

Ottawa, Thursday, November 21, 1996

File No.: PR-96-011

IN THE MATTER OF a complaint filed by Corel Corporation under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended by S.C. 1993, c. 44;

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

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

File No.: PR-96-011

Date of Determination:	November 21, 1996
Tribunal Member:	Charles A. Gracey
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Hugh J. Cheetham
Complainant:	Corel Corporation
Counsel for the Complainant:	Bruce C. Caughill
Interveners:	Lotus Development Canada Ltd. Microsoft Corporation
Counsel for Microsoft Corporation:	Marshall N. Margolis
Government Institution:	Department of Public Works and Government Services



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FINDINGS OF THE TRIBUNAL

INTRODUCTION

On July 9, 1996, Corel Corporation (the complainant) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) (Solicitation No. W8474-5-QQ05/A) for the supply of a department-wide, unlimited user licence (Enterprise Licence) for an Office Automation (OA) Suite,² including installation and integration support and training services for approximately 40,000 users in the Department of National Defence (DND). The users are distributed across Canada in the form of workgroup Local Area Networks, are integrated into base and formation Metropolitan Area Networks and are connected by the DND wide area network.

The complainant alleged that the manner in which this procurement was carried out violates Articles 1008(1)(a) and (b) of the *North American Free Trade Agreement*³ (NAFTA). The complainant submitted that this procurement was fundamentally flawed and failed to conform to the rules of fair and equal treatment of the participants. Specifically, it alleged that:

- (a) grounds exist which support actual or perceived bias by government officials making assessments and recommendations;
- (b) bidders have not been treated equally throughout the process;
- (c) the assessment of offers was flawed, as certain mandatory evaluation parameters were based on the functions of a particular product rather than on generic functionality;

1. R.S.C. 1985, c. 47 (4th Supp.).

2. For the purpose of this procurement, an Office Automation Suite is defined as a product grouping which consists of a family of commercial off-the-shelf (COTS) products capable of "data/information" manipulation by the suite in an integrated manner and fully supported by a single publisher. Data/information manipulation by the COTS suite describes the capability of producing, generating, utilizing, extracting and/or otherwise processing personal information management tasks/documents/applications/datasets using information, word processing, spreadsheets, desktop databases and presentation graphics applications. The key function that defines the suite as "integrated" is the ability to transfer data and information across the suite components and have the data/information received by the target component as though it had been generated internally. In addition, where like functionalities exist across the suite components, then the same look, feel and behaviour exist.

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).

- (d) the procurement was not conducted by the Department in accordance with its normal procedures;
- (e) the Department's and DND's conduct has been discriminatory; and
- (f) DND incorrectly and unfairly assessed the functionality of the product offered by the complainant and failed to properly implement and operate the software proposed, in that the necessary filters for the importation of PowerPoint version 4.0 files were provided.

The complainant requested, as a remedy, that the procurement action be set aside, that the Statement of Requirement be reviewed and amended by a panel of independent experts to ensure that it meets the needs of DND, while ensuring fairness to potential suppliers, and that a new procurement be instituted which meets the standards required of the Government of Canada.

INQUIRY

On July 10, 1996, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁴ (the Regulations) had been met in respect of the complaint and decided to conduct an inquiry into whether the procurement was conducted in accordance with the requirements set out in Chapter Ten of NAFTA.

On August 2, 1996, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On August 16, 1996, the complainant filed a motion with the Tribunal requesting: (1) an extension of time; (2) the production of additional information; (3) the issuance of a postponement order; and (4) the holding of a hearing in this matter. On August 23, 1996, the Tribunal informed the complainant that, with respect to the request for the production of additional documents, in its view, the only portion of the complaint that it considered timely and, thus, to be decided on the merits was whether or not the complainant's proposal was properly declared non-compliant. The Tribunal indicated that, except for a portion of the complainant's request for additional information relating to the Request for Proposal (RFP) and its evaluation by DND and the Department, the complainant's request for additional information was not relevant to the matter at issue. With respect to that portion of the request relating to the RFP, the Tribunal indicated that it would be prepared to consider that portion of the request if it were made more specific. With respect to the postponement order, the Tribunal indicated that a contract had already been awarded⁶ and that, contrary to the complainant's submission, no standing offer⁷ had been issued in respect of this procurement. Finally, the Tribunal indicated that it would be prepared to consider the complainant's request for a hearing after all submissions had been filed. On

4. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

5. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

6. Subsection 30.13(3) of the CITT Act states: "Where the Tribunal decides to conduct an inquiry into a complaint that concerns a designated contract proposed to be awarded by a government institution, the Tribunal may order the government institution to postpone the awarding of the contract until the Tribunal determines the validity of the complaint." (Emphasis added)

7. A standing offer is a method of supply whereby authority is delegated by the Department to client departments to place individual orders. Standing offers allow the federal government to purchase frequently ordered commercially and non-commercially available goods and/or services directly from firms at prearranged prices, under set terms and conditions, when and if such goods and services are requested. Individual orders against a standing offer are customarily referred to as call-ups. There is no commitment to purchase any of the goods and/or services contained in a standing offer, and no contract exists until the government issues a call-up against the standing offer.

August 27, 1996, the complainant wrote to the Tribunal, restating its request for additional information and reiterating its request for a postponement order. On August 30, 1996, the Tribunal informed the complainant that its request for additional information was denied and that it had already denied its request for a postponement order and directed the complainant to file its submission in respect of the GIR by September 6, 1996. On September 6, 1996, the complainant filed its comments on the GIR with the Tribunal. On September 13, 1996, the parties were informed that a staff investigation would be conducted in this matter. On October 8, 1996, the Staff Investigation Report (SIR) was sent to the parties for comments. The Department and the complainant filed their comments on the SIR on October 16, 1996.

On October 31, 1996, the Tribunal informed the complainant that, given that the factual matters surrounding the issue before the Tribunal, i.e. whether or not the complainant's proposal was properly declared non-compliant, had been sufficiently dealt with in the complaint, the GIR, the SIR and various other submissions by the parties, a hearing was not necessary.

ALLEGATIONS NOT ACCEPTED FOR INQUIRY

On August 23, 1996, the Tribunal informed the complainant that the only issue that it would address on its merits was whether or not the complainant's proposal was properly declared non-compliant. All the other issues raised by the complainant were determined to be out of time for the following reasons.

Article 1017(1)(a) of NAFTA states that "each Party shall allow suppliers to submit bid challenges concerning any aspect of the procurement process, which for the purposes of this Article begins after an entity has decided on its procurement requirement and continues through the contract award."

The Tribunal must, therefore, establish which entity is involved in this procurement, what procurement requirement is being procured and when the entity decided on this procurement requirement, thereby launching the related procurement process. All parties agree that DND is the entity. As well, it is not disputed that DND has had an operational requirement of one sort or another for some forms of OA Suites since at least 1994. The requirement being procured by means of Solicitation No. W8474-5-QQ05/A, however, is quite specific and consists essentially in the acquisition of an Enterprise Licence for some 40,000 users. In the Tribunal's opinion, this specific requirement was not the object of the OA Suite product assessments conducted by DND in 1994 and 1995 or of the OA Suite acquisitions made by various DND individual commands off existing standing offers put into place by the Department to accommodate the OA Suite requirements of various government departments, including DND. These procurement actions are separate procurement actions. Finally, the Tribunal is convinced from the evidence on the record that DND decided to go the "Enterprise Licence" route for its OA Suite requirement on or about December 14, 1995. Accordingly, the Tribunal concludes that the designated contract at issue is a DND requirement for an Enterprise Licence for OA Suites which was decided upon by DND on or about December 14, 1995, and which was published on the Open Bidding Service on February 5, 1996, under Solicitation No. W8474-5-QQ05/A. Actions by DND and the Department relating to this procurement process only can be considered by the Tribunal in this instance. Therefore, the Tribunal determines that any grounds of complaint raised by the complainant which predate this procurement process relate to other procurements and procurement processes. To the extent that it might be argued that certain of the grounds raised by the complainant in respect of these earlier actions relate to the procurement process at issue, such grounds of complaint are also clearly out of time.

Concerning the complainant's allegation that it was denied an extension of the period to bid, the Tribunal is satisfied that the complainant knew of such denial before bid closing on March 18, 1996. Given that the complainant did not raise this issue with the Tribunal until July 3, 1996, the Tribunal determines that

this ground of complaint was not filed within the prescribed time frames and, therefore, it cannot consider it on its merits.

Concerning the complainant's allegation that certain technical requirements in the RFP were overly restrictive in that they related to a particular brand-name product, the Tribunal concludes that the basis for discovering this allegation existed from the date on which the RFP was published, that is, February 5, 1996. The complainant did not raise an objection with the Department in this respect nor did it raise this issue with the Tribunal until July 3, 1996, well after the expiration of the applicable time frames. Consequently, the Tribunal cannot consider this ground of complaint on its merits.

PROCUREMENT PROCESS

On or about December 14, 1995, DND decided that it required an Enterprise Licence, including installation, maintenance and training to meet its OA Suite requirements. Accordingly, on January 11, 1996, DND raised a requisition for the procurement of an Enterprise Licence for OA Suite software.

On January 31, 1996, the complainant publicly announced that it was to be the new owner of Novell (the former owner of WordPerfect) Business Applications Group. The purchase was subject to the approval of the Government of the United States, which was obtained on March 1, 1996.

On February 5, 1996, the Department posted an RFP on the Open Bidding Service for the provision of "one [Enterprise Licence] that allows all DND employees unlimited usage of the OA Suite." The RFP with a bid closing date of March 18, 1996, contained the following information relating to the requirements, technical proposals and evaluation.

Requirements

Article 7, "Requirements Definition," on page 6 of Part 2 of the RFP reads, in part:

The software offered by the Bidder must meet all Mandatory requirements as identified in the Appendix "A" - Statement of Requirement.

Appendix A to the RFP, "Statement of Operational Requirement for the Procurement of Office Automation Suite Software for the Department of National Defence," contains a number of clauses which detail both mandatory and desirable requirements. Clause 3.1.5, "Import/Export," on page 30 of Part 2 of the RFP reads, in part:

The OA Suite shall support file formats currently in use within [DND] to enable continuity of operations of electronic archiving, file management, records keeping and file processing. Mandatory file formats to be supported are:

- f) PowerPoint Version 4.0 and previous releases.

Technical Proposals

Article 10.2, "Technical Proposal," on page 11 of Part 2 of the RFP reads, in part:

It is mandatory that bidders submit ten (10) copies of their Technical Proposal each of which must include the following:

- d) Evaluation copy of all proposed software including documentation (see 9.4 for number of copies).

Article 9.4, "Product Evaluation," on page 9 of Part 2 of the RFP required that "[b]idders ... provide two (2) copies of the current commercially available retail version of their proposed software with the right to copy for evaluation purposes only. The same applies to any software support programs and accessory programs.... All proposed software products must be in production (non-Beta) and commercially available as of the solicitation issue date."

Evaluation

Article 8, "Evaluation of Proposals," on page 7 of Part 2 of the RFP reads, in part:

At the Crown's discretion any bidder may be required to provide a demonstration of the proposed software to show that it is capable of meeting all stated requirements.

Article 9.1, "General Evaluation," on page 8 of Part 2 of the RFP reads, in part:

A Departmental evaluation team will validate and evaluate all proposals received. The selection of the successful bidder will be based on the best value to the Crown.

The evaluation process will consist of the following steps:

- a) verification that all information required by this RFP is included in the proposal;
- b) verification of compliance with the mandatory requirements;
- c) evaluation of the desirable requirements;
- d) product evaluation; AND
- e) financial evaluation.

Article 9.2, "Evaluation of Mandatory Requirements," on page 8 of Part 2 of the RFP reads, in part:

All mandatory requirements will be evaluated on a simple pass/fail basis. Bidders must provide sufficient information in the proposal to demonstrate their ability to meet the mandatory requirements. Lack of sufficient information may cause the proposal to be deemed non-compliant.

Any proposal deemed to not have met all of the mandatory requirements will be declared non-compliant and will not be considered further.

On March 5, 1996, the complainant requested, in writing, that the Department extend the period for bidding to allow it to provide a solution that represents the "[b]est value to the Crown." The Department denied the request.

Three proposals were received. The complainant's proposal addressed clause 3.1.5.f in Appendix A to the RFP in the following manner:

3.1.5.f PowerPoint Version 4.0 and previous releases.
COMPLIANT

You can import slide shows from the following applications:

- Harvard Graphics 2.3 and 3.0 (DOS)
- PowerPoint 2.0 and 3.0 (Windows)
- PowerPoint 4.0 (See details below)

(Presentations v3.0 User's Guide, Pg. 197)

At the time of the release of PerfectOffice 3.0, Power Point version 4.0 filters were not available. To meet DND requirements, Corel has licensed a filter from Image

Mark Software that will provide the necessary functionality. This filter is a plug-in, and will be provided at no cost, as permitted by section 3.2.2.1 Conversion. Power Point files can be saved in PerfectOffice 3.0 format and imported into Presentation without the need for any additional filters. PerfectOffice 7, which is scheduled for release in May, 1996, will support Power Point version 4 natively.

The complainant's proposal came with two "shrink wrapped" packages of the current commercially available retail version of PerfectOffice version 3.0.

On March 20, 1996, the Department sent a facsimile to the complainant which read, in part:

Please answer the following questions:

1- In various responses to the mandatory requirements it is stated that the required functionality is provided through the inclusion of "patches" or "add-ons" to the proposed products. Please confirm that all necessary patches and add-ons have been supplied in the software made available to DND for this evaluation.

The two other bidders were sent a facsimile on the same date which included, among other things, the above-mentioned request.

On March 21, 1996, the complainant responded to the Department's request in the above-mentioned facsimile, in part, as follows:

It was unclear in the RFP if the necessary patches and add-ons were to be supplied in the software made available to DND for this evaluation. We would be pleased to provide the physical media to DND for this evaluation, if required.

The two other bidders responded that all necessary patches were included on March 18, 1996, with their original responses to the RFP.

On March 22, 1996, a facsimile was sent from DND to the Department. This facsimile was, in turn, modified by the contracting officer to remove references that did not apply to a particular bidder, and the facsimile was forwarded to each bidder. On each facsimile, a handwritten entry identified the time and location for the performance of a product demonstration by that bidder. Included in the facsimile sent to all bidders was the following entry:

For all vendors. Vendors are to supply all patches necessary to verify the functionality requested in the RFP.

On March 25, 1996, the complainant submitted, prior to the beginning of the scheduled demonstration, three 3 1/2-in. diskettes and accompanying written documentation. One of the diskettes provided was a diskette which the complainant believed contained the patch required to allow PerfectOffice version 3.0 to import Microsoft PowerPoint version 4.0 files. According to the Department, these patches were accepted by the Department and considered to be clarifications because the complainant had specifically identified them in its proposal. The other bidders did not object to the above request that patches be supplied nor did they submit any patches after March 18, 1996, the closing date for the receipt of proposals. The complainant and the two other bidders successfully demonstrated all required functions using equipment that they had brought with them.

Following the March 25, 1996, demonstration, neither the DND software evaluation team nor the technical personnel in the Department could get the software submitted by the complainant (including the

patches submitted on March 25, 1996) to perform the desired function of importing PowerPoint version 4.0 files. The complainant was then requested to demonstrate that the software provided could do so.

On April 15, 1996, the complainant, using a computer supplied by the Department, the software submitted on March 18, 1996, with its proposal and the patches submitted on March 25, 1996, attempted to import a PowerPoint version 4.0 sample file supplied by the Department. The complainant was unable to import this sample file. However, using its own equipment, the complainant was able to import the sample file. The complainant then compared the software on the two computers and discovered that at least one file, "PRWIN30.EXE," on its computer was different from the file with the same name on the Department's computer. The time stamp on the file present on the complainant's equipment was "3:01a," while that on the file present on the Department's equipment was "3:00a." At this point, the demonstration was concluded.

On April 15, 1996, a letter was sent by the complainant to the Minister of National Defence which reads, in part:

During this second technical presentation, we imported all of the above listed files into PerfectOffice, except the PowerPoint v. 4 files. There is a patch which enables PowerPoint v. 4 files to be imported into PerfectOffice but it only works with PerfectOffice v. 3.01 and later versions. Since the Department of National Defense received, for the purposes of their evaluation, PerfectOffice v. 3.0, they were not able to import PowerPoint v. 4 files. PerfectOffice v. 3.01 was commercially available prior to January 31, 1996.

As a common business practice in the software industry, updates, such as v. 3.01, are integrated into the manufactured products from that date forward. Nonetheless, these updates are commercially available at no charge to all existing clients of the original release. These interim version updates are not considered to be full upgrades and are not indicated as a new version on the packaging.

On May 15, 1996, the complainant provided the Department with a more detailed explanation of the cause of the problem of importing PowerPoint version 4.0 files. According to the complainant, in order for the patches submitted on March 25, 1996, to work, an additional patch had to be present on the system. This patch was an in-production patch which allowed PerfectOffice version 3.0 to work within Microsoft Windows 95. According to the complainant, the difference in the two versions of file "PRWIN30.EXE," discovered at the time of the April 15, 1996, demonstration, was a result of the "Windows 95 patch" being present on the complainant's equipment, but not on the Department's equipment, nor in the software packages submitted on March 18, 1996.

On May 21, 1996, the technical evaluation report was sent by DND to the Department. This report identifies the evaluation team, the method of evaluation and the evaluation results. With respect to the complainant's bid, the report indicates that it is non-compliant to mandatory requirement 3.1.5.f, ability to import PowerPoint version 4.0 files. As such, the complainant's proposal was given no further consideration.

On June 28, 1996, the complainant was informed that its proposal was found to be non-compliant with one of the mandatory requirements specified in the RFP. That requirement was identified as the ability of the software submitted as part of the complainant's proposal to import PowerPoint version 4.0 files.

After initially objecting to the Department, the complainant, upon receiving denial of relief, sent this complaint to the Tribunal on July 3, 1996.

VALIDITY OF THE COMPLAINT

Complainant's Position

The complainant submits that, some time between November 29 and December 18, 1995, DND in conjunction with the Department decided to cancel the competitive selection process started on June 16, 1995, by means of the Request for Information process. This process resulted in Novell PerfectOffice OA Suite being identified as the DND "Preferred Office Suite Product." Nevertheless, the Department decided to begin yet another new competition for DND's OA Suite requirement. The complainant submits that, during this later process, it was again discriminated against by DND and by the Department. Specifically, it was denied an extension of time to bid, despite the fact that DND had granted an extension of time to accommodate another bidder during the Request for Information process. Further, the extension of time was denied because DND stated that it required delivery by the end of the fiscal year, a reason which the complainant submits had no basis in fact. The complainant also states that it was required to meet the import/export function of the latest version of a particular brand-name product, Microsoft PowerPoint version 4.0, while a similar requirement was omitted in respect of Lotus and Novell (Corel) products. Moreover, the evaluation team attempted to build a case that PerfectOffice did not meet one or more of the mandatory requirements, even though the complainant demonstrated twice to the Department and DND the ability of PerfectOffice to import Microsoft PowerPoint version 4.0 files.

The complainant submits that the Department "overlooked, varied or put aside the evaluation rules that it set out in the RFP and in so doing, improperly declared non-complaint the Complainant's proposal which, at the time of bid opening, met all the mandatory and rated desirable technical requirements." It denies, as is suggested by the Department in the GIR, ever admitting that the software submitted with its proposal was unable to satisfy all mandatory requirements. As well, it submits that "none of the bidders' software in the possession of [the Department] as at March 18, 1996 was complete." In fact, the complainant states that, consistent with the language of clause 3.1 in Appendix A to the RFP, all vendors were afforded the opportunity after bid closing on March 18, 1996, to provide additional software for testing purposes.

With respect to the product demonstration, the complainant submits that it became apparent that the patches that it supplied on March 25, 1996, were incomplete because "one filter was missing." Notwithstanding that fact, the complainant asserts that it was able to successfully demonstrate the importation of PowerPoint version 4.0 files on March 25, 1996, and again on April 15, 1996. It states that, "[w]hile the software used ... in [the] demonstration included all patches necessary to import PowerPoint 4.0 files, the software, patches, add-ons and plug-ins then in the possession of [the Department] did not include one filter that was critical to the successful importation of PowerPoint 4.0" (Emphasis added). The complainant adds that this filter was "commercially available" prior to the date of issue of the RFP and, in accordance with the language of clause 3.1 in Appendix A to the RFP, its provision would not have resulted in an increase in price. The complainant submits that, "[r]ather than accepting the inclusion of this filter in the Complainant's proposal, [the Department] purportedly determined the Complainant's bid to be non-compliant." The complainant submits that this decision by the Department is unacceptable, given its earlier acceptance from all bidders after bid closing of similar software add-ons. This behaviour, the complainant contends, constitutes a variance to the evaluation rules in place as of April 15, 1996. In the complainant's submission, the above actions by the Department amount to an unfair and inconsistent application of the bid clarification process. Indeed, all bidders were allowed to submit software after bid closing and, to argue as the Department does, that acceptance for evaluation of a product not proposed by the complainant would be tantamount to permitting one supplier to modify its proposal after bid closing while not extending the same opportunity to other bidders is, the complainant submits, a proposition not supported by the facts of this case and the clarification process in place as of April 15, 1996.

In summary, the complainant submits that, now that it has had the opportunity to thoroughly review the lengthy history of this procurement, it is convinced that actual and perceived bias and personal attitudes of individuals involved in the procurement precluded a fair RFP and evaluation process. It is of the view that its legitimate interests have been jeopardized by the apparent discriminatory behaviour of government officials.

Department's Position

In its response to the complaint and various other submissions, the Department submits that the complainant's proposal was eliminated from the evaluation process because it failed to satisfy a mandatory requirement of the RFP. Moreover, the Department states that the complainant, in its own correspondence, admits that the version of the applicable software submitted with its proposal did not meet a mandatory requirement.

Concerning the evaluation of proposals, the Department submits that the evaluation criteria were applied rigorously. On the complainant's proposition that the staff who wrote the RFP "should know that PerfectOffice meets that requirement [importation of PowerPoint version 4.0 files]," the Department responds that it is not permitted to evaluate proposals based on what the staff "should know," but rather is required to evaluate proposals based on the material submitted by the bidders.

On the issue of the complainant's proposed product's ability to import PowerPoint version 4.0 files, the Department states that every effort was made to ensure that each bidder's March 18, 1996, response to the RFP was given complete consideration. To that end, the Department initiated, on March 20, 1996, a bid clarification process, including, as appropriate, the introduction of additional software for demonstration purposes. In this context, the Department emphasizes that the only reason that any additional software was accepted from the complainant after the closing date was because the complainant had made reference to certain patches in its proposal. In fact, only the complainant submitted additional software after the bid closing date. In the Department's submission, the complainant's proposition that bidders were at liberty to submit an unlimited number of software packages, provided there was no cost attached, is clearly unsustainable in the circumstances. The Department states that the software submitted by the complainant as part of its proposal on March 18, 1996, did not have the ability to import PowerPoint version 4.0 files, nor was this ability provided with the patch disk submitted on March 25, 1996. While the complainant may have "bid" a software package that it believed was capable of meeting all the mandatory requirements of the RFP, the Department asserts that it did not submit a software package which was capable of meeting one of those mandatory requirements. Indeed, as was found on April 15, 1996, at least an additional modified program executable file, "PRWIN30.EXE," appears to have been necessary to initiate the PowerPoint version 4.0 conversion process and to activate the filters to that end. The Department states that this one file was never mentioned in the complainant's proposal and that to have accepted it then would have constituted a modification to the complainant's proposal. Given the opportunity to show that it complied, the complainant failed to demonstrate that the software that it had submitted in its proposal satisfied all the mandatory requirements. To accept for evaluation a product not proposed would have been to permit one supplier to modify its proposal after the date for submission of proposals had passed. This would clearly be unfair to other suppliers that would not have had the opportunity to modify their proposals.

The Department submits that Article 1008(1)(b) of NAFTA requires that the tendering procedures be consistent with Articles 1009 through 1016. In this respect, the Department submits that only Articles 1012, "Time Limits for Tendering and Delivery," and 1015, "Submission, Receipt and Opening of Tenders and Awarding of Contracts," apply to this procurement. Concerning Article 1012, the Department notes that it is satisfied that the RFP was posted on the Open Bidding Service on February 5, 1996. The bid closing date being March 18, 1996, the Department states that the 40-day minimum posting time required

under NAFTA has been met. In respect of Article 1015 and the requirement, *inter alia*, that bidders meet the essential requirements and comply with the conditions for participation to be considered for award, the Department states that the complainant failed to meet one such essential requirement of the RFP.

In conclusion, the Department submits that the Tribunal should dismiss the complaint, as the complainant's proposal was non-compliant and it failed to demonstrate that the procurement process in this instance was flawed in any respect.

Tribunal's Decision

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in NAFTA.

The only issue before the Tribunal is whether the Department and DND breached Articles 1008(1)(a) and (b) of NAFTA in evaluating the complainant's proposal. More specifically, the Tribunal must determine whether DND and the Department acted according to prescribed procedures when they evaluated the complainant's proposal and found it to be non-compliant with one of the mandatory requirements specified in the RFP. Article 1008(1)(a) provides that entities are to ensure that their tendering procedures are "applied in a non-discriminatory manner." By virtue of Article 1008(1)(b), the only other article relevant to this case is Article 1015(4)(a), which provides that "to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation."

The facts of the case are clear and can be summarized as follows. During the period from March 18, 1996, the bid closing date for this RFP, and May 21, 1996, the date on which DND sent its technical evaluation report to the Department, DND and the Department conducted a technical evaluation of the three proposals submitted in response to this solicitation, including that of the complainant.

In evaluating the complainant's proposal, DND and the Department were unable to import PowerPoint version 4.0 sample files. Furthermore, on April 15, 1996, using a computer supplied by the Department, the software that it had submitted on March 18, 1996, and the additional patch that it submitted to the Department on March 25, 1996, the complainant was also unable to import PowerPoint version 4.0 sample files. There is no dispute concerning these facts.

Inasmuch as the ability to import PowerPoint version 4.0 files was a mandatory requirement of the RFP, this acknowledged failure would seem to confirm that the complainant's offer was non-compliant. However, another fact to be kept in mind is that, using the software installed on its own computer, the complainant demonstrated the said functionality to the Department and DND on March 25, 1996.

The explanation given by the complainant relates to unknown inventory practices of the former owner of the product and, because of packaging and product description practices, it erroneously submitted, for evaluation purposes, a software package which contained PerfectOffice version 3.0. It had intended to submit a "version" known internally as "PerfectOffice 3.01" which apparently included the aforementioned program executable file date stamped "12/9/94 3.01a."

The complainant characterizes the demonstration process as one of clarification. It concedes that its own attempt to import PowerPoint version 4.0 files using the software that it submitted failed. However, the complainant submits that, upon the discovery of the existence of an errant file, it immediately clarified that its proposal met the required functionality, as it should be considered to include PerfectOffice version 3.01, which is merely an upgrade of the PerfectOffice version 3.0.

The Tribunal is inclined to believe that the failed evaluation was the result of an unfortunate and understandable error on the part of the complainant. The evidence indicates that the complainant acquired ownership of the PerfectOffice product only shortly before bid closing. In the circumstances, it may not have been aware of the existence of the two different program executable files and of the specific software configurations required to achieve the importation of PowerPoint version 4.0 files. Apparently, the proper software configuration was in the complainant's computer, but not in the software and patches submitted to the Department. Had the complainant tested the actual software that it submitted to the Department, the complainant would undoubtedly have detected the deficiency.

The evaluation team, following its own unsuccessful attempt to replicate the functionality successfully demonstrated by the complainant on March 25, 1996, called for a further demonstration, thereby giving the complainant an opportunity to confirm that the software that it had submitted could actually import PowerPoint version 4.0 files. This, the Tribunal believes, was prudent, as it would determine whether the failure of the evaluation team to import PowerPoint version 4.0 files was due to some technical error on the part of the Department or DND or was due to a deficiency in the software submitted. This was particularly prudent in light of the fact that the complainant had already conducted a successful demonstration. As noted, the complainant was also unable to import PowerPoint version 4.0 files using the software that it had submitted with its proposal and the patch provided on March 25, 1996.

In making its determination as to the appropriateness of the Department's decision in the instance, the Tribunal must consider the wording of the RFP as it relates to the evaluation process. But first, the Tribunal notes that the functionality at issue (importation of PowerPoint version 4.0 files) is a mandatory requirement of the RFP. This is not in dispute. The Tribunal also notes that the treatment of mandatory requirements in any procurement process is very stringent. This is usually conveyed to prospective bidders in the solicitation documents, as was done in this RFP, by inserting provisions which indicate clearly the very serious consequences on bidders for failing to meet essential conditions, i.e. non-compliance of proposal, the effect of which precludes any further consideration for award.

Concerning the evaluation process proper, and the requirement in article 7 of the RFP that the software offered meet all mandatory requirements, the Tribunal is satisfied that the complainant believed that on March 25, 1996, it was demonstrating the same software that it had submitted in its proposal. This software, however, was not the same.

The complainant asserts that PerfectOffice version 3.01 is merely an upgrade of PerfectOffice version 3.0, an upgrade which it emphasises was commercially available as of the issuance date of the RFP and which, according to common business practices in the software industry, is available at no charge to all existing owners of the original release. However, in the Tribunal's view, in order to declare the complainant's proposal compliant, the Department had no choice but to evaluate the software proposed in the complainant's offer and submitted for evaluation. This software had to be capable of importing PowerPoint version 4.0 files. The software submitted by the complainant failed to meet this requirement.

The Tribunal must also consider whether the demonstration formally requested by the Department and successfully performed by the complainant established, as the complainant suggests, the technical compliance of the complainant's proposal.

When read in isolation, articles 9.1 and 9.2 of the RFP do not indicate that the software proposed by bidders will be tested as part of the evaluation methodology. However, articles 9.4 and 10.2 of the RFP clearly indicate that complete copies of the software proposed are required for evaluation purposes. In the Tribunal's opinion, when read together, the applicable articles of the RFP make it clear that the Department and DND would test the software submitted by the bidders in their proposals as part of the evaluation process to establish the compliance or non-compliance of the products proposed. Moreover, the RFP provided for demonstrations by bidders, and the Tribunal can find nothing in the RFP to suggest that a successful demonstration by a bidder supplants or "trumps" an actual evaluation by the evaluation team.

In any tendering process, as in most competitive endeavours, the margin of victory can be very slim. Often, as in the present case, the outcome is of importance to all parties. For that reason alone, the process requires rigour. Indeed, it is the very essence of the tendering process that the requirements and conditions be set out with clarity and adhered to with rigour. In the present case, no party can claim that the mandatory requirements at issue were not clearly spelled out in the RFP. Further, if any party, including the complainant in this case, felt that any of the requirements were unfair or too exacting, that party had ample opportunity to make a complaint in a timely manner. The procurement review process does not provide for an accumulation of grievances to be put forward only in the event of an unsuccessful bid.

In the Tribunal's view, DND and the Department went to great lengths to ensure that the complainant's proposal was fully considered. For example, on March 22, 1996, it requested bidders to bring with them all necessary patches required to demonstrate the software proposed. In addition, the Tribunal also notes that the Department accepted software mentioned in the complainant's proposal after bid closing. As well, the complainant was given the opportunity to conduct a second demonstration of its software.

For the reasons stated above, the Tribunal finds that the Department properly declared the complainant's proposal non-compliant, in that it failed to meet one of the mandatory or essential requirements to be considered for award. As well, the Tribunal has found no evidence of discrimination on the part of DND or the Department in favour of the other bidders or against the complainant with respect to whether the complainant's proposal was properly declared non-compliant. Therefore, the complaint is not valid.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was conducted in accordance with NAFTA and that, therefore, the complaint is not valid.

Charles A. Gracey
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Member