CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR
CANADA

Ottawa,Tuesday, July 30, 1996

File No.: PR-95-040

IN THE MATTER OF a complaint filed by ISM Information Systems Management Corporation 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.

Arthur B. Trudeau
Arthur B. Trudeau
Member

Michel P. Granger
Michel P. Granger
Secretary

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File No.: PR-95-040

Date of Determination:	July 30, 1996
Tribunal Member:	Arthur B. Trudeau
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Gerry Stobo
Complainant:	ISM Information Systems Management Corporation
Interveners:	Canadian Advanced Technology Association Information Technology Association of Canada Nuvo Network Management Sierra Systems Consultants Inc. Stratus Computer Corp. Unisys Canada Inc.
Counsel for the complainant:	Dalton Albrecht
Government Institution:	Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

Introduction

On April 3, 1996, ISM Information Systems Management Corporation (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) (Solicitation No. EW EN869-5-8125/000/B) for the supply of technical services to support local area networks (LANs) and approximately 8,000 workstations located in the National Capital Region and elsewhere in Canada.

The complainant alleges that the mandatory unlimited exposure of bidders required in sections 19, 20 and 23 of the General Conditions - Services of DSS-MAS 9676 (DSS-MAS 9676), which are found in the manual entitled Standard Acquisition Clauses and Conditions, is contrary to Article 1009 of the *North American Free Trade Agreement*[2] (NAFTA), as it constitutes discrimination against the complainant and is inconsistent with NAFTA supplier qualification procedures. In addition, the complainant asserts that the mandatory nature of sections 19, 20 and 23 of DSS-MAS 9676 is contrary to Article 1015 of NAFTA. Such features can only be the result of a misuse of the procurement process. The complainant requested, as a remedy, that the Department re-issue the solicitation, making compliance with the indemnities in sections 19, 20 and 23 of DSS-MAS 9676 a desirable criterion. Alternatively, the complainant requested that the Department evaluate the bid proposals on the basis that compliance with the above-mentioned indemnities is not mandatory. Finally, the complainant requested that it be awarded compensation equal to its costs of making the bid proposal and bringing the complaint.

1. R.S.C. 1985, c. 47 (4th Supp.).
2. Done at Ottawa, Ontario, 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).

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Inquiry

On April 4, 1996, 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*[3] (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 Ten of NAFTA.

On May 10, 1996, 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 filed its preliminary comments on the GIR with the Tribunal on June 3, 1996, and its final comments on the GIR on June 17, 1996. The GIR and the comments thereon were sent to all parties. Three interveners filed submissions on this matter.

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 October 20, 1995, the Department received a requisition for the subject requirement from Government Telecommunications and Informatics Services, a constituent of the Department. The requirement concerned the provision of hardware repair services for LAN servers, workstations, printers and other peripherals located in the National Capital Region and in other regions of Canada.

On January 5, 1996, the Department issued a notice which was published in Government Business Opportunities and posted on the Open Bidding Service concerning the availability of a pre-release Request for Proposal (RFP). This notice was to advise potential suppliers that a draft document was available for them to review and to offer comments on the requirements, including a model contract, prior to the formal release of the RFP. It also gave notice of a briefing to be held January 15, 1996, which potential bidders were invited to attend.

According to the Department, 40 vendors requested a copy of the pre-release RFP and 15 vendors attended the briefing. As a result of this process, 5 companies, including the complainant, submitted formal responses detailing areas of the RFP which might be improved. The Department made improvements to the pre-release RFP document and, on February 6, 1996, it issued the RFP for this solicitation through the Open Bidding Service. The original bid closing date of March 13, 1996, was extended to March 27, 1996, during the bidding period.

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3. SOR/93-602, December 15, 1993, Canada Gazette Part II, Vol. 127, No. 26 at 4547, as amended.
4. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912, as amended.

The RFP includes a number of provisions particularly relevant to this matter.

Section 6.0 of the RFP, "COMPLIANCE WITH RFP," reads as follows:

*All clauses, terms, conditions and other requirements in this RFP are considered **MANDATORY** unless otherwise indicated.... Proposals not complying with all the **MANDATORY** requirements of this RFP will not be given further consideration.*

Section 13.0 of the RFP, "GENERAL INSTRUCTIONS TO BIDDERS," reads, in part, as follows:

It is the Crown's intention to issue only one contract in response to this RFP to the bidder whose proposal:

- *meets **all** mandatory requirements; **AND***
- *complies with General Conditions DSSMAS 9676 (03/95) and contract terms and conditions specified herein; ...*

For your proposal to be considered responsive, you must comply with all requirements of this RFP identified as Mandatory.

(Emphasis added)

Section 21.0 of the RFP, "EVALUATION FOR COMPLIANCE," reads, in part, as follows:

In addition to other mandatory requirements detailed herein, the Bidder must demonstrate to the satisfaction of the Crown that it is financially capable of performing the work pursuant to the Contract.

Section 25.0 of the RFP, "STANDARD INSTRUCTIONS AND CONDITIONS," reads, in part, as follows:

TERMS AND CONDITIONS OF CONTRACT

Pursuant to the Department of Supply and Services Act, R.S.C. 1985, c. S-25, the general terms, conditions and clauses identified herein by title, number and date, are hereby incorporated by reference into and form part of this contract, as though expressly set out herein, subject to any other express terms and conditions herein contained.

GENERAL TERMS AND CONDITIONS:

General Terms and Conditions DSS-9676 (31/03/95) for Services shall apply to and form part of this contract. The firm acknowledges to have received a copy of DSS 9676.

According to the Department, consistent with the provisions of the Treasury Board "Interim Policy on Indemnification in Contracting[5]" and considering the high probability of a competitive response to this RFP, the Department decided to include a number of clauses in the RFP to provide for the full indemnification of the Crown.

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5. Chapter 2-7 of the "Materiel, Risk and Common Services" volume of the Treasury Board Manual.

Section 19 of DSS-MAS 9676 entitled "Indemnity Against Third-Party Claims" reads as follows:

(1) The Contractor shall indemnify and save harmless Canada, the Minister and their servants and agents from and against any damages, costs or expenses or any claim, action, suit or other proceeding which they or any of them may at any time incur or suffer as a result of or arising out of

(a) any injury to persons (including injuries resulting in death) or loss of or damage to property of others which may be or be alleged to be caused by or suffered as a result of the performance of the Work or any part thereof, except that Canada and the Minister shall not claim indemnity under this section to the extent that the injury, loss or damage has been caused by Canada, and

(b) any liens, attachments, charges or other encumbrances or claims upon or in respect of any materials, parts, work-in-process or finished Work furnished to, or in respect of which any payment has been made by, Canada.

(2) The Minister shall give notice to the Contractor of any claim, action, suit or proceeding referred to in subsection (1) and the Contractor shall, to the extent requested by the Attorney General of Canada, at its own expense participate in or conduct the defence of any such claim, action, suit or proceeding and any negotiations for settlement of the same, but the Contractor shall not be liable to indemnify Canada for payment of any settlement unless it has consented to the settlement.

Section 20 of DSS-MAS 9676 entitled "Royalties and Infringement" reads as follows:

(1) In this section, "Royalties" includes

(a) license fees and all other payments analogous to royalties for, and also claims for damages based upon, the use or infringement of any patent, registered industrial design, trade mark, copyrighted work, trade secret, or other intellectual property right, and

(b) any costs or expenses incurred as a result of the exercise by any person of Moral Rights.

(2) Subject to subsection (4), the Contractor shall indemnify and save harmless Canada, the Minister and their servants and agents against any claim, action, suit or other proceeding for the payment of Royalties, that results from or is alleged to result from the carrying out of the Contract or the use or disposal by Canada of anything furnished by the Contractor under the Contract.

(3) Canada shall indemnify and save harmless the Contractor and its servants and agents against any claim, action, suit or other proceeding for the payment of Royalties, that results from or is alleged to result from the use by the Contractor in performing the Contract of equipment, Specifications or other information not prepared by the Contractor and supplied to the Contractor by or on behalf of Canada, provided that the Contractor notifies the Minister immediately of any such claim, action, suit or other proceeding, but Canada shall not be liable to indemnify or save harmless the Contractor for payment of any settlement unless Canada has consented to the settlement.

(4) *The Minister shall give notice to the Contractor of any claim, action, suit or proceeding referred to in subsection (2) and the Contractor shall, to the extent requested by the Attorney General of Canada, at its own expense participate in or conduct the defence of any such claim, action, suit or proceeding and any negotiations for settlement of the same, but the Contractor shall not be liable to indemnify and save harmless Canada for payment of any settlement unless it has consented to the settlement.*

(5) *The Contractor shall notify the Minister of all Royalties which it or any of its subcontractors will or may be obligated to pay or propose to pay in respect of carrying out the Contract, and the basis thereof, and the parties to whom the same are payable, and shall promptly advise the Minister of any and all claims which would or might result in further or different payments by way of Royalties being made by the Contractor or any of its subcontractors.*

(6) *Where and to the extent that the Minister so directs, the Contractor shall not pay and shall direct its subcontractors not to pay any Royalties in respect of the carrying out of the Contract.*

(7) *After the giving of any direction provided for in subsection (6), and subject to compliance by the Contractor with the foregoing provisions, Canada shall indemnify the Contractor and its subcontractors from and against all claims, actions, suits or proceedings for payment of such Royalties as are covered by the direction.*

(8) *The Contractor shall not be entitled to any payment in respect of any Royalties included in the Contract Price to which the indemnity provided in subsection (7) applies.*

Section 23 of DSS-MAS 9676 entitled "Default by the Contractor" reads, in part, as follows:

(1) *Where the Contractor is in default in carrying out any of its obligations under the Contract, the Minister may, upon giving written notice to the Contractor, terminate for default the whole or any part of the Contract, either immediately, or at the expiration of a cure period specified in the notice if the Contractor has not cured the default to the satisfaction of the Minister within that cure period.*

(2) *Where the Contractor becomes bankrupt or insolvent, makes an assignment for the benefit of creditors, or takes the benefit of any statute relating to bankrupt or insolvent debtors, or where a receiver is appointed under a debt instrument or a receiving order is made against the Contractor, or an order is made or a resolution passed for the winding up of the Contractor, the Minister may, to the extent permitted by the laws of Canada, upon giving notice to the Contractor, immediately terminate for default the whole or any part of the Contract.*

(3) *Upon the giving of a notice provided for in subsection (1) or (2), the Contractor shall have no claim for further payment other than as provided in this section, but shall be liable to Canada for any amounts, including milestone payments, paid by Canada and for all losses and damages which may be suffered by Canada by reason of the default or occurrence upon which the notice was based, including any increase in the cost*

incurred by Canada in procuring the Work from another source. The Contractor agrees to repay immediately to Canada the portion of any advance payment that is unliquidated at the date of the termination. Nothing in this section affects any obligation of Canada under the law to mitigate damages.

According to the Department, 48 vendors requested a copy of the RFP. It is common for the government, when it requests proposals, to insert provisions in the solicitation documents for dialogue between potential suppliers and the government during the bidding period. Potential suppliers can submit questions or seek clarifications regarding the RFP. Section 14.0 of the RFP describes at length how communications and enquiries were to proceed between bidders and the government during the bidding period. When a query was substantive in nature, both the question and the answer could be circulated to all firms receiving the RFP. In this instance, 79 questions and answers were addressed through 6 sets of RFP updates. The question numbered 77.0 pertaining to compliance with the terms and conditions of DSS-MAS 9676 was responded to by the Department in the 6th set of RFP updates dated March 21, 1996, and reads as follows:

77.0 Q: *RFP Section 6.0 Compliance with RFP states that all terms, conditions and other requirements of this RFP are considered Mandatory unless otherwise indicated.*

Therefore, will exceptions to General Conditions DSS-MAS 9676 and/or the terms and conditions specified in Section D, Terms and Conditions of Any Resulting Contract articles 25.0 through 39.0 be grounds for elimination of the proposal from further consideration in accordance with the second sentence of the RFP Section 10-Evaluation Process, article 21.0 which includes evaluation of compliance to terms and conditions.

A: ***Yes.***

Three vendors, including the complainant, submitted proposals. The complainant, in its offer, proposed modified terms and conditions in respect of the above-mentioned indemnification provisions. According to the Department, the two other bidders agreed to the indemnification provisions of the RFP.

The complainant filed this complaint with the Tribunal on April 3, 1996.

Validity of the Complaint

<u>Complainant's Position</u>

In its complaint and its comments on the GIR, the complainant submits that it should not be a mandatory condition for participation that suppliers[6] agree to "unreasonable exposure to unlimited liability for uninsurable risks."

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6. The word "supplier" shall, for the purpose of this decision, be taken to be interchangeable with the words "bidder" and "contractor" unless otherwise indicated.

More specifically, the complainant submits that the mandatory indemnification provisions in the RFP require full indemnification of the Crown by the contractor in an unlimited amount. It also submits that the said indemnification provisions expose the contractor to greater risk than under common law. Indeed, the contractor may be liable for forms of damages for which it is not liable under common law and be required to indemnify losses and damages that would be considered too remote under common law. Moreover, the complainant submits that agreement to unlimited liability for third-party claims and consequential losses and damages is clearly not essential to the fulfillment of this RFP. The indemnification provisions can be modified or capped, and the Department has admitted that it could have been silent in the RFP on the indemnification question and instead relied on common law. The complainant states further that the US federal regulations exclude consequential damages from the standard procurement terms and conditions. As well, other major governments (United Kingdom and Australia) cap liability for third-party claims and consequential losses and damages. The Canadian government, for its part, has capped liability and third-party claims and consequential damages in other information technology (IT) contracts and in contracts in the aerospace industry for example. Therefore, the complainant concludes, unlimited liability can be and has been dispensed with in Canadian government contracts and in those entered into by Canada's main trading partners.

The complainant then submits that full indemnification of the Crown is contrary to Article 1009(2)(b) of NAFTA. Article 1009(2)(b), the complainant submits, is breached when a qualification or condition for participation by suppliers in tendering procedures is not essential to ensure the fulfillment of the contract in question, but, nonetheless, it is made a mandatory requirement in the RFP. The complainant submits that a mandatory requirement in an RFP is clearly a qualification. Indeed, the word "qualification" is defined, according to the complainant, to mean, *inter alia*, "[a] condition which must be fulfilled or complied with before a certain right can be exercised, office held, etc.; a requirement." In this instance, making the indemnification provisions mandatory reduces the field of qualified bidders to those that will agree to the indemnification provisions.

The complainant further states that full indemnification of the Crown in this RFP is also contrary to Article 1009(2)(d) of NAFTA, in that it constitutes a misuse of the process of qualification to exclude suppliers from being considered for a particular procurement. Indeed, the complainant submits that to require a company specializing in the provision of IT goods and services to become an insurer can only result from a misuse of the procurement process. It is also a misuse of the procurement process to force companies to agree to commercially unreasonable terms. For example, subsection 23(3) of DSS-MAS 9676 does not define the term "default" or "occurrence" and provides no procedure to enable a contractor to determine or become involved in mitigating its exposure. The net result of this situation is that subsection 23(3) is one-sided in favour of the Crown, which becomes judge and jury on the question of default and the moneys demanded as indemnification.

The complainant further submits that full indemnification of the Crown is contrary to Article 1015(4)(a) of NAFTA, in that the indemnification provisions are not essential requirements of the RFP and, consequently, compliance thereto cannot be made a mandatory requirement of the RFP. Moreover, the Department has further breached the same article of NAFTA when it stated in the RFP that it would reject bid proposals that did not conform to this non-essential qualification requirement.

The complainant also submits that private sector contracts in the IT industry contain limitation of liability clauses to allocate risks more fairly and to reflect the need to bring potential liability in proportion to the profit expected from the contract. Without a risk assessment, and no risk assessment was performed in respect of this RFP, the indemnification provisions in DSS-MAS 9676 do not allocate the risks associated with a particular procurement nor do they bear relation to the value of the contract. Further, requesting full indemnification only because competition is likely to exist, (1) without conducting a risk assessment prior to sending out the RFP to determine whether full indemnification is necessary or whether contractor liability could be limited, (2) without considering the ability of bidders to deliver at an otherwise cost-effective price and (3) without asking for proof of bidders' capacity to satisfy the indemnification of the Crown in the event of a significant claim against the Crown, can only be the product of a misuse of the procurement process.

The complainant finally submits that adherence to the Treasury Board "Interim Policy on Indemnification in Contracting" is not an answer, as it does not resolve the breaches of Articles 1009(2)(b), 1009(2)(d) and 1015(4)(a) of NAFTA or, in the alternative, if government policy is an excuse for a breach of Articles 1009 and 1015, the above policy itself is contrary to Article 1001(4), which provides that "[n]o Party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of [Chapter Ten]." Moreover, reliance on common law is not an appropriate solution to the problem. Limitation of liability is necessary in the IT industry because catastrophic damages are foreseeable at the time of contracting. Liability for indirect third-party claims and consequential losses and damages should be capped in a way that reasonably balances the contractor's profit from the contract and the potential liability.

In concluding, the complainant submits that Articles 1009(2)(b), 1009(2)(d) and 1015(4)(a) of NAFTA must be interpreted broadly in a manner consistent with the objectives of NAFTA which, *inter alia*, aim at promoting "fair competition in the free trade area.[7]" As well, the NAFTA preamble has as one of the goals of NAFTA to ensure "a predictable commercial framework for business planning and investment."

Interveners' Positions

Several interveners stated that the indemnification of the Crown issue was very important for them, as for all members of the IT industry.

In its submission, Unisys Canada Inc. (Unisys) essentially adopts the arguments advanced by the complainant. Moreover, in addressing the Department's position that prospective vendors have not refrained from bidding because of the mandatory nature of the indemnification provisions in the RFP, Unisys asserts that the federal government is possibly the largest buyer of IT goods in Canada and is, consequently, an extremely important customer. Nevertheless, it submits that the requirement that all vendors deviate from standard, prudent commercial practice and provide unlimited indemnification represents an abuse of the government's dominant procurement position. There is nothing unusual or unique to the government environment which supports or justifies this mandatory requirement. Other governments in Canada (provincial and municipal) and the commercial marketplace readily understand and accept the proposition that it is unreasonable to insist that a vendor effectively "bet the company" in accepting unlimited liability.

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7. Article 102(1)(b) of NAFTA.

In its submission, Nuvo Network Management (Nuvo) challenges the mandatory requirement to provide full indemnification and adopts the arguments advanced by the complainant. Nuvo submits, in part, that there is no direct correlation between a supplier's ability to fulfill the contract and the requirement for full indemnification of the Crown. Moreover, the Crown should satisfy itself of the financial capacity of its suppliers and should verify whether they meet the conditions to ensure the fulfillment of the contract in all respects. Nuvo submits that no single supplier can possibly satisfy the Crown's requirement for full indemnification since the magnitude and the frequency of claims by third parties and consequential damages are unpredictable and uninsurable. Therefore, Nuvo concludes that the requirement can never be fulfilled.

In its submission, the Information Technology Association of Canada (ITAC) states that it remains concerned about the government policy on indemnification in contracting. The policy, in its view, is both unreasonable and discriminatory. ITAC submits that any equitable approach to vendor liability must be based on a reasonable sharing of risk between the parties. In this regard, it submits that insurance is not a practical answer because insurance companies cannot quantify the risk associated with unlimited liability and, consequently, cannot establish appropriate premiums. As well, the indemnification policy is discriminatory, as firms with more assets face a greater risk than smaller vendors that may not be capable of paying the total indemnity required under the terms of the contract. In particular, ITAC submits that the mandatory nature of the full indemnification requirement runs counter to the provisions of NAFTA. Indeed, full indemnification is rarely, if ever, essential to the fulfillment of a contract with the Crown. In light of the above, ITAC indicates that it has recommended to the government that: (1) the Department and user departments be empowered to determine levels of risk sharing consistent with standard commercial practice; (2) the Crown adopt commercial terms which exclude indirect or consequential damages and third-party claims; (3) the Crown requirement for protection be limited to insurable risks; (4) the contractor's liability for other unspecified direct damages be limited to the contract value; and (5) full indemnification for third-party products supplied or integrated by a contractor be discontinued, since the Crown has normal remedies under warranty against the supplier of the products.

In summary, ITAC submits that it is in the best interest of all parties to resolve the indemnification issue in a way which clearly limits liability, while at the same time providing the Crown with the same level of protection required by other jurisdictions.

Department's Position

In its response to the complaint, the Department generally submits that the complainant has no basis for its complaint, as the indemnification provisions of the RFP are in compliance with Treasury Board policy, are equally applicable to all bidders and amount to no more than what would be upheld under common law. Furthermore, it states that the complainant has misrepresented Article 1009 of NAFTA for the purpose of this complaint, as the paragraphs of that article, to which the complainant referred, deal with bidder qualification, whereas the requirement for indemnification is simply a term under which the work will be conducted. Moreover, the Department submits that it has clearly specified what it considers to be the essential provisions of this requirement in the RFP, including indemnification provisions, and states that it will award the contract in accordance with those provisions in compliance with Article 1015(4)(a).

Specifically, the Department submits, in part, that the complainant, in summarizing the indemnification provisions of the RFP, has created a misconception as to what is actually required. Bidders are not required to accept, as the case may be, to indemnify the Crown on an unlimited, unqualified basis for

all losses of or claims against the Crown by any person at any time. The indemnification provisions in DSS-MAS 9676 are essentially those to which the government or any other buyer would be entitled under common law. These do not make the contractor responsible for losses caused by the Crown. The Department asserts that to expect any party, including contractors, to be responsible for the losses that they cause is not unreasonable. In this respect, the Department suggests that acquiring commercial insurance is only one form of managing risk, and whether or not risk is managed in this manner is a business decision solely within the discretion of the contractor.

The Department also submits that the Treasury Board policy has always been to seek full indemnification where possible and is a reflection of the federal government's long-standing practice of self insurance. Though exceptions can be made to the above-mentioned basic approach, e.g. only one supplier of the goods or services or the existence of a high degree of uncertainty about the nature of the requirement, this approach is expected to be the norm in competitive situations. The Department was expecting a competitive situation in this instance. In this regard, the Department plainly affirms that no risk assessment was done for this solicitation, as it was determined at the planning stage of the RFP that there existed a high probability of achieving a competitive response.

The Department further states that it has in the past, on occasion, obtained indemnification from the complainant in accordance with DSS-MAS 9676. In addition, to negotiate now contractual terms dealing with the risk allocation after the determination of compliance with RFP requirements, as suggested by the complainant, would, in the Department's view, render meaningless the labelling of the indemnification terms as mandatory and would be unfair to other bidders that did not have the opportunity to bid on those terms. The Department admits that discussions took place between the complainant and the Department during bidding concerning the possibility of amending this evaluation criterion to make full indemnification a desirable criterion. At no time, however, did the Department contract authority state that the indemnification provisions would be amended.

On the issue as to whether or not the mandatory requirement of full indemnification is a "qualification" as contemplated by Article 1009(2)(b) of NAFTA, the Department submits that it is not the case. Acceding to this mandatory requirement of the RFP "does not require proof of ability, capability, capacity, experience or otherwise." The decision to comply or not to comply, the Department submits, is a business decision solely within the complainant's discretion and has nothing to do with qualification. Concerning the complainant's allegation that the Department is not using a single, consistent financial qualification procedure, contrary to Article 1009(3), the Department asserts that the requirement for full indemnification of the Crown is not a financial qualification procedure; "[i]t is a requirement to agree to a condition that requires no qualification or related proof by the government."

Concerning the complainant's allegation that the mandatory requirement for full indemnification of the Crown is in breach of Articles 1015(4)(a) and 1009(2)(b) of NAFTA when read together and constitutes a misuse of the procurement process, the Department submits that the intent of Article 1009(2)(b) has been followed to the fullest and that no part of the RFP would exclude suppliers of another party from being

considered for this procurement. The Department asserts that the RFP is totally compliant with the provisions of Article 1003, "National Treatment and Non-Discrimination."[8]

Dealing with the complainant's assertion that mandatory full indemnification of the Crown by the contractor is unreasonable, the Department submits that it is even less reasonable to require the Crown to assume liability for those risks, management of which is within the control of the contractor and whose occurrence results from the actions of the contractor. The real effect of such a ruling, the Department submits, "would be to require the Crown to act as the unremunerated insurer of the Contractor, with little control of potential risks, as well as requiring the Crown to ignore its own policy."

In summary, the Department submits that this complaint should be dismissed, as it fails to demonstrate that the procurement process, in this instance, was in any way inconsistent with the procedural obligations of Chapter Ten of NAFTA.

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 procedures and other requirements prescribed 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 NAFTA.

The complainant's position essentially rests on the following propositions: (1) the mandatory acceptance of the indemnification provisions in the RFP is clearly a qualification, in that it is a condition that must be fulfilled or complied with before a supplier can effectively participate in the procurement process; (2) the indemnification provisions as stated in the RFP are unwarranted, as they are not essential to the fulfillment of the contract; (3) making the indemnification provisions in this case a mandatory requirement of the RFP, on its own merit or because of government policy, is tantamount to misusing the process for this procurement; and (4) insisting that a requirement, non-essential for the participation of bidders, be made a mandatory condition of award is an irregular condition which should not be used in declaring any offer

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8. Article 1003 of NAFTA reads, in part, as follows:

> *1. With respect to measures covered by this Chapter, each Party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party, treatment no less favorable than the most favorable treatment that the Party accords to:*
>
> *(a) its own goods and suppliers; and*
>
> *(b) goods and suppliers of another Party.*
>
> *2. With respect to measures covered by this Chapter, no Party may:*
>
> *(a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or*
>
> *(b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for the particular procurement are goods or services of another Party.*

compliant or non-compliant. In the alternative, the complainant proposes that the RFP, though following government policy, represents a construction which, it submits, was prepared, designed and structured in order to avoid the obligations of Chapter Ten of NAFTA.

The parties agree that the indemnification provisions in dispute are those at sections 19, 20 and 23 of DSS-MAS 9676. The parties also agree that the said indemnification provisions were mandatory requirements of the RFP.

All parties agree, as well, that the issue of indemnification in government contracting is a difficult and complex question. What the Tribunal must decide, however, is whether the indemnification provisions in sections 19, 20 and 23 of DSS-MAS 9676, included by reference in the RFP as mandatory requirements, constitute a breach of Article 1009(2)(b), 1009(2)(d), 1015(4)(a) or 1001(4) of NAFTA. The Tribunal must also decide whether the use by the Department of the suppliers' willingness to comply with the said indemnification provisions to determine the responsiveness of offers is consistent with the provisions of NAFTA. Last, the Tribunal will decide whether or not there is evidence that this solicitation has been prepared, designed or structured in order to avoid the obligations of NAFTA.

Section B of Chapter Ten of NAFTA deals with the procedures for tendering. Article 1009 of NAFTA entitled "Qualification of Suppliers" deals with a particular set of procedures all related to the qualification of suppliers. Specifically, Article 1009(2) reads, in part, as follows:

> *(b) conditions for participation by suppliers in tendering procedures, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of whether a supplier meets those conditions, shall be limited to those that are essential to ensure the fulfillment of the contract in question;*
>
> *(d) an entity shall not misuse the process of, including the time required for, qualification in order to exclude suppliers of another Party from a suppliers' list or from being considered for a particular procurement.*

In the Tribunal's view, Article 1009 of NAFTA deals at length with the qualification of suppliers and not with the tenders that might be submitted by qualified suppliers. It deals with the conditions for participation by suppliers, but not with the conditions to declare any tender, on its merit, responsive or compliant. This, in the Tribunal's opinion, is clear from the texts of Articles 1009(2)(b) and 1009(2)(d) and also of all other subparagraphs of paragraphs (2) and (3) of Article 1009.

The distinction between supplier qualifications and tender requirements is important. Article 1009(2)(b) of NAFTA requires that conditions for supplier participation be limited to those essential for the fulfillment of a given contract. The rationale for having qualifications for suppliers is to ensure that only bidders that can actually deliver on the fulfillment of a tender be considered for the contract award. For some government contracts, bidders may be pre-qualified or assessed against the qualification criteria separately from the solicitation process. In other cases, such as this one, supplier qualifications may be assessed as part of the contract award process. In either event, if potential suppliers do not meet the qualifications established, they will not be considered for the contract. Given that the purpose of qualification is to reassure the government that a bidder is capable of delivering a particular contract, it is important that supplier qualification be limited to those qualities essential for the fulfillment of the said contract. Imposing

qualifications on suppliers which are unrelated to the fulfillment of the contract, or which are more onerous than necessary in order to have the work performed or the service provided, could constitute a barrier to trade.

An example of supplier qualification in this case is found in section 21.0 of the RFP, which required that, in addition to the other mandatory requirements detailed in the RFP, the bidder demonstrate to the satisfaction of the Crown that it is financially capable of performing the work pursuant to the contract. In this case, the Department never disputed that the complainant was a qualified supplier for this procurement. The complainant was allowed to submit a bid, and no facts or arguments have been advanced by the Department or the complainant to the effect that the complainant might be rejected from winning this solicitation on the basis of not being qualified.

The Tribunal is satisfied that the indemnification provisions in the RFP are not conditions for participation requiring proof of ability, capability, capacity or experience as contemplated in Article 1009(2)(b) of NAFTA. The decision to conform to the "essential requirements" of the tender documentation is strictly that of the supplier. In view of this finding, the limiting of the conditions for participation to those which are essential to the fulfillment of the contract is not a relevant consideration. Accordingly, the Tribunal need not address the numerous arguments advanced by parties on whether or not the indemnification provisions in the RFP are essential conditions to qualify for this procurement.

Concerning Article 1009(2)(d) of NAFTA, the Tribunal again is satisfied that the process referred therein is the supplier qualification process only. In the Tribunal's opinion, the capability of the complainant to submit a bid and to be awarded a contract is not at issue and, therefore, Article 1009(2)(d) does not apply. In other words, Article 1009 was not breached in this case, as the complainant was not rejected by virtue of its qualifications as a supplier.

Article 1015 of NAFTA deals with the procedures affecting the submission, receipt and opening of tenders and the award of a contract. Specifically, Article 1015(4)(a) reads as follows: "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." It is in this article that one can find the criteria used to evaluate the responsiveness and merits of the bid.

Article 1015 of NAFTA clearly describes two sets of requirements that must be met in order for a contract to be awarded. The first set of requirements relates to the conditions for participation by suppliers and addresses the "responsibility" of suppliers. The second set of requirements relates to the essential requirements of the RFP and addresses the "responsiveness" of tenders. Under this particular construction, four basic configurations are possible: (1) the supplier is not qualified and its offer is not responsive; (2) the supplier is qualified, but its offer is not responsive; (3) the supplier is not qualified, but its offer is responsive; and (4) the supplier is qualified and its offer is responsive. NAFTA requires that the above two sets of requirements be met by the supplier and its tender respectively, in order for the tender to be considered for award.

Despite the urging of the complainant, the Tribunal is of the view that the provision in Article 1009(2)(b) of NAFTA that the conditions for participation be limited to those conditions that are **essential** to ensure the fulfillment of a particular contract should not be confused or interchanged with the provision in Article 1015(4)(a) that tenders conform to the **essential** requirements of the notices or tender

documentation. These provisions describe two distinct concepts, and reading Article 1009(2)(b) together with Article 1015(4)(a) does not have the effect of extending the "essential to ensure the fulfillment" test applicable to the conditions for participation (Article 1009(2)(b)) to the essential or mandatory requirements of the RFP (Article 1015(4)(a)). Accordingly, in the Tribunal's view, it is not a violation of Article 1015(4)(a) for the Department to use the indemnification provisions in the RFP as a criterion in evaluating the responsiveness of offers.

The Tribunal has also considered whether the actions of the Department relating to the indemnification provisions in the RFP are injurious to Article 1009(3) of NAFTA concerning the use of a single qualification procedure, to Article 1003 on national treatment and non-discrimination and to Article 1001(4).

The Tribunal has determined that the indemnification provisions are terms of the tender and not a financial qualification procedure contemplated by Article 1009 of NAFTA. Consequently, its application cannot constitute a breach of Article 1009(3), which relates exclusively to qualification procedures.

The complainant has advanced the proposition that the indemnification provisions in the RFP discriminate among bidders on the basis of the assets that they own and their related exposure to risk and their capability to be held liable. The Tribunal notes that the discrimination bases referred to in Article 1003 of NAFTA deals with discrimination or preferential treatment of bidders based on nationality, degree of foreign affiliation or ownership or residence. The Tribunal concludes that no evidence exists in this case which supports the existence of discrimination or preferential treatment on these bases. All bidders were subject to the same provisions, even though these provisions might affect the individual bidders differently due to their corporate circumstances.

Finally, the Tribunal also concludes that no evidence exists to support the allegation that the Department, by relying on the Treasury Board policy on indemnification in contracting, has prepared, designed and structured this procurement to avoid the obligations of Chapter Ten of NAFTA. Indeed, the Tribunal has found no breach of the NAFTA provisions on national treatment and non-discrimination, on technical specifications, on tendering procedures specifically, on the qualification of suppliers and on the award of the contract. Further, the Tribunal has discovered no evidence whatsoever that would support the view that the Department attempted to avoid the obligations of NAFTA through the use of the indemnification requirements. The indemnification requirements have been a long-standing feature in government contracting, and this RFP was consistent with that practice, as well as with the relevant Treasury Board policy in effect at the applicable times.

In light of the foregoing, the Tribunal determines that the complaint is not valid.

Notwithstanding the Department's compliance with policy and the articles of NAFTA, the objectives of NAFTA, as stated in the preamble, are in part to promote fair and predictable competition in order that the competitiveness of firms in a global market is enhanced. In the Tribunal's view, the indemnification policy is an important aspect of the competitiveness of firms. While the Tribunal has concluded that, based on the circumstances of this case, NAFTA was not breached, it does find the application of unlimited liability or indemnification provisions, without first conducting an assessment of their appropriateness in a given tender, to be troublesome. It seems to the Tribunal that businesses and individuals competing for government work should be able to know, to the greatest extent possible, their legal and

financial exposure so that they can bid and plan accordingly. The Tribunal notes that the current government policy on indemnification in contracting is being reviewed. This review is timely. Both business, which has provided extensive comments on this topic, and government would be well-served by resolving this issue in a manner which best promotes competitiveness in accordance with our international obligations, while still preserving necessary financial protection for the Canadian public.

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 in accordance with NAFTA and that, therefore, the complaint is not valid.

Arthur B. Trudeau
Arthur B. Trudeau
Member