position to take the decisions they have purported to take. This will be the basis of its determination.

An examination of this issue must begin with an examination of paragraph 16 of Article V of the GATT Code.

As noted earlier, the whole of Article V deals with tendering procedures and the bulk of those procedures relate to the manner in which competitions are to be conducted, both open tendering (where any person may bid) and selective tendering (where bidders are invited to tender). Article V:1 also notes that these procedures will provide for single tendering, which it defines as "*...those procedures where the (procuring) entity contacts suppliers individually, only under the conditions specified in paragraph 16 below...*"

Paragraph 16, in turn, authorizes (but does not require) single tendering, in language that only says that the provisions of paragraphs 1-15 governing open and selective tendering need not apply in the conditions thereafter set out, with a proviso that we shall return to later.

The five conditions that follow represent an extremely tight circumscribing of the freedom of any entity that wants to single tender or sole source their supplies. The fifth condition is a special case having to do with the procurement of prototypes under development contracts, and it has no application to the present case. The other four conditions are worth considering briefly for the light they shed upon the policy of the GATT Code with respect to sole sourcing.

The first condition is applicable only where a competition has already been held...but has proven abortive, for lack of bidders, or the bidders were not qualified or were non-responsive to the tender call. In such a case, the rules that demanded a competition "need not apply" a second time, provided, however, that the requirements of the initial tender are not substantially modified in the contract awarded (in other words, if the requirement is substantially modified for the purposes of the contract to be awarded, it is to be regarded as a different requirement...and must be competed).

The second condition is also a special case where the procurement is for works of art or where existing legal rights are to be protected (such as patents or copyrights). Certainly, legal rights cannot be thwarted -- and in the case of works of art, the artistic creator (or the owner of the creation) is a sole source almost by definition, but this condition, as obvious as it may appear, is the object of a further sub-condition, that "no reasonable alternative or substitute exists".

The third condition involves extreme urgency caused by unforeseeable events. But the condition has two subconditions: that it is established that the products could not be obtained in time by means of a competition, and then, only "*...insofar as it is strictly necessary*."

The fourth condition relates fundamentally to situations in which there is a requirement for interchangeability of the equipment to be procured, with those already existing in the hands of the user.

The conclusion to be reached from all of these conditions is that competition is to be the norm; sole sourcing is the exception, always expressed in terms of extremity: a competition aborted because no competition could be obtained; where vested legal rights must be protected and no reasonable alternative or substitute exists, or the supplier sells or produces unique works of art, obviously obtainable only from the owner or the artist; where events unforeseeable provoke extreme urgency...where strictly necessary and a competition would take too long; where interchangeability of goods is critical.

Another issue in this connection is that, in the two GIR's, a covering letter to the Board makes the following point:

> "*1. The points raised by the complainant are not germane to the issue or do not demonstrate they have a product meeting all the requirements of Agriculture Canada. In our view the latter is necessary to make the case for competitive solicitation.*"

With the greatest respect, the Board must state that this argument is the exact reverse of the true requirement of the GATT Code. It is not for the complainant to demonstrate any case for a competitive solicitation. Competitive solicitations are the norm -- the standard requirement of the rule. The true requirement is for the government to demonstrate the case for a sole sourcing, and this is the issue under consideration.

And there is the final proviso mentioned at the outset: even where a condition is met, it must be shown "*...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...*"

In light of the foregoing, it may be worth observing that the investigation does not disclose that DSS's decision to go sole source in this case followed any consideration whether a competitive solicitation might be worthwhile even though it "*...need not apply...*" They did not question AC's proposal to sole source these growth chambers and accepted the justification offered as established.

Certainly, in similar circumstances DSS has quite recently considered the question and insisted on competition in another procurement for similar goods for National Research Council (NRC) in Saskatoon. There, when NRC sought to sole source the goods -- also to Conviron -- DSS Regina office, faced with a similar sole source justification, obtained the agreement of NRC to provide a "*...good generic description...that are unbiased...*" in order that a "*...proper description* [could] *be used for FTA solicitation*". NRC provided a revised specification, including a requirement for compatibility with the existing equipment, and two firms -- the same two complainants as in this case -- put in bids. That RFP was cancelled before bid closing, although not for the reason that the bidders could not be responsive to the requirement. The complaints to the Board disputed the outcome, and the case is reported in the Board's last decision (EGC and Enconaire, cases D90PRF6631-021-0017 and D90PRF6631-021-0018, respectively, dated 14 January 1991).

We must now examine reason (d) as to its parts, to consider what is required in order to comply with it.

First, the goods must be "*...additional deliveries by the original supplier...*" The investigation showed there are over 50 environmental growth chambers in Building 21 on the Experimental Farm in Ottawa, where the four chambers in this case are to be installed. Most of them were built by Conviron -- but there are a small number built by others, retro-fitted with control systems made by Conviron, and all are connected to the Conviron data logger and host computer. There are a few smaller chambers, or incubators, not connected to the data logger and computer. No case is being made by the complainants that the new chambers are not "*additional deliveries*", nor that the goods are being sourced to other than the "*original supplier*" and the Board does not find against either of these notions for the purposes of these proceedings.

Secondly, the goods must be "*...intended either as parts replacement for existing supplies or installations, or as the extension of existing supplies or installations...*" The Board does not find against the basic supposition that these goods are an extension of existing supplies or installations.

However, the Board notes that the French language version of the Code uses the word "*compléter*", i.e. "to complete", as a translation for the English "*extension*" and seems to involve a much narrower concept...of the new goods being intended to "complete" some earlier initial order for similar supplies. If that were the case, the application of this reason to justify sole sourcing would seem to be even more difficult than it appears to be under the English language version. However, both versions of the Code are equally authentic in Canadian law (Official Languages Act RSC 1985 c.O-3 s.9(1)).

Thirdly, the condition requires that a change in supplier would compel the entity to procure equipment not meeting requirements of interchangeability with already existing equipment.

Put in just that way, the condition may sound odd to someone versed in government procurement, because a properly conducted competitive procurement cannot result in compelling the entity to procure equipment that did not meet their requirements for interchangeability. Plainly, if interchangeability is a stipulated mandatory requirement, any bidder offering equipment that fails to meet it will be ruled non-responsive, and rejected.

It must be observed at this point that the requirement of the condition is for interchangeability; but AC nowhere expresses their requirement in those terms. Instead they speak of compatibility, a rather different concept.

The dictionary definitions of interchangeability all involve the idea of substitution of one thing for another, the idea that one thing can replace the other. But AC is not ordering these growth chambers to replace any of the ones they already have, or to substitute for any of them. Indeed, they intend to use both the old and the new at the same time...thereby enabling additional research.

Compatibility, on the other hand, involves the idea of congruency. Not sameness, but the capacity to work together, or to be mutually tolerant. The Shorter Oxford English Dictionary expresses it this way:

> "...**2.** *Mutually tolerant, capable of existing together in the same subject; accordant, consistent, congruous*"

The true kind or extent or degree of compatibility required in any given case will be defined by the need, and AC has aptly set out their need as meaning compatibility between the new units and the host computer and data logger. The new units must "*...interface with the existing systems...*" The host computer "*...allows the manager of this location to monitor, control and/or adjust any of the Conviron units...*"

In other words, the controls on the new units must be able to work with, and communicate with, the data logger and host computer, and be in turn controlled by the host computer.

Consequently, it may be said that this condition for sole sourcing is not met because there is not, in fact, any real requirement for interchangeability between these new units and already existing equipment.

However, because there is some apparent confusion between "compatibility" and "interchangeability" in the material submitted to the Board in defence of the decision to sole source, the Board intends to show that, in this case, even if the two terms could be treated as synonymous, there is insufficient material to support the decision that the condition for sole sourcing has been met.

The justifications for sole sourcing offered by AC are in terms of three things: First, they say the units to be bought must be compatible with the data logger and the host computer - that they must interface with the existing systems. They don't say that units offered by the complainants can't do that, but they point out that the computer and the data logger are designed exclusively by Conviron, the favoured supplier.

But the justification must be in terms that a change of supplier would result in their being compelled to procure equipment that was not interchangeable, or in this case, was not compatible, with their own. They do not go so far as that. They only say that compatibility would be one of their requirements.

On the other hand, DSS went that far. They state flatly that the product manufactured by the complainant EGC "*...cannot interface with this* [Conviron] *computer...*" They support this assertion by saying that the inability of the EGC product to meet the requirements of interchangeability "*...is complied with through review of the ability of competing products to be controlled by the installed Host Computer...*"

If this assertion is true, the only thing the Board can say is that its investigation did not disclose the results - or even the existence - of any particular review of competing products. In fact, the evidence in response to questions posed was that there had not been any such review, formal or otherwise.

But DSS goes on to say that their assessment "*...would seem to be supported by the Conviron submission...*" to the Board dated 4 December 1990. That submission, quoted above, is to the effect that "*...any other supplier would not be able to connect his control system to our control system without extensive development work...*" and that none of the five or six controls systems for plant growth chambers that are available world-wide "*...are compatible with one another...*"

That assertion may well be correct. But the question is whether that would compel AC to procure goods that didn't meet their requirements. Even Conviron will say that the computer interfacing requirement might be met with "*extensive development work*". Perhaps one of their competitors would be willing to do that. Or perhaps one of them can think of a solution to the requirement that would prompt AC to reconsider the requirement or revise their way of expressing it, to their own advantage. There is no necessary implication that such development work would be something for which AC would have to pay, or even have to wait a long time for. That is what competitions are intended both to achieve and to permit. The competitor may find it difficult to meet AC's requirement, but it may have a solution to offer that does meet the requirement. The Board believes that the policy that imposes competition should not be easily thwarted by an internal government judgement about what the private sector can or cannot do.

With respect to the Enconaire product, DSS similarly asserts that "*...the Agriculture Canada determination that only the growth chambers manufactured by Conviron were capable of being controlled by the on-site host computer and data logger and software was arrived at after due consideration comprising, in part, the on-going review of other available products by responsible technical experts...*" They add that their own DSS product specialist, in concurring with the sole source request, also considered the capabilities of competing products and concluded that "*...only Conviron manufactured chambers could be controlled by the proprietary software resident in the on-site host computer...*"

Again, it must be said that the investigation did not disclose the existence of that "*part*" of the support for their decision that rested upon an on-going review of other available products by responsible technical experts. The Board's observation can only be that the decision taken was based upon mere assertions which, upon investigation, are unsupported by facts.

And if that was only a "*part*" of the "*due consideration*" for their decision, what was the other part? There is no further reference to it, and the Board can only conclude that that was the only support for their decision.

Indeed, information given orally to Board investigators contradicts the GIR in this respect, and would seem to suggest that the DSS action was based largely upon considerations of service to the customer (see I.R.).

What of the other reasons offered for sole sourcing?

The second justification offered is that it will eliminate the need for purchasing additional inventory parts and reduce the amount of storage space required.

This reason is also offered without much in the way of evidence to support it, but the real difficulty in the way of its helpfulness to their cause is that, true or not, it doesn't go to the issue of a change of suppliers compelling acceptance of goods that don't meet the requirements of interchangeability. It is a reason that goes to the convenience to the user of having to accept non standard goods...but that is not what is at issue here.

Could it be argued that there is a real interchangeability argument here...that the new units must be interchangeable with the existing stock of spare parts? The Board does not think so. That could be a reasonable requirement of an order of spare parts, but not of these new units. They are not themselves replacement parts, and are not being ordered to substitute for the spare parts. In any case, AC has never put the requirement on this basis.

Similarly, the third reason offered for sole sourcing - avoiding the need to train service and maintenance technicians on new equipment - is also a "convenience" reason that does not go to the issue of compelling acceptance of goods not meeting the requirements of interchangeability.

When neither a Free Trade nor a GATT procurement is involved, there is a policy recorded at SPM 3002.7(c) which would seem to allow sole sourcing where a "*...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 was a policy that, before Free Trade, frequently applied to procurements many of which had values generally in the range that fits into what is now the Free Trade monetary "window" between $31,000 and $210,000, and it may shed some light on the way the justifications for sole sourcing are advanced in the GIRs.

However, with the recent advent of Free Trade between Canada and the United States, and the application to such procurements of the GATT Code on Government Procurement, a much more rigorous set of rules governing the suitability and use of single tendering has come into play. This case is a good example of one of the significant differences between the regime that controls Free Trade procurement (and GATT ones), and the regime applicable to other sorts of procurements.

It is clear, therefore, that these complaints must be upheld. The procedural requirements for meeting the condition set out in Article V:16(d) of the Code under which the requirements for competitive tendering need not apply, have not been met on two grounds: interchangeability was never a requirement of this procurement; compatibility was, but that need doesn't justify sole sourcing under the Code. And even if it did, there is insufficient support for DSS to assert that a change of supplier would result in AC being compelled to procure equipment that was not interchangeable (or in this case, incompatible) with their already existing equipment.

We should return finally to the concluding proviso of Article V:16. For the purposes of this determination, it is not necessary to consider it in detail since the government has not met the condition that brings it into play. But the Board cannot help noting the very sobering effect that it must have upon those who now seek to establish that sole sourcing is justified.

The words of the proviso are:

> "*...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...*"

The words "with a view to" indicate that the intentions of the government in sole sourcing a procurement are critical, even if there were a case for meeting one or another of the conditions that would seem to allow it. Thus, there will remain an issue of intention to be gone into in every case where the condition is met.

In the present case, that isn't necessary, but it may be worth observing that some evidence was offered that has a bearing on intention, and other evidence was found that relates to it as well. The complainants assert that the government has been sole sourcing these growth chambers for years to Conviron, and repelling their every attempt to urge the holding of a competition, from which they conclude that the government has no intention whatever of allowing maximum possible competition, very much to their detriment.

On the other hand, the investigation turned up some oral evidence that seems to suggest nothing more sinister than a well-meaning intent within DSS to cater to what was perceived to be in the long-run best interests of the customer department.

None of this evidence was tested at an open hearing, nor subjected to cross-examination, something the Board would consider important if the outcome turned upon it. However, this consideration of the meaning of the proviso serves, in the Board's view, to show how the policy favouring competition is much more firmly rooted now than formerly, and how much less flexible are the exceptions that may allow sole sourcing. Even where it is thought that a case for it can be made, it will be important to consider if there exists, and be prepared to deal with, any evidence that the government is actually trying to avoid maximum possible competition, or discriminate among, or protect, certain suppliers.

**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 Section 17 of the Free Trade Agreement Implementation Act in that it did not provide all potential suppliers equal opportunity to be responsive to the requirements of the procuring entity in the tendering and bidding phase 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 complainants their reasonable costs of filing and pursuing their complaints, and it recommends 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.**

**Gerald A. Berger**
**G.A. Berger**
**Chairman**
**Procurement Review Board of Canada**