

Ottawa, Friday, August 18, 1995

File No.: PR-95-001

IN THE MATTER OF a complaint filed by Mechron Energy Ltd. 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 CITT Act) and section 11 of the *North American Free Trade Agreement Procurement Inquiry Regulations*, the Canadian International Trade Tribunal (the Tribunal) determines that the complaint is valid.

Pursuant to subsections 30.15(4) and 30.16(1) of the CITT ACT, the Tribunal awards the complainant, subject to the Tribunal's recommendation herein, its reasonable costs incurred in preparing a response to the solicitation and in relation to filing and proceeding with its complaint.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that the Department of Public Works and Government Services terminate the contract awarded to Schneider Canada and award it to the complainant. If the contract is awarded to the complainant, the value thereof should be reduced by any amount paid in compliance with the Tribunal's cost award for preparing a response to the solicitation.

Alternatively, if the contract is not awarded to the complainant, in addition to implementing the cost award for filing and proceeding with the complaint, the Tribunal recommends that the Department of Public Works and Governments Services present to the Tribunal a proposal for compensation, developed jointly with the complainant, that recognizes that the complainant should have been awarded the contract and would have had the opportunity to profit therefrom. This proposal is to be presented to the Tribunal within 30 days of the date hereof.

Charles A. Gracey

Charles A. Gracey
Member

Michel P. Granger

Michel P. Granger
Secretary

File No.: PR-95-001

Date of Determination:	August 18, 1995
Tribunal Member:	Charles A. Gracey
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	John L. Syme
Complainant:	Mechron Energy Ltd.
Counsel for the Complainant:	Dalton Albrecht
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 April 5, 1995, Mechron Energy Ltd. (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) for the supply, Request for Proposal (RFP)/Solicitation No. NG T8080-4-0166/000/A, of five uninterruptible power systems (UPS) for installation at the Department of Transport (Transport Canada) Area Control Centres² across Canada.

The complainant alleges that it submitted the only commercially and technically compliant proposal and would have been awarded the contract, absent a breach of the applicable provisions of Chapter Ten of the *North American Free Trade Agreement*³ (NAFTA). Alternatively, if the evaluation criteria were modified either before the submission deadline or after the delivery of the proposals (during negotiations), the complainant was not informed of the new or amended commercial and technical specifications or evaluation criteria, nor was it given the opportunity to revise its proposal to reflect new or amended criteria. In the complainant's submission, these actions represent discrimination against the complainant contrary to NAFTA. The complainant requests, as a remedy, that the Canadian International Trade Tribunal (the Tribunal) instruct the Department to award it the contract and to pay its costs of filing and proceeding with the complaint or, in the alternative, that it be permitted to rebid for the procurement based upon the modified specifications and be awarded its costs of filing and proceeding with the complaint or, alternatively, that the Tribunal award it compensation equal to its costs of preparing the proposal, its expected profit in completing the contract and its costs of filing and proceeding with the complaint.

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

2. In the event of a power failure, these systems are intended to provide uninterrupted emergency electrical power to air traffic control centres.

3. 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).

On April 11, 1995, the Tribunal determined that the conditions for inquiry set forth in section 7 of the *North American Free Trade Agreement Procurement Inquiry Regulations*⁴ (the Regulations) had been met. Having made that determination, the Tribunal decided to conduct an inquiry into the complaint to determine whether the procurement was conducted in accordance with the requirements set out in Chapter Ten of NAFTA.

Inquiry

On May 8, 1995, the Department filed with the Tribunal a Government Institution Report (GIR), in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*,⁵ which report was made available to the complainant. On May 17, 1995, the complainant requested an extension to file its final comments on the GIR as, in its opinion, relevant documents necessary to prepare a full response to the GIR had not been provided by the Department. The Tribunal granted the complainant's request and subsequently ordered the Department to produce the relevant documents. On May 26, 1995, the complainant filed preliminary comments on the GIR. On June 15 and July 7, 1995, the Department filed additional documents relevant to the complaint, thereby completing the filing of the GIR. The complainant's final comments on the GIR were subsequently filed with the Tribunal and sent to the Department for comments. The Department's comments were filed with the Tribunal on July 28, 1995.

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 existing record.

Procurement Process

The RFP

A "Notice of Proposed Procurement" in respect of the RFP at issue appeared in the June 22, 1994, edition of Government Business Opportunities and bears the code "0-1," indicating that the procurement is open to all suppliers. Subarticle 4.1 of the RFP provides as follows:

- 4.1 *As opposed to an Invitation to Tender, this is a request [commonly referred to as a Request for Proposal (RFP)] that proposals be developed and submitted to the Minister of Supply and Services setting out the alternative means by which several technical, performance, time and other goals and objectives may be best met, having regard to stated mandatory requirements. The Minister will consider entering into a contract for the implementation of the most acceptable proposal which will be determined having regard to the evaluation factors set out in this RFP. In addition, the acceptability of the contract terms and conditions upon which the respondent would be prepared to undertake the implementation of the proposal will be measured against the contract terms and conditions set forth in this RFP.*

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

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

Article 5.0 of the RFP sets out the purpose of the RFP. Subarticles 5.1 and 5.2 provide as follows:

- 5.1 *Transport Canada, under the Canadian Airspace System Plan has a requirement for Uninterruptible Power Systems. This RFP with its attached Draft Contract, Statement of Work and Specifications sets forth the requirement of the Department of Transport for the items with related documents, supplies and services as listed in Appendix 1, Draft Contract.*
- 5.2 *The purpose of this Request for Proposal (RFP) is to solicit a firm price proposal to supply Uninterruptible Power Systems including training, technical manuals, spare parts, a temporary Uninterruptible Power System and field engineering services conforming to the requirements set out in Appendix 1, Draft Contract and its Annexes "A" to "H" inclusive.*

Article 7.0 of the RFP, which sets out, in general terms, the basis upon which proposals would be evaluated. Subarticles 7.1, 7.2 and 7.3 provide, in part, as follows:

EVALUATION OF PROPOSAL:

- 7.1 *The Minister of Supply and Services, or his/her designate, will evaluate the proposals received and such evaluation will include, but not be limited to, consideration of the effect of various factors, including the following;*
- a) *compliance with the terms and conditions of this Request for Proposal;*
 - b) *the lowest Evaluation Price for a technically compliant Proposal to the Crown for the Work, having regard to qualifications, exceptions or alterations to the technical requirement;*
 - c) *assessment of all technical documentation and information by the Technical Authority, for technical compliance.*
- 7.2 *The evaluation plan is attached.*
- 7.3 *The Minister of Supply and Services reserves the right to reject any proposal which does not comply with this Request for Proposal.*

Six notices (SD U001 to SD U006), confirming, clarifying or modifying elements of the RFP, were issued by the Department before bid closing on September 19, 1994. All notices were issued through the Open Bidding Service and were sent to all bidders that had requested the RFP. Notice SD U002 dated July 27, 1994, deleted the requirement at article 4 of the plan for the evaluation of proposals (the evaluation plan) for the management plan to achieve a minimum overall score of 75 percent to be considered compliant. Bidders were instead required "to submit a Technical and Management proposal which addresses the requirements set out in Appendix 2 of the Request for Proposal. It is this data which will be evaluated." Notice SD U003 dated August 3, 1994, *inter alia*, extended bid closing to September 19, 1994.

Response to the RFP

Two suppliers, the complainant and Schneider Canada (the awardee), submitted proposals. Between September 19, 1994, the date of bid closing, and March 22, 1995, the date of the Department's letter

informing the complainant that a contract had been awarded to the awardee, a number of events occurred, the more relevant of which are mentioned below.

On October 5, 1994, the Department's Senior Contract Management Officer (the contracting officer) wrote to the awardee making comments and raising questions on numerous aspects of its September 19, 1994, proposal (hereinafter referred to as "the Proposal") and requesting a response to enable Transport Canada to continue its evaluation of the Proposal. On October 27, 1994, the awardee responded to the Department's October 5, 1994, request for information. The first paragraph of the awardee's letter reads as follows: "This letter and the attached document form our complete response to your letter. Due to the substantial changes and clarification made to our original 'Volume 1' document [Volume 1 of the Proposal] we have included a revised version [hereinafter referred to as 'the revised proposal'] in [its] entirety. The revisions made are needed to respond to your questions."

On November 9, 1994, the Department wrote to the awardee requesting additional information on the revised proposal and addressing activities to be undertaken during a plant visit scheduled for November 17 and 18, 1994.

On December 20, 1994, the contracting officer wrote to the awardee requesting information concerning an aspect of the revised proposal involving [confidential information omitted] and how it would meet the requirements. On January 4, 1995, the Department wrote to the awardee, raising numerous questions relating to the revised proposal. On January 12, 1995, the awardee responded to the Department's letter of January 4, 1995. Attached to the letter were the following appendices: Appendix A, [confidential information omitted]; Appendix B, [confidential information omitted] Appendix C, [confidential information omitted] Appendix D, [confidential information omitted] Appendix E, [confidential information omitted] Appendix F, [confidential information omitted] Appendix G, [confidential information omitted] and Appendix H, [confidential information omitted]

On February 10, 1995, Transport Canada, in a memorandum to the Department, stated that the technical evaluation of the complainant's and the awardee's proposals was completed. Copies of the evaluation reports, one for each proposal, dated February 6, 1995, were attached. The memorandum stated that "[b]oth proposals [were] deemed compliant," and it was recommended that the contract be awarded to the awardee, the lowest bidder. On February 22, 1995, the awardee wrote to the Department, transmitting a copy of certain [confidential information omitted]. On the same day, the awardee wrote to the Department, transmitting its "long awaited response to [the Department's] request for the [confidential information omitted]"

On March 3, 1995, the contracting officer signed the report on the evaluation of the proposals. After stating that Transport Canada deemed both proposals technically compliant, the report briefly addressed the following matters: factory inspection, delivery, financial, insurance, price evaluation and contract terms and conditions. The contracting officer summarized the evaluation as follows: "On the basis of the above evaluation, Schneider ... has provided the lowest priced, technically compliant proposal."

Positions of Parties

The Complainant

In its comments on the GIR, the complainant submits that the Proposal: (1) was not technically and commercially compliant with the RFP; (2) did not comply with the technical documentation requirements; (3) did not show that the documentation would be provided according to the time requirements in the RFP; (4) did not provide sufficient information to show that the [confidential information omitted] would meet the time requirements in the RFP; (5) did not provide sufficient information to show that it was compliant with the mandatory [confidential information omitted] requirements specified in the RFP; (6) did not provide the [confidential information omitted] as required in the RFP; and (7) did not contain a [confidential information omitted] as required in the RFP. It further submits that the GIR confirms, in many respects, that the Department and Transport Canada were of the opinion that the Proposal was not technically and commercially compliant. In addition, it states that the awardee submitted the revised proposal in recognition of the fact that the Proposal was not compliant. The complainant states that: (1) the revised proposal, even as subsequently amended, was not compliant with the RFP; (2) the Department and Transport Canada evaluation reports contained numerous, significant errors or incorrect statements; (3) the awardee changed the Proposal; and (4) amendments were made to the requirements in the RFP after bid closing. In summary, the complainant submits that:

- (1) contrary to Article 1008 of NAFTA, the Department and Transport Canada have consistently discriminated against it to accommodate a lower-priced but technically non-compliant proposal;
- (2) contrary to Article 1015(4)(a) of NAFTA, the Department considered for award the Proposal which, at the time of bid opening, failed to conform to the essential requirements in the RFP;
- (3) contrary to Article 1014(1) of NAFTA, the Department conducted negotiations without the required conditions for doing so existing;
- (4) contrary to Article 1014(4)(d) of NAFTA, the Department failed to permit the complainant to submit an amended proposal in accordance with a common deadline;
- (5) contrary to Article 1014(4)(a) of NAFTA, the Department and Transport Canada improperly applied the evaluation criteria set out in the RFP, thereby failing to eliminate the awardee's Proposal for not being compliant with certain essential requirements in the RFP; and
- (6) contrary to Articles 1014(4)(b) and (c) of NAFTA, the Department failed to inform the complainant of the modifications to the evaluation criteria and technical requirements and failed to permit the complainant to submit an amended proposal on the basis of the modified evaluation criteria and technical requirements.

The Department

In response to the complainant's comments on the GIR, the Department submits that the UPS is a "complex requirement" and that, consequently, subarticle 7.3 of the RFP expressly reserves the right of the Minister of Public Works and Government Services (the Minister) to reject any proposal that has not complied with the RFP. Moreover, the Department submits that subarticle 7.3 also empowers the Minister to

accept bids which are not, in all respects, compliant with the RFP. The Department further submits that the RFP, unlike an invitation to tender, calls for the submission of solutions by bidders rather than the provision of specific equipment.

The Department states that, for complex requirements, it may not be possible to confirm “with 100% confidence” during the proposal evaluation phase whether or not the equipment which forms part of the proposed solution will meet all the requirements set forth in the RFP. In the Department’s submission, the ultimate determination of compliance is made at the time of “acceptance testing” under the contract. The Department submits that, in light of the foregoing, it places primary emphasis, in evaluating proposals, on the bidder’s statement of compliance. In the Department’s words:

We are looking for an offer from bidders to comply with our requirements, not for an offer to supply specific items of equipment. It is this offer which, when accepted by the Crown, constitutes the contract.

The Department submits that, in the evaluation of proposals, if it finds a discrepancy between the statement of compliance and the proposal, it is obliged to clarify the bidder’s intention. The bidder then has the option of confirming its offer’s compliance or withdrawing its bid.

The Department also submits that the RFP requests a considerable amount of material to be supplied with the proposals. In the Department’s submission, the purpose of this request is to facilitate the review of the proposals, reduce the time required to complete the review and minimize the need to go back to bidders for clarifications. Omission of this material is an inconvenience; however, it may not necessarily be grounds to reject a proposal.

Finally, the Department responded to the numerous specific allegations made by the complainant. On the question of whether or not the Department considered for award a proposal which, at the time of bid opening, did not conform to the essential requirements in the RFP, the Department submits the following: (1) no definition is established for what comprises “essential requirements;” (2) the complainant’s allegations that all information alleged to have been missing or changed is an essential requirement is not supported or established; (3) the very use of the word “essential” would seem to call for the exercise of judgement; and (4) the Department’s responses have demonstrated that the essential requirements were met and that the Proposal offered to comply with all the essential requirements of Specification 5507 (the Specification) and was given a passing score on all but two of the rated desirable technical requirements. Finally, the Department submits that the complainant’s characterization of Article 1015(4)(a) of NAFTA, as providing that offending proposals “must be eliminated,” is incorrect.

Validity of the Complaint

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 and that, at the conclusion of the inquiry, it determine whether the complaint is valid on the basis of whether the prescribed procedures and other requirements in respect of the designated contract have been or are being observed. Section 11 of the Regulations requires that the Tribunal determine whether the procurement was conducted in accordance with the requirements set out in NAFTA.

The complainant has raised numerous grounds upon which it alleges that the Department has breached the provisions of Chapter Ten of NAFTA. Though the complainant has not styled it as such, its primary ground of complaint would seem to be that the Department discriminated against it by accepting a proposal which, at the time of bid opening, failed to comply with the requirements in the RFP. Many, if not all, of the other grounds of complaint stem from that alleged initial breach.

The Department's response to this primary ground of complaint is twofold. First, the Department submits that, with two exceptions, the Proposal, as clarified, did comply with the requirements in the RFP. Second, to the extent that the Proposal, as clarified, did not comply with the RFP, pursuant to subarticle 7.3 of the RFP, the evaluation team exercised its discretion not to reject the Proposal. This second argument is based on the fact that there were only two requirements with which the Proposal was non-compliant and, more importantly, on the fact that they were not "essential requirements."

Subarticle 4.1 of the RFP affirms that the solicitation at issue is an RFP type of solicitation aimed at eliciting from bidders alternative means for best meeting several technical, performance, time and other goals and objectives. This is to be done by having regard to stated mandatory requirements. It also states that the Minister will consider entering into a contract for the implementation of the most acceptable proposal to be determined in accordance with the evaluation factors set out in the RFP. It finally states that the bidders' preparedness to comply with the contract terms and conditions set forth in the RFP will be taken into account as an additional factor.

Article 7.0 of the RFP sets out the key evaluation factors, which include compliance with the terms and conditions of the RFP, the lowest evaluation price and the assessment of technical documentation and information. Subarticle 7.2 refers to the evaluation plan attached to the RFP. Subarticle 7.3 states that the Minister reserves the right to reject any proposal which does not comply with the RFP.

Subarticle 1.1 of the evaluation plan states the following: "The proposals must [include] the required information. Incomplete information will result in the Proposals being classified as non-responsive." At article 3, "Financial Capability Evaluation," the evaluation plan states that the "Bidder's financial capability will be reviewed by examination of the firm's financial statements which must be submitted with the Bid Proposals."

Article 6 of the evaluation plan, which sets out 17 mandatory technical requirements, stipulates that "Bid Proposals must meet the following mandatory requirements." Article 6 further provides that "Bid Proposals which fail to meet these requirements shall be considered non-compliant."

Article 7 of the evaluation plan sets out 52 desirable technical requirements. Beside each of the 52 requirements is a minimum score. Article 7 provides that bid proposals must respond to each requirement and that each response will be rated on a score of 1 to 10. Article 7 goes on to state that, "[i]n order to be compliant, the [Bidders] must achieve the minimum score indicated for each requirement."

Subarticle 8.3⁶ of the RFP sets out the requirement that technical proposals include a summary sheet indicating compliance or non-compliance with all the requirements set forth in the RFP. Subarticle 8.5⁷

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6. 8.3 *All technical proposals shall include a summary sheet indicating substantive compliance (Comply) or non-compliance (Not Comply) to all the requirements set forth in this RFP and will state how they will comply to the requirements of this RFP.*

prescribes the minimum information requirements, as well as the format and content of proposals. It indicates, in part, that the content of Volume 1, “Technical/Management Proposal,” must also include the information required by Appendix 2 of the RFP. Subarticle 10.1⁸ sets out the significance of signing the cover page of the RFP and the person who should do so.

Reading these articles together, the Tribunal concludes that, with the RFP, the Department has set forth, for itself and any interested bidders, a precise road map for evaluating the proposals. In order to be considered for award, a proposal has to be the most acceptable one according to these factors. Pursuant to subarticle 1.1 of the evaluation plan, the failure to provide the required information in a proposal will result in that proposal being classified as non-responsive. Financial statements must be submitted with the proposal. To be technically compliant, a proposal must meet the 17 mandatory technical requirements of article 6 of the evaluation plan and achieve the minimum scores for the 52 rated desirable technical requirements of article 7 of the evaluation plan. Finally, the bidders’ preparedness to comply with the contract terms and conditions will be measured. This, in substance, is the road to be followed by the Department and the bidders in this instance.

In its response to the complainant’s comments on the GIR, the Department submits that elements of this whole scheme are subject to the Department’s discretion, as provided by subarticle 7.3 of the RFP, whereby the Minister reserves the right to reject any proposal which does not comply with the RFP. This subarticle states that the Minister has the right to reject a non-compliant proposal. The Tribunal has no difficulty with the meaning of those words, in that they plainly affirm the Minister’s authority to reject any non-compliant proposal. The Tribunal cannot agree with the proposition that this subarticle has the broader meaning suggested by the Department. In the Tribunal’s view, the authority to reject a non-compliant proposal provided at subarticle 7.3 does not imply the reverse proposition that the Department has the authority to accept a non-compliant proposal. Such an interpretation would result in the stated evaluation scheme being subject to alteration at the sole discretion of the Department after bid closing. In the Tribunal’s view, that would undermine the bidding system and could impose a hardship on bidders that, having relied upon and complied with the stated requirements in an RFP in preparing their bids, subsequently discover that the requirements have been altered. The Tribunal is of the opinion that subarticle 7.3 strictly states, emphasizes or reaffirms the Department’s authority to reject any non-compliant proposal, and nothing more.

7. 8.5 THE PROPOSAL:

(b) The Bidder shall submit a proposal describing how it would supply goods and services for the Uninterruptible Power Systems as set out in this RFP. As a minimum, the proposal shall provide information in the areas of capability, methods, work identification, documentation, for performance of the work. The Bidder shall prepare and submit its proposal in two (2) separate volumes each with the content as described in the attached appendices.

VOLUME 1 - TECHNICAL/MANAGEMENT PROPOSAL

(Refer to Appendix 2)

8. 10.1 *Signature and completion of the cover page of this document by an authorized representative of the Bidder’s company shall be taken to signify agreement to the terms and conditions of this document unless otherwise explicitly indicated in the Bidder’s proposal.*

On the issue of the correct interpretation of Article 1015(4)(a)⁹ of NAFTA and the Department's statement that "offending proposals" need not be eliminated, the Tribunal is of the opinion that Article 1015(4)(a) makes it an obligation that any proposal, to be considered for award, must conform to the essential requirements of the tender documentation, at the time of bid opening.

The Department argues that the complainant has not established what constitutes an essential requirement in the circumstances. The fact that, in the RFP, rather than use the "essential," the Department used the words "mandatory requirements," as well as the words "shall," "must" and "will," and indicated that the desirable technical requirements must meet the prescribed minimum scores, does not alter the character of these requirements. In the Tribunal's view, these requirements were "essential" within the meaning of Article 1015(4)(a) of NAFTA.

In addition, the Tribunal cannot accept the Department's proposition that the ultimate determination of compliance is made at acceptance testing under the contract. The Tribunal's difficulty with this proposition is that it associates two separate events, that is, proposal compliance and contract compliance. It is erroneous, in the Tribunal's view, to suggest, as the Department does in its comments, that the compliance of a proposal can only be fully determined once the contract is performed. The compliance of a proposal should be fully determined once the evaluation of the proposals is completed. What is fully determined at acceptance testing under the contract is compliance with the contract terms and conditions, a matter different from proposal compliance and, in the Tribunal's view, not under consideration here.

The Department submits that, after bid opening, it is entitled to seek, receive and take into consideration clarifications from bidders in finalizing its evaluation of the proposals. The Tribunal agrees with this position. It is important, however, to have a clear understanding as to what constitutes a clarification. The Tribunal is of the view that a clarification is an explanation of some existing aspect of a proposal that does not amount to a substantive revision or modification of the proposal. With this in mind, the Tribunal will now assess whether or not the Department and Transport Canada properly determined the Proposal, as clarified, to be in compliance with all of the mandatory requirements contained in the RFP. This will entail considering the relationship between the Proposal and the additional information provided by the awardee, principally on October 27, 1994, and on January 12, 1995, and determining if these submissions constitute clarifications of the Proposal or amendments to the Proposal. As well, in assessing the Department's and Transport Canada's evaluations of the Proposal, the Tribunal will consider whether or not the Department and Transport Canada relaxed, altered or otherwise modified the evaluation criteria set out in the RFP, thereby resulting in the Proposal, as clarified, being responsive on an evaluation basis different from the one stated in the RFP.

Throughout the RFP, reference is made to the Specification. That document is attached to and forms part of the RFP. It is 133 pages in length and sets out, in minute detail, the specifications relating to various aspects of the UPS. In section 5.0 of the Proposal, the awardee provided a chart indicating the elements of the Specification which the Proposal satisfied.

9. Article 1015(4)(a) of NAFTA reads, in part, as follows:

- (a) *to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation.*

Mandatory Technical Requirements

Item no. 1 of article 6 of the evaluation plan refers to paragraph 1.12 of the Specification. Paragraph 1.12 (Reliability/Availability) states, in part, that “[t]he UPS equipment shall, when connected as indicated in Single Line diagram # H-711-266, provide a minimum availability of 0.9999 for UPS power to the critical load main panel.” Bidders are required, at paragraph 1.12.5, to provide in their proposals the calculated and actual availability figures for each piece of equipment. [confidential information omitted]

The Tribunal notes that [confidential information omitted]

Item no. 6 of article 6 of the evaluation plan refers to paragraph 3.2.4 of the Specification and deals with the performance requirements of the UPU. More specifically, paragraph 3.2.4.21 specifies a minimum overall UPU efficiency at various percentage loads, e.g. 90 percent at both 75 percent and 50 percent loads. [confidential information omitted]

The Tribunal concludes that, [confidential information omitted]

Item no. 15 of article 6 of the evaluation plan refers to paragraphs 4.1.0 to 4.12.0 of the Specification which relate to testing. The text of those paragraphs is set out in pages 104 to 123 of Annex “A” to Appendix 1 of the RFP and details the mandatory system testing requirements. [confidential information omitted]

The Tribunal concludes that [confidential information omitted]

Item no. 16 of article 6 of the evaluation plan refers to Appendix “B” of the Specification, which states the following at paragraph .1: “The Bidders shall provide IPU technical data with their Proposal Documents as follows. The technical data concerning the engine shall include a performance graph. The graph is to be a signed, witnessed, and dated graph, of a dynamometer test of the specific engine type, size, and model being offered, and operating when fitted with the specific size and type of injector nozzles intended to be supplied for this project.” [confidential information omitted]

The Tribunal concludes that the Proposal [confidential information omitted]

The Tribunal notes that there is no evidence on the record that the awardee signed the cover page of the RFP. [confidential information omitted]

Rated Desirable Technical Requirements

Item no. 2 of article 7 of the evaluation plan refers to paragraph 1.3 of the Specification (Commercial Off-The-Shelf (COTS) Equipment). That paragraph states that bidders shall provide sufficient information and details in their proposals to demonstrate and confirm that any COTS equipment will meet the requirements in the RFP. [confidential information omitted]

The Tribunal concludes that [confidential information omitted]

Item nos. 10 and 11 of article 7 of the evaluation plan refer to paragraphs 1.13 and 1.14 of the Specification. Paragraph 1.13 states: “**Pattern Failures.** The UPS equipment provided by the Contractor

shall be subject to the pattern failure requirement in DTS [Department of Transport Standard] 1000 section 4.7.” Paragraph 1.14 states, in part: “**Maintainability**. A formal Maintainability Program is not required for the UPS. However, a MTTR [mean time to repair] prediction shall be provided in the proposal.” [confidential information omitted]

The Tribunal concludes that [confidential information omitted]

Item no. 22 of article 7 of the evaluation plan refers to paragraph 1.28 of the Specification. That paragraph states that the “Contractor shall provide equipment shop drawings, system and equipment manuals and training course material which are clear and contain sufficient detailed information to enable Department personnel to install, operate, maintain, repair and overhaul the equipment as specified in the Specification and DTS 1002.” [confidential information omitted]

The Tribunal concludes that, [confidential information omitted]

Item no. 28 of article 7 of the evaluation plan refers to paragraph 1.34 of the Specification. Paragraph 1.34 details requirements for software to be used in the UPS. [confidential information omitted]

Finally, item no. 51 of article 7 of the evaluation plan refers to paragraphs 3.9.0 to 3.9.7 of the Specification. Paragraph 3.9.5.5 states: “Sound level not to exceed 55 db in accordance with CSA C9-M1981 Table 10.” [confidential information omitted]

Having assessed the evidence relating to each of the above mandatory and rated desirable technical requirements, the Tribunal concludes that the additional information provided by the awardee as a result of the “clarification” process, in fact, amounted to substantive modifications, revisions or alterations of the contents of the Proposal in respect of a number of essential requirements in the RFP.

In summary, the Tribunal finds that the Department has overlooked, varied or put aside the evaluation rules that it had set out in the RFP and, in so doing, improperly declared compliant a proposal which, at the time of bid opening, failed to meet the minimum requirement of at least [confidential information omitted] mandatory technical requirements and [confidential information omitted] rated desirable technical requirements, which were essential requirements as defined in the RFP. In addition, the awardee did not submit [confidential information omitted] with the Proposal, and this, too, constitutes a breach of another essential requirement in the RFP. Each of the foregoing represents departure from the requirements established pursuant to the evaluation plan in the RFP. The Tribunal is of the view that the Department, having established that plan and having indicated to all potential bidders that elements of it were required at the time of bid opening, cannot substantially alter the plan after bid opening. In the Tribunal’s view, all of the above clearly constitute a breach of Article 1015(4)(a) of NAFTA and, consequently, the Tribunal determines that the complaint is valid.

Given that the Tribunal’s determination on the above point is sufficient to determine the validity of the complaint, the Tribunal will not address any of the other alleged breaches of NAFTA.

The complainant requested, as a remedy, that the Tribunal instruct the Department to award it the contract and to pay its costs of filing and proceeding with the complaint or, in the alternative, that it be permitted to rebid for the procurement based upon the modified specifications and be awarded its costs of filing and proceeding with the complaint or, alternatively, that the Tribunal award it compensation equal to its

costs of preparing the proposal, its expected profit in completing the contract and its costs of 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 a number of circumstances relevant to the procurement. In the present instance, the Tribunal is of the view that serious deficiencies in the procurement process are apparent. Essentially, a complex, sophisticated and well-constructed RFP for an equally complex and sensitive requirement, including a comprehensive evaluation plan, was effectively put aside by the Department and Transport Canada at the time of bid evaluation. This action goes to the very foundation of competitive bidding, compromised the integrity and efficiency of this procurement and reflects negatively on the procurement system as a whole. There is no doubt, in the Tribunal's opinion, that the complainant has been prejudiced. Indeed, Transport Canada, in its technical evaluation report of February 10, 1995, and the Department, in its overall evaluation report of March 3, 1995, both declared the complainant's proposal to be compliant. Consequently, in the Tribunal's opinion, but for the Department's actions, the complainant would have been awarded the contract and would have had the opportunity to profit therefrom. This is a serious prejudice and, taking into consideration the fact that the contract is already being performed, but noting as well that, according to the terms of the RFP, Appendix 1, in particular, Annex E (Delivery Schedule and Destinations), many of the deliverables under the contract are not to be delivered before 12 months or more from the effective date of the contract and noting that the contract has now been in the performance stage for only approximately 4 months, the Tribunal will, nevertheless, recommend that the contract be terminated and that it be awarded to the complainant.

The Tribunal, considering the possible impact of its recommendation on the complainant, the Department, Transport Canada and the awardee; the government's need for the UPS system within a reasonable time frame to service the Canadian public; and the fact that the complainant has indicated that, at this point in time, a monetary compensation might be the most suitable and practicable remedy, will recommend, as an alternative, that the Department present the Tribunal, within 30 days of this decision, a proposal for compensation, developed jointly with the complainant, that recognizes the prejudice suffered by the complainant in being deprived of the contract and of the opportunity to profit therefrom.

Determination of the Tribunal

In light of the foregoing, pursuant to section 30.14 of the CITT Act and section 11 of the Regulations, the Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(4) and 30.16(1) of the CITT Act, the Tribunal awards the complainant, subject to the Tribunal's recommendation herein, its reasonable costs incurred in preparing a response to the solicitation and in relation to filing and proceeding with its complaint.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that the Department terminate the contract awarded to Schneider Canada and award it to the complainant. If the contract is awarded to the complainant, the value thereof should be reduced by any amount paid in compliance of the Tribunal's cost award for preparing a response to the solicitation.

Alternatively, if the contract is not awarded to the complainant, in addition to implementing the cost award for filing and proceeding with the complaint, the Tribunal recommends that the Department present to the Tribunal a proposal for compensation, developed jointly with the complainant, that recognizes that the

complainant should have been awarded the contract and would have had the opportunity to profit therefrom. This proposal is to be presented to the Tribunal within 30 days of the date hereof.

Charles A. Gracey
Charles A. Gracey
Member