



Ottawa, Tuesday, November 22, 1994

File No. 94N6601-021-0005

IN THE MATTER OF a complaint filed by Enconair Ecological Chambers Inc. 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* and section 10 of the *North American Free Trade Agreement Procurement Inquiry Regulations*, the Canadian International Trade Tribunal determines that the complaint has no valid basis. Accordingly, the complaint is dismissed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Member

Michel P. Granger

Michel P. Granger

Secretary

File No. 94N6601-021-0005

Date of Determination:	November 22, 1994
Tribunal Member:	Robert C. Coates, Q.C.
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Estelle Lane
Counsel for the Tribunal:	Robert Desjardins
Complainant:	Enconair Ecological Chambers Inc.
Government Institution:	Department of Public Works and Government Services
Intervener:	Controlled Environments Limited



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IN THE MATTER OF a complaint filed by Enconair Ecological Chambers Inc. 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*.

FINDINGS OF THE TRIBUNAL

Background

On August 24, 1994, Enconair Ecological Chambers Inc. (the complainant) filed, under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act), a complaint concerning the award, by the Department of Public Works and Government Services (the Department), of a contract for the supply and installation of two environmental growth rooms, including retrofitting, cabling and upgrades for existing equipment, in accordance with specifications set out in Solicitation No. STN 01581-4-9417/00/A dated July 27, 1994, for the Swift Current Research Station (the Research Station) in Saskatchewan, a constituent of the Department of Agriculture.

The complainant makes the following allegations:

- 1) the Department had no justification for abridging the bidding process or for demanding delivery in such a short time; and
- 2) the Department's decision to change the bidding/tendering procedure from the old Invitation to Tender method to the current Request for Proposal (RFP) system is arbitrary and subjective, is unfair to bidders and is detrimental to the financial interests of the Canadian government, specifically:
 - (a) the use of the term "reserves the right to reject a bid" under certain conditions implies that arbitrary and subjective criteria can be used;
 - (b) certain mandatory requirements in the RFP
 - (i) are difficult, if not impossible, to provide (i.e. performance bond, technical literature for the products offered and shop drawings),
 - (ii) are subject to arbitrary decision (i.e. bid and performance bonds),
 - (iii) are insulting (i.e. the certification of education and experience of key personnel), and
 - (iv) are ridiculous (i.e. the award of rating points for more than two successful projects); and
 - (c) the rated criteria and weighing of the technical proposal at 70 percent and price at 30 percent make price immaterial and allow the government to be arbitrary and subjective in its assessment of bids.

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

For these reasons, the complainant requested, as a remedy, that the RFP be cancelled and that a Request for Quotation be issued in its stead which would reflect "the reality of the quality of the goods offered and their price." The complainant also requested that the Canadian International Trade Tribunal (the Tribunal) strongly suggest to the Department that it revert to centralized procurement for the acquisition of sophisticated equipment, such as that specified in this RFP, which requires the use of expertise not normally found in local branches.

On August 25, 1994, the Tribunal determined that the requirements set forth in section 7 of the *North American Free Trade Agreement Procurement Inquiry Regulations*² (the Regulations) had been satisfied. Having made that determination, the Tribunal decided to inquire into whether the procurement was conducted in accordance with the requirements set out in Chapter Ten of the *North American Free Trade Agreement*³ (NAFTA).

The Tribunal issued a postponement of award order on August 26, 1994. However, on August 29, 1994, the Department certified to the Tribunal, in writing, that a delay in the performance of the contract would be contrary to the public interest. In the circumstances, pursuant to subsection 30.13(4) of the CITT Act, the Tribunal rescinded its order on September 2, 1994.

Inquiry

The three parties to this inquiry are: (1) the complainant; (2) the government institution, in this case, the Department or the Research Station; and (3) Controlled Environments Limited (the intervener), which was granted the status of intervener on September 13, 1994.

On September 21, 1994, as part of the inquiry, the Department filed with the Tribunal a Government Institution Report, in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*,⁴ which report was made available to all parties. The complainant's comments on this report were filed with the Tribunal and sent to all parties.

The intervener's submission regarding the complaint was filed with the Tribunal on September 26, 1994, and sent to all parties.

An interim report prepared by the Tribunal staff under subsection 8(1) of the Regulations was introduced into the record and sent to all parties. The representations filed with the Tribunal concerning the interim report were also sent to all parties.

No party requested a hearing. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on file.

Procurement Process

According to the Research Station personnel, every fall, the Research Station prepares an equipment plan prior to budget allocations in April. In November 1993, the Research Station

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

3. *North American Free Trade Agreement*, 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/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912.

personnel identified the need to replace the three growth rooms then in operation at the Research Station and planned accordingly. However, the failure of one of the growth rooms in March 1994 made this replacement an urgent matter. Since the estimated replacement cost of the equipment was in excess of the standard forecasted budget allocations, a proposal was submitted by the Research Station to the Department of Agriculture Headquarters for approval of additional funds. Approval of the funds was received in April 1994. The better part of the month of May was spent working with eight scientists at the Research Station to finalize their operational needs. According to the Research Station's Administration Officer, it was believed that the procurement would be exempt from the requirements of NAFTA due to the fact that the equipment related to research work. It was only after contacting the Department that the Research Station found out that the procurement was covered by NAFTA and had to be treated accordingly.

On June 28, 1994, the Research Station informed the Department that this requirement was urgent. On July 7, 1994, the Department received a draft of proposed terms and conditions and the technical specifications along with the requisition from the Research Station. The requisition described the requirement as follows:

"URGENT REQUEST FOR PROPOSAL ONLY"

*Environmental Growth Room
Specifications as attached*

Installation date deadline November 1, 1994

Request two quotes:

- 1) with installation*
- 2) with supervision of installation*

Several drafts of the proposed RFP were reviewed by the responsible parties in both the Department and the Research Station. According to the Department, the Research Station was more concerned with quality, after-sales service and technical support than price alone. For this reason, it was decided that a point-rating method of evaluating bids would best serve the purpose.

The Department prepared a notice of proposed procurement (NPP) which appeared in the July 27, 1994, edition of Government Business Opportunities (the GBO) with a solicitation closing date of August 22, 1994. The NPP bears the code "B-1" which means that the procurement is subject to both GATT and NAFTA and that all interested suppliers may submit a bid.

The background section in the RFP states the following:

BACKGROUND:

The Swift Current Research Station of Agriculture and Agri-Food Canada located in southwestern Saskatchewan has been involved in active research of cereal breeding and physiology, as well as cereal pathology. Their research in grains and cereals has garnered numerous awards and national and international recognition and has a tremendous effect on the agricultural economy. This requirement is to provide equipment vital to the research presently being conducted by a team of eight (8) scientists. Disease screening and vernalization of parents which are done with this equipment are essential for the continuous productivity of the cereal breeding program. Delay in delivery and/or

installation of equipment will cause delays in future releases of new cereal cultivars by one year (12 months). This delay would result in a backlog of genetic materials that would move through the plant breeding system like a wave causing further resource constraints at each step in the program. This effect would be irreversible.

According to the Head, Crop Science Section of the Research Station, it takes five to seven years to develop new varieties of plants. Canada is in competition with other countries for the sale of its grains, and a delay in the development of new varieties may place its exports at a disadvantage.

Some of the terms and conditions of the RFP and the evaluation criteria were communicated as a preamble to the requirement and read, in part, as follows:

OPERATIONAL CONTINGENCY:

If there are any delays in the delivery and/or the installation and/or the acceptable performance of the equipment during the acceptance stage, the contractor agrees to provide alternate environmental growth environments at no additional charge to the Crown. The Contractor further agrees that these environments shall remain on site until the delays are rectified or, in the case of rejection of the equipment, until such time as the Crown can acquire replacement equipment.

Your bid MUST be in sufficient detail to permit a full evaluation without delay. No modifications or alterations will be permitted after the bid closing. The bidder must agree to respond to any faxed written requests for clarifications of a minor nature within two (2) business days.

REJECTION OF BIDS:

The Crown reserves the right to reject a bid if:

- 1. a suitably executed bid bond does not accompany the bid.*
- 2. insufficient technical information is provided to permit a full evaluation of the capability of the proposal;*
- 3. failure to comply with any of the mandatory criteria.*

EVALUATION CRITERIA:

Proposals will be evaluated in accordance with the following criteria. Bidders are advised to address these criteria in sufficient depth in their proposals.

(A) MANDATORY CRITERIA:

SITE VISIT

It is mandatory that a representative of your firm visit the site and observe the scope of work required and the existing conditions.

Bids/Proposals submitted by bidders who have not attended the site visit will be rejected as non-responsive bids for not meeting essential criteria of the bid document.

Proposals MUST include:

- 1) *A bid bond in the amount of 20% of the bid price.*
- 2) *A statement that you will comply with providing a performance bond in the amount of 50% of the contract price to run from date of award of contract to completion of two (2) years unconditional warranty.*
- 3) *Certification of education and experience of key personnel including history of PRESENT company, length of time in business.*
- 4) *Employment equity certification.*
- 5) *Resume of the installer/warranty service provider.*
- 6) *Technical literature for products offered.*
- 7) *A MINIMUM of two (2) references from customers of projects similar in size and scope in accordance with Reference form attached as Appendix B. Points will be awarded for more than two (2) successful projects.*
- 8) *Shop drawings.*
- 9) *Firm prices on ALL items.*

(B) RATED CRITERIA:

1. *Technical Proposal - worth 70%*
2. *Price - worth 30%*

TECHNICAL PROPOSAL: (70%)

- 1) *Meeting and exceeding the technical specifications..... 35 points*
 - 2) *Ability to achieve 01 November 1994 delivery date and 15 November 1994 installation date as detailed in workplan 10 points*
 - 3) *Availability of maintenance service and spare parts 15 points*
 - 4) *Interface capability to connect with various existing microprocessors including the CMP series microprocessor 15 points*
 - 5) *Company/Personnel qualifications, thoroughness of approach of proposal and responsiveness 25 points*

- TOTAL TECHNICAL POINTS..... 100 points*
- MINIMUM PASS MARK FOR TECHNICAL POINTS..... 80 points*

(C) PRICE: (30%)

The requirement is described in the RFP, in part, as follows:

001 Walk-in growth rooms as follows: 2.00 ea \$

2) Installation of the two (2) growth rooms including hookup to Central Control System.

2A) Supervision of the installation of the two (2) growth rooms and hookup to the central control system.

A Central Control System (CCS) is required to allow new and existing growth chambers to be monitored and controlled remotely through a CCS computer or locally through their local controllers.

3) Supply of one (1) central control system (CCS).

4) Firm, all inclusive price for any retrofitting, cabling and upgrades for existing equipment including communications adapters, bypass switches and local microprocessor [sic] controllers where necessary for five (5) existing growth chambers and one (1) existing incubator, tissue culture chamber and seed germinator. Each unit to have its own local control as well as the capability of being monitored and controlled from the central control system.

The RFP incorporated, among others, the following clause which is included in the "Instructions to bidders/contractors" section of a manual entitled Standard Acquisition Clauses and Conditions. The clause reads as follows:

A0006T Request for Proposal
29/10/93

As opposed to an Invitation to Tender, this is a request [commonly referred to as a Request for Proposal (RFP)] that proposals be developed and submitted to the Minister of Supply and Services setting out the alternative means by which several technical, performance, time and other goals and objectives may be best met, having regard to stated mandatory requirements. The Minister will consider entering into a contract for the implementation of the most acceptable proposal which will be determined having regard to the evaluation factors set out in this RFP. In addition, the acceptability of the contract terms and conditions upon which the respondent would be prepared to undertake the implementation of the proposal will be measured against the contract terms and conditions set forth in this RFP.

In response to the RFP, the complainant submitted a letter dated August 19, 1994, expressing its desire to perform this project. In the same letter, the complainant stated that, in its opinion, the RFP contained a "poorly written specification" and "a subjective evaluation process," and it indicated its intention to appeal these issues to the Tribunal. Along with the letter, it included an unsigned, uncompleted copy of the RFP. The only other proposal received was from the eventual contract awardee, the intervener in this case.

An evaluation of the bids was performed by the Department and the Research Station using a detailed rating guide that had been prepared in advance of the closing date for receipt of bids. The rated criteria listed in the RFP were further broken down in the guide, resulting in most individual elements being assigned a maximum of between one and three points. The

complainant's bid was determined to be non-responsive, as it failed to meet seven mandatory requirements. The other proposal received was evaluated and determined to be responsive and to exceed the 80-point required score for rated technical criteria. The contract was awarded on August 26, 1994, to the intervener, the only other bidder in this case.

Validity of the Complaint

Section 30.14 of the CITT Act requires that, in conducting its inquiry, the Tribunal limit its considerations to the subject-matter of the complaint and that, at the conclusion of the inquiry, it determine whether the complaint is valid on the basis of whether the prescribed procedures and other requirements have been or are being observed. Pursuant to section 11 of the Regulations, the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in NAFTA.

The complainant alleges that "[t]here is in fact no justification for this speed up in the bid process or tight delivery requirements" and that the preamble to the specifications was introduced in the RFP to justify speeding up this action. The complainant argues that it was initially contacted by the Research Station in November 1993 concerning the growth chambers and that, during the same month, it sent a three-page quotation along with three drawings "specifically designed to illustrate solutions to this nonstandard unique requirement." This information was to be used by the Research Station to "provide the budgetary basis for the current Request for Proposal." The complainant further states that, subsequent to that event and while on a business trip, it visited the Research Station to follow up on this requirement and was informed that the procurement was still planned for the next fiscal year. In July 1994, the complainant followed up again with a telephone call to the Research Station, at which time it was informed that the specifications had been forwarded to the Department. The complainant concludes by stating that "[o]n the surface it would certainly appear that we at Enconair were more concerned about getting this project underway than anybody else was."

The complainant further alleges that the RFP method of solicitation is objectionable as a general method of purchasing, and it also objects to numerous specifics involved in this RFP. Dealing with the RFP as a general method of solicitation, the complainant argues that, using numerous procurements from previous years as examples, over the years, the emphasis on bid evaluation methods has shifted from technical compliance and costs to other criteria, such as those used in this RFP. The complainant concludes on this point by stating that, on reflection, this change "stems from a conviction in Supply and Services Canada personnel that they should be able to buy from whomever they like regardless of cost." With respect to the specifics involved in this RFP, the complainant argues, *inter alia*, that:

- the operational contingency conditions requiring the provision of alternate environmental growth chambers in cases of delay in delivery or start-up problems demonstrate a complete lack of understanding on the part of the Research Station as to the technical sophistication and the real difficulty in providing the equipment specified;
- the requirement for a mandatory site visit, even though it knew the site and had visited it recently, is due to the fact that the contracting officer in the Department "[doesn't] have a clue" as to what this requirement is about;
- the requirement for a performance bond on the type of equipment involved in this RFP is probably impossible to obtain and shows the Department's depth of understanding of this equipment and, in any event, this requirement is subject to application rules that are "in the completely arbitrary judgement of the crown;"

- the requirement to certify the education and experience of key personnel "amounts to nothing more than an insult" as "[i]t apparently stems from the belief that private sector firms would tell lies on the education qualifications of the personnel in order to obtain a contract;"
- the requirement to provide technical literature that defines the products offered "is beyond our comprehension," as this equipment is highly sophisticated, technically complex and customized;
- the statement that the provision of a minimum of two references documenting the successful completion of similar projects in scope and size could provide additional points at the time of evaluation is ridiculous. "[W]hy would 5 or 10 or 15 occasions add more points?";
- the requirement for "shop drawings" to accompany the bids is an unreasonable mandatory expectation which "again emphasizes the fundamental lack of understanding of the type of equipment requested." "Shop drawing[s] are a requirement of contractors, usually in construction, after a contract has been awarded;" and
- the rated criteria and weighing of the technical proposal at 70 percent and price at 30 percent make price immaterial and allow the government to be arbitrary and subjective in its assessment of bids, particularly where, as is the case here, the minimum pass mark for technical points is 80 points out of a possible 100 points.

The complainant summarizes its argumentation on this point by stating that "[v]ast, laborious, cumbersome Request For Proposals are inimical to the best interests of the Canadian Government and the Canadian taxpayers" and that "[t]he procurement of equipment on the basis of Request For Proposal which allow[s] arbitrary discriminatory judgements to be made in terms of the selection of the successful bidder which tend to minimize or eliminate low bidders should be eliminated completely from Canada's tendering system."

In response to the complainant's allegations, the Department has taken the position that, with respect to the urgency, the preamble to the specifications was to convey both the urgency and the contingent effect on the Department of Agriculture's operations if the equipment were not in place when required. It stated that the failure of one of the growth rooms in March 1994 made replacement an urgent matter for which additional funding had to be secured. It further indicated that, at the time of the complainant's site visit last year, the Research Station had not requested a quote on a central control system or on retrofitting the existing equipment accordingly, as may be required, and that this additional requirement had to be researched for definition requirement purposes.

With respect to the complainant's view as to the objectionable nature of the RFP as a general method of solicitation, the Department indicated that, "[w]hile PWGSC would be pleased to provide the Tribunal with any information it requires on departmental policies relating to the use of various solicitation methods," it would not provide such information in its report since this issue related mostly to procurements other than the one under review.

On the specifics in the RFP, a summary of the Department's position is that:

- it is aware of the sophistication and of the difficulty involved in providing the equipment specified. It is also aware of past performance problems with such equipment, the cost of such performance incidents in relation to the purchase price and the need to obtain alternate equipment or the cost associated with the loss of research material;
- the purpose of the words "[t]he Crown reserves the right to reject a bid" was "to emphasize that each of the three features listed: a bid bond, sufficient technical information, and compliance with the mandatory criteria, were necessary in order to be found compliant." It stated that it is not arbitrary or judgemental to require a bid bond or to reject a bid should one not be provided. This is compliant with policy and guidelines concerning contract security. As regards compliance with the mandatory criteria in the RFP, these were clearly itemized;
- on the subject of the site visit, this requirement was designed so that the contractor would assume full responsibility for all measurements, connections, construction and installation work. "No allowances would be made at the time of contract performance for additional work or costs unless authorized by a change in the scope of work." Finally, the requirement to connect all existing equipment in various locations and buildings, including any retrofitting as may be required, was a new requirement for this site;
- performance bonds are often requested where performance is considered critical, as is the case here. Requesting bonds on laboratory equipment is not uncommon, the other bidder had no difficulty complying with the bond requirements, the terms of the standard bond are sufficiently precise to satisfy this requirement, and the performance bond requirement and the ability of bidders to obtain such bonds were intended to be used as a proxy to measure the financial competence of bidders;
- the education and experience certification clause is a standard clause not meant to be insulting. The Department is entitled to know the qualifications of personnel performing the work and to give notice that it will rely on the information given;
- the statement of the requirement to provide technical literature is sufficiently clear to indicate that the Department is looking for information on the company's products that are similar to the installation requested. The complainant indicated in its complaint that it provided technical literature to the Research Station with its quote of November 1993 and that it provided eight pages of technical literature with its response to the RFP;
- the Department's interest in assessing all bidders' previous experience by asking for references on previous projects comparable in scope and size is to identify a pattern of performance;
- "shop drawings" were provided by the other bidder. Further, it is reasonable to expect that a bidder could not provide a firm price or confirm that it could meet the requested schedule for delivery and installation unless it had done some form of shop drawings and scheduling to ensure that all parts and resources would be available when needed;

- the relevance of price to other elements of the contract was given careful consideration at the requirement definition stage. The Department's judgement that low price was not to be the overriding factor is a reflection of the Department of Agriculture's view that the importance of reliability in the work to be carried out with the equipment exceeds, but does not nullify, the importance of the cost of the equipment itself. The relative weighing of price and technical proficiency is a reflection of the Department of Agriculture's requirement for technical reliability, the long-term satisfactory performance of the equipment and the need to ensure the integrity of the research program.

The Department concluded its response and argumentation on this point by stating that the changes to the RFPs over the years can be attributed, in the main, "to the Department's attempts to find a fair and equitable method of acquiring this equipment without jeopardizing the customers' operations." The RFP permits competition without compromising the Research Station's operational needs.

For its part, the intervener indicated in its submission on the complaint that, in its opinion, the mandatory site visit was essential in the circumstances, that it had no difficulty to comply with the bond requirements, that sufficient time was allowed in this instance for bid preparation and delivery of the product, granted more time would always be nice, and that the evaluation criteria were clearly laid out in the solicitation documents. In summary, its belief is that the RFP document created for this requirement "reflects the growing trend in today's buying procedures for sophisticated research equipment." It tells bidders "exactly what is important in their request and how you will be scored. All that is left is for the bidders to make an honest effort to provide the information requested."

In its comments on the intervener's submission, the complainant stated that "[g]iven that his firm [Controlled Environments Limited] has received several million dollars in orders on a sole source basis his satisfaction with the current system is completely understandable."

Having carefully examined the complainant's allegations dealing specifically with the designated contract, the Tribunal is of the view that such allegations raise the question as to whether the Department has complied with the requirements of NAFTA set forth in Article 1008, "Tendering Procedures," Article 1009, "Qualification of Suppliers" and Article 1012 "Time Limits for Tendering and Delivery."

Time Limits for Tendering and Delivery

Article 1012 of NAFTA sets out, in part, the following requirements:

2. *Subject to paragraph 3, an entity shall provide that:*
 - (a) *in open tendering procedures, the period for the receipt of tenders is no less than 40 days from the date of publication of a notice in accordance with Article 1010 [Invitation to Participate];*
3. *An entity may reduce the periods referred to in paragraph 2 in accordance with the following:*
 - (c) *where a state of urgency duly substantiated by the entity renders impracticable the periods in question, the periods may be reduced to no less than 10 days from the date of publication of a notice in accordance with Article 1010.*

The complainant alleges the absence of justification for the state of urgency. More specifically, the complainant argues that the Department could have initiated the procurement earlier, since the need to replace the three existing growth rooms had been known to the Research Station as early as November 1993. In this connection, the Tribunal notes a few points. First, it is beyond doubt that the Research Station was planning, in November 1993, to replace the growth rooms. Second, the Research Station then budgeted for their replacement sometime in fiscal year 1994. However, it was not known in the fall of 1993 that the failure of an existing growth room, which occurred in March 1994, would alter significantly the time schedule relating to the acquisition of the new equipment. In addition, the requirement to interconnect a number of existing growth rooms, so that they could be centrally operated and monitored, was identified only in late spring of 1994.

Bearing in mind the foregoing, the Tribunal is of the view that a state of urgency has been duly substantiated in the present instance. In essence, the need to avoid the loss of a full year in the development of new cereal cultivars which are of significance to the Canadian economy supported, in the Tribunal's view, the requirement that the new equipment be delivered as specified in the RFP. The Tribunal also notes that, although the complainant argued that the development of a state of urgency might have been avoided had the Research Station and the Department acted with more diligence, the complainant never disputed that a state of urgency existed at the time that the NPP was published in July 1994 in the GBO. The Tribunal is satisfied that there is nothing in the file to establish that the Department or the Research Station engineered the situation whereby a state of urgency existed at the time that the NPP was published. It is also satisfied that such state of urgency was duly substantiated and that the 40-day period for the receipt of tender under open tendering procedures was impracticable in the circumstances facing the Department or the Research Station. The Tribunal thus concludes that there has been no violation of Article 1012(3)(c) of NAFTA.

Tendering Procedures and Qualification of Suppliers

Article 1008 of NAFTA sets out, in part, the following requirements:

1. *Each Party shall ensure that the tendering procedures of its entities are:*
 - (a) *applied in a non-discriminatory manner; and*
 - (b) *consistent with this Article and Articles 1009 through 1016.*

Article 1009(2)(b) of NAFTA sets out the following requirements:

- (b) *conditions for participation by suppliers in tendering procedures, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of whether a supplier meets those conditions, shall be limited to those that are essential to ensure the fulfillment of the contract in question.*

The complainant alleges that the RFP method of solicitation, in general, and specific aspects of the RFP for the procurement under review are arbitrary and subjective, unfair to bidders and detrimental to the financial interests of the Canadian government.

As to the RFP as a general method of solicitation, the Tribunal notes that the complainant's allegations relate essentially to various procurements conducted in previous years, the majority of which occurred before the coming into force of NAFTA. In the Tribunal's view, these procurements bear no relevance to the case at hand.

With regard to the specifics of the RFP in the present instance, the Tribunal considers that the offer submitted by the complainant has been properly declared non-compliant by the Department for failing to meet seven mandatory requirements clearly spelled out in the RFP, i.e. (1) a bid bond in the amount of 20 percent of the bid price; (2) a statement to the effect that the bidder complies with providing a performance bond in the amount of 50 percent of the contract price; (3) certification of education and experience of key personnel; (4) employment equity certification; (5) résumé of the installer/warranty service provider; (6) minimum of two references; and (7) shop drawings. In effect, the complainant chose not to provide any information or relevant documents in response to these seven requirements. In these circumstances, it is clear that no subjective judgement or discretion could have been applied, since there was no information which could be weighed or assessed by the Department and the Research Station. Therefore, the decision was objective and dealt strictly with determining the absence or presence of certain required information. In addition, having regard to the evidence, the Tribunal is satisfied that the contract awardee's bid was assessed using the evaluation criteria set out in the RFP and that the contract was awarded on the basis of these evaluation criteria. Therefore, the Tribunal concludes that, in the present case, the evaluation criteria were not applied arbitrarily or unevenly to both bidders.

The last issue to be determined is whether or not the RFP, with its mandatory and rated requirements, constituted in fact a discriminatory solicitation instrument. In other words, the question is to consider whether the RFP was designed, on purpose or otherwise, in such a way as to prevent open competition as provided in the NPP. In this connection, all parties to this case agree that the requirement was in respect of the acquisition of sophisticated and complex equipment, that such equipment must perform to a high level of reliability to ensure the integrity of the research program and that production, delivery and installation of this equipment must be completed within a tight schedule. Also, the Tribunal notes that the Department was not asking bidders to provide a set solution to its problem; indeed, it was prepared to consider alternative means to achieve this requirement (as stated in clause A0006T of the RFP). This is particularly noticeable in respect of the requirement for a central control system. Having reviewed all requirements of the RFP in light of the circumstances of the present case, the Tribunal is of the view that such requirements, taken separately or together, were entirely justifiable. As they can reasonably be considered as essential to ensure the fulfilment of the contract in question, they did not constitute a barrier to open competition.

With respect to the rated criteria, technical and price, the Tribunal notes that, though the weighing is 70 percent and 30 percent respectively, price at 30 percent remains the single most important rated factor, with the next rated factor in importance being "[m]eeting and exceeding the technical specifications" at 70 percent of 35 points, or 24.5 percent. Finally, the Tribunal finds nothing exceptional or discriminatory in the remaining rated requirements dealing with the ability to deliver, the availability of maintenance service and spare parts, the interface capability, and the company/personnel qualifications and thoroughness of approach, or their assigned weights. In fact, it notes that the itemization of all rated criteria in a detailed rating guide prepared in advance of bid closing into numerous evaluation elements, with most elements being assigned a maximum of between one and three points, reduces considerably the possibility of applying improper discretion or subjectivity at the evaluation stage or the impact of such practices on the overall results should this occur. Finally, the fact that more than one person

from two different and distinct organizations participated in the evaluation is a further guarantee of the objectivity of the evaluation of bids. Accordingly, the Tribunal concludes that the Department did not violate the relevant provisions of Articles 1008 and 1009 of NAFTA in designing and utilizing the RFP as it did.

Determination of the Tribunal

In light of the foregoing, pursuant to section 30.14 of the CITT Act and section 10 of the Regulations, the Tribunal determines that the complaint has no valid basis. Accordingly, the complaint is dismissed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member