

Ottawa, Thursday, April 30, 1998

File No.: PR-97-037

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

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

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid in part.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services make available to all bidders involved in this solicitation the updated version of the AASMD Software Engagement Simulation Final Report to be produced by Atlantis Scientific Inc. and, with this information in hand, allow them to modify their proposals as appropriate in relation to this new information and proceed onward with this procurement as provided under the provisions of the *Agreement on Internal Trade*.

Charles A. Gracey

Charles A. Gracey
Member

Michel P. Granger

Michel P. Granger
Secretary

Date of Determination: April 30, 1998

Tribunal Member: Charles A. Gracey

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Joël J. Robichaud

Complainant: Tactical Technologies Inc.

Government Institution: Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

INTRODUCTION

On January 23, 1998, Tactical Technologies Inc. (TTI) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement (Solicitation No. W7714-7-0113/A) by the Department of Public Works and Government Services (the Department) of services in support of the Advanced Anti-Ship Missile Defence (AASMD) Simulation Project² for the Defence Research Establishment Ottawa (DREO) of the Department of National Defence (DND). This procurement is for the continuation of services currently provided by Atlantis Scientific Inc., the incumbent contractor (the Incumbent).

TTI alleged that: (1) the Request for Proposal (RFP) and related Statement of Work (SOW) duplicate an existing product and fail to include several features which, in TTI's opinion, are critical to properly describe such a procurement; (2) that the RFP is biased in favour of the Incumbent; and (3) that the requirements as set out in the RFP are extremely difficult if not impossible to relate to the evaluation criteria, thus making the preparation of a proposal virtually impossible. The above, TTI submitted, are contrary to the provisions of Articles 501, 504 and 506(6) of the *Agreement on Internal Trade*³ (AIT).

TTI requested, as a remedy, that the current RFP be temporarily withdrawn and that an independent review of TTI's analysis methodologies and simulation tools in relation to DREO's research objectives be carried out.

On January 26, 1998, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁴ (the Regulations) had been met in respect of allegations 2 and 3 mentioned above and, pursuant to section 30.13 of the CITT Act, decided to conduct an inquiry into these affirmations.

1. R.S.C. 1985, c. 47 (4th Supp.).
2. Project to provide an enhanced capability to simulate the attack of a missile against a ship that is using electronic countermeasures against such an attack. The electronic countermeasures are intended to confuse and/or deceive the radar seeker and divert the missile away from the ship, providing the desired anti-ship missile defence protection.
3. As signed at Ottawa, Ontario, on July 18, 1994.
4. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

The first allegation was not accepted for inquiry since, in the opinion of the Tribunal, this situation does not disclose a reasonable indication that the Department has acted contrary to the provisions of Chapter Five of the AIT. On January 27, 1998, the Tribunal issued an order postponing the award of any contract in this procurement until the Tribunal determined the validity of the complaint. On February 23, 1998, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with Rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On March 4, 1998, TTI filed its comments on the GIR with the Tribunal. On March 24, 1998, the Department submitted its observations on TTI's comments on the GIR and on March 31, 1998, TTI submitted additional comments in reply.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

PROCUREMENT PROCESS

On October 29, 1997, the Department received a requisition from DREO for a contract to provide support services to the AASMD Simulation Project. This solicitation is for the continuation of services currently provided by the Incumbent. Under the terms of the requisition, personnel is required to maintain and operate the AASMD Simulation Framework⁶ (the Framework) and to implement electronic warfare simulation models. The support services for the Framework include enhancements to the software source code to improve the operational efficiency of the Framework, additions to the software code to provide new services to users, as well as modification of the software source code to fix software problems and to address changes in software programs and hardware.

On December 16, 1997, a Notice of Proposed Procurement and the RFP were posted on the government electronic tendering service (MERX). The RFP closing date of January 12, 1998, was extended to January 30, 1998, due to a severe ice storm in the Ottawa/Hull region.

The RFP and SOW read, in part, as follows:

SECTION I - A: DESCRIPTION OF REQUIREMENT

2.0 STATEMENT OF WORK

The successful bidder will be required to perform work on an "As and When Requested" basis within the scope of the objectives, as set out in the Statement of Work, attached hereto as **Annex "B"**.

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

6. A software program developed by the Incumbent for DREO that permits DREO to conduct a variety of electronic warfare (EW) simulations. The Framework co-ordinates the data communication between models within the simulation system and provides services for the input and output of simulation data. DREO uses the Framework in conjunction with various EW models to determine the outcome of simulated anti-ship missile engagements and to validate and compare the effectiveness of EW tactics. The Framework was developed by the Incumbent under a contract which was awarded following a competitive process. Following its development, it was necessary to provide for the support and enhancement of the Framework. This requirement was also addressed through a competitive process, in which both TTI and the Incumbent participated and which was won by the Incumbent on price. The competitive process, which is the object of this latest procurement, is designed to renew the support and enhancement services competed previously.

SECTION II - A: PROPOSAL PREPARATION INSTRUCTIONS

3.0 TECHNICAL AND MANAGEMENT PROPOSAL

- d) The requirement consists of the provision for three categories of support personnel. The categories are as follows:

Project Manager
Senior Systems Analyst
Programmer Analyst

4.0 PRICE PROPOSAL

[Bidders] shall submit **firm labour rates** throughout the complete period of the contract.

SECTION III: RESULTING CONTRACT CLAUSES AND ADDITIONAL TERMS AND CONDITIONS APPLICABLE TO ANY RESULTING CONTRACT

9.0 "AS AND WHEN REQUESTED" TASKS - AUTHORITY TO PROCEED

[This article describes the procedure to develop defined tasks under the contract.]

Annex "B" Statement of Work

2.0 OBJECTIVE

- 2.1 The objective of this contract is to provide support for simulation framework maintenance, model implementation, and operation of the simulation framework.

In addition, Article 3.0 of the SOW, CATEGORIES OF SUPPORT, describes at length the three categories of support and Article 4.0, SAMPLE TASKS, identifies sample tasks. Annex "C," EVALUATION CRITERIA AND CONTRACTOR SELECTION METHOD, in part, identifies three rated requirements: "Personnel," with 70 percent of the total available points; "Understanding the requirements," with 15 percent of the points; and "Company" (experience and depth and availability of back-up personnel), with the remaining 15 percent.

The Department made available to all bidders, for viewing at its offices, background information concerning the design of the original Framework. TTI examined the information on January 6, 1998. In response to questions raised during the bidding period, TTI was informed by the Department that, since the solicitation was for the provision of support services on an "As and When Requested" basis, the SOW and the associated evaluation criteria placed emphasis on the qualifications of the proposed personnel rather than the performance of specific tasks. TTI was also informed that no additional background information existed which could be provided to the bidders.

According to the Department, nine firms requested bid packages during the bidding period and, by January 30, 1998, three bids were received, including one from TTI. According to the Department, as of February 23, 1998, the technical and financial evaluation of the bids had not commenced.

VALIDITY OF THE COMPLAINT

TTI's Position

TTI submits that its primary objective in filing this complaint is to see independent oversight applied to the definition and the award of the solicitation in dispute. TTI wants to ensure that this competition and subsequent award are carried out in accordance with the Crown's policies, procedures and regulations and its obligations under international agreements, particularly the AIT and the Treasury Board of Canada Secretariat's Contracting Policy, particularly those related to research and development services contracts.

TTI submits that, in the course of investigating the GIR, it has found evidence of substantial infringements in the drafting of the RFP, of the Treasury Board of Canada Secretariat's Contracting Policy and of the AIT. In addition and perhaps more importantly, TTI submits that it has found evidence of substantial violations in the award and execution of the previous contract related to AASMD Model Development Support (dated August 31, 1995) currently being performed by the Incumbent.

Specifically, TTI submits that the Department's assertion, to the effect that the RFP for the contract currently held by the Incumbent provided a higher emphasis on modeling than the current RFP, is wrong. Indeed, the objective of the contract currently held by the Incumbent was to develop models only. However, TTI submits that evidence presented by the Department in the GIR shows that contrary to the SOW, which required that all tasks be devoted to transferring models of physical systems into code, the actual implementation of the contract focused on developing the Framework. This situation, TTI submits, may, in part, be related to the absence of a clear statement of requirements in the RFP. In any event, evidence in the GIR shows that the current contract is poorly managed, resulting, among other things, in the apparent absence of design document deliverables for each individual task completed as required under the contract. These documents, TTI submits, would have been most useful information to bidders in this solicitation.

Concerning the Department's argument that it is not necessary that a definitive work plan be provided to formulate proposals, e.g. TTI has been able to submit a bid in this instance, TTI submits that initiating a complaint with the Tribunal and not submitting its best proposal effort would have been inconsistent. However, had the tasking requirements been clearly described in the RFP, TTI could have presented a substantially stronger proposal.

TTI also submits that the SOW included in the RFP does not identify specific stages of work, their sequence or their relationship to the overall work. Further, the SOW does not clearly describe the work to be carried out, the objectives to be attained and the time frame for their execution. Finally, the solicitation has not been defined well enough in advance to not depend on a series of ad hoc assignments over the course of the resulting contract. TTI submits that each of the above is contrary to the Treasury Board of Canada Secretariat's Contracting Policy (Article 16.1.2, Service contracts - General,⁷ article 16.1.3, Service

7. "The statement of work or requirements description should clearly describe the work to be carried out, the objectives to be attained and the time frame. It should be: (a) explicit about the client's requirements and the contractor's responsibilities so that questions of interpretation can be avoided."

contracts - General⁸ and article 16.4 Service contracts - Contracts for research and development⁹) and Article 506(6)¹⁰ of the AIT.

Moreover, TTI submits that the absence of clear technical requirements in the RFP results in extreme difficulty in relating the evaluation criteria to the requirements. The GIR, TTI submits, endeavours to show (exhibits 7, 8 and 9 attached to the GIR) a correlation between the qualifications of the project manager and analysts, as described in the SOW, and the evaluation criteria. In the absence of a clear statement of requirements, such a correlation, TTI submits, is without basis, foundation or justification. Any such description of personnel qualifications is simply the identification of desired individual characteristics without basing or justifying them on the work to be done. The subsequent creation of evaluation points and weights is substantially arbitrary and the subsequent application of evaluation criteria to any such personnel qualification is similarly without basis, foundation or justification, and is arbitrary. TTI further submits that the element of arbitrariness which is introduced through the absence of a clear description of the technical requirements, personnel requirements and evaluation criteria amounts to a bias against TTI, in favour of the Incumbent. This, TTI submits, is a violation of Article 504(3)(b)¹¹ of the AIT and Article 2 (Policy statement) of the Contracting Policy.

Concerning the RFP mandatory requirement for “Smalltalk/ENVY” programming experience, TTI submits that this is intended to prevent it from being a compliant bidder. Indeed, TTI submits that DREO is fully aware that TTI’s intended project manager is not a Smalltalk programmer. In any event, this is not an essential requirement of the project. Indeed, TTI points out, its intended project manager has successfully managed the development of a product line of simulation software including anti-ship missile defence simulation software in Simulink, even though he was not a Simulink programmer. “Smalltalk/ENVY” programming experience should simply not be a mandatory requirement of this RFP.

On the issues of equal access to bidding and the achievement of best value to the Crown, which are administered by Article 501 of the AIT and by Articles 2 and 9 of the Contracting Policy, TTI submits that there is significant variance among the various statements made by the Department in the GIR in respect of the existence of additional technical or design information. In addition, TTI submits that there is evidence (Exhibit 11 attached to the GIR) that some such documentation has been delivered to DREO by the Incumbent. TTI’s perception is that the Crown possesses, or should possess, design documents and other technical information relevant to preparing a response to the RFP. The descriptors “preliminary” and “finalized” appear to TTI to be relevant to the Crown’s judgment in not making them available. However, if

8. “The Statement of work should identify the specific stages of the work, their sequence, their relationship to the overall work in general and to each other in particular.”

9. “Research and development service contracts may be entered into when: (b) the requirement can be defined in advance well enough that it will not depend on a series of ad hoc assignments over the course of the contract.”

10. “The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

11. “Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following: the biasing of technical specifications in favour of, or against particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter.”

the current contract had been properly managed, such technical documents would have been available for release to potential suppliers, thereby stimulating competition.

TTI submits that this denial of access to documents is consistent with discouraging competition and results in the denial of fairness in the spending of public funds and in a “less-than-best-value” procurement. In conclusion, TTI observes that, while the procurement process is reported to be open and competed fairly, it may be one of form only.

In its final comments, in reply to the Department’s observations of March 24, 1998, TTI submits that its references to the contract currently being performed by the Incumbent are relevant to this matter as they demonstrate a history on the part of DREO of awarding contracts in contravention of Article 506(6) of the AIT. Regarding the release of technical reports, TTI submits that its request for technical documentation was not restricted to “finalized” documents and certainly covered the “point-form preliminary technical notes” now mentioned by the Department. In addition, TTI submits that, contrary to the Department’s assertion, the RFP that leads to the current contract being performed by the Incumbent did require the production of task reports by the Incumbent.

TTI also submits that the Department’s arguments in respect of the clarity of the description of requirements in the RFP are vague and disjointed and, in fact, support TTI’s allegation that these were not clearly stated in the RFP. On the question of bias in favour of or against a particular supplier, TTI submits that DREO knew that TTI was interested to bid on this contract and it adds that, in respect of the restrictive nature of the specifications in the RFP, it had to challenge the said specification during the bidding period. In any event, TTI submits that the Department bears the primary responsibility to issue clear and unbiased requirements. On the issue of the link between the evaluation criteria and the sample tasks, the so-called “Task Authorization” methodology, TTI submits that it can find no reference to the said method in the Treasury Board of Canada Secretariat’s Contracting Policy, the Supply Manual or the AIT.

DEPARTMENT’S POSITION

The Department submits that the primary requirement of this procurement is to provide firm daily rates for proposed personnel to perform support services for the Framework. Because of this requirement, the qualifications and experience of the proposed personnel in supporting systems similar to the Framework have been accorded greater weight than qualifications and experience related to software model development. The Department also submits that, though TTI’s particular area of expertise apparently lies in the area of modeling, this fact cannot operate to change the stated requirements of the RFP nor render the evaluation criteria discriminatory.

Concerning the Incumbent’s possible advantage in demonstrating a greater understanding of the objectives of the contract (a rated requirement), the Department submits that it is a fact of history that the Incumbent designed and developed the Framework. This, however, and by itself, is not discriminatory in the circumstances.¹² Further, the Department submits that, to mitigate any perceived advantage of the Incumbent, the actual design document of the Framework was made available to all bidders for their review.

12. See Canadian International Trade Tribunal, File No. PR-95-024, *Array Systems Computing Inc.*, March 25, 1996. In this case, the Tribunal held that, indeed, the Incumbent may have had an advantage from the experience that it had gained in past contracts, but that, in itself, is normal and is not considered to be unfair.

In addition, a brief summary of the current design status of the Framework identifying high-level enhancements to the original Framework design was also provided in the RFP. Concerning the evaluation of the back-up personnel (another rated requirement), the Department submits that the RFP did not specify the number of back-up personnel nor required familiarity or experience with the Framework. The Department submits that the rated evaluation criteria were developed solely to reflect DREO's actual personnel service requirements. As well, the relative weight of each element was established in consideration of the objectives, sample tasks and requirements of each labour category identified in the RFP. Further, the SOW and evaluation criteria were developed in isolation of any bidder's involvement and were designed to provide DREO with competent, qualified personnel to fulfill its support requirements.

Concerning the mandatory requirement for personnel to have "Smalltalk/ENVY" software experience and the requirement of one of the sample tasks to move the simulator program from a Smalltalk/C++ implementation to a strictly C++ implementation, the Department submits that this software package, not proprietary to the Incumbent or any potential bidder on this procurement, was specified long before the Incumbent won the first competitive Framework development contract. Further, the Department submits that Smalltalk is regularly used in the R&D environment. It is a language that is neither obscure nor limited to a single source of expertise or supply. In addition, no restriction was placed on any bidder in regard to teaming with whomever it considered capable of performing the work should this be necessary to meet the requirements of the RFP.

Concerning TTI's argument that the bundling of the requirements for the Framework's maintenance and individual model development virtually precludes competition, the Department submits that, as the models must work seamlessly within the Framework, it is preferable that there be a single qualified supplier which can ensure the compatibility of the Framework with the models and vice versa. The separation of the modeling functions and the support functions, the Department submits, would lead to inefficient and unnecessarily expensive duplication of services and efforts.

Concerning TTI's allegation that the SOW is vague to the point that it cannot be related to the evaluation criteria and that the preparation of a proposal is virtually impossible, the Department submits that a comparison prepared to answer this complaint clearly demonstrates that such is not the case. As well, the fact that three firms submitted proposals, including TTI, tends to diminish the value of this argument. The Department also submits that, after comparing this RFP with the RFP for the contract currently performed by the Incumbent, on which TTI competed and for which it was technically evaluated to be within only a few evaluation points of the Incumbent's proposal, it finds the original RFP much less sophisticated than the current RFP, lacking for example, defined labour categories, utilization and sample tasks. Nevertheless, TTI was capable then to submit a competitive bid and was only unsuccessful due to the price that it proposed.

The Department further submits that the previous RFP put a higher emphasis on modeling than the current RFP. Nevertheless, TTI is of the view that the point allocation for modeling in the current RFP is low. The reality is that, in the previous RFP, modeling accounted for only 7.1 percent of personnel scoring while, in this RFP, with a lower modeling content, modeling accounts for 21.4 percent of personnel scoring. In the circumstances, it cannot be argued that the weighing of points was established to favour the Incumbent.

Concerning the generality of the SOW, the Department submits that this was done by design, and not by omission, to reflect the "As and When Requested" nature of the solicitation. Indeed, the SOW defines

the qualifications and experience considered necessary for the proposed personnel, but does not provide defined tasks. The personnel will perform tasks defined during the contract period, following the issuance of task authorizations to the contractor by DREO. Further, the level of detail for each of the labour categories shown in the SOW is comparable to that contained in the Department-published labour category definitions for Informatics Professional Services and are regularly used by private companies to categorize their personnel when submitting proposals for the provision of informatics services to the federal government.

Finally, concerning the background information made available to bidders, the Department submits that the initial Framework design document, the subsequent high-level Framework enhancements and the sample tasks were provided to establish as fair a level playing field as possible for all bidders. Further, neither the evaluation criteria nor the SOW identifies a requirement for familiarity with the Framework and this, the Department submits, is a further indication that neither it nor DREO have acted in a discriminatory manner or have denied access to the procurement.

In its observations on TTI's comments on the GIR, the Department submits that, in its comments, TTI introduced a number of tangential arguments and supporting policy excerpts which tend to defocus the initial complaint. Furthermore, TTI's comments are highly speculative and, in several cases, completely mistaken.

Concerning the issue raised by TTI regarding the contract currently being performed by the Incumbent, the Department submits that these issues are contract administration issues, not procurement review issues, which have no link to, or material bearing on, the validity of the current complaint.

Concerning TTI's speculation that the DREO had withheld from bidders some AASMD design documentation, the Department states that this is simply not true. DREO does not have additional finalized design documentation in its possession. Further, the Department submits that TTI assumed incorrectly that each task would produce a separate design document. The reality is that only a final report is to be produced at the end of the contract. On the issue of the Treasury Board of Canada Secretariat's Contracting Policy, the Department submits that the latter is promulgated with a consciousness of Canada's obligations under the different trade agreements and that TTI has provided no evidence that the policy was not properly applied in this case.

On the issue of the SOW being a valid bidding document, the Department submits that, since the primary requirement of this RFP was to provide personnel to perform services within the scope of the SOW, the task authorization method of contracting does not constitute contracting on an ad hoc basis. Indeed, the task authorization method permits the development of defined tasks within the broader SOW.

In light of the above, the Department requests that the complaint be dismissed and, further, requests the costs of defending this complaint.

TRIBUNAL'S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedure 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.

TTI based its original complaint on a number of premises, of which only two were accepted by the Tribunal for inquiry, namely, (1) that, contrary to Article 504 of the AIT, the RFP was biased in favour of the Incumbent and against other bidders and (2) that contrary to Article 506(6) of the AIT, the requirements were not clearly defined in the solicitation documents, making it extremely difficult for bidders to relate the evaluation criteria to the requirements in formulating a proposal.

Other allegations made by TTI in its complaint regarding this solicitation, as well as a previous solicitation regarding the contract currently performed by the Incumbent, were not accepted for inquiry by the Tribunal. Therefore, they will not be considered further in this determination, despite the fact that TTI commented extensively upon these in its various submissions to the Tribunal, even after the Tribunal had declared that they were not accepted for inquiry.

On the matter of a bias existing in favour of the Incumbent, the Tribunal observes first that it sees nothing objectionable in the fact that the requirements, as set out in the RFP, put some emphasis on the maintenance of the Framework as opposed to the development of models. Since the Framework already exists, it is not abnormal, in the opinion of the Tribunal, that the evaluation be weighed toward the maintenance, servicing and improvement of the existing Framework. In addition, considering that the procurement is for research and development purposes and, further, considering that it is for an "As and When Requested" type of contract, the Tribunal is satisfied that the manner in which the requirements have been described in the RFP and the method whereby proposals are to be evaluated, i.e. defined resources against sample tasks (the task authorization method), are adequate for the purpose and do not, in themselves, constitute a bias in favour of the Incumbent. In fact, putting aside the question of the availability to bidders of certain technical documentation, a matter discussed below, the Tribunal is of the view that the requirements have been described in the RFP in a manner which allows for the submission of competitive offers by qualified bidders.

The above conclusion does not rest on the fact that TTI was able to bid on the previous ASMD solicitation or the present one, as is advanced by the Department. In the opinion of the Tribunal, this argument has no value in the circumstances as it proves nothing in respect of the inherent quality and clarity of the tender documentation.

In the Tribunal's view, TTI's complaint appears to have less to do with the present RFP than with the contract currently being performed by the Incumbent or perhaps earlier contracts. Whatever deficiencies real or otherwise have been revealed in the execution of the current contract, in the opinion of the Tribunal, these alleged deficiencies are contract administration issues which are beyond the scope of the present complaint and which fall outside of the procurement review jurisdiction of the Tribunal.

There nevertheless remains the issue of the availability to bidders of certain technical documentation to assist them in formulating their proposals.

The Tribunal is of the view that, as much as possible, all bidders are entitled to receive any information that could reduce the natural advantage of an incumbent in this respect. The Tribunal is not satisfied that the Department did achieve this goal in this instance. Indeed, the Tribunal believes that the Incumbent had available to it certain information that was not available to the other bidders. When

conducting competitive procurements in the field of research and development, where new developments are conditioned by recent advances, it is critical that the latter be reasonably documented and made equally available to all potential suppliers. The Tribunal observes that such information is one of the deliverables under the Incumbent's contract. The experience and know-how that the Tribunal was referring to in *Array*, wherein it stated that "the Incumbent may have an advantage from the experience that it has gained in past contracts, but that, in itself, is normal and is not considered to be unfair,"¹³ does not include the information contained in the deliverables. The Tribunal is of the opinion that the scheduling of a competitive procurement, such as the one here, should not be arranged to take place immediately before the production of the final report by the Incumbent, thus depriving potential bidders from benefiting from the same information. This is particularly important when the Incumbent, the author of the information, is also in the running.

In the GIR, the Department informed the Tribunal that, in deference to TTI having filed a complaint with the Tribunal, the technical and financial evaluation of the bids had not commenced. The Tribunal welcomes this initiative of the Department since it preserves a wider range of remedies.

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 completely in accordance with the AIT and, therefore, that the complaint is valid in part.

Pursuant to section 30.14 of the CITT Act, the CITT determines that the complaint is valid in part.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the Department make available to all bidders involved in this solicitation the updated version of the AASMD Software Engagement Simulation Final Report to be produced by the Incumbent and, with this information in hand, allow them to modify their proposals as appropriate in relation to this new information and proceed onward with this procurement as provided under the provisions of the AIT.

Charles A. Gracey
Member

13. *Supra* note 12 at 9.