CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, September 10, 1997

File No.: PR-97-008

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.

Pursuant to subsection 30.15(4) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Symtron Systems Inc. its reasonable costs incurred in preparing a response to the solicitation.

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.

Charles A. Gracey
Member

Susanne Grimes
Acting Secretary

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Date of Determination:	September 10, 1997
Tribunal Member:	Charles A. Gracey
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Joël J. Robichaud
Complainant:	Symtron Systems Inc.
Counsel for the Complainant:	Marshall N. Margolis Lynda P.S. Covello
Intervener:	I.C.S. International Code Fire Services Inc.
Counsel for the Intervener:	Louise Tremblay Brian Riordan Ronald M. Auclair
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 June 12, 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 fire fighter training systems (FFTS), one in Halifax, Nova Scotia, and one in Esquimalt, British Columbia, for the Department of National Defence (DND).

Symtron alleged that the proposed award of the contract to I.C.S. International Code Fire Services Inc. (ICS) in spite of its complaints, the deficiencies of the Morrison Hershfield[2] report (the MH Report) and ICS's clear non-compliance with Defence Construction's own selection criteria has had the effect of discriminating against Symtron in favour of ICS. This, according to Symtron, is in clear contravention of the *North American Free Trade Agreement*[3] (NAFTA), specifically Article 1008, Article 1014(4)(a) and Articles 1015(4)(a) and 1015(4)(d).

Symtron requested, as a remedy, that the award be held in abeyance until such time as the Canadian International Trade Tribunal (the Tribunal) makes a final determination on the complaint. It also requested to be reimbursed its reasonable costs incurred in filing and proceeding with its complaint. Symtron requested that the Tribunal recommend the termination of any award or proposed award of the contract and that it award the contract, instead, to Symtron. In the alternative, if Symtron is not awarded the contract, it requested that the Tribunal recommend that Defence Construction present to the Tribunal 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.

BACKGROUND

On June 13, 1997, the Tribunal determined that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[4] (the Regulations) had been met

1. R.S.C. 1985, c. 47 (4th Supp.).
2. Engineering consulting firm engaged by Defence Construction to conduct an independent verification of ICS's minimum qualifications to compete for this requirement.
3. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).
4. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

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in respect of the complaint and decided to conduct an inquiry. On the same day, the Tribunal issued an order postponing the award of any contract in this solicitation until it determined the validity of the complaint. On June 16, 1997, Defence Construction informed the Tribunal that a contract had been awarded to ICS on June 10, 1997. Accordingly, on June 23, 1997, the Tribunal rescinded its order of June 13, 1997. On July 4, 1997, Defence Construction filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 or the *Canadian International Trade Tribunal Rules*.[5] On July 9, 1997, the Tribunal granted ICS leave to intervene in this complaint. On July 23, 1997, ICS filed comments on the GIR with the Tribunal and, on July 24, 1997, Symtron filed its comments on the GIR with the Tribunal. On July 30, 1997, the Tribunal asked Defence Construction to produce additional information. Defence Construction responded to the Tribunal's request on July 31, 1997. On August 8, 1997, Symtron filed with the Tribunal comments on the additional information.

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 the record.

PROCUREMENT PROCESS

A Notice of Proposed Procurement for this requirement along with the solicitation documents were posted on the Open Bidding Service (OBS) on October 18, 1996. On February 27, 1997, Symtron filed a complaint with the Tribunal alleging, in part, that 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. On the same day, the Tribunal decided to initiate an inquiry into the complaint and, on February 28, 1997, it issued an order postponing the award of any contract in this matter.

On May 6, 1997, the Tribunal issued its determination in the matter.[6] The Tribunal found, in part, that Defence Construction improperly applied the minimum mandatory qualification requirement provisions of the Request for Proposal (RFP), resulting in Defence Construction considering for award suppliers which may or may not have met all the essential requirements set out in the RFP. As a result, the Tribunal recommended 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.[7]"

The minimum mandatory qualification requirement referred to above is set out in section 00002 of the RFP, "SELECTION CRITERIA," and reads, in part, as follows:

> 1. 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.

5. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.
6. *Symtron Systems Inc.*, File No. PR-96-030, *Determination of the Tribunal*.
7. *Ibid.* at 16.

> 3. 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"[8] will be returned unopened.

Item 12, section 00100 of the RFP reads as follows:

> Only companies and their key personnel that have previously supplied and built Computer Controlled Fire Fighting Training Facilities shall be considered for this project. Reference section 00002, Selection Criteria.
>
> To assess the previous experience of each proponent, the proposal must contain:
>
> .1 Complete the Application Form included with this request.
> .2 Complete the prior experience forms included with this request.
> .3 Complete the Experience of Key Personnel on Comparable Projects Form included with the request.
> .4 Forms must be complete.
> .5 Use one form per job.

After surveying the professional community with the prerequisite credentials in the fire specialty field, on May 20, 1997, Defence Construction and DND retained the consulting firm of Morrison Hershfield to provide an independent verification to determine whether the bid submissions of ICS and Symtron complied with the minimum mandatory qualification requirement in the RFP.

Morrison Hershfield submitted its report dated June 5, 1997, to Defence Construction outlining the approach taken in the conduct of the review and setting out its conclusions.

The approach consisted in reviewing relevant documentation, including: (a) pages 15 and 16 of the Tribunal's determination of May 6, 1997; (b) the Fire Fighter Training System Performance Specifications; and (c) extracts from ICS's and Symtron's proposals, namely, Appendix 001 "Application Form," Appendix 002 "Mandatory Prior Experience Date Sheet" and Appendix 003 "Experience of Key Personnel on Comparable Projects." As well, the approach involved the development of a questionnaire based on the mandatory criteria to assist in gathering information from a number of telephone contacts.

The conclusion of the MH Report reads, in full, as follows:

> It is our opinion that both *ICS International Code Fire Services Inc.* and *Symtron Systems, Inc.* comply with the mandatory previous experience criteria as outlined in the Performance Specification and Section 1.1 of this report.
>
> The named references confirmed that the "mandatory prior experience" and "experience of key personnel on comparable projects" information supplied in Appendices 002 and 003 of the bid submissions was accurate and complete. The references verified that both companies and their listed personnel have demonstrated experience in the design, supply and building of computer controlled, propane fueled fire fighting training systems having a minimum construction value of $1,000,000 Cn. Both companies have experience in managing and coordinating a project of this scale to successful completion.

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8. Envelope containing a bidder's financial proposal.

On June 10, 1997, Defence Construction sent copies of the MH Report to the Tribunal, ICS and Symtron and issued a contract to ICS. On June 16, 1997, Defence Construction advised the Tribunal that a contract had been awarded to ICS.

VALIDITY OF THE COMPLAINT

Symtron's Position

In its comments on the GIR, Symtron submits that Defence Construction has failed to properly construe its mandate from the Tribunal by failing to reference NAFTA and the RFP. The misrepresentation, Symtron submits, tainted the instructions given by Defence Construction to Morrison Hershfield.

Symtron further submits that Defence Construction failed to provide Symtron an opportunity to comment on the MH Report before contract award, thus denying Symtron its fundamental right under Canadian law, including NAFTA, to the principles of natural justice. Symtron submits that "[f]undamental legal rights must be paramount to operational considerations, including alleged environmental issues."

Symtron also submits that the fact that only the ICS tender was subject to a final administrative review prior to the award of the contract strongly suggests bias in favour of ICS in violation of NAFTA.

Symtron submits that Defence Construction's conclusion that only the last two pages of the Tribunal's determination of May 6, 1997, were pertinent to the re-evaluation of the qualifications of Symtron and ICS was an arbitrary decision and an error in principle. Further, Defence Construction's conclusion that the need to verify a joint venture role for ICS in the Australian Navy Project was unnecessary is a fundamental error in principle and interpretation of the Tribunal's ruling.

Moreover, Symtron submits that Defence Construction improperly expanded the definition of the selection criteria to include the value of the overall project, including civil works in direct conflict with the plain reading of the performance specification in the RFP. Such an interpretation, Symtron submits, leads to unqualified parties being qualified based on ancillary construction work which was done by parties other than the bidder or which relates to elements other than those of the relevant system. The tender document itself recognizes and anticipates that the fire fighting training facility portion will be constructed and completed separately from the construction of the FFTS. Symtron concludes that Defence Construction's instructions to Morrison Hershfield were misleading in this respect.

Symtron also states that Defence Construction does not provide in its investigation any details of the answers which were provided to Morrison Hershfield to several questions posed. Therefore, Symtron submits, it is impossible to assess whether Morrison Hershfield properly applied the information at hand or whether the conclusions that it reached are supportable on the basis of the evidence gathered. For example, Morrison Hershfield failed to verify whether ICS was a joint venture partner in the Australian Navy Project, and failure to make this verification should result in the disqualification of ICS. Symtron also submits that Defence Construction failed to state, as it clearly should have, that the contractual linkage between ICS and the Australian Construction Services was in the nature of a subcontract and based on the estimated value of the subcontract and the task performed by ICS, not a major subcontract.

In sum, Symtron submits that Defence Construction has failed to operate in accordance with the spirit and intention of NAFTA. The end result, Symtron submits, lead directly to the misdirection of Morrison Hershfield as to the scope and thoroughness of its task of verification.

Defence Construction's Position

In its response to the complaint, Defence Construction submits that Symtron's complaint is without merit and that it should be rejected. Specifically, it submits that an independent evaluation must be based on impartial and unbiased information. Accordingly, Morrison Hershfield was provided with information which was impartial yet pertinent to the issue of minimum mandatory requirement. It was provided with all the information as originally submitted by the bidders in respect of the issue in dispute. This information, Defence Construction submits, provided the starting point for an independent approach to carry out interviews with named references which would either corroborate or disprove a bidder's claim that it met the stipulated minimum requirements.

Concerning the question of whether or not ICS was a joint venture partner in the Australian Navy Project, Defence Construction submits that there was no need to verify this point, as the MH Report established that the role played by ICS in that project "was a major one" and that "the key technical expertise with respect to system design, simulation, commissioning and training was supplied by ICS." Defence Construction submits that, on this basis alone, the MH Report demonstrated that ICS met the mandatory minimum requirements of the specification.

Concerning the alleged misconstruction of the selection criteria by Morrison Hershfield, Defence Construction submits that, in the context, the word "construction" means the supply and installation of a component or system complete with any ancillary activities. It, therefore, must include all costs associated with such an installation and it is on this basis that Morrison Hershfield determined that the Australian Navy Project had a construction value which exceeded CAN$1,000,000.

Concerning the deficiencies in the review process proper, Defence Construction submits that the questions enable Morrison Hershfield to obtain the essential pertinent information to which it could apply its professional expertise. Concerning the contacts selected, Defence Construction submits that selecting a representative of the user, i.e. the Australian Navy, was more appropriate than selecting a representative of the Australian Construction Services. The fact that not all references mentioned were contacted indicates, according to Defence Construction, that the review was carried out in an efficient manner and not that the review was not thorough.

Concerning the specific breaches of NAFTA, Defence Construction submits in relation to Article 1008, that: (1) the requirement for FFTSs was advertised on the OBS and submitted to a competitive public tender call; (2) the determination of the qualifications of the bidders was made by a committee of DND technical personnel knowledgeable and experienced in the FFTS field; (3) the committee, though it originally qualified the three bidders, ruled out one of the bidders when it became apparent that its situation had changed substantively; and (4), following the Tribunal's decision, it accepted its recommendation and commissioned an independent re-evaluation. These actions, Defence Construction submits, involve transparent and non-discriminatory procedures. Finally, on the questions of Articles 1014(4)(a) and 1015(4)(a) of NAFTA, Defence Construction submits that the Tribunal already decided in File No. PR-96-030 that no negotiations of the sort contemplated in Article 1014 of NAFTA took place. The independent re-evaluation made by Morrison Hershfield has confirmed the original conclusion of the DND evaluation committee that ICS had the necessary qualifications and resources to design, build and install the required FFTSs.

In sum, Defence Construction submits that the procurement of the FFTSs was carried out in accordance with important contracting principles, including prudence, probity, accessibility and competition. It took into consideration Treasury Board directives on contracting and industry practices and, therefore, was in full accordance with the spirit and written intent of NAFTA. The complaint should be dismissed, and costs should be awarded to Defence Construction in accordance with the provisions of the CITT Act.

ICS's Position

In its comments on the GIR, ICS submits that the independent evaluation of its qualifications was carried out in conformity with the guidelines established by the Tribunal in its determination of May 6, 1997. Further, it submits that the MH Report on which Defence Construction relied for its decision clearly demonstrates that ICS has the requisite qualifications.

On the question of the background information provided by Defence Construction to Morrison Hershfield to conduct its verification, ICS submits that pages 15 and 16 of the Tribunal's determination are the only relevant pages relating to the question at issue, all other questions having been rejected by the Tribunal. Concerning the detailed affidavits and other information, ICS submits that not only does this information demonstrate that ICS was a qualified bidder for the present contract but also that it is irrelevant to the issue. Indeed, it is proper that an independent evaluation not rely on information provided by the parties, but rather rely on impartial and unbiased information. On the question of the joint venture, ICS submits that the real issue is to determine whether or not ICS acquired the expertise and know-how to be able to implement the present project. The rest is form. The MH Report is clear on the substantive question. ICS did acquire the requisite expertise and know-how under the terms of the RFP.

On the question of the misconstruction of the selection criteria by Morrison Hershfield, ICS submits that the consultant directed its enquiries directly to the point in dispute and that there is absolutely no basis to claim that such professionals, with no vested interest in the result of their research, arrived at an erroneous conclusion.

Concerning the review process itself, ICS submits that the questionnaire used by the engineers went directly to the heart of the issue and allowed them to obtain the essential information. Further, ICS submits that, though the engineers inadvertently spoke with a person related to ICS, they also spoke with two other individuals entirely independent from ICS. As well, ICS submits that there is nothing improper in Morrison Hershfield's decision to contract a representative of the Australian Navy, unrelated to ICS's Australian affiliate, instead of a representative of the Australian Construction Services.

In sum, ICS submits that the conclusion of the MH Report relating to ICS's qualifications are accurate and are based on an appropriate interpretation of the selection criteria. Finally, ICS requests that the Tribunal exercise its discretion and award it its reasonable costs incurred in preparing and filing its comments in opposition to Symtron's complaint.

Tribunal's Decision

As noted earlier, on May 6, 1997, the Tribunal found that a complaint filed by Symtron in relation to Solicitation No. HQ60151, the same procurement at issue in the present case, was valid. The Tribunal recommended 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.[9]" By letter dated May 14, 1997, Defence Construction advised the Tribunal that it was proceeding to implement the Tribunal's recommendations and, by letter dated June 10, 1997, Defence Construction explained to the Tribunal the extent to which these recommendations had been implemented.

Defence Construction explained that it had retained the consulting engineering firm of Morrison Hershfield to carry out an independent verification of both Symtron's and ICS' claimed expertise in the FFTS field submitted in response to minimum requirements stipulated in the selection criteria for the procurement at issue. In Morrison Hershfield's view, both ICS and Symtron complied with the mandatory previous experience criteria. Defence Construction advised the Tribunal that, in its view, the Tribunal's recommendations had been met by the independent review and that it was proceeding with preparations to award the contract, as planned, to ICS.

First, the Tribunal notes that the matter in dispute does not consist in determining whether or not its recommendations of May 6, 1997, were properly implemented by Defence Construction. However, the Tribunal is of the view that the implementation by Defence Construction of its recommendations effectively extended the procurement process and, therefore, gave rise to the possibility of new challenges by potential suppliers. Article 1017(1)(a) of NAFTA provides that the procurement process begins after an entity has decided on its procurement requirement and continues through the contract award.

The complaint at issue, although part of the same procurement process at issue in File No. PR-96-030, is a separate complaint and must be treated as such by the Tribunal. Section 30.14 of the CITT Act provides that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint, which, in the present case, consists of events which occurred subsequent to the Tribunal's determination dated May 6, 1997, and recommendations, i.e. the approach adopted by Defence Construction in order to determine whether ICS and Symtron met the minimum mandatory qualification requirements and its subsequent reliance on the MH Report in deciding to award the contract to ICS. The Tribunal must determine whether this part of the procurement process was conducted in accordance with the requirements set out in the relevant provisions of NAFTA.

A mandatory condition for participation in this solicitation set out in section 00002, "SELECTION CRITERIA," paragraph 1, required bidders to demonstrate that they had successfully completed a propane fuelled computer controlled FFTS with a minimum construction value of CAN$1,000,000. As well, according to paragraph 3 of section 00002, bidders were required to provide complete previous experience data sheets, including verifiable information. Therefore, the Tribunal must determine, in part, whether or not, at the time of the re-evaluation of Symtron's and ICS's qualifications, Defence Construction's conclusion that ICS met the above objective conditions and requirements at the time of bid closing was in accordance with the provisions of Article 1015(4)(a) of NAFTA and whether or not Defence Construction's decision to award a contract to ICS on that basis is in accordance with the provisions of Article 1015(4)(d) of NAFTA.

Symtron alleges that Defence Construction improperly instructed Morrison Hershfield by providing it with only the last two pages of the findings of the Tribunal, rather than the entire text, which would have allowed a more informed evaluation process. The explanation offered by Defence Construction is that only the last two pages were pertinent to the re-evaluation of the qualifications of both ICS and Symtron from the

9. *Supra* note 7.

technical perspective and that it merely raised the issue of whether ICS's participation in the Australian Navy Project was sufficient to meet the mandatory requirements set out in the RFP.

The Tribunal, however, notes that, throughout its findings of May 6, 1997, there is a detailed recounting of the allegations made by Symtron against ICS and, in the Tribunal's opinion, it cannot be said that such allegations are not relevant. Indeed, they are relevant inasmuch as the Tribunal found that Defence Construction had, "improperly applied the minimum mandatory qualification requirement provisions of the RFP.[10]" In this context, one might conclude that the more prudent course for Defence Construction would have been to present the entire text of the findings or none of it to Morrison Hershfield to conduct its evaluation.

The Tribunal notes that Defence Construction was under no obligation to provide any part of the May 6, 1997, findings to Morrison Hershfield. However, Defence Construction did provide Morrison Hershfield with the last two pages of the Tribunal's finding and that cannot be disregarded. Specifically, in its determination of May 6, 1997, the Tribunal raised the issue of whether the level of involvement of ICS in the Australian Navy Project was sufficient to have satisfied the minimum mandatory qualification requirements. Of particular interest was the statement made by the Tribunal that "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.[11]" The Tribunal went on to opine that "participation in a joint venture would be sufficient to qualify ICS as meeting the minimum requirement, if Defence Construction is satisfied that ICS's participation … allowed it to acquire the expertise and know-how to be able to implement such a project.[12]" It is now apparent from evidence submitted by Symtron that ICS may not have been in a joint venture relationship, but rather in a subcontractor role for the Australian Navy Project. The MH Report only says that ICS "worked with local companies," without specifying the nature of the relationship.

The Tribunal is prepared to accept the expert opinion of Morrison Hershfield that ICS is qualified to carry out such a project as contemplated in the RFP. This, however, is quite different from a conclusion that ICS fully met all of the requirements as laid out in the RFP. In the Tribunal's opinion, Defence Construction acted unreasonably when it accepted the MH Report as fully satisfying the qualification requirements of the RFP. Given the importance attached to a joint venture arrangement and given that the MH Report is silent on this point, Defence Construction should have been more thorough in its assessment.

In addition, it is now apparent that there are diverging views over the monetary value of certain projects. For example, the MH Report states that "[t]he four projects listed in Section 2.2 of this report all had construction values which exceeded $1,000,000 Cn," while ICS, in its bid, indicates the West Midlands Project value, one of the four projects mentioned above, at £250,000 (approximately CAN$500,000). Further, the proper interpretation of the word "construction" applying either to the FFTS only or to the project as a whole is now the object of debate between the parties.

Though the Tribunal recognizes that Morrison Hershfield was entitled, in fact, was expected, to apply its professional judgement to the situation as was Defence Construction, in the Tribunal's opinion, this does not relieve Defence Construction from the requirement to provide the basis upon which such judgement

10. *Ibid.*
11. *Supra* note 6 at 15.
12. *Ibid.*

was made. This was not done. In the result and on balance, the Tribunal is not satisfied that Defence Construction properly established whether or not ICS is a qualified supplier within the meaning of paragraph 1 of section 00002 of the RFP. This, in the Tribunal's opinion, is a matter that is still open and, therefore, it cannot be said with certainty that ICS is not a qualified bidder or was not entitled to this award. At the same time, it cannot be established that ICS is a qualified bidder. But a contract has been awarded to ICS and the Tribunal will address this situation below.

Symtron specifically alleges that Defence Construction has acted contrary to the provisions of Article 1008(1) of NAFTA in that, at the time of the administrative review, only ICS was the object of a final administrative review. The Tribunal notes, in this respect, that ICS is the low bidder and that Defence Construction considered ICS the low responsive bidder. In this context, the Tribunal observes that it is quite common that the procuring organization will focus on the low responsive bidder only since, according to the award rules in the RFP, it is the supplier in line for contract award. The Tribunal, therefore, finds nothing improper about this practice and fails to see, therein, the expression of any preference.

Concerning the conduct of negotiations contrary to the provisions of Article 1014(4)(a) of NAFTA, the Tribunal finds that no negotiation took place with ICS in this instance and that, therefore, there is no basis in fact to support this allegation.

In deciding a remedy, the Tribunal must consider a number of factors set out in subsection 30.15(3) of the CITT Act. In this particular instance, the Tribunal is satisfied that the price quoted by ICS is lower than the one quoted by Symtron. In addition, in the Tribunal's opinion, the MH Report and Defence Construction have established that ICS has the necessary expertise to conduct the procurement. This, in fact, is not disputed by Symtron. But this does not decide the central issue as to whether or not ICS is a qualified supplier within the meaning of the RFP. In fact, the Tribunal has determined that this question is still open and, therefore, that the complaint is valid. But a contract has been awarded to ICS, and the Tribunal believes that this is prejudicial to Symtron. As a minimum, Symtron was entitled to a fair evaluation of all offers. This was not done, leaving a doubt as to the proper outcome. Accordingly, attempting inasmuch as possible to put Symtron back into the position in which it was at the beginning of this solicitation, the Tribunal awards Symtron its reasonable costs incurred in preparing a response to the solicitation.

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 that, therefore, the complaint is valid.

Pursuant to subsections 30.15(4) and 30.16(1) of the CITT Act, the Tribunal awards Symtron its reasonable costs incurred in preparing a response to this solicitation and in filing and proceeding with this complaint.

Charles A. Gracey
Member