



**IN THE MATTER OF:**

**A Complaint  
By Enconair Ecological Chambers Inc.  
of 477 Jarvis Avenue  
Winnipeg, Manitoba**

**Intervenor:**

**Controlled Environments Limited  
of 590 Berry Street  
Winnipeg, Manitoba**

**Board File No:  
D93PRF6631-021-0025**

**Complaint dismissed**

**AND IN THE MATTER OF:**

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

**December 7, 1993**

**DETERMINATION BY THE BOARD**

The Procurement Review Board (PRB or the Board) received a complaint, on September 24, 1993, from Enconair Ecological Chambers Inc. (Enconair). The complaint concerns the procurement by the Department of Supply and Services, Saskatoon (DSS) of two multi-tier tissue culture chambers for the National Research Council of Canada (NRC), Plant Biotechnology Institute (PBI), Saskatoon, Saskatchewan.

The complainant alleges the reasons given by DSS in their letter of September 13, 1993 for not accepting its bid are not legitimate. More specifically, it claims that the statement by DSS that its offer does not meet certain mandatory requirements is simply not true.

The remedy requested by Enconair is that the contract awarded to its competitor be cancelled and re-issued to Enconair.

On October 4, 1993, the administrative and regulatory requirements all having been satisfied, the Board accepted the complaint for investigation.

DSS filed a Governmental Institution Report (GIR) with the Board on October 25, 1993. A copy of the relevant portions of the GIR was sent to the complainant and the intervenor, Controlled Environments Limited (Conviron). Enconair filed comments with respect thereto with the Board on November 4, 1993. The complainant's comments were forwarded to DSS.

On November 10, 1993, a copy of the investigative staff's Preliminary Investigation Report was sent to DSS, the complainant and the intervenor, for their comments. All parties responded with written replies which were then sent to the respective parties. These elicited further comments and these comments, too, were appropriately communicated. All of the above comments have been added to the Preliminary Investigation Report and form part of the Investigation Report (Report) as submitted to the Board.

The Report of this investigation contains a number of appendices relative to material and documents deemed relevant by the Board's investigative staff. Specific reference is not made to these appendices 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 the parties. The Board, in reaching its conclusions, has considered the complaint, the GIR, the complainant's response to the GIR, the Preliminary Investigation Report and the comments thereon, 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 of this complaint were investigated by the Board's staff by means of interviews and the examination of documents.

The following people were interviewed in person and/or by telephone to confirm various statements made and/or contained in the documentation:

Mr. Wayne Mack, Contracting Officer, DSS, Saskatoon; Ms. Irene Howe, Supply Officer, NRC/PBI, Saskatoon; Mr. C.E. Lamont, President, Enconair, Winnipeg.

## **The Procurement**

On May 14, 1993, DSS Saskatoon received a requisition by fax from NRC/PBI. The requirement was described as follows:

*A TC16 Multitier Tissue Culture Chamber*

*\*SEE ATTACHED TECHNICAL SPECIFICATIONS*

On May 19, 1993, DSS contacted the Supply Officer at NRC to finalize the statement of requirements. According to NRC, the mandatory requirements contained in the requisition were actual requirements and, consequently, DSS was requested to proceed with the procurement as stated.

DSS prepared a "Notice of Proposed Procurement" (NPP) which appeared in the Government Business Opportunities of June 2, 1993. The notice was published with the following mandatory requirements:

*Mandatory requirements to be included: a) communication adapter and bypass switch installed to communicate with existing central host computer and data logger...*

DSS also prepared a Request for Proposal (RFP) dated June 2, 1993 with a closing date of 1400 CST July 12, 1993. The requirement was described as follows:

*To supply two (2) muliti-tier [sic] tissue culture chambers to National Research Council, Plant Biotechnology Institute, 110 Gymnasium Place, Saskatoon, Sk., in accordance with the specifications detailed herein and with Annex "B" and "D" three (3) pages attached.*

...

*001 Tissue Culture Chamber, multi-tier in accordance with the specifications detailed herein:*

Listed under the above description were the features of the specification attached to the requisition as provided by NRC. Two columns designated as "MET" and "NOT MET" were provided for the bidders to indicate whether or not they complied with each feature of the specification. One such feature reads:

*2.N) The controller must interface with the existing data logger and central host computer (286 IBM compatible), to allow the manager to monitor, control and/or adjust the unit offered and any of the [at] least 24 other units in use. To accommodate the units from various manufacturers the software should run in a windows 3.0 environment.*

Another feature of the specification, but this time under the heading, "MANDATORY REQUIREMENTS", reads:

*A) Communication adapter and bypass switch installed to communicate with existing central host computer and data logger.*

The specification concluded with the following remarks:

*Acceptable Product: Conviron Model TC 16 Tissue Culture Chamber complete with accessories COMM, SNH, CAST, PV, and WC.*

*Product Offered:\_\_\_\_\_.*

\*\*\*\*\*

*Please provide complete specifications and descriptive literature for product(s) offered.*

\*\*\*\*\*

Also contained in the RFP was a "STORES CERTIFICATION" clause which reads:

*The item offered conforms strictly in accordance with the specification.  
YES\_\_\_\_ NO \_\_\_\_\_. The deviations are as follows:*

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Two suppliers submitted proposals. The complainant's proposal was submitted with a covering letter dated July 12, 1993 which reads, in part:

...

*We comply in all respects to your request except for the proprietary controller requested. The wording here would appear to be a continuation of NRC's sole sourcing under which all of the other 24 units mentioned were purchased.*

*The control system specified is not generic but describes features proprietary to Convicon with a hook up to a data logger and host computer which is likely illegal. The controller we would provide would be based on a 386SX IBM compatible with hard disk and floppy disk. The unit would be capable of everything requested and has features which the Convicon unit does not have including...*

The complainant's proposal sets out its response to the requirements listed in the specification. However, with respect to the two features of the specification in dispute, the complainant does not indicate "MET" or "NOT MET". Instead, the complainant provides comments:

Comment

*2.N) The controller must interface with the existing data logger and central host computer (286 IBMcompatible), to allow the manager to monitor, control and/or adjust the unit offered and any of the [at] least 24 other units in use. To accommodate the units from various manufacturers the software should run in a windows 3.0 environment.*

*EXISTING DATA LOGGER IS PROPRIETARY AND PROBABLY ILLEGAL FOR US TO INTERFACE WITH THE DATA LOGGER. WE CAN NETWORK WITH THE COMPUTER. DATA LOGGING IS DONE AUTOMATICALLY TO HARD DISK OR FLOPPY.*

**MANDATORY REQUIREMENTS:**

*A) Communication adapter and bypass switch installed to communicate with existing central host computer and data logger.*

*SEE ABOVE [comments (2.N)]*

The complainant indicates under "*Product Offered*", Enconair ECTC - 16.

The following "*STORES CERTIFICATION*" provides:

*The item offered conforms strictly in accordance with the specification. YES XX NO \_\_\_\_\_. The deviations are as follows:*

*THERE ARE NO SIGNIFICANT DEVIATIONS. THE ONLY DIFFERENCE IS A CHANGE FROM THE PROPRIETARY(SOLE SOURCE?) CONTROLLER OUTLINED.*

On July 13, 1993, DSS referred the two bids received to NRC. According to NRC, copies of the bids were distributed internally to those who had an interest in the subject procurement. On July 14, 1993, the Technical Manager of the NRC/PBI Transgenic Plant Centre (TPC) transmitted the following "*comments*" to the NRC Supply Manager:

...

*In reviewing Econaire [sic] Ecological Chamber's [sic] proposal we find that they do not meet the following specifications:*

...

2. N.     *not met*

9. A.     *not met* [this should simply read "A"]

*On this basis we recommend that Econaire [sic] Ecological Chamber's [sic] bid be rejected and the next high tender be accepted.*

At the request of the NRC Supply Manager, a meeting of those involved with this procurement was called to review the bids item by item. At this meeting, it was determined that further verification of Enconair's bid was required. As a result, a letter dated July 21, 1993 was sent by DSS to Enconair requesting it to provide additional information. On August 5, 1993, Enconair responded by providing DSS with the additional information requested.

According to NRC, a meeting was held on September 1, 1993 between the Supply Manager of NRC, the DSS Contracting Officer and his Manager. A full review of Enconair's initial bid was made, and based on the response in its proposal to the two requirements mentioned above, it was recommended that Enconair's bid be declared non-responsive. On September 2, 1993, the following decision, dated September 1, 1993, was sent by facsimile from DSS to NRC:

*...Econaire['s] [sic] ... bid clearly indicates that they are not capable of meeting the specifications of the RFP*

*e) The controller must interface with the existing data logger and central host computer...the bidder's letter indicates clearly that they do not comply with this requirement*

*f) the MANDATORY REQUIREMENT (A) "communication adapter and bypass switch installed to communicate with existing central host computer and data logger is not met - reference the bidder's letter indicating non-compliance.*

*The bid from Econair [sic] is considered non-responsive...*

On September 9, 1993, a contract was awarded by DSS to Conviron.

In a letter dated September 13, 1993, Enconair was advised by DSS that "a Contract will not be placed with you in this particular instance as a more favourable offer has been accepted." The letter then identified Enconair's failure to meet the requirements contained in the relevant provisions, 2.N and A, of the RFP.

In a letter dated September 24, 1993, Enconair filed the subject complaint.

### **Discussion**

In the Board's view, the essence of the complaint is that the evaluation carried out by DSS was in breach of the evaluation criteria and methodology stated in the RFP. Alternatively, or additionally, the complainant alleged that the specification of the multi-tier tissue chambers is, in part, restrictive in nature (proprietary property) and that the conduct of DSS, in this regard, was tantamount to having proceeded by single tendering (sole sourcing), the effect of which avoided maximum possible competition.

Subsection 23(1) of the Board's Regulations states:

*Where the basis of a complaint is known or should reasonably have been known prior to bid opening or the closing date for receipt of bids, the complaint shall be filed prior to bid opening or the closing date for receipt of bids, as the case may be, but not later than 10 days after the basis of the complaint is known or should reasonably have been known. [emphasis added]*

The information submitted for the Board's consideration indicates that the first time the issue of restrictive specification or "sole sourcing" was raised by the complainant is in its letter to DSS dated July 12, 1993. As that letter was not delivered separately, but rather formed part of the complainant's bid proposal, it was not accessible to the government prior to the opening of bids. Yet, the basis for the complainant's concern in this regard was apparent on the face of the NPP and the RFP and should have been raised prior to bid closing or the closing date for the receipt of bids. This was not done and, consequently, the Board cannot address this concern now and will not pronounce on its validity.

The Board is left with the issue of the evaluation and, specifically, it must determine whether or not the government acted properly in declaring Enconair's bid non-responsive.

Subsection 15(e) of Article V of the General Agreement on Tariffs and Trade, the Agreement on Government Procurement reads, in part:

*...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 be from suppliers which comply with the conditions for participation. [emphasis added]*

There is no dispute between the parties that the "*communication adapter and bypass switch installed to communicate with existing central host computer and data logger*" is identified in the RFP as a mandatory requirement. Nor is there any dispute that "[t]he controller must interface with the existing data logger and central host computer (286 IBM compatible)" is also identified in the RFP as an essential requirement. However, the fact that the parties agree that these features are effectively identified in the RFP as mandatory requirements does not conclusively decide the complainant's assertion that the government failed, at the evaluation stage, to provide "*any sound explanation [...] as to why these two requirements are necessary*".

This latter comment may or may not be valid, but it relates to the issue of restrictive specifications (single tendering) or, perhaps, to the fairness of the evaluation criteria contained in the RFP. As stated earlier, these are concerns that should have been known at the time the RFP was issued and should have been raised with DSS or the Board prior to the opening of bids or the closing date for the receipt of bids, for a complaint to have been considered filed in a timely manner.

It is, therefore, only left to the Board to determine whether or not the evaluation of offers was conducted fairly by DSS when they assessed the complainant's response to the requirements of this procurement. Was the complainant's proposal responsive to those requirements? It is clear from the information submitted to the Board that, in this regard, the complainant's proposal failed to meet two of the essential requirements contained in the RFP. The complainant, itself, acknowledged this when, in responding to the Preliminary Investigation Report (letter dated November 24, 1993), it stated:

*THE LETTER WHICH WE SENT WHICH ACCOMPANIED THE REQUEST FOR PROPOSAL STATED THAT WE DID NOT MEET THESE TWO CRITERIA. FROM THE VERY BEGINING [sic] WE STATED THAT WE DID NOT MEET CRITERIA THAT HAD DE FACTO MADE THE REQUEST FOR PROPOSAL A SOLE SOURCE REQUEST.*

The Board finds that the government's decision to declare Enconair's bid non-responsive for not meeting the two requirements addressed in this determination is consistent with the evaluation methodology and criteria provided for in the RFP. It is, therefore, the Board's view that there is no validity to the complainant's contention that the evaluation was conducted unfairly.

The Board dismisses the complaint.

**DETERMINATION**

Having reviewed the complaint, the Governmental Institution Report and all other relevant information, the Board, pursuant to section 33 of the *Procurement Review Board Regulations*, determines that there is no valid basis for the complaint and hereby dismisses it.

**J. Craig Oliver**

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**Chairman**

**Procurement Review Board**