



IN THE MATTER OF:

**A Complaint
By Unicom Analytical Inc.
of 405 Britannia Road, E. Unit 23
Mississauga, Ontario**

**Board File No:
D92PRF6601-021-0027**

Complaint upheld

AND IN THE MATTER OF:

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

October 30, 1992

DETERMINATION BY THE BOARD

The Complaint

On August 12, 1992, the Procurement Review Board (PRB or the Board) received a complaint from Unicom Analytical Inc. (Unicom). The complaint concerns the supply of a spectrometer and accessories for the Department of Agriculture (AC). The complainant contends that the product offered by Perkin-Elmer Canada Ltd. (Perkin-Elmer), the contract awardee, does not equal the Unicom model specified in the Request for Proposal (RFP) and, consequently, Perkin-Elmer should not have been awarded the contract.

The remedy requested by the complainant is that the Board review the decision made by the Department of Supply and Services (DSS) and award the contract to Unicom.

The complaint met the criteria for filing (subsection 21(1) of the PRB *Regulations*). The receipt of the complaint was acknowledged to the complainant.

On August 17, 1992, the Board accepted the complaint for investigation as it met the criteria for acceptance and timeliness (subsection 28(1) and subsection 23(1) of the PRB *Regulations*). A Notice of Complaint was published in the Canada Gazette, Part I and the Government Business Opportunities (GBO). DSS was officially notified and sent a copy of the complaint.

DSS filed the Governmental Institution Report (GIR) with the Board on September 8, 1992. A copy of the relevant portions of the report was sent to the complainant who, in turn, filed comments with the Board on September 15, 1992. 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 supporting documents 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 set forth in this complaint, the government's response to those allegations and the complainant's comments on the government's response were investigated by means of interviews and the examination of documents. The individuals interviewed are:

Mr. Cedric Buddo, Canadian Sales Manager, Unicom, Mississauga, Ontario; Ms. Carole Bouchard, Contracting Officer; and M. Daniel Lessard, Contracting Officer's Supervisor, both of DSS, Ste. Foy, Québec; Ms. Thérèse Nadeau, Administrative Officer; and M. Régis Simard, Research Scientist and end-user, both of Ste. Foy, Québec.

The Procurement

On or about May 12, 1992, DSS-Québec received a requisition which included reference to an Atomic Absorption (AA) Spectrometer with accessories and a trade-in from the AC Research Station located in Ste. Foy. After verifying with the end-user that they would accept equivalents of the items specified, the contracting officer prepared the Notice of Proposed Procurement (NPP) and RFP. The NPP was published in the June 2, 1992 issue of GBO and contained the code designation F-4 denoting a conditionally limited competition.

The RFP had a bid closing date of July 13, 1992. Included in the RFP were a number of requirements which read, in part:

REF: Unicom ou/or équivalent/equal [emphasis added]

001	9423 393 0071		
	Solaar 939 double beam AA spectrometer	1.00	EA \$
002	9423 470 03001		
	Gilson 221 (or 222 or equivalent) flame autosampler	1.00	EA \$
003	9423 470 03501		
	AA wash facility	1.00	EA \$
004	9423 470 0311		
	Polypropylène tubes	1.00	EA \$
005	9423 393 46031		
	Accessory tray	1.00	EA \$

006	9423 393 29201		
	<i>Advanced software</i>	1.00	EA \$
007	9423 393 29301		
	<i>Multi-element software</i>	1.00	EA \$
008	9423 390 30821		
	<i>Lead Lamp</i>	1.00	EA \$
009	9423 390 35011		
	<i>Flatted tube atom trap</i>	1.00	EA \$
010	<i>Moins allocation pour échange d'un spectrophotomètre d'absorption [sic] atomique perkin-elmer 2380 incluant installation et formation sur place de 1-2 jours</i>	1.00	EA \$

*Garantie: 13 mois sur pièces,
main-d'oeuvre et
déplacement.*

EVALUATION OF PROPOSALS:

-
- a) Your Proposal, quoted price and the charge-out rates are to be made in strict compliance with the requirements of the Request [sic] must be made on this form.*
 - b) Supply and Services Canada will evaluate proposals received and such an evaluation will include consideration of the effect of various factors, including the following:*
 - i) Compliance with the terms and conditions of this Request for Proposal.*
 - ii) The lowest evaluation price delivered at destination having regard to qualifications, exceptions or alterations to the technical requirements.*
 - iii) Assessment of all technical documentation and information.*
 - iv) Delivery date.*

- c) *It is a requirement that your Proposal be in accordance with this Request for Proposal. Supply and Services Canada reserves the right to reject any Proposal which does not comply with this Request for Proposal. Any deviation is to be clearly identified and supported with full details...*

Ten firms requested bid documents and six bids from five suppliers were received prior to the solicitation closing date. Since only two bids, Unicom's and Perkin-Elmer's, contained a completed Statement of Eligible Goods form, in accordance with the rule stated in the GBO, all offers were considered.

Unicom's proposal matched the requirement item by item. In Perkin-Elmer's proposal, items one through 10 were crossed out and the following note was added:

VOIR NOTRE SOUMISSION MJAC3549 CI-INCLUSE
[see our enclosed submission MJAC3549]

That submission (MJAC3549) listed the following items:

<u>ITEM</u>	<u>DESCRIPTION</u>
1	<i>Spectrophotomètre d'absorption atomique modèle 3300...</i> [also included a two-page description of product features]
2	<i>Echantillonneur automatique modèle AS-90</i>
3	<i>Tubes de 16 ml (1000/paquet)</i>
4	<i>Logiciel d'opération</i>
5	<i>Lampe à cathode creuse codée, Plomb</i>
6	<i>Support pour cellule</i>
7	<i>Installation et formation</i>
8	<i>Extension de 9 mois de garantie, 3300 -</i>
9	<i>Extension de 9 mois de garantie, AS-90 -</i>
	<i>...Allocation d'échange pour votre spectro-otomètre AA Perkin Elmer modèle 2380 avec accessoires...</i>

Garantie : Treize (13) mois sur pièces, main d'oeuvre et déplacement

OPTION

- | | |
|----|--|
| 10 | <i>*Nébuliseur Haute Sensibilité (en échange du nébuliseur standard</i> |
| 11 | <i>*Capuchon de la chambre d'atomisation[sic]</i> |
| 12 | <i>Extension de garantie additionnelle pour période de douze (12) mois</i> |

On July 15, 1992, DSS-Québec sent complete copies of the bids received to AC, including the prices, with a covering memo requesting AC to advise DSS of the products acceptable to them. The reason given in this memo for sending the bids was that a number of bidders offered substitute products.

AC replied to DSS with a memo dated July 21, 1992 requesting that the contract be awarded to Perkin-Elmer. This memo refers to a previous conversation which the investigation reveals took place during a conference call between the contracting officer's supervisor, the AC Administrative Officer, and the end-user of the equipment. During this discussion, the end-user advised DSS that the equipment being offered by Perkin-Elmer would meet AC's basic requirements and, since that bid was the lowest, it was requested that the contract be awarded to them. The AC end-user who conducted the evaluation stated that, although Unicam and another bidder were offering equipment which he considered better, the decision to accept Perkin-Elmer's proposal was based on the fact that it was the least expensive and could do the analysis required. This conclusion was arrived at after reading the proposals submitted. No written record of the evaluation is present on the DSS contract file nor was any provided to the Board by AC.

DSS-Québec verbally awarded the contract to Perkin-Elmer on July 23, 1992. According to Unicam, on or about August 4, 1992, its representative in Québec was advised of the decision to award the contract to Perkin-Elmer. A formal letter of regret was sent by DSS to Unicam on August 14, 1992.

Discussion

In response to Unicom's complaint, the Board will first assess whether or not the government had sufficient reason to specify the procurement requirements as it did, using a trade name or equivalent instead of using performance-based specifications. Second, the Board will determine whether DSS, having decided on a particular course of action, conducted itself in accordance with the provisions of the RFP and the Free Trade Agreement (FTA). In reviewing this matter, the Board considered the facts and circumstances surrounding this procurement and the applicable law and government policy relating thereto.

Dealing with the issue of the statement of requirements, paragraph 3 of Article IV of the GATT Agreement on Government Procurement states:

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.

Given that only a trade name and an itemization of the accessories, mostly by part number and limited description, were set out in the RFP, the question arises as to whether DSS could have used a more generic description in preparing the RFP, a description that would have been "...sufficiently precise" or that would have constituted "...an intelligible way of describing the procurement requirements."

In its response to the complainant's allegations, DSS states, inter alia:

*The equipment selected is considered equivalent because its main functions (the work for which it's designed) are the same and **the results expected will be achieved.*** [emphasis added]

Furthermore, when addressing certain of the substantive points raised by the complainant, DSS speaks of the results expected from the instrument:

*Unicom's product is in fact more sensitive, but this **does not affect the results expected in any way.*** [emphasis added]

When referring to the "*Slotted Tube Atom*", DSS again refers to the issue of greater sensitivity by commenting that "[it] ***does not affect the results expected.***" [emphasis added]

It is evident from these responses given by DSS in the GIR that the government could have provided a sufficiently precise and intelligible description of its requirements, if not for each and every feature of the instrument being sought, then at least for the key results expected from it (i.e. "*analysis of the elements which we use the most (potassium, sodium, calcium and so forth)*"), and thus avoid the use of a trade name and part numbers. This, however, was not done in the RFP.

Instead, DSS determined that a description of the goods required could be best met, or was more conveniently achieved, by specifying the Unicam trade name and part numbers with the words "*ou/or équivalent/ equal*". This, in the Board's opinion, was done without proper justification. However, having chosen this course of action, it was incumbent upon the government to ensure that its evaluation procedure, including the assessment of equivalent products and accessories, was conducted in a fair and transparent manner, providing each potential supplier with an equal opportunity to be responsive to the needs of the government in the tendering and bid evaluation phases of the procurement.

Article 1305.2(c) of Chapter 13 of the FTA states, in part, that the government shall,

use decision criteria in the qualification of potential suppliers, evaluation of bids and awarding of contracts, that...best meet the requirements specified in the tender documentation...and are clearly specified in advance.

There are no such decision criteria or methodology distinguishably set out in the RFP that satisfy this obligation, nor did the investigation reveal that any systematic technical equivalency assessment of the products offered was conducted. Instead, the government used discretion in conducting the technical evaluation. This is quite evident where, in respect of certain items specified in the RFP, the government evaluation concluded that the provision of an equivalent to those items was in fact optional. In other words, the government decided that certain items, though specified in the RFP, were not really needed. In the Board's opinion, for the reasons outlined below, this kind of conclusion falls outside of the government's latitude in assessing equivalency.

For example, in the RFP, there is listed, inter alia, item 001-9423-393-0071 (Solaar 939 double bean AA spectrometer). The complainant alleges that with respect to this item, the product offered by the contract awardee is not equivalent to the referenced item found in the RFP.

In its reply to this allegation, DSS states:

Unicam's product is in fact more sensitive, but this does not affect the results expected in any way.

Another example is with respect to item 009-9423-390-35011 in the RFP. In this regard, the complainant states that the "*Slotted Tube Atom Trap*" included in its offer "*provides improved sensitivity and is important for the end-user's requirement for better sensitivity.*" Furthermore, the complainant contends that the contract awardee offered no equivalent.

DSS, in replying to the afore-mentioned, acknowledges that the "*Slotted Tube Atom Trap*" has greater sensitivity but then adds, "*but [this fact] does not affect the results expected.*" This being the case, then why ask for such an item or an equivalent in the first place?

This is not to say that the government cannot modify its statement of needs if it so determines. In fact, if it were in the government's best interest to substantively deviate, as it did here, from the specifications as stated, it could have done so provided that it had complied with the requirements of the FTA. For example, the government could have cancelled the current action, redefined its requirements, and re-tendered the procurement.

In both illustrations cited above, however, the government exercised discretion relative to the statement of needs rather than comply with the equivalency evaluation test that it had established for itself in the RFP. This, in the Board's opinion, resulted in a unilateral, after-the-fact, non-transparent modification of the evaluation method announced in the RFP and, ultimately, resulted in unannounced and material changes in the statement of needs. This modification is contrary to the provisions of the FTA as it directly affects the decision as to whom the contract ought to have been awarded, a question the Board is, in the circumstances, unable to determine without a reasonable doubt.

For these reasons, the complainant prevails.

During the review of this procurement, the Board also noted that DSS disclosed price data to AC at the time of the technical evaluation.

DSS Supply Policy Manual Directive 3002.27 includes a note which reads as follows:

It is generally not advisable to disclose price information to customers.

In the Bio-Temp Scientific determination (Board File No: E90PRF66W9-238-0003, June 1, 1990), the Board addressed this issue saying that knowledge of the costs could have "*a bearing on the objectivity with which the technical evaluation was carried out. Those who set up the procurement system appear to have been aware of this possibility, and were concerned that the system not be laid open to such criticism.*"

The referenced DSS policy and the Board's comments pertaining thereto were not taken into account in this instance.

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 section 17 of the *Free Trade Agreement Implementation Act* in that, in the evaluation of offers, it exercised discretion rather than apply clear decision criteria to assess the degree of equivalency of the substitute products being offered. This resulted in unannounced and material changes in the statement of needs thereby depriving all potential bidders equal opportunity to be responsive to the requirement of the procuring entity at the tendering and bidding stages and, more specifically, at the bid evaluation stage.

The Board has decided to award the complainant reasonable costs relating to the filing and pursuit of its complaint and, given the circumstances of this procurement, the Board will also award the complainant its bid preparation costs.

J. Craig Oliver

J. Craig Oliver

Chairman

Procurement Review Board