

Ottawa, Friday, May 27, 1994

**File No. 93F664Y-021-0004**

IN THE MATTER OF a complaint filed by Enconair Ecological Chambers 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**

The Tribunal determines that the complaint has no valid basis; therefore, the complaint is dismissed.

Lise Bergeron

Lise Bergeron

Member

Michel P. Granger

Michel P. Granger

Secretary

**File No. 93F664Y-021-0004**

Date of Determination:	May 27, 1994
Tribunal Member:	Lise Bergeron
Investigation Manager:	Randy W. Heggart
Investigation Officer:	Estelle Lane
Counsel for the Tribunal:	Gilles B. Legault
Complainant:	Enconair Ecological Chambers Inc.
Government Institution:	Department of Public Works and Government Services
Intervener:	Controlled Environments Limited

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### FINDINGS OF THE TRIBUNAL

#### Background

This is an inquiry into a complaint filed under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (the CITT Act). The complaint concerns a procurement procedure that began before January 1, 1994, and which relates to the award of a contract by the Department of Public Works and Government Services (the Department) for the supply of two on-site plant growth chambers for the Petawawa National Forestry Institute (the Institute), in Chalk River, Ontario, a constituent of the Department of Natural Resources.

On March 4, 1994, the Canadian International Trade Tribunal (the Tribunal) accepted the complaint for inquiry, as it determined that the requirements set forth in section 7 of the *North American Free Trade Agreement Procurement Inquiry Regulations*<sup>2</sup> (the Regulations) had been satisfied, namely, (1) that the complainant was a "potential supplier" under the CITT Act, (2) that the complaint was in respect of a "designated contract" under the CITT Act and the Regulations and (3) that the information provided by the complainant disclosed a reasonable indication that the procurement had not been carried out in accordance with Chapter Ten of the *North American Free Trade Agreement*<sup>3</sup> (NAFTA). The last two determinations were made on the basis that, as between Canada and the United States, subparagraph (c) of Annex 1001.2c of NAFTA incorporates Chapter Thirteen of the *Canada-United States Free Trade Agreement*<sup>4</sup> (the FTA) for purposes of any procurement procedure that began before January 1, 1994.

#### Inquiry

The three parties to this inquiry are: (1) the complainant, Enconair Ecological Chambers Inc. (Enconair); (2) the government institution, in this case, the Department, on behalf of the Department of Natural Resources, a successor entity to the Canadian Forestry Service, which

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1. R.S.C. 1985, c. 47 (4th Supp.).

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

3. *North American Free Trade Agreement*, done at Ottawa, Ontario, on 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).

4. *Canada Treaty Series*, 1989, No. 3 (C.T.S.), signed on January 2, 1988.

itself was a successor entity to the Department of Agriculture; and, finally, (3) the awardee, Controlled Environments Limited (Conviron), which was granted the status of intervener on March 17, 1994.

As part of the inquiry, the Department filed with the Tribunal a Government Institution Report, in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*,<sup>5</sup> which report was made available to all parties. The complainant's comments on this report were filed with the Tribunal and sent to all parties.

An interim report prepared by the Tribunal staff under subsection 8(1) of the Regulations was also introduced into the record, a copy of which was sent to the parties for representations on any aspect of the interim report. The representations filed with the Tribunal were communicated to all parties.

Given that no party requested a hearing and that there is sufficient information on file to proceed on the merits of the complaint, the Tribunal decided to dispose of the matter without holding a hearing.

### **Procurement Process**

On October 14, 1993, the Department received a requisition for goods and incidental services from the Institute. The requisition was for the supply and construction, on site, of two plant growth chambers. The requisition included, under special instructions, a recommendation to purchase sole source from Conviron, the eventual contract awardee. On October 29, 1993, an Advance Contract Award Notice was published in Government Business Opportunities (GBO) with respect to the above-mentioned procurement. It was specified that the chambers had to be connected to and compatible with a QNX computer control system already in place which, according to a tree physiologist at the Institute, Mr. John Major, happens to be specifically designed and produced for Conviron plant growth chambers. The Advance Contract Award Notice also mentioned that Conviron was the intended vendor and that the process constituted a single or sole source procurement.

On November 1, 1993, Enconair protested against the Advance Contract Award Notice to the Department by telephone. Another supplier also called to complain about the sole source procurement. Both suppliers substantiated their concern in writing. In a letter dated November 19, 1993, the Department advised these two suppliers that the single source procurement would not be proceeding at that time.

On December 3, 1993, the Department received an amendment to the requisition from the Institute, including a specification to delete the existing specification related to Conviron and a recommendation to follow the requirements for open bidding under the FTA. A new Request for Proposal was prepared by the Department and dated December 16, 1993. The Department also prepared a Notice of Proposed Procurement, which appeared in GBO on December 29, 1993.

The requisition was for the supply and construction of two plant growth chambers in accordance with specifications. A note to bidders mentioned that the proposal had to provide sufficient information about the equipment to enable the technical authority, i.e. the Institute,

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

to determine whether the proposal met all requested specifications. Those specifications, contained in Annex "A" of the Request for Proposal, read in part as follows:

- (a) *Programmable microprocessor control system with continuous digital display of all parameters.*
- (b) *Must supply equivalent hardware and software to communicate with existing Convicon host software for programming, data acquisition and alarming.*
- (c) *Provide and document necessary software and hardware for communications to a Host computer for programming and sensor monitoring.*

On January 12, 1994, Enconair wrote to the Department to express its concern with the specifications. Enconair was, in fact, questioning whether specifications (b) and (c) above were both required. A copy of that letter was forwarded by the Department to the Institute on January 13, 1994, requesting a response to the question. On January 13, 1994, the Institute responded directly by telephone to Enconair and another supplier. According to the Institute, Enconair was told that specifications (b) and (c) described an "either/or" situation and that one computer to control the two plant growth chambers was required.

At the time of the closing of the solicitation, that is, 2:00 p.m. local time on February 7, 1994, four suppliers had submitted five proposals. On February 10, 1994, a contract was awarded to Convicon by telephone. Enconair was advised by the Department on February 24, 1994, that it was unsuccessful, which the Department later confirmed by facsimile letter to Enconair on February 28, 1994. The letter reads, in part, as follows:

*The Specification required either provision of equipment to communicate with the existing (Convicon) host computer or to provide and document necessary hardware and software for a host computer.*

*There was no provision for either communication with the existing computer nor provision of another "host" computer as required. Therefore, your proposals A & B were found to be non-responsive for not meeting the specifications.*

On March 3, 1994, Enconair filed a complaint with the Tribunal in which it alleged that, despite being a lower bidder than the contract awardee, its bid was dismissed because of a failure to meet required specifications which, it contended, were not contained in the Request for Proposal nor mentioned in a further telephone conversation where it sought clarifications. The complainant asked that the contract be terminated and that a new one be awarded to Enconair.

### **Applicable Procedure and Requirements**

Subsection 30.14(1) of the CITT Act requires that, in conducting its inquiry, the Tribunal limit its considerations to the subject-matter of the complaint. Moreover, subsection 30.14(2) of the CITT Act provides that, at the conclusion of the inquiry, the Tribunal determine whether the complaint is valid on the basis of "whether the procedures and other requirements prescribed in respect of the designated contract, or the class of contracts to which it belongs, have been ... observed" (emphasis added).

For the Tribunal to determine the applicable procedure and requirements in the examination of this complaint, it is necessary to examine, separately and in order, the relevant provisions of the Regulations, Chapter Ten of NAFTA, Chapter Thirteen of the FTA and Article V of the *General Agreement on Tariffs and Trade Agreement on Government Procurement*<sup>6</sup> (the Code).

Section 11 of the Regulations provides that, where the Tribunal conducts an inquiry into a complaint, it is required to determine whether the procurement was conducted in accordance with the requirements set out in NAFTA. However, Chapter Ten of NAFTA incorporates Chapter Thirteen of the FTA for purposes of any procurement procedure that began before January 1, 1994. Paragraph 1303(1) of the FTA incorporates, in turn, into Chapter Thirteen of the FTA, the Code and its amendments. Moreover, paragraph 1303(1) of the FTA provides that, as between Canada and United States, Chapter Thirteen of the FTA may supplement the rights and obligations contained in the Code.

There are, under Article V of the Code, two categories of obligations: those which are related to the procedural aspects of the procurement process and those which govern the award of a contract.

As part of the procedural requirements under the Code, the publication of a Notice of Proposed Procurement and tender documentation for open tendering, as in this case, is mandatory. This notice, as well as the tender documentation, must contain specific information. The information that the tender documentation must contain includes, *inter alia*:

*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;*

*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.*

These procedural requirements are supplemented by paragraph 1305(5) of the FTA, which stipulates that, subject to rules relating to confidentiality, potential suppliers of either Party shall have reasonable access to information substantially affecting the procurement.

In addition to the procedural requirements described above, the requirements governing the award of a contract are set forth in paragraph 15 of Article V of the Code. Of the several principles enumerated in that provision, three can be considered relevant to this inquiry. First, subparagraph 15(e) of Article V provides that, to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation. Second, subparagraph 15(f) of Article V provides that the awardee should be the tenderer that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest or the one which is the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation. Finally, subparagraph 15(j) of Article V

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6. Agreement on Government Procurement - Revised Text 1988, February 2, 1987, *General Agreement on Tariffs and Trade*, Geneva, 1988.

provides that the award shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

### **Evaluation on the Merits of the Complaint**

The procurement at issue relates to the supply and construction of two plant growth chambers. According to the Government Institution Report, those plant growth chambers are used by the Institute for research experiments on plants and trees, as well as for forest inventory. As experimental parameters such as humidity, temperature and carbon dioxide levels must be accurately recorded and documented, computer technology is used to manage varying numbers of those chambers. The Institute's installation in Chalk River has presently 18 of those chambers and 1 host computer, which was supplied by Convicon. According to the Government Institution Report, the function of the host computer is to communicate with the plant growth chambers for purposes of data acquisition, programming and sensor monitoring. The plant growth chambers that are the subject of the procurement at issue were to communicate with the host computer already in place, or the bidder had to supply its own host computer.

In its representations to the Tribunal, the complainant stated that, contrary to the Department's facsimile letter dated February 28, 1994, in which it is mentioned that the complainant's proposals did not contain any provision for either communication with the existing computer or provision of another host computer, Enconair was actually offering a "host computer on each chamber." In the complainant's view, the real reason for the rejection of its proposals is the Institute's mistaken belief that the units that Enconair proposed were not capable of remote monitoring and programming. Enconair further contended that it was never told before bid closing that communication via modem for monitoring and programming was required. In this regard, Enconair objects to the statement made by the tree physiologist at the Institute in a memorandum to the Department that there is no current way of communicating with Enconair's plant growth chambers via modem for monitoring and programming.

As to the Department, it took the view in the Government Institution Report that, although it was clear that the bidders had the choice of connecting to the existing Convicon host computer or of providing their own host computer, the complainant's proposals gave no indication of being able to communicate with the Convicon host computer nor did it provide an alternate host computer, which explains why the proposals were found non-responsive and set aside. Moreover, according to the Department, remote monitoring happens automatically when a host computer, which is separate and remote, monitors chambers for data acquisition and programming.

As mentioned above, in deciding whether the complaint is valid, the Tribunal must limit its consideration to the subject-matter of the complaint and determine whether the procedures and other requirements mentioned above were observed.

From the complaint, as well as from other comments and submissions filed by the complainant, the Tribunal gathered that the subject-matter of the complaint involves whether Enconair was informed of all relevant specifications, whether its proposals met the required specifications and whether an unannounced criterion was used to disqualify its proposals. The first subject falls within the category of procedural requirements, while the second and third fall within the category of requirements governing the award of a contract.

In considering Enconair's complaint with respect to the procedural requirements, it is essential to take into account that the Request for Proposal had to provide a full description of

the specifications and that the bidders had to have reasonable access to information affecting the procurement. Although it recognizes that the specifications could have been clearer in the Request for Proposal, the Tribunal is of the view that the procedural requirements were met in this instance. The Tribunal notes that two out of four bidders sought clarification before bid closing. However, an important point clarified with Enconair during a telephone conversation with the tree physiologist at the Institute was to the effect that the specifications as to the supply of "equivalent hardware and software to communicate with existing Conviron host software for programming, data acquisition and alarming" and the provision and documentation of "necessary software and hardware for communications to a [h]ost computer for programming and sensor monitoring," in fact, described an "either/or" situation, where bidders had to offer one solution or the other.

Furthermore, the meaning of the words "host computer" were clarified to Enconair and another bidder. According to the tree physiologist at the Institute, Enconair was told that bidders were being informed that the Institute already had a host computer and that they could either use it or provide and document their own host computer. Enconair acknowledges this fact in its complaint, as it states that the Institute indicated that only one computer, not two, that could communicate with both products was required. The complainant even added, on this very point, that it could not communicate with both products with one computer because of the first specification mentioned earlier, i.e. continuous digital display, and that it would be supplying two computers, one with each chamber:

*Mr. Major indicated that he didn't require two computers but [h]e required only one computer that could communicate with both products. [Enconair] explained that [it] could not do this because of item [(a)] the requirement for the continuous display, and that [it] would therefore be supplying two computers, one with each chamber.*

The above indicates that the complainant had difficulty meeting specification (a) and, at the same time, either specification (b) or (c). The complainant expressed some concerns in this regard. It remains, however, that it was its decision to provide two computers, one with each chamber, despite the clarifications as to the meaning of the specifications. In the Tribunal's view, the specifications were sufficiently clarified to allow Enconair to bid on the Request for Proposal. As stated in response to Enconair's complaint in the Government Institution Report, Enconair was not required to hook up to Conviron's host computer, but, if not, it was required to provide a separate host computer to control and monitor the computer-equipped plant growth chambers that it was proposing and to document the hardware and software for its host computer. The Tribunal notes, in this regard, that another bidder, which also requested clarifications as to the host computer, sent a proposal that was found to be technically responsive by the Institute, although its price was actually higher than the bid received from Conviron. In fact, the complainant knew or should have known that the Institute needed a computer capable of communicating with the two plant growth chambers for programming and sensor monitoring purposes. Nonetheless, Enconair offered two plant growth chambers each equipped with its own stand-alone computer, but not communicating with each other or with a third computer.

Having said that, the Tribunal is of the view that the requirements governing the award of the contract in this procurement were also satisfied. Given that the complainant's proposals did not respond to the criteria and essential requirements specified in the tender documentation and further clarified by telephone, the Institute had no choice but to find the proposals non-responsive. As to the question of whether an unannounced evaluation criterion, i.e. remote communication, was used to disqualify Enconair's proposals, the information filed with the Tribunal clearly indicates that the subject of remote communication was raised, after bid closing,



at the time that the Institute sought to secure a complete understanding of Enconair's proposals. In the Tribunal's view, there is no indication that remote communication via modem was actually a factor or criterion in evaluating the technical compliance of the complainant's proposals with the specifications.

There is no indication, in view of the subject-matter raised in the complaint, that the procedures and requirements prescribed in respect to the designated contract have not been observed.

**Determination of the Tribunal**

In light of the foregoing, the Tribunal determines that the complaint has no valid basis; therefore, the complaint is dismissed.

Lise Bergeron

Lise Bergeron

Member