



IN THE MATTER OF:

**A Complaint
By Chesher Equipment Ltd.
of 135 Watline Avenue
Mississauga, Ontario**

**Board File No:
G92PRF6621-021-0039**

Complaint upheld

AND IN THE MATTER OF:

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

March 9, 1993

DETERMINATION BY THE BOARD

The Procurement Review Board (PRB or the Board) received a complaint on December 10, 1992 from Chesher Equipment Ltd. (Chesher). The complainant alleged that, in a competition for an oven combining steam and hot air (combi-oven) for the Department of Correctional Services, Ste-Anne des Plaines Establishment, Québec (CSC), the product that it offered was not properly evaluated, the evaluation was not thorough, and the reasons for not accepting it are not valid. The complainant further alleged that the Department of Supply and Services (DSS) did not properly supervise the evaluation.

The remedy requested by Chesher is to have the contract awarded to it if the oven had not been installed. Otherwise, Chesher sought relief in the amount of 20% of the submitted bid price and compensation for the cost of preparing this and a previous complaint.

On December 15, 1992, the administrative and regulatory requirements all having been satisfactorily met, the Board accepted the complaint for investigation.

DSS filed a Governmental Institution Report (GIR) with the Board on January 6, 1993. A copy of the relevant portions of the report was sent to the complainant who, in turn, filed comments with the Board on January 18, 1993. The complainant's comments were forwarded to DSS.

A copy of the Preliminary Investigation Report was sent to DSS and the complainant for their comments. Both parties responded with written replies which were then exchanged between them. These comments have been added to the Preliminary Investigation Report and form part of the Investigation Report as submitted to the Board.

The Report of this investigation contains a number of appendices relating to material and documents deemed relevant by the Board's investigative staff as part of their Report. Specific reference is not made to these appendices in this determination, but they have been made available to the parties and, subject to the provisions of the *Access to Information Act*, 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 an oral hearing was not required, nor was one requested by either of the parties. The Board, in reaching its conclusions, has considered the complaint, the GIR, the complainant's response to the GIR, the Report of its investigative staff and the comments made thereon by the parties, and has made its findings and determinations on the basis of the facts disclosed, the relevant portions of which are mentioned in this determination.

The Investigation

The allegations of this complaint, were investigated by the Board's staff by means of interviews and the examination of documents.

The following people were interviewed by telephone to confirm various statements made and/or contained in the documentation:

Ms. Joanne Valin, Contracting Officer, and Suzanne Boivin, Buyer, both of DSS Laval, Québec; Mr. Gilles Vanier, Procurement Manager, CSC Laval, Québec; Mr. Paul Lemieux, Chief, Food Services, CSC Ste-Anne des Plaines, Québec; Mr. Miles Chesher, Marketing Manager, Chesher, Mississauga, Ontario; Mr. Mike Licursi, Regional Director-Québec/Ottawa, W.D. College Cie Ltée, Lasalle, Québec; Mr. Steve Dunn, Service Technician, The Blodgett Oven Company (Blodgett), Burlington, Vermont.

The Procurement

According to the evaluation criteria set out in the Request for Proposal (RFP) dated July 10, 1992, those offers which contained a Statement of Eligible Goods form may be given preference over other offers, in accordance with clause K1002T of the Standard Acquisition Clauses and Conditions Manual (incorporated by reference in the RFP).

Clause K1002T reads:

*If the bidder attaches a **signed** Statement of Eligible Goods form DSS-MAS 4079 to this bid, the bidder represents and warrants that the Statement is accurate and complete in accordance with the definition of eligible goods referred to in that Statement, that the goods being offered to Canada would correspond to that Statement, and that the level of eligible goods being offered qualifies the bid for inclusion in Group 1 as defined in DSS's Supply Policy Manual Directive 3005.*

Bids containing such a Statement of Eligible Goods may be given preference over other bids, in accordance with the procedures set out in Directive 3005...

[emphasis added]

The Supply Policy Manual (SPM) Directive 3005 ("Government Procurement Under Canada-U.S. Free Trade Agreement") introduces a priority grouping system for bid responses received, based on the origin of the goods being offered in those responses:

15. *A bid response qualifies for inclusion in Group 1 if the good being offered is an eligible good. For bids consisting of more than one good or of a mix of goods and incidental services, 80 percent of the bid price of the goods must be comprised of eligible goods for the bid to qualify for inclusion in the first group.*
24. c) *Products not identified in the Statement of Eligible Goods will be treated as non-eligible goods of foreign origin.*

Article 16 of SPM Directive 3005 also describes a sourcing system based on the bid responses grouping system. More specifically:

Competitions to which the FTA applies may be,

- (a) limited solely to suppliers whose bids qualify for inclusion in Group 1,
- (b) conditionally limited to suppliers whose bids are eligible for inclusion in the first group, or

- (c) open to bids in both groups 1 and 2.

The applicable sourcing method must be announced in the Notice of Proposed Procurement (NPP), as was done in this instance, by using the code designation F-4, 'F' meaning, Free Trade Agreement (FTA) and '4' meaning, conditionally limited to Group 1.

Article 19 of SPM Directive 3005 describes this particular, F-4, sourcing method:

19. *Where the procurement officer is unsure of whether there exists sufficient competition within Group 1, the area of solicitation shall be conditionally limited to Group 1. Suppliers whose bids qualify for inclusion in either Group 1 or Group 2 will be invited to submit bids, with the understanding that after the bid solicitation has closed, the procurement officer will determine, prior to the further evaluation of the bids, whether there exists sufficient competition, in the form of **three or more suppliers who have completed** the Statement of Eligible Goods and whose bids accordingly qualify for inclusion in Group 1. Where there are three or more such bids, the competition will be limited to the suppliers submitting the bids which are in Group 1. **The other bids will not be given subsequent consideration, even if bids which qualified for inclusion in the first group are thereafter determined to be non-compliant.** Where there are fewer than three such bids, all bids will be given further consideration.*
[emphasis added]

DSS performed the above procedure by tabulating the 11 proposals received to determine their priority grouping and, consequently, to identify the offers among those received that had to be considered further. Four offers including that of the contract awardee, Les Entreprises Julien Inc. (Entreprises Julien) did not contain a completed (i.e. filled out and signed) Statement of Eligible Goods form.

In a note to file dated September 15, 1992, the buyer determined Chesher's bid to be non-admissible to Group 1, since its form DSS 4079 indicated that eligible goods amounted to only 35% of the gross value of its offer and not 80% as required in the RFP.

In a note to file, also dated September 15, 1992, the buyer stated that since Chesher's offer was inadmissible for entry in Group 1, Entreprises Julien's offer became the lowest bid. As previously mentioned, Entreprises Julien's offer did not contain a signed Statement of Eligible Goods form. On the front page of its offer, under the heading Country of Foreign Content, is the notation, "U.S.A." and under the heading Value of Foreign Content, is the notation, "\$ **[amount deleted]**", a sum which represents 84.6% of the gross value of the offer.

After internal consultation, it was determined by DSS that Entreprises Julien's tender document provided sufficient information concerning eligible goods. DSS thus proceeded (after bid closing) to have Entreprises Julien fill out the required Statement of Eligible Goods form. That form, duly completed, was returned to DSS on September 15, 1992. It identified the equipment as originating (100%) in the United States.

On September 16, 1992, a contract was awarded to Entreprises Julien for a Blodgett COS-20 Combi oven. On September 17, 1992, when inquiring about the results of the competition, Chesher learned about the details of clause K1002T and SPM Directive 3005. In a letter dated September 21, 1992, Chesher complained to DSS about the accuracy of what was set out in the Statement of Eligible Goods form completed by the contract awardee.

On September 28, 1992, Entreprises Julien, in answering DSS's query of September 25, indicated that its Statement of Eligible Goods form should have read 80% American origin and 20% German origin. Chesher was informed of this situation. On October 19, 1992, subsequent to the Board receiving Chesher's complaint, DSS received a facsimile dated September 25, 1992 from Entreprises Julien stating that an error had been made in their fax of September 28, 1992 and that the text should have read, 80% German origin and 20% American origin.

A DSS note to file dated October 27, 1992 reads:

[TRANSLATION]

Further to the 'fax' letter from Ent. Julien indicating that Blodgett is 80% German and 20% U.S.A, we have issued a stop work order...

In light of this information and to avoid laborious and futile work with the 9 Blodgett bidders...Blodgett[s representative] will send me a letter confirming the origin of the goods and will confirm that he is the only authorized manuf. agent in Canada.

*At that time and in accordance with our evaluation criteria, all bids will be evaluated as we **no longer have at least 3 bids offering eligible goods in group 1**. Chesher's offer the lowest bidder for Eloma will therefore be evaluated (technically) by the customer. [emphasis added]*

A DSS note to file dated October 27, 1992 refers to a telephone conversation between DSS and CSC:

[TRANSLATION]

I explained to [the procurement manager] the status of the file; he agrees to evaluate Chesher's bid. There will be a meeting on 28.10.

On October 30, 1992 the complainant notified the PRB that it would not continue with its complaint because the contract had been re-opened and the Chesher/Eloma oven would be evaluated.

In the RFP dated July 10, 1992, the government requirement was described as follows:

001 Four à vapeur et air chaud modèle COS-20 COMBI de BLODGETT ou équivalent conformément à l'Annexe "A" ci-jointe et incluant 40 panes de 12 x 20".

Combi-oven / steamer model COS-20 COMBI BLODGETT or equal in accordance with the Annexe "B" attached and including 40 pans 12 x 20" capacities

Dimensions extérieures / Outside dimensions:

hauteur/height : 74 1/4"

largeur/width : 51 1/8"

profondeur/depth : 43 1/8"

Volts 208, 3 phases, 170 amps, 60 kw.

Doit être approuvé CSA / Must be approved CSA

The following specification, "Annexe B", an English version of "Annexe A", is identical to the specification attached to the requisition except for the CSA certification as noted above. The text used is a word-for-word transcription from a Blodgett product brochure which was attached to the amendment to the requisition:

ANNEXE B

Unit shall be a floor model Combi-Oven / Steamer with the ability to cook with pressureless steam, hot air, or combination of steam and hot air. Unit will be of all stainless steel construction with large right hand glass door with condensate drip pan and micro-switch to automatically shut off fan when door is opened. Unit shall have fast cool-down mode. Unit features automatically controlled cooking process using 100 minutes built-in timer and temperature range from 140 degrees F- 570 degrees F, continuously adjustable. Unit to have continuous interior lights. Unit shall have drain in bottom center of oven. Automatic internal temperature meat probe standard.

Unit shall have automatic waste-air quenching to eliminate flavor transfer and to condense and drain away steam and other by-products of the cooking process. Units shall be easy to clean and allow hosing down of the oven cavity. Unit will have the capacity to accept twenty (20) full size sheet pans on wire racks or forty (40) full size steam table pans. Unit shall be CSA listed. Requires one cold water connection, atmospheric drain connection, and electrical service (specify voltage and phase). Unit shall include water pressure regulator and vented drain

assembly, mobile roll-in transport cart, five (5) wire pan racks, and one spray bottle.

Included in the RFP were the following evaluation criteria:

EVALUATION - CRITERIA

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

- a. Specifications;*
- b. Descriptive literature of the product;*
- c. Transportation costs (see clause C5200T);*
- d. Price F.O.B. DESTINATION & F.O.B. PLANT
(see description on page 2 of 14);*
- e. Delivery requirement;*
- f. Offers containing a Statement of Eligible Goods may be given
preference over other offers as per conditions of the clause K1002T.*

A DSS note to file dated October 28, 1992 records a meeting held between DSS and CSC personnel, the purpose of which was to discuss the technical evaluation of Chesher's bid for the Eloma oven:

[TRANSLATION]

We compared the technical literature of the ELOMA AND COMBI ovens. [The Chief, Food Services] stated that the temperature of the ELOMA oven is 482°F maximum in lieu of 570° which is not acceptable. I asked him to clarify in writing the importance of this factor, and to continue with the evaluation. As we already have a complaint from Chesher, I explained to [the Chief, Food Services] that it is very important that all aspects of the ELOMA oven be verified.

[The Chief, Food Services] asked that I verify the following elements with Chesher:

- 1) Is the oven connected to the steam?*
- 2) Info concerning the air filter*
- 3) If necessary, would it be possible to view a similar oven at one of their customers?*
- 4) Is training in the operation of the oven included? What type of training?*
- 5) Who performs the service?*

The same note reports Chesher's reply:

[TRANSLATION]

29-10-92

I contacted...Chesher's representative in Montréal...He provided the following answers:

(1) Connected directly to the water/drain for excess condensation/water entry/electrical/no need for vapour from exterior/autonomous system. Installation requires: cold water connection of 3/4" connection for 2" diam drain; 125 amps, 60 cycles.

2) Removable filters for ease of cleaning; filters in front of fan.

3) Possibility of viewing similar oven at Royal Victoria. [Chesher representative] could set up appointment, if desired.

4) On site training would be provided by [a Chesher representative] and, in addition, a French video is available

5) ...Montréal/Spare parts are available in Toronto.

6) The pans (40) are included in the price.

I contacted [the procurement manager] and transmitted the info from [Chesher's representative]. I told him that if the customer [the Chief, Food Services] wants to see an oven, I will be available.

A DSS note to file, dated November 2, 1992, refers to a telephone conversation held that day between CSC and DSS concerning the technical evaluation:

[TRANSLATION]

[The procurement manager] informs me that since Eloma has a video cassette available, [the Chief, Food Services] of Ste Anne will request it as well as a cassette for the Combi oven. They will view the cassettes to complete the technical evaluation.

According to him, it will not be necessary to visit one of Chesher's customer to see an oven. He has enough information with the cassettes and the technical data.

A memorandum signed by the Chief, Food Services and the Chief, Works and Maintenance Services, dated November 18, 1992 provided the following technical evaluation:

[TRANSLATION]

We chose the Blodgett Combi model CS-20 for the following reasons:

1. The Combi model gives us more intense heat for broiling certain food (ex.: chicken), as specified in the initial request for 140° to 570°F.

2. The Combi has an integrated boiler which eliminates the need for a water softener, especially since our water is very hard.

3. It is easier to clean the Combi and the controls seem less complicated.

According to a note to file dated November 24, 1992, DSS called CSC to discuss the evaluation detailed in the above memorandum:

[TRANSLATION]

I informed [the procurement manager] that following the 18-11-92 memorandum, I would like the customer to elaborate on the rejection of the Eloma oven rather than to stress the advantages of the Blodgett Combi oven. I also mentioned that elements 2 and 3 cannot be considered 100% as these elements were not included as criteria (desirable and/or mandatory) in the specifications during the bidding process.

After a discussion with [the Chief, Food Services], [the procurement manager] tells me that the maximum temperature requested is essential; the Eloma oven at 482°F will not permit browning meat at the last minute. In addition, the costs related to the steam system of the Eloma oven would increase compared to the Combi as a water softener would have to be added (additional costs).

Following my discussion with [the procurement manager], I conclude that we must reject Chesher's bid because his Eloma oven does not meet the temperature requirement mentioned in the specifications. Eloma has 88°F less than required. The customer who has the technical expertise certifies that this difference will affect broiling.

On November 26, 1992, DSS rescinded the Stop Work Order issued earlier to Entreprises Julien.

A note to file dated November 26, 1992 records a telephone conversation between DSS and Chesher's representative. The purpose of the call was to advise the complainant of the results of the evaluation:

[TRANSLATION]

He asked why his oven is not acceptable. I explained that the customer rejected it because it does not meet the maximum temperature requirement of 570°F. His oven has 482°F, 88°F less. According to the customer this has an effect on the grilling of meats. I informed him that the customer mentions that the combi also has an integrated boiler which eliminates the need for a water softener, as their water is very hard and that cleaning of the Combi oven appears less complicated compared to that of the Eloma. I told him that my decision was above all based on the temperature requirement and that in his bid, [Chesher representative] did mention that he did not meet this point. If we had accepted his oven, we would not have been fair with the other bidders who could have offered an oven with a lower temperature. [Chesher representative] stated he would relay the conversation to [the complainant].

A note to file dated December 2, 1992, records a telephone call to DSS by the complainant. The complainant stated that he was not satisfied with the results of the evaluation, and would like to speak with the customer. He was put in contact with the Chief, Food Services of CSC who, in a memorandum of December 7, 1992 to the Procurement Manager of CSC, describes the conversation:

[TRANSLATION]

I contacted [Chesher's representative] of "Chesher Equipment Ltd" on 92/12/04, to inform him of the reasons to justify our choice of a convection steam oven.

1-The temperature of the Eloma oven does not reach that required in the specification. This temperature is necessary for last minute browning of certain foods.

2-Because the water at the Ste-Anne des Plaines complex is very ferrous, the way the steam is produced in the Eloma model would cause problems with the pipes and the breakdown of the heating elements. We would probably have to install a water softener which would increase operation costs.

In letters dated December 9, and December 10, 1992 Chesher filed a complaint with the Board.

Discussion

The first issue that must be addressed is the question of timeliness. After reviewing the documentation provided, the Board has concluded that the filing of the complaint took place within 10 days from the time that the complainant knew or should reasonably have known of the basis of the complaint, that is, December 2, 1992.

Evaluation of Bids

The principle allegation made by the complainant is that its oven (Eloma) was not properly evaluated. More specifically, if a fair evaluation had been conducted, the Eloma oven would have been recognized as an equal and Chesher, having submitted the lowest bid, would have been awarded the contract. It will thus become critical to focus on what is meant by "or equal" as provided for in the RFP and the ensuing evaluation.

In the matter before the Board, DSS issued a RFP in which the requirement reads, in part,

Combi-oven/steamer model COS-20 COMBI-BLODGETT or equal in accordance with Annexe B attached...
[emphasis added]

It should be recalled that the text used in "Annexe B" is a word-for-word transcription from a Blodgett product brochure.

No complaint was made as to whether a "brand name or equal" type solicitation was warranted in the circumstances and consequently the Board will not address this issue. Nevertheless, because the government chose this mode for evaluating offers they are required to apply the procedural rules governing "brand name or equal" assessments in order to give suppliers equitable treatment.

These rules include Article V:13 of the *GATT Code* and Article 1305.2 of the FTA.

Article V:13 of the *GATT Code* reads, in part,

*Tender documentation provided to suppliers shall contain **all information** [sic] **necessary to permit them to submit responsive tenders**, including information required to be published in the notice of proposed procurement, except for paragraph 5(g) of this Article, and the following:*

- g) **a complete description of the products required** or of any requirements including **technical specifications**, conformity certification to be fulfilled by the products, necessary plans, drawings and instructional materials;*
- h) **the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders** and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of foreign products, customs duties and other import charges, taxes and currency of payment;*
[emphasis added]

Article 1305.2 of the FTA reads, in part,

Each Party shall, for its procurements covered by this Chapter:

- c) use **decision criteria** in the qualification of potential suppliers, **evaluation of bids** and awarding of contracts, that:*
 - i) **best meet the requirements** specified in the tender documentation,*

...

iii) *are clearly specified in advance...* [emphasis added]

Recognizing these procedural obligations, noting that no specific equivalency assessment test is included in the RFP, and in light of the complainant's allegation that its product was equal but not fairly evaluated, what kind of "brand name or equal" evaluation test should have been applied and was it?

In this regard, the *GATT Code* does not assist us, as a definition of "equal" is not provided therein. Nor is such a definition found in the FTA or the RFP. It is thus necessary to look elsewhere for a relevant definition.

*Webster's Encyclopedic Dictionary*¹ defines "equal" as "...having the same effect...that which is equivalent to something else..."

The Glossary of Procurement Terms and the *Glossary of Material Management Terms*² refer to "equivalent items" and say, "items are equivalent when, without actually being identical, they have sufficient in common to be capable of being used for the same purpose."

*The Government Contracts Reference Book, A comprehensive Guide to the Language of Procurement*³ reads, in part, under the expression *Brand name or equal description*:

...is generally the minimum acceptable description in Government contracting; prospective contractors must be allowed to offer products other than those named by brand if those other products will meet the needs of the Government in essentially the same manner."

The test, therefore, is:

- a) whether there is sufficient commonality between the products, and
- b) whether the product being offered is fit for the purpose for which it is intended.

¹ *The New Lexicon Webster's Encyclopedic Dictionary of the English Language*, Canadian Edition, Lexicon Publications, Inc. New York, 1988.

² *Glossary of Procurement Terms*, DSS Supply Policy Manual, 31/05/90/C 65B-116-1-90

Glossary of Materials Management Terms, Canadian General Standards Board, CAN/CGSB-116.1-90

³ *The Government Contracts Reference Book, A Comprehensive Guide to the Language of Procurement*. Ralph C. Nash, Jr., Steven L. Schooner, Jean Nelson Phillips, Editor-in-Chief, George Washington University, 1992.

How was the evaluation test conducted for this procurement?

Commonality is not at issue, both the Blodgett and Eloma products are combination ovens designed for cooking in institutional-like settings and generally function in the same manner. That being said, the Board must consider the issue of "fitness for purpose."

In a memorandum dated November 18, 1992, signed by the Chief, Food Services and the Chief, Works and Maintenance Services, CSC, it is said:

[TRANSLATION]

We chose the Blodgett Combi model CS-20 for the following reasons:

- 1. The Combi model gives us more intense heat for broiling certain food (ex.: chicken), as specified in the initial request for 140° to 570°F.*
- 2. The Combi has an integrated boiler which eliminates the need for a water softener, especially since our water is very hard.*
- 3. It is easier to clean the Combi and the controls seem less complicated.*

In response to this memorandum, a DSS official telephoned a CSC official to discuss the evaluation. A DSS note to file dated November 24, 1992 elaborates on the discussion:

[TRANSLATION]

I informed [procurement manager] that following the 18-11-92 memorandum, I would like the customer to elaborate on the rejection of the Eloma oven rather than to stress the advantages of the Blodgett Combi oven. I also mentioned that elements 2 and 3 cannot be considered 100% as these elements were not included as criteria (desirable and/or mandatory) in the specifications during the bidding process.

After a discussion with [Chief, Food Services], [procurement manager] tells me that the maximum temperature requested is essential; the Eloma oven at 482°F will not permit browning meat at the last minute. In addition, the costs related to the steam system of the Eloma oven would increase compared to the Combi as a water softener would have to be added (additional costs).

Following my discussion with [procurement manager], I conclude that we must reject Cheshier's bid because his Eloma oven does not meet the temperature requirement mentioned in the specifications. Eloma has 88°F less than required. The customer who has the technical expertise certifies that this difference will affect broiling.

Although the investigation disclosed that, at the technical evaluation stage, the technical authority stated that the stipulated temperature range was an

essential feature, the Board must determine whether that factor was clearly specified in advance.

To be "equal" does not mean to be "identical". In reading the specifications, it is noted that certain features or characteristics are prefaced by the word 'shall': "*unit shall have drain in bottom center of oven...unit shall be CSA listed...unit shall be easy to clean [and] unit shall include water pressure regulator...*" The particular choice of language ("shall") used in these instances could reasonably be interpreted as serving notice to potential suppliers that those referenced features or characteristics are essential to the requirement. However, when referring to temperature range, the specification reads, "*unit features automatically controlled cooking process using 100 minutes built-in timer and temperature range from 140 degrees F - 570 degrees F, continuously adjustable.*" This is a neutral statement that does not, in the Board's opinion, readily convey the same notion, that is, that the stipulated temperature range is essential to the requirement.

A general rule of contract interpretation is that all clauses are interpreted one by the other, giving to each the meaning derived from the entire contract. Another rule emphasizes that words should be consistently used. Simply put, when the same meaning is intended, the same words should be used and when a different meaning is intended, then different words should be used. Adapting these rules to "Annexe B", one notes that the specifications refer to "will" or "shall" in most of the sentences set out therein, but not in all of them. Can it, therefore, not be inferred when reading one sentence in the context of the others, that, given it is not explicitly mentioned that the temperature range "shall" or "will" be between 140°F and 570°F, a supplier can still be compliant when offering an oven with a temperature range that is not identical to the one stipulated in the specifications, but is nevertheless fit for the purpose for which it is intended?

Furthermore, in the case of ambiguity, would it not be acceptable to interpret the intent of the temperature range wording in favour of the person (Chesher) who gives it a reasonable interpretation and against the person (government) who stipulated it? After all, another rule of contract interpretation states that, in cases of doubt, a contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation.

It was certainly apparent from the complainant's tender document that the Eloma oven being offered had a temperature range from 122° F - 482° F. If the complainant thought that the product it offered had to have an identical temperature range to that referred to in the specifications why did it still submit a bid? Or, did the complainant, upon reviewing the specifications, consider that they were designed not to restrict competition to perhaps only one product, but rather to assist potential suppliers to fairly assess the government's requirement and thereby determine whether or not their products had sufficient commonality with the product used as the bench mark and were fit for the intended purpose?

It is also of interest that in a note to file dated October 28, 1992 there is recorded an exchange between DSS and CSC personnel in which the technical authority indicates that the Eloma maximum temperature of 482° F "*is not acceptable.*" The contracting officer asked the technical authority to clarify the

importance of this feature and directed the technical authority to continue the evaluation. Yet, despite the technical authority's comment about the unacceptability of the maximum range offered by Chesher, he then asked the contracting officer to obtain answers to some further questions.

If the temperature range were essential, why would the technical authority even bother to ask these questions instead of simply stating that this characteristic was mandatory, and the reasons therefor? Because the contracting officer requested him to continue with the evaluation? Could the technical authority not have simply elaborated as to why it was an essential feature? After all, if the temperature range stated in the specifications were an essential requirement, then there would be no justification to ask for supplementary information as the complainant's product would already be non-responsive. In other words, it is understandable that the technical authority would respond to the contracting authority's request for an explanation as to the importance of the temperature range. However, for the technical authority to then suggest asking Chesher questions unrelated to the temperature range implies that the evaluation criteria may not have been definitively established in advance.

In summary, the issue with respect to the temperature range is not that such a need may exist but, assuming it does, whether it is an essential requirement and whether that can be reasonably read into the specifications.

The Board will not pronounce on the acceptability or unacceptability of the products offered or, more specifically, determine whether the Eloma oven is "equal" to the Blodgett oven. However, in considering the complainant's allegations, the Board has reviewed the procedural fairness of the procurement process and has found that the government failed to comply with Article 1305 of the FTA by not providing clear evaluation criteria to potential suppliers, the effect of which was the carrying out of an unfair evaluation. The complaint is, therefore, upheld and the Board will award the complainant reasonable costs for filing and pursuing this complaint and for preparing its bid.

Furthermore, the Board is of the opinion that, due to the circumstances surrounding the Statement of Eligible Goods form, the Government breached its own clearly announced rules first, by not only irregularly asking the contract awardee to fill out a Statement of Eligible Goods form but, moreover, doing so after bid closing, and second, by opening the procurement action to other bidders once the bidders in Group 1 were determined to be non-compliant. This procurement action should have been cancelled at that point in time.

DETERMINATION

The Board has determined on the basis of its investigation that this procurement by the Department of Supply and Services failed to comply with Article 1305 of the Free Trade Agreement by not providing clear evaluation criteria to potential suppliers, the effect of which was the carrying out of an unfair evaluation.

The Board has decided to award the complainant reasonable costs relating to the filing and pursuit of its complaint and the preparation of its bid.

J. Craig Oliver

J. Craig Oliver

Chairman

Procurement Review Board