



Ottawa, Thursday, June 5, 1997

File No.: PR-96-035

IN THE MATTER OF a complaint filed by Accutel Conferencing 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.

The Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services cancel the procurement. For any subsequent procurement in relation to the teleconferencing services, the requirement and evaluation criteria should be defined in a clear, precise and complete manner consistent with all the expectations for the services and the procedures and obligations of any applicable agreements.

Pursuant to subsections 30.15(4) and 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Accutel Conferencing Systems Inc. its reasonable costs incurred in preparing a response to the solicitation and in relation to filing and proceeding with its complaint.

Arthur B. Trudeau

Arthur B. Trudeau

Member

Michel P. Granger

Michel P. Granger

Secretary

Date of Determination: June 5, 1997

Tribunal Member: Arthur B. Trudeau

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Heather A. Grant

Complainant: Accutel Conferencing Systems Inc.

Counsel for the Complainant: Marc R. Duguay

Intervener: Advanced Multi-Point Conferencing Inc.

Intervener: ConferTech Canada Inc.

Government Institution: Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

INTRODUCTION

On March 7, 1997, Accutel Conferencing Systems Inc. (Accutel) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement (Solicitation No. EN994-6-2960/B) by the Department of Public Works and Government Services (the Department) of teleconferencing services and equipment.

Accutel alleges that the government: (1) introduced new, unannounced mandatory criteria after the closing date for receipt of bids, the application of which resulted in its bid being declared non-compliant; (2) applied evaluation criteria that had not been clearly set out in the Request for Proposal (RFP); (3) withheld essential information, until after bid closing, that ought to have been set out in the RFP; and (4) misled and prejudiced Accutel because new criteria were applied after bid closing, where Accutel had reasonably and properly relied on information and criteria set out in the RFP. In support of its allegations, Accutel states that the government's refusal to grant Accutel's request to visit the service site had the effect of denying Accutel the opportunity to see first-hand the number of operators needed and that the government's characterization of Accutel's letter of February 7, 1997, as an attempt at bid repair further tainted the procurement process. In view of the above, Accutel submits that the government has violated Chapter Five of the *Agreement on Internal Trade*² (the AIT) and, in support of this position, referred to Articles 501, 506(6) and 504(3)(b) of the AIT.

Should the complaint be upheld, Accutel requests that, as a remedy, its bid be declared compliant and responsive and that the evaluation of the bids proceed on the basis of all compliant bids, inclusive of its own. Alternatively, it requests that it be awarded the contract and, in the further alternative, that the solicitation be terminated and re-tendered. Accutel also requests that it be awarded its costs associated with filing the complaint and preparing its bid. Furthermore, if the contract were ultimately to be awarded to another bidder, Accutel requests that it be awarded compensation for lost profits, specifically profits that it would have earned had it been awarded the contract.

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1. R.S.C. 1985, c. 47 (4th Supp.).
 2. As signed at Ottawa, Ontario, on July 18, 1994.

BACKGROUND

On March 7, 1997, the Tribunal determined, on the basis of the existing record, that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*³ (the Regulations) had been met in respect of the complaint. On March 11, 1997, the Tribunal issued an order postponing the award of any contract in connection with the solicitation until the Tribunal determined the validity of the complaint. On March 17, 1997, the Tribunal granted Advanced Multi-Point Conferencing Inc. (AMC) leave to intervene in this matter and, on April 4, 1997, it also granted ConferTech Canada Inc. (ConferTech) leave to intervene. AMC and ConferTech filed comments relating to the complaint with the Tribunal on March 20 and April 8, 1997, respectively. On April 7, 1997, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ AMC and ConferTech filed comments on the GIR with the Tribunal on April 17 and 15, 1997, respectively. ConferTech also filed additional comments with the Tribunal on May 1 and 9, 1997. Accutel filed its comments on the GIR on April 18, 1997, and, subsequently, comments on the submissions of the interveners on May 5 and 14, 1997.

Given the scope and nature of the information on the record, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on file.

PROCUREMENT PROCESS

On September 3, 1996, the Department issued a Letter of Interest to solicit comments from members of the teleconferencing industry regarding the proposed Statement of Work (SOW) for an upcoming teleconferencing service requirement of the government. The Department received comments on the proposed SOW from a number of companies, including Accutel, and, as a result, refined the specifications taking into account the recommendations of the bidder community.

On November 20, 1996, the RFP was advertised on the Open Bidding Service. Tenders closed on December 18, 1996.

The RFP contained, in Appendix "A," an SOW which described the functional and technical specification for the teleconferencing services. Beside each individual entry in the SOW was any one of the following designations: "Mandatory," "Desirable" or "Information." Section 2.1.3 was designated "Mandatory" and reads as follows:

It is mandatory that the bidder provide the following:

- a) the total capacity of the proposed service for every year of the forecast traffic shown in Section 6.0;
- b) the service design and evolution (wherever and whenever additional equipment is added); and
- c) the physical location(s) (including full address) where the equipment used to provide the service will be located.

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

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

The forecasted traffic in section 6.0 of the SOW reads as follows:

6.2.2 Forecasted Traffic

Calendar Year	# of Reservations	# of Cancellations	# of Conferences
1997	29,500	4,425	25,075
1998	31,860	4,779	27,081
1999	33,771	5,065	28,706
2000	35,121	5,268	29,853
2001	35,900	5,385	30,515

6.2.3 Forecasted Breakdown of Call Types

Based on Minutes	[Dial-out Attended]	[Dial-in Attended]	[Meet-me]
1997	86%	1%	13%
1998	83%	1%	16%
1999	80%	1%	19%
2000	77%	1%	22%
2001	74%	1%	25%

Based on Call Type

1997	83%	3%	14%
1998	80%	3%	17%
1999	77%	3%	20%
2000	74%	3%	23%
2001	72%	3%	25%

6.2.4 Forecasted Bridge Ports

Calendar Year	Number of Busy Hour Ports
1997	376
1998	406
1999	430
2000	447
2001	457

Note: The Busy Hour Port requirement is based on the following assumptions:

1. Number of conferences during the busiest month is assumed to be 10% of the annual total of conferences.
2. Ports required during the busy hour are assumed to be 15% of the monthly total of conferences.

For example:

Number of conferences per year = 25,075

Number of conferences per busy month = $25,075 \times 0.1 = 2,507.5$

Ports required during busy hour = $2,507.5 \times 0.15 = 376$

Range of Ports (+ or -10%) = 338 to 414

There was no reference in the RFP as to a required minimum number of terminals/operators nor was there an indication that the majority of conferences were expected to start on the hour or half hour.

On December 2, 1996, Accutel requested a site visit in order to ascertain whether the existing bridge was a viable vehicle for providing the service for the next three to five years and also to respond to item 1.2.6 b) of the SOW to ensure a transparent backup service during any switchover period between the supply of the current service and that of a new contractor. The request for a site visit was denied.

In response to the RFP, three proposals were received by the Department, one each from Accutel, ConferTech and AMC.

The technical proposals submitted by Accutel, ConferTech and AMC were reviewed by the Department's Government Telecommunications and Informatics Services and its Science, Informatics and Professional Services Sector in order to determine whether the proposals complied with the mandatory requirements set out in the RFP. According to the Department, Accutel's proposal did not appear to be able to handle the forecasted traffic. On January 21, 1997, a facsimile was sent to Accutel requesting clarification on, among other things, item 2.1.3 b). With respect to this item, the Department requested that Accutel "detail how [its] proposed primary service will handle forecasted traffic indicated in section 6 with 8 operator/reservation terminals given the high percentage (89%) of attendant - type calls."

On January 29, 1997, Accutel responded to the request for clarification with a letter that detailed how it proposed to meet the requirements of item 2.1.3 b). In its letter, Accutel stated that the planned eight terminals that it had indicated in its proposal would be sufficient for the Department's purposes and explained why this was the case. However, if further attendant terminals beyond the planned equipment evolution indicated were needed, Accutel stated that it would install these immediately.

A further request was made by the procurement officer to clarify aspects of the technology to be employed by Accutel, and a meeting was held on February 5, 1997, for this purpose. At that time, Accutel was informed that it had too few operators to meet the government's requirements in respect of the forecasted traffic. It became apparent to Accutel, at that meeting, that reservations were assumed by the Department to start mainly on the hour or half hour.

The meeting was followed up with a letter from Accutel to the Department on February 7, 1997, in which Accutel provided details about the allocation of staggered start times and how it would meet the traffic requirements stipulated in the RFP with the planned eight terminals. Alternatively, it proposed to increase the operator terminals, should the Department continue to require that the clients determine their own conference start times.

On February 21, 1997, the Department sent a letter to Accutel, stating that Accutel's proposal was non-compliant because "[t]he proposed service design of 8 operator/reservation terminals does not meet the operational service requirements of [Government Telecommunications and Informatics Services]." The letter also stated that the proposed number of terminals in Accutel's letter of February 7, 1997, constituted an amendment to the original proposal and could not be accepted. On the same day, Accutel sent a letter to the Department objecting to the determination that its proposal was non-compliant and stating that it believed that this determination was made based on unspecified criteria.

On March 6, 1997, the Department denied relief to Accutel with a letter that read, in part: "it is incumbent on bidders to understand the service for which they are bidding and the onus is on each bidder to seek clarification on any aspect of the RFP that they feel will provide a better understanding of the requirement, thus enabling them to provide a compliant bid."

On March 7, 1997, Accutel filed a complaint with the Tribunal.

VALIDITY OF THE COMPLAINT

Accutel's Position

Accutel submitted that the Department's actions, in conducting this procurement, as outlined in the introductory section of this decision, whether taken as a whole or as any single occurrence, amount to a denial of fairness in the bidding process and, more so, constitute a violation of Chapter Five of the AIT. Accutel indicated that it does not object to the RFP or its contents. Rather, it emphasized the importance and content of the RFP criteria which were met by Accutel in its response to the RFP. The focus of the complaint is primarily that the Department introduced new mandatory criteria and information after tenders closed on December 18, 1996.

Accutel further submitted that it did not learn, until its meeting of February 5, 1997, that teleconferencing activities were generally required to start on the hour or half hour, as this requirement was not in the solicitation documents. Accutel believes that, since a bidder reasonably expects all mandatory criteria to be present in the solicitation documents, its lack of knowledge of this requirement placed it in an unfair position relative to ConferTech. It further submitted that the Department should be prevented from adding this new and unannounced requirement to the procurement action and that the Department should be forced to abide, as were the bidders, by the SOW as originally presented in the RFP.

In its response to the GIR, Accutel presented a mathematical argument in an attempt to demonstrate that the "worst case scenario," described by the Department in the GIR, would be impossible to achieve without staggered start times. It also submitted that the incumbent would be the only bidder to know that its current level of 12 terminals was inadequate according to the government. However, Accutel submitted that a re-tender of this requirement would put it at a disadvantage because, now, its competitors realize that their advantage might lie in technological applications that reduce operator personnel requirements. Accutel proposed that the Tribunal announce, based on the pricing evidence, the lowest compliant bidder entitled to perform the resulting contract.

Department's Position

In response to the complaint, the Department stated, in the GIR, that the RFP may not have been "sufficiently clear" in respect of the mandatory item based on which Accutel's proposal was declared non-compliant. Given that the Department has not commenced a financial evaluation of the proposals and that no contract has been awarded, it indicated that it was prepared to re-tender the requirement.

The Department then went on to address each of Accutel's specific allegations. With respect to the allegations that it had introduced new mandatory criteria after bid closing, that it had applied evaluation criteria not specified in the RFP and that essential information was withheld from Accutel until after bid closing, the Department denied the validity of these allegations. Specifically, it stated that, although the RFP did not indicate that conference start times were to be on the hour and half hour, there was sufficient information in the SOW for an experienced bidder to deduce this requirement. Furthermore, had Accutel correctly interpreted, or requested clarification of, the traffic statistics in the SOW, it would have realized that a minimum of 15 terminals was required. Instead, Accutel interpreted the statement of the technical evaluation team, at the February 5, 1997, meeting, as introducing new mandatory criteria. The Department submitted that Accutel was not misled or prejudiced by the introduction of "new criteria," rather its proposal

was based on its misinterpretation of, or failure to request clarification of, the SOW. The Department also noted that the other bidders had correctly interpreted this requirement and were able to bid an adequate level of service.

With respect to Accutel's allegation that the Department's failure to grant Accutel permission to visit the service site created an unfair advantage for ConferTech, the Department submitted that, at the time of Accutel's request for the site visit, that being on December 2, 1996, it was of the view that, given the reasons cited for the visit by Accutel, the visit was not necessary and that the information sought by Accutel was not relevant to the submission of a proposal. It further noted that it was not in a position to unilaterally grant access to the site.

With respect to Accutel's allegation that the Department improperly characterized Accutel's attempts to respond to the "new criteria" as an attempt at bid repair, the Department stated that, during the meeting of February 5, 1997, it was Accutel that advised the evaluation team that it was prepared to provide additional terminals in lieu of the eight proposed in its bid.

Interveners' Positions

AMC

In its letter of March 20, 1997, AMC stated that, based on the information provided in the RFP, it believed that ConferTech had only 6 operator positions and stated as such to the Department without ever being corrected. Although it proposed 15 to 18 operator positions, it acknowledged that Accutel may have been misled by the RFP. AMC also indicated that, in its opinion, the RFP was biased towards the equipment manufactured by ConferTech.

ConferTech

In its letter of April 8, 1997, ConferTech indicated that there was no need to disclose that the majority of conference calls start on the hour or half hour, since over 95 percent of all calls occur in this fashion throughout the teleconferencing industry. Moreover, any capable vendor would have been aware of this fact or questioned it, if in doubt. In its letter of April 15, 1997, ConferTech disagreed with the Department's proposal to re-issue the RFP, as its proposal has been in the Department's possession for over three months. It also stated that it was both fair and understandable to anyone in the teleconferencing industry that Accutel's proposal was deemed non-compliant. In its letter of May 1, 1997, ConferTech stated, in relation to the complaint, that Accutel's proposal of staggered start times demonstrates Accutel's lack of experience and expertise to meet the requirements of running the teleconferencing service needed by the government. It stated that a company with both the experience and resources available to service peak demand periods of the government teleconferencing service would likely build a service around the median service requirements with some capability for additional capacity. ConferTech reiterated its concern with the possible cancellation and re-issuance of the procurement in question. In a letter submitted to the Tribunal on May 9, 1997, ConferTech submitted that Accutel's proposal was correctly determined non-compliant, since its bid did not contain enough operator stations or personnel to service the demands set out in section 6.0 of the SOW.

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 the AIT.

Article 506(6) of the AIT requires that the Department clearly set out, in the solicitation documents, the evaluation criteria, including the methods of weighting such criteria, that it will use in evaluating offers. The Tribunal is of the opinion that the essence of the complaint is that Accutel's proposal was unfairly declared non-compliant based on either unclear or unstated evaluation criteria.

The Department has stated, in the GIR, that the RFP may not have been sufficiently clear on the mandatory item on which Accutel's proposal was declared non-compliant. In the Tribunal's view, the mandatory item upon which Accutel's proposal was declared non-compliant was not only unclear but was absent from the RFP. If, as the Department and ConferTech say, most, if not all, teleconferencing sessions start on the hour or half hour, as generally requested by the users of the services, this is a significant and key piece of information that was not present in the RFP. If the Department then applies this information in the assessment of proposals to the detriment of suppliers that assumed a different approach, then those suppliers have been unfairly placed at a disadvantage. The Tribunal is of the view that it is not enough to give forecasted traffic without giving precise direction in the RFP on how the traffic is to be accommodated, if the Department has certain minimum expectations.

The Tribunal is of the view that the Department, by declaring Accutel's proposal non-compliant based on criteria not clearly set out in the solicitation documents, has violated the procedural requirements of the AIT, specifically Article 506(6) and, consequently, that the complaint is valid.

On the matter of remedy, the Tribunal recommends that the current procurement be cancelled and that the requirement be re-written to include clearly all valid requirements of the teleconferencing service and the method by which proposals will be evaluated. After the requirement has been re-written, the procurement should be conducted in accordance with all applicable procedures.

The Tribunal also awards Accutel its reasonable costs incurred in preparing a response to the solicitation and in relation to filing and proceeding with its complaint, in order to place Accutel in the position in which it was prior to the start of the procurement.

In considering the appropriate remedy in this case, the Tribunal took into account the submissions of the parties regarding the significance of the start times on the hour and half hour compared with the staggered start times, as well as the implications of various remedies. ConferTech submitted that conference start times on the hour and half hour are the industry norm. The Department submitted that start times requested by the service users (usually on the hour or half hour) are expected to be accommodated as much as possible. Accutel proposed a system based on staggered start times, which it maintains could meet the forecasted traffic demands set out in the RFP. Accutel submitted that, since this requirement of start times on the hour and half hour was not in the RFP in the first place, the procurement should continue to its conclusion with its proposal being viewed as responsive. Although the Tribunal finds that the complaint is valid, it is of

the view that to recommend the continuation of the procurement as a remedy in this case, as Accutel suggests, when such a procurement may not adequately reflect the needs or requirements of the government, is not appropriate in the circumstances. However, to allow the procurement to continue in this case with unclear or unstated criteria, against which a proposal's compliance with the RFP would be assessed, would, in the Tribunal's view, be prejudicial to the integrity and efficiency of the competitive procurement system.

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 the AIT and, therefore, that the complaint is valid.

The Tribunal recommends that the Department cancel the procurement. For any subsequent procurement in relation to the teleconferencing service, the requirement and evaluation criteria should be defined in a clear, precise and complete manner consistent with all the expectations for the service and the procedures and obligations of any applicable agreements.

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

Arthur B. Trudeau

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Member