

Ottawa, Friday, February 9, 1996

File No.: PR-95-011

IN THE MATTER OF a complaint filed by AmeriData Canada 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 Canadian International Trade Tribunal determines that the complaint is not valid.

Lise Bergeron

Lise Bergeron
Member

Michel P. Granger

Michel P. Granger
Secretary

File No.: PR-95-011

Date of Determination:	February 9, 1996
Tribunal Member:	Lise Bergeron
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	David M. Attwater
Complainant:	AmeriData Canada Ltd.
Counsel for the Complainant:	Gregory O. Somers
Government Institution:	Department of Public Works and Government Services

Ottawa, Friday, February 9, 1996

File No.: PR-95-011

IN THE MATTER OF a complaint filed by AmeriData Canada 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*.

FINDINGS OF THE TRIBUNAL

Introduction

On September 28, 1995, AmeriData Canada 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 of informatic professional services for the Department of National Defence (DND) at Canadian Forces Base (CFB) Borden, Ontario (Solicitation No. BOR W0113-5-Z015/00/A).

The complainant alleges that the Department awarded the contract on the basis of indefinite evaluation factors and the mistaken application of the evaluation criteria stated in the Request for Proposal (RFP). According to the complainant, these actions by the Department have resulted in the offer from Control Data Systems Canada, Ltd. (Control Data) receiving a substandard score, mainly in the area of key personnel, and being ranked second overall. The complainant requested, as a remedy, that it be awarded the contract.

On October 6, 1995, 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*² (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*³ (the AIT).

Inquiry

On November 2, 1995, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ The complainant's comments on the GIR were subsequently filed with the Tribunal. An interim report was prepared by the

-
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, as amended.
 3. As signed at Ottawa, Ontario, on July 18, 1994.
 4. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

Tribunal's staff and introduced into the record on December 21, 1995. The complainant and the Department subsequently filed comments with the Tribunal on this report.

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 July 6, 1995, a requisition from DND was received by the Department's procurement office at CFB Borden. This requirement for informatic professional services in support of CFB Borden's Metropolitan Area Network was issued through the Open Bidding Service on July 24, 1995, and appeared in the July 28, 1995, edition of Government Business Opportunities.

The RFP described the evaluation methodology and criteria as a "best value" to the Crown approach. The basis for determining best overall value was "dollar per point evaluation" (bid price divided by rating points). The RFP also described 100 rating points assigned as follows: key personnel (60 points), firm's experience (20 points) and methodology and approach (20 points). The RFP further indicated in relation to the 60 rating points assigned to key personnel that attention would be paid to the following factors in rating this criterion: individual's education, work history, individual's qualifications, relevant projects, including a brief description of the project, the responsibilities of each of the individuals proposed and project duration. It also stated that the evaluation would be based on the knowledge of a software package found at paragraph 10 of the "Statement of Work," Appendix A to the RFP, which listed in order of importance nine applications with respect to the knowledge level required at CFB Borden. Finally, included in paragraph 10, which applied to all positions, was a requirement that bidders document their experience with the various products listed in the software package.

No substantive questions were raised by bidders before bid closing on August 14, 1995. Three proposals were received.

An evaluation team comprised of three members, all from CFB Borden Base Information Services, reviewed the proposals. Each member reviewed the proposals independently, using as a guide the following evaluation scheme developed by the Department's contracting officer:

1. Key Personnel: (education, work history, relevant projects, qualifications, number of years, demonstrated knowledge/experience with listed software)

The scale sets the following:

0	-	no data
25	-	lacks detail/support and/or merit
36	-	relatively good, but lacking support/details
40	-	good
50	-	very good, well supported details
60	-	excellent

Subsequently, the members of the evaluation team met and consolidated their evaluations according to the marking scale provided by the Department. The evaluation tabulation and explanatory notes were then

forwarded to the contracting officer. No mark given by the evaluation team to the three bidders fell between the discreet points on the rating scale.

Upon reviewing the technical evaluation performed by the evaluation team, the contracting officer asked for certain clarifications and informed the evaluation team that marks could have been given that fell between the discreet points on the rating scale.

As a result, the evaluation team reviewed its evaluation and reduced the original evaluation mark of Control Data's proposal as it related to key personnel, stating that such a rating better reflected the skill set of the personnel proposed by Control Data.

Subsequent to the above events, the calculation of price per points was performed by the Department, and a contract was awarded to SHL Systemhouse Inc., the firm offering the lowest price per points.

Jurisdictional Issues

In the GIR and subsequent submissions, the Department presents its position that the complainant has no standing to complain since, at all material times, Control Data was the bidder in response to the RFP. It further submits that, while the complainant appears to have purchased the assets and assumed the liabilities of Control Data, as of October 17, 1995, Control Data still existed as a separate and distinct legal entity. In the instance, the bidder, Control Data, continued to exist as a separate and distinct legal entity from the complainant and consequently it, and it alone, could file a complaint in this matter. The complainant had absolutely no involvement in this procurement process and, consequently, cannot be considered a potential supplier in the circumstances. The Department further states that it is inaccurate to say that it considered the complainant successor to Control Data for all purposes relating to this solicitation. The correspondence directed at the eventual complainant aimed solely to respond to its correspondence and did not represent a common understanding of any legal rights being transferred from Control Data to the complainant. Indeed, the Department concludes that, until this point in time, the contracting officer was not aware of the impending sale of Control Data to the complainant. In any event, had Control Data succeeded in its proposal, a contract would have been awarded to it, and any transfer of the contract to the complainant would have been subject to the standard assignment terms and conditions in the RFP which require, among other things, the prior written consent of the Minister of Public Works and Government Services.

For its part, the complainant submits that, pursuant to an agreement of purchase and sale between the parent corporations of Control Data and the complainant, all assets, real, personal, tangible and intangible, existing on August 31, 1995, and held by Control Data were transferred to the complainant. In addition, the complainant assumed the corresponding rights of Control Data, including causes of action and contractual and legal rights accrued or accruing to Control Data. It further states that no legislative or regulatory qualification currently exists to override the clear intention of the parties in this case to transfer all relevant rights and obligations of Control Data to the complainant as the actual "potential supplier." In the circumstances, denial of standing to pursue this claim could only rest on an overly literal interpretation of the definition of "potential supplier" and would require complete disregard of the parties' intention to transfer all rights, liabilities, causes and obligations. The complainant adds that there was a common understanding between the complainant and the Department that the complainant was successor to Control Data for all

purposes relating to the procurement, as is apparent from the correspondence between them. The fact that the complainant and Control Data still existed as separate legal entities as of October 17, 1995, does not change the fact that, if Control Data had been successful in its proposal, it would not have performed nor benefited from performance of the contract. All such obligations and benefits would have devolved upon the complainant. The complainant concludes its argument on this point by stating that “[d]enial of standing to aggrieved parties and therefore of recourse to the Tribunal on the mere basis of change of ownership, without showing that standing ought to be denied on a principled basis, would inhibit the free and efficient allocation of resources in the context of businesses which are potential suppliers to the federal government.”

The Tribunal notes that, pursuant to subsection 30.11(1) of the CITT Act, “a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract.” Furthermore, a “potential supplier” is defined to mean “a bidder or prospective bidder on a designated contract.” The main thrust of the Department’s argument is that the complainant lacks standing to file a complaint with the Tribunal because it was not a bidder on the designated contract at issue and, therefore, does not qualify as a potential supplier under the CITT Act.

The Tribunal believes that, as a bidder on the designated contract at issue, Control Data acquired the right to file a complaint with respect to the procurement process that related to that contract. As the complainant argued, and the Tribunal accepts, this right represented an intangible asset that was assigned to the complainant incidental to the assignment of all the properties and assets existing and held by Control Data on August 31, 1995. The Tribunal has no doubt that the assignment of property and assets was a bona fide business arrangement and that the complainant has a legitimate commercial interest in pursuing the complaint. While it may have been clearer if the complainant had commenced this matter in both corporate names, i.e. AmeriData Canada Ltd. and Control Data Systems Canada, Ltd., there is no legal principle that requires this. Assets and liabilities, including the rights to commence or defend a legal action, are regularly sold by businesses and, absent some legal reason why this is not acceptable, the courts have accepted that these actions may be maintained and litigated.

It is apparent from the correspondence between the parties that the Department knew that the complainant, commencing at least as early as September 8, 1995, was pursuing the alleged grievance with respect to the procurement process. In fact, the Department, on September 15, 1995, sent the complainant a written debriefing of the evaluation process and scoring with respect to the bid by Control Data. Though express notice of the assignment of the right to complain would have been prudent, the Tribunal accepts that the Department had been notified of the assignment.

The Department further submits in the GIR that the complainant did not comply with the 10-day time limit for filing its complaint with the Tribunal. According to the Department, Control Data knew of the Department’s intent to award the contract to the contract awardee as of August 24, 1995, and Control Data had been debriefed by the Department, on August 28, 1995, as to why it had lost the bid. Further, the Department submits that Control Data knew, at the end of August 1995, the basis of the complaint and about the existence of the Tribunal, as it had been mentioned to it by the Department as a possible avenue to escalate its case. Nonetheless, the complainant did not contact the Tribunal before September 27, 1995, to ask how to file a complaint.

For its part, the complainant submits that it made known its objection to the contract award well within the time period contemplated by the Regulations and submits that it filed its complaint with the Tribunal within the 10-day period following denial of relief by the Department, as is prescribed in the Regulations.

The Tribunal has determined that Control Data knew the basis of the complaint as a result of a debriefing conducted by the Department and DND representatives on August 28, 1995. On August 29, 1995, Control Data objected in writing to the Department and requested that the situation be rectified. The Tribunal regards Control Data's letter to the Department as making an objection pursuant to subsection 6(2) of the Regulations.

The Tribunal is also of the view that actual or constructive knowledge of denial of relief to the objection raised in Control Data's letter occurred as a result of the Department's letter, dated September 14, 1995, and sent by facsimile to the complainant on September 15, 1995. As a result, the Tribunal determines that the complaint filed with the Tribunal on September 28, 1995, is also timely in accordance with subsection 6(2) of the Regulations.

Validity of the Complaint

The Complainant's Position

In its comments on the GIR and subsequent submission to the Tribunal, the complainant submits, in part, that the evaluation criteria specified in the RFP were changed, misapplied or not applied by the Department in respect of its proposal. Indeed, notwithstanding the specificity and precision of the evaluation criteria as stated in the RFP, at some point in the evaluation, the process departed seriously from the criteria announced in the RFP. Specifically, the complainant submits that significantly less than the 60 points announced in the RFP for software package knowledge were assigned to this criterion in evaluating key personnel. In addition, the Department interpreted and, consequently, rated certain key requirements, i.e. software knowledge, formal education and network management skills, in a manner not obviously or easily traceable to the statement of requirement in the RFP and the "Statement of Work," thereby prejudicing the final score and ranking of Control Data's proposal. This can be observed in the written rationale transmitted by the Department on September 15, 1995, and in the rationale in support of the bid evaluation clarification exercise which resulted in the lowering of Control Data's score. In both instances, the emphasis in the rationale offered by the Department rests on factors other than software package knowledge, as is specified in the RFP. The complainant submits that the clarification exercise, which affected only its proposal, amounts to a device to erode its points earned in the first phase of the evaluation and, thus, to raise its price per points to a level "uncompetitive" with that of the contract awardee.

In summary, it is the view of the complainant that, though the RFP clearly stated the basis for bid evaluations, contrary to the provisions of Article 506(6) of the AIT, the Department applied different evaluation factors from those specified in the RFP in a second "clarification" phase of evaluation.

The Department's Position

In response to the complainant's comments on the GIR, the Department submits that the RFP clearly stipulated that key personnel would be rated out of 60 points and that the evaluation would be based on the proposed personnel's knowledge of the software applications identified in the "Statement of Work" and in accordance with the order of importance in which these applications are listed. The RFP also clearly identified the factors, i.e. individual's education, work history, etc., on which the evaluation of key personnel would be based and, consequently, there were no indefinite evaluation factors. In fact, software knowledge was evaluated as the sum of education (15 points), work history (10 points), relevant projects (5 points), qualifications (10 points), years of experience (10 points) and demonstration of knowledge and experience (10 points), which represents 60 points as stated in the RFP. In addition, it was clear enough from the construction of the RFP and attached "Statement of Work" that software knowledge was a key factor to be evaluated, and there is no need to keep on repeating these words every time a statement is made about this subject matter in the evaluation document. Conversely, the absence of the words "software knowledge" in respect of comments made in relation to the above-mentioned factors cannot be interpreted to mean that a matter other than software knowledge is being evaluated. On the specific issues relating to the requirements for software knowledge, formal education and network management skills, the Department indicates that the software package in paragraph 10 of the "Statement of Work" and the CFB Borden Metropolitan Area Network are one and the same; that the formal education of Control Data's personnel, specifically as it relates to Banyan VINES, was properly evaluated; and that the "Statement of Work" clearly indicated that the network management position required someone with project management skills. On the issue of the bid evaluation clarification, the Department emphasizes that the evaluated costs were not calculated until the final evaluation was done and that the clarification was needed because of contradictory or unclear statements made by Control Data in its proposal. In summary, the Department submits that the RFP clearly defined the bid evaluation criteria and that these criteria were used fairly in the evaluation of all bids.

The 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 prescribed procedures and other requirements 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.

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."

There are two elements to the issue of whether or not the tender documents clearly identified the requirements of the procurement, the criteria that would be used in the evaluation of bids and the method of weighting and evaluating the criteria. First, were the evaluation criteria and their method of application and weighting clearly identified in the tender documents? Second, were the criteria, their method of application and weighting used in the evaluation those that were specified in the tender documentation?

The RFP must be clear enough that a supplier can reasonably predict, in relative terms, what will be rated higher when proposals are evaluated. However, if it is obvious to a supplier that the elements contained in the RFP are unclear, i.e. there are ambiguous or contradictory statements, it is incumbent on the supplier to address these elements when they are first evident. In the case at hand, the complainant is not alleging that the evaluation criteria in the RFP are or were unclear, but rather that they were misapplied or that new criteria were added that were previously unannounced. Therefore, on the issue solely of whether or not the evaluation criteria and their method of application and weighting were clearly identified in the tender documents, the Tribunal determines that this was not an element of complaint and will not be addressed with respect to the validity of the complaint. The Tribunal is of the view, however, that the Department could and should have done a much better job in describing and explaining the evaluation process in the RFP. A further breakdown of the marking scheme would have given more transparency to the process and might have made the consequences of certain trade-offs in bidding evident to suppliers.

The complainant alleges that the Department awarded a contract on the basis of indefinite evaluation factors and the mistaken application of the evaluation criteria. The RFP identifies the approach that was to be used in the evaluation of proposals. The Tribunal is of the view, based on the evidence before it, that the Department, in conducting its evaluation, did not deviate from what was stipulated in the RFP. The RFP identified a weighting of 60 points to key personnel, 20 points to firm's experience and 20 points to methodology and approach. In the case of key personnel, the RFP, although not providing a further breakdown of point allocation, did provide identifiable factors that would be taken into consideration in evaluating bids under this heading.

Turning now to the question of whether or not the criteria used in the evaluation were those that were specified in the tender documentation, the complainant argues that evaluation criteria were misapplied or that new criteria were added that were previously unannounced. Evaluations of this type are, to a certain extent, subjective, even when the evaluation criteria and associated weightings are clearly identified in advance. The Tribunal will not review the judgment of the technical evaluation team, but will determine whether the criteria and method of weighting and evaluating the criteria specified in the RFP were actually used to evaluate the bids. With respect to the complainant's assertion that less than 25 of the 60 points allotted to key personnel were assigned to software knowledge, the Tribunal finds that this allegation is unfounded, as the evidence indicates that software knowledge was considered in each of the factors of key personnel. With respect to assigning relatively higher points for personnel with "certified" training, the Tribunal finds that this is a reasonable extension of having education as one of the evaluation criteria and that the judgment of the technical evaluation team was reasonable in this case. With respect to the complainant's concern about the lack of project management responsibilities being mentioned in the scope of work, the Tribunal notes that the evaluation summary produced at the time of the evaluation makes no mention of a lack of project management skills in the personnel proposed. The Tribunal is of the view that the RFP's clarity is particularly wanting in respect of this evaluation factor. Reading the evaluation scheme as a whole, however, particularly considering the requirements to document in the bids relevant projects and the responsibilities of each of the individuals proposed, the Tribunal finds that assessing the project management skills of personnel proposed as network managers with tasks such as assisting in the development of project plans and roll-out reports is reasonable. Therefore, from the evidence before it, the Tribunal is of the view that the evaluation was conducted according to the plan contained in the RFP, and no new unannounced criteria were added.

The Department, in its facsimile transmission of September 15, 1995, to the complainant, provided a breakdown of point allocation for the factors of key personnel in an attempt to explain how it arrived at the score given to Control Data's bid. The Tribunal concludes that, although a similar rationale may have been used during the evaluation, this breakdown of points was not contemporaneous to the evaluation.

The Tribunal does harbour some concern about the revision of the score of Control Data's bid. This concern arises not because of the action of revising the score (evaluations are frequently iterative processes) but because of the consequences of the revision and the potential questions regarding an ulterior motive that this has generated. In deciding this matter, the Tribunal has considered the Department's rationale, as documented in the original evaluation report. The Tribunal is satisfied that the difference in the written appraisal of the complainant and that of SHL Systemhouse Inc., specifically in relation to key personnel, is sufficient to support the revision of Control Data's bid score in this respect. Further, the Tribunal has not seen any evidence that contradicts the Department's assertions as to the reasons for this revision and, therefore, cannot conclude that this revision is a violation of the AIT.

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 conducted according to Chapter Five of the AIT and, therefore, that the complaint is not valid.

Lise Bergeron

Lise Bergeron
Member