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

IN THE MATTER OF: **A Complaint** **By Earl C. McDermid Limited** **of 124 Norfinch Drive** **Downsview, Ontario**	**Board File No:** **E90PRF6608-021-0012**
AND IN THE MATTER OF: **The Free Trade Agreement** **Implementation Act, Part II, Sec. 15** **S.C. 1988, Ch. 65.**	

11 December 1990

DETERMINATION BY THE BOARD

This complaint concerns a procurement by the Department of Supply and Services (DSS) for three types of facsimile paper for use in various models of facsimile machines, all manufactured by Ricoh, and used by the Department of External Affairs (DEA). DSS was seeking to set up an arrangement known as a Regional Individual Standing Offer (RISO) under which the winning competitor's offer would be accepted as a standing offer to supply the specified facsimile paper on certain agreed conditions including price, and in amounts to be called up from time to time in orders (or call-ups) that would be given directly to the supplier by DSS's customer department (DEA). By the terms of the RISO, there would be no obligation to give any orders, but it was anticipated that there would be call-ups over the planned one year life of the RISO, to a value estimated to be $60,000. This amount, being above the Free Trade Agreement (FTA) threshold of $31,000, was one of the factors prompting DSS to treat the procurement as coming under the FTA, and it was advertised as an open competition by a Notice of Proposed Procurement (NPP) in the Government Business Opportunities (GBO) booklet on 28 February 1990.

The competition closed on 9 April 1990 with 24 bids submitted, and on 18 April the RISO was issued to the winning bidder, Rittenhouse Ribbons and Rolls Ltd. (Rittenhouse), of Laval, Québec.

The complainant is Earl C. McDermid Limited (McDermid), paper converters, of Downsview, Ontario and the gist of their complaint is that their bid was lower than that of Rittenhouse but that they were not selected for reasons they believe are associated with the inclusion, contrary to what they were led to believe in the bidding documents, of duty and sales taxes in the evaluation of their bid, which, they believe, were not included in the evaluation of the Rittenhouse bid. They ask that the RISO be withdrawn or re-issued, or else awarded to them "as the low bidder on the best quality product."

Before embarking upon the details of this complaint, it will be convenient here to deal with two objections raised by DSS when it filed the Governmental Institution Report (GIR) following notification by the Board of the filing of this complaint. These are: (1) that the complaint is filed later than "10 days after the basis of the complaint is known or should reasonably have been known" as required by Section 23(1) of the Procurement Review Board (PRB or the Board) Regulations, and (2) that, contrary to Section 21(1)(f) of the PRB Regulations, the complaint is not "concise, and logically arranged" and does not "contain a clear and detailed statement of the substantive and factual grounds of the complaint."

The RISO was awarded on 18 April 1990. This complaint was filed four months later on 17 August. The issue is when the complainant knew of the basis of its complaint. As noted, the complaint is essentially that McDermid was the low bidder, but didn't win, even though the bidding documents are clear that the RISO would go to the low compliant bidder. The evidence does not disclose when the complainant learned that a supplier, with what he considered to be a higher bid than his own, had won. However, McDermid was in correspondence with the Access to Information section of DSS during May, June, and July, seeking a variety of information about this and another procurement on which they had bid. It is clear that they wrote on 29 June to DSS expressing dissatisfaction with these two procurements, both of which subsequently became the subject of complaints to this Board. The other complaint was dealt with in Board file E90PRF6635-021-0013, wherein the Board noted that a letter from the Minister of DSS dated 30 July 1990, and which dealt with McDermid's complaints about both procurements, served in a real sense as the instrument informing them of the basis of their complaint to the Board. That is not clearly the case here, where the issue is somewhat different. The Minister's letter, however, did say the following about this case:

> *"The Standing Offer awarded to Rittenhouse Ribbons and Rolls was awarded on the basis of lowest aggregate price. I would like to assure you that the bids were evaluated inclusive of customs duty, although I understand you were mistakenly told otherwise by the contracting officer. I am sorry for this misunderstanding. I should explain that the procurement rules of origin for requirements subject to FTA stipulate that the product to be delivered to the government must originate in Canada or the United States. The bid price for products that are not of domestic origin is subject to a 10 per cent increase factor for evaluation purposes. Since your proposal contained goods of 66 per cent Japanese origin, it was subject to this factor."*

This constitutes a clear indication that the Department's position was that Rittenhouse was the low bidder, and is a clear denial of relief. However, even if we take this as the first clear knowledge the complainant had of the basis of their complaint, it cannot be said, as the Board observed in the other case, that this complaint was filed within 10 days thereafter. In fact, it was filed on 17 August 1990 and is therefore at least a week late.

The Board has, however, authority in Section 23(4) "where good cause is shown or where it determines that a complaint raises issues significant to the procurement system" to consider a complaint that is not filed within the time limits set out in Section 23.

In this instance, the Board has determined that this complaint does raise issues significant to the procurement system. This is because in competitive procurements where there is a stipulation that the low bidder will ordinarily be accepted, hardly any issue can be more significant to the procurement system than an allegation that the evaluation by-passed the low bidder. McDermid believed they knew that their bid was lower than Rittenhouse's - on the basis set out in the Request For Standing Offer (RFSO) (which required them to certify that there was no element of duty or taxes in their price) - and they had a letter from the Minister that told them the evaluations had been conducted with duty <u>included</u> in the prices. Moreover, this is the first complaint the Board has received in which the issue turns around the correct consideration of the three issues of taxes, duties, and origin of goods in the evaluation of the bids. Accordingly, the Board concluded that issues significant to the procurement system had been raised, and so decided at its meeting of 28 August 1990 (see Investigation Report (I.R.) appendix 2) to accept this complaint for investigation.

Concerning the second government allegation that the claim itself is not concise, logically arranged and clear with a detailed statement of the substantive and factual grounds of the complaint, as appears to be required of complainants by Section 21(1)(f) of the PRB Regulations, the Board wishes to make clear the manner in which it intends to interpret this requirement. It believes the provision must be interpreted with reasonable flexibility so that it does not result in proper complaints being rejected on overly technical grounds - particularly, as here, where the procurements are of modest amounts, the complainants act on their own behalf, without sophisticated assistance, legal or otherwise, and they have scant access to all the facts, sometimes having to await the working out of the Access to Information process before being sure they know enough to properly complain. On the other hand, neither should it be interpreted so loosely as to effectively allow the complaint system to be encumbered with trivial, frivolous, incomprehensible, or even vexatious complaints. The Board intends to steer a course between these extremes, guided by the principle set out in Section 20(1) of the PRB Regulations which specifies that "all proceedings before the Board shall be dealt with as informally and as expeditiously as the circumstances and considerations of fairness permit."

In the present case, although the letter of complaint is perhaps not organized to facilitate instant clarity, and is not free from unrelated and judgemental matter, it is clear enough, especially when read in conjunction with the other material enclosed with it, what the true nature of the complaint really is, and the Board believes that it discloses a reasonable indication that the procurement may not have been carried out in accordance with the policies, practices, and procedures of the Government of Canada.

In those circumstances, the Board determined that it ought to proceed with an investigation of this case.

Turning now to the substance of the complaint itself,

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 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 include: Mr. Marcel Roy, DSS (Contracting Officer); Ms. Julia Brunette, DSS (Replacement Contracting Officer); Ms. Johanne Camirand, DSS (Contracting Officers' Supervisor); Mr. Brian Carroll, DSS (Section Chief); Mr. Earl C. McDermid, Earl C. McDermid Limited, Downsview, Ontario (President); Mr. Thomas Clarke, McDermid (Purchasing Manager); Mr. G. Michael Dies, Rittenhouse Ribbons and Rolls, Markham, Ontario (General Manager, Canadian Operations); Mr. A. Martin, DEA (Requisitioning Officer).

The report of this investigation, 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 ultimately 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, a preliminary version of which was made available to the parties for their comments, and has made its findings and determinations on the basis of the facts disclosed therein, together with the comments of the parties, the relevant portions of which are mentioned in this determination.

The Procurement

The RFSO (see I.R. Appendix 7), dated February 28, 1990 with a closing date of April 9, 1990, was prepared by DSS, Capital Region Supply Centre (CRSC), and included, among other things:

a) Two boxes in the front page that are required to be filled in with the name of the source country of foreign content of the goods to be offered, and the value of that foreign content:

"

Country of Foreign Content Pays d'origine des éléments étrangers	Value of Foreign Content Valeur des éléments étrangers $ CDN

"

b) "*NOTE TO SUPPLIER:*

- *PRICES SHOULD INCLUDE DELIVERY (FOB DESTINATION)* [Ottawa].

- *SUBSTITUTES WILL BE CONSIDERED. HOWEVER THE SUPPLIER WILL BE HELD RESPONSIBLE FOR ANY MAINTENANCE COST ASSOCIATED WITH DAMAGE TO EQUIPMENT RESULTING FROM THE USE OF THE SUBSTITUTE ITEM.*

REQUIREMENT:

THE SUPPLY OF FACSIMILE PAPER 8-1/2" X 328 ft ROLL ON AN "AS AND WHEN ORDERED" BASIS FOR THE PERIOD OF ONE YEAR.

001 TYPE 200A (TO BE USED WITH RICOH FAX 100/200 SERIES AS WELL AS MODELS 510 AND 610).
1700.00 rl

002 TYPE 300A (FOR RICOH FAX MODEL 60, 60E, 70, 70E, 75 AND 76).
1700.00 rl

003 TYPE 50A (FOR RICOH FAX MODEL 10, 15, 20, 25 AND 35).
550.00 rl"

c) "*SALES TAX, EXCISE TAX AND CUSTOMS DUTY:*
As these goods are for export, we certify that the prices quoted herein do not contain any element representing sales tax or any amount representing refundable excise taxes or customs duties paid upon the import of materials, parts and components incorporated or to be incorporated in such goods.

The Department of Supply and Services will provide a Drawback Certificate which will enable the Contractor to claim customs drawback from the Department of National Revenue.
(t320)

The aforementioned clause (t320) is subject to following clarifications:

- *Federal Sales Tax and Customs Duty will apply some of the time.*
- *The 942 call-ups will specify if the invoice should include Federal Sales Tax and Custom Duty."*

d) *"Any contract resulting herefrom will normally be awarded to the tenderer whose quotation produces the lowest total cost at point of destination.*
t540a"

e) *"STATEMENT OF ELIGIBLE GOODS:*
The Bidder represents and warrants that the Statement of Eligible Goods attached to this bid is accurate and complete and satisfies the definition of eligible goods set out in that statement.

The Bidder acknowledges that the Minister relies upon such representation and warranty to enter into any contract resulting from this bid.

Bids for eligible goods and bids for products of Canadian origin may be given preference over other bids in accordance with the procedures for implementing the Canada-U.S. Free Trade Agreement respecting government procurement, published annually in the Canada Gazette.

Such representation and warranty may be verified in such manner as the Minister may reasonably require.
t543"

It should also be noted that the RFSO stipulates that the goods are for export. Under those circumstances, taxes and duties are not payable. Consequently, the RFSO demands that the bidders certify that their prices, as quoted, contain no element of sales tax or refundable excise taxes or customs duties.

However, the investigation shows that certainly by the end of January 1990, DSS knew that the bulk of the goods to be ordered (perhaps 80%) under the standing offer were to be used in Canada.

The RFSO continued to say that only some portion of the goods might also be used in Canada - a circumstance in which the government does pay taxes and duties on the goods it buys. Presumably for that reason, the bidders were also advised that "FST and Customs Duty will apply some of the time" and that "the 942 call-ups will specify if the invoice should include Federal Sales Tax and customs duty" (942 is the number of the DSS standard form that customer departments use when forwarding a "call-up" to the supplier when using the RISO to obtain the supplies they need). (Curiously, this latter clause in the RFSO is omitted from the French language version).

The NPP was published in the GBO at the end of February (Vol. 2, No. 9, dated 28 February 1990), indicating a closing of 9 April 1990, and those who responded were sent bid packages that included the RFSO with no change made in the evaluation method.

In the end, the evaluation was actually conducted, in most cases, with FST excluded (apparently because it would increase the bid prices by the same factor in every case, and could therefore be disregarded) but with customs duties included (apparently because different rates of duty might apply depending on the different foreign sources of the goods and could not be disregarded because it might have a bearing on the ranking of the bids).

Unfortunately, as will appear, this was not done consistently with all bids.

To complicate matters further, a series of other unusual things happened that led, in fact, to an evaluation process that became irretrievably flawed.

To begin with, the bidding documents indicated to all bidders that (since this was an FTA procurement) a "Statement of Eligible Goods" form was included in the bid package, and that the bidder was going to be asked to complete the form and return it with their bid, and "represent and warrant" that the statement in that form was accurate and correct, and moreover, that the Minister was going to rely on that warranty to enter into any contract resulting from that bid.

The investigation discloses that, unfortunately, the bid packages went out without any of those forms included, which inevitably resulted in all the bids being returned without those forms being completed, and critical information, needed for bid evaluation, missing.

This oversight is serious because for FTA procurements it is critical to know if suppliers are offering eligible goods. The RFSO contains the warning:

> "*Bids for eligible goods and bids for products of Canadian origin may be given preference over other bids in accordance with the procedures for implementing the Canada-U.S. Free Trade Agreement respecting government procurement, published annually in the Canada Gazette.*"

The nature of the "preference" referred to therein is not explained. Moreover, as the Board found in dealing with the other McDermid complaint referred to above, resort to the "procedures for implementing the Canada-U.S. Free Trade Agreement respecting government procurement, published annually in the Canada Gazette" will not provide any information on the preference or how it is applied either. As the Board noted in that earlier case:

> "*The procedures in question are now published in the GBO, and insofar as this procurement is concerned, a copy of them was published in the 31 January 1990 issue of that booklet. They are silent on the issues of the evaluation of bids for products of domestic origin and designated products of rationalized firms as well as for non-eligible goods of foreign origin. These procedures have recently been re-published in the 28 September 1990 issue of GBO, again remaining silent on these issues.*
>
> *It is a fact that DSS had publicized the above-mentioned evaluation procedure in the issue of* The Supplier*, No. 6, dated March 1989. This communication device, used at the time of the introduction of the Free Trade Agreement, however, does not constitute an official notice of such procedures. In fact, the official publication of procedures in the Canada Gazette Part I of January 21, 1989, shortly after the FTA was implemented, also omitted a reference to the evaluation factor.*

Since the GBO is now the official place to which a bidder should be directed for information, the Board considers that the provisions of Article 1305: c)iii) of the FTA requiring that the decision criteria used in the evaluation of bids be "clearly specified in advance" are not being met."

The point to all this is that:

(1) Neither having put full information about the application of the preference scheme into the hands of the bidders, nor having directed them to a proper source of that information, it was not proper to apply it in the evaluation of the bids. The Investigation Report shows it was applied to one bid only: the complainant's;

(2) When applying the preference scheme - which involves a 10 percent increase in the bid price, per foreign item, as a penalty for not offering eligible or domestic goods (or for failing to return the Statement of Eligible Goods form properly completed), DSS did not penalize any bidder for failure to return the form - but penalized the complainant on the basis of the "Foreign Content" box on the RFSO showing a Japanese content of 66 percent - thus basing the decision not on information relevant to the Eligible Goods Statement - but on information that was elicited by a portion of the RFSO form (the "Foreign Content" boxes) that is not relevant to FTA procurements, and should not have been used for evaluation purposes for such procurements (in fact, McDermid may have offered what DSS would define as "domestic goods", which, under their rules, would be treated in the same manner as "eligible goods" and therefore not subject to the 10 percent penalty factor);

(3) Finally, as an internal matter, it appears that to have continued with the evaluation process without the information needed about eligible goods, was to do so on a basis other than the one which Canada agreed, under the FTA with the United States, that they would conduct these procurements.

A further complicating factor is that not all the bids contained all the information requested in the RFSO, while others volunteered unrequested information. It will be convenient to quote the Investigation Report at some length, to illustrate the difficulties this posed, and show how DSS dealt with them:

"Although not requested, certain suppliers provided information on the duty rate applicable to their prices. Not all of these however, provided full information on the duty rate applicable and to what portion (materials, parts and components) of their offer it would apply. The offers submitted were evaluated and this exercise can be summarized as follows:

EQUIVALENT PRODUCTS:

- *it appears that all brand names were accepted as being equivalent products;*

STATEMENT OF ELIGIBLE GOODS:

- *none of the twenty-four suppliers included a Statement of Eligible Goods form with their bids;*
- *one bid had the 10 percent evaluation factor added for non-eligible goods of foreign origin without such declaration being made, based on its foreign content declaration* [McDermid -see above]*;*

FEDERAL SALES TAX:

- *six suppliers quoted FST "extra"; of these, three specified the rate of 13.5% would be applicable;*
- *one supplier submitted two quotes, one FST "extra" and one FST "included", with the FST rate applicable at 13.5%;*
- *one supplier quoted FST "included" at 13.5%;*
- *sixteen suppliers did not provide information supplemental to their FST certification;*

CUSTOMS DUTY:

- *two suppliers quoted duty "extra", with one specifying that the applicable rate would be 9.2%;*
- *twenty-two suppliers did not provide information supplemental to their duty certification;*

FOREIGN CONTENT:

- *eleven suppliers left the foreign content and country of origin blocks blank;*

- *five suppliers provided the foreign content value and country of origin of their bids;*

- *seven suppliers indicated that the foreign content in their bids was nil;*

- *one supplier provided partial information on foreign content.*

The tabulation of the five lowest proposals, as determined by DSS, can be summarized as follows:

- *Rittenhouse Ribbons and Rolls' (Rittenhouse) prices (specified to be FST excluded and certified to be refundable duty excluded) were used in the tabulation as submitted. Rittenhouse (Scarborough office) had included a letter with its offer stipulating:* "...prices quoted DO NOT include F.S.T." *The letter is silent concerning duty (see Appendix 9).*

- *The second offerer's prices were reduced by 13.5% identified as the applicable FST rate in its proposal.*

- *The third offerer, McDermid, had its prices increased by 9.2% identified in its proposal as the applicable duty rate extra. Also, a separate calculation including the 10% evaluation factor for non-eligible goods of foreign origin is on the tabulation.*

- *The fourth offerer's prices were used as submitted. A clarification by the contracting officer with the supplier prior to the issuance of the standing offer indicated that duty would apply at 3.9%. Its total bid price was revised* [by that amount]. *The basis of this increase is explained on the tabulation as:* "with duty in". *No further information is offered.*

- *The fifth offerer's prices were used as submitted with no clarification on duty being sought by the contracting officer.*

Prior to the issuance of the standing offer, on April 11, 1990, the contracting officer confirmed with Rittenhouse that its offer had no Japanese content. On that same day, Rittenhouse (Laval office) wrote to the contracting officer confirming it was offering goods with 65% American content and 35% Canadian content (see Appendix 10).

DSS contacted the second and fourth offerers to determine whether FST had been included in their bids and at what rate. The second offerer had specified in its offer, that FST was included at 13.5%. The fourth indicated that FST would apply at 13.5%. DSS also verified with the fourth offerer that the customs duty rate would apply at 3.9%. According to the replacement contracting officer, DSS contacted the ninth offerer to establish the FST rate and reduced its quoted prices by 13.5% for evaluation purposes, even though the supplier's proposal clearly specified: "FSTNI" *(Federal Sales Tax Not Included). In addition, DSS contacted the twenty-second offerer to clarify that prices quoted were per carton and not per roll. It also determined that FST was excluded (see Appendix 11).*

. . . . .

On April 17, 1990, the contracting officer contacted the requisitioning officer to inform him of the leading contender for the standing offer (see Appendix 12). On April 18, 1990, the contracting officer's supervisor issued the standing offer agreement to Rittenhouse (Laval office), clearly stating the "contract prices" *were duty and federal sales tax exempt (see Appendix 13). It also included the following clause:*

> "DRAWBACK CERTIFICATE - CANADIAN CUSTOMS DUTY, EXCISE AND SALES TAXES:
> It is certifed (sic) that this contract was placed with your firm on the basis that you had excluded from the contract price all customs duties and taxes you were or might be required to pay on imported goods used in the manufacture of the stores you have agreed to supply. Accordingly, all rights to drawback accruing in this connection under regulations established by the Department of National Revenue - Customs and Excise are hereby waived to your firm when the manufactured stores have been exported (or supplied to our satisfaction in Canada)."

As noted earlier, the complainant, on 29 June 1990, wrote to DSS expressing dissatisfaction about this and the other procurement on which they had bid. In preparing a reply for the Minister's signature, there followed an attempt to ascertain just exactly what had happened when the bids on this procurement were evaluated. At one point, the complainant was told that neither taxes nor duty had been included in Rittenhouse's price, at evaluation. This proved to be an error and was corrected later when the ministerial reply to the complainant was sent on 30 July 1990 advising that duty had been included. DSS had confirmed this earlier, directly with Rittenhouse, and DSS, on 18 July 1990, amended the RISO to indicate that the unit prices quoted were regarded as duty included - but FST exempt (rather than both of them exempt as the RISO originally read). Later still, after the complaint had been filed and Rittenhouse, as contract awardee, had been sent a copy of the complaint by the Board, Rittenhouse sent a letter to the Board stating:

> *"Mr. McDermidt (sic) is mistaken by indicating that our quoted prices do not include Federal Sales Tax and duty.*
> *OUR PRICES DO INCLUDE BOTH F.S.T. AND DUTY."*
> (see I.R. Appendix 24)

Finally, to put the matter beyond doubt, Rittenhouse, in response to a direct oral enquiry on the point, wrote to the Board a month later:

> *"This letter is sent to you confirming that the amount for the facsimile rolls on standing offer, (08009-9-9750/01-OTT) includes F.S.T. and all duties."* (see I.R. Appendix 25)

However, the Investigation Report shows that in bills submitted to the Government for goods called-up and paid for, for use in Canada, FST was charged extra.

The Governmental Institution Report

The GIR, sent to the Board in response to the complaint which had been forwarded to DSS, after dealing with the two preliminary matters referred to at the outset of this determination, went on to urge that the complaint be rejected as well for these reasons:

> "*The complainant, Mr. McDermid, claims the company awarded the requirement was not the lowest priced offer. This claim is based on an erroneous statement made in a telephone conversation between the responsible SSC contracting officer and Mr. McDermid. The contracting officer inadvertently stated the award value was duty exempt when in fact, the price given to Mr. McDermid included duty. As his proposal had quoted prices as duty exempt, his offer indeed appeared lower.*
>
> *The method of evaluation and tabulations on this file have been reviewed in detail and it is evident that CRSC has applied all salient policies and procedures in a correct manner. No mistake was made in awarding the Standing Offer nor is there any intent on the part of CRSC to hide information or somehow mislead Mr. McDermid.*
>
> *Again, there were no administrative errors on our part in the evaluation, assessment and selection of Rittenhouse.*"

In these circumstances, the Board's investigative staff conducted a trial evaluation of the five lowest bids, following the method that appeared to be required in accordance with the RFSO and departmental directives, to see if that would have resulted in any change in the ranking of those five bids. It appeared to show that the third and fourth bids would have come first and second, and that the first and second would have come third and fourth. The fifth ranked bid would have been unchanged.

The staff also attempted to conduct a second trial evaluation of the same five bids, using the method actually adopted by DSS - that is, including the duty but not the FST, and applying this method consistently. Unfortunately, this attempt could not be completed because insufficient information was available.

When the Board staff realized the difference the test evaluation method might have made in the outcome, it so informed the Board. The Board then directed that the preliminary report of the investigation showing the results of the trial evaluation be disclosed to the parties for their comments, before considering the report, and authorized an extension of the time limits in Section 39 of the PRB Regulations, for issuing its determination.

The preliminary report was sent by the Secretary to the Board to each of the parties, along with a letter reading, in relevant part, as follows:

> "*The investigative staff of the Board has partially completed its investigation into this complaint, and a preliminary report has been drawn up - and a copy is attached. We consider it necessary to present the preliminary report to the parties for their comments before completing the report for the Board. This is being done because the report contains information of which the parties may not have been aware. The information in question concerns the result of a test evaluation of bids conducted by the Board's investigative staff for comparison purposes only. This was done because the investigation of the actual evaluation conducted by DSS appeared to involve certain inconsistencies. The test evaluation was conducted in accordance with what appears to be the evaluation criteria set out in the bidding documents and resulted in significant differences in bid ranking. We would like the parties' comments on this matter before completing the investigation. Some names and dollar values have been deleted for reasons of confidentiality, but, in our view, this does not obscure the point at issue.*"

The response from the complainant can be summarized as a reiteration of its position that they were offering the best quality product for the machines on which it was to be used. They objected to having to take the 10 percent increase factor for having bid on non-eligible goods, and they observed that the method of specifying the product required left them no alternative but to offer a product having the same level of quality that the manufacturer specifies for use in those machines. McDermid believes that no other product offered met that standard...although they are clearly not saying that lesser quality facsimile paper cannot be used in those machines.

The response from the Government to the preliminary report is quoted in full because it is markedly different from the GIR:

"SUPPLY AND SERVICES CANADA
SUBMISSION ON PRB INVESTIGATION REPORT

PRB COMPLAINT NO: #E90PRF6608-021-0012
COMPLAINANT: EARL C. MCDERMID PAPER CONVERTERS LTD.
STANDING OFFER NO: 08009-9-9750/01-OTT

The investigative report, as commented on by the Secretary of the Board, contains information setting out alternate evaluations which result in significant differences in the bid ranking. Given the appearance of a lack of fair play it is considered desirable by DSS to re-solicit bids for this requirement. As a result the Board is advised that Supply and Services proposes to issue a revised NPP notice, revise the bid solicitation package to clarify the evaluation criteria and solicit bids from vendors for the balance of the requirement under this procurement.

In proposing the foregoing Supply and Services reviewed the activities undertaken in pursuit of this procurement. Regrettably the original bid solicitation package in the form of the Request for Proposal (RFP) contained certain ambiguities with respect to the correct position in regards to federal sales tax and duty. This was compounded by the administrative failure to include the appropriate attachment to the RFP, in the form of the statement of eligible goods. It appears that instead of the statement of eligible goods the employment equity form was attached inadvertently. Under usual circumstances, at least one or more of the thirty or so bidders would have notified SSC of the foregoing difficulties within the RFP document before bid closing, however in this instance no party brought it to the attention of SSC.

SSC believing it would be fair and cost effective for all parties concerned, proceeded using the only information available, namely the Country of foreign content information provided by the bidders. This form of evaluation was at the time considered the only practical means to emulate the evaluation method outlined in the RFP. SSC could not and did not anticipate that the alternative of applying a uniform 10% evaluation penalty on <u>all</u> bids was fair or practical. Thus SSC proportionately applied the 10% penalty rule for all bidders who stated their foreign content to be other than Canada or the US. The investigation

report has led SSC to believe that what it considered a least cost practical solution for all parties could be subject to another interpretation as provided by the Board's investigator, namely that the 10% evaluation penalty was applied selectively by SSC.

The investigative report also highlights SSC's treatment of all brands of goods, namely the facsimile paper, being accepted as equivalents. SSC notes that in this solicitation package, no specifications were included other than the requirement that the paper function properly with the equipment. The solicitation further advised vendors that they would be liable for any difficulties due to their products performance. Given the value of the solicitation, the client department's acceptance of the product, and the provisions in the RFP treatment of all brands as equivalents in this instance was considered appropriate. This point is noted in order to express to the Board that the treatment of all vendors in this solicitation was uniform and without bias.

Notwithstanding the foregoing, as indicated earlier, SSC proposes to re-issue solicitation for this procurement and to revise the solicitation package."

With these responses in hand, which do not dispute the facts as set out in the preliminary report, the Investigation Report was submitted to the Board, which concluded that there was then sufficient evidence to make a determination in this case, and that a hearing was not required.

The Board finds that:

(a) The failure to include the Statement of Eligible Goods form in the bid packages was a critical matter because it resulted in a failure to elicit the basic information upon which the "national treatment" part of the evaluation was to be conducted. But even if it had been provided (as was noted in the other case of McDermid referred to above) there was no disclosure there of the manner of application of the preference and its effect on the evaluation. Not having disclosed this matter results in making its application improper and contrary to Article 1305 of the FTA as being the use of a decision criterion in the evaluation of bids and the awarding of contracts that was not clearly specified in advance.

The government acknowledges that with insufficient information at hand, they chose an evaluation method that was intended to "emulate the evaluation method outlined in the RFP". The fault the Board finds with this is that the government chose a method that builds on a clause inapplicable to FTA procurements, not specified in advance and relies on information supplied by only some of the bidders.

This Board is challenged to understand how anyone could find this to be a "fair", "cost-effective", and "the only practical means to emulate the evaluation method outlined in the RFP" or that "the treatment of all vendors in this solicitation was uniform and without bias". It is doubtful if the party that brought this complaint would see it that way, considering that it may have resulted in their bid ranking third instead of, perhaps, first and winning the RISO.

(b) The Board also finds that the method of evaluation used in fact...which involved the addition of duty to the total bid prices is also contrary to the same provision of the FTA and for the same reason: the decision criterion is not clearly specified in advance.

(c) Moreover, that method of evaluation also suffers from the fact of its inconsistent application, which appears to have resulted in a ranking of the bids different from what might have resulted (at least for the five lowest ranked bids) if it had been done as set out in the bidding documents. The government response does not contest this point.

In fact, the government indicates in its response, that it intends to re-issue the solicitation, by issuing a revised NPP, clarifying the bid solicitation package and soliciting bids from vendors for the balance of the requirement under this procurement.

This is, in part, the right result, but the Board notes that it is a result that should have been brought about long ago. The complainant made persistent efforts to get at the facts and make their concerns clear to the department, but they were met on two formal occasions with blunt, clear statements that the government had done nothing wrong - once over the signature of the Minister, and once again in the GIR when this complaint was laid.

Finally, in its response to the Board's disclosure of its preliminary investigation report, DSS points to the bidders for not alerting DSS about the oversight concerning the Statement of Eligible Goods form. They do

see that what they have done "could be subject to another interpretation..." yet they still believe it was "a least cost practical solution for all parties." They ignore the main thrust of the preliminary investigation report to the effect that the evaluation may have produced the wrong result; they stress to the Board that "the treatment of all vendors in this solicitation was uniform and without bias"; and they end by stating "notwithstanding the foregoing...SSC proposes to re-issue solicitation..."

The Board believes that if the department had spent less time defending its position and more time checking the substance of the complaint, there may have been a speedier and fairer resolution of this matter, to the general benefit of both parties.

DETERMINATION

The Board has determined that this procurement by the Department of Supply and Services does not comply with all the requirements referred to in Section 17 of the Canada-United States Free Trade Agreement Implementation Act in that it did not use decision criteria in the evaluation of bids and the awarding of contracts that were clearly specified in advance.

Accordingly, the Board, noting the departments proposal to re-solicit this requirement, recommends that the department cancel the RISO with the contract awardee, and proceed with the re-solicitation of this requirement, in accordance with the FTA Chapter on Government Procurement.

The Board awards the complainant its reasonable costs in filing and proceeding with the complaint and, taking into consideration all of the circumstances of this case and because it appears that the complainant, but for the actions of the government, may have been the low bidder in this solicitation, the Board also awards the complainant its reasonable costs relating to the preparation of its bid.

Gerald A. Berger
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Chairman
Procurement Review Board of Canada