



IN THE MATTER OF:

**A Complaint
By Waters Chromatography Division
of Millipore Canada Limited
of 6555 Abrams Street
Ville St-Laurent, Québec**

**Board File No:
E91PRF6601-021-0022**

Complaint upheld

AND IN THE MATTER OF:

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

16 October 1991

DETERMINATION BY THE BOARD

This complaint alleges that certain specifications, which describe a complex laboratory instrument, to be purchased in a competitive procurement for Agriculture Canada, have been so written as to create a "lock-out" competition which only one competitor can win. The complainant states that this has been done by selecting a series of product features, the combination of which will be found only in the desired instrument, and setting them out as mandatory needs that will effectively render non-compliant any bid that does not meet them all.

The complainant, Waters, sought and received a bid set (from the Department of Supply and Services (DSS) who were conducting this competition for Agriculture Canada) and they immediately complained about the specifications to DSS. After a consultation with their client department, DSS notified Waters on 26 June (and two other bidders who had also raised this issue informally with DSS) that they did not intend to revise the specifications and would proceed with the competition. Waters then filed this complaint on 5 July, within the 10-day time limit for filing, as set out in the Procurement Review Board Regulations (the Regulations).

Because the contract had not yet been awarded, the Board, after determining that it had jurisdiction and that the complaint met its criteria for acceptance, on 9 July issued a "Stop Award Order" to DSS, and the contract award has been in abeyance since then, awaiting this determination.

The Investigation

The investigation by the Board has taken longer than usual in this case because the complainant, in responding to a defence of Agriculture Canada's selection method, has raised issues that required the Board to afford the government extra time to consider and respond in turn. As well, owing to a strike in the Public Service, certain key employees were not available and DSS sought an extension of time to respond, which the Board granted. The Preliminary Investigation Report prepared by Board staff, and the additional comments of the parties thus reached the Board only a day before expiry of the 90-day time limit for issuing Board determinations set out in subsection 39(1) of the Regulations. Thus, it became necessary to extend that time, as permitted by subsection 39(2) of the Regulations, to ensure sufficient time for proper consideration of the issues raised. The extension was made by Board Order dated 2 October 1991 and the Stop Award Order was extended as well, both until 18 October.

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

A number of individuals were contacted by telephone and in person to confirm various statements made and/or contained in the documentation. These are:

Mr. Richard Blais, Regional Manager, Waters, Ville St-Laurent, Québec; Ms. Francine Pilon (Contracting Officer), Ms. Suzanne Roy (Contracting Officer's Supervisor), and Mr. John Mihailov (Acting Chief Section B), all of DSS Capital Region Supply Centre, Ottawa; Dr. L. Faye Russell (Research Scientist and End-Use Customer), Agriculture Canada, Ottawa; and Mr. David Holmes, Technical Service Consultant, of Varian Canada Ltd.

Following a procedure which has been adopted by the Board as standard practice, a copy of the Preliminary Investigation Report was sent to both the governmental institution and the complainant for their

comments, prior to submission to the Board. Both these parties submitted written comments, and these were exchanged between the parties as noted above, who then provided additional comments. These comments have been added to and formed part of the Investigation Report at the time it was submitted to the Board.

The report of this investigation contains a number of appendices relating to material and documents deemed relevant by the investigative staff as part of the basis of its report. Particular reference is not made to all of these supporting documents in this determination, but they have been made available to the parties and, subject to the provisions of the Access to Information Act, they are available 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, nor was one requested by either party. The Board, in reaching its conclusions, has considered the report of its investigative staff and the comments thereon by the parties, 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 planning that led up to this procurement began back in February of 1991 when researchers at Agriculture Canada's Food Research Centre in Ottawa concluded that their existing high pressure liquid chromatographic (HPLC) equipment was not suitable for conducting a program of research they wished to do to determine with precision the amounts of various water-soluble vitamins contained in foods.

This new and challenging field of food research is said by the department to be both costly and highly competitive, with teams of researchers working on similar projects in the U.S.A., Japan, and Europe, and is also said to be generally more extensively funded there than in Canada, and with several instruments available rather than the single one that was to be purchased for Agriculture Canada. Here, in a climate where fiscal and personnel resources are very limited (where there will be only one HPLC instrument in a lab staffed by one scientist and one technician), Agriculture Canada saw time as a very critical resource to be spent as productively as possible on a 24-hour basis, if they were to be competitive

in this area. They made a conscious decision to "do more with less" by automating their HPLC analyses in order to achieve the maximum output with a minimum of operator attention.

The Procurement

When it became obvious to Agriculture Canada's scientist that a new HPLC system would have to be purchased, she stated that she drew on her past experience with a variety of HPLC systems and extensive work on vitamin B₂ to draw up a checklist of some of the features that are operational requirements for this type of research. Using this checklist as a basis, plus certain other factors which she said she did not need to write down, she then contacted and interviewed sales personnel from a number of suppliers, including Beckman, Varian, Perkin-Elmer, Waters, and Shimadzu. After she had met with all the sales representatives, she again re-evaluated her operational requirements in order to establish which features were absolutely essential. At that point, on 5 March 1991, she prepared mandatory specifications for an HPLC system designed to meet the needs of her particular area of research.

In this regard, she determined that the HPLC system that best suited her requirements was the one offered by Varian Canada Inc. and she received from them a price quotation also dated 5 March 1991 for the equipment she required. This consisted of:

	<u>Unit price</u>	<u>total</u>
1. <i>Star 9010 Ternary Gradient Pump with keypad and display, 10 microliter/minute to 5 microliter /minute flow rates, and 6,000 psi rating. Includes accessory kit and manual, 120 V. Select required accessories. (no nitrogen degassing required)</i>		(deleted)
2. <i>9010 GPIB kit for workstation control, factory installed.</i>		(deleted)
3. <i>Star 9095 LC AutoSampler with AC6W Valco Automated loop valve injector (10 microliter sample loop),</i>		(deleted)

includes 100 microliter sampling syringe, 2 ml vials, installation tubing and instructions, and the operator's manual, 120 V. Requires purge valve and GPIB or synchronization kits.

4. 9095 GPIB Interface Kit for workstation control, factory installed. **(deleted)**
5. **[Programmable Fluorescence Detector -- Deleted]**
6. ADC Sync Cable Kit. **(deleted)**

Note: System includes software version upgrade for existing Star Software to complete system integration." **N/C**

This last note, concerning an upgrade to existing software, appears to be a reference to a purchase made earlier by the Food Research Centre through DSS, during the preceding fiscal year. It developed that the entire system included, besides the above listed items a data management package consisting of a software package called "Star Integrator", a 386 Micro-computer with colour monitor and associated peripherals, a Printer/Plotter, and a Parallel cable. These four items were purchased in the 1990-91 fiscal year. The procurement that is the subject of this complaint is another part of the system, the cost of which will come from Agriculture Canada's 1991-92 budget.

(It should perhaps also be mentioned that the complete system included yet another item, called a scanning, programmable fluorescence detector (the deleted item, No. 5, above), which Agriculture Canada also purchased in the last fiscal year. Since, according to Agriculture Canada, Varian "*did not handle a suitable fluorescence detector*", this item was removed from the requirement, separate specifications were prepared, and it was purchased from Fischer. However, according to Agriculture Canada, it is not incompatible with the important data management parts of the system referred to above.)

With the foregoing information in hand, Agriculture Canada sent a requisition to DSS dated 26 April 1991 in which they requested the purchase of the above five items of Varian equipment, listed by model and part number, indicating that it was available from Varian Canada Inc. of Ottawa, Ontario. They requested delivery by 5 June 1991.

The requisition reached DSS on 3 May and was recognized as being one whose estimated value brought it within the Free Trade Agreement (FTA). The contracting officer also advised Agriculture Canada that it would be necessary, in order to comply with Free Trade requirements, to indicate that an "or equal" product would be acceptable.

Agriculture Canada agreed to this provided the "equal" product could meet their mandatory requirements. They were asked to supply a specification setting out those aspects considered mandatory, and this they did on 10 May.

Since this specification lies at the heart of what is being complained of here, it will be convenient to set it out completely. It is in three parts, containing two mandatory requirements applicable to the whole system, 13 mandatory requirements applicable to the pump and five more that are applicable to the autosampler, as follows:

"General System Specifications:

- 1. The HPLC pump and autosampler must be fully controlled by existing Varian Star Software purchased under DSS file # OTT90-14138-(135)/Agriculture Canada Requisition # 01531-90-0455, via a Windows 3.0 interface, i.e. "point and click" operation.*
- 2. All samples must be trackable through workstation software and meet GLP (Good Laboratory Practice) guidelines.*

Mandatory Pump Specifications:

- 1. Ternary gradient single piston pump with high pressure mixing.*

2. *No solvent degassing required. Proportioning of mobile phase gradients must be independent of flow rate.*
3. *Must have a mechanical inlet check valve, not ball-and-seat valve.*
4. *Gradient must be able to contain at least 75 steps. Maximum duration of individual steps in the gradient must be at least 900.0 minutes.*
5. *Capability to program an equilibration step at the beginning of a gradient method, prior to sample injection.*
6. *At the end of an analysis, the following options must be available for programming: (1) stop pump, (2) continue to pump using the conditions of the last step of the method, and (3) default to the equilibration or first step of the method.*
7. *Capable of flow gradient programming.*
8. *Flow rate range: 0.010 to 5.00 mL/min.*
9. *Back pressure range: 0 to 6000 psi. Real-time back pressure readings must be available.*
10. *Pump controls must be accessible to user during a run without interrupting the computer, i.e. the pump must operate as a "stand-alone" unit as well as being fully controlled by a computer, without the need for an external gradient programmer.*
11. *Must be able to link at least 5 methods to run consecutively.*
12. *Pump must have complete electronic and mechanical diagnostics, including a pump stroke counter, a leak tester and the capability to call up pump diagnostics through a modem.*
13. *Pump must have easy access to seals, with seal flush capability.*

Mandatory Autosampler Specifications:

1. *Minimum sample capacity: 100.*
2. *Partial and overflow loop capabilities. Capability to change the size of the loop is desired.*
3. *Injection volumes: 1-100 mL in 1 mL increments. Capability to inject 1 mL out of 10 mL of sample.*
4. *Internal and external needle wash after each injection.*
5. *Programmable capability to perform liquid/liquid extractions, serial dilutions, derivatizations, and addition of internal standards."*

With the exception of the underlined words, the above was transcribed word for word by DSS to become the specification in the Request for Proposals (RFP) that was sent out to bidders who responded to the NPP published in the GBO.

It was this specification that provoked the complaint at issue here. Before reviewing that specification in detail, it will be useful to complete the chronology of events that led up to the complaint.

The NPP was published on 27 May. It contemplated a bid closing date of 10 July. By mid-June, DSS had three enquiries from bidders about the "lock-out" nature of the specification, all complaining that only Varian could meet it. On 20 June, the contracting officer informed Agriculture Canada about the complaints, and asked them to justify their mandatory specifications. They demurred, and she took the matter up with her superiors, sought policy advice and it was decided that they couldn't change course at that late date - - but Agriculture Canada should be asked to provide a written justification for their mandatory specification as soon as possible. That same day (26 June), the contracting officer called all three bidders and told them there would be no change in the specifications.

Waters submitted a bid in the competition (albeit acknowledging they were non-compliant on two mandatory requirements), but as noted earlier, among the three suppliers who complained to DSS, Waters was the only one to file a complaint with the Board, on 5 July 1991, and, on 9 July 1991, the Board issued its Stop Award Order.

The "Or Equal" Requirement

When DSS received the requisition from Agriculture Canada and told them that the Free Trade Agreement required them to give notice that a product "equal to" the Varian products that were being used as the specification would be acceptable, they were referring to the provisions of Article IV of the GATT Code on Government Procurement. That Code is incorporated by reference into the Free Trade Agreement, by Articles 1302 and 1303 thereof, and it will be convenient to reproduce here paragraphs 2 and 3 of Article IV of the GATT Code:

"2. Any technical specification prescribed by procurement entities shall, where appropriate:

- (a) be in terms of performance rather than design; and*
- (b) be based on international standards, national technical regulations, or recognized national standards.*

3. There shall be no requirement or reference to a particular trade mark or name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tenders."

From this, it can be readily seen that the policy of the FTA contains a bias against design specifications and in favour of performance specifications. In particular, there is a bias against the use, in any specification, of a requirement or reference to a particular trade mark or name, patent, design or type, specific origin or producer "***...unless there is no sufficiently precise or intelligible way of describing the procurement requirements...***"

DSS officials knew this, and knew also that if they were going to have to go against that bias, and use the Varian Star models and part numbers as specification references, they were going to have to meet the proviso, which insists that "*...words such as "or equivalent" are included in the tenders.*"

The first part of the difficulty the Board has with what was done in this procurement is that it seems that insufficient attention was paid to the question whether it was really true that "*no sufficiently precise or intelligible way of describing the procurement requirements*" existed, other than to describe the instruments as Varian Star models by name and specific part numbers. As we shall see, when Agriculture Canada was asked, after the complaint came in, to provide a justification for each of the mandatory product features they had selected for their specification, they produced it, and without much difficulty, and for the most part, in terms of their specific performance requirements -- not in terms of design and product features.

Here are some examples:

1. The specification required a "*Ternary Gradient single piston pump with high pressure mixing.*" The justification offered for this mandatory requirement is, in fact, in terms of performance requirements, stressing that system reliability and ease of service by the operator during routine maintenance is an important requirement. The justification notes that the requirement for a single piston pump is based on the observation that piston failure is a common cause of down-time in HPLC, and that a single piston will reduce the number of moving parts, which in turn is assumed to increase reliability. But the true requirement is high reliability, and this is the performance requirement that the specification should demand.

The difficulty that this would pose for the procuring authority would be to provide a measure of reliability that would distinguish between levels of reliability offered by different products. They do not seem to have one, or at least, none is set out in the specification. Instead, a decision was made -- in advance of this competition -- that a single piston pump would provide the degree of reliability they required, and they therefore set up as mandatory, a pump with that particular feature. This practice could, of course, eliminate from the competition a pump of any other design **even if it could be conclusively demonstrated to be more reliable than a single piston pump**. The specification therefore misses the real requirement of the client department, notwithstanding that it was, in fact, possible to state that requirement in an intelligible way.

2. Similarly with the high pressure mixing requirement, the justification offered is simply that "*High-pressure mixing is absolutely essential.*" It goes on to state that "*Existing equipment at FRC has consistently failed to perform the vitamin B₂ analysis. Several thousand dollars in repair bills have failed to produce a suitable HPLC system for this analysis. The service personnel involved repeatedly contended that the crux of the problems resulted from insufficient solvent degassing. High pressure mixing eliminates the need to degas solvents.*"

Again, the justification is clear enough in terms of performance: a machine capable of performing the Vitamin B₂ analysis is required. And again, a decision was taken, in advance of the competition, that the service personnel must be right in their conclusion that insufficient solvent degassing was the problem, so they settled on the conclusion that high pressure mixing was mandatory as it would eliminate that problem. This may be correct, but it also eliminates any product that utilizes any other approach to solving the problem -- **even if it could perform the real requirement: the necessary Vitamin B₂ analysis.** Of course, the difficulty this might pose for the procurement authority is that they might actually have to set up and test the offered equipment to determine if it could perform the analysis. Instead, they seem to have concluded (again, before this competition was conducted) that one among the available products could, indeed, perform the required analysis, and they have specified that one -- by the criterion of its high pressure mixing feature -- as the mandatory one. Even so, it was, in fact, possible to set out the real requirement in an intelligible way.

3. The specification requires that the winning product "*must have a mechanical inlet check valve, not ball-and-seat valve.*" Here, the justification offered is simply "*Absolutely essential to eliminate problems with pump cavitation experienced in the past (see above). Mechanical inlet valves have been shown to require less frequent maintenance than ball-and-seat valves, thereby reducing down-time and service costs.*" Here again, the true requirement turns out to relate to pump cavitation and reduced maintenance (really, increased reliability again). Yet it is expressed in the specification in terms of a particular

product feature. But it also eliminates any product without that feature **no matter what its maker could prove about pump cavitation or performance reliability.**

By no means all of the Varian product features selected as the specification are susceptible of the above criticism. One of them, such as the requirement that "*pump controls must be accessible to user during a run without interrupting the computer*", is in fact a means of expressing an operational requirement notwithstanding that it also describes a feature of a given product. However, two other mandatory requirements are open to two different sorts of criticisms.

The first of these is the requirement that "*pump must have easy access to seals, with seal flush capability.*" The justification offered here relates, again, to considerations of reliability and the assumption that ease of service by the operator will minimize down-time. Thus, the specification in this area too is subject to the first criticism for it would eliminate from the competition both a product that did not require seal-changes, or a difficult-to-service product even if it could be proved to have no seal failures at all.

But the real problem is that there is no criterion offered in the specification to determine how "easy" is easy enough. When a requirement like this is made mandatory, with no criterion for judgement, it is not possible to make any kind of appropriate ranking based on ease of change. The offered products are either "easy" or they are not, and the procurement authority is left with an evaluation decision they cannot defend because the basis on which it was to be made was not made known to the bidders, and **THAT** is contrary to the Free Trade Agreement, Article 1305, which demands that decision criteria be used in the evaluation of bids and the awarding of contracts, **that are clearly specified in advance.**

The second criticism relates to the mandatory requirement that the "*pump must have complete electronic and mechanical diagnostics, including a pump stroke counter, a leak tester and the capability to call up pump diagnostics through a modem.*"

Now it happens that this is a feature of the Varian product, described in its product literature this way:

"On-board diagnostics provide easy troubleshooting and maintenance. The Star 9010 even has a pump stroke "odometer" so you can schedule routine maintenance. Varian's exclusive

Telediagnosics™ included with a service contract, allows the Star 9010 Pump to connect to a Varian Service Center for rapid diagnosis."

It is to be noted, in connection with this "*diagnostics through a modem*" that the requirement is only that the equipment have the **capability** to do this -- not that it be a feature available on the model purchased. This is not unreasonable if the intention is to acquire the feature at a future date (note that this feature is available only on a service contract).

But the criticism here is that the specification in this regard is misleading because there is no intention whatever to make use of this special capability because there is no intention to purchase the necessary service contract. In fact, the justification states that as a matter of policy, Agriculture Canada does not purchase service contracts for their Research Branch. Thus, the **capability** to have the diagnostics information accessible through a modem is not a real requirement of Agriculture Canada given their current policy on service contracts. To have made it mandatory is misleading, and serves to misdescribe the department's real needs and is therefore contrary to Article 1305 of the FTA for failing to provide all potential suppliers an equal opportunity to be responsive to the requirements of the procuring entity in the tendering and bidding phase, since there was no real requirement for this capability.

A final observation that relates to the misleading nature of this specification relates to the overall mandatory requirement that "*the HPLC pump and autosampler must be fully controlled by existing Varian Star Software.*"

The justification for this requirement says only this: "*Agriculture Canada has invested \$10,000 in an HPLC data management system, as per information given in the specifications*". This is a reference to the purchase of that other part of the overall system that was completed in the last fiscal year, mentioned already above. And recall that the data management system consisted of:

- a Star Integrator Software package;
- a 386 Computer with colour monitor and other peripherals;
- a Star workstation printer/plotter; and
- a parallel cable.

The complainant, in responding to the Preliminary Investigation Report sent to both parties, has suggested that what Agriculture Canada had acquired was probably not the Varian Star **workstation** software with control features for the pump and the autosampler, but another software package called Varian Star **Integrator**, which does not have the capability to control these other instruments. Their point was that if they don't have the existing software to control the pump and autosampler, then why does the specification demand that this equipment be "fully controlled by **existing** Varian Star Software". Bear in mind that what Agriculture Canada meant by "existing", although spelled out in the specification prepared by them for the requisition sent to DSS, was deleted by DSS in preparing the RFP. It said "...existing Varian Star Software purchased under DSS file # OTT90-14138-(135)/Agriculture Canada Requisition # 01531-90-0455, via a Windows 3.0 interface, i.e. "point and click" operation."

The investigation has shown that the software purchased under the named requisition and file number is the Varian Star Integrator software package, and a check with the supplier confirms that the Integrator software does not have any capability for controlling the pump and the autosampler. To acquire that capability, Agriculture Canada will have to buy a software package with those control features.

Because of this, the Board sought the comments of DSS and their client department on this point specifically, and the reply received runs as follows:

- "4. *Comments from Waters indicated some confusion concerning the nature of the equipment purchased under Contract # 01531-0-0455. The contract (Appendix 5) clearly states that it is for an integration system, inclusive of both hardware and software. This RFP was processed by DSS through open competition in which Varian was the lowest bidder. The purpose of the current purchase is to build an fully automated HPLC system. Having spent \$10,000.00 on the data management package, it is absolutely necessary that **any additional instrument control software** be compatible and operate at peak efficiency in conjunction with existing hardware and integration software.*" (emphasis added)

It seems evident therefore that Agriculture Canada does not (or, at least, on 16 September when the response was prepared, did not) have the software that would have been required to "fully control" the pump and autosampler. It may be that they had the ultimate intention of acquiring that software -- and of course if they did acquire the Varian pump and autosampler in the present procurement, they would need the Varian Workstation software later on, to fulfil their need to fully automate their complete HPLC system.

Of course, there is nothing wrong with that line of reasoning on their part. But the difficulty with what they represented in the specification for this procurement is that it misleads the other bidders who will be invited into this competition. They refer to control by "existing" software when in fact it isn't existing. Moreover, it shows, just as the complainant believed it did, a pre-judgement about who was intended to win this particular competition -- because they intended to match the product purchased here with a software package they had yet to acquire.

This brings us to the second part of our difficulty with the way this procurement was handled, and it goes to the heart of the complaint that this is a "lock-out" specification.

This case discloses ample proof that what actually went on in this procurement was a pre-competition, held by Agriculture Canada in private, in the course of assessing what the market had to offer that might meet their needs. These were knowledgeable people with much more than a passing acquaintance with the technical details of the instruments they wanted to acquire. Knowing their needs intimately, they assessed the market with a critical eye and went straight to the conclusion that they had found the product that best met those needs. They got a price quotation and then they instructed DSS to acquire it.

When faced with the incidental requirements of the law to conduct an open competition, they went along with that. But they didn't intend to risk "losing" in that competition, so they prepared a specification with 13 mandatory requirements for the pump, 5 more for the autosampler and 2 for the overall system, which are set up mainly in terms of particular product features -- but which, as the above analysis shows, were open to a series of criticisms that go straight to the issue of fairness to those potential suppliers who would be invited to bid.

Unfortunately for Agriculture Canada, the preliminary, or private, competition of the sort they actually conducted here is prohibited under the GATT Code and Free Trade Agreement, and is not allowed either, under the general rules of policy and procedure that DSS works to, even when the procurement is not under FTA. Competitions are required to be fair and open with all the terms and conditions transparent. They are not to be conducted in private, which is virtually what happened here, and the actual competition, when it occurs, is not to be a mere formality with the true expression of actual needs, and the justifications for mandatory requirements prepared later on, only after it becomes apparent that a complaint has been filed.

Thus, in the final analysis, the Board has had little real difficulty in coming to the conclusion that this procurement is flawed by a series of unfair, improper and misleading actions that establish fairly clearly that it was designed to produce one result only, namely, the purchase of the Varian equipment around which the specification is built. This is plainly contrary to Article 1305 of the FTA because it resulted in a failure to provide all potential suppliers an equal opportunity to be responsive to the requirements of the procuring entity in the tendering and bidding phase, and because it would involve the use of decision criteria in the evaluation of bids and the award of the contract that were not clearly specified in advance.

The Board will uphold the complaint, and will recommend to DSS that the requirement be re-competed after a specification has been prepared that reflects the genuine needs of Agriculture Canada. The Board will also award the complainant its reasonable costs of pursuing the complaint, and in view of the fact that they were induced to participate in a competition they were not intended to have any chance of winning, the Board will also award the complainant its reasonable costs of bid preparation up to the point on 26 June 1991 where they knew that the department would not accept their request to modify the specification. After that point, costs incurred by the complainant in preparing the bid they ultimately did file, are to their own account because after that point they knew they were submitting a non-compliant bid.

Proceeding now to the Board's formal determination:

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 referred to in Section 17 of the Free Trade Agreement Implementation Act, in that the specification was designed to produce a pre-selected result, thereby failing to provide all potential suppliers an equal opportunity to be responsive to the requirements of the procuring entity in the tendering and bidding phase, and because it would involve the use of decision criteria in the evaluation of bids and the award of the contract that were not clearly specified in advance.

The Board recommends that DSS re-compete this procurement after a specification has been prepared that accurately reflects the real needs of Agriculture Canada.

The Board has also decided:

- a) to award the complainant its reasonable costs of proceeding with the complaint; and
- b) to award the complainant its reasonable costs of preparing and submitting its bid incurred up to and including 26 June 1991.

Gerald A. Berger

Gerald A. Berger
Chairman
Procurement Review Board of Canada