



IN THE MATTER OF:

**A Complaint
By Business Stationers
of 225, de Liège West
Montréal (Québec)**

**Board File No:
D92PRF66W-021-0040**

Complaint upheld in part

AND IN THE MATTER OF:

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

March 24, 1993

DETERMINATION BY THE BOARD

The Procurement Review Board (PRB or the Board) received a complaint on December 24, 1992 from Business Stationers. The complaint concerns the issuance of a Regional Individual Standing Offer (RISO) for the supply, on an as and when required basis, of miscellaneous office supplies for Canadian Forces Base (CFB) Gagetown, New Brunswick of the Department of National Defence (DND). The complainant alleged that the RISO was awarded on the basis of "*substituted specifications*" for which no provisions were made in the tender documents. Further, it alleged that the Department of Supply and Services (DSS) awarded the RISO for an amount in excess of its own bid even though it had been told by the government that the RISO awardee had a lower total bid price.

The remedy requested by Business Stationers is to have the RISO set aside and to have the balance of the requirement awarded to it. In addition, Business Stationers requested an explanation as to how the above-mentioned inconsistencies occurred.

On January 5, 1993, 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 21, 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 28, 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. Elaine Leonard, Contracting Officer, DSS, Saint John, New Brunswick; Ms. Rachel Malette, Access to Information, DSS Headquarters, Hull, Québec; Cpl. R. Bennett, Originator of

Requisition, and Mr. L. Richard, Chief Buyer, both of CFB Gagetown DND; Mr. Henry Epstein, V.P., Sales and Marketing, Quartet-Weber-Costello (Weber), Mississauga, Ontario.

The Procurement

On September 4, 1992 a requisition was received by DSS Saint John from CFB Gagetown. The requisition asked for the establishment of a RISO for miscellaneous stationery supplies to be called up on an as and when requested basis for the period between December 1, 1992 to December 1, 1993. In the Request for a Standing Offer (RFSO) prepared by DSS, dated September 11, 1992 with a closing date of October 28, 1992, the requirement is described as follows¹:

FOR THE SUPPLY OF MISCELLANEOUS STATIONERY SUPPLIES AS AND WHEN REQUESTED BY DEPT. OF NATIONAL DEFENCE, CFB GAGETOWN, OROMOCTO, N.B. DURING THE PERIOD 1 DECEMBER, 1992 TO 30 NOVEMBER, 1993.

<i>Item</i>	<i>Description</i>	<i>U of I</i> [Unit of Issue]
001	<i>Description Id : S-001 [Staedtler] 12 PENCIL, GLAZED SURFACE, BLACK P/N 108-9</i>	EA [Each]
002	<i>Description Id : S-002 [Staedtler] PEN, LUMOCOLOR P/N 315-9</i>	EA
003	<i>Description Id : S-003 [Acme] POINTER LECTURE, P/N ACM D-105</i>	EA
004	<i>Description Id : S-004 [Acme] RULER, WOOD, ONE METER P/N R694-10</i>	EA
005	<i>Description Id : S-005 [Dennison-Carter] INK, STAMP PAD P/N DENC 89122</i>	BT [bottle]
006	<i>Description Id : S-006 [Staedtler] PENCIL, GLAZED SURFACE P/N 108-1</i>	EA
007	<i>Description Id : S-007 [Staedtler] PENCIL, POINTER ERASER, P/N 91323</i>	EA
008	<i>Description Id : S-008 BULLETIN BOARD 40" X 30" FOR PLASTIC WHITE LETTERS</i>	EA
009	<i>Description Id : S-009 [Oxford] BINDER, NOT [sic] PAD ALUMINUM 8 1/2" X 11" P/N 6969</i>	EA

¹ The investigation revealed a number of brand or trade names that correspond to the part numbers or descriptions provided. These are shown in the square brackets on the first line of the item description.

010 Description Id : S-010 [Staedtler] PENCIL, GLAZED P/N 108-2	EA
011 Description Id : S-011 [Staedtler] PENCIL, GLAZED P/N 108-3	EA
012 Description Id : S-012 [Hunt] SHARPENER, PENCIL ELECTRICAL P/N HUNT 1808	EA
013 Description Id : S-013 [Staedtler] MOUNT TRANSPARACNY [sic] FOR OVERHEAD 8 1/2" X 11" P/N STA991AV (0.21 EA) 50 PER PKG	PG [Package]
014 Description Id : S-014 [Intercity Papers] PAPER, BOND. NO. 7, 11" X 17" 16M, P/N ITC-1117	PG
015 COPY HOLDER, TYPIST, [Data Accessories] NON COLLAPSIBLE, P/N PAT COPY 5	EA
016 Description Id : S-016 [Weber] CHALK BOARD, P/N WEBBER [sic] ST-1 (36 X 48)	EA
017 Description Id : S-017 [Staedtler] PEN POINT DRAFTING P/N 750-045	EA
018 Description Id : S-018 [Staedtler] PEN POROUS SET, P/N 317 WP8	EA
019 Description Id : S-019 [Staedtler] ERASER, RUBBER 3 1/2" X 1/2" GREEN STAEDTLER 52650	EA
020 Description Id : S-020 [Staedtler] PEN SET POROUS, NIB P/N 316WP6	EA
021 Description Id : S-021 [Hazel] CLIP BOARD FILE, 8 1/2" X 11" P/N HAZEL R252	EA
022 Description Id : S-022 ROLLER DISPENSER, TAPE P/N CORES	EA
023 Description Id : S-023 [Rubbermaid] BASKET, WASTE PAPER, P/N RUB 2845 BK	EA
024 Description Id : S-024 [Dymo] EMBOSSING STRIPPING, DYNO [sic] TAPE P/N 1575	EA
025 Description Id : S-025 [Weber] MAGNETIC STRIPPING 1" WIDE, WHITE P/N WEBBER [sic]	FT [Foot]
026 Description Id : S-026 PENCIL, MECHANICAL LEADS 0.070 TO 0.085	EA
027 Description Id : S-027 LEAD, PENCIL GRAPHITE 0.070 TO 0.085	BX [Box]
028 MISCELLANEOUS STATIONERY SUPPLIES NOT LISTED ABOVE: CURRENT RESALE PRICE LESS A DISCOUNT OF ____%	

The RFSO contains a reference to the Standard Instructions and Conditions clause DSS-MAS 9403-6 dated 08/92. This clause, found in the Standard Acquisition Clauses and Conditions (SACC) manual, states, in part:

2. *Offers may be accepted in whole or in part and may be accepted on the lowest price per item and/or destination or group of items and/or destinations or on a lowest aggregate price basis. The lowest or any Standing Offer will not necessarily be authorized. In case of error in the extension of prices, the unit price will govern.*

According to the complainant, on or about October 5, 1992, it called DSS to question whether or not the specifications had to be adhered to since there was nothing mentioned in the RFSO concerning the offer and acceptance of alternate products. The complainant states that the contracting officer said the award would be made on the basis of the specifications. According to the contracting officer, DSS, Saint John gets many calls about ongoing procurements. There is no written record of this call and she has no personal recollection of it taking place.

At bid closing, five firms had submitted proposals. Two bidders, including the complainant, proposed something for every item listed in the specification. One bidder, the eventual RISO awardee, proposed something for all but one item. One bidder proposed something for five items in total. One bidder proposed something for two items.

The proposal submitted by the complainant contains a number of features as follows. For items # 1, 2, 6, 10, 11, 18 and 19, underneath the proposed product for each item, there are additional products and prices mentioned. According to the complainant, these entries were added to inform the contracting officer of the availability of lower priced alternates and they were not intended for use as part of the quote. There are no notations on the proposal to that effect. For items # 13 and 23 the proposal stipulates the specified product followed by a slash and the name of another brand. According to the complainant, these items were offered in this manner to show what alternate product could be substituted for the same price should sourcing problems prevent the prompt delivery of the specified product. Finally, for item # 14, the complainant's proposal offers two brands that are different from the brand specified in the RFSO.

The proposal submitted by the RISO awardee offers brands other than those specified in the RFSO for items # 5, 9, 16, 21 and 24. This proposal does not offer a product for item # 7, instead, it noted on its bid that this product was "[d]iscontinued".

According to the contracting officer, for non-technical contracts of this type (i.e. stationery supplies), contracting officers use their own judgement when determining if the alternates proposed are equivalent to specified products. For this procurement, the investigation revealed that the additional entries presented by Business Stationers for items # 1, 2, 6, 10, 11, 18 and 19 were treated by DSS as alternates and the lowest priced alternate offered by each of the bidders was tabulated in all cases.

On November 2, 1992, DSS began tabulating the proposals submitted by all bidders. According to the contracting officer, this first tabulation brought to light a pricing anomaly in the bids. The bids, of the eventual RISO awardee and another bidder, were significantly higher than that of Business Stationers because of the price of one particular item, # 25. The RFSO specified the unit of issue for this item to be 'per foot.' The bid by the RISO awardee contains the following notation in relation to this item:

*WEB1907 - color
pkg of 5 24" strips*

A note to file indicates three bidders were contacted to obtain confirmation on prices for item # 25. This note reads:

*Covey advised should be \$[amount deleted] per Ft.
[name deleted] should be \$[amount deleted] per Ft.
Bus. Stationers confirmed price is \$[amount deleted] Ft.*

According to the contracting officer, the first two bidders listed had quoted a price per package of five 24" strips or ten feet. The above note to file provided the price per foot, in both cases equal to 1/10 of the price per package quoted. The proposal from the second bidder listed has a notation "#19-07-87" with item # 25.

According to Weber, the manufacturer of item # 25, this particular product, with a part number 190787, is supplied to distributors in 24" strips. They are required to buy five at a time.

A fax message from the RISO awardee to DSS, dated November 4, 1992, states:

Item # 25

Magnetic Stripping 1" Wide White

[amount deleted] per foot

A November 17, 1992 fax message from the second bidder listed in the above note to file, states:

*Item #25: price for 1 foot : \$[amount deleted]/1
You have to order Minimum 120 inches per color*

The note to file mentioned above also indicates that item # 7 had been "cancelled". According to the contracting officer the computerized tabulation system does not provide an aggregated total if an item is missing from a proposal. Since one bidder, the RISO awardee, mentioned that this product was discontinued, the originator of the requisition was contacted to determine if this item was still needed. According to the contracting officer it was not and, as indicated in the note, the item was cancelled on November 17, 1992.

According to the instructions referred to in the RFSO, the award of a multiple item standing offer can be made on the basis of individual item prices, lowest price on a group of items or lowest total aggregate price. According to the contracting officer the method of award is determined by studying the results of the call for offers on a procurement by procurement basis. If the savings realized by creating more than one standing offer are significant, consideration would be given to awarding the standing offer to more than one bidder. In this case, the government concluded that the standing offer should be awarded to only one bidder.

On November 17, 1992 the RISO was awarded to Covey the Stationer on the basis of lowest total aggregate price.

Discussion

The Board first considered Business Stationer's claim that DSS awarded the RISO to a supplier whose bid price was higher than its own. The complainant based this assertion on reading of the "formal award" contained in the Government Business Opportunities (GBO).

In the Board's opinion, it is clear from reading the RFSO that the amount of \$53,500 stipulated therein is intended to apprise potential suppliers of the

maximum allowable expenditure for this procurement. This information was also set out in the RISO and in the Contract Award Notice published in the GBO.

The complainant has apparently confused this amount with the total bid prices which are used to rank responsive offers at the bid evaluation stage. In fact, in a letter dated November 23, 1992, DSS informed the complainant of the total bid prices of the top three bidders. The Board is satisfied that these prices accurately reflect the lowest aggregate bid prices from the responses received in this competition and were the basis of the award decision. The Board cannot accept the complainant's claim that the contract was awarded to a supplier whose bid price was higher than its own.

The second part of the complaint is that the RISO was awarded on the basis of "*substituted specifications*" for which no provision was made in the tender.

Article 1305:2(c) of the Free Trade Agreement (FTA) reads, in part:

2. *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:

...

iii) are clearly specified in advance

[emphasis added]

In the competition under consideration, the three lowest aggregate bids, including Business Stationers', offered at least some substitute products. It is also true that DSS conducted the evaluation and awarded the RISO on the basis of the lowest total aggregate prices for the products specified or the substitute products proposed. Do these facts effectively rebut the complainant's contention that the government should have substantially limited its evaluation to the specified brand or trade name products?

The government, in responding to the complainant's observations, makes reference to Article IV:3 of the *General Agreement on Tariffs and Trade* (GATT) *Agreement on Government Procurement* (the Code) saying that the "*specification was in the form of a particular trade mark or name and, as such, equivalent products were considered acceptable.*"

That scenario may very well be what the government intended for this procurement, but if it did, it should have fully complied with the Article to which it referred:

*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.***

[emphasis added]

In other words, when it is necessary to use only brand or trade names for a procurement, consideration of "equivalent products" is permissible (and required) provided that such words as "or equivalent" are also included in the tender. In this procurement the government failed to comply with this procedural requirement.

Although the government apparently knew what it required, the tender did not explicitly provide for it (brand or trade names or equivalent). Instead, there is an absence of expressed evaluation criteria and a description substantially limited to brand or trade name products.

In this instance, the complainant claims to have called the contracting officer to determine whether or not the specifications had to be adhered to since the RFSO made no mention of the acceptability of alternate products. Although the exchange relating thereto cannot be unequivocally ascertained, what is not in dispute is that, although the tender does not make reference to the acceptability of alternate products (or equivalents), the government, in evaluating bids, chose to accept such products. However, the issue of "equivalency" is not the subject of the complaint and, consequently, the Board shall not address it.

In the Board's view, the application of such evaluation criteria, in the absence of those criteria being clearly specified in advance, is in breach of Article 1305 of the FTA. Allowing such discretion would permit the government to reject all bids offering alternate products or, conversely, to accept all bids offering alternate products. This is contrary to the need for transparency

and fairness in procurement procedures. This is why the FTA requires, *inter alia*, the government to use decision criteria that are clearly specified in advance.

The complainant contends that it received confirmation from DSS that the evaluation would be based on the specifications, specifications substantially made up of brand or trade name products. Yet, despite this explanation, the complainant still listed alternate products, which, according to the complainant, were added solely to inform the contracting officer of the availability of lower priced products. The Board notes, however, that the complainant did not communicate this information in the bid or in correspondence to any government official. Furthermore, a review of the documentation does not provide sufficient evidence to substantiate the complainant's contention that its tender did not, in fact, offer alternate products for consideration.

Ancillary Issues

The complainant expressed the view that the acceptance of an alternate product played a particularly significant role in relation to item # 25. However, the investigation revealed that the RISO awardee also offered the brand name product for this item.

On the issue of minimum quantity order requirements for item # 25, the complainant alleged that the RISO awardee's proposal did not comply therewith. The Board's investigation disclosed that, although a third bidder introduced certain ordering restrictions for this item, the RISO awardee's offer conformed to the units of issue as stated in the tender.

In respect of the complainant's comments regarding the failure of the RISO awardee to bid on a particular item (Staedtler 513-81), the Board's investigation disclosed that the government had cancelled this requirement before award.

Finally, on the complainant's question concerning the rule governing the basis of award in matters of individual items, including, lowest price on group of items and lowest total aggregate price, the Board notes that this rule was clearly stated in the Standard Instructions and Conditions clause DSS-MAS 9403-6 of the SACC manual (incorporated by reference in the RFSO). Although it is true that the rule is a flexible one which leaves discretion to the government, the Board is satisfied that, in the circumstances, the government applied this rule correctly.

Conclusion

In conclusion, the Board has determined that the government was in breach of the FTA (Article 1305:2(c)) and GATT Code (Article V:13(h)) for using, in the evaluation of offers and the awarding of the RISO, decision criteria that were not spelled out in advance. However, considering all the circumstances surrounding this procurement, including, the seriousness of the deficiency in the procurement, the degree of prejudice to the complainant, and the extent of performance of the RISO to which this procurement relates, the Board will not award costs nor recommend any other remedial action.

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 Article 1305:2(c) of the Free Trade Agreement by failing to use decision criteria specified in advance.

The Board has further determined that, given the circumstances surrounding this procurement action, no costs will be awarded nor will other remedial action be recommended.

J. Craig Oliver

J. Craig Oliver

Chairman

Procurement Review Board