CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, May 6, 1997

File No.: PR-96-030

IN THE MATTER OF a complaint filed by Symtron Systems Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

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 valid in part.

The Canadian International Trade Tribunal recommends that Defence Construction Canada re-evaluate the proposals of Symtron Systems Inc. and I.C.S. International Code Fire Services Inc. in respect of the minimum mandatory qualification requirement, according to the provisions of the Request for Proposal and the *North American Free Trade Agreement*, and proceed thereon with this procurement as provided in the Request for Proposal and the *North American Free Trade Agreement*.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Symtron Systems Inc. its reasonable costs incurred in relation to filing and proceeding with its complaint.

Patricia M. Close
Patricia M. Close
Member

Michel P. Granger
Michel P. Granger
Secretary

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File No.: PR-96-030

Date of Determination:	May 6, 1997
Tribunal Member:	Patricia M. Close
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Joël J. Robichaud
Complainant:	Symtron Systems Inc.
Counsel for the Complainant:	Marshall N. Margolis
Intervener:	Securiplex Inc.
Counsel for Securiplex Inc.:	Joel Richler Suemas Woods
Intervener:	Pro-Safe Fire Training Systems
Intervener:	I.C.S. International Code Fire Services Inc.
Counsel for I.C.S. International Code Fire Services Inc.:	Louise Tremblay Brian Riordan
Government Institution:	Defence Construction Canada

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AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

FINDINGS OF THE TRIBUNAL

INTRODUCTION

On February 27, 1997, Symtron Systems Inc. (Symtron) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] (the CITT Act) concerning the procurement (Solicitation No. HQ60151) by Defence Construction Canada (Defence Construction) of two firefighting training facilities (FFTF), one in Halifax, Nova Scotia, and one in Esquimalt, British Columbia, for the Department of National Defence (DND).

Symtron alleged that: (1) contrary to Article 1008 of the *North American Free Trade Agreement*[2] (NAFTA), Defence Construction consistently discriminated against Symtron to accommodate a lower-priced but technically non-compliant proposal; (2) contrary to Article 1015(4)(a) of NAFTA, Defence Construction considered for award tenders which, at the time of bid opening, failed to conform to the essential requirements in the solicitation documents; (3) contrary to Article 1014(1) of NAFTA, Defence Construction conducted negotiations without the required conditions for doing so existing; (4) contrary to Article 1014(4)(d) of NAFTA, Defence Construction failed to permit Symtron to submit an amended proposal in accordance with a common deadline; (5) contrary to Article 1014(4)(a) of NAFTA, Defence Construction improperly applied the evaluation criteria set out in the solicitation documents, thereby failing to eliminate the other bidders for not being compliant with certain requirements stated in the solicitation documents; and (6) contrary to Articles 1014(4)(b) and (c) of NAFTA, Defence Construction failed to inform Symtron of the amendments to the evaluation criteria and technical requirements and failed to permit Symtron to submit an amended tender on the basis of the amended criteria and technical requirements.

Symtron requested, as a remedy, that any contract awarded be terminated and that it be awarded the contract. Alternatively, should it not be awarded the contract, Symtron requested that the Canadian International Trade Tribunal (the Tribunal) recommend that Defence Construction present the Tribunal with a proposal for compensation, developed jointly with Symtron, that recognizes that Symtron should have been awarded the contract and would have had the opportunity to profit therefrom. In addition, Symtron requested that it be awarded its reasonable costs incurred in preparing a response to the solicitation and in relation to filing and proceeding with its complaint.

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1. R.S.C. 1985, c. 47 (4th Supp.).
2. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).

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BACKGROUND

On February 24, 1997, the Tribunal received a complaint from Symtron. Given that, in the Tribunal's opinion, certain information necessary for the filing of the complaint was missing, on February 26, 1997, the Tribunal, pursuant to subsection 30.12(2) of the CITT Act, requested Symtron to provide additional information on or before February 27, 1997. Symtron sent the additional information to the Tribunal on February 27, 1997. On the same day, the Tribunal determined, on the basis of the existing record, 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, including the two jurisdiction issues discussed below, and decided to conduct an inquiry into this matter. On February 28, 1997, the Tribunal issued an order postponing the award of any contract in connection with this solicitation until the Tribunal determined the validity of the complaint. On March 6, 1997, the Tribunal granted Defence Construction's request for use of the express option in these proceedings. On March 7, 1997, the Tribunal granted Securiplex Inc. (Securiplex) and Pro-Safe Fire Training Systems (Pro-Safe) leave to intervene in this matter and, on March 11, 1997, it also granted I.C.S. International Code Fire Services Inc. (ICS) leave to intervene. On March 14, 1997, Defence Construction filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*[4] (the Tribunal Rules). On March 20, 1997, Symtron filed a motion with the Tribunal requesting the production of additional documents relevant to the complaint. On March 26, 1997, the Tribunal enjoined Defence Construction to produce 31 additional documents relevant to the complaint. ICS, Pro-Safe and Securiplex filed comments on the GIR with the Tribunal on March 21 and 26 and April 1, 1997, respectively. Securiplex and ICS filed additional comments on the GIR with the Tribunal on April 8, 1997. Symtron filed its comments on the GIR on April 9, 1997.

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 that a decision could be made on the basis of the information on the record.

JURISDICTION ISSUES

In the GIR, Defence Construction submits that the Tribunal has no jurisdiction in this case, since the procurement at issue is not subject to the provisions of Chapter Ten of NAFTA. Defence Construction submits that it is the contracting agency for this procurement and that it will sign the resulting contract, on behalf of the Crown, with the successful bidder. Therefore, Defence Construction submits that the applicable monetary threshold in this case is the $11.3 million which applies to government "enterprises" and not the $9.1 million which applies to government entities such as DND. Both the estimated value of the contract in the Notice of Proposed Procurement (NPP) in the order of $9 to $10 million and the tender results compiled by Defence Construction's Tender Opening Committee on January 17, 1997, ranging from $7,231,674 to $7,993,914 were below the monetary threshold for government enterprises provided in Article 1001 of NAFTA. Consequently, this procurement is not covered under NAFTA, and the complaint does not fall within the Tribunal's jurisdiction as a "designated contract."

Securiplex supports Defence Construction's submission in this respect and submits that Defence Construction, and not DND, prepared the tender package and managed the tendering process.

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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.

Further, on the issue of the value of the procurement, it submits that, when tenders are opened, the relevant time for assessing whether a contract falls below the threshold is the moment after all the tenders have been opened. ICS, for its part, adopts Defence Construction's arguments in respect of the entity concerned and the applicable monetary threshold.

Symtron, for its part, submits that the NPP clearly states that the procurement will follow the tendering procedures in accordance with Chapter Ten of NAFTA. Having made such a determination at the time of publication of the NPP, Defence Construction, Symtron submits, should be bound by its decision. In the alternative, Symtron submits that: (1) the correct estimated value of the requirement as provided in the NPP is $9 to $11 million, not $10 million as indicated in the GIR; (2) DND played an instrumental role prior to and during the tendering process and will continue to play an important role as the ultimate user of the facilities and, consequently, the contract is substantially a contract for DND, a government entity; (3) the value of the contract for construction services should be augmented by the value of the contracts for architects and general contractors, since they are vital players in the construction project and the project must be viewed in its entirety to meet the valuation requirements of Article 1001(4) of NAFTA; and (4) the goods and services' part of the contract is well above the applicable NAFTA monetary thresholds for government entities and enterprises. For all these reasons, Symtron submits that the monetary thresholds set forth in Articles 1001(c)(i) and (ii) have been met and that this procurement is covered under NAFTA.

In deciding this issue, the Tribunal noted, first, that Article 1002(2) of NAFTA clearly provides that the value of a contract shall be estimated as at the time of publication of a notice in accordance with Article 1010 of NAFTA and not after all the tenders have been opened, as is submitted by Securiplex. Moreover, the estimated value as advertised on the Open Bidding Service (OBS) on October 18, 1996, is in the range of $9 to $11 million, not $10 million. The NPP also includes the following note: "This procurement follows the tendering procedures in accordance with Chapter 10 of NAFTA."

The Tribunal, in addressing the question of "enterprise versus entity," notes that the FFTFs are required by DND, that DND approved the specifications, that it conducted the technical evaluation of proposals, that it will pay for the work under the contract and that it will be the owner and user of the facilities. Defence Construction is merely the contracting agent in this instance. On this basis, the Tribunal determined that it is the monetary threshold of DND, a federal government entity listed for Canada in Annex 1001.1a-1 of Chapter Ten of NAFTA, that is appropriate in this case. On the basis that the estimated value of the procurement exceeds the NAFTA monetary threshold applicable to DND, the procurement is covered by NAFTA, and the complaint falls within the Tribunal's jurisdiction.

Defence Construction, in the GIR, also submits that the complaint was not filed within the time limits prescribed, given that Symtron knew or reasonably should have known the identity of the bidders at least at the time of the opening of the price envelopes on January 17, 1997. Therefore, the complaint submitted on February 24 and 26, 1997, does not meet the criterion of 10 working days in accordance with subsection 6(2) of the Regulations. Both ICS and Securiplex essentially adopt Defence Construction's position on this point.

Symtron, for its part, submits that it made several objections to Defence Construction on January 21 and 29, 1997, and, as no responses were received from Defence Construction, it reiterated its objections on February 6, 1997. These objections, Symtron submits, were filed within 10 working days following January 17, 1997, the date on which Defence Construction states, in the GIR, that Symtron should have become aware of its grounds of complaint. Moreover, Symtron submits that, though Defence Construction responded on January 30, 1997, to its letter of January 29, 1997, this response did not address its objections regarding the qualifications of Securiplex and ICS nor paragraph 2 of Amendment No. 1 to the tender documents concerning price revision. It is only on February 11, 1997, that Defence Construction addressed these objections and, as far as Symtron can determine, Defence Construction was still reviewing its objection in respect of certain bidders' qualifications as late as February 20, 1997. Accordingly, Symtron submits that its complaint received by the Tribunal on February 24, 1997, was filed on time.

The Tribunal is of the view that Symtron knew or reasonably should have known the basis of its complaint on January 17, 1997. The Tribunal, however, is also satisfied that Symtron made a first objection regarding the procurement on January 21, 1997, when it wrote to Defence Construction concerning the qualifications of Securiplex as a bidder and a second objection on January 29, 1997, when it wrote again to Defence Construction, still within 10 working days of January 17, 1997, this time stating: (1) that it was "the only offeror on the subject tender to have to its credit the successful completion of a propane fueled computer controlled fire fighter training system"; and (2) that it had been prejudiced in its ability to submit a price adjustment because of the reduction by about half of the 48-hour time period defined in Amendment No. 1 to the tender documents. Subsection 6(2) of the Regulations provides that a potential supplier may file an objection with the relevant government institution as long as such an objection is made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier. Hence, the Tribunal is satisfied that the first condition regarding the time limit was met.

On January 30, 1997, Defence Construction replied to Symtron essentially re-stating the contents of its facsimiles of January 13 and 16, 1997, which dealt with the submission of clarifications and the time frame in which to make price adjustments. In the Tribunal's view, because Defence Construction's reply of January 30, 1997, did not address completely the issue of the bidders' qualifications, Symtron could not, at that point, have reasonably concluded that its objection had been denied. On February 6, 1997, Symtron reiterated its objections to Securiplex and ICS and requested the opportunity to submit a price revision in accordance with paragraph 2 of Amendment No. 1 to the tender documents. On February 11, 1997, Defence Construction wrote to Symtron denying the request to submit a price revision and stating that all bidders were qualified. Filing occurred on February 27, 1997, when the Tribunal received the additional information that it had requested from Symtron. February 27, 1997, had been set by the Tribunal as the date on which the information was to be received and the date on which the complaint would be considered filed in accordance with subsection 30.12(2) of the CITT Act and rule 96 of the Tribunal Rules.

In sum, the Tribunal was of the view that Symtron's objections were made with Defence Construction within the time frame prescribed in subsection 6(2) of the Regulations and that its complaint was filed within the time period set by the Tribunal. The Tribunal, therefore, went on to conduct its inquiry.

PROCUREMENT PROCESS

During the two-year period from September 1994 to October 1996, DND's project management personnel visited several existing Canadian and foreign FFTFs and consulted with various firms that were known to have competence and ability to design, build and install FFTFs. It also consulted with Defence Construction personnel on the sourcing strategy to utilize for this requirement. As a result, a multi-phased competitive sourcing strategy was adopted reflecting the fact that only a few companies, including Symtron, ICS and Pro-Safe working with Contraves Inc. (Contraves), had the competence and resources to design, build and install the required FFTFs. A performance specification was developed with input from the above-mentioned companies. The performance specification was written to ensure that only firms having the requisite experience would submit a proposal. In this respect, paragraph 1 of the selection criteria stated: "In order for any potential supplier of this fire fighter training system to be considered they must complete all of the information requested in appendix 001, 002 and 003. The minimum requirement that must be met for further consideration will be the following: A company's successful completion of a propane fuelled computer controlled fire fighter training system with a minimum construction value of $1,000,000 Canadian Currency."

On October 16, 1996, Defence Construction received a Contract Demand from DND for the required FFTFs. On October 18, 1996, the tender documents, along with the NPP, were posted on the OBS. On the same day, Amendment No. 1 to the tender documents was ready. This amendment dealt with the question of the price adjustment and price revision deadlines. On October 21, 1996, a copy of the NPP was sent by facsimile to Symtron, ICS and Pro-Safe because of their expertise in the field and their involvement with DND during the planning stages. Between November 13 and 15, 1996, Symtron, ICS and Securiplex each requested an extension of the tender closing date. On November 15, 1996, Defence Construction extended the original tender closing date of November 27 to December 11, 1996. On December 5, 1996, Amendment No. 6 to the tender documents was posted on the OBS. The amendment incorporated the acceptability of letters of credit as valid bid and contract security instruments for this tender. On December 10, 1996, a facsimile was received by Defence Construction from ICS requesting clarifications of specified security and warranty requirements and requesting an extension of the tender closing date to January 8, 1997, in order to assess the impact of Amendment No. 7 to the tender documents issued on December 9, 1996, and to finalize arrangements concerning its bid security instruments. On December 10, 1996, Amendment No. 9 to the tender documents correcting the tender closing date to January 7, 1997, was posted on the OBS. Tenders closed on January 7, 1997. Three proposals were received from Symtron, ICS and Securiplex.

The technical proposals submitted by Symtron, ICS and Securiplex were reviewed by the DND evaluation team on January 8, 9 and 10, 1997. On January 13, 1997, facsimiles were sent to Symtron, ICS and Securiplex. Each facsimile included a supplier-specific "Instructions & clarifications" section. The cover page of the facsimiles read as follows:

> Re: **Request for Clarificationd [sic] or Additional Information**
>
> Please find attached a request for clarification and/or additional information. Please provide your answers and/or comments, by fax, not later than:
>
> **January 15, 1997**
> **15:00 hours (local time)**

> Any price adjustments as a result of the items noted in the "Instructions & Clarifications to All Proponents" attached will be accepted, by fax at ..., no later than:
>
> January 17 1997
> 15:00 hours (local time)

By January 15, 1997, the three bidders had responded to the January 13, 1997, request. On January 16, 1997, a facsimile was sent to the three bidders as follows:

> Re: **Request for Clarification or Additional Information**
>
> DND's review committee advises that the responses submitted have been accepted.
>
> Please note that any price adjustments must be received at ..., not later than:
>
> **January 17, 1997**
> **15:00 hours (local time)**
>
> PRICE ADJUSTMENTS RECEIVED AFTER THIS TIME ARE INVALID and shall not be considered, regardless of any reason for their late arrival.

On January 17, 1997, Defence Construction received price adjustments by facsimile from ICS and Securiplex. On the same day, the price envelopes were opened by Defence Construction's Tender Opening Committee, and prices were recorded on a tender result summary form as follows: Securiplex, $7,231,674; ICS, $7,863,000; and Symtron, $7,993,914. Tender results were communicated by facsimile to the three bidders shortly after tender opening.

On January 21, 1997, following a telephone call to Defence Construction, confirming that Securiplex was qualified as a bidder on the basis of the participation of Contraves, Symtron sent Defence Construction a legal document filed on January 17, 1997, with the United States District Court for the District of New Jersey indicating that Contraves had agreed to withdraw from the firefighter training market. As a result, Defence Construction asked Securiplex to confirm that Contraves would continue to be available as a member of the team. Securiplex failed to demonstrate to Defence Construction that Contraves would be a member of the team. Accordingly, Defence Construction informed Securiplex of its intent to consider ICS, the second lowest bidder, for award.

VALIDITY OF THE COMPLAINT

Symtron's Position

Symtron's position is that it is the only bidder which meets the minimum mandatory qualification requirement of the tender documents. It maintains that neither Securiplex nor ICS has completed a propane-fuelled, computer-controlled firefighter training system of a minimum construction value of $1 million. Securiplex has no experience in this respect except for Contraves that is disqualified, it claims, on the basis of the legal document that it sent to Defence Construction, filed on January 17, 1997, where Contraves agreed to withdraw from the firefighter training market. ICS, it claims, has never completed a $1 million project of the sort required and may not be the same ICS firm that participated in the Australian Navy Project.

"Participation," Symtron submits, does not equate to "successful completion" and is not a proper test to determine bidder qualification in this instance. Further, there appears to be no evidence of verification

of the bidders' qualifications by Defence Construction, as was required by the Request for Proposal (RFP). Symtron submits that, if the focus of the evaluation committee was on "participation" rather than on a company's successful "completion" of a propane-fuelled, computer-controlled FFTF, then "it is evident that [Defence Construction] unilaterally modified a key aspect for qualification, and thereby did not act in accordance with the Selection Criteria, failing to eliminate tenderers which were not compliant with the essential requirements contained in the tender." By liberalizing the selection criteria during the tender review process, Defence Construction, Symtron submits, has "dangerously" eliminated the most important technical criterion requirement and violated Articles 1014(4)(b) and (c) of NAFTA in failing to inform Symtron of amendments to the evaluation process and to permit Symtron to submit an amended bid.

Symtron also submits that, contrary to the provisions of paragraph 2 of Amendment No. 1 to the tender documents, Defence Construction failed to provide it with a 48-hour price revision deadline. In effect, it submits that it was denied the opportunity to submit its best and final offer. It suggests that Defence Construction lacks a clear understanding regarding the distinction between "price adjustment" and "price revision." Though it attempted on several occasions to communicate its view on this point to Defence Construction, it basically remained non-responsive. Therefore, Symtron invokes the rule of interpretation known as "*contra proferentem*" and requests that the terms of the tender be strictly construed as against Defence Construction.

Concerning discriminatory practices in favour of ICS, Symtron submits that Defence Construction appears to have given more weight to a number of requests and representations received from ICS than to similar representations that it made. Indeed, Symtron submits that the first extension of the tender period was granted by Defence Construction primarily to accommodate ICS, even though it was more critical to Symtron in terms of its ongoing participation in the tendering process and the maintenance of the competitive process. Similarly, Symtron submits that the second extension was granted mainly to accommodate ICS's difficulties in arranging its bid security instruments. This, Symtron submits, constitutes a discriminatory practice by Defence Construction, in that it granted an unfair competitive advantage to ICS to the detriment of the equitable treatment of all bidders. Finally, Symtron notes that direct communication between ICS and Defence Construction before tender closing in respect of the qualifications of another bidder were improper.

In sum, Symtron submits that Defence Construction had no authority to accept non-compliant tenders and that it has no authority to unilaterally eliminate a mandatory stage of the tendering process. Essentially, Symtron submits that a well-constructed solicitation for an important requirement was effectively put aside by Defence Construction during the time of tender evaluation. Symtron concludes by stating that it is the only qualified bidder and, accordingly, that it should be awarded the contract and its costs for bringing this complaint.

Defence Construction's Position

In its response to the complaint, Defence Construction submits, in relation to the issue of the price adjustment period, that paragraphs 1 and 2 of Amendment No. 1 to the tender documents advised all bidders that: (1) following tender closing, each submitted technical proposal would be analyzed for general conformance to the technical and administrative requirements of the tender; (2) clarifications, corrections and confirmations might be requested by the owner's (DND) review team; (3) written responses to each such communication would be required from bidders; (4) bidders would be given an opportunity to consider the cost impact that this information may have on their proposals; (5) price adjustments would be permitted

during the proposal review period; (6) all changes should be priced as an addition, a deletion or a no cost change to the undisclosed base price contained in bidders' envelopes "B"; (7) when all technical proposals have been confirmed as meeting the tender requirements, all bidders would receive a 48-hour advance notice establishing a price revision deadline and time for public opening of the price envelopes; and (8) additions or deletions received prior to the opening of envelopes "B" would then be added or subtracted from the base price to arrive at the final tender prices. Defence Construction further submits that, consistent with the directions in Amendment No. 1, the three bidders were clearly informed on January 13, 1997, that January 15, 1997, would be the deadline for submitting responses to the request for clarification and that the date for associated price adjustments would be January 17, 1997, thereby providing bidders with the 48-hour notice mentioned in Amendment No. 1. Concluding on this point, Defence Construction submits that, although "[t]he instructions in Amendment no. 1., in respect to the 48 hours notice, may very well be open to interpretation, however it remains that the same instructions were communicated at the same time to all prospective bidders who had requested and received tender documents."

Concerning Symtron's allegation of bias for allowing an "eleventh Hour" time extension to ICS allegedly to permit it to provide a standby letter of credit facility, Defence Construction states that the tender closing date was extended twice, the first time to December 11, 1996, at the request of all three bidders, and the second time to January 7, 1997, at the request of ICS. It further submits, in support of the latter time extension, that: Amendment No. 7 posted on the OBS on December 9, 1996, was issued too close to the December 11, 1996, tender closing date; Amendment No. 7 contained information that all bidders would have to take into consideration in preparing their bids; one bidder asked for clarification of bid security requirements and information contained in Amendment No. 7; it wanted to ensure that the three bidders would submit tenders to achieve the maximization of the competition; and, with the Christmas holiday season fast approaching, the evaluation of proposals would not be carried out before the new year.

Concerning the bidder qualification issue, Defence Construction states that the "Instructions to Tenderers DCL Form 193 (R-03-96) forming part of the Standard Construction Contract Documents DCL Form 250 (03-96)" anticipate various arrangements in the signing of tenders and, thus, recognize that the party which signs the tender can have different compositions, i.e. a company acting as a general contractor with a myriad of specialist subcontractors and suppliers, each with individual resources and competence which contribute to make the bidder who signs the tender collectively responsive to the stipulations of the plans and specifications. It submits that the DND evaluation committee concluded, on the basis of the information presented by bidders (be they a design-build company and their subcontractors or a team of companies with a collective design-build capability), in Appendices 001, 002 and 003 of section 00002, "Selection Criteria," of the RFP, that all three bidders had either individually or collectively the competence and resources required to design, build and install the specified FFTFs.

Concerning the above allegations and their relationship to various provisions of NAFTA, Defence Construction submits that, in compliance with the spirit and intent of Article 1008 of NAFTA, it advertised the requirement on the OBS as a competitive public tender call and that the determination of the bidders' qualifications was made by a DND committee comprised of technical personnel with expertise in the FFTF field and knowledge of available industry resources in this specialized field, as well as on the basis of information provided by bidders in fulfilment of the requirements of section 00002, "Selection Criteria," and section 00100, "Proposal Content," of the tender documents.

Defence Construction further submits that no breach of Article 1015(4)(a) of NAFTA occurred, since all three bidders met the required qualification criteria. Similarly, given that no negotiation took place during this procurement, no breach of Article 1014(1) of NAFTA occurred. In respect of Symtron's allegation that Defence Construction breached Article 1014(4)(1) of NAFTA by failing to provide it with an opportunity to submit an amended proposal in accordance with a common deadline, Defence Construction submits that Amendment No. 1 to the tender documents did not provide for the submission of amended proposals and that none was requested nor received from any bidder. However, Amendment No. 1 does provide for a price adjustment, if required, to take place, in accordance with a common deadline, prior to the opening of price envelopes. The three bidders were advised on January 13, 1997, of the common deadline of January 17, 1997, to submit price adjustments. Moreover, Defence Construction submits that it did not breach Article 1014(4)(a) of NAFTA, since, in its view, all three bidders were properly declared qualified. Finally, Defence Construction submits that Article 1014(4)(b) of NAFTA cannot possibly have been breached, since no amendments to the evaluation criteria and technical requirements took place and, accordingly, no reason existed to permit Symtron, or the other bidders, to submit an amended tender.

In summary, Defence Construction submits that, for the above reasons, this complaint is unjustified.

Position of Interveners

ICS

ICS submits that the complaint is, at least in part, unjustified insofar as it is concerned. Specifically, ICS submits, in respect of the 48-hour notice issue, that, during the procurement process, all bidders were subject to the same conditions in both the bidding and the proposal evaluation processes and that, on this basis, Defence Construction was well-founded to dismiss the complaint. Concerning the supplementary allegation that ICS would not have qualified with respect to the security requirements of the tender documents if a second extension to the tender closing date had not been granted, ICS denies the allegation as totally ill-founded. The statement is purely speculative, irrelevant and erroneous, since it was, at all times, in the position to respect the security requirements of the tender documents and it, in fact, deposited a certified cheque on the tender closing date in compliance with tender instructions. ICS states that Amendment No. 6 to the tender documents, incorporating the acceptability of letters of credit as bid and contract security into the tender documents, was in no way made on its instigation. The time extension request that it made was to assess the impact of Amendment No. 7 on its bid amount, to allow time to conclude its consideration of the use of bonding as an alternative available to bidders and to obtain clarification of certain terms of payment in Amendment No. 1 to reflect a five-year warranty period maintenance service requirement. In summary, ICS submits that it requested additional time not to provide a standby letter of credit facility, but rather to obtain clarifications on issues that could have a major impact on the amount of its bid.

Concerning the bidder qualification issue, ICS submits that, by virtue of the information presented in its proposal, it has demonstrated that it has the necessary qualifications to perform this requirement. Specifically, its involvement and experience with the Australian Navy and, amongst others, the West Midlands project demonstrate that it has successfully completed a propane-fuelled, computer-controlled firefighter training system of a minimum value of $1 million. Therefore, it is a qualified bidder on this project. In addition, for this project, it will draw on the additional resources of two specialized companies to respond more completely to the project. These two subcontractors are named in its submission, which also specifies that ICS has all the necessary experience in managing these specialized companies. With regards to

the qualifications of Securiplex to be selected for award, ICS submits that Securiplex, by itself, is not qualified, since it has never completed a system such as the one described for qualification. Insofar as Securiplex might be qualified on the basis of the past experience of Contraves (a conclusion that it denies), ICS submits that Contraves is no longer available to the Securiplex team. In any event, ICS submits that Contraves would only have a minor consulting role in this project and that it has no experience as a main contractor in the field of FFTFs and even less in co-ordinating specialized subcontractors in that field. In summary, ICS submits that the decision of the evaluation committee in respect of Securiplex's proposal is ill-founded and that Defence Construction should have granted Symtron's complaint on the qualification issue in respect of Securiplex.

ICS, in its additional comments on the GIR, submits that Contraves cannot be represented as a critical member of the Securiplex team when its role on this project consists only of a quality assurance function. It requests that the Tribunal dismiss the complaint against ICS, direct Defence Construction to award ICS the contract as the lowest compliant bidder and award it its reasonable costs incurred in preparing comments and filing them in opposition to the complaint.

Securiplex

Securiplex strenuously denies Symtron's allegations that its design team failed to meet the qualifications stipulated in the RFP or lacks the competence to complete the work contemplated by the contract. To the contrary, it submits that it meets these qualifications and that Defence Construction recognized this fact both before and after bid opening. The complaint, it submits, is merely one in a series of steps taken by Symtron for the deliberate purpose of preventing the contract from being awarded to anyone other than itself, no matter the cost.

Specifically, Securiplex submits that all bidders were given proper notice of the final date and time for submission of any price adjustments and were treated fairly insofar as extensions of time were concerned. It submits that Symtron never suggested that it intended to lower its price and that neither of the other two bidders was confused as to when the time for price adjustments expired.

Concerning its qualifications to respond to the RFP and its technical capability to complete the contract, Securiplex states that Symtron's allegations in this respect are "categorically untrue." It submits that the Securiplex team, including Pro-Safe and Contraves as subcontractors, collectively met the requirement of section 00002 of the RFP which stipulates that, before a bid may be considered, it must meet a minimum mandatory qualification requirement. This fact, Securiplex submits, was recognized by Defence Construction on a number of occasions. Moreover, Securiplex submits that it never misrepresented, in its proposal, its own experience and expertise nor misportrayed Contraves' involvement in this proposed project. In any case, it asserts that "with or without Contraves, Securiplex and Pro-Safe are ready, willing and fully able to complete the Contract."

Concerning Symtron's allegations of unfair treatment by Defence Construction because it is a US company, Securiplex joins Defence Construction in rejecting that claim. It submits that the Tribunal should consider, in this respect, Symtron's own conduct which, in its opinion, "has at all times been calculated to eliminate any and all competition to its pursuit of the Contract." Symtron gained and exploited an unfair advantage by influencing the introduction in the RFP of the $1 million condition which, its claims, it alone can meet. Next, it sent surreptitiously to Defence Construction a copy of minutes of the settlement of its outstanding litigation in the United States after the bids were opened and it had been revealed as the

highest bidder. Finally, it refused to take up Contraves' contract with Securiplex or allow Contraves to do so, as provided for under the terms of paragraph 11 of Symtron's settlement with Contraves.

In concluding, Securiplex submits that Defence Construction properly determined that it complied with the requirements set out in the RFP and that it has no knowledge of the accuracy of Symtron's allegations against ICS. The complaint, Securiplex submits, should be dismissed, and it should be awarded its reasonable costs of responding to the complaint.

In the addendum to its comments on the GIR, Securiplex submits that there is no basis for Symtron's allegation that Defence Construction breached Articles 1015(4)(a) and 1014(4)(a) of NAFTA for considering the Securiplex tender as it did. Insofar as Article 1014(1) of NAFTA is concerned and Symtron's allegation that Defence Construction conducted improper negotiations, Securiplex submits that there is no evidence of any negotiations between itself and Defence Construction. However, Securiplex submits that the same cannot be said of the discussions between ICS and Defence Construction, particularly as it concerns the time extension of the tender closing requested by ICS on December 10, 1996. Indeed, it submits that, in deciding to grant a time extension to allow ICS to meet the requirements of the RFP for a performance bond, Defence Construction may have improperly conducted negotiations. Short of that time extension, Securiplex submits that ICS would not have been able to submit a tender and, as such, Defence Construction gave ICS an improper advantage over both Symtron and Securiplex contrary to Article 1014 of NAFTA. Consequently, it submits that it would not, in any circumstances, be fair to recommend award of the contract to ICS.

Pro-Safe

Pro-Safe asserts that Defence Construction did, through the tendering process documentation, give proper and ample notification to Pro-Safe and Securiplex of the process for a price adjustment after initial submission, as well as of the deadline for these to be received by Defence Construction.

Concerning the qualification issue, Pro-Safe submits that it concurs with Symtron to the effect that ICS does not technically qualify for this project due to its limited experience with water bath burner technology. In fact, it submits that Symtron itself has never used such technology for any interior installations. Moreover, it submits that the unique control and delivery technology required in the RFP is not only not exclusive to Symtron or anyone else but also has never been demonstrated by Symtron in the format prescribed in the RFP. Pro-Safe, for its part, has in fact lead the field in water bath and automated control since 1983 for various interior applications, and Securiplex is a recognized leader in Computer/PLC/Hazard senior product design and manufacture. Further, it submits that Contraves' participation in the Securiplex proposal is accurate. It concludes by stating that, "if Contraves is not able to directly participate with Securiplex/Pro-Safe, (since we only learned of the Contraves/Symtron situation after having been awarded the contract), we Pro-Safe and Securiplex together are well equipped to put a competent team together with or without Contraves." Pro-Safe finally submits that the GIR improperly portrays the technical/project management expertise of certain Contraves staff and, by association, that of Pro-Safe and Securiplex. It also stresses that any references by Symtron to indicate patent infringement preventing Pro-Safe from meeting the RFP criteria can be totally disregarded.

In summary, Pro-Safe asserts that the Securiplex/Pro-Safe tender was not only the lowest, but it also met the tender review criteria. Consequently, it submits that the Tribunal should determine that the complaint

is not valid and that it should award Pro-Safe its reasonable costs incurred in preparing a response and filing it in opposition to the complaint.

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.

Symtron alleged that, in conducting this procurement, Defence Construction and DND improperly declared, as qualified, two other bidders that failed to meet the minimum mandatory qualification requirement. Further, Symtron alleged that Defence Construction modified unilaterally, and after bid closing, the 48-hour period during which bidders might provide price revisions and, thereby, improperly initiated and conducted negotiations. Finally, it alleged that Defence Construction appears to have given more weight to a number of requests and representations that it received from ICS than to similar representations that it made, thereby showing a bias in favour of ICS. These actions, Symtron submits, are contrary to the provisions of Article 1015(4)(a), Article 1014(1), Articles 1014(4)(a), (b), (c) and (d) and Article 1008 of NAFTA.

Addressing, first, that part of the complaint that relates to the provisions of Amendment No. 1 to the tender documents, paragraphs 1 and 2,[5] the Tribunal notes that the amendment refers to price adjustments and a price revision deadline, arguably two distinct notions, particularly when utilized in separate paragraphs, as is the case here. In addition, the Tribunal is of the view that it is not unreasonable to argue, as did Symtron, that two different time periods existed in which to achieve the price adjustments and the price revision. In paragraph 1, there would be a time period of undefined length shortly following tender closing when technical proposals would be analyzed by Defence Construction and DND for general conformance and to allow for clarifications, corrections, confirmations and price adjustments by bidders. In paragraph 2, there would be a 48-hour time period, starting after all the technical proposals had been confirmed by Defence Construction as meeting the tender requirements, in which to make price revisions. Such a reading, however, is not free from significant difficulties, particularly when one reads all the provisions of paragraphs 1 and 2 together. Specifically, paragraph 1 states that "[p]rice adjustments will be permitted during the proposal review period" in the form of "an addition, deletion or no cost change to the undisclosed base price contained in their envelope 'B'." Paragraph 2 then states that price additions or deletions "will then be added or

5. 1. Shortly following the tender closing each technical proposal submitted will be analyzed for general conformance to the technical and administrative requirements of the tender. Clarifications, corrections and confirmations may be requested by the owner's review team at that time. A written response to each such communication is required. Bidders will be given the opportunity to consider the cost impact that this information may have on their proposal. Price adjustments will be permitted during the proposal review period. All changes should be priced either as an addition, deletion or no cost change to the undisclosed base price contained in their envelope "B".

   2. When all technical proposals have been confirmed as meeting the tender requirements all bidders will receive a forty-eight (48) hour advance notice establishing a price revision deadline and time for public opening of the price envelopes. Additions or deletions received prior to the opening of envelope "B" will then be added or subtracted from the base price to arrive at final tendered prices.

subtracted from the base [not adjusted] price" included in the unopened envelope "B". In the Tribunal's view, this wording, though ambiguous, tends to support Defence Construction's position that Amendment No. 1 did not provide for the submission of amended proposals, but only for clarifications and price adjustments. Furthermore, the text does not refer to price adjustments and price revisions, but to price adjustments and a price revision deadline.

Moreover, the Tribunal notes that all bidders, including Symtron, were advised in writing on January 13, 1997, that price adjustments would not be accepted by Defence Construction past "15:00 hours (local time)" on January 17, 1997. This time period is more than 48 hours. The same direction was reiterated in writing to all bidders on January 15, 1997. Further, Symtron, by its own admission, was aware of this direction at the latest on the morning of January 16, 1997, approximately 30 hours before the deadline. Further, the Tribunal notes that Symtron itself, in its objection letter of January 29, 1997, talks about not being provided "the full forty-eight hour opportunity to provide a price adjustment" and does not make the distinction between price adjustment and price revision until as late as its February 6, 1997, letter.

Concluding on this point, the Tribunal finds that paragraphs 1 and 2 of Amendment No. 1 to the tender documents were ambiguous in their formulation. If this was all there is to the matter, Defence Construction might be responsible for the ambiguity, since it wrote the provisions. However, to the extent that Symtron was surprised by Defence Construction's interpretation of the said provisions (a surprise, in the Tribunal's view, somewhat tempered by the text of Symtron's own objection letter of January 29, 1997), it nevertheless had ample time, if not to adjust/revise its price, at least to object to Defence Construction about the reduced time to respond. This was not done. The Tribunal believes that Symtron should have done so, not only to protect its business interest but also to signal to Defence Construction what clearly had now become, at least in Symtron's perception, a significant deviation or ambiguity. Defence Construction would then have had the opportunity to correct the situation as it deemed appropriate. Moreover, it was particularly important for Symtron to do so in the circumstances, as it was aware that the total prices of the various offers would be the object of a public opening on January 17, 1997. The Tribunal notes that the two other bidders interpreted the said provisions in the same manner as Defence Construction and provided price adjustments, upward and downward in time. At no time did they ask for or provide amended proposals nor did Defence Construction ask for any. Accordingly, the Tribunal determines that Defence Construction did not amend unilaterally, after bid closing, the conditions set out in paragraphs 1 and 2 of Amendment No. 1. Although the Tribunal finds the provisions ambiguous, it is also of the opinion that Defence Construction acted in good faith in this matter and that, though Symtron had an opportunity to bring its interpretation of the clauses to Defence Construction's attention, in the circumstances, before January 17, 1997, the date set for the public opening of tenders, it failed to do so. The Tribunal thus finds that Defence Construction did not breach the provisions of NAFTA in acting as it did in respect of the price adjustment/price revision issue.

Concerning Symtron's allegation that Defence Construction, in contravention of Article 1008 of NAFTA, has treated ICS more favourably than the other bidders, particularly in accepting to extend the tender period to January 7, 1997, allegedly as a result of improper negotiations, the Tribunal notes the following. In its request of December 10, 1996, ICS invokes three reasons in the following order: (1) to analyze and incorporate amendments to the tender, particularly Amendment No. 7 that it received on

December 9, 1997; (2) to conclude a bonding agreement with a surety company;[6] and (3) to clarify the implications of paragraph 6 of Amendment No. 1 concerning certain warranty provisions. In the Tribunal's view, there is little doubt that the security instruments issue is an important consideration of ICS's request, but it nevertheless was only one of the three reasons that it submitted to Defence Construction. In explaining its decision to grant the time extension, Defence Construction submits that it was guided by the following considerations: (1) Amendment No. 7, which affected all bidders, was issued on December 9, 1997, too close to the tender closing date of December 11, 1997; (2) ICS needed time to clarify certain warranty provisions in Amendment No. 1; (3) Defence Construction was concerned that it might end up with less than the three bidders that it then knew were seriously involved in this competition; and (4) given that the Christmas holiday season was fast approaching and considering that the required evaluation of the proposals submitted would not be carried out until after the new year, it was of the view that some time was available.

The Tribunal notes that the granting of time extensions is within Defence Construction's discretion. The Tribunal also finds the above considerations by Defence Construction to be reasonable in the circumstances. It is satisfied that the time extension granted is not contrary to the principle of equal access and non-discrimination and did not have the effect of precluding competition.

The Tribunal is also satisfied that no negotiations, as contemplated by Article 1014 of NAFTA, took place. In the Tribunal's opinion, once the tender period closed on January 7, 1997, Defence Construction proceeded to seek clarifications from all bidders, including, as appropriate, price adjustments as was envisaged in the RFP. At no time did Defence Construction seek or obtain revised proposals from any bidders on the basis of an amended specification. Accordingly, the Tribunal determines that there is no basis in fact to support Symtron's allegations that, contrary to Article 1014(1) of NAFTA, Defence Construction improperly initiated negotiations. By way of consequence, the Tribunal also determines that there is no foundation to Symtron's allegations that Defence Construction breached the provisions of Articles 1014(4)(a), (b), (c) and (d) of NAFTA, since such breaches could only materialize if negotiations had been conducted.

Dealing finally with the bidder qualification issue, the Tribunal must determine whether, contrary to the provisions of Article 1015(4)(a) of NAFTA, Defence Construction considered for award proposals which, at the time of opening, failed to conform to the essential requirements of the tender documents. Specifically, the Tribunal must determine whether Defence Construction acted properly when it determined that Symtron, Securiplex and ICS met the minimum mandatory qualification requirement set out in paragraph 1 of section 00002 of the RFP. In addition, the Tribunal must determine whether Defence

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6. ICS is a small to medium size Canadian corporation that does not normally have access to Labour and Material and Performance Bonding markets for a project of this size. ICS competitors in this field are typically large U.S. corporations that are part of industrial conglomerates with existing bonding facilities. The Bid Bond and Contract Bonding requirements of this tender put a severe, if not insurmountable, burden on developing Canadian companies.

   ICS successfully tenders and completes multi-million dollar projects in the U.S. utilizing the performance guarantee services of Canadian Commercial Corporation, an agency of the Canadian Government. There seems to be an irony in the fact that the Canadian Government is willing to take the risk of our performance for export purposes, but not for domestic projects.

   Although we are advised that bonding will most likely be available, at this time we do not have an Agreement to Bond from a surety company. An extension to the tender closing date will allow ICS to conclude this process.

Construction acted in accordance with the provisions of paragraph 3[7] of section 00002 of the RFP by determining that the requirements of data sheets as per item 12 of section 00100 had been satisfied or that the references given in these data sheets could be verified.

In the GIR, Defence Construction describes its actions as follows: "The three proposals were submitted by bidders which were already known to the members of the evaluation committee. Therefore the evaluation committee confined its verification of each bidder's past experience to a confirmation that the bidders had indicated on the submitted Annexes 001, 002, and 003 that they, or at least one of their team members, as stipulated by the selection criteria had participated in the construction of a propane fired computer controlled fire fighter training facility in value over CAN$1M."

The Tribunal is of the view that Defence Construction was under a twofold requirement in respect of the determination of the qualification of bidders before proceeding with the full evaluation of the proposals. It had to determine, first, whether the provisions of paragraph 3 of section 00002 of the RFP had been met and, second, whether the provisions of paragraph 1 of section 00002 of the RFP had also been met. Concerning the provisions of paragraph 3, the Tribunal concludes that Defence Construction conducted its assessment of the information submitted in the proposals by relying on its knowledge of the bidders. The Tribunal is not satisfied that the assessment conducted by Defence Construction was sufficient.

Concerning the provision in paragraph 1 of section 00002 of the RFP, the Tribunal is of the view that Securiplex could only have been declared qualified by Defence Construction using an interpretation of the qualification criteria which is not in accordance with the plain meaning of the words of paragraph 1, which requires "[a] company's successful completion" of similar projects. In the Tribunal's view, the notion of a company cannot be extended to mean any member of a bidder's team. In reviewing the evidence before it, the Tribunal finds that Securiplex never claimed any successful completion of the stated qualification requirement in its own name. Instead, all such successes are claimed under the name of Contraves, a subcontractor to Securiplex. Contraves is not the bidder. Accordingly, the Tribunal determines that Defence Construction erroneously applied the mandatory requirement in determining that Securiplex was a company within the meaning of paragraph 1. Securiplex, with or without Contraves, was not a company meeting the required minimum mandatory qualification requirement of the RFP.

While the Tribunal agrees with Symtron that "participation" and "completion" are two different concepts, nevertheless, a company can complete a major project on its own or in concert with other parties. ICS claims, in its own name, the successful completion of the stated minimum mandatory qualification requirement in its proposal, particularly in respect of a project of the Australian Navy. ICS's involvement in the above-mentioned project was in the form of a joint venture, as indicated in its proposal and as provided for in the mandatory previous experience data sheets in the RFP. The Tribunal believes that participation in a joint venture would be sufficient to qualify ICS as meeting the minimum requirement, if Defence Construction is satisfied that ICS' participation in the joint venture allowed it to acquire the expertise and know-how to be able to implement such a project. Symtron has presented evidence which casts doubt on the level of involvement of ICS in this project. ICS, in turn, has provided an affidavit explaining in detail its involvement. Defence Construction needs to conduct an independent verification of this claim.

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7. The Proposal will not be evaluated if the Mandatory previous experience data sheets as per item 12 - section 00100, have not been satisfied or reference [cannot] be verified and therefore will be disqualified and Envelope "B" will be returned unopened.

It is clear to the Tribunal that, from the very beginning of this procurement, DND and Defence Construction wanted to limit participation in this solicitation to qualified firms only. However, it is also the Tribunal's opinion that DND and Defence Construction were not attempting to run a sole source procurement in disguise. To argue now, as Symtron does, that the provisions of the minimum mandatory qualification requirement can only mean successful completion by one company alone proposes an interpretation which does not agree with the text of the provision and the declared intent of DND and Defence Construction.

In conclusion, the Tribunal finds that Defence Construction improperly applied the minimum mandatory qualification requirement provisions of the RFP. As a consequence, Defence Construction may now be considering for award proposals which may or may not meet all the essential requirements of the RFP as of the time of bid opening. This, the Tribunal finds, is a breach of the provisions of Article 1015(4)(a) of NAFTA.

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

The Tribunal recommends that Defence Construction re-evaluate Symtron's and ICS's proposals in respect of the minimum mandatory qualification requirement, according to the provisions of the RFP and NAFTA, and proceed thereon with this procurement as provided in the RFP and NAFTA.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards Symtron its reasonable costs incurred in relation to filing and proceeding with its complaint.

Patricia M. Close

Patricia M. Close
Member