

Ottawa, Thursday, June 13, 1996

File No.: PR-95-035

IN THE MATTER OF a complaint filed by Secure Technologies International Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended by S.C. 1993, c. 44;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid in part.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services cancel the standing offer portion of the requirement and, instead, should the requirement continue to exist, re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable agreements.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the complainant its reasonable costs incurred in relation to filing and proceeding with the complaint.

Arthur B. Trudeau

Arthur B. Trudeau

Member

Michel P. Granger

Michel P. Granger

Secretary

File No.: PR-95-035

Date of Determination:	June 13, 1996
Tribunal Member:	Arthur B. Trudeau
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	David M. Attwater
Complainant:	Secure Technologies International Inc.
Intervener:	ISOTEC Corporation
Government Institution:	Department of Public Works and Government Services

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AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

FINDINGS OF THE TRIBUNAL

Introduction

On March 15, 1996, Secure Technologies International Inc. (the complainant) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) (Solicitation No. 11QE.08324-5-3136) for the supply of TEMPEST² Level I personal computers for the Department of Foreign Affairs and International Trade (the DFAIT). The requirement included an initial contract for 131 units and provided for the subsequent purchase, on an as and when required basis, through a standing offer for up to 131 additional units, plus fibre-optic network interface cards, internal CD-ROMs and spare parts.

The complainant alleges that: (1) the time frame provided to potential suppliers to ask questions and to receive answers from the Crown was unusually short, given the complexity of the requirement and the fact that the requirement was ill-defined in the Request for Proposal (RFP); (2) to secure the mandatory Microsoft's NT³ certification in the time frame allowed was next to impossible; (3) it was impossible for ISOTEC Corporation (the contract awardee), given its size and testing capability, to have completed the mandatory TEMPEST certification within the time frame allowed, thereby suggesting "complicity" with the DFAIT; (4) the procedure adopted by the Department to attest to the veracity of the TEMPEST test results was extremely lax in the circumstances; (5) the product testing conducted by the DFAIT as part of this solicitation is dubious and was run behind closed doors with no opportunity for potential suppliers to interact or to clarify anything; and (6) the Department possibly acquitted the contract awardee of its delivery obligations by changing the scope of the work to be performed by March 31, 1996. The complainant submits that these actions resulted in specifications written around specific pre-configured products, unclear and unstated evaluation criteria and the improper use of the evaluation criteria which, if these had been applied equally to all bidders, would have resulted in all bids being non-compliant. The complainant requested, as a remedy, the payment of its bid preparation costs and the damages that it suffered in losing the opportunity to

1. R.S.C. 1985, c. 47 (4th Supp.).
2. Depicts a classified technology that reduces the emanations given off by electric equipment and, thereby, reduces the risk of electronic espionage.
3. Operating system.

profit from this solicitation. Finally, it requested that, should the contract awardee fail to deliver the goods according to the terms in the RFP, the current contract be cancelled immediately and that the total requirement or, as the case may be, at least the standing offer portion thereof be re-competed on a fair and equitable basis.

Inquiry

On March 20, 1996, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁴ (the Regulations) had been met in respect of the complaint and decided to conduct an inquiry into whether the procurement was conducted in accordance with the requirements set out in Chapter Five of the *Agreement on Internal Trade*⁵ (the AIT) and Chapter Ten of the *North American Free Trade Agreement*⁶ (NAFTA).

On April 19, 1996, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁷ The complainant filed its comments on the GIR with the Tribunal on May 3, 1996. On May 10, 1996, the Tribunal requested that the Department provide detailed reasons and justification upon which the contract awardee's proposal was established as being responsive to the requirements concerning certification to the TEMPEST Level I standard and certification of compatibility to Microsoft Windows NT 3.5.1. The Department sent the additional information to the Tribunal on May 17, 1996, and the complainant's and the contract awardee's comments thereon were received by the Tribunal afterward.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on file.

Procurement Process

On December 8, 1995, the 52 members of the Canadian Industrial TEMPEST Program (CITP) were asked whether they would be interested in receiving the solicitation covering 131 TEMPEST workstations and ancillaries for the DFAIT to be issued by or before December 15, 1995. On December 14, 1995, after close of business, an RFP with a bid closing date of January 10, 1996, was issued to the 9 CITP companies which had indicated an interest in this solicitation. The transmittal page of the RFP sent to interested suppliers dated December 15, 1995, indicated, in part, under "MESSAGE":

Any enquiries for clarification or additional information shall be submitted to my attention at fax no. ... by no later than 0200PM EDT on 20 Dec 95. The information resulting from enquiries will be forwarded to bidders by close of business on 22 Dec 95.

4. SOR/93-602, December 15, 1993, Canada Gazette Part II, Vol. 127, No. 26 at 4547, as amended.

5. As signed at Ottawa, Ontario, on July 18, 1994.

6. Done at Ottawa, Ontario, December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).

7. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912, as amended.

The RFP included, *inter alia*, the following:

A. PROPOSAL REQUIREMENTS

6. *All sections and paragraphs of the attached "Procurement Specification" shall be addressed in the RFP response with a brief statement indicating what is being proposed and how the proposed product will meet or exceed the specified performance and specification requirements. Technical detail shall be provided that will enable the technical compliance of the bidder's offering to be confirmed.*

B. EVALUATION CRITERIA

1. *Equipment shall comply with the TEMPEST Level I standard as specified in CID/09/15 and be listed in the latest issue of the NATO Recommended Product List (NRPL) or already be certified to meet the TEMPEST Level I standard by a Certified TEMPEST Professional Level II (CTP II) in a Notice of Equipment Certification. [The DFAIT] staff will evaluate Bidders' proposals for technical merit by the assessment of compliance and adequacy of responses to all aspects of the Procurement Specification.*
3. *To be considered responsive, a bid must meet all of the mandatory requirements of this solicitation. Bids not meeting all of the mandatory requirements will be given no further consideration.*
4. *While it is anticipated that a contract will be awarded to the responsive bidder offering a technically and operationally compliant product at the lowest total price/cost, determined as shown in Section 7.6 of the attached Annex "A", and is able to meet the 31 March 1996 delivery based upon a contract award by 01 February 1996, the Crown ...*

The procurement specification (Doc. No.: SIGN.DESG.20.400.E, Version 1.0, December 4, 1995) states, in part:

- 2.1 *The platform^[8] shall comply with the TEMPEST Level I standard as specified in CID/09/15 and be listed in the latest issue of the NATO Recommended Product List (NRPL) or already be certified to meet the TEMPEST Level I standard by a Certified TEMPEST Professional Level II (CTP II) as documented in a Notice of Equipment Certification. The TEMPEST Critical Features List for the platform must be provided.*
- 2.2 *The platform must be certified to be Microsoft Windows NT 3.5.1 compatible, and individual components not included as part of the platform certification must also be listed on Microsoft's Windows NT 3.5.1 hardware compatibility list or be OEM certified in accordance with Microsoft's NT certification requirements.*

8. Refers to all components, devices and peripherals required to meet this procurement specification, including but not limited to the system unit, keyboard, monitor, mouse, floppy and hard disk drives, disk controllers, video adapters, network interface cards, memory, PCMCIA cards, cable, power bars and power supply unit.

*Bidders are **cautioned** that the compatibility must include, and is not limited to the motherboard, video adapter, network interface cards, hard drive adapter, hard disk drive, floppy drive, CD-ROM drives, monitor, keyboard and mouse. The system must function correctly with Windows NT 3.5.1.*

The procurement specification also reads, at section 7: "The contract will be awarded to the supplier who has the lowest cost, provides certification that the product meets or exceeds the requirement, and passes [the] DFAIT's testing."

On December 22, 1995, the Department sent by facsimile, to all 9 CITP members, its responses and those of the DFAIT to the bidders' questions received by December 20, 1995. On December 28, 1995, the complainant sent two questions to the Department in a facsimile letter. On December 29, 1995, the complainant sent three additional questions to the Department in two separate facsimile letters. The three letters were forwarded to the DFAIT by the Department on January 3, 1996. Also, the bid closing date was changed to January 15, 1996, and the date for delivery of the complete platform to the DFAIT for testing purposes was postponed to January 22, 1996.

Seven proposals, including one from the complainant, were received by the Department before bid closing on January 15, 1996. On January 16, 1996, the seven proposals were sent by the Department to the DFAIT for technical evaluation. On January 23, 1996, the Department sent a facsimile to the complainant indicating that, after carrying out a preliminary review of its proposal, the DFAIT required additional information for clarification purposes. The DFAIT was seeking, *inter alia*, additional information in relation to the TEMPEST Notice of Equipment Certification and the signed Critical Features List covering the proposed configuration. It also raised a number of questions dealing with Microsoft Windows NT 3.5.1 hardware compatibility and compatibility tests and certification. The complainant responded to the above questions and request for information on January 25, 1996.

On January 23, 1996, the Department also sent a facsimile to the contract awardee requesting additional information for clarification purposes. The DFAIT was seeking, *inter alia*, additional information on the Notice of Equipment Certification as documented by a Certified TEMPEST Professional Level II (CTP II) and the Critical Features List covering the proposed configuration. It also requested an itemized list of components that clearly indicated the month in which the products appeared on Microsoft's Windows NT 3.5.1 hardware compatibility list. Moreover, it requested evidence documenting the OEM's (original equipment manufacturer) authority to certify to Microsoft's Windows NT 3.5.1 compatibility standard and asked for specific NT compatibility information in respect of the CD-ROM, the hard disk drive and the PCMCIA cards. The contract awardee responded to the above request for information on January 25, 1996.

Given that the bid closing date was extended by five days to accommodate certain suppliers that were delayed in the preparation of their offers by a severe snow storm which affected the east coast of the United States on January 7 and 8, 1996, and considering a contract had to be issued in early February 1996 to allow for delivery of the initial contract by the end of March 1996, the DFAIT agreed to double up on the evaluation process and commenced the testing of the proposed workstations while the proposal evaluation was proceeding.

A bid evaluation report dated January 30, 1996, was produced by the DFAIT. The report recommended that the contract awardee be awarded the contract. It also states that “[n]o other vendor was acceptable.” In respect of the complainant’s offer, the report indicates that its proposal is non-compliant on six counts, as follows: section 2.1, notice of equipment certification; section 2.2, Microsoft’s NT compatibility certification; section 2.3, SIGNET-C2 software baseline; section 3.13, bilingual keyboard; section 3.14 (referred to erroneously as 3.13 in the report) video; and section 7.3, TEMPEST Critical Features List.

A contract dated February 5, 1996, was issued to the contract awardee by the Department and, on the same date, the complainant was informed that it was unsuccessful in its bid. On March 15, 1996, the complainant filed this complaint with the Tribunal.

Validity of the Complaint

Complainant’s Position

In its comments on the GIR, the complainant submits that the DFAIT and the Department incriminate themselves through word games and a selective approach in the treatment of evidence contained in the file.

Specifically, the complainant submits that the time frame provided to potential suppliers to submit questions was totally unreasonable. Indeed, it was provided with 3 1/2 working days to read the bid, transfer a copy of the bid to its two U.S. suppliers, have their people review the bid in depth, formulate questions and have the complainant consolidate all questions and submit these to the Department and, this, during a holiday season with extensive corporate and personal commitments. In addition, the complainant submits that the time allowed for Microsoft’s NT certification was totally unreasonable. For example, in late February 1996, it submitted its proposed configuration, excluding special items, for certification to Microsoft. As of May 3, 1996, more than 60 days later, formal notification of Microsoft’s NT certification had not been received. The complainant adds that, as the GIR did not specify the winning configuration by make and model number, it is impossible for it to determine whether the winning hardware configuration was indeed certified. The complainant then queries whether or not all evaluation criteria were equally applied to all vendors. For example, there were no PCMCIA card readers whatsoever on Microsoft’s Windows NT 3.5.1 hardware compatibility list. The complainant also submits that the certified TEMPEST laboratory used by the contract awardee was not operational from some time before March 13 to April 1, 1996. Finally, the complainant suggests that the Tribunal might use its investigative powers to confirm if and when delivery occurred, to confirm how the contract awardee delivered the requirement contained in section 3.6.b of the specification concerning the SCSI ID and to determine how the contract awardee performed the product assurance testing in accordance with the “Technical and Security Requirements Document” as required by CITP policies and procedures.

Department’s Position

In its response to the complaint, the Department submits that the complaint is frivolous and vexatious and that the allegations made by the complainant are unsubstantiated.

Specifically, the Department submits that the cut-off date for clarifications applied equally to all bidders and that no request for an extension of this cut-off date was received from bidders. The cut-off date was selected taking into consideration that many companies close down for the Christmas and New Year period and to ensure that the Crown had time to answer the questions sufficiently ahead of bid closing to allow bidders time to digest the answers and to modify their proposals as necessary. On the issue of Microsoft's NT certification requirements, the Department submits that the DFAIT's operational requirements would not allow for a post-closing date certification and, hence, the DFAIT stated in the procurement specification, at section 2.2, that "individual components not included as part of the platform certification must also be listed on Microsoft's Windows NT 3.5.1 hardware compatibility list or be OEM certified in accordance with Microsoft's NT certification requirements." The complainant failed to comply with subsection A.6 of the RFP, requiring that technical detail be provided to confirm technical compliance, specifically in respect of the motherboard, the floppy drive and the CD-ROM that it offered. The Department states that no advanced information was provided to bidders and that the RFP was released to all bidders after closing hours on December 14, 1995. On the issue of the PCMCIA card drives, the Department indicates that all bidders proposed PCMCIA card drives that were acceptable to the DFAIT. In respect of the TEMPEST certification, the Department indicates that, in December 1992, the Communications Security Establishment (CSE) introduced alternative methods of achieving TEMPEST certification (Certified TEMPEST Professional⁹ Level II) as an option to meet Canadian government TEMPEST Level I equipment needs. As a member of the CITP, the complainant would have been provided this information when it was distributed by the CSE in 1993.

The Department indicates that subsection B.1 of the RFP and section 2.1 of the procurement specification authorized the use of CTP II type certification using a Notice of Equipment Certification. It further notes that the complainant provided information with its bid indicating that, at the time of bid closing, the product proposed was not certified and that the TEMPEST Critical Features List was not available. Moreover, the Department states that the time frame allowed in the RFP was sufficient to carry out CTP II type certification, as was done by two bidders, including the contract awardee, which, by formal agreement, had access to a certified TEMPEST laboratory. Concerning the procedures used, in this instance, to attest to the veracity of the TEMPEST test results, the Department submits that the complainant is incorrect in its statement that a simple signature was required. Indeed, testing was performed in a certified TEMPEST test facility,¹⁰ and tests were certified by a CTP II,¹¹ as determined by the CSE and as required in the RFP. The Department submits that the complainant's allegation in respect of testing is false and misleading. Indeed, the DFAIT did offer to provide the complainant greater elaboration on the technical deficiencies of its proposal and details on the shortcomings of the products that it offered that were experienced during testing. The complainant declined the offer. The reason why no suppliers were contacted when problems were found with their equipment during the testing by the DFAIT is that the DFAIT did not want to be perceived to be permitting "bid modification" or "bid fixing." Finally, concerning the fulfilment of

9. Alternative TEMPEST certification method which reduces the cost to users of TEMPEST measures, the administrative burden on industry and the time required to certify equipment.

10. A TEMPEST test facility holding a valid facility certification certificate from the Canadian or U.S. Industrial TEMPEST Program.

11. A TEMPEST professional certified to Level II under the joint Canada/U.S. TEMPEST Professional Certification Program.

the contract obligations, specifically delivery, the Department states that the contract awardee delivered the 131 Pentium TEMPEST workstations and spare parts by March 29, 1996, in accordance with the terms and conditions of the contract.

In summary, the Department submits that all bidders were given equal, fair and equitable treatment and that there were no breaches in the procurement process. The complainant's bid was fairly evaluated in accordance with a process consistent with the provisions of the AIT, and the complainant was not awarded the contract because its proposal was found technically non-compliant.

Intervener's Position

In its brief submission on the comments submitted by the complainant in respect of the Department's evaluation of its proposal, the contract awardee submits that the DFAIT is in receipt of systems that are fully compliant to the specifications of the original RFP. The systems were delivered on time at the price that was bid. The contract awardee concludes by stating that there was neither complicity nor collusion between it and the DFAIT, as claimed by the complainant.

Tribunal's Decision

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the AIT and NAFTA.

Article 506(6) of the AIT provides, in part, that "[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria." Article 501 of the AIT also provides, in part, that the purpose of Chapter Five is to "establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

Article 1007 of NAFTA requires, *inter alia*, that any technical specification prescribed by its entities is, where appropriate, specified in terms of performance criteria rather than design or descriptive characteristics and is based on international standards, national technical regulations and recognized national standards.

Article 1012 of NAFTA provides, in part, that, in prescribing a time limit to prepare and submit tenders, adequate time should be allowed by entities, taking into consideration, *inter alia*, their reasonable needs, the complexity of the procurement and the extent of subcontracting anticipated. In any event, but for a state of urgency, the bidding period should not be less than 40 days from the date of the initial issuance of invitations to tender. Article 1013 of NAFTA provides, in part, that the tender documentation shall include the criteria for awarding the contract. As well, it provides that an entity must reply promptly to any reasonable request for relevant information made by a supplier participating in the tendering procedure, on

condition that such information does not give that supplier an advantage over its competitor in the procedure for the award of the contract. Article 1015 of NAFTA provides, in part, that, to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the tender documentation and that the award shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

The Tribunal, having examined the evidence and arguments presented by the parties and considering the obligations specified in the AIT and NAFTA, concludes that the complaint is valid in part.

The complainant states that, because only one bid was deemed compliant in this solicitation, it seriously doubts that a fair and competitive bid process took place. Specifically, it alleges that the time frame to ask questions and to receive answers during bidding and the time frames to secure Microsoft's NT certification and TEMPEST certification were too short, that the standards and methods used by the Department and the DFAIT in accepting TEMPEST certification and in testing the products offered by bidders were, respectively, extremely lax and not transparent and that the Department might have been accommodating to the contract awardee by relaxing the terms and conditions for delivery in the RFP.

The Tribunal first notes that this solicitation was conducted over a compressed time frame in order to meet tight delivery requirements. Nevertheless, except for the requests to extend the bid closing date, requests which the Department accommodated, no timely, express written request was sent to the Department by any bidder seeking other time extensions of the process or part thereof. The Tribunal finds that the complainant was at liberty to ask the Department for a time extension of the period to ask questions and to receive answers. This was not done. Indeed, the complainant indicated that it failed to note the Department's message in the December 15, 1995, transmittal page of the RFP which severely limited the time period to seek clarification or additional information. It is true that, on December 28 and 29, 1995, the complainant addressed a number of questions to the Department and, in a sense maybe, implicitly requested, in writing, an extension of the said time period. The Department, however, did not answer these questions, as it claims that it was bound by its rule of December 15, 1995. The Tribunal will not decide the merit of the Department's decision, since the complainant did not raise the issue with the Tribunal within the time frames prescribed in the Regulations.¹² Indeed, the complainant had to bring this complaint to the Tribunal within 10 working days from when it knew or should have known the grounds of the complaint or, assuming it raised an objection with the Department on or about December 29, 1995, within 10 working days from the

12. *6.(1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.*

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

date on which it discovered that the Department would not answer its questions, thereby denying relief. This was not done.

On the issues of the time frames allowed to secure Microsoft's NT certification and TEMPEST certification, the Tribunal notes that the time frames allowed by the Department were short and quite demanding on potential suppliers. The fact remains, however, that the issue was readily visible in the RFP and, to the extent that these time frames might be objectionable, the matter could have been brought to the Department's and/or the Tribunal's attention. The complainant did not raise the issue with the Tribunal within the prescribed time frame and, consequently, the Tribunal will not decide the question on the merit. The Tribunal will note, however, on the issue of Microsoft's NT certification, that section 2.2 of the procurement specification provided bidders with an alternative. Bidders were allowed to rely on Microsoft's NT certification, as attested by the presence of the certified product on Microsoft's Windows NT 3.5.1 hardware compatibility list or through OEM certification in accordance with Microsoft's NT certification requirements. Any combination of the above was acceptable, and bidders, including the complainant, relied on various certification combinations in submitting their proposals.

On the question of the method used by the Department to accept TEMPEST certification, the Tribunal is of the view that the evidence on the record does not support the complainant's contention of laxness and that a simple signature attesting to the veracity and integrity of the TEMPEST certification tests carried the day. Indeed, the signature required was that of a CTP II under the joint Canada/U.S. TEMPEST Professional Certification Program affirming the results of tests conducted in a facility holding a valid facility certification from the Canadian or U.S. Industrial TEMPEST Program. The Tribunal is satisfied from the evidence on the record that the contract awardee fully met these requirements.

Concerning the methods used by the DFAIT to run the testing of the products offered by bidders, the Tribunal found no evidence of irregularities having been committed. The Department and the DFAIT admit that they were pressed by time and, consequently, ran the technical evaluation and the product testing evaluation concurrently. Moreover, they admit that no clarification questions were asked of any bidders concerning the product being tested. The Department and the DFAIT were concerned that seeking clarifications might extend the evaluation time frame, that it might compromise the delivery requirements and that it might be perceived as permitting "bid modification" or "bid fixing." The Department and the DFAIT were not required to seek clarification or to consult with bidders during product testing, and their behaviour in this respect is not irregular. Finally, the Tribunal notes that the complainant's offer was declared non-compliant at the technical evaluation stage for failing to meet all the mandatory requirements of the RFP, specifically, the requirement for TEMPEST certification. Consequently, the Tribunal is of the view that the Department's position to the effect that the results of product testing were not used by the DFAIT to declare the complainant's offer non-compliant is supportable.

Finally, evidence on the record indicates that the contract awardee met the delivery requirements in the RFP. In the Tribunal's opinion, there is no evidence to support the complainant's allegation that the delivery terms and conditions were relaxed for the contract awardee.

There remains for the Tribunal to determine whether or not the above findings amount to specifications written around specific pre-configured products, unclear and unstated evaluation criteria and

the improper use of the evaluation criteria with a view to favouring one supplier, in particular, the contract awardee.

The Tribunal has considered very carefully the question as to whether or not “complicity” ever existed between the DFAIT and the contract awardee in this procurement, resulting, among other things, in the contract awardee receiving preferential treatment at the time of bid evaluation, as alleged by the complainant. The Tribunal’s review included the examination of specific evidence concerning the technical evaluation of the contract awardee’s bid by the DFAIT. The Tribunal is of the view that the DFAIT relaxed the mandatory and stringent rule that it had set for itself in the RFP concerning both the TEMPEST certification and Microsoft’s NT certification in evaluating the contract awardee’s offer. Specifically, the updated TEMPEST Critical Features List for the product offered by the contract awardee was signed and sent to the Department after bid closing and included the results of TEMPEST tests in respect of the CD-ROM drive and PCMCIA slots which were conducted after bid closing. In addition, the DFAIT accepted, as evidence of OEM Microsoft’s NT certification in respect of the network interface card and the PCMCIA card adapter, a declaration and/or literature from OEMs which only attest that such items would support or be supported in a Windows NT environment. The Tribunal is of the view that these actions by the Department and the DFAIT amount to changing the evaluation criteria, as stated in the RFP, which required TEMPEST certification at the time that the proposal was submitted. As well, the acceptance by the Department and the DFAIT of the contract awardee’s submission of certification in respect of the PCMCIA card adapter and the network interface cards is only possible by changing the requirements in the RFP that parts either be on Microsoft’s Windows NT 3.5.1 hardware compatibility list or be OEM certified in accordance with Microsoft’s NT certification requirement. These changes, in the Tribunal’s opinion, are of consequence since they resulted in declaring compliant a proposal which, at the time of bid opening, failed to conform to all the essential requirements in the solicitation documents, as required by Article 1015(4)(a) of NAFTA. In conclusion, the Tribunal notes that there is no evidence on the record to support the allegation that “complicity” ever existed in this matter.

The complainant requested, as a remedy, that it be awarded its bid preparation costs. Considering that the complainant’s proposal was properly declared non-compliant by the Department and the DFAIT, the Tribunal will not grant these costs. The Tribunal, however, awards the complainant its reasonable costs incurred in relation to filing and proceeding with the complaint.

Where the Tribunal determines that a complaint is valid, in recommending an appropriate remedy, it is required, pursuant to subsection 30.15(3) of the CITT Act, to consider all the circumstances relevant to the procurement of the goods to which the designated contract relates, including the following:

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

In examining the degree to which the complainant was prejudiced in this case, the Tribunal notes that no proposal met all the essential requirements in the RFP. Consequently, the complainant was not entitled to the contract. But the contract awardee also was not entitled to the contract and, nonetheless, it was awarded the contract and the goods have been delivered.

The Tribunal recommends that the Department not give effect to the standing offer portion of this requirement and, instead, should the requirement continue to exist, re-issue a competitive solicitation.

Determination of the Tribunal

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was not conducted according to the AIT and NAFTA and that, therefore, the complaint is valid in part.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the Department cancel the standing offer portion of the requirement and, instead, should the requirement continue to exist, re-issue a competitive solicitation for the requirement in accordance with the provisions of the applicable agreements.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards the complainant its reasonable costs incurred in relation to filing and proceeding with the complaint.

Arthur B. Trudeau
Arthur B. Trudeau
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