



IN THE MATTER OF:

**A Complaint
By Kaysam Worldwide Inc.
of 55 Shepherds Lane
Totowa, New Jersey**

**as represented by
Morris/Rose/Ledgett
Toronto, Ontario**

**Board File No:
D92PRF66K-238-0003**

Complaint Upheld

AND IN THE MATTER OF:

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

February 28, 1992

DETERMINATION BY THE BOARD

Complaint

The complainant, Kaysam Worldwide Inc. of Totowa, New Jersey (Kaysam) alleged that this procurement for natural rubber weather balloons conducted by the Department of Supply and Services (DSS) on behalf of the Department of the Environment was in breach of the requirements of Article 1305 of the Free Trade Agreement (FTA). For example, they contend that certain designations used in the Advanced Contract Award Notice (ACAN) i.e. "no substitute" and "strategic product" are overly restrictive and "*...worked to defeat Kaysam's efforts to respond to and participate openly and competitively in the tendering and bidding phase.*" They requested that a new solicitation for the contract be issued and that they be awarded their reasonable costs relating to the filing and proceeding with the complaint, including solicitor's fees and disbursements and costs relating to the preparation of their bid.

The complaint was filed with the Board on February 6, 1992. The same day, it was accepted for investigation by the Board under the Express Option, which was requested by the complainant. On February 7, 1992, a Stop Award Order to postpone the award of any contract in relation to this procurement was issued by the Board, pursuant to paragraph 16(1)(b) of the *Free Trade Agreement Implementation Act* (the Act). DSS submitted their Governmental Institution Report (GIR) on February 21, 1992 and the complainant's comments on the said report were received by the Board on February 24, 1992.

Background

The GIR submitted by the government is short and it is quoted in full hereinafter:

The Government has re-examined its requirement and a decision has been made to discontinue the sole source procurement. It is intended to re-tender the requirement on a competitive basis in accordance with the Government's open bidding policy. This decision has been communicated to the complainant. The end user and the procuring entity will be developing appropriate functional specifications for use in a potential competition.

As the Government has decided to discontinue the sole source procurement, it is submitted that there is no further basis for a complaint. Accordingly, no attempt has been made to file attachments with this Governmental Institution Report.

The Government would be prepared to pay the complainant's reasonable costs for filing the complaint as determined by the Board, if the Board determines this to be an appropriate course.

The complainant's comments on the GIR, as conveyed by their solicitor, are also short and to the point and substantially read as follows:

Our clients [Kaysam] are prepared to accept the position of the government to the effect that it will discontinue the sole source procurement in the above matter and re-tender on a competitive basis.

Therefore, in consideration of the government's decision, our clients are prepared to withdraw the complaint. Our clients feel that reasonable costs for preparation of this complaint are [amount deleted] and respectfully request an order for that amount.

Determination

The Board is of the view that this complaint has been substantially solved by agreement between the parties. Further, since the government's actions indicate that the complainant was substantially correct in its allegations and its request for open tendering, the Board upholds the complaint and will award the complainant its reasonable costs for filing and proceeding with its complaint.

DETERMINATION

The Board has determined on the basis of the evidence presented to it by the parties that the procurement did not comply with 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.

The Board has also decided to award the complainant its reasonable costs relating to filing and proceeding with the complaint.

Finally, the Board recommends that this procurement be open to competition in conformity with the requirements of the FTA and the GATT Code.

Gerald A. Berger
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Chairman
Procurement Review Board of Canada